OPINION NO. 79-056

Syllabus:

1. Because Ohio's compulsory school attendance law, set forth in R.C. 3321 et seq., permits home-based instruction that meets state requirements, rather than attendance at public schools, the law is not necessarily in conflict with Wisconsin v. Yoder, 406 U.S. 205 (1972), or State v. Whisner, 47 Ohio St. 2d 181 (1976).

2. When confronted with a religiously-based request for exemption from compulsory school attendance under R.C. 3321.04, the local superintendent of schools must apply the three-pronged test enumerated in Wisconsin v. Yoder, supra, and adopted by the Ohio Supreme Court in State v. Whisner, supra—namely: (1) are the religious beliefs sincere? (2) will application of the compulsory school attendance law infringe on the constitutional right to free exercise of religion? (3) does the state have an interest of sufficient magnitude to override the claim of violation of the right to free exercise of religion? If the parent can meet the first two prongs of the test, and if the state fails to meet the third, the exemption must be granted.

3. Pursuant to R.C. 3313.60 and 3321.04, a local board of education may prescribe the course of study for children excused from compulsory school attendance for religious reasons; however, a local board of education does not have the authority to specify guidelines for the exemption of children from compulsory school attendance.

4. R.C. 3321.04 vests the local superintendent of schools with the authority to determine whether a child of compulsory school age may be excused from compulsory school attendance; a determination that a child may be excused must be based upon a judgment by the superintendent that the program of home education proposed for the child will satisfy applicable requirements.

To: Donald L. Lane, Preble County Pros. Atty., Eaton, Ohio
By: William J. Brown, Attorney General, September 18, 1979

I have before me your request for my opinion regarding Ohio's compulsory school attendance law, R.C. Chapter 3321. Your questions were precipitated by a

father's desire to withdraw his two fourteen-year-old sons from a public high school and enroll them in a correspondence course to be completed at home. The father is a member of the Old German Baptist Brethren Church and wishes to have his sons complete their high school education at home in order to avoid violating certain tenets of his church. Your questions are as follows:

1. Must R.C. 3321.01 yield to Wisconsin v. Yoder, 406 U.S. 205 (1972), on the basis of the United States Constitution?

2. If so, does a Board of Education have the right to specify guidelines for the exemption of children and for their correspondence school educations?

The First Amendment to the United States Constitution, as applied to the states pursuant to the Fourteenth Amendment, invalidates any law which prohibits the free exercise of religion by citizens of this nation. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the United States Supreme Court held that the free exercise of religion clause prevented the State of Wisconsin from compelling Amish parents to send their children to public schools through age 16 when such compulsory attendance was in conflict with sincerely-held religious beliefs. Wisconsin v. Yoder does not, however, represent a wholesale invalidation of state compulsory education laws, to wit:

> There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.
>
> . . . .
>
> Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes. . . . (406 U.S. at 213, 236.)

For the reasons stated below, I believe that Ohio's compulsory school attendance law may be interpreted to avoid any constitutional infirmities.

The questions you ask require examination of three sections of the Revised Code which govern the compulsory education of children of school age. The first, R.C. 3321.01, states that "a child between six and eighteen years of age is 'of compulsory school age.' " R.C. 3321.03 requires parents to either send their children of compulsory school age to the public schools or to otherwise "cause [them] to be instructed in accordance with the law." R.C. 3321.04 sets forth the circumstances under which a child may be excused from attendance at the public schools. The statute states in pertinent part:

> Excuses from future attendance. . .may be granted. . .under the following conditions:
>
> (A) The superintendent of schools of the city, exempted village, or county school district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts:
>
> (1) That his bodily or mental condition does not permit his attendance at school or a special education program during such period; . . .
>
> (2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or a special education program or the qualifications of the person instructing the child at home were determined. All such excuses shall become void and subject to recall upon the removal of the disability

> of the child or the cessation of proper home instruction; and thereupon the child or his parents may be proceeded against after due notice whether such excuse be recalled or not. (Emphasis added.)

The statute thus allows the superintendent to excuse a student under two separate sets of circumstances. The superintendent may excuse a child who suffers from mental or physical disabilities or he may excuse a child who is receiving instruction at home from a qualified person. It is the latter situation that is relevant to the questions you have posed.

At first blush, R.C. 3321.04 appears to be geared to personal instruction in the home as an alternate to compulsory attendance at certified schools. If construed as a per se prohibition against the exemption from compulsory school attendance requested in this instance, however, the statute would be in grave danger of offending the free exercise clause. Hence, we are confronted with the well-settled principle of statutory construction that a statute is to be liberally construed as to save it from constitutional infirmities. State v. Sinito, 43 Ohio St. 2d 98 (1975). Therefore, if there is a construction of a statute which will prevent the infringement of any individual's constitutional rights, that construction should be adopted.

R.C. 3321.04 does not specify any particular method by which a child who is excused from attendance at certified schools must receive instruction at home, nor has the state board of education promulgated any guidelines for such a determination.

With respect to the specific situation you have described concerning the use of a correspondence course, it should be noted that the sort of "person" who may administer at-home instruction is not defined specifically for purposes of R.C. Chapter 3321, but that the general definition applicable under R.C. 1.59(C) includes corporations and associations. Hence, a private company offering a correspondence course is not per se an unacceptable alternative method of instruction. Therefore, it is possible that the situation confronting the Preble County superintendent may be resolved without rising to the level of a constitutional conflict.

Furthermore, the statutes would appear to be sufficiently flexible to accomodate first amendment free exercise rights in that the statutes do not preclude the religious beliefs of the parents from being the reason that the parents seek to exempt their child from compulsory school attendance. R.C. 3321.03, by express language, allows for alternative instruction:

> The parent of a child of compulsory school age shall cause such child to attend a school in the parent's school district of residence or participate in a special education program under Chapter 3323. of the Revised Code, or shall otherwise cause him to be instructed in accordance with law. (Emphasis added.)

The term "law" as used in this statute would, of course, include case law that has delineated the constitutional rights of parents who wish to provide instruction to their children at home because of their religious beliefs. Therefore, instruction countenanced under R.C. 3321.04(A), as that statute is construed to meet constitutional requirements, could include instruction that, except for first amendment rights, would not be sanctioned.

When confronted with a religiously-based request for exemption, a superintendent must apply the three-pronged test enunciated in Yoder and adopted by the Ohio Supreme Court in State v. Whisner, 47 Ohio St. 2d 181 (1976). If the test is met, the exemption must be granted.

The Yoder and Whisner cases first call upon the parents to demonstrate that their religious beliefs are sincere or "truly held." Next, the parents must make a showing that the state, in applying its law, infringes on their constitutional right to

the free exercise of their religion. Finally, if these demonstrations are made, it must be determined whether the state has an interest of sufficient magnitude to override the claim of violation.

Let's examine this test in a bit more detail. The initial inquiry as to whether the religious beliefs are "truly held" has nothing to do with the quality or validity of the beliefs but is confined to the question of sincerity, to wit:

> With regard to appellants' assertion that the state's "minimum standards," as applied to them, unconstitutionally interfere with their right to freely exercise their professed religious beliefs, both the Court of Appeals and the Court of Common Pleas committed error in failing to accord the requisite judicial deference to the veracity of those beliefs. Indeed, both courts questioned whether appellants' beliefs were founded upon religious principles, ...
>
> However, at this date and time in the history of our nation, it is crystal clear that neither the validity of what a person believes nor the reasons for so believing may be contested by an arm of the government. As stated in United States v. Ballard (1944), 322 U.S. 78, 86: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." The applicable test was enunciated in United States v. Seeger (1965), 380 U.S. 163, 185, in these words: "* * *that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held'. This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact* * *". State v. Whisner, supra, at 198-199.)

In short, the function of the superintendent when confronted with a religiously-based request for exemption is not to make value judgments on the content of parental religious beliefs. The only question is whether these beliefs are sincerely held.

If the beliefs are sincerely held, the superintendent must next determine whether strict application of the compulsory attendance law would infringe upon the family's free exercise of religion. Under this test, the parents must show that strict application of the law to them would have a coercive effect because of a real conflict between what the law requires, on the one hand, and what their religious tenets require, on the other.

If the parents meet both of these tests, the final question is whether the State can demonstrate an interest which is sufficiently compelling to override the free exercise rights of the applicant. In fact, this is almost a false test because the Ohio Supreme Court has all but eradicated its applicability in the present context, to wit:

> [I] t is difficult to imagine "* * *a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin v. Yoder, supra, at page 214. And, equally difficult to imagine, is a state interest sufficiently substantial to sanction abrogation of appellants' liberty to direct the education of their children. (State v. Whisner, supra, at 218.)

I am aware that a local school superintendent evaluating these issues does not have the same resources that a judge has in the setting of a courtroom. Nevertheless, because these issues do involve factual determinations, a local school superintendent must, of necessity, decide each case on its own merits in determining whether to excuse a child from school for religious reasons under R.C. 3321.03 and R.C. 3321.04(A)(2).

It is apparent that an appropriate balance can be struck between first amendment rights and the state's interest in universal education under Ohio's compulsory school attendance law. Therefore, I conclude that Ohio's compulsory school attendance law is not per se unconstitutional in relation to the factual context presented and can be applied in such a manner to avoid conflict with the constitutional right of this Ohio family to the free exercise of their religious beliefs.

You raise two additional issues in your second question. First, you inquire as to the authority of a local board of education to promulgate rules excusing absences from school. R.C. 3321.04 governs the power of both the state and local boards to issue excuses. R.C. 3321.04(B) provides that the state board of education may promulgate rules allowing the limited excused absence of children who must work for their parents. This is not relevant to the present situation, and in any event the state board has not adopted any rules of that nature. The last paragraph of the statute allows the state board to regulate by rule the issuance of excuses. The state board has not adopted any such rules.

R.C. 3321.04(C) vests the local board of education with authority to adopt rules governing the issuance of excuses as part of their general rules regarding discipline. In an earlier opinion, I concluded that this section relates to day-to-day absences, and is, therefore, inapplicable to long-term absences. 1974 Op. Att'y Gen. No. 74-066. Therefore, for permanent or long term absences the local board of education has no authority to adopt rules excusing students from attendance at a public secondary school; rather, such authority is vested solely in the superintendent pursuant to R.C. 3321.04.

The second part of the question deals with the authority of a local board of education to set standards for correspondence courses used as an alternative for school instruction. Pursuant to R.C. 3313.60 local boards of education have authority to prescribe the course of study for all schools under their control, subject to the approval of the state board of education. (See R.C. 3301.07 for the authority of the state board of education in this area.) This authority apparently extends to correspondence courses taken by children who are to be excused from school, for R.C. 3321.04 makes it clear that the primary criterion in deciding whether or not to excuse a child from school is whether or not the proposed instruction meets the required course of instruction. However, since the superintendent has been given the authority to determine whether or not a child may receive instruction in the home in lieu of formal school instruction, it is the superintendent who must determine whether a particular program proposed for a child will satisfy requirements. Therefore, the authority of local school boards to regulate correspondence courses is limited to establishing the course of instruction under R.C. 3313.60.

The Yoder opinion suggests, at page 236, that the state might reasonably regulate the type of education provided at home for religious reasons:

> The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion. (Emphasis added.)

In order for local board standards for home-based education to be "not inconsistent" with Yoder and Whisner, they will have to be drafted and applied in a flexible manner with respect to children whose home-based education is bottomed upon religious beliefs. In short, such standards should not be applied to the extent that their application would produce an irreconcilable conflict with sincerely held religious beliefs.

Therefore, it is my opinion, and you are advised, that:

1. Because Ohio's compulsory school attendance law, set forth in R.C. 3321 et seq., permits home-based instruction that meets state requirements, rather than attendance at public schools, the law is not necessarily in conflict with Wisconsin v. Yoder, 406 U.S. 205 (1972), or State v Whisner, 47 Ohio St. 2d 181 (1976).

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