

LETTER OPINION
93-L-142

April 23, 1993

Representative Rick Berg
Speaker of the House
of Representatives
State Capitol
Bismarck, ND 58505-0360

Dear Representative Berg:

Thank you for your April 2, 1993, letter requesting an opinion regarding whether prayer at graduation ceremonies is constitutional.

The United States Supreme Court in Lee v. Weisman, 112 S.Ct. 2649 (1992) addressed the question of whether invocation and benediction prayers may be offered as part of the formal graduation ceremonies for middle schools and high schools. In a five to four decision, the Court in Lee held that the Establishment Clause of the First Amendment was violated when the school invited a member of the clergy to offer invocation and benediction prayer as part of the formal graduation ceremony. Id. at 2658-59. Justice Kennedy, writing for the Court, explained that the school's conduct created "a state-sponsored and state-directed religious exercise in a public school." Id. at 2655.

Because the religious activity is sponsored by the state, Justice Kennedy explained that there is a risk that students will be indirectly coerced into participating in the activity, despite their personal objections. Id. at 2658. Because no school can persuade or compel a student to participate in a religious exercise, the Court found the school's conduct to be forbidden by the First Amendment. Id. at 2661.

Following the Supreme Court's decision in Lee, the Fifth Circuit in Jones v. Clear Creek Independent

Representative Rick Berg
April 23, 1993
Page 2

School District, 977 F.2d 963 (5th Cir. 1992) held that under certain circumstances, prayer at a high school graduation would not violate the Constitution's Establishment Clause. Before the Court in Jones was a resolution passed by a local school district which provided:

- "1. The use of an invocation and/or benediction at high school graduation exercise shall rest with the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. The invocation and benediction, if used, shall be given by a student volunteer; and
3. Consistent with the principal of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature."

Id. at 964 n.1. The Court distinguished the facts in Lee from those before it in the Jones case by pointing out that in Lee the public school principal decided that an invocation and benediction should be given, chose the religious participant (a rabbi) to give the invocation and benediction, and provided the rabbi with a copy of guidelines for the prayers, advising him his prayers should be nonsectarian. Id. at 970-971. In Jones, the resolution leaves the choice of whether there is an invocation with the graduating class, precludes anyone but a student volunteer from delivering the invocation, and imposes the restriction that the prayer be nonsectarian and nonproselytizing.

A petition for certiorari has been filed in the Jones case. 61 USLW 3684 (March 26, 1993). The Supreme Court has not yet indicated whether it will grant certiorari in this case.

I have attached copies of both the Supreme Court opinion in Lee v. Weisman and the Fifth Circuit Court of Appeals opinion in Jones v. Clear Creek Independent School District for your review. Because of the

Representative Rick Berg
April 23, 1993
Page 3

current state of the case law in this area, I am
unable to determine how the Supreme Court would hold
in any specific factual situation.

I hope this information is helpful to you.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

bab/krb
Enclosures

Representative Rick Berg
April 23, 1993
Page 4

Representative Rick Berg
Speaker of the House
of Representatives
State Capitol
Bismarck, ND 58505-0360