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NO.
STATE OF NEBRASKA
OFFICIAL
JUL 23 1993
DEPT. OF JUSTICE

DATE: July 23, 1993

SUBJECT: Graduation Invocations and Benedictions at the Nebraska Law Enforcement Training Center

REQUESTED BY: Jean A. Lovell, Executive Director
Nebraska Commission on Law Enforcement and Criminal Justice

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

The Nebraska Commission on Law Enforcement and Criminal Justice has requested an opinion regarding "Whether prayers in the form of invocations and benedictions by members of the Basic graduating class may be given during graduation ceremonies for the Basic training classes at the Nebraska Law Enforcement Training Center." The resolution of this question involves an analysis of two constitutional provisions: Article I, § 4 of the Nebraska Constitution, and the First Amendment to the United States Constitution.

I. Applicable Law

1. Article 1, § 4 of the Nebraska Constitution provides:

> . . . No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. . . .

2. The First Amendment to the United States Constitution (applicable to the states via the Fourteenth Amendment)

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provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

II. Background

The purpose of the Nebraska Law Enforcement Training Center is to "conduct pre-employment and advanced law enforcement training programs." Neb. Rev. Stat. § 81-1402 (1987). Basic training programs are conducted at the Training Center four times each year in 12 week sessions. The vast majority of the persons seeking a Certificate of Satisfactory Completion at the Training Center are law enforcement officers employed by the State or by a political subdivision of the State. The remaining trainees, known as "non-law" or "tuition" trainees, seek the Certificate of Completion as a means to gainful employment as a law enforcement officer.

All persons attending the Training Center must satisfy certain admission requirements pursuant to Neb. Rev. Stat. § 81-1410 (Cum. Supp. 1992), including among other things United States citizenship and a high school diploma or its equivalent. No person serving as a law enforcement officer prior to 1972 is required to attend the Training Center as a condition of tenure or continued employment. Neb. Rev. Stat. § 81-1414(1) (1987). Persons beginning employment since 1971 must possess a Certificate of Satisfactory Completion or its equivalent within one year from the date of employment. Failure to complete the training will result in nonrenewal of employment as a law enforcement officer. Neb. Rev. Stat. § 81-1414(2) (1987).

Near the end of each 12 week basic training program, the administration of the Training Center has traditionally announced to the members of the graduating class that a volunteer may give the invocation and benediction at the upcoming graduation ceremony. We are told that in every year since the Training Center's inception at Grand Island, members of the graduating class have volunteered to give the invocations and benedictions. During this same time the administration has taken no part in determining the content of what the graduates say other than by the designation of "Invocation" and "Benediction" in the printed programs distributed to those in attendance at the ceremony. The trainees are free to say what they please. In fact, during the Training Center's most recent graduation exercises one speaker made remarks rather than reciting a prayer.

III. Analysis

The issue of prayers at public high school graduation ceremonies has received a great deal of attention since the United States Supreme Court's decision in ***Lee v. Weisman***, 112 S. Ct. 2649 (1992). To be sure, it is in the wake of the ***Weisman*** decision that many public educators, and in this case, an administrative agency executive director, have questioned whether similar graduation exercises at their public schools or institutions are permitted by the constitution. While the facts in this situation stray considerably from those in ***Weisman***, the Supreme Court's analysis in its decision is nonetheless instructive. The ***Weisman*** decision now effectively serves as a boundary line marking what type of graduation prayer violates the establishment clause of the First Amendment.

In ***Weisman***, a public school district, consisting of elementary and secondary schools, permitted its principals to decide whether graduation exercises would include prayers and who would be invited to deliver the prayers. After deciding that prayers would be included in the graduation exercises, the principal in ***Weisman*** invited a Jewish Rabbi to give the prayers. The principal gave the clergyman a pamphlet recommending nonsectarian prayers, and further advised him that the benediction and invocation should be nonsectarian in content. ***Id.*** at 2652. The Court concluded that the school sponsorship of the Rabbi's prayers violated the First Amendment to the United States Constitution.

It was based on this combination of facts that the Supreme Court rendered its decision, stating:

> These dominant facts mark and control the confines of our decision: state officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 2655.

Rather than evaluating the propriety of the prayers under its twenty-year-old test first articulated in ***Lemon v. Kurtzman***, 403 U.S. 602 (1971), the Court instead based its decision on what has been called a coercion test. The Court's opinion included an analysis of its prior school prayer cases, including ***Abington School District v. Schempp***, 374 U.S. 203 (1963), and ***Engel v.***

Vitale, 370 U.S. 421 (1962). The Court stated, "[C]onducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us." 112 S. Ct. at 2655. These cases involved school-sponsored prayer in elementary and secondary schools. The Court emphasized, "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary schools." *Id.* at 2658.

The Court distinguished such school-sponsored prayers in elementary and secondary schools from prayers in other contexts, stating, "Our decisions in *Engel v. Vitale*, (citation omitted), and *Abington School District v. Schempp*, (citation omitted), require us to distinguish the public school context." 112 S. Ct. at 2661. In fact, the Court expressly limited its holding to the public elementary and secondary school context: "We do not address whether [such coercion] is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the establishment clause, place primary and secondary school children in this position." *Id.* at 2658-59.

It is important to recognize that each member of the graduating class at the Nebraska Law Enforcement Training Center is required to be at least 21 years of age. Neb. Rev. Stat. § 81-1410(2) (Cum. Supp. 1992). As mentioned above, each class member must also have either graduated from high school or possess a general educational development certificate. Neb. Rev. Stat. § 81-1410(9) (Cum. Supp. 1992).

The *Weisman* holding, therefore, does not control our opinion regarding graduation invocations and benedictions at the Nebraska Law Enforcement Training Center - - an institution which is not a public elementary or secondary school. However, it is the Supreme Court's reasoning in *Weisman* and other cases which informs this opinion.

In *Weisman*, the Court referred to the secondary student involved as being subject to "public pressure, as well as peer pressure," and as having "a reasonable perception [of] being forced by the state to pray in a manner her conscience will not allow." 112 S. Ct. at 2658. The Court also cited a number of sociological and psychological journals to support the proposition that "adolescents are often susceptible to pressure from their peers towards conformity, and that influence is strongest in the matters of social convention." *Id.* at 2659. This reasoning seems consistent with that of numerous Supreme Court decisions in recent years.

In ***Edwards v. Aguillard***, 482 U.S. 578, 584 (1987), the Court stated, "Students in [elementary and secondary] schools are impressionable and their attendance is involuntary." The Court reasoned in ***School District of City of Grand Rapids v. Ball***, 473 U.S. 373, 390 (1985), "[M]any of the citizens perceiving the governmental message are children in their formative years . . . children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."

In ***Marsh v. Chambers***, 463 U.S. 783, 792 (1983), (a case which the ***Weisman*** court discussed at some length at 112 S. Ct. 2660-61), the Court stated, "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination.'" In ***Widmar v. Vincent***, 454 U.S. 263, 274, n.14 (1981), the Court reasoned, "University students are, of course, young adults. They are less impressionable than younger students . . . ." In ***Tilton v. Richardson***, 403 U.S. 672, 686 (1971), the Court stated, "There is substance to the contention that college students are less impressionable and less susceptible [than elementary and secondary school students] to religious indoctrination."

In ***Board of Education of Westside Community Schools v. Mergens***, 496 U.S. 226 (1990), the Court made a further distinction which would inform this opinion. In ***Mergens***, the Court stated that when religious activity is the result of <u>student initiative</u>, rather than being state-sponsored, "`[S]tudents below the college level are capable of distinguishing between state-initiated, school sponsored or teacher-led religious speech on the one hand and student-initiated, student led religious speech on the other.`" ***Id.*** at 250-51, ***quoting*** S.Rep. No. 98-357, pg. 8, 35 (1984). The Court opined, "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250.

IV. <u>Conclusion</u>

The authority cited above leads us to the conclusion that the current practice of allowing student-led invocations and benedictions at the Nebraska Law Enforcement Training Center graduation ceremonies does not violate the Establishment Clause of the First Amendment to the United States Constitution. As we stated in an earlier opinion concerning graduation prayer at what was then Kearney State College, "The same reasoning and conclusions apply to Article I, Section 4 of the Nebraska Constitution" as

apply to the First Amendment to the United States Constitution. Op. Att'y Gen. No. 87023, (Feb. 25, 1987).

Respectfully submitted,

DON STENBERG
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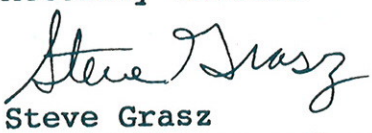

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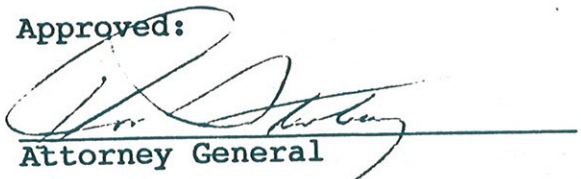

Attorney General

* The assistance of Mr. Rob Hotz, law clerk for the Office of the Attorney General, in preparation of this opinion is gratefully acknowledged.

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