Opinion No. 67-48

March 16, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Fred Foster State Representative Legislative-Executive Building Santa Fe, New Mexico

QUESTION

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Can the Legislature enact laws permitting the public schools in New Mexico to grant credit to pupils for Bible study or other religious courses taught in a church Sunday school by non-accredited ministers or other Sunday school teachers?

CONCLUSION

No.

OPINION

*{*62}* **ANALYSIS**

*{*63}* The question presupposes that the Sunday school teaching is done outside of the public school building and with no real control by the school authorities over the teaching materials used, over the teachers, or over the methods of teaching used. Presumably, the Bible teaching would be conducted on Sundays as a part of a denominational, sectarian, church program. Some of the teaching might be done by ordained ministers or others with training that might qualify them to obtain teaching certification. Also, presumably, some of the instruction would be given by persons who could not qualify for certification. It is also apparent that such instruction might be denominational although this does not necessarily follow. It would not be conducted under the actual supervision and control of responsible public school authorities.

Upon the basis established above, we proceed to examine the applicable provisions of our laws, our Constitution and the Constitution of the United States.

Article II, Section I of our Constitution provides that the United States Constitution is the supreme law of the land. The First Amendment of the United States Constitution provides, among other matters, that Congress shall make no law respecting the establishment of a religion or prohibiting the free exercise thereof. Article II, Section 11 of the Constitution of New Mexico contains similar prohibitions and guarantees.

The Fourteenth Amendment to the Constitution of the United States provides for certain prohibitions on the authority of a state to abridge any privileges or immunities of its citizens. Following earlier strict constructions of this Amendment, the Supreme Court of the United States has gradually construed the Amendment more liberally and has, on on many occasions, held that this Amendment makes the First Amendment of the United States Constitution applicable to the individual states.

Certain other provisions of our New Mexico Constitution must also be considered in arriving at an answer to the question presented. First, among these, is Article XII, Section 1. This Section provides as follows:

"A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained."

And Section 3 thereof reads in pertinent part:

"The **schools,** colleges, universities and other educational institutions provided for by this Constitution shall forever remain under the the **exclusive control** of the state, * * *." (Emphasis added)

Article IV, Section 24 of our Constitution prohibits the passage of special laws concerning the management of public schools or any case where a general law can be made applicable. As interpreted by our Court, this provision requires that some reasonable basis for the creation of a special class affected by a law must exist before a special law is constitutional.

In reaching an answer to the question propounded, we must consider the application of the United States Constitution as well as that of our Constitution. Even though it is our opinion that such a legislative enactment would be contrary to the Constitution of the United States which would sufficiently answer the question, it is our opinion also that it would violate the New Mexico Constitution for reasons hereinafter set forth.

There are several landmark cases of the United States Supreme Court that must be considered. The case of **Engle v. Vitale,** 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, was decided in 1962 and was one of the forerunners of the recent trend of decisions on this subject. It involved *{*64}* the constitutionality of a school policy permitting an undenominational prayer to God. The prayer **was not compulsory.** The United States Supreme Court held that such was a violation of the United States Constitution. It stated:

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The case of **School District of Abington Township v. Schemp,** 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed 2d 844, was decided in the same year. This case involved a policy,

not of prayer at school, but of reading portions of the Bible. This, also, was not compulsory. No comments were made and at times the Jewish Holy Scripture was used. The Court emphasized that the ban was not that against preferring one religion as opposed to another but involved **aid or deterrent** to religion of any nature by any governmental action. The Court then stated:

"The test may be stated as follows: What are the purpose and the primary effect of the enactment? **If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.** That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (Emphasis added)

In both the cases above mentioned there was a compulsory school attendance law, although the attendance at or participation in the prayer or Bible reading activities was voluntary. Unlike the proposition now presented there was **no credit inducement** given for such participation.

There are numerous other cases of the United States Supreme Court involving a construction of the Establishment Clause as applied to schools. It is not deemed necessary here to analyze and discuss each of these beyond noting that the application and language of the test stated in **School District of Abington Township v. Schemp,** supra, has **not** had a more restrictive meaning placed on it.

The New Mexico Supreme Court considered the application of the United States Constitutional provisions and those of the New Mexico Constitution in the case of **Zellers v. Huff,** 55 N.M. 501. In that case, certain members of a religious order were teaching in public schools of this State. They were accredited teachers. They were dressed in the garb of their order while teaching. **Voluntary** religious training was given. There was some distribution of religious tracts to the students.

Our Supreme Court reviewed the decisions then applicable and the facts involved. It held, insofar as pertinent to this question:

1. The fact that a teacher was or was not a member of a religious order did not act as a bar to such person being a teacher.

2. The wearing of religious garb or insignia while teaching amounted to sectarian teaching, even if not necessarily denominational.

3. The teaching of sectarian religion and doctrines and the dissemination of religious literature while in the discharge of teaching duties is forbidden (even though given at a time not usually considered a part of the normal school day, except as a result of long standing custom).

4. The teachers must be under the **actual control and supervision** of the responsible school authorities. (This *{*65}* would include the power to remove and discipline such teachers.) The Court said at p. 528: **"A church cannot be permitted to operate a school system within our public school system."**

Section 73-1-7, N.M.S.A., 1953 Compilation (P.S.) provides for the certification of teachers by the State Board of Education and requires that it determine the qualifications of teachers and promulgate a system of classification of teachers.

Any enactment of the type proposed in the question submitted would necessarily violate the provisions of the United States Constitution and of the Constitution of New Mexico. Since our Constitution requires that our public school system attendance be compulsory and that it must be under the exclusive control of the State any sectarian teaching in church Sunday schools for which credit was given would necessarily violate the rules laid down in **Engle v. Vitale,** supra, which forbade non-denominational prayer as a part of the school program, even though non-compulsory, and by **Abington Township v. Schemp,** supra, which forbade the reading of portions of the Bible or other sectarian material as a part of the school program, even though not compulsory. Under the test laid down in this case, the purpose and primary effect of the enactment would be to advance or inhibit religion. The primary purpose and effect would **not** be secular such as would be the case where the schools established **a bona fide study of religion, of the Bible or of other similar material.**

Presumably the teachers would, at times, conduct their classes while wearing secular garb and insignia and in an environment where such insignia would be displayed and where sectarian and denominational material would be disseminated.

If this could be considered a portion of the regular public school program, it would also be in direct violation of the New Mexico Constitution under the rule established by **Zellers v. Huff,** supra, as well as the United States Constitution. If it be considered that this program is not under the direct control of the public school authorities, it then is in violation of the provisions of the New Mexico Constitution which require this. It could not fall within the exception permitted by Section 72-13-3, N.M.S.A., 1953 Compilation, which permits the giving of credit for courses of instruction of schools that are not a part of our public school system. That Section does require approval of all courses of instruction and monthly reports by the governing body of such institution. No such control is set up under the question proposed and in fact assumes that the teaching is to be done by non-certified personnel and that virtually no control would be exercised over the course of instruction or method of instruction.

Any attempt to place such a course under the direct control and supervision of our public school authorities would violate constitutional provisions of the United States and of New Mexico Constitutions. Any attempt to allow credit for such instruction without such supervision and control would violate the New Mexico Constitution and very possibly also the Constitution of the United States. Any attempt to place Sunday school teachers in a separate category, not requiring certification as teachers in order to qualify

them, would probably and additionally be held to constitute an unreasonable classification and in violation of our Constitution concerning special legislation.

It is noted that the factual situation does not bring it within the possible exception of **Zorach v. Clauson,** 343 U.S. 306.

It is our conclusion that the legislation proposed **under the question** would necessarily be in violation of the Constitutions of *{*66}* the United States and of New Mexico.

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