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## **EDUCATION Elementary, Secondary, and Adult Education: Require a Moment of Quiet Reflection at the Opening of Each School Day; Prevent Prohibition of Student Initiated, Voluntary Prayer at Schools and School-Related Events**

Leila Ann Greiff Lawlor

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## EDUCATION

*Elementary, Secondary, and Adult Education: Require a Moment of Quiet Reflection at the Opening of Each School Day; Prevent Prohibition of Student-Initiated, Voluntary Prayer at Schools and School-Related Events*

CODE SECTION: O.C.G.A. § 20-2-1050 (amended)  
BILL NUMBER: SB 396  
ACT NUMBER: 770  
SUMMARY: The Act requires Georgia public school teachers to conduct a period of quiet reflection not to exceed sixty seconds at the start of each school day. The moment of quiet reflection is not to be conducted as a religious service. The Act is not to be interpreted as precluding student-initiated, voluntary prayers at schools or school-related events.  
EFFECTIVE DATE: July 1, 1994

### *History*

In 1962, the United States Supreme Court ruled that an official prayer reading in a public school violates the Establishment Clause of the First Amendment to the United States Constitution.<sup>1</sup> Until recently, the modern Court has uniformly applied a three-part test, delineated in *Lemon v. Kurtzman*, to determine whether governmental action violates the Establishment Clause.<sup>2</sup> Several recent Supreme Court cases failing to expressly use the *Lemon* test for Establishment Clause challenges have prompted questions concerning its continued vitality.<sup>3</sup>

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1. *Engel v. Vitale*, 370 U.S. 421 (1962). The First Amendment states: "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1970). In order to pass a review of constitutionality under *Lemon*, the government action: (1) must have a secular legislative purpose; (2) must have a principal effect which neither advances nor inhibits religion; and (3) must not foster excessive government entanglement with religion. *Id.* at 612-13.

3. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994); *Lee v. Weisman*, 112 S. Ct. 2649 (1992). In concurring opinions in *Lee*, several Justices proposed alternative tests for identifying Establishment Clause violations. The tests include Justice O'Connor's "endorsement" test and Justice Kennedy's "coercion" test. *Id.* See generally Mark A. Boatman, Note, *Lee v. Weisman: In Search of a Defensible Test for Establishment of Religion*, 37 ST. LOUIS U. L.J. 773 (1993).

In 1985, the United States Supreme Court struck down an Alabama statute authorizing a one-minute silent period at the start of each school day.<sup>4</sup> The majority in *Wallace v. Jaffree* concluded that the legislative purpose in enacting the Alabama statute was to endorse religion.<sup>5</sup> The majority based its decision on testimony from the bill's sponsor that the main intent was to return prayer to schools.<sup>6</sup> The Court ruled that the Alabama statute failed the first prong of the three-part *Lemon* test, thus violating the Establishment Clause.<sup>7</sup> However, the Court also suggested that it would review future state attempts at "moment of silence" legislation on a case-by-case basis.<sup>8</sup> Justice O'Connor noted in a concurring opinion that if a state legislature "expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent."<sup>9</sup>

Previously, Georgia law allowed a public school teacher, at the teacher's discretion or upon the direction of the local board of education, to conduct a "brief period of silent prayer or meditation" at the opening of each school day.<sup>10</sup>

### SB 396

The sponsoring senators of SB 396, fully aware of Supreme Court precedent with regard to prayer in public schools, were careful to state a nonsecular purpose in the Act.<sup>11</sup> In drafting the secular legislation,

4. *Wallace v. Jaffree*, 472 U.S. 38 (1985). Interestingly, the initial challenge in *Wallace* comprised a challenge to three different Alabama statutes. *Wallace v. Jaffree*, 554 F. Supp. 1104 (S.D. Ala. 1983). The district court did not apply the *Lemon* test or any identifiable Establishment Clause test, and upheld all three statutes. *Id.* The plaintiffs challenged two of the three statutes, which both included references to "prayer." *Id.* However, one statute, similar in language to Georgia's HB 396, was not challenged beyond the district court level. *See Wallace*, 472 U.S. at 38.

5. 472 U.S. at 56.

6. *Id.* "The sponsor . . . Senator Donald Holmes, inserted into the legislative record . . . a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." *Id.* at 56-57. When asked before the District Court whether he had any other legislative purpose, he stated, "No, I did not have no other purpose in mind." *Id.* at 57.

7. *Id.* at 59-61.

8. *See id.* at 59; *id.* at 62 (Powell, J., concurring); *id.* at 73, 78 n.5 (O'Connor, J., concurring).

9. *Id.* at 74-75 (O'Connor, J., concurring).

10. 1969 Ga. Laws 488 (codified at O.C.G.A. § 20-2-1050 (1992)).

11. Telephone Interview with Sen. David Scott, Senate District No. 36 (Apr. 5, 1994) [hereinafter Scott Interview]; Telephone Interview with Sen. Charles C. (Chuck) Clay, Senate District No. 37 (Apr. 4, 1994) [hereinafter Clay Interview]. Sen. Scott explained that he conducted legal research before drafting SB 396. Scott Interview, *supra*. His research included study of *Lemon*. *See supra* note 2. Thus, Sen. Scott was

the sponsors hoped to alleviate some problems faced by the state's young people without forcing religious dogma upon any school child.<sup>12</sup> Senator David Scott, cosponsor of the Act, expressed a strong belief that today's society is experiencing a disintegration of moral values.<sup>13</sup> Senator Scott said SB 396 is a way to exert a "positive impact on the violence, the negative messages, and the environment in which [the state's] young people are now living, particularly our young people of school age."<sup>14</sup>

Senator Charles C. "Chuck" Clay, a cosponsor, cited two purposes of the Act.<sup>15</sup> First, it may provide some semblance of order in Georgia classrooms for one moment each morning.<sup>16</sup> A quiet moment at the start of each school day reserved for reflecting on the day's activities "cannot hurt, and just might help."<sup>17</sup> Second, it may give students a framework for self-analysis by providing a routine of a daily moment of silence for thirteen years (grades kindergarten through twelve).<sup>18</sup>

In contrast to the previous statute, this Act *requires* public school teachers to conduct a quiet moment of reflection at the start of each school day.<sup>19</sup> The General Assembly accomplished this by changing the word "may" to "shall" and eliminating the requirement that teachers defer to the discretion of the local school board.<sup>20</sup> The Act removes all references to "silent prayer or meditation" and inserts language

careful throughout the drafting process to be certain the legislative purpose was secular. Scott Interview, *supra*.

12. Scott Interview, *supra* note 11; Clay Interview, *supra* note 11.

13. Scott Interview, *supra* note 11. Symptoms of this disintegration are "the proliferation of gangs, satanic worship, violence, and disregard for human life." *Id.* In the absence of positive influences such as family relationships, many of the state's young people have turned to gang membership. *Id.*

14. *Id.*

15. Clay Interview, *supra* note 11.

16. *Id.*

17. *Id.*

18. *Id.* The *Atlanta Journal & Constitution* reported that the Act was "pushed by black Democrats, who see prayer as an antidote to school violence, and conservative Christian Republicans, who want to roll back 30 years of court rulings against school prayer." Ben Smith III, '94 *Georgia Legislature: Lawmakers Push "Reflection" Period in Public Schools; Legal Experts Question Such Measures Aimed at Mandating Time for Prayer*, ATLANTA J. & CONST., Feb. 9, 1994, at C1. Asked whether this view had fairly characterized support for the Act, Senator Scott replied, "No. The Act was pushed by [almost] the entire legislature, by the Governor, and by the Lieutenant Governor." Scott Interview, *supra* note 11. Despite the sponsors' stated intent, some legislators indicated support for return of prayer to schools. See *Lawmakers '94* (WGTV broadcast, Mar. 4, 1994) (videotape available in Georgia State University Law Library); see also Ben Smith, III & Charles Walston, *Bill Allowing "Student Led" Prayers in School Clears Georgia House*, ATLANTA J., Mar. 4, 1994, at A1; see *infra* notes 31, 40 and accompanying text.

19. Compare O.C.G.A. § 20-2-1050 (1992) with *id.* § 20-2-1050 (Supp. 1994).

20. Compare *id.* § 20-2-1050 (1992) with *id.* § 20-2-1050 (Supp. 1994).

mandating a "brief period of quiet reflection for not more than 60 seconds."<sup>21</sup>

The Act expressly states that the statute does not intend the moment of quiet reflection to be a "religious service or exercise," but rather an opportunity to reflect "on the anticipated activities of the day."<sup>22</sup> However, the Act does not prevent nonsectarian and nonproselytizing prayers at school, or school-related events, if the prayers are student-initiated and voluntary.<sup>23</sup> Because the word "prayer" is included in the third subsection<sup>24</sup> added by the House floor amendment, this subsection was controversial.<sup>25</sup> Finally, the Act includes a severability clause which allows one or more parts of the Act to remain in force if other parts are found unconstitutional.<sup>26</sup> The sponsors of SB 396 prompted this inclusion in fear that, under judicial scrutiny, subsection (c) might be found unconstitutional.<sup>27</sup>

When originally introduced, SB 396 only amended the former statute by *requiring* teachers to conduct a moment of silence but did not remove the reference to "silent prayer."<sup>28</sup> According to Senator Scott, the Senate Education Committee eliminated all references to silent prayer to increase the Act's chances to survive constitutional review.<sup>29</sup> The committee substitute referred instead to a moment of quiet

21. See generally *id.* § 20-2-1050 (Supp. 1994).

22. *Id.* § 20-2-1050(b) (Supp. 1994).

23. *Id.* § 20-2-1050(c) (Supp. 1994).

24. HB 396 (HFA), 1994 Ga. Gen. Assem.; Smith & Walston, *supra* note 18. This subsection is now codified at O.C.G.A. § 20-2-1050(c) (Supp. 1994). This controversial provision is remarkably similar to a provision held constitutional in the Fifth Circuit Court of Appeals. See *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). Many supporters of this subsection feel that the Supreme Court has given a "green light" to student-led prayer by refusing to grant certiorari in the *Jones* case. Ben Smith, III, *Legislature '94: Day 35 School Prayer Backers Cite Texas Case*, ATLANTA CONST., Mar. 5, 1994, at B4; cf. *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (holding school practice allowing religious invocations at high school football games violates the Establishment Clause).

25. Smith & Walston, *supra* note 18.

26. O.C.G.A. § 20-2-1050 (Supp. 1994). Sen. Scott insisted upon the severability clause out of concern over subsection (c), notwithstanding the Supreme Court's denial of certiorari in *Jones*. Letter from Sen. David Scott, Senate District No. 36, to Stephen Chance, Co-Legislation Editor, *Georgia State University Law Review* 2 (Sept. 1, 1994) (available at Georgia State University College of Law Library) [hereinafter Scott Letter].

27. Scott Interview, *supra* note 11.

28. SB 396, as introduced, 1994 Ga. Gen. Assem.

29. Scott Interview, *supra* note 11. Senator Scott indicated that Senator Sallie Newbill, Senate District 56, was instrumental in the committee change. Senator Newbill feared that, without the change, a reviewing court might conclude that reference to prayer was intentional in the Act. *Id.*

reflection and limited this moment to "not more than 60 seconds."<sup>30</sup> The Senate passed this version and then forwarded the bill to the House.

In the House, many representatives insisted the bill contain some reference to school prayer and refused to pass the bill as written.<sup>31</sup> The House added two floor amendments to the bill. One floor amendment added two subsections.<sup>32</sup> One subsection stated that voluntary, student-initiated prayer should not be prevented by the moment of silence provisions.<sup>33</sup> The other subsection permitted religious clubs to recruit members and use school property along with other noncurriculum organizations.<sup>34</sup> The other House floor amendment changed the length of the period for quiet reflection from sixty seconds to one hundred and twenty seconds.<sup>35</sup>

This version, containing both House floor amendments, passed the House and was forwarded to the Senate.<sup>36</sup> The Senate, however, refused to pass the House version.<sup>37</sup> A Conference Committee was appointed to negotiate a compromise bill.<sup>38</sup> The House conferees agreed to eliminate the House floor amendments and restore the bill to the version that passed the Senate.<sup>39</sup> The Senate once again passed this version; however, the House rejected the Conference Committee's version.<sup>40</sup> The Conference Committee met again and drafted an "eleventh-hour" compromise which re-inserted the provision allowing student-initiated, voluntary school prayer and also inserted a severability clause.<sup>41</sup> Some opponents of the Act expressed concern

30. HB 396 (SCS), 1994 Ga. Gen. Assem.

31. Scott Interview, *supra* note 11. Sen. Scott stated that the purpose of the legislators who drafted SB 396 was neither to authorize prayer nor to prohibit student-initiated prayer. Scott Letter, *supra* note 26.

32. SB 396 (HCSFA), 1994 Ga. Gen. Assem.

33. *Id.* This subsection was included in the final version of the bill. See O.C.G.A. § 20-2-1050(c) (Supp. 1994); see *supra* notes 24-25 and accompanying text.

34. SB 396 (HCSFA), 1994 Ga. Gen. Assem. This subsection was struck in the House-Senate Conference Committee. See *infra* text accompanying notes 39-41; cf. Board of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226 (1990) (plurality opinion) (requiring public school to grant equal access to school facilities to all noncurriculum, school-related, student organizations, including religious clubs).

35. HB 396 (HCSFA), 1994 Ga. Gen. Assem.

36. *Id.*

37. Final Composite Status Sheet, Mar. 16, 1994.

38. *Prayer Deleted From Bill Requiring Moment of Silence*, ATLANTA J., Mar. 14, 1994, at A1.

39. *Id.*

40. Final Composite Status Sheet, Mar. 16, 1994; see also Ben Smith, III, *Legislature '94, House Gets Wish: Moment of Silence Bill Includes Prayer*, ATLANTA CONST., Mar. 17, 1994, at D4.

41. Clay Interview, *supra* note 11; see also Smith, *supra* note 24. Senator Clay stated that passage in the Senate was "noncontroversial." Clay Interview, *supra* note 11. The Senate sponsors desired there be no discussion of prayer "in the well" in

about the inclusion of the subsection on student-led prayers.<sup>42</sup> Therefore, to protect the other provisions of the Act, the committee conferees included the severability clause.<sup>43</sup> This version of the bill was enacted.<sup>44</sup>

*Leila Ann Greiff Lawlor*

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order to assure that legislative history would indicate a secular purpose. *Id.* Senate sponsors were disappointed that House debate included mention of "prayer" and "God." *Id.* Senator Clay indicated that because the floor debate was "replete" with such discussion, the "clean" bill that Senate sponsors had desired became "muddied." *Id.*

42. Telephone Interview with Sen. Ron Slotin, Senate District No. 39 (Apr. 5, 1994). Sen. Slotin opposed the final version of the Act. *Id.* However, Sen. Slotin said he had supported Senator David Scott's version of the bill when it left the Senate, before the House of Representatives made changes mentioning student-led prayer. *Id.* Sen. Slotin recognized that "what may seem innocuous to some infringes upon the rights of others who have different beliefs." *Id.* Sen. Slotin also expressed concern that local school boards would be forced to bear the costs of fighting legal challenges. *Id.*

43. Scott Interview, *supra* note 11; *see also supra* note 26 and accompanying text.

44. Final Composite Sheet, Mar. 16, 1994.