VOLUME NO. 44 **OPINION NO. 7**

HEALTH - Mandatory immunization of students and religious exemption;
RELIGION - Mandatory immunization of students and religious exemption;
SCHOOL DISTRICTS - Mandatory immunization of students and religious exemption;
MONTANA CODE ANNOTATED - Sections 20-5-405(1), 49-2-307;
MONTANA CONSTITUTION - Article II, section 5; Article X, section 7;
MONTANA LAWS OF 1989 - Chapter 644, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 68 (1982);
UNITED STATES CONSTITUTION - Amendments I, XIV.

HELD: 1. The religious exemption to mandatory immunization of students in section 20-5-405(1), MCA, encompasses sincerely held personal religious beliefs and not only religious beliefs or tenets of an "established or recognized" religion.

2. Absent the use of established, uniform standards or procedures, a school district should refrain from challenging an affidavit claiming a religious exemption from mandatory immunization.

February 27, 1991

Wm. Nels Swandal
Park County Attorney
414 East Callender
Livingston MT 59047

Dear Mr. Swandal:

You have requested an opinion on two questions involving the mandatory immunization of students under section 20-5-405, MCA, and the sufficiency of an affidavit claiming a religious exemption from immunization filed pursuant to these sections. In particular, you have asked the following questions:

1. May a school district require that an affidavit filed pursuant to section 20-5-405, MCA, claiming a religious exemption from mandatory immunization of students, be based on the tenets and practices of an established religion and not on personal religious practices of the signer?

2. What authority or duty does a school district have to challenge an affidavit presented pursuant to section 20-5-405, MCA, stating that immunization is contrary to the religious tenets and practices of the signer?

Section 20-5-405, MCA, provides in pertinent part:

> (1) When a parent, guardian or adult who has the responsibility for the care and custody of a minor seeking to attend school or the person seeking to attend school, if an adult, signs and files with the governing authority, prior to the commencement of attendance each school year, a notarized affidavit on a form prescribed by the department stating that immunization is contrary to the religious tenets and practices of the signer, immunization of the person seeking to attend the school may not be required prior to attendance at the school. The

> statement must be maintained as part of the person's immunization records. A person who falsely claims a religious exemption is subject to the penalty for false swearing provided in 45-7-202.

Your concerns arose from a situation in which a husband and wife claimed a religious exemption for their six-year-old daughter. The couple stated that they practiced a particular faith although they apparently do not subscribe to every tenet of that faith. Their personal religious belief, which is not held by others of the same faith, is that their child should not be immunized before she attends school. You suggest that the notarized affidavit must be based on religious tenets and beliefs of an organized religion. To support that suggestion you balance the state's interest in protecting school children with the First Amendment rights of individuals. See U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") and Mont Const. Art. II, § 5 ("The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). In performing this balancing test, you conclude that the state's interest must be paramount and that immunizations are required in all cases except when the religious exemption is based upon a tenet of an established religion. You also believe that a school district has not only the right but the duty to challenge all religious exemptions to guarantee compliance with the statute.

In 1989, the Montana Legislature amended section 20-5-405(1), MCA, substituting "religious tenets and practices of the signer" for "personal and religious tenets and practices of the signer." 1989 Mont. Laws, ch. 644, § 4 (House Bill 364). While the legislative history reveals that the bill's sponsor believed that the religious exemption would apply only to those holding beliefs of an organized religion, there is no mention in the plain language of the statute that the religious practices which serve as a basis for the exemption must be derived from an organized or established religion. See Hearing on House Bill 364, Minutes of Senate Education Committee, March 10, 1989, at 4 (Representative Nelson, the bill's sponsor, stated that the exemption would apply only to "well recognized religion[s] which includes spiritual healing").

When construing a statute, the words should be given their plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 614 P.2d 1020, 1023, on reh'g, 622 P.2d 195 (1980). If language of a statute is clear and unambiguous, the statute speaks for itself and there is nothing left to construe. Yearout v. Rainbow Painting, 222 Mont. 65, 719 P.2d 1258 (1986); 39 Op. Att'y Gen. No. 68 (1982). The plain language of section 20-5-405(1), MCA, indicates that the affidavit need only be based on the "religious tenets and practices of the signer." There is no requirement that such tenets and practices must be based on a recognized or established religion. Compare section 39-31-204,

MCA, and the right of nonassociation with a labor organization based upon religious grounds.

It is also a fundamental mandate of statutory construction not to insert what has been omitted or omit what has been inserted. § 1-2-101, MCA. To read the phrase "religious tenets and practices of the signer" as only including religious beliefs from a recognized or established religion would require inserting a qualification that is simply not contained in the plain language of the statute.

I am compelled to construe a state statute such that it will withstand constitutional scrutiny. If the exemption in section 20-5-405(1), MCA, were construed to apply only to religious beliefs from a recognized or established religion, under case law from other states such a construction might place the statute in conflict with the Fourteenth Amendment or the Free Establishment Clause in the First Amendment. LaFountaine v. State Farm Mutual Automobile Insurance Co., 215 Mont. 402, 698 P.2d 410 (1985). Three significant cases from Mississippi, Massachusetts, and Maryland have found a statutory religious exemption to mandatory immunization which requires belief in a "recognized" religion to be unconstitutional. Brown v. Stone, 378 So. 2d 218 (Miss. 1980) (religious exemption requiring certificate from officer of a church of a "recognized denomination" violates equal protection clause); Dalli v. Board of Education, 267 N.E.2d 219 (Mass. 1971) (religious exemption limited to the "tenets and practice of a recognized church or religious denomination" unconstitutional because it grants preferred treatment of one group and discriminate[s] against another); Davis v. State, 451 A.2d 107 (Md. 1982) (statutory religious exemption for members of "recognized church or religious denomination" violates Establishment Clause of First Amendment because the exemption shows preference of one religion over another). See also Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979) (in custody suit, district court could not give preference to father because he was member of an "organized" religion); Kemp v. Workers' Compensation Department, 65 Or. App. 659, 672 P.2d 1343 (1983), adhered to as modified, 677 P.2d 725 (1984) (statute granting right to refuse medical treatment by members who held beliefs based on "well-recognized" church violates establishment clause).

More important, perhaps, is the consideration of the numerous court decisions involving questions other than immunization, which recognize that the term "religious beliefs" does not necessarily include only those beliefs held by a "recognized religion." An overwhelming body of case law clearly holds that the First Amendment right to the free exercise of religion protects all sincerely held religious beliefs, not just those held because of membership in an established or recognized religion. Most recently, the United States Supreme Court clearly stated: "[B]ut we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." Frazee v. Illinois Department of

Employment Security, ___ U.S. ___, 109 S. Ct. 1514, 1517 (1989). The Court in Frazee was deciding whether Frazee qualified for unemployment insurance benefits because he had refused suitable work for good cause. Frazee claimed that his personal religious beliefs as a Christian forbade him from working on Sunday and therefore he had good cause for refusing otherwise suitable work that required working on Sunday. The Court in Frazee reasoned:

> Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. Thomas [Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 398, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)] settled that much. Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

109 S. Ct. at 1517-18. See also United States v. Seeger, 38 U.S. 163, 178, 85 S. Ct. 850, 860, 13 L. Ed. 2d 733 (1965) (term "religious training and belief" not limited to those believing in a traditional God); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (individual's most sincere beliefs do not necessarily fall within traditional religious categories); Mason v. General Brown Central School District, 851 F.2d 47, 51 (2d Cir. 1988) ("There is no doubt that 'religious belief' encompasses more than the traditional Judeo-Christian, Moslem or Buddhist forms of worship"); Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056-78 (1978). It is therefore clear that First Amendment protection of the free exercise of religion is not limited to traditional religious beliefs.

Applying the principles pronounced in these court decisions, I conclude that the religious exemption in section 20-5-405, MCA, is not limited to tenets and practices held by an established or recognized religion.

Your next question is, in fact, more difficult to answer. You ask what authority or duty a school board has to challenge the affidavit submitted for a religious exemption. The following statement from the United States Supreme Court is relevant because it acknowledges that a state does have authority to assure itself that a religious belief is sincerely held when a state

statute is challenged as an unconstitutional violation of the free exercise of religion. In Frazee, the Supreme Court stated:

> Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.

109 S. Ct. at 1517. In Wisconsin v. Yoder, 406 U.S. 105, 115, 92 S. Ct. 1526, 1533-34, 32 L. Ed. 2d 15 (1972), the Supreme Court recognized that certain tests or considerations may be used in distinguishing a sincerely held religious belief from a secular or philosophical belief. The Supreme Court cautioned, however, that such a determination involves "the most delicate matter" and deserves the most careful consideration. Yoder, 406 U.S. at 115, 92 S. Ct. at 1533.

In Yoder, the Supreme Court, in balancing the state's interest in compulsory education with the free exercise of the tenets of the Amish religion, distinguished a secular belief from a sincerely held personal religious belief and stated:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, [footnote omitted], the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Yoder, 406 U.S. 215-16, 92 S. Ct. at 1533. See also Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (plaintiff's claim "must be rooted in religious belief, not in 'purely secular' philosophical concerns"); Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1151 (4th Cir. 1980) (if belief asserted is "philosophical and personal rather than religious," or is "merely a matter of personal preference," it is not entitled to protection); Mason v. General Brown

Central School District, 851 F.2d 47, 51 (2d Cir. 1988) (plaintiffs' objection to mandatory vaccination was simply embodiment of secular chiropractic ethics, and not sincerely held personal religious belief); International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 433 ("threshold inquiry into 'religious' aspect of particular beliefs and practices cannot be avoided"). While recognizing the state's authority to distinguish a religious belief from a secular one, the courts have not given much guidance concerning what procedure a state may use to determine sincerity of belief. Early case law on mandatory vaccination statutes suggested that the state's authority is extensive because of the compelling state interest of protecting the health and welfare of school children. Jacobsen v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922). In Zucht, the Court suggested that the extreme importance of protecting the health and welfare of children in a community vests the local authority with broad discretion in enforcing mandatory vaccination laws. But how broad is the discretion of local authorities in the face of an assertion of First Amendment rights?

In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), the Court balanced the state's interest in the protection of its children with the parents' free exercise of religion. The Court in Prince stated:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [Citations omitted.] And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. *Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.* [Footnotes omitted, emphasis added.]

321 U.S. at 166, 64 S. Ct. at 442. Prince therefore suggests that the state's interest in protecting the health and welfare of children may outweigh the freedom to exercise a religious belief that would endanger the child's health and welfare, but Prince does not address the extent of discretion in the local authorities when there is a constitutional challenge based on the Free Exercise Clause.

In Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S. Ct. 900, 84 L. Ed. 1049 (1941), the Court recognized that unbridled discretion in a local authority in determining what is religious may be unconstitutional. While Cantwell dealt with a state's regulation of solicitation, which does not necessarily involve regulation of an interest as compelling as protection of the health of children, one federal district court has applied the Cantwell standard to mandatory immunization laws. In Avard v. Dupuis, 376 F. Supp. 479, 481 (D.N.H. 1974), the Court examined a statute that read, "[A] child may be excused from immunization for religious reasons at the discretion of the local school board." Relying upon Cantwell and its progeny, the Court in Avard held that the religious exemption vested too much discretion in the school board. The Court stated that

> the fact that the State has a right to regulate, and arguably completely prohibit, the conduct in question here does not relieve it of its duty to regulate fairly.

376 F. Supp. at 482. The Court reasoned that the statute was too vague and without standards, and therefore in contravention of the due process clause of the Fourteenth Amendment. In addition to the due process infirmities, the Court noted the possibility of equal protection problems lurking in the background. "Standardless statutes may result in different applications to similarly situated persons, not to mention the possibility that unarticulated underlying reasons may in themselves be constitutionally impermissible." 376 F. Supp. at 482. See also Niemotko v. Maryland, 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951) (practice of allowing local official discretionary control over public parks unconstitutional on basis of freedom of religion); Espinoza v. Rusk, 634 F.2d 477 (9th Cir. 1980) (administrative determination without established guidelines and procedures as to what is religion or what is religious may be unconstitutional); Swearson v. Meyers, 455 F. Supp. 90 (D. Kan. 1978) (local committee's authority to grant, deny, or revoke permits based on determination of religious nature of solicitation found unconstitutional). Caution must therefore be exercised by the school board because unbridled discretion by the board could give rise to a challenge based on a violation of the due process clause of the Fourteenth Amendment.

Caution is also indicated because of the more recent holding in Lewis v. Sobel, 710 F. Supp. 506 (S.D.N.Y. 1989), in which a local school district rejected an affidavit from parents claiming a religious exemption from mandatory immunization based on personal religious beliefs. The Court recognized that sincerely held, personal religious beliefs are protected by the First Amendment, analyzed the sincerity of the plaintiffs' religious beliefs, and found that the school board's rejection of the affidavit was a violation of the plaintiffs' right to free exercise of their religion. The court in Sobel awarded $1,000 in damages to the plaintiffs for emotional distress.

While a school district clearly has a compelling interest in distinguishing a sincerely held religious belief from a secular or philosophical belief, the case law leaves a district in a difficult position. In order to avoid violating the Fourteenth Amendment and due process, established guidelines and standards should be developed and followed when an affidavit is challenged. Such standards could be adopted by statute, by administrative rule, or by the local school board. However, if guidelines and standards are established that could be construed to favor one religious belief over another, numerous constitutional challenges are possible. As discussed above, religious exemptions have been stricken because of possible violations of equal protection, the Free Exercise Clause, or the Establishment Clause. See also Mont Const. Art. X, § 7 ("no person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin"); § 49-2-307, MCA (it is an unlawful discriminatory practice for an educational institution to announce or follow a policy of denial or limitation of educational opportunities of a group or its member, through a quota or otherwise, because of race, color, sex, marital status, age, creed, religion, physical or mental handicap, or national origin). One way to limit, but not eradicate, the possibility of a constitutional violation would be for the state or local authority to develop uniformly applicable procedures to challenge affidavits which are submitted under the religious exemption but which are considered not to be based upon sincerely held religious beliefs. Guidelines for conducting such a "sincerity analysis" are suggested in International Society for Krishna Consciousness v. Barber, 650 F.2d 430, 440 (2d Cir. 1981), and may include consideration of questions such as whether the affiant acts in a manner inconsistent with the claimed religious belief, or whether there is evidence that the affiant materially gains by fraudulently hiding secular interests behind a veil of religious doctrine. *Id.* at 441.

Although the school district undeniably has a compelling interest to protect students from communicable diseases, it does not have unlimited discretion to determine the legitimacy or sincerity of the religious tenets and practices of one seeking an exemption pursuant to section 20-5-405, MCA. The school district should therefore refrain from challenging an affidavit under section 20-5-405(1), MCA, and attempting to distinguish between a religious belief and a secular one, and between a sincerely held belief and one that is insincerely held, until established standards are in place.

THEREFORE, IT IS MY OPINION:

1. The religious exemption to mandatory immunization of students in section 20-5-405(1), MCA, encompasses sincerely held personal religious beliefs and not only religious beliefs or tenets of an "established or recognized" religion.

2. Absent the use of established, uniform standards or procedures, a school district should refrain from challenging an affidavit claiming a religious exemption from mandatory immunization.

Sincerely,

MARC RACICOT
Attorney General