



STATE OF KANSAS

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July 10, 1978

ATTORNEY GENERAL OPINION NO. 78- 243

Mr. Merle R. Bolton
Commissioner of Education
Kansas State Department of Education
120 East 10th Street
Topeka, Kansas 66612

Re: Schools--Special Education--Sectarian Students

Synopsis: Kansas school districts must provide special education services to developmentally disabled and exceptional children attending sectarian schools at religiously neutral sites, and public employees who conduct such programs must maintain a religiously neutral stance. Such services must be provided notwithstanding the Establishment Clause of the United States Constitution.

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Dear Mr. Bolton:

You inquire whether a unified school district is required to provide special education services to children regularly enrolled in a sectarian school.

Kansas school districts are required to provide services to developmentally disabled children and to exceptional children by K.S.A. 72-933 and by the Special Education for Exceptional Children Act, K.S.A. 72-961 et seq.

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K.S.A. 72-933 provides for the education of developmentally disabled children as follows:

" The board of education of every school district shall establish appropriate special education services for all developmentally disabled children, as such children are defined in the state plan, in the school district, and such special education services shall meet eligibility standards set by the state board. Such special education services shall be planned and operative not later than July 1, 1974."

And special education services for exceptional children are mandated by K.S.A. 72-966 as follows:

"(a) The board of education of every school district shall provide special education services for all exceptional children in the school district and said special education services shall meet standards and criteria set by the state board. Said special education services shall be planned and operative not later than July 1, 1979. The manner and time for implementation in school districts of special education services designed for each of the various categories of exceptionality shall be designated by the state board in accordance with the state plan.

(b) Nothing in this section shall be construed to limit or supersede or in any manner affect the implementation date for special education services required under K.S.A. 1973 Supp. 72-933, as amended, or to diminish the requirements of said 72-933."

The issue whether any particular public education activity when conducted in conjunction with a sectarian education program violates the constitution is difficult to determine as an abstract matter of law. Acknowledging this, the United States Supreme Court in the case of Wolman v. Walter, 433 U.S. 229 (1977) summarized the problem as follows:

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" The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion. See Romer v. Maryland Public Works Bd., 426 U.S. 736, 748, (1976); Committee for Public Education v. Nyquist, 413 U.S. 756, 772-733 (1973); Lemon v. Nyquist, 413 U.S. 756 612, 613 (1971).

In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the school children of the State. As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria.

We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state 'is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' Lemon, 403 U.S., at 614. Nonetheless, the Court's numerous precedents 'have become firmly rooted', Nyquist, 413 U.S., at 761, and now provide substantial guidance. We therefore turn to the task of applying the rules derived from our decisions to the respective provisions of the statute at issue."
[Emphasis Supplied]

In determining whether Kansas Special Education Laws are constitutional, therefore, we must look to the specific rulings of the Supreme Court with respect to closely related programs. In Wolman, the Supreme Court upheld the constitutionality of Ohio statutes authorizing the expenditure of public funds for diagnostic and therapeutic, guidance and remedial services. The services provided pursuant to these Ohio statutes are similar to those required under Kansas Special Education Laws.

In approving State funded diagnostic services provided on sectarian

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school premises, by state employees, the Court distinguished between such diagnostic services and impermissible teaching and counseling services as follows:

" First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact includes chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement."

Likewise, in Wolman, the Supreme Court reviewed and approved Ohio statutes, authorizing the expenditure of public funds for therapeutic, guidance and remedial services. Under the statutes such services were to be provided at off sectarian school premises. In approving such services being offered in mobile classrooms used exclusively for sectarian students, the Court held as follows:

" We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In Meek the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But, as discussed in Part V, supra, the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. 421 U.S., at 371. See also Lemon, 403 U.S., at 618-619. The danger existed there not because the

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public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in Meek does not arise.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in Meek. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in Meek arouse from the nature of the institution, not from the nature of the pupils.

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

Although the constitutionality of therapeutic, guidance and remedial services offered to sectarian students at public facilities where both public and sectarian school students were served simultaneously was conceded by the Appellants in Wolman, the Court impliedly recognized the propriety of such activities in its holding as follows:

" We hold that providing therapeutic and remedial services at a neutral site off the premises of nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

The Kansas Special Education Plan, developed pursuant to Kansas statutes, requires local school districts to undertake the following

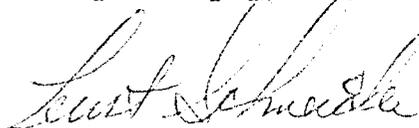
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activities with respect to the identification of exceptional and developmentally disabled children and the provision of services to such children:

- " 1. Initiate screening and identification procedures to determine which children within the district are in need of special education services.
2. Provide appropriate special education services for all exceptional children of school age. Exceptional children are as follows: Semi-Independent (Educable Mentally Retarded), Semi-Dependent (Trainable Mentally Retarded), Dependent (Severely-Profoundly Mentally Retarded), Learning Disabled, Hearing Impaired, Physically Impaired, Gifted, Personally and Socially Maladjusted, Severely Multiply Handicapped/Deaf-Blind, Visually Impaired, and Speech and Language Impaired.
3. When necessary, transport exceptional children to and from special education services.
4. Adopt a due process policy regarding the placement of pupils in special education programs.
5. Provide supervision and administration for special education services.
6. Submit annually to the Special Education Administration section an update or revision of the local comprehensive plan for providing special education services.
7. Maintain information activities which alert the public to the needs of exceptional children, their educational rights, and the availability of special education services."

Based on Wolman, it is our view that the services required by the Kansas State plan and set out above must be provided to sectarian students. Identification and diagnostic services may be provided on sectarian school premises, but actual special education services must be provided to sectarian students at a "neutral site". School districts are authorized to provide transportation for this purpose.

Very truly yours,



CURT T. SCHNEIDER
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