THE ATTORNEY GENERAL OF TEXAS

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March 28, 1977

Honorable Oscar H. Mauzy
Chairman
State Committee on Education
P. O. Box 12068
Austin, Texas 78711

Letter Advisory No. 128

Re: Constitutionality of a bill authorizing silent prayer or meditation in public school classrooms.

Dear Chairman Mauzy:

You have requested our opinion as to the constitutionality of Senate Bill 86, which proposes to add a section to the Texas Education Code to read as follows:

> (a) In each public school classroom, the person in charge may conduct a brief period of silent prayer or meditation with the participation of all consenting pupils therein assembled. No disciplinary action may be imposed on any nonconsenting pupil.
>
> (b) The silent prayer or meditation authorized by Subsection (a) of this section is not intended to be, and may not be conducted as, a religious service or exercise, but shall be considered an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day.

The First Amendment to the United States Constitution commands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." The prohibition extends to the States by virtue of the Fourteenth Amendment. Article 1, section 6 of the Texas Constitution similarly provides that "no preference shall ever be given by law to any religious society or mode of worship ...." While article 1, section 7 prohibits the expenditure of State funds for the benefit of any sect or religious society.

The principle is well established that the public schools may not be utilized for the establishment of religious exercises for students. Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Attorney General Opinion O-5037 (1943). "[I]t is not part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Engel v. Vitale, 370 U.S. at 425.

The Supreme Court has explicated a three-part test of any law challenged as an establishment of religion:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion.

Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1973). A Massachusetts statute similar to the bill about which you inquire has recently been considered by a three-judge United States District Court. Applying the three-part test of Nyquist to the statute under consideration, the court found no violation of the First or Fourteenth Amendments to the Constitution. Gaines v. Anderson, 421 F.Supp. 377 (D. Mass. 1976).

The Gaines v. Anderson court relied to a large extent upon the Massachusetts statute's "lack of any mandatory direction to students to meditate or pray" as evidencing "a legislative purpose to maintain neutrality." 421 F.Supp., at 344. Although an attitude of neutrality toward religion does in fact comply with the second part of the Supreme Court's three-part test, it may be questioned whether the inclusion of the phrase "conduct . . . prayer" within the language of Senate Bill 86 does indeed "reflect a clearly secular legislative purpose." In the absence of any authority to the contrary, however, we feel obliged to accept the court's decision in Gaines v. Anderson as the most current expression of the law in this area. It is therefore our opinion that both the United States and Texas Supreme Courts would probably hold that Senate Bill 86 does not on its face violate the First or Fourteenth Amendments to the United States Constitution or section 6 or 7 of article 1 of the Texas Constitution.

Very truly yours,

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APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

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