

Opinion No. 35.

**Schools and School Districts—Public
Schools—School Day Excusing
Pupils to Attend Religious
Schools.**

HELD: School trustees have some discretion to determine what absences are excusable.

Whether discretion of school trustees may be exercised to release pupils one hour each week to enable them to attend religious schools depends on facts in each case.

The power of board to release pupils for attendance at religious schools is

limited to such releases as would not materially affect the best interests of the public school.

The statute fixing the hours of the school day must be substantially complied with.

March 22, 1939.

Mr. D. Gordon Rognlien
County Attorney
Kalispell, Montana

Dear Mr. Rognlien:

You have submitted for my opinion the question whether "the trustees of a public school district in Montana have the authority to release children from attendance at the regular district school for a period of one hour on a certain day of each week for the purpose of attending week day schools of religious education, such schooling to be conducted under a competent committee of some religious organization or organizations and with well qualified teachers."

No other facts are given. It is not stated what time of the day the children will be released, whether any classes will be disrupted, whether any greater burdens or duties will be placed upon the teacher, or any facts from which it can be determined to what extent the release of such pupils for one hour each day will affect the school, the other pupils, the instruction of the pupils released or the work of the teacher.

The only case we have found directly bearing on this case is *People v. Graves* (1927), 245 N. Y. 195, 156 N. E. 663, where the court was considering a plan to excuse from school attendance children between the ages of seven and fourteen years, on the written request of parents, one day each week for the last half hour of the school session, which was a study period, so that they might attend one of several denominational church schools which gave religious instruction during such period. The children excused lost no school recitations and received no credit for the work taken in the church schools. On these facts the court held that it could not say, as a matter of law, that there was an infringement of constitutional right or abuse of statutory requirement. The court there was considering a constitutional provision forbidding the use of

public funds in aid of denominational schools and the compulsory attendance statute. Referring to the latter the court said:

"A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school."

The statutes of New York fixed the minimum number of days for schools to be in session but, unlike Montana, did not fix the number of hours per day. (*Id.* 217 N. Y. Supp. 183.) Section 1059, R. C. M., 1935, provides:

"The school day shall be six hours in length, exclusive of an intermission at noon; but any board of trustees in any district having a population of five hundred or more may fix as the school day a less number of hours than six; provided, that it be not less than four hours, except in the lowest primary grades, where the pupils may be dismissed after an attendance of three hours."

On the facts stated we do not think that we can safely express an opinion which could be accepted as decisive in all cases. If the rule that "practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities" be followed, we do not

think we have enough facts before us to say whether the school trustees would or would not have such authority. We think, however, that the board should have some discretion in determining what absences are excusable, but, as we have stated, we have no facts upon which to determine whether such discretion, if exercised to release pupils for the purpose stated, would be abused in this case. Moreover, this would involve a question of fact upon which it would be difficult for this office to pass.

If the board has discretion in such matters it would, of course, be limited to such releases of children as would not materially affect the best interests of the public school. The statute fixing the hours of the school day must be substantially complied with. The people of this state from territorial days have jealously guarded our public schools from all sectarian or denominational influences. (Section 1055, R. C. M., 1935.) On the other hand, the right of people of different religions and denominations to conduct religious schools at such times and places as do not interfere with the public schools has never been denied and would be as zealously upheld as the right to conduct public schools free from religious, sectarian and denominational influences.