1979 WL 43163 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 13, 1979

***1** Bruce E. Davis, Esquire
1704 Fair Street
Camden, South Carolina 29020

Dear Mr. Davis:
As attorney for Sumter County School District No. 17, you have requested an opinion of this Office as to whether that district may excuse a particular child from state graduation requirements as they relate to physical education. On religious grounds, this child and the child's parents have objected to the child's participation in physical education classes which are conducted on a co-educational basis. [1]

Section 59-29-80 of the Code of Laws of South Carolina (1976) requires that courses in physical education be taken by all public school children. See also § 59-29-100. While this section does provide for substitution of ROTC programs where they are available and provides for modified physical education courses for handicapped students, no other exceptions are made to the general requirements, and no provision is made for excusing students from them. The Defined Minimum Program for South Carolina School Districts (DMP) also requires that physical education be taken (pp. 25 and 38) and includes it as a graduation requirement (p. 41). These graduation requirements may also be found at R43-259 of the Code, as amended. The DMP provides for no exceptions to these physical education requirements except in the case of the ROTC and modified physical education programs noted above. Thus, under these provisions, the child could not be excused from class. Only if the class, as conducted, impermissibly impinges on constitutionally protected rights of her or her parents, could relief be afforded.

The First Amendment of the United States Constitution states that Congress shall make no law prohibiting the free exercise of religion. This amendment applies to the states through the Fourteenth Amendment. Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). With reference to the First Amendment claim in that case, Yoder states that '. . . it must appear either that the state does not deny the free exercise of religious belief by its requirements, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.' 32 L. Ed. 2d at 24. The first part of this analysis evaluates the claims of encroachment on First Amendment rights. 'To have the protection of the Religion Clauses, the claims must be rooted in religious belief' rather than be 'philosophical and personal.' Yoder. In Yoder, the court analyzed in depth the tenets of the Amish faith and found that compulsory attendance laws as applied beyond the eighth grade would have a severe impact on the religious practices of the parties in that case. Thus, the parent and child in Sumter County must show that the child's attending co-ed physical education classes would violate their religious beliefs and would not be merely a matter of personal objection. [2]

An order in a recent case found valid religious objections to a co-educational physical education class. In Moody v. Cronin, Civil Action No. 78-3178 (D Ill. August 13, 1979) two children and their parents objected that the children's seeing members of the opposite sex dressed in 'immodest apparel' in the physical education classes violated tenets of their religion. The district judge reviewed evidence of the tenets of faith of the church to which the parties belonged and found that their objections to 'immodest apparel' was one of 'deep religious conviction' rather that of merely 'personal preference.' Slip Opinion at p. 9. He further found that the degree of exposure of the children to this attire would be more frequent in physical education than in other classes in which the majority of the students wore 'modest clothing' and that the degree of physical and visual contact in physical education would be much greater. He concluded that compulsory

attendance in co-ed physical education classes would be in sharp conflict with the 'fundamental mode of life' mandated by the parties' religion. Slip Opinion at p. 11.

***2** If the parent and child are able to make a valid claim of infringement on their rights of free exercise, as the parties did in Moody, then the State must show an interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. This issue, along with others relevant here, was considered in Moody.

In Moody, the children were required to take physical education under Illinois law and the law provided for no waiver of these requirements. The classes were conducted co-educationally because the school district was attempting to follow Title IX. Although the legal assistant to the State Superintendent of Education was aware of a policy interpretation by the Department of Health, Education and Welfare regarding Title IX which provided for religious exemptions to participation in co-ed classes, he believed that this policy had no effect on Illinois law which did not allow for excusing students from class. The students were not allowed to be, excused from class and that action resulted.

The judge in Moody stated that, if he had to make such a finding, he would find that First Amendment religious freedom is of greater importance than the State's interest in physical education; however, he considered such a determination unnecessary because the State had failed to attempt to achieve its interest in the least restrictive manner. In Moody, the State's interest was in providing a program of physical education [3] and the plaintiffs did not object to taking sex-segregated physical education or individual physical education. According to the judge, these alternatives would satisfy the interests of the State without violating the rights of the children; however, if the State did not have the resources to provide these alternatives or if it felt that doing so would not be in the best interest of the children, the State could exempt the children from physical education. The judge noted that Title IX allowed for religious exemptions, but he stated that neither it nor the Illinois statutes could deny exemptions if their operation resulted in the violation of a person's constitutional rights and they were not justified by a superior interest and were not the least restrictive of the rights impinged upon. Slip Opinion at p. 15.

The Illinois scheme in Moody is comparable to that here in that South Carolina law, without providing exemptions, requires a student to take physical education and the school district here conducts its classes in a co-educational manner. The interests of the State and district here should be similar to those of the Illinois defendants. Thus, Moody indicates that, if the parent and child here have a valid First Amendment objection to the classes as taught which is as strong as that in Moody, then that claim must prevail over any interest of the State and district in requiring the child to attend the co-ed classes. Assuming that the objection here is only to the co-ed nature of the classes, then Moody would offer two alternative means of satisfying the State's interest in the child's taking physical education: providing individual physical education or sex-segregated physical education. [4] If these alternatives would not be within the resources of the district, or if not in the best interests of the child, then under Moody, a court in this State could hold that the child must be exempted from the physical education requirements even though South Carolina law does not provide for exemptions. [5]

***3** This same conclusion should apply to the graduation requirements which include physical education. Enforcement of them would have the effect of compelling the child to take physical education so that she could graduate. Thus, if the child and her parents establish a valid religious objection to co-ed physical education, and alternative classes could not be provided, then a court could hold that the graduation requirement could not be enforced.

Initially, the school district board of trustees might wish to evaluate the religion basis of the claims of the child. If the district board should determine that the claims are valid, it could then consider whether it could provide physical education to the child in an alternative manner which would not conflict with the child's religious views. If no alternatives are possible, then the district board would be faced with two choices: 1) enforcing state requirements for physical education which are facially valid but which might violate First Amendment rights of the child and/or her parent; or 2)

ignoring the state law requirements for physical education and excusing the child from class. No opinion is expressed at this time as to which course of action should be taken by the school district should it be faced with those choices.

Because graduation requirements have been promulgated by the State Board of Education and do not provide for exceptions, that board should approve any action taken with respect to those requirements. No opinion is expressed herein as to what action should be taken by that board if the child establishes a valid religious claim and alternative physical education classes cannot be provided.

If you have any questions or if I can be of further assistance, please do not hesitate to contact me.
Yours very truly,

J. Emory Smith, Jr.
State Attorney

Footnotes

1 Title IX of the Education amendments of 1972, 20 USCA § 1681, et seq., prohibits sex discrimination '. . . under any education program or activity receiving federal assistance . . .' except under certain circumstances. § 1681. Physical education classes may not be conducted separately on the basis of sex, under 45 C.F.R. § 86.34 except in the case of certain contact sports. No opinion is expressed herein as to whether a school district is required to follow § 86.34 when its physical education program receives no federal funding.

2 Because your request for an opinion states that both the child and the child's parents have objected to the classes, no conflict is presented between their claims. The issue of the resolution of such a conflict was noted in the majority opinion in Yoder and discussed at some length in the dissenting opinion of Justice Douglas. Although Moody, infra, noted differing interests between the parents and children in that case (the children's right of free exercise and the parent's right to control the religious upbringing and education of their minor children, citing Yoder), it stated that no actual conflict existed between the wishes of those parties.

3 The Illinois statute sets out the purposes behind the physical education courses. Although South Carolina's law is not so specific, these goals would be compatible with § 59-29-80.

4 Moody did not make clear whether these sex segregated classes would include all students or just those having religious objections. As noted supra, note 1, no opinion is expressed herein as to whether holding all classes in a sex-segregated manner would violate Title IX when the physical education program is not federally funded.

5 No opinion is expressed herein as to what course of action should be taken by the district if the child objects to the co-ed nature of the classes but, at the same time, insists on being allowed to take sex-segregated or independent physical education.

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