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LAW ALERT

QUIET DOWN NOW: THE "MOMENT OF SILENCE" IS BACK

October 26, 2010

The U.S. Court of Appeals for the Seventh Circuit Court has reversed a 2008 federal district court ruling which prohibited Illinois public schools from observing a "moment of silence" at the start of the school day, as required by Section 1 of the *Silent Reflection and Student Prayer Act*, 105 ILCS 20/1.

The decision in *Sherman v. Koch*, 2010 WL 4026812 (7th Cir.10/15/10) means that districts will again need to devise a way to comply with the mandate while also complying with Section 1's admonition that the period "shall not be conducted as a religious exercise" but instead "be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day."

After the General Assembly changed the Act in 2007 to make the moment of silence mandatory rather than optional, Township High School District 214 student Dawn Sherman filed suit attacking the amended statute on its face as a violation of the First Amendment Establishment Clause. That provision forbids Congress - and as construed by the Supreme Court, the States and their political subdivisions - from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof". Parting company with the trial court, a divided appellate panel of three circuit judges held that the Act satisfied the Supreme Court's three-part "*Lemon v. Kurtzman*" test for surviving an Establishment Clause challenge.

First, the Seventh Circuit found that the statute has the secular purpose of "establishing a period of silence for all school children in Illinois to calm the students and prepare them for a day of learning", even if the 2007 amendment was also motivated in part by the religious purpose of encouraging prayer in school. The court observed that "the text mandates only one thing - silence", and cited legislators' comments about the bill's intent, including the Senate sponsor's statement that it permits students to reflect on whatever they wish, whether religious or not. The majority opinion distinguished the *Sherman* case from other federal court decisions striking down moment-of-silence laws, on the ground that in those cases, no secular purpose of any kind could be discerned in the legislative history of the challenged statutes.

Second, and based only on the "neutral" language of the Act, the court declined to find that its primary effect was to impermissibly advance religion. However, the court cautioned that if a school or an individual teacher were to implement the moment of silence in a way that either encourages or discourages prayer, "that would be another case." Finally, as to whether the Act leads to an "excessive government entanglement with religion", the Seventh Circuit majority opinion noted that no court considering a facial challenge to a moment-of-silence statute had found excessive entanglement. Again, the court implied that the manner in which districts *apply* the law could lead to a different conclusion.

The court also rejected the plaintiff's argument that Illinois' law is unconstitutionally vague because it does not specify how the moment of silence is to be implemented, or the penalties for violation. Even though Section 1 does not say how long the period of silence is to be, District 214's proposed procedure as described to the trial judge demonstrated that the Act could be applied in a way which was not "unconstitutionally vague", according to the Seventh Circuit:

". . . District 214 indicated that it intended to implement Section 1 by making a school-wide morning announcement: "We will now have a brief period of silence." Then, after 15 seconds had passed, the announcer would begin the Pledge. A student of ordinary intelligence would clearly understand that he is to remain silent for the fifteen seconds between the announcement and the beginning of the Pledge...[G]iven the school setting, the Constitution does not mandate a cornucopia of additional details or a statement of the punishment students will face should they disregard their teacher's direction."

Dissenting from the majority opinion, Circuit Judge Ann Williams wrote that the General Assembly did not need to refer to prayer, if the Act "truly is meant to achieve the purpose that its sponsors claim it is - mandating a quiet, meditative time at the beginning of each school day for students to settle down and shift into learning mode." In her view, "the legislature's decision to make the Act mandatory represents an effort to introduce religion into Illinois public schools, couched in the hollow guise of a mandated period of silence".

Given that *Sherman v. Koch* leaves open the door for future challenges if the Act is implemented improperly, school districts should exercise care to conduct the moment of silence in a manner consistent with constitutional requirements. Boards of education and administrators should determine what method their district will use to comply with the statutory mandate. We recommend that districts provide a standard procedure for teachers to follow, specifying the duration of the moment of silence and instructing them to refrain from characterizing it as a time for prayer. A short statement such as, "We will now begin our school day with a brief period of silence" should comply with the statute and avoid any inference that the district is favoring or inhibiting religion.

Questions regarding the *Sherman* decision or compliance with the *Silent Reflection and Student Prayer Act* may be directed to any RSNLT attorney.

Susan E. Nicholas, an associate in the firm's Decatur office, prepared this *Law Alert*.

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