OPINION
63-215

May 29, 1963 (OPINION)

SCHOOL DISTRICTS

RE: Religious Instruction

This is in reply to your letter of May 20, 1963, concerning release time for religious instruction.

As you know this office, in an opinion dated March 13, 1962, held that section 15-34-07 of the North Dakota Century Code constituted a release time statute. This was not the first expression of opinion on this matter. On November 29, 1955, this office issued an official opinion to Mrs. Alfred Pack, School Director, Selfridge, North Dakota, which held that section 15-34-07 constituted a release time statute.

As we have pointed out in previous letters and opinions section 15-34-07 cannot be considered as anything but a release time statute. Section 15-34-04(1) of the North Dakota Century Code, as amended, excepts pupils who attend parochial or private schools approved by the county superintendent of schools from the requirements of the compulsory attendance law. It cannot, therefore, be argued that section 15-34-07 is a statute which only permits attendance at a parochial or private school rather than a public school. If section 15-34-07 were not considered a release time statute its purpose would be useless in view of section 15-34-03(1). The Legislature is never presumed to indulge in an idle act.

As you noted in your letter the 1963 Legislature was given an opportunity to determine once and for all whether the public schools of this state can lawfully permit students to be absent from school for a set period week for religious instruction. Two bills were introduced, one definitely stating that release time for religious instruction was to be legalized by statute, and the other prohibiting release time for religious instruction. Neither bill was enacted by the Legislature. Therefore the previous opinions of this office to the effect that section 15-34-07 of the North Dakota Century Code authorizes release time for religious instruction are still in effect. As a matter of fact, the failure of the Legislature to enact a statute governing release time for religious purposes after considering two bills relative to this matter does, by the rules of statutory construction, indicate their acquiescense in the opinions previously issued by this office.

Release time statutes, as such, are not violative of the State or Federal Constitution. See 16 CJS 1044, CONSTITUTIONAL LAW, section 206 (3) and cases cited therein.

You also ask the following questions:

> "Also, if it is lawful, how many hours or minutes may a class

> or a youngster be released from school for religious instruction? Must that religious instruction be off the school grounds and can it be taught by the public school teachers? If not off the school grounds, can religious instruction periods be held in the school building using school district heat and light?"

In reply to your first question, section 15-34-07 provides in part that students may be excused from school attendance for the purpose of preparing a child for religious duties "**for a total period of not exceeding six months in the aggregate, and such period may extend over one or more years." This statute provides that the aggregate time for religious preparation may not exceed six months in the aggregate. Since the required school attendance is established by law, this would mean not more than six months during the entire period of years during which a child is, under the laws of this state, required to attend school.

In reply to the questions of whether the religious instruction can be taught in the school building using school district heat and light, we note the provisions of section 15-35-14 of the North Dakota Century Code, as amended, which provides:

> "USE OF SCHOOL BUILDINGS FOR OTHER THAN SCHOOL PURPOSES - PENALTY FOR REMOVAL OF FURNISHINGS. School boards having charge of school buildings may permit the use thereof under proper restrictions for any appropriate purpose when not in use for school purposes. Equal rights and privileges shall be accorded to all religious denominations and to all political parties. The use of school buildings under this section shall be without cost to the district, and furniture fastened to the buildings shall not be removed or unfastened. Public school and high school auditoriums and gymnasiums may be let for meetings, entertainments, or conventions of any kind, subject to such restrictions as the governing board of the district shall prescribe. Such use of the buildings shall not be permitted to interfere with the operation of the schools or with school activities. A charge shall be made for the use of the buildings in amount at least sufficient to defray any cost to the district for light, heat, janitor service, or other incidental expenses connected with such use. Any person who removes any school furniture for any purpose other than to repair the same or for the purpose of repairing the schoolroom, shall be punished by a fine of not less than five dollars nor more than ten dollars for each offense." (Emphasis supplied)

The language in the above quoted statute clearly indicates an intent on the part of the Legislature to permit the use of school facilities by religious organizations. We are also aware, however, that the Supreme Court of the United States in Illinois v. Board of Education, 68 S.Ct. 461, 333 US 203, 92 L.Ed. 649, (1948), held that a released time arrangement, made between a board of education and a local association of churches, under which pupils, whose parents signed "request cards" were permitted to attend religious instruction classes conducted during regular school hours in the school building by outside teachers furnished by the association, subject to the approval and supervision of the superintendent of schools, attendance

records being kept and reported to the school authorities for these classes in the same way as for other classes, and pupils not attending such classes being required to continue their regular secular studies, was invalid as in violation of the constitutional principle of separation of church and state, as expressed in the Fist Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment to the Constitution. It is difficult to ascertain whether it was the mere fact that schoolrooms were being used which was the factor behind the court's opinion or that fact combined with the supervision and control exercised by the school authorities. The Supreme Court subsequently held that a release time statute in New York was constitutional. See Zorach v. Clauson, 72 S.Ct. 679, 343 U.S. 306, 96 L.Ed. 648 (1952). The Court distinguished the Illinois case on the basis of the facts involved.

However, in view of section 15-35-14, quoted above, we believe the school rooms may be used for religious instruction when not being used for any other purpose. However, the school authority or other school procedure cannot be used in conducting the classes or in requiring attendance. In addition, if the school buildings are used for instruction, such instruction must not interfere with the school activities and a charge must be made in an amount at least sufficient to defray any cost to the school district for light, heat, janitor service or other incidental expenses connected with such use.

With respect to the public school teachers teaching religious classes, we do not believe this is within the intent of our statutes or the State or Federal Constitution. We do not mean to imply that a public school teacher cannot teach religious classes during the time school is not in session. However we do not believe public school teachers may teach religious classes during the time of the day that school is in session. We cannot, of course, dictate the exact factual conditions on which every release time program is to be conducted. It is the function of the school board and the school administrators to establish a program if requested to do so, which will be coordinated with and which will not interfere with the normal educational requirements.

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