

Opinion No. 68-68

July 12, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Richard Gonzales, President Penasco Board of Education P.O. Box 1481 Taos, New Mexico

QUESTION

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Is it permissible for a public school system to hire a member of a religious order to teach non-religious subjects on a part-time basis and to pay her out of Title I funds under the Elementary and Secondary Education Act of 1965?

CONCLUSION

Yes.

OPINION

{*112} The Elementary and Secondary Education Act of 1965 is intended to provide funds to satisfy the special educational needs of children of low income families. The act provides such funds for both public and private schools. The Department of Health, Education and Welfare allocates funds to the states and approves the programs of the various states. Under Title I, The State Director allocates such funds to counties and school districts on the basis of census figures and welfare rolls, both of which indicate the presence of persons below certain income levels within the county. Approval of all local programs by the State Director is required. Since a county's allocation is determined in part by the number of low income families therein, and since the children of these families may be in attendance at parochial schools, it is clear that parochial schools are to receive part of the allocation. Other provisions of Title I make this even more evident. See 32 Federal Register 2747.

The power to regulate personnel receiving their salaries from Title I money and the power to set their qualifications rests entirely in the states. See Section 604, Public Law 89-10. The question of employing members of religious orders as teachers in New Mexico public schools was raised in **Zellers v. Huff**, 55 N.M. 501, 236 P.2d 949 (1951). In **Zellers v. Huff**, the **New Mexico** Supreme Court said:

"[T]he wearing of religious garb and religious insignia must henceforth be barred during the time the Religious are on duty as public school teachers." *Id.* at 525.

This decision thus recognized that the Religious can teach in public schools. However, we wish to emphasize if a member of a religious order does teach in a public school, it is imperative that the dictates of **Zellers v. Huff**, supra, are strictly complied with in that no religious garb or insignia may be worn and no religious courses taught.

Finally in **Flast v. Cohen**, Supreme Court of the United States, October Term, 1967, No. 416, the question of the constitutionality of the Elementary and Secondary Education Act of 1965 was raised in regard to federal aid to parochial schools. However, the issue was not decided since preliminary jurisdictional matters necessitated the case be remanded for a determination on the merits. Because of the presumptions of constitutionality which exist, neither this case, nor any others which have been called to the attention of this office, have any effect on those conclusions hereinbefore reached.

By: Gary O'Dowd

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