

Opinion No. 42-4066

April 13, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Richard F. Rowley Assistant District Attorney Clovis, New Mexico

{*179} In your letter dated April 10, {*180} 1942, you request an opinion of this office concerning a proposed "Released Time Plan for Religious Education in Connection with Public Schools," and you outline the proposal as follows:

"Under this plan, pupils in the public schools would be released from school during school hours and allowed to go to the churches of their choice or of their parents choice, for the purpose of being instructed in the religious principles of their own individual faiths. Such instruction would be entirely optional with the parents of the student and it is contemplated that school credit might be given for such training. Any student who did not wish to take the religious training would be provided with a class in citizenship at the school."

You state that upon a superficial examination of the question, you do not believe it violates any provision of the law or of the Constitution of New Mexico. However, I am inclined to disagree with you.

Article XII, Section 3 of the Constitution provides that no part of the proceeds of lands granted to the state or any other funds appropriated, levied or collected for educational purposes shall be used for the support of any sectarian, denominational or private school, college or university. Article XXI, Section 4 of the Constitution makes provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state and free from sectarian control. Article XII, Section 9 of the Constitution, provides that no teacher or student of the public schools shall ever be required to attend or participate in any religious service whatsoever.

Section 120-1102, New Mexico Statutes Annotated, 1929 Compilation, forbids any teacher to use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools. Sections 120-1418 and 120-2301, New Mexico Statutes Annotated, 1929 Compilation, enumerate the subjects which shall be taught in the public schools, and religious instruction is excluded from such subjects.

In the case of *People v. Graves*, 245 N. Y. 195, 156 M. E. 663, the Court of Appeals held that upon the written request of parents, school children may be excused one day each week for the last half hour of school for religious instruction. The child so excused loses no school recitation and receives no school credit therefor, and such practice was held not to violate the constitutional provision prohibiting the use of public moneys or credit in aid of any school or institution of learning under the control of any religious denomination. In this case the court recognizes the fact that teachers would necessarily

have to devote some time to checking up excuses for absences from the religious instruction classes, but passed over this use of the teachers time as an expenditure of public moneys in aid of a religious denomination as being negligible.

In an opinion entitled "Religious Instruction in Public Schools," reported in 5 Pennsylvania District & County Reports, page 137, this precise question was passed upon by the Attorney General of Pennsylvania in 1924, and the conclusion reached was that the procedure outlined was illegal and forbidden under the constitution and laws of that state, I quote from the opinion as follows:

"By excusing pupils at stated periods during legal school hours to attend denominational schools for the purpose of receiving religious instruction another question is presented. If this plan should be {*181} adopted, pupils would attend schools over which the public school authorities have no supervision and the teachers in which are in no way answerable to such authorities. Notwithstanding this, the school authorities would be responsible for the attendance of pupils at such schools during school hours. This would bring sectarian religious instruction definitely into the public school system and make the machinery of the public schools, particularly the Compulsory School Attendance Law, available to enforce attendance at denominational schools.

"Sectarian religious instruction would become in effect an additional elective subject offered to pupils attending the public schools. When a pupil has elected a subject, the responsibility of the public school system to enforce the Compulsory Attendance Law by keeping official records of attendance is no less operative than in the case of all required subjects. The Compulsory Attendance Law operates during the entire period of time in which the schools are required to be kept open, and if public school pupils are excused during legal school hours to attend a sectarian religious school, official record of such attendance must be kept by the proper teachers and unexcused absences therefrom reported to local and State officers for action, as in the case of non-attendance upon regular public school subjects. How can this be accomplished when, as was said before, the school authorities have no supervision or control over the schools imparting religious instruction?

"Another serious question arises. If the pupils of public schools are excused during legal school hours to attend sectarian or denominational schools, they must, and under the Compulsory Attendance Law can be compelled to, attend such schools, and it would be the duty of the school authorities to see that the law is enforced. This might conflict with the Constitution of the State, for in article 1, section 3, it is provided: 'No man can of right be compelled to attend, erect or support any place of worship'."

Under Section 120-1203, New Mexico Statutes Annotated, 1929 Compilation, children between the ages of 6 and 16 inclusive are required to attend public school, with certain exceptions. Under Section 120-1214, New Mexico Statutes Annotated, 1929 Compilation, the school day is required to consist of not less than five hours nor more than six hours, exclusive of the noon hour intermission. Since a teacher holding a certificate is forbidden to teach sectarian doctrines, I do not believe such doctrines

should be taught during the legal school day outside of the school by a person who may or may not be qualified under the laws of our state to teach in our schools. To do so would result in an act being done indirectly which is expressly forbidden to be done directly.

If school credit is allowed for such religious or sectarian instruction, the school, in effect, would be ratifying such instruction and giving credit for a course of training which is forbidden to be given in the public schools. Clearly then, such plan is illegal if school credit is given for such training. In addition, however, I am of the opinion that any religious or sectarian training should be entirely separate from the public school system, and not be given directly or indirectly as a part of the public school program during legal school hours. The local board may rearrange {*182} school hours to allow for dismissal of the school at an earlier time one or two days per week, with the idea of allowing those who desire to attend a denominational school for religious instruction. Such instruction in that case, however, would be entirely outside of the jurisdiction and supervision of the school authorities in a manner such as religious instruction given on Sunday is considered to be.

In view of the constitutional provisions and of the statutes above mentioned, it is my opinion that the plan proposed in your letter is not legal, and cannot be done without violating said statutes and constitutional provisions, and violating the intent of the legislature expressed therein in spirit, if not in letter.

Trusting that the foregoing sufficiently answers your inquiry, I am,

By C. C. McCULLOH,

Asst. Atty. General