Subject Schools — Religious Education

Copy to

STATE OF KANSAS

Office of the Attorney General

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Attorney General

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Opinion No. 74- 363

Mr. Max O. Heim
Superintendent, USD 308
P. O. Box 1606
Hutchinson, Kansas 67501

Dear Superintendent Heim:

You inquire concerning two organizations established among the students in your high schools, being the Fellowship of Christian Athletes, and Youth for Christ.

The Fellowship, you state, is under the sponsorship of one of the coaches, meets regularly, and from time to time sponsors minor fund-raising projects. The Youth for Christ organization, organized in 1969, has approximately 20 members, and meets every other week in one school room, after school. A teacher serves as sponsor, who is unpaid for that service. In your letter, you emphasize that you have no objection to either of these organizations, and feel, on the contrary, that each makes a positive contribution to the total school program. Nonetheless, concerns have been expressed whether the operation of these two organizations within the framework of the high school is consistent with the various decisions of the United States Supreme Court interpreting the First Amendment provisions respecting the free exercise of religion, and prohibits any law "respecting an establishment of religion."

Lacking any definitive information regarding these two organizations, we understand and assume them to be private non- or inter-denominational groups, organized to promote among their members the sharing of generally religious beliefs and values, although not the beliefs or theology of any particular denomination. Your concern, as we understand it, is the extent to which these organizations may be permitted to use school facilities for meetings and activities, and whether faculty members may serve as sponsors. These points appear to be the extent of the relationship between the school and the organizations, as appears from your letter.

Few areas of the law have presented more difficult questions to the courts for resolution, than the complex relationships between public education and religion. A necessarily brief review of recent decisions of the United Supreme Court is helpful. Modern constitutional history of the "establishment" and "free exercise" clauses of the First Amendment begins with *Everson v. Board of Education*, 330 U.S. 1, (1947), in which the Court upheld a New Jersey statute under which a local board of education authorized reimbursement to parents of money expended by them for bus transportation of children to schools, including Catholic parochial schools. The Court took the view that the law, providing for reimbursement for transportation costs, extended a benefit to all citizens of the state without regard to religious beliefs, including parochial school students and their parents:

> "[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools....[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In *McCollum v. Board of Education*, 333 U.S. 203 (1948), there was challenged a policy whereby religious teachers, employed by private religious groups, were permitted to come weekly into school buildings, during regular hours set apart for secular teaching, and provide thirty minutes of religious instruction to those pupils whose parents consented, for which instruction pupils were released temporarily from their regular secular classes. After a detailed review of a highly factual record, the Court found it to

> "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects." 333 U.S. at 209.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court considered a New York City program

> "which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction."

The Court upheld the program, finding that it "involves neither religious instruction in public school classrooms nor the expenditure of public funds. The Court rejected the argument that in permitting the program, the school district, and hence the state, engaged in prohibited activities tending toward the establishment of religion, the argument relying on the tangential involvement of the district with the program summarized thus:

> "Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religion training; without the cooperation of the schools this 'release time' program, like the one in the *McCollum* case, would be futile and ineffective."

The Court found, in short, that the First Amendment does not require that the state be hostile to religion, and that the New York "released time" program was but a neutral accommodation to the religious needs of the students.

Engel v. Vitale, 370 U.S. 421 (1962), is famous as the case in which the Supreme Court, according to the conventional wisdom, banned prayer from public schools. The case has thus been widely misunderstood and misrepresented. The case

arose on quite simple facts:

> "The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:
>
> "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our County.'"

The Court held that the New York state prayer program officially established the religious beliefs embodied in the prayer, an intrusion by the state into religious affairs which was prohibited by the First Amendment:

> "It is neither sacriligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." 370 U.S. at 435.

In *Abington School District v. Schempp*, 374 U.S. 203, 10 L.Ed. 2d 844, 83 S.Ct. 1560 (1963), the Court summarized its holding in cases decided therein as follows:

> "[W]e find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*. The trial court in [case] No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial

> court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause." 374 U.S. at 223.

In two more recent cases, *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971), and *Tilton v. Richardson*, 403 U.S. 672, 29 L.Ed.2d, 91 S.Ct. 2091 (1971), the Court articulated the questions to be resolved in determining the constitutionality of an enactment which is challenged on First Amendment grounds:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion,....; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. at 612.

A fourth question was posited in *Tilton v. Richardson*, supra, in addition to these three: "Fourth, does the implementation of the Act inhibit the free exercise of religion." 403 U.S. at 678.

Here, of course, we are concerned not with a statutory enactment, but with a policy of the board of education, or of the school administration, permitting voluntary organizations of students, organized for the sharing and promotion of religious beliefs and values among their members, to hold organization meetings on school premises after school hours, and permitting faculty members to serve as "sponsors" of such organizations. The more general school policy in question here is one of permitting organizations whose membership is composed primarily or entirely of students, to use school premises for meetings after the end of the instructional use of such premises. It may fairly be said that such a policy applied uniformly to all such organizations, whether it be one related in interest and activities to a part of the curriculum, as, e.g., the Future Farmers of America chapter is related to vocational agriculture education, or an organization of students formed to serve a mutual and

common interest of the member-students generally unrelated to the curricular or extracurricular program of the school, such as the organizations in question here, Youth for Christ, and the Fellowship of Christian Athletes, appears to serve a primarily secular purpose, that of regulating the use of and access to school building premises by student-member groups and organizations, and has no secondary purpose to either foster or to inhibit religious exercises and beliefs among the student population. Such a policy, so far as we can determine and on the face of the matter, does not serve a sectarian purpose. If applied uniformly to all student-member organizations such a policy regarding access to school building premises for meetings serves, it may more reasonably be argued, a secular purpose of the school, i.e., to provide accessible and adequate meeting facilities for any organization comprised primarily of students which is organized to serve and promote their mutual and common interests. Certainly, it is difficult to assign a primarily sectarian purpose to a school policy which permits these two organizations, in common with other student-member groups, to use school premises, after the instructional period has finished, for meeting places.

Secondly, again on the face of the matter, the primary or principal effect of such a policy appears to be neither to advance nor inhibit religion. Such a policy is, on its face, a neutral one, and its effect is neither to enhance nor to inhibit the practice of religious exercises or beliefs among students. Lastly, the policy, to pass constitutional muster, must not foster an "excessive government entanglement with religion." An even-handed, neutral policy regarding availability of school premises for meeting places after school hours to student-member organizations, which is extended to all such organizations uniformly, whether organized for religious fellowship or because of a common secular avocational interest, e.g., would present little opportunity for any entanglement by the district with religion, whatever.

Of course, neither the state, nor an instrumentality thereof such as the school district, may by any official action promote or "establish" such an organization as those in question. Only neutrality is required, however, and not hostility. You may wish to reexamine the role of faculty sponsors in respect to these organizations. The duties and responsibilities of such sponsors are not clear. The term "sponsor" is one of traditional application to faculty members who assume responsibility for a broad overview of the activities of a student organization. In the context of a student-member organization of students of shared religious purposes and objects, however, the term may connote to some persons a form of official administrative sponsorship and

endorsement of such organizations. That is in no way suggested by your letter; in this context, it is assumed that a faculty "advisor" or "sponsor" acts only as a guide to the organization to assure its compliance with rules and regulations of the school regarding use of its premises and facilities, and like matters. Traditional nomenclature may be misleading, and perhaps should be reviewed in this area.

In short, we cannot conclude that the First Amendment prohibits the school from permitting these organizations to use school building premises for meeting places, after instructional hours are concluded, on a voluntary basis, and on the same access basis as other student-member organizations whether related or unrelated to curricular or extracurricular programs of the school. The First Amendment does prohibit action by the district officially to endorse religious organizations, to require membership therein, or to give preferment to such organizations because of their religious character. It does not require hostility, however, as indicated above. I hope that these observations will be helpful to you. If further questions arise in light of the foregoing, and as you review the matter, please feel free to contact us.

Yours very truly,

VERN MILLER
Attorney General

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