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ATTORNEY GENERAL OPINION NO. 2012- 19

The Honorable Bob Marshall
Senator, Thirteenth District
P.O. Box 1131
Fort Scott, KS 66701

Re: Constitution of the United States—Amendments to the U.S. Constitution—
Amendment 1—Freedom of Religion, Speech and Press; Schools; Health
Tests and Inoculations; Alternatives; Parent or Guardian Statement;
Adherent of a Religious Denomination

Constitution of the State of Kansas—Bill of Rights—Religious Liberty;
Schools; Health Tests and Inoculations; Alternatives; Parent or Guardian
Statement; Adherent of a Religious Denomination

Schools—Health Programs—Health Tests and Inoculations; Certification
of Completion Required, Alternatives; Parent or Guardian Statement;
Adherent of a Religious Denomination; Constitutionality

Synopsis: The alternative to mandatory inoculations provided by K.S.A. 72-
5209(b)(2) does not, on its face, require membership in a religious
organization or give preferential treatment to particular religious
organizations, and therefore does not violate the First Amendment of the
United States Constitution. In addition, K.S.A. 72-5209(b)(2) does not, on
its face, infringe upon, control, or interfere with any person's right to
worship or act in accordance with religious conscience; compel any
person to attend or support any form of worship; or give preference to any
religious establishment, and therefore does not violate Section 7 of the
Kansas Constitution's Bill of Rights. Cited herein: K.S.A. 72-5209; 72-
5211a; Kan. Const., Bill of Rights, § 7; U.S. Const., Am. 1.

Dear Senator Marshall:

As Senator for the Thirteenth District, you seek our opinion on whether the alternative to pupil inoculation provided in K.S.A. 72-5209(b)(2) violates the religious liberty provisions of the United States and Kansas Constitutions by requiring membership in an organized religion.

The First Amendment to the United States Constitution states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" ¹ Section 7 of the Bill of Rights of the Kansas Constitution states in relevant part:

The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. . . .

Pursuant to K.S.A. 72-5209(a), prior to admission to and attendance at school, every pupil enrolling in any school for the first time in Kansas must provide certification that the pupil has received tests and inoculations deemed necessary by the secretary of the Kansas Department of Health and Environment. ² A pupil who has not complied with the requirements of K.S.A. 72-5209(a) may be excluded from school attendance until such time as the pupil is in compliance with the statute. ³

K.S.A. 72-5209(b) provides two alternatives to the certification requirement of K.S.A. 72-5209(a). The first alternative allows a pupil to present an annual written statement from a licensed physician stating that the pupil's physical condition is such that the required tests or inoculations would seriously endanger the pupil's life or health. ⁴ The other alternative requires the pupil to present "a written statement signed by one parent or guardian that the child is an adherent of a religious denomination whose religious teachings are opposed to such tests or inoculations." ⁵

Our office has previously considered whether this statute violates parental and religious rights. In Attorney General Opinion No. 94-162, Attorney General Robert Stephan concluded that K.S.A. 1993 Supp. 72-5209, as amended by L. 1994, Ch. 206, § 3, does not permit a parent to object to mandatory tests and inoculations based upon the parent's personal, non-religious beliefs:

¹ U.S. Const., Am. 1.

² Pursuant to K.A.R. 28-1-20, pupils must receive the following vaccinations prior to enrollment in school: diphtheria; hepatitis B; measles (rubeola); mumps; pertussis (whooping cough); poliomyelitis; rubella (German measles); tetanus; and varicella (chickenpox).

³ K.S.A. 72-5211a(a).

⁴ K.S.A. 72-5209(b)(1).

⁵ K.S.A. 72-5209(b)(2).

First . . . the statute specifies that the religious belief must be that of the child and not the parent. Secondly, even if the objections mentioned were the child's, personal convictions and moral attitudes do not equate to "a religious denomination whose teachings are opposed to such tests and immunizations" ⁶

Attorney General Stephan opined that the statute is constitutional even though it does not allow an exception for a parent's personal beliefs that are non-religious in nature. Attorney General Stephan further noted that there is a wide body of case law to support compulsory vaccinations as a valid exercise of state police power, even when such mandates infringe upon constitutional rights; religious exemptions to compulsory vaccination are not constitutionally required.⁷ However, that opinion did not address the specific question you pose; namely, whether the alternative to mandatory inoculations authorized by K.S.A. 72-5209(b)(2) is only available to children who are *members* of an organized religion.

To answer your question, we apply rules of statutory construction to K.S.A. 72-5209(b)(2). The fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained.⁸ When construing a statute, legislative intent must be derived from the language of the statute; where the language used is plain and unambiguous, courts must follow the intent as expressed by the words used.⁹ Words in common usage should be given their natural and ordinary meaning during statutory construction.¹⁰ A statute is presumed constitutional and all doubts must be resolved in favor of its validity.¹¹ If there is any reasonable way to construe a statute as constitutionally valid, the court must do so.¹²

In the absence of a specific factual scenario to which your question applies, we consider K.S.A. 72-5209(b)(2) on its face. To qualify for the exception in K.S.A. 72-5209(b)(2), a pupil must present a written statement "that the child is an *adherent* of a religious denomination whose religious teachings are opposed to such tests or inoculations."¹³ Adherent is ordinarily defined as "a believer in or advocate especially of a particular idea or church."¹⁴ Member is ordinarily defined as "a person baptized or enrolled in a church."¹⁵ These terms are not synonymous; a person may be an adherent of a religious denomination without being an actual member of such denomination. Thus, we

⁶ Internal citations omitted.

⁷ See *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Wright v. DeWitt School District No. #1*, 385 S.W.2d 644 (Ark.1965); *Davis v. State*, 451 A.2d 107 (Md.App.1982); *Syska v. Montgomery Cty. Bd. of Ed.*, 415 A.2d 301 (Md.App.1980); *Brown v. Stone*, 378 So.2d 218 (Miss.1980); *Board of Education of Lake Mountain v. Maas*, 152 A.2d 394 (N.J.1959); *McCartney v. Austin*, 293 N.Y.S.2d 188 (1968); *Itz v. Penick*, 493 S.W.2d 506 (Tex.1973).

⁸ See, e.g., *Steffes v. City of Lawrence*, 284 Kan. 380, 386 (2007).

⁹ See, e.g., *Fisher v. State Farm Mut. Auto Ins. Co.*, 264 Kan. 111, 118 (1998).

¹⁰ See, e.g., *Appeal of Boeing Co.*, 261 Kan. 508, 515 (1997).

¹¹ See, e.g., *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243 (1992).

¹² *Id.*

¹³ Emphasis added.

¹⁴ <http://www.merriam-webster.com/dictionary/adherent>.

¹⁵ <http://www.merriam-webster.com/dictionary/member>.

opine that the plain and unambiguous language of K.S.A. 72-5209(b)(2) does not limit the religious alternative to mandatory tests and inoculations to members of religious denominations.

Having so opined, we examine the constitutionality of K.S.A. 72-5209(b)(2) in light of the First Amendment. While no Kansas court has addressed your specific question, other states have determined that some religious exemption statutes are unconstitutional under the First Amendment. In *Sherr v. Northport-East Northport Union Free School District*,¹⁶ the court examined a New York statute that limited its religious exemption to mandatory inoculations to “bona fide members of a recognized religious organization.”¹⁷ Holding that the statute violates both the Establishment Clause and the Free Exercise Clause of the First Amendment, the court noted:

The primary effect of [the statute]'s limiting clause is manifestly the inhibiting of the religious practices of those individuals who oppose vaccination of their children on religious grounds but are not actually members of a religious organization that the state recognizes. . . . Here, New York has conditioned the conferring of a statutorily created exemption on membership in a religious denomination upon which the state, if the attempted witticism can be forgiven, has bestowed a blessing of governmental approval. [The statute] makes available to members of certain religious organizations to which the state has given some sort of official recognition a statutory benefit for which other individuals who may belong to either an unrecognized religious group or possess their own personal religious beliefs are not eligible.¹⁸

Thus, limiting the exemption to “bona fide members” discriminates against parents who choose not to become official members of a religious organization, in violation of the Free Exercise Clause. Likewise, limiting the exemption to “recognized” religious organizations means that the government must prefer or approve of certain faiths over others, in violation of the Free Exercise Clause and the Establishment Clause.

In a later case, *Boone v. Boozman*,¹⁹ the court considered an Arkansas statute that permitted parents to object to required immunizations “on the grounds that immunization conflicts with the religious tenets and practices of a *recognized* church or religious denomination of which the parent or guardian is an adherent or member.”²⁰ The court determined that by limiting the exception to “recognized” churches and denominations, the statute “singles out ‘recognized churches’ for preferential treatment,” and therefore violates the First Amendment.²¹

¹⁶ 672 F.Supp. 81 (E.D.N.Y. 1987).

¹⁷ N.Y. Pub. Health L. §2164(9). The statute was amended by L. 1989, Ch. 583, §3 to allow parents who “hold genuine and sincere religious beliefs” to exempt their children from mandatory immunizations.

¹⁸ 672 F.Supp. at 89-90. Citations omitted.

¹⁹ 217 F.Supp.2d 938 (E.D. Ark. 2002).

²⁰ Ark. Code Ann. § 6-18-702(d)(2) (Repl. 1999). Emphasis added.

²¹ 217 F.Supp.2d at 947.

The holdings in *Sherr* and *Boone* indicate that a religious exemption statute is vulnerable to a challenge on Free Exercise or Establishment Clause grounds if it limits the exemption to actual members of a religious organization or to religious groups that are “recognized” by the state. Although these cases do not involve Kansas statutes, we find the reasoning therein persuasive. Plainly, K.S.A. 72-5209(b)(2) does not limit its application to adherents of state-recognized religious organizations. Further, the statute does not require bona fide membership in a religious organization because the terms “adherent” and “member” are not synonymous. Accordingly, we conclude that the statute does not violate the First Amendment.

We next consider K.S.A. 72-5209(b)(2) in light of Section 7 of the Bill of Rights of the Kansas Constitution, which provides much more detail respecting religious freedom than the First Amendment.²² Specifically, this section prohibits the state from (1) infringing upon the right to worship God according to the dictates of conscience; (2) compelling any person to attend or support any form of worship; (3) controlling or interfering with the rights of conscience; and (4) giving any preference by law to any religious establishment or mode of worship.

It has been suggested that the “rights of conscience” clause is not expressly limited to *religious* conscience, and therefore protects beliefs that are non-religious in nature. No Kansas court has defined “rights of conscience” as it pertains to the state constitution, but we find persuasive analysis in cases from Ohio and Minnesota, whose state constitutions contain similar religious freedom provisions.²³

Ohio courts have held that the Ohio Constitution does not recognize a general right of conscience unconnected to the exercise of religious freedom.²⁴ The Ohio Constitution protects the rights of conscience “only when predicated upon bona fide religious beliefs, even though the word ‘conscience’ in a secular sense necessarily includes moral and philosophical views not within the confines of established religion.”²⁵ Similarly, Minnesota courts have declined to interpret the Minnesota Constitution’s “rights of conscience” clause to include a non-religious belief that a person must tell the truth,²⁶ but have determined that the clause *does* protect a business owner’s right to refuse to provide services to an organization based upon the business owner’s religious beliefs.²⁷ We are persuaded by this reasoning and therefore opine that the “rights of conscience” clause in Section 7 of the Bill of Rights of the Kansas Constitution does not protect secular beliefs that are unconnected to the exercise of religious freedom.

²² *State v. Smith*, 155 Kan. 588, 594 (1942).

²³ “. . . [the court] should look to the Ohio and Minnesota courts for guidance because the provisions of their respective state constitutions on religious liberties are similar to § 7 of the Kansas Constitution Bill of Rights.” *Stinemetz v. Kansas Health Policy Authority*, 45 Kan. App. 2d 818, 849 (2011).

²⁴ See, e.g., *Luken v. Brigano*, 154 Ohio App. 3d 531 (2003); *Humphrey v. Lane*, 89 Ohio St. 3d 62 (2000); *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684 (1993).

²⁵ 89 Ohio App. 3d at 697.

²⁶ *State v. Schwartz*, 598 N.W.2d 7 (1999).

²⁷ *Rasmussen v. Glass*, 498 N.W. 2d 508 (1993).

When a party asserts a facial challenge to the constitutionality of a statute, courts do not consider whether that statute is *authorized* by the constitution, but whether it is *prohibited* thereby.²⁸ On its face, K.S.A. 72-5209(b)(2) does not infringe upon, control, or interfere with any person's right to worship or act in accordance with religious conscience. The statute also does not compel any person to attend or support any form of worship or give preference to any religious establishment. Accordingly, we conclude that K.S.A. 72-5209(b)(2) is not prohibited by Section 7 of the Bill of Rights of the Kansas Constitution.

Sincerely,

Derek Schmidt
Kansas Attorney General

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb

²⁸ See, e.g., *In re Weisgerber*, 285 Kan. 98, 102 (2007).