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ATTORNEY GENERAL OPINION NO. 79- 70

The Honorable Joe Warren
State Senator, 32nd District
Room 136 North, Capitol Building
Topeka, Kansas 66612

The Honorable Anita Niles
State Representative, 17th District
Room 278 West, Capitol Building
Topeka, Kansas 66612

Re: Schools--School Attendance--Constitutional confines of compulsory school attendance

Synopsis: Two (2) of the eight (8) conditions of approval for religious educational programs provided in K.S.A. 1978 Supp. 72-1111, when applied, may constitute an unreasonable infringment upon free exercise of religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution and, therefore, may be unenforceable in some cases. Those conditions are: (1) requiring at least fifteen (15) hours per week of classroom work and (2) requiring teachers of such programs to hold a valid, "conventional" teaching certificate.

* * *

Dear Senator Warren and Representative Niles:

You have requested our opinion as to the constitutional propriety of K.S.A. 1978 Supp. 72-1111, the compulsory education law, in regard to the free exercise of religion protected by the First Amendment to the United States Constitution as made

applicable to the states by the Fourteenth Amendment to the United States Constitution, and Section 7 of the Bill of Rights of the Constitution of the State of Kansas.

Please be advised that the United States Supreme Court, in Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), in essence, proclaimed the limits of what a state may require in regard to compulsory school attendance, when such state action affects the free exercise of religion. Our compulsory school attendance law, K.S.A. 1978 Supp. 72-1111, must, therefore, be scrutinized to determine if it comports with the principles set forth in Yoder.

From the very outset, it should be noted that Mr. Chief Justice Burger, in writing for the plurality said:

> "Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Older Order Amish or others similarly situated . . . . [T]here is no basis for assuming that . . . reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion. Id. at 236. (Emphasis added.)

From this it is clear that compulsory attendance laws, in and of themselves, are not unconstitutional. It is only when compliance therewith is challenged by a member of an established religion that possible constitutional infirmities may become apparent. In addition, the decision in Yoder is limited to compulsory school attendance subsequent to completion of the eighth grade. It was not necessary for the Court to decide the issue of compulsory school attendance through the eighth grade. Given this fact, we, too, limit our opinion to compulsory education following successful completion of the eighth grade.

A careful reading of Yoder reveals that the major objection of the United States Supreme Court to Wisconsin's compulsory school attendance law was that said law required "compulsory formal education" to age 16. Almost every reference by the Court is to compulsory formal education. Id. at 219, 223, 224, 225, 227 and 234. The Court, however, expresses its approval of "continuing agricultural vocational education," pursuant to "reasonable standards" promulgated by the State "concerning the content" of such education. Id. at 236.

After careful review of the provisions of K.S.A. 1978 Supp. 72-1111, it is our opinion that the first two (2) paragraphs of the act, pertaining generally to compulsory school attendance, are, in no way, inconsistent with or repugnant to the Court's decision in Yoder. We are further of the opinion that only two (2) of the conditions of approval enumerated in this statute are of questionable validity, i.e., paragraphs number three and number six. All other enumerated paragraphs of the law, in our opinion, comply with the "reasonable standards" test prescribed in Yoder.

K.S.A. 1978 Supp. 72-1111, in relevant part, provides:

> "When a recognized church or religious denomination that objects to a regular public high school education provides . . . offers and teaches a regularly supervised program of instruction, approved by the state board of education for children of compulsory school attendance age who have successfully completed the eighth grade, participation in such a program of instruction by children who have successfully completed the eighth grade . . . shall be regarded as acceptable school attendance within the meaning of this act. Approval of such programs shall be granted by the state board . . . upon application from recognized churches and religious denominations, under the following conditions: (1) Each participating child shall be engaged, during each day on which attendance is legally required in the public schools . . . in at least five (5) hours of learning activities appropriate to the adult occupation he or she is likely to assume in later years;
> . . . .

> "(3) at least fifteen (15) hours per week of classroom work shall be provided, at which time students shall be required to file written reports of the learning activities they have pursued since the time of the last class meeting . . .
> . . . .
>
> "(6) the teacher shall be capable of performing competently the functions entrusted to him or her, but shall be required to hold a valid teaching certificate issued by the state of Kansas . . . ." (Emphasis added.)

The first of our concerns is condition number three. This concern stems from the fact that whether you interpret enumerated paragraphs one, three and four as requiring five (5) or eight (8) hours per day to be devoted to learning activities, (an interpretation not necessary to your inquiry and which we expressly do not make herein), enumerated paragraph number three requires an average of at least three hours per day to be spent in the classroom. This means that, at a minimum, these children must devote three-eighths (3/8) of their learning activities' time to classroom work, and may be required to spend as much as three-fifths (3/5) of such time in a classroom.

In regard to classroom activities, the Court said:

> "During this period [formative adolescent period of life] the children must acquire Amish attitudes favoring manual work . . . and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in the classroom." Id. at 211. (Empahsis added.)

Given this judicial pronouncement, we are of the opinion that to require a minimum of three (3) hours per day in classroom activity, devoted only to preparing "written reports of the learning activities they [participating children] have pursued since the time of the last class meeting" [K.S.A. 1978 Supp. 72-1111, enumerated paragraph three], imposes a classroom-time requirement which is too lengthy and which does not assist the children in acquiring vocational skills. This is not consistent with the requirements in Yoder.

Therefore, we are of the opinion that if enumerated paragraph number three of K.S.A. 1978 Supp. 72-1111 were to be challenged by an individual belonging to a recognized religion whose tenets were opposed to formal education beyond the eighth grade, said paragraph would be held to be an infringement upon the free exercise of religion. Consequently, it is our opinion that said paragraph may prove to be unenforceable in such a case.

Our second concern is with the teacher certification requirement imposed by enumerated paragraph number six. In regard to teachers, the Court in Yoder, said:

> "In short, high school attendance with teachers who are not of the Amish faith--and may even be hostile to it--interposes a serious barrier to the integration of the Amish child into the Amish religious community." Id. at 211.

Further, quoting with approval from Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court stated:

> "'The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the

> high duty, to recognize and prepare him for additional obligations.' 268 U.S. at 534-535, 69 L.Ed. at 1078." (Emphasis added.)

Notwithstanding this apparent, "hands-off" attitude expressed by the Court, Mr. Chief Justice Burger states:

> "[t]o be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will . . . have a potential for significant social burdens." 406 U.S. at 233.

Further, in Pierce v. Society of Sisters, supra, it is said:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that teachers shall be of good moral character and patriotic disposition . . . ." 268 U.S. at 534.

Finally, the Court in Yoder, said:

> "Our disposition of this case, however, in no way, alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." 406 U.S. at 234.

Given these statement, it is our opinion that a State, in determining one of the necessary, "discrete aspects" of its compulsory education program, may require "certification" of teachers';not certification in the conventional sense,but rather,

based upon the "teacher's" qualification to teach a particular vocation, such as a minimum number of years of experience in agriculture or homemaking or other subjects to be taught by the "teacher."

However, as no standards currently exist for obtaining such a special teachers' certificate and, since enumerated paragraph number six (6) of K.S.A. 1978 Supp. 72-1111 requires a conventional teaching certificate, it is our opinion that this paragraph, like the third enumerated paragraph of this statute, would, if challenged, be held to be an unreasonable infringement of the free exercise of religion; forcing children to accept instruction from "public teachers only," thereby "standardizing" them. The state has no such power. Thus, unless and until provisions are made for special teacher's certificates for those who teach informal vocational education, it is our opinion that the teacher certification requirement of K.S.A. 1978 Supp. 72-1111 (6) is unenforceable.

In summation, it is our opinion that the third and sixth enumerated paragraphs contained in K.S.A. 1978 Supp. 72-1111, as applied, each constitute a potentially unconstitutional infringement on the free exercise of religion guaranteed by both the Federal and State Constitutions and are, therefore, unenforceable.

Very truly yours,

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RTS:BJS:RJB:jm