

VOLUME NO. 38

OPINION NO. 95

BOARD OF PUBLIC EDUCATION - Board is responsible for determining whether private institutions' instructional programs satisfy requirements of law;

EDUCATION - "Private institutions" do not include parents who teach their children at home;

MONTANA CODE ANNOTATED - Sections 20-4-101, 20-5-102, 20-5-103, 20-5-104, 20-5-106, 20-7-111;

1972 MONTANA CONSTITUTION - Article 10, sections 1 and 6.

HELD: 1. The "private institution" exception to Montana's compulsory attendance law does not apply to a parent who teaches his children at home.

2. Teachers at "private institutions" need not hold Montana teaching certificates.
3. The Board of Public Education is responsible for determining whether a private institution provides instruction in the program the Board prescribes pursuant to section 20-7-111, MCA.

7 August 1980

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Dear Mr. McKeon:

You have requested my opinion concerning a number of questions related to the "private institution" exception to Montana's compulsory school attendance law. I have summarized your questions and stated them in the following form:

1. Does the "private institution" exception to Montana's compulsory school attendance law apply to a parent who teaches his children at home?
2. Must teachers at "private institutions" hold Montana teaching certificates?
3. Who is responsible for determining whether "private institutions" in Montana provide instruction in the program prescribed by the Board of Public Education?

Neither the specific questions you have asked nor the particular facts out of which they arise suggest any conflict between compulsory school attendance and freedom of religion. However, consideration of that factor is essential in addressing this area of the law in light of the fact that most private educational institutions are established by religious groups.

Your questions should first be viewed against the backdrop of the applicable provisions of the Constitution of the State of Montana. Montana Constitution, article 10, sections 1 and 6 provide:

Section 1. Educational goals and duties.

(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

Section 6. Aid prohibited to sectarian schools.

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

It is important to note at the outset that the Constitution recognizes the state's legitimate interest in the education of its citizens. At the same time, the Constitution implicitly recognizes the existence and legitimacy of private sectarian schools.

As the United States Supreme Court noted in Brown v. Board of Education, 347 U.S. 483, 493 (1954), "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." To further the goal of developing the full

educational potential of each person, the Legislature enacted Montana's compulsory attendance law, section 20-5-103, MCA, which provides:

(1) Except as provided in subsection (2), any parent, guardian, or other person who is responsible for the care of any child who is 7 years of age or older prior to the first day of school in any school fiscal year shall cause the child to attend the school in which he is enrolled for the school term and each school day therein prescribed by the trustees of the district until the later of the following dates:

(a) the child's 16th birthday;

(b) the date of completion of the work of the 8th grade.

(2) The provisions of subsection (1) do not apply in the following cases:

(a) The child has been excused under one of the conditions specified in 20-5-102.

(b) The child is absent because of illness, bereavement, or other reason prescribed by the policies of the trustees.

(c) The child has been suspended or expelled under the provisions of 20-5-202.

(Emphasis added.)

According to section 20-5-102, MCA, a child may be excused from the operation of the compulsory attendance law if the child is:

(a) enrolled in a private institution which provides instruction in the program prescribed by the board of public education pursuant to 20-7-111:

(b) enrolled in a school of another district or state under any of the tuition provisions of this title;

(c) provided with supervised correspondence study or supervised home study under the transportation provisions of this title;

(d) excused from enrollment in a school of the district when it is shown that his bodily or mental condition does not permit his attendance and the child cannot be instructed under the special education provisions of this title;

(e) excused from compulsory school attendance upon a determination by a district judge that such attendance is not in the best interest of the child; or

(f) excused by the board of trustees upon a determination that such attendance by a child who has attained the age of 16 is not in the best interest of the child and the school.

(Emphasis added.)

The term "private institution" is not defined in conjunction with the "private institution" exception. Therefore, a brief look at the history of the compulsory attendance law is necessary in order to shed some light on what was contemplated by the Legislature when it provided for the "private institution" exception.

Prior to the turn of the century, section 1920, Montana Codes Annotated 1895, provided:

Every parent, guardian or other person in the state of Montana, having control of any child or children between the ages of eight and fourteen years, shall be required to send such child or children to a public school, or private school taught by a competent instructor, for a period of at least twelve weeks in each year, six weeks of which time shall be consecutive; PROVIDED, That such parent, guardian or other person having control of such child or children shall be excused from such duty by the school board of the district wherever it shall be shown to their satisfaction, subject to appeal as provided by law, that one of the following reasons exist therefor, to-wit:

1. That such child is taught at home by a competent instructor in such branches as are usually taught in the public schools.

2. That such child has already acquired the branches of learning taught in the public schools.

3. That such parent, guardian or other person is not able by reason of poverty, to properly clothe such child.

4. That such child is in such a physical or mental condition (as declared by a competent physician, if required by the board) to render such attendance inexpedient or impracticable.

5. That there is no school taught the requisite length of time within two and one-half miles of the residence of such child by the nearest traveled road; PROVIDED, That no child shall be refused admission to any public school on account of race or color.

(Emphasis Added.)

Section 1920 was amended in 1903 to include specific subjects in which children were to be instructed. The reference to home study was made even more explicit by the amendatory language. The law then provided in pertinent part:

All parents, guardians and other persons who have care of children, shall instruct them, or cause them to be instructed in reading, spelling, writing, English grammar, geography, physiology and hygiene, and arithmetic. Every parent, guardian or other person having charge of any child between the ages of eight and fourteen years shall send such child to a public, private, or parochial school...unless the child is excused from such attendance...upon satisfactory showing ...that the child is being instructed at home.

1903 Mont. Laws. ch. 45, § 1.

The law remained in substantially that form until 1971, when the law underwent extensive revision. 1971 Mont. Laws, ch. 5. At that time the express provision for home instruction was eliminated. The rejection of the home instruction exception in the 1971 laws buttressed by the use of the term "private institution" in the new statutory scheme leads to the conclusion that the "private institution" exception to Montana's compulsory school attendance law does not apply to a parent who teaches his children at home. Cases from other jurisdictions support this conclusion.

In State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929), the Supreme Court of New Hampshire addressed the rationale underlying the state's interest in compulsory attendance at public or private institutions:

Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of

all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen. The object of our school laws is not only to protect the state from the consequences of ignorance, but also to guard against the dangers of "incompetent citizenship."

In State v. Counort, 69 Wash. 361, 124 P. 910 (1912), the supreme court of Washington, addressing the definition of "private school" stated:

We do not think that the giving of instruction by a parent to a child, conceding the competency of the parent to fully instruct the child in all that is taught in the public schools, is within the meaning of the law "to attend a private school." Such a requirement means more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required study and for the full time required by the laws of this state.

In Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 245 (1968), the United States Supreme Court noted:

[a] substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the state's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of Pierce v. Society of Sisters: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

Consistent with these interpretations, then, I conclude that a parent cannot comply with the compulsory attendance law by simply teaching his or her child at home.

With respect to your second question, section 20-4-101(1), MCA, provides:

In order to establish a uniform system of quality education and to ensure the maintenance of professional standards, a system of teacher and specialist certification shall be established and maintained under the provisions of this title and no person shall be permitted to teach in the public schools of the state until he has obtained a teacher certificate or specialist certificate or the district has obtained an emergency authorization of employment from the state.

This statute applies exclusively to persons wishing to teach in public schools. While recent decisions of the United States Supreme Court indicate that the state's interest in education is such that the state can impose reasonable regulations on private schools, the Montana Legislature has not addressed the minimum qualifications of those who teach in private schools. Therefore, at the present time, teachers at "private institutions" need not hold Montana teaching certificates.

Your final question arises because of the requirement that "private institutions," in order to qualify for the exception to the compulsory attendance law, must provide "instruction in the program prescribed by the board of public education." Because the Board of Public Education prescribes the program of instruction referred to in the statute, private institutions are entitled to a determination by the Board as to whether their particular program complies. Therefore, the Board of Public Education may review programs which may be submitted to them annually by private institutions, to determine whether they comply with the board's requirements and issue a statement to those institutions that are in compliance. However, this review may not impose teacher certification requirements upon teachers, librarians, and guidance counselors. An institution which does not obtain a statement of compliance from the board may seek judicial review or present its justification in court during the course of the proceedings initiated by an attendance officer when he finds a child who is not enrolled in an appropriate institution.

If the attendance officer, provided for in section 20-5-104, MCA, discovers that a child subject to compulsory attendance is not enrolled in a school providing the required instruction and has not been excused under the provisions of Title 20, MCA, he must "notify in writing the parent, guardian, or other person responsible for the care of the child that the continued truancy or nonenrollment of his child shall result in his prosecution..." "If the child is not enrolled and in attendance at a school or excused from school within 2 days after the receipt of the notice, the attendance officer shall file a complaint against such person in a court of competent jurisdiction." § 20-5-106(1), MCA.

Throughout the investigation and research of your request, I have found a great deal of concern on the part of parents and educators alike about the state's role in insuring the quality of "private institutions." What I have attempted to do in this opinion, absent any controlling decisions from our Supreme Court in this area, is demonstrate how courts from other jurisdictions and the United States Supreme Court have in the past interpreted language similar to that found in our statutes. However, a great many questions remain unanswered. These include constitutional questions regarding the extent to which states may impose requirements on private educational institutions. See Wisconsin v. Yoder, 406 U.S. 205 (1972). They are questions that should be addressed by the Legislature.

Insofar as this opinion has clarified the current state of the law, its effect should be prospective and it should not be used to penalize parents who in good faith may have relied on interpretations of the law from other sources and may in the future wish to return their children to the public school system.

THEREFORE, IT IS MY OPINION:

1. The "private institution" exception to Montana's compulsory attendance law does not apply to a parent who teaches his children at home.
2. Teachers at "private institutions" need not hold Montana teaching certificates.
3. The Board of Public Education is responsible for determining whether a private institution provides instruction in the program the board prescribes pursuant to section 20-7-111, MCA.

Very truly yours

MIKE GREELY
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