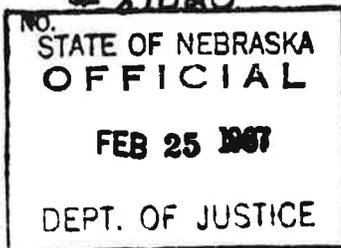


STATE OF NEBRASKA  
Department of Justice  
# 87023



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ROBERT M. SPIRE  
Attorney General

DATE: February 25, 1987

SUBJECT: Constitutionality of Kearney State College  
Requirement That Faculty Members Attend Graduation  
Ceremonies When Prayers Are Given

REQUESTED BY: Senator Ernest Chambers  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General

Dear Senator Chambers:

Kearney State College requires faculty and administration personnel to attend College commencement ceremonies at which prayers are offered. The procedure is this:

(1) The prayers are an invocation and benediction. They are prepared and given by students, not clergy. The students are not restricted in any way as to the scope, content, or religious or non-religious character of what they present.

Some deliver poems, general readings or other recitations which have little or no religious character. Others recite traditional prayers in widely varying forms. These invocations and benedictions are brief portions of the total commencement ceremonies.

(2) The graduation attendance requirement is a general policy. A faculty member will be excused upon request without disclosing any reason for not wanting to attend. Actual attendance or non-attendance at the graduation ceremonies is not recorded. There is no sanction for non-attendance.

(3) The College has these goals in mind:

(a) The College wants the faculty to attend graduation ceremonies out of respect for the graduating students, their families and friends. The College prides itself upon having a faculty that genuinely cares about the students. Attendance at graduation, a major event in the lives of the students, is tangible evidence of a faculty

member's personal interest in the students he or she teaches.

- (b) The offering of the prayers serves two purposes:
  - (1) Students selected to give the prayers are chosen for their outstanding work at the College. Having a student give an invocation or benediction is a way for the College to recognize publicly that student's achievements.
  - (2) The offering of prayers as a part of public functions is a common practice nationwide. Doing so is both popular and traditional. The College believes that these invocations and benedictions add a worthwhile dimension to the graduation ceremonies.

I. Does this procedure violate either the First Amendment to the United States Constitution or Article I, Section 4 of the Nebraska Constitution? No, in my judgment.

I believe the College has developed a reasonable and legally supportable compromise between the demands of its educational policy goals and First Amendment separation of church and state requirements. But it is a close case. There are conflicting legal authorities. An explanation is warranted.

- (1) The pertinent Constitutional provisions are these:
  - (a) The First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."
  - (b) Article I, Section 4 of the Nebraska Constitution:

"All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. 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. No religious test shall be required as a qualification for office, . . ."

I will discuss the issues here in relation to the First Amendment. The same reasoning and conclusions apply to Article I, Section 4 of the Nebraska Constitution.

(2) For several years there has been much litigation about the validity of prayers at public school functions. Two recent federal court cases are instructive:

- (a) Graham v. Central School District of Decatur, 608 F.Supp. 531 (1985-Iowa): This case challenged the constitutionality of Christian prayers offered by a Christian minister at a high school graduation. The challenge was made by a graduating student who was not required to attend in order to receive her diploma. The court held that the offering of these prayers did violate the "establishment" clause of the First Amendment.

The Court found that the prayers (a) served a "Christian religious purpose, not a secular purpose," and (b) "have as their primary effect the advancement of the Christian religion." In short, the case holds that almost any religious invocation at a school ceremony is a violation of the First Amendment whether or not an objector is required to attend.

- (b) Stein v. Plainview Community School, 610 F.Supp. 43 (1985-Michigan): The facts here were similar to the Graham case except that the prayers were given by honor students, not clergy. The Court came to an opposite conclusion than Graham and ruled that there was no First Amendment violation.

The Court found that all prayers were not inherently religious, but could serve both religious and ceremonial functions. It found that the prayers here were essentially ceremonial and served secular rather than religious purposes. It concluded that the prayers were motivated by secular purposes and "did not have the primary effect of advancing religion." The Court also indicated that voluntary attendance was of some significance.

(3) Most of the recent cases dealing with this issue refer to Lemon v. Kurtzman, 403 U.S. 602 (1971), a famous United States Supreme Court decision which held this: for a governmental act which has any religious characteristics to be constitutional, it must pass these three tests:

- (a) reflect a clearly secular purpose;
- (b) have a primary effect (as distinguished from an incidental effect) that neither advances nor inhibits religion; and
- (c) avoid excessive government entanglement with religion.

Individual judges often view the same fact situation in different ways when applying these three Lemon case tests. What is a "clearly secular" purpose? What precisely neither "advances nor inhibits" religion? What is "excessive entanglement" between government and religion?

These are difficult determinations. Under our system of law they are made on a case by case basis. Drawing the line between government neutrality toward religion and government support of religion is a matter of degree.

(4) I conclude that the Kearney State College procedure does not violate the First Amendment because:

- (a) The prayers given have both a ceremonial and religious aspect. But they are primarily ceremonial. They are given by outstanding students as a means of recognizing those students, not as a means of promoting religion. They are of widely varying content, and frequently are not prayers in a traditional sense. They are a very brief part of the graduation program. Therefore, presenting the prayers does not by itself violate the First Amendment.
- (b) If a faculty member who objects for religious reasons must either attend or single himself or herself out as a dissenter from the practice, I believe there would be a First Amendment violation. Such a faculty member might be (1) of a religion which objects to a particular prayer, or (2) not believe in any religion at all and thus be offended by any prayer.

This singling-out process could have a chilling effect upon the dissenting faculty member. How? By requiring the dissenter, as a condition for respecting his individual religious or non-religious views, to identify himself as being different from other faculty members. He must announce that on religious matters "he marches to the beat of a different drummer." I believe that the First Amendment is designed to protect his integrity and privacy on such a religious issue. This is fundamental to the Jeffersonian concept of a "wall of separation between church and state."

However, although the faculty member may identify himself as a non-believer, he need not do so. He may be excused without stating any reason. And no faculty attendance record is kept at graduation. Therefore, I conclude that the College procedure is sufficiently voluntary to be acceptable constitutionally.

From a constitutional point of view, the answer would be much easier if faculty attendance at graduation was, as a matter of policy, completely voluntary. In such case the constitutionality would be clearer. However, making it so easy to be excused (with no requirement for any religious belief or non-belief statement) and not taking attendance gives the procedure sufficient voluntariness to pass constitutional muster in my judgment.

I readily acknowledge that I may be "dancing on the head of a pin" here. Knowledgeable constitutional scholars wiser than I am can have varying views of a case of this nature. This issue would qualify as sufficiently nerve-racking to be a Law School examination question. It is thought-provoking, important, not easily answerable and would keep a student humble.

II. Is this an issue in which the law has a ready answer? Clearly no. A look at history tells us that anything as important or as delicate as religious liberty is difficult to define. Let us look at some of this history:

(1) Our nation's Founding Fathers considered freedom of religion to be a fundamental personal right. Why? Because many of those who initially settled our country came here primarily

because they had been denied the right freely to exercise their religious convictions. And so the First Amendment requires that government must keep its hands off religion, religious groups and the various religious practices.

Consider the well-known biblical passage from Matthew 22:21: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Let's not confuse who God is and who Caesar is.

(2) The Constitution requires neutrality toward religion, not a complete banning of religious thought from the public arena. This neutrality needs to recognize both (a) an appropriate balance between majority and non-majority interests and (b) a person's need for knowledge of other religions to be a constructive member of our pluralistic society. For example:

- (a) Some exposure to another's religion is informative and teaches respect for the beliefs and customs of others.
- (b) In our need to accommodate non-majority beliefs and sensitivities, we should not completely ignore the majority. The majority has sensitivities also. Primarily ceremonial invocations and benedictions may have meaning for the majority, a meaning which deserves some respect so long as non-majority beliefs are not abused in the process.

(3) Defining this concept of neutrality is exceedingly difficult. Certainly the First Amendment "establishment" clause does not require an insensitive indifference to religion in public life. For example, "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." The United States Supreme Court said this in 1968 when it struck down an Arkansas law that banned the teaching of evolution in public schools.

This is still an accurate statement of the law today. But this rule of neutrality is much easier to state than to apply. Stuart Taylor, Jr. writing in the New York Times December 14, 1986, said:

"Religious beliefs and the ethical values historically associated with them are so interwoven with the fabric of the nation's public life that no consensus is ever likely on the exact coordinates of what Jefferson called the 'wall of separation between church and state'. . . .

Nor is there a consensus that the First Amendment requires a 'wall of separation' at all. In a 1985 dissenting opinion that has been endorsed by Attorney General Edwin Meese 3d, Associate Justice William H. Rehnquist, now Chief Justice, called for abandoning 'Jefferson's misleading metaphor.' He said the First Amendment was not designed to 'require Government neutrality between religion and irreligion.'

Many who do not share this view agree that the Court's meandering interpretation of the First Amendment's religion clauses--'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'--has not forged predictable rules as to how government can accommodate the free exercise of belief while avoiding any hint of sponsorship."

And so government must "accommodate" religion, but it cannot "sponsor" it. In addressing its educational mission Kearney State College recognizes that just the accumulation of facts is not the goal of education. Other goals are (1) knowledge of and respect for others, (2) the ability to think and reason and (3) the development of wisdom and goodness, however defined. When analyzing this Kearney State College situation how do we draw the line? We simply try to balance the two competing interests here: (1) the state's interest in promoting sound education through policies such as those of Kearney State College, and (2) the rights of dissenters from majority religious views.

Thus the law struggles with the concept of neutrality. Don't "sponsor," but be sure you "accommodate." The authors of the First Amendment intentionally drafted it in broad general terms. They knew it would be an impossible task to set out answers to specific situations. They demonstrated their confidence in later generations to apply the fundamental guarantees of the First Amendment to specific situations. That is what we are about here.

(4) Perhaps world history teaches us more than law here. For world history teaches us that you either have freedom for all religions or for none. You respect a person's right to practice a religion of his or her choice, or to practice no religion at all. To do otherwise puts the authority and power of government behind religious or non-religious belief. Either alternative would stifle an essential right which is sacred to free men and women.

Senator Ernest Chambers  
February 25, 1987  
Page -8-

Thank God for the First Amendment. It lets us believe in God as we see fit, or not at all if that is our choice. Such is the character of democratic respect for individual dignity.

Most sincerely yours,

A handwritten signature in cursive script that reads "Robert M. Spire".

Robert M. Spire  
Attorney General

RMS/bae

cc: Patrick J. O'Donnell  
Clerk of the Legislature