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June 24, 1993

663-93-0394

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465-3603

Enrollment of private and home school students in public schools

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INTRODUCTION

You have asked our opinion regarding the legal issues raised by part-time enrollment in a public school by private school or home-school students. For the purposes of this memo, "private school students" is used to refer to both home-school students and private school students. The primary questions are whether existing law prohibits districts from enrolling students on a part-time basis in public school courses, whether it requires or permits districts to do so, how part-time enrollment should be treated under the foundation aid program, and whether enrollment in extracurricular activities is similarly prohibited, required or permitted.

The questions you raise overlap with a question raised earlier this year by the Centralized Correspondence School (CCS). CCS asked whether they could enroll private students on a part-time basis. The answer was yes, subject to the same enrollment requirements as other students, and so long as the practice was not used by private schools on a widespread basis to provide the curriculum requirements of the school. A similar analysis compels our conclusion that existing laws neither prohibit nor require a part-time enrollment policy. Thus, the department has some discretion in devising a policy on this issue.

ANALYSIS

I. UNDER CURRENT LAWS, MAY PUBLIC SCHOOLS ENROLL PRIVATE SCHOOL STUDENTS ON A PART-TIME BASIS?

We believe the answer to this question is yes, and address briefly each body of law that might, but in our opinion does not, proscribe, a part-time enrollment arrangement.

Federal Constitution. The Establishment Clause of the First Amendment of the federal constitution, made applicable to the states through the Fourteenth Amendment, states that

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . [.]" To the extent that the private school students seeking part-time enrollment in public schools are from sectarian private schools, this clause could be implicated. One could argue that the government supports religion when it provides education to church school students.

In our opinion, however, part-time enrollment would not violate this clause. The enrollment would have a secular purpose, it would not advance or inhibit religion, and it would not foster excessive government entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); 1993 Inf. Op. Att'y Gen. at 4 (Mar. 18; 663-93-0179. The Supreme Court did strike down a "Shared Time" program where public school teachers taught secular courses in private, religious school facilities. School Dist. of Grand Rapids v. Ball, 465 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985). The primary evil in that scheme, however, was that the state-paid teachers actually taught on the private school premises, obscuring the distinction between the public and private nature of the instruction. It also necessitated significant interaction between the private and public systems. Those concerns would not be present where private school students come to the public school for instruction.

In Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151 (Mich. 1984), the Michigan Supreme Court held that Michigan law required its districts to permit part-time enrollment. Id. at 166-68. Although Michigan's laws differ from Alaska's and thus do not compel the same result, we agree with that court's application of the Lemon test,[1] finding that the Establishment Clause is not violated when private school students take classes in public schools on a part-time basis.

State Constitution. The Alaska Constitution article I, section 4, contains a clause similar to the Establishment Clause, prohibiting any law establishing religion. We believe that a part-time enrollment scheme would not violate that clause, following the analysis of the federal clause.

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[1] Recent Supreme Court cases cast some doubt on the continued viability of the Lemon test, although it has not been overruled. A new test is likely to be less restrictive than Lemon, however, and so it is extremely unlikely that this Court would find that part-time enrollment offends the constitution. See, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992).

The Alaska Constitution article VII, section 1, also prohibits any payments from public funds made "for the direct benefit of [a] religious or other private educational institution." As we advised you in our CCS memo, the current test for a violation of the direct benefit clause was set out in Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979):

> (1) Is the benefit applied with neutrality and without regard to status or affiliation? (2) What is the nature of the use of the funds? (3) What is the magnitude of the benefit conferred?

Id. at 130.

Part-time enrollment does not raise any concerns as to prongs one and two of the test. Part-time enrollment would, presumably, be offered to all private students if offered to any, and the use of the funds would be secular public school instruction. Prong three is the only area that could raise a direct benefit concern. One could argue that the availability of part-time enrollment benefits a private school because it allows the school to retain as students those who might otherwise leave to obtain the more varied curriculum offered by a public school. The argument has merit, but strong arguments can also be made that such a benefit is speculative at best, and is not of sufficient magnitude to offend the direct benefit clause. A clear answer to the direct benefit question is not possible without specific facts, because the magnitude of the benefit cannot be measured.

This concern was addressed in the Snyder case, where parents filed suit to compel a district to allow their private school student to enroll in band. Although the Michigan Supreme Court held that Michigan's statutory scheme required the district to enroll the student in band, it held that not every public school class must be offered to part-time students enrolled in private schools. Id. at 161. This result was reached because Michigan law requires private schools to provide a core curriculum to its students.

> If shared time instruction were required for all courses, it would be possible for a nonpublic school to offer a full curriculum to its students while conducting only a small percentage of the classes at the nonpublic school. . . . [I]f public schools can be required to satisfy in any way a parochial school's statutory responsibility to

> provide a core curriculum to its students, this might constitute impermissible direct aid to the parochial school, rather than legitimate aid to the students which incidentally benefits the parochial school.

Id. at 161-62. Thus, the Michigan court held that if districts offer "'nonessential elective courses,' such as band, art, domestic science, shop, advanced math and science classes, etc." to public school students, they must offer them to nonpublic school students residing in that district's enrollment area. Id. at 162.[2]

This argument is not as strong in Alaska as in Michigan, because Alaska does not require that private schools offer a certain core curriculum.[3] The benefit afforded the private school in Alaska would not be fulfillment of a statutory obligation, but a more indirect benefit of possible higher enrollment. We believe that good faith arguments can be advanced on either side of this question, but that the better view probably is that part-time enrollment by private school students in public schools does not violate Alaska's direct benefit clause. Again, we add that our opinion could change if it could be shown that a private school's very existence was dependent on its students' part-time enrollment in public schools.

Alaska's Statutes. An argument can be advanced that certain Alaska statutes read together make clear that part-time enrollment is prohibited because it does not satisfy Alaska's compulsory attendance law. We do not believe such an argument would be successful in court, but bring it to your attention here.

The compulsory education statute requires that "[e]very child between seven and 16 years of age shall attend school at the public school in the district in which the child resides during each school term." AS 14.30.010. The statute goes on to exempt from the requirement certain students, including those

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[2] In Snyder, the defendant admitted that it had room in its band course, and plaintiff agreed to provide transportation for the student to and from class. Thus, the court did not have to answer certain administrative questions that could arise if the facts were different.

[3] While private schools may obtain state accreditation by providing a certain curriculum, they are not required to do so. AS 14.07.020(a)(10).

attending private schools. Although it did not say so, it is unlikely that the legislature intended that attendance for one hour a day would satisfy the compulsory attendance requirement. We believe that the statute should be read to mean that school age children must attend school for the full school day in order to comply with the law. This interpretation is supported by one of the exceptions to the requirement: the law does not apply to a student who is enrolled in "a full-time program of correspondence study approved by the department . . . ." AS 14.30.010(b)(10)(B). Since full-time correspondence study is necessary to exempt one from attending school, it is likely that full-time attendance at a public school, or a private school for exemption purposes, was also contemplated.

This argument finds additional support in the funding statutes. AS 14.17.041(c) provides "[k]indergarten students who attend school less than four hours a day are counted as 0.5 ADM under (a) and (b) of this section." This section strongly suggests that the legislature assumed that other students would be enrolled full-time. Rather than a deliberate decision, it is probable that the legislature simply did not contemplate or consider part-time enrollment except where it has traditionally occurred, as in kindergarten and in correspondence programs.

Even if it is true, however, that the legislature contemplated full-time enrollment for purposes of the compulsory attendance law, there is no reason to assume that they would not consider dual enrollment, (part-time enrollment in two schools, one public and one private), as meeting that requirement. This view is supported by AS 14.30.010(b)(11), which exempts from the public school attendance requirement a child who "is equally well-served by an educational experience approved by the school board as serving the child's educational interests despite an absence from school . . . ." Although approval is required, the legislature here has expressed a willingness to accept alternatives to public school enrollment not specified in the statute.

In conclusion, we do not believe that the federal or state constitution, or existing state statutes, prohibit the enrollment of private school students in public schools on a part-time basis.

II. DOES EXISTING LAW REQUIRE DISTRICTS TO ENROLL PRIVATE STUDENTS ON A PART-TIME BASIS?

One could argue that not only is part-time enrollment not prohibited, it is in fact required by the constitution and by

Alaska's free education statute. We believe that this is too extreme a position.

There is a constant tension between the Establishment Clause of the First Amendment of the federal constitution, mandating a separation of church and state, and the Free Exercise Clause of the same amendment, prohibiting government interference with one's exercise of religion. Under the latter, one could argue that refusing to enroll a private sectarian school student on a part-time basis burdens that student's free exercise of religion by forcing him or her to choose between religion and the benefits of the public school system.

In our opinion the balance is struck by making the public school available to all who choose to enroll on a full-time basis. The legislature has devised a system of education and offered it to all school age children on an equal, nondiscriminatory basis. Those who elect to obtain their education elsewhere should not be heard to complain that the system is not open to them. We find the words of the United States District Court for the Eastern District of Missouri instructive:

> All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. The fact that a child or his parent for him voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school systems does not deprive him of anything by State action.

Brusca v. Missouri ex rel. State Bd. of Educ., 332 F. Supp. 275, 279 (E.D. Mo. 1971), aff'd 405 U.S. 1050, 92 S. Ct. 1493, 31 L. Ed. 2d 786 (1972).

AS 14.03.080(a) provides that "[a] child of school age is entitled to attend public school without payment of tuition during the school term in the school district in which the child is a resident subject to the provisions of AS 14.14.110 and AS 14.14.120." The language can be read to mean that this entitles a child to enroll in any one or more courses offered by the public school system. However, the language is equally susceptible to a reading that "attend public school" means attend full-time. This is consistent with the interpretation advanced in part I. above that the legislature appears to have contemplated enrollment in school as meaning full-time enrollment. Again, the legislature has not addressed the issue directly, and thus we do not find any support for the view that

the legislature must have intended, in AS 14.14.120, to entitle school age children to enroll in one course at a time. Other states have considered this issue and have reached conflicting results.

Michigan considered the issue in Snyder v. Charlotte Pub. Sch. Dist., 365 N.W.2d 151 (Mich. 1984), where parents filed suit to compel a district to allow their private school student to enroll in band. The court held that nonessential elective courses offered to public school students must be made available to private school students on a "shared time" basis. It based its holding in part on the fact that shared time had been an accepted arrangement in Michigan for over sixty years, that the legislature specifically authorized aid to school districts for part-time enrollment of private school students, and because the legislature did not require full-time attendance at one school for the entire day.[4] Id. at 157.

In Morton v. Board of Educ. of Chicago, 216 N.E.2d 305 (Ill. App. 1966), the Appellate Court of Illinois, First District, held that an experimental dual enrollment program permitting part-time enrollment in public and nonpublic school and leading to a public school diploma did not violate Illinois statutes or the constitution. The Illinois School Code, however, provided for part-time enrollment in their funding scheme. "Students who are regularly enrolled in a public school for only a part of the school day may be counted on a basis of one-sixth of a day for every class hour attended pursuant to such enrollment. Ill. Rev. Stat. 1963, Chap. 122, Par. 18--8.1." Morton at 310.
Thus Morton does not lend support to an argument that Alaska's statutes require a part-time enrollment option.

The Maryland Court of Special Appeals reached the opposite conclusion. In Thomas v. Allegany County Bd. of Educ., 443 A.2d 622 (Md. App. 1982), several private school students sought admission to the All-County High School Band. The county had permitted participation by both public and private school students for two years, and in 1980 limited participation to students enrolled in the Allegany County public school system.

The court emphasized that the county rule did not

[4] According to this opinion, the attendance laws of Missouri require a student to attend one school for at least six hours per day, and any additional attendance at a public school by private school students must be beyond the six hours. Id. at 157 n.6.

violate the students' right to exercise their religion. It "merely prevents a child from reaping the benefits of a public school activity once the constitutional right to a private school education is exercised." Thomas at 625. The court noted that in this particular instance the administrative burden on the county appeared slight, but could foresee that such a policy could be quite burdensome under other circumstances.

> With the opening of such "Pandora's box", there would be no device to preclude, for example, a private school having difficulty securing a qualified chemistry teacher from unilaterally deciding to transport the entire student body to a nearby public school for their chemistry education. The potential for administrative disruption is obvious.

Id. at 626.

The court did not find that Maryland's free education statute ("all individuals who are 5 years old or older and under 21 shall be admitted free of charge to the public schools of this State") mandated part-time enrollment. They found "strained" a construction of that language that would entitle students "not merely to be admitted to the public schools of this state, but to any part or portion of the public school system which they choose." Id. at 627. In summary, the court stated

> [i]f the legislature or the school board wishes to permit parochial students to attend selected classes or programs, we see no impediment . . . but we do not think it is for any court to mandate such admission under a strained interpretation of the aforementioned statute.

Id. In our opinion, Maryland has the better view, permitting but not requiring part-time enrollment. The Michigan holding rested in part on legislative policies not present in Alaska, and to the extent that any Alaska legislative intent can be determined, it suggests that full-time enrollment was contemplated. Thus, in our opinion, existing law does not require districts to enroll private school students on a part-time basis.

III. IF THE LAW NEITHER PROHIBITS THE DISTRICTS FROM NOR REQUIRES THEM TO ENROLL PRIVATE SCHOOL STUDENTS ON A PART-TIME BASIS, MAY THE DISTRICTS SIMPLY CHOOSE WHETHER OR NOT TO PERMIT PART-TIME ENROLLMENT?

The answer to this question is probably yes, unless the department adopts a contrary policy. It is the role of the department to administer the state's program of education, AS 44.27.020(1), and this must be done in a manner consistent with the education statutes. The legislature has not spoken clearly on this issue, and so the department may exercise its discretion in setting policies in a manner consistent with legislative scheme.

Although we believe both sides of the issue have merit, as stated above, there is a legal basis for a departmental decision that part-time enrollment is not permitted. It would find the most support in the funding statutes, where it appears fairly clear that the legislature did not contemplate part-time enrollment.

It would be more difficult to defend a department decision that districts must permit part-time enrollment. There is no strong evidence that the legislative scheme requires it, and in some districts the burden could be significant. Nevertheless, because the legislative scheme does not clearly prohibit it, the department could adopt such a policy, based on the department's statutory duties to adopt plans for the improvement of public schools. AS 14.07.020(a)(2).

Another option is for the department to adopt a policy encouraging part-time enrollment where it can be reasonably accommodated by a district. The department could issue guidelines to districts so that a part-time enrollment policy should be applied fairly and uniformly. If this option is selected, we would encourage the department to consult with us as the guidelines are developed and refined. In our opinion, this option would be defensible if challenged, is consistent with the local control being sought by the Alaska 2000 initiative, and would provide flexibility to districts to accommodate part-time arrangements to the extent that it was physically and administratively feasible. If the legislature determines that a policy permitting part-time enrollment is not what they intended, they are free to amend the statute to more clearly reflect their intent.

IV. IF DISTRICTS ENROLL STUDENTS ON A PART-TIME BASIS, HOW SHOULD THEY BE COUNTED FOR FOUNDATION AID PURPOSES?

Except for correspondence study and kindergarten, the legislature did not provide for counting students on any basis other than full-time. Under the current scheme, then, a district would receive full funding for a student enrolling in one course.

In your memo you stated that some districts already reap the benefits of such an arrangement, by counting part-time public school students who need only one or two credits to graduate, and receiving full funding.

It is unlikely that the legislature intended such a result. AS 14.17.041 providing for counting kindergarten students attending school less than four hours per day as 0.5 ADM, suggests that they did not.

The department's authority includes adopting regulations necessary to carry out the provisions of Title 14. AS 14.07.060. Promulgating regulations to clarify the funding statutes with respect to part-time enrollment would be well within its statutory authority. The department has adopted other funding regulations, including funding of correspondence programs, 4 AAC 09.040 (providing for a fractional ADM for part-time students), and funding for bilingual and vocational education programs, 4 AAC 09.015 (providing a method for converting enrollment in one period to a full-time equivalent or FTE.)

In our opinion the department is free to permit the statutes to operate as they currently do, allowing part-time students to generate the same amount of funds as full-time students, or to adopt regulations that would to some extent prorate funding for part-time students. If the department chooses the former, we would anticipate that at some point the legislature will step in to speak to part-time enrollment funding.

V. UNDER CURRENT LAW, CAN PRIVATE SCHOOL STUDENTS PARTICIPATE IN THE EXTRACURRICULAR ACTIVITIES OF A PUBLIC SCHOOL?

The issues raised by enrollment in courses are largely the same as those raised by participation in extracurricular activities. The law neither prohibits nor requires the participation, and if the participation by private school students would not be an administrative burden to a district, or supplant public school students, there is no reason why participation cannot be encouraged. There may be some activities that would be enhanced by additional participation. At least two issues differ from the question of enrollment in classes, however.

A number of extracurricular activities include interscholastic competition. Those activities are subject to

rules described in the Alaska School Activities Association (ASAA) Constitution and By-laws. The rules are minimums, and member schools are free to adopt additional school requirements or standards. Among other requirements, ASAA requires that in order to participate in interscholastic activities, a student must be enrolled in the school in which the student is participating, carrying a minimum of four classes that lead to credit toward graduation. Article XII, section 1 of the ASAA By-laws. Thus, a private school student coming to the public school only for sports or debate, for example, could not compete interscholastically.

Although one may challenge this rule as denying equal protection of the laws to some school age students, we do not believe such a challenge would be successful.[5] In our opinion there are important interests served by the rule, and we see no justification for waiving them or changing them to accommodate private school students. We also note that private schools can become members of ASAA, so the interscholastic experience is not foreclosed to their students.

The second way in which activities differ from classes is the manner in which they are funded. To the extent that funding for activities is derived from the foundation funding, private school students participating only in extracurricular activities would generate no funds for a district. For activities that require little funding, this may not be problematic. But where the activities have an expense associated with them, districts may be unwilling to take on the financial burden of funding private school students coming to the district for extracurricular activities.

If the analysis is followed that the law neither requires nor prohibits permitting private school students equal access to public school activities, then a permissive rule could also be adopted for extracurricular activities. Again, the department may need to guide the districts in developing a fair policy on these issues.

CONCLUSION

The issue of part-time enrollment raises many

[5] The rule is currently being challenged in Blomfield v. Anchorage Sch. Dist.. ASAA, Inc. is a named party, but ASAA and the Department of Education are not named at the present time.

interesting issues--legal, practical, and emotional. From a legal standpoint, we believe there is some legal basis to defend a department policy either prohibiting or requiring part-time enrollment. However, the easiest to defend would be a policy permitting part-time enrollment, based on certain department guidelines and district ability to accommodate the arrangement.

Although a policy permitting but not mandating part-time enrollment is the easiest to defend, it is probably the most difficult to administer. It would be simpler administratively to adopt a bright line rule prohibiting or mandating a part-time policy. If the department elects to pursue a permissive policy, the Department of Law is available to advise on legal issues as the policy is refined. Please do not hesitate to contact us if we can be of further assistance.

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