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COMMITTEE REPORT
SENATE

FURTHER: HERE

Date: Jan. 29, 1979

Mr. President:

The Committee on APPROPRIATIONS has had HR 959

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for SS 354-2 same title
- new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

BILL SHEFFIELD, GOVERNOR

REPLY TO:

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

January 18, 1984

1031 W 4th AVENUE
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ANCHORAGE, ALASKA 99501
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POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

465-3603

The Honorable Fritz Pettyjohn
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: SB 354 (as corrected)

Dear Senator Pettyjohn:

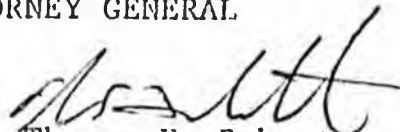
You have asked that we indicate whether the corrected version of SB 354 remedies the equal protection problems which we identified last year during consideration of HB 357. We believe that it does. For additional detail, please refer to our review of SCS CS HB No. 357 (RIs) am S, a copy of which is enclosed.

If you have other questions, do not hesitate to contact this office.

Sincerely yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:



Thomas H. Robertson
Assistant Attorney General

THR:jca

Enclosure

July 19, 1983

x

The Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Re: SCS CSHB 357(Rls) am S --
state regulation of
religious schools
Our file: 388-095-83

Dear Governor Sheffield:

At the request of Emil Notti on your behalf, we have reviewed SCS CSHB 357(Rls) am S which addresses the degree to which certain religious schools are to be regulated by the state.

This bill diminishes the authority of executive agencies over all religious pre-elementary schools and over religious elementary and secondary schools which elect to comply with various requirements. The provisions of the bill, and the constitutional issues which they generate, are discussed below. We do not believe that the constitutional issues are sufficiently clear to require veto of this bill.

In order to qualify for the protections afforded by this bill, a school must be operated by a church or other non-profit religious organization that is exempt from federal taxation and does not receive direct state or federal funding. It is therefore possible that, except with respect to licensure of pre-elementary schools, executive authority over some religious schools would remain unchanged even if this bill becomes law.

Section 1 of the bill amends AS 14.07.020(8) which currently requires the Department of Education (DOE), in cooperation with the Department of Health and Social Services (DHSS), to "exercise general supervision" over public and private pre-elementary schools. The bill would delete reference to DHSS, would prohibit licensing of any pre-elementary schools, and would

eliminate authority to supervise the "educational component" of pre-elementary schools operated by a church or other qualifying religious organization.

Section 2 of the bill makes it clear that the system of voluntary accreditation of elementary and secondary schools established by AS 14.07.020(10) does not vest authority in DOE to "license" schools operated by a church or other qualifying religious organization.

Section 3 of the bill adds an exemption from compulsory public school attendance for children who attend an educational program operated by a church or other qualifying organization which meets the requirements set out in sections 4 -- 8 of the bill. The compulsory education statute, AS 14.30.010, which would be amended by sec. 3, currently exempts children who attend private schools which employ certificated teachers, who are tutored by certificated tutors, or who attend private schools in which the average student proficiency is not less than that found in nearby public schools, as measured by national achievement tests.

Sections 4 -- 8 of the bill would amend AS 14.45 to provide a means through which elementary and secondary schools operated by churches or other qualifying religious organizations can become partially exempt from state regulation. The exemption would not extend to laws relating to physical health, fire safety, sanitation, immunization, and physical examinations.

The requirements for exemption are set out in new AS 14.45.030 -- 14.45.040. New AS 14.45.030 requires that the religious school maintain monthly attendance records for each student, operate on a regular schedule for a school year of at least 180 days, and annually report to DOE the number of students in each grade and the school calendar. In addition, the parents of each child must file an annual notice of enrollment, signed by the parent and school administrator, with the local public school superintendent. The religious school must notify the superintendent if the child leaves school. New AS 14.45.035 requires that the religious schools administer at least one nationally standardized test, selected by the school from a list compiled by DOE, to children in grades 1, 3, 6, and 9. The test must measure achievement in English grammar, reading, spelling, and mathematics. The results must be maintained by the school and be made available to the child's parent or guardian and "authorized representatives" of the state. New AS 14.45.040 requires that the religious schools maintain "adequate" student records,

including records of immunizations, physical examinations, testing, and courses taken.

Finally, sec. 9 repeals AS 14.45.020 which authorizes DOE to provide final exam questions and diplomas for eighth graders in private and denominational schools. Apparently, this authority has not been exercised since well before statehood.

In general, SCS CSHB 357(R1s) am S would establish two categories of private schools, those which are operated by a church or other qualifying religious organization and those which are not. This gives rise to the legal question of whether or not the disparate treatment afforded each category is in keeping with the equal protection clauses of the state and federal constitutions.

Although courts have developed separate tests under each, the state and federal constitutions both require that there be reasons for treating these categories of private schools differently. The bill itself does not contain a statement of purpose. However, it has been characterized by supporters as an effort to accommodate the free exercise of religion.

The free exercise of religion is protected by the First Amendment to the United States Constitution and by art. 1, sec. 4, of the Alaska Constitution. Courts have developed a threefold test to determine whether state educational requirements impermissibly limit the free exercise of religion: (1) whether the regulated activity is motivated by and rooted in a legitimate and sincerely held religious beliefs; (2) the degree to which the parties' free exercise of religion has been burdened; and (3) whether the state has a compelling interest in the regulation which justifies the burden. Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972). The focus of this test is on the exercise of religion; "[t]he religious character of an organization does not provide a shield from regulation which no way affects religious beliefs or acts." In re Rabbinical Seminary Netzach Israel Ramailis, 450 F.Supp. 1078, 1081 (E.D. N.Y. 1978).

Unfortunately, the limits of permissible regulation have not been clearly established. On one hand, courts have acknowledged that religious schools combine religious and secular education and have invalidated state regulations which unreasonably interfered with the former. E.g., Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 715, reh' den 404 U.S. 876, 30 L.Ed.2d 123, 92 S.Ct. 24 (1971); State v. Whisner, 351 N.E.2d 750 (Ohio 1976). On the other hand, courts have acknowledged that

"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." Board of Education v. Allen, 392 U.S. 236, 247, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968). For example, state regulations requiring certified teachers, a minimum curriculum, and state licensure have been approved. E.g., New Jersey State Board of Higher Education v. Board of Directors of Shelton College, 448 A.2d 988 (N.J. 1982); State v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981), app. dism. 454 U.S. 803, 70 L.Ed.2d 72, 102 S.Ct. 75 (1982); State v. Shaver, 294 N.W.2d 883 (N.D. 1980). See also Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed.2d 1070, 45 S.Ct. 571 (1925).

This is also an area in which courts may defer to the legislature. In State v. Rivinius, 328 N.W.2d 220, 231 (N.D. 1982), the Supreme Court of North Dakota, after approving a teacher certification requirement, indicated that "[w]e are not implying or intimating that the legislature may not work out a system that will be satisfactory to both sides -- meaning the state and the defendants -- and still accomplish the constitutional mandate." See also West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 87 L.Ed. 1620, 63 S.Ct. 1178 (1943).

Because the United States Supreme Court has yet to resolve some of these issues, we cannot state with certainty that SCS CSHB 357(R1s) am S provides protections to religious schools beyond those which are constitutionally required. However, since it precludes various means of regulation which, at least for elementary and secondary schools, have been approved by lower courts, we believe this result to be likely. If this is true, the legislation would fall on equal protection grounds unless other reasons based on actual differences between the two categories of private schools could be found to support it. In addition, it would be subject to challenge as an aid to religion under the establishment clauses of the state and federal constitutions.

It is noteworthy that present regulatory requirements of DOE are minimal and that this bill is based on legislation, enacted in North Carolina in 1972, which has not been challenged in court. N.C. Gen. Stat. § 115-257.1, et seq. (Cum. Supp. 1979). We also acknowledge that substantial arguments can be made in its support. See generally "State Regulation of Private Religious Schools in North Carolina -- A Model Approach," 16 Wake Forest Law Review 405 (1980). Accordingly, we do not believe that veto on constitutional grounds is required.

The Honorable Bill Sheffield
Governor
388-095-83

July 19, 1983
Page 5

Except as noted, this bill presents no constitutional or other major legal problems. It is possible, however, that problems of statutory interpretation could arise as DOE attempts to exercise its remaining authority in this area.

Sincerely,

Norman C. Gorsuch
Attorney General

NCG:THR:jal

STATE OF ALASKA
THE LEGISLATURE

POUCHY STATE CAPITOL
SUNEAU ALASKA 995
907-465-3611

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 16, 1984

SUBJECT: Sectional analysis of SB 354

TO: Senator Jan Faiks
Chairman, Senate Rules Committee

FROM: Keith B. Levy *KBL*
Legislative Counsel

You have requested a sectional analysis of SB 354, "An Act relating to the regulation of private schools." The main thrust of the bill is to allow religious and other private schools to opt out of the general laws and regulations applicable to private schools if they agree to comply with certain minimal requirements.

Section 1 states that the purpose of the bill is to guarantee that the state will not interfere with the constitutional right of freedom of religion while at the same time ensuring the quality of all education in the state.

Section 2 amends the duties of the Department of Education with respect to private education (AS 14.07.020). It provides that the department will consult with the state fire marshall and the state sanitarian rather than the Department of Health and Social Services on matters of health and safety (AS 14.07.020(7)). It clarifies that the department must require physical examinations and immunizations in private pre-elementary schools (AS 14.07.020(7)). Section 2 also provides that the department is no longer responsible for the general supervision of private pre-elementary schools and nurseries. Supervision over public pre-elementary schools will no longer be done in cooperation with the Department of Health and Social Services (AS 14.07.020(8)). Finally, section 2 makes clear that the department may provide voluntary accreditation for any private school that requests it, although the department is not authorized to require private schools to be licensed (AS 14.07.020(10)).

Section 3 amends the state's compulsory education law

(AS 14.30.010) to provide that attendance at a school operating in compliance with AS 14.45 (see section 5, below) satisfies the compulsory education requirements.

Section 4 provides that a private school that does not choose to comply with AS 14.45 (see section 5, below), is not exempt from other laws and regulations relating to education and must make attendance reports in the same manner as public schools.

Section 5 provides the minimum requirements a religious or other private school must meet if it elects to be exempt from other provisions of law and regulations. However, even these schools are subject to laws and regulations relating to physical health, fire safety, sanitation, immunization, and physical examinations (AS 14.45.100).

The parent or guardian of a child enrolled in an exempt school must file an annual notice of enrollment with the local public school superintendent on a form signed by the school administrator and the parent (AS 14.45.110(a)). The school must notify the local public school superintendent if the child is no longer attending or enrolled in the school. The exempt school must maintain monthly attendance records, operate on a regular schedule of at least 180 days, and report to the commissioner of education annually the number of students enrolled in each grade and the school calendar (AS 14.45.110(b)).

An exempt school must also administer a nationally standardized test to all students in grades one, three, six, and nine at least once each school year (AS 14.45.120(a)). The test must measure achievement in English grammar, reading, spelling, and mathematics (AS 14.45.120(b)). The school must maintain records of the results of these tests and make them available to the parent or guardian of the student. The school is required to make composite test results available annually to an authorized representative of the Department of Education, but these results are not public information unless each public school is subject to similar testing requirements, the result of which are also public (AS 14.45.120(c)).

The exempt schools are also required to maintain permanent student records reflecting immunizations, physical examinations, standardized testing, academic achievement, and courses taken at the school. The administrator of the

Senator Jan Faiks
Page 3
January 16, 1984

school must certify under oath that these records are being maintained (AS 14.45.130). Finally, "religious school," as used in these sections, is defined as a private school operated by a church or other religious organization that does not receive direct state or federal funding (AS 14.45.140).

It should be kept in mind that these provisions are not mandatory unless the private school chooses to exempt itself from other laws and regulations relating to education. Also, this option is available to all private schools, religious and otherwise.

KBL:ojb
J2/036