

## Opinion No. 73-77

December 6, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. James A. Little Superintendent New Mexico School for the Deaf 1060 Cerrillos Road Santa Fe, New Mexico 87501

### QUESTIONS

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May the Board of Regents of the New Mexico School for the Deaf deny to staff members the use of the school's facilities for the purpose of private and/or public Bible study or discussion of religion with students or parents?

#### CONCLUSION

Yes.

### OPINION

#### {\*150} ANALYSIS

The legislature of New Mexico has given to the Board of Regents of the New Mexico School for the Deaf power to make rules and regulations for the government of the institution under its care. Section 73-24-3, N.M.S.A., 1953 Comp.

The Supreme Court of the State of New Mexico has not ruled on the specific question you present. It has held, in related areas, that teachers may not wear religious garb and religious insignia, and may not disseminate religious literature in the school during school hours. **Miller {\*151} v. Cooper**, 56 N.M. 355, 244 P.2d 520 (1952); **Zellers v. Huff**, 55 N.M. 501, 236 P.2d 949 (1951).

Regarding possible constitutional barriers to such a regulation, the First Amendment of the United States Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The Supreme Court of the United States has understandably experienced difficulty in applying these prohibitions, made applicable to the states by the Fourteenth Amendment, to particular fact situations. **Zorach v. Clauson**, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952); **McCollum v. Board of Education**, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948). Problems posed to that Court have often concerned a school

activity alleged to be an unconstitutional joining of church and state, as in the two cases above. Because of the Court's duty to maintain a separation between church and state, a number of these officially sponsored religious activities have been declared unconstitutional.

This inquiry, on the other hand, concerns the extent to which the school authority may constitutionally **prohibit** unofficial, voluntary religious activity on the school premises. Pursuant to its authority to regulate the institution, the Board of Regents may adopt a regulation governing the use of school facilities. Such a regulation may constitutionally prohibit the use of school facilities for worship services, prayer meetings, group Bible reading or other religious activities. **Hunt v. Board of Education of County of Kanawha**, 321 F. Supp. 1263 (S.D. W. Va. 1971).

A regulation which seeks to prohibit private, individual prayer or Bible reading on the school campus during a teacher's or student's "free time" may, however, exceed constitutionally permissible restraints on the exercise of religion and it may also exceed the scope of the authority of the Board of Regents to control and manage the institution.

Finally, the regulation should be thoughtfully and carefully drawn because the Supreme Court has observed that a "study of religions and of the Bible from a literary and historic viewpoint presented objectively as a part of a secular program of education, need not collide with the First Amendment's prohibition." **Epperson v. Arkansas**, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968). **Abington School District of Abington Township, Pennsylvania v. Schempp**, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

We note that the school's present regulation does not expressly prohibit use of school facilities by staff members for the purpose of private or public Bible study or discussion of religion with students or parents. The present regulation reads, in part, as follows:

"At no time will any proselyting be condoned on campus. The religious affiliation of each student and staff member is the concern of the individual. No group of students or staff members will be assembled on the school's campus for the purpose of being addressed by any religious organization."

By: Bill Primm and Thomas L. Dunigan

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