

## Opinion No. 57-103

May 16, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Hon. Edwin L. Swope, District Judge, Second Judicial District Court, P. O. Box 488, Albuquerque, New Mexico

### QUESTIONS

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Does the Board of Trustees of New Mexico Boys' School have authority to employ two chaplains at the School, one on a full time basis and the other on a part time basis?

#### CONCLUSION

For certain purposes, See opinion.

### OPINION

#### ANALYSIS

The New Mexico Boys' School (or Industrial School, or Reform School, all referring to the same institution), at Springer, New Mexico, has certain statutory powers. At § 13-3-2, N.M.S.A., 1953 Comp., we find that the governing body of such institution has the power to enact by-laws, rules and regulations for the government of the school; and also has power to employ all teachers, physicians, wardens, etc., and employees, and to prescribe their duties and qualifications. The object of such school, according to § 42-4-1, N.M.S.A., 1953 Comp., is for the detention, reformation, and instruction of certain boys. It is our opinion that such express statutory authority includes the authority to employ chaplains, either on a full or part time basis, who would provide counselling. As an incident, such chaplains may conduct non-denominational services, although payment should be for conducting counselling services.

In dealing with this and similar problems, we are always confronted with the serious matter of separation of church and state. The leading case on this problem, insofar as this jurisdiction is concerned, **Zellers vs. Huff**, 55 NM 501, 236 P2d 949, has again been carefully re-examined by us. Without going into details, we find numerous differences in circumstances between the situation in *Zellers vs. Huff*, supra, wherein the public schools were involved, and the instant situation of what is, frankly speaking, a penal institution. We assume that the boys at the reform school would not be subjected to compulsory religious education, nor would they be required to attend church services. If this assumption is incorrect grave constitutional questions will arise. Returning to

Zellers vs. Huff, supra, the court in that case pointed out that it is not unconstitutional for a member of a religious order to be employed as a teacher in a public school, if that is as far as the matter goes. By analogy we reason that there is nothing unconstitutional in the employment of chaplains at a state penal institution for counselling purposes. Bearing in mind the differences of circumstances, it is our further opinion that there would be nothing unconstitutional in the chaplains being hired to render general counselling services to any inmate who should desire to avail himself of the same.

As contrasted with the situation wherein sectarian or religious doctrine was taught or promulgated in public schools, and which has caused so much litigation before the Supreme Court of the United States and the supreme courts of the several states, is the long honored practice of the governments of the United States and of the several states employing chaplains to minister to the spiritual needs of people who are found in circumstances of a trying nature. The wall which must be maintained between church and state, **People of State of Illinois ex rel. McCollum vs. Board of Education**, 333 U.S. 203, 68 S. Ct. 461, does not rule out every vestige of religion in the affairs of state. Indeed, our Supreme Court, in Zellers vs. Huff, supra, recognized this and expressed itself as follows at page 531:

"However, we take this occasion to say that while we oppose the teaching of sectarian religion or the giving of control of the state or any of its agencies to any sect or combination of sects, yet we know religion itself is so intermingled in the daily life of our people and in the administration of and in the affairs of state that no wall of absolute separation of religion and state can be maintained -- but few would want it."

Accordingly, it is our opinion that the employment of chaplains by the New Mexico Industrial School, to perform the duties outlined above, finds sanction in the statutes of this State, and would not run afoul of any provision in either the Federal or State Constitutions.