1977 S.C. Op. Atty. Gen. 65 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-66, 1977 WL 24408

Office of the Attorney General

State of South Carolina
Opinion No. 77-66
March 1, 1977

***1 RE: Constitutionality of S.161 as it applies to day care centers operated by churches**

TO: Honorable T. Dewey Wise
Senator

Senate Bill S.161 states as its purpose the establishment of 'statewide minimum regulations for the care and protection of children in child day care facilities.' Article V of S.161 authorizes the Department of Social Services to promulgate and enforce these requlations, and Section (1)(b) of Article V expressly states that the requlations 'shall be designed to promote the health, safety and welfare of the children who are to be served by assuring safe and adequate physical surroundings and healthful food; by assuring supervision and care of the children by capable, qualified personnel of sufficient number.' DSS has no authority under S.161 to 'influence or regulate the curriculum of child day care centers.'

The terms 'child day care', 'child day care facility', etc. as defined in Article I, Section 2 of S.161 clearly include certain day care facilities operated by churches.

DISCUSSION:

The First Amendment to the Constitution of the United States states in pertinent part as follow:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Although the Amendment speaks to the Congress, it has been held applicable to the states by the Fourteenth Amendment. Sherbert v. Verner, 374 U.S. 398 (1963).

The United States Supreme Court in the case of Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) expounded on the First Amendment's prohibition in a passage that since has been quoted countless numbers of times:
The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society . . .. It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. Cantwell, supra., 84 L.Ed. at 72. (emphasis added)

***2** The First Amendment consists of two parts: the Establishment Clause and the Free Exercise Clause. To be permissible under the Establishment Clause a governmental activity or regulation must have a secular legislative function, its primary effect

must neither advance nor inhibit religion, and it must not foster an excessive entanglement with religion. Lemon v. Kuntzman, 403 U.S. 602, 91 S.Ct 2105, 29 L.Ed.2d 745 (1971). On the other hand, the Free Exercise Clause prohibits any restraint on the free exercise of religion. Its purpose is to secure religious liberty by preventing any invasions thereon by civil authority, and in any free exercise case it is necessary for one to show the coercive effect of a legislative enactment as it operates against him in the practice of his religion. Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

S.161 clearly serves a secular legislative function by providing for the welfare of minor children. Its primary affect neither advances any church or any religious creed nor hinders any church or religious creed. S.161 is 'evenhanded in operation, and neutral in primary impact,' and any benefit or harm it might cause a church or other religious organization would be incidental to the operation of the law and secondary in nature. Neither does S.161 so entangle the state in the operation and administration of a church as to constitute 'excessive entanglement.' Leman, supra., Allen v. Morton, 495 F.2d 65 (C.A.D.C. 1973).

Furthermore, since S.161 is only concerned with the health and safety of the children who attend day care centers and does extend to the regulation of the activities of the children or the curriculum at these centers, it cannot interfere with either the parent's or the child's right to the free exercise of his religion.

Assuming, however, that the primary impact of S.161 is to aid or hinder religion, or that it fosters 'excessive entanglement' between church and state, or that it hinders the free exercise of religion, S.161 would still be constitutional as a proper exercise of the state's police power.

Although the First Amendment requires government activities or regulations that touch on the religious sphere to be 'secular in nature, evenhanded in operation, and neutral in primary impact', and totally bars governmental regulation of religious beliefs as such as well as governmental interference with the dissemination of religious ideas, Gillette v. U. S., 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), the First Amendment has never been held to exempt churches and other religious groups from the normal exertion of the state's police power. U.S. v. Kenstler, 250 F.Supp. 833 (W.D.Pa. 1966).

The line of separation that exists between church and state is 'far from being a wall', and is in fact a 'blurred, indistinct, and variable barrier.' Lemon, supra., 29 L.Ed.2d at 757. The Supreme Court has consistently held that total separation between church and state is an impossibility, and that state and local laws requiring churches to comply with fire inspection codes, building and zoning regulations, and compulsory school-attendance laws are constitutionally permissible. Lemon, supra., 29 L.Ed.2d at 756.

***3** Any law that infringes a persons right to the free exercise of his religion must be justified by a compelling state interest. Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The protection of minor children by the state has consistently been held to constitute such a 'compelling state interest.' State legislation designed to protect minor children is not an unconstitutional interference with the free exercise of religion even though the type of protection afforded runs contrary to the parent's religious beliefs. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1945).

As stated by the Court in Prince, supra.
The right to practice religion freely does not include the liberty to expose . . . the child . . . to ill health or death.

State or local laws that require minimum lighting or sanitary facilities for all school buildings, including religious school buildings, are permissible. Levitt v. Committee for Public Education, 413 U. S. 472, 37 L.Ed.2d 736, 93 S.Ct. 2814 (1973). The state has a clear interest in preserving a healthy and safe educational environment for all of its school children, Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

The state has a substantial range of authority to provide for the welfare of its minor children, and S.161, on its face, appears to do nothing more than attempt to insure that all minor children who are placed in day care centers by their parents are placed in a clean, safe, and healthy environment under adequate supervision.

CONCLUSION:

It is the opinion of this office that S.161 violates neither the Establishment Clause nor the Free Exercise Clause of the First Amendment to the Constitution of the United States.

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