Opinion No. 75-69

December 8, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Legislative School Study Committee Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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May a student be exempted from the immunization requirements if the parents' personal religious and/or moral convictions prohibit immunization?

CONCLUSION

See analysis.

OPINION

*{*183}* **ANALYSIS**

Section 12-3-4.2, NMSA, 1953 Comp. states that "[i]t is unlawful for any student to enroll in school unless he has been immunized, as required under the rules and regulations of the health and social services board . . ." Section 12-3-4.3, NMSA, 1953 Comp., creates exemptions from the legal requirement of immunization for physical and religious reasons. The statute provides that the religious exemption be granted

". . . upon affidavits from an officer of a recognized religious denomination that such child's parents or guardians are bona fide members of a denomination whose religious teaching requires reliance upon prayer or spiritual means alone for healing."

The health and social services department has the responsibility of applying the immunization statute including establishing the form and sufficiency of the affidavit of exemption. See Opinion of the Attorney General No. 59-159 dated October 5, 1959. In the exercise of that responsibility, however, the department must consider the substance as well as the language of the statute.

While definitions of moral belief or spiritual persuasion or religious denomination are necessarily vague and cannot be reduced to precise language, the language of Section 12-4-4.3 is clear and unambiguous in that it requires for exemption an affidavit from an officer of a recognized religious denomination. Absent any ambiguity, there is no *{*184}* room for construction and the statute should be given effect as written. **State v. Herrera,** 86 N.M. 134, 520 P.2d 554 (Ct. App. 1974). It would appear, therefore, that the religious exemption may be granted only upon the filing of the described affidavit. A

statement by parents of personal religious and/or moral convictions would not conform to the explicit requirements of Section 12-3-4.3.

It is our opinion, however, that a conclusion reached solely on the basis of the plain meaning of the words is not appropriate in this case. To apply the statute as written, in light of recent decisions on religious freedom, raises serious doubts as to its constitutional validity. It is a well established principle of law that:

"whenever an act of the legislature can be so considered and applied as to avoid a conflict with the Constitution and give to it the force of law, such construction should be adopted by the court; and all doubts which may exist as to whether the statute is or is not constitutional should be resolved in favor of the constitutionality of the same." **State ex rel. Sedillo v. Sargent,** 24 N.M. 333, 171 P. 790 (1918).

Thus, although the absence of ambiguity would preclude looking behind the plain language of the statute for legislative intent, the necessity of preserving constitutionality is controlling and such a construction must be adopted.

Specifically, to apply the statute as written would effectively require those persons holding religious beliefs rejecting immunization to belong to a recognized religious denomination espousing those beliefs. Such a requirement would be in violation of the First Amendment guarantee of freedom of religion.

In Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the Supreme Court said:

"[The First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." 310 U.S. at 303.

That principle -- that a law may not require membership in a recognized religious organization -- has been most clearly illustrated in the conscientious objector cases. Draft exemptions clauses have eliminated all restrictions in terms of sectarian affiliation. "The specified objection must have a grounding in 'religious training or belief' but no particular sectarian affiliation or theological position is required." **Gillette v. United States,** 401 U.S. 437, 450-1, 91 S. Ct. 828, 28 L. Ed. 2d 168, 181 (1971).

Accordingly, we would construe Section 12-3-4.3 as if the legislature did not intend to violate the First Amendment and require that persons claiming religious exemption from the immunization law be members of a particular sect. As a New York court stated in **Maier v. Besser,** 341 N.Y.S. 2d 411, 73 Misc. 2d 241 (1972), a case raising essentially an identical question,

"It was obviously not the intent of the legislature to force individuals to join a religious organization in order to practice their religious tenets freely, but rather to prevent individuals from avoiding this health requirement enacted for the general welfare of society, merely because they oppose such medical procedures on the basis of personal

moral scruples or by *{*185}* reason of unsupported personal fears," 341 N.Y.S. 2d at 413.

The **Maier** court held that the immunization statute must be construed to preserve its constitutionality. In support of its holding the court explained:

"Clearly, the child of a parent who is a bona fide Christian Scientist may be enrolled and received into school under the statutory exemption. To deny the exemption to a child whose parent conscientiously and honestly believes and practices the teachings and tenets of the Christian Science faith, notwithstanding lack of formal membership in the church, would require a holding that the exemption provision of the statute is unconstitutional." 341 N.Y.S. 2d at 413.

Similarly, we would conclude that in spite of the plain and unambiguous language of Section 12-3-4.3, the legislature did not intend to require membership in a "recognized religious denomination" as a condition of religious exemption. The requirement of an affidavit would pertain only to those who could, in fact, comply. For those who could not comply with the affidavit requirement, a substitute or alternative requirement must be implied.

We would suggest, therefore, that the rules and regulations established by the health and social services board pursuant to Section 12-3-4.2 be amended to contain appropriate alternatives to the specific requirement of an affidavit from an officer of a religious organization. The legislature could not intentionally enact an unconstitutional statute. If the legislature creates a religious exemption to the immunization requirement, the department must apply it in a manner which does not render the legislation constitutionally invalid.

We are not unaware of the difficulty in defining an adequate standard of serious religious conviction for those persons who would be exempt from the immunization requirement but cannot submit the prescribed affidavit. As the Supreme Court explained in **United States v. Seeger,** 380 U.S. 163, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965):

"[The] vast panoply of beliefs reveals the problem which faced Congress when it set about providing an exemption from armed service. It also emphasizes the care that Congress realized was necessary in the fashioning of an exemption which would be in keeping with its long-established policy of not picking and choosing among religious beliefs." 380 U.S. at 175.

Nevertheless, draft boards do make a determination as to the substance and sincerity of religious beliefs in considering exemptions. And, in **Maier v. Besser, supra** the court held that "if plaintiff can prove at trial that he has a genuine and sincere religious belief which he actively practices and follows and which is in reality substantially similar to the Christian Science Faith, as he alleges, he will qualify for the exemption under § 2164 (8)." 341 N.Y.S. 2d at 414.

Thus, the precedent exists for an individual case by case determination of whether or not a person's religious or moral or spiritual convictions would qualify him for an exemption from some legal requirement which is contrary to those convictions. It is our opinion that those precedents exist because the First Amendment would not permit such exemptions to be limited only to persons who are bona fide members of a qualifying *{*186}* religious denomination. For that reason we conclude that Section 12-3-4.3 must be applied in a manner consistent with the guarantees of religious freedom in the First Amendment.

By: Jill Z. Cooper

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