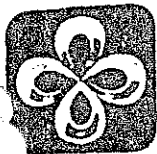


STATE OF IOWA • DEPARTMENT OF PUBLIC INSTRUCTION

GRIMES STATE OFFICE BUILDING • DES MOINES, IOWA 50319 0146



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DECLARATORY RULING #38

(Cite as 1 D.P.I. Dec. Rul. 107)

April, 28, 1986

12.3(b)

Mr. Peter S. Cannon
 CONNOLLY, O'MALLEY, LILLIS,
 HANSEN & OLSON
 820 Liberty Building
 Des Moines, Iowa 50309

Dear Mr. Cannon:

On March 20, 1986, we received your Petition for Declaratory Ruling, filed on behalf of Dowling High School. In your Petition, you establish several facts which were expounded upon in an informal meeting on April 23. Specifically, the points you have made are as follows:

Dowling High School is an approved private school with an enrollment of approximately 1500 students. Students attend on a payment basis with annual tuition currently set at \$1120.00; tuition payments constitute a large portion of Dowling's revenue.

The Dowling St. Joseph's Board of Education has created or approved a contractual form ("Enrollment Agreement") to be signed by the prospective student and his or her parents which includes a provision referencing our rules. To wit:

We further agree that all tuition and charges will be paid under the terms and conditions prescribed by the Dowling/St. Joseph Board of Education, and we understand that no formal release, transcript, or diploma will be given our student until all financial obligations at Dowling are satisfied. We understand that we waive all rights to request said records under 670 Iowa Admin. Code Ch. 3.3(10)(11).

The department rules referred to above read as follows:

3.3(10) Permanent office records of pupils. Each board shall require its administrative staff to establish and maintain an accurate and complete

permanent office record (a pupil record which has a permanent value and which always remains in the files of the school or school district) for every enrolled pupil, and it shall be stored in a fire-resistant safe or vault. A copy of the permanent record shall be sent to the officials of the receiving school when the student transfers to another school.

3.3(11) Cumulative records of pupils. In addition to the permanent office record, the board shall require the instructional guidance, and administrative personnel to establish and maintain a pupil's cumulative record (a continuous and current record of significant information regarding the progress and growth of a pupil as the pupil goes through school, including such information as courses, school marks, scholastic progress, school attendance, family background, physical and health record, experiences, interests, aptitudes, abilities, honors, extracurricular activities, part-time employment and future plans. The cumulative record is used to assist professional school personnel in understanding the pupil). A copy of the cumulative record may be sent to the officials of the receiving school when the pupil is transferred, and such copy shall be sent when the pupil or pupil's parents request the transfer of such records.

Iowa Administrative Code 670—3.3(10) (11) (emphasis added).

These rules apply to all public schools and any nonpublic schools that seek approval from this Department pursuant to Iowa Code chapter 257. You have asserted in your Petition that if Dowling loses its approval status, the school risks an indirect loss of up to \$50,000 annually from state and local funding.

The questions you pose in your petition are as follows:

1. Whether or not the proposed enrollment agreement would jeopardize Dowling High School's standing as an approved school under the rules of the Department of Public Instruction, chapter 670 of the Iowa Administrative Code?
2. Whether or not the Department of Public Instruction could force Dowling High School to release transcripts, cumulative records or other significant information regarding a student who has not performed the obligations contained in [the Enrollment Agreement]?
3. Whether or not Rules 3.3(10) and (11) apply to tuition-based private schools?

4. Whether or not the referenced rules deny Petitioner equal protection of the laws of the State of Iowa or under the United States Constitution?
5. Whether or not the rules, as promulgated, operate to infringe upon the Petitioner's freedom of religion, in violation of the Iowa Constitution and the United States Constitution?

We answer as follows:

1. Yes. An approved school district is subject to loss of approval status, following the statutory period to cure the deficiency. (Iowa Code §§ 257.25(10) (11) (12) (1985)).

2. This Department cannot "force" a nonpublic school to comply with the provisions of the rule pertaining to approved schools. For a nonpublic school, the choice to seek state approval is a voluntary one. Once that decision has been made, the school either complies or, in the absence of full compliance and deficiency cure, will be removed from the approved school list in accordance with the statutory procedure.

3. Rules 670--3.3(10) and (11) apply to all schools seeking approval status. When these rules were proposed, input was sought and obtained from, among others, the Nonpublic Advisory Committee and independent private schools prior to adoption. Clearly, all nonpublic schools seeking Department approval should be aware that the rules in question apply to them with equal force.

4. When a constitutional question is addressed, such as in your questions four and five, we generally decline to comment, believing that the court is the proper forum to identify and resolve questions of constitutionality. However, we will briefly respond for purposes of clarification of the respective positions involved here.

You, as Petitioner, contend that the rules at issue may deny equal protection of the laws to a tuition-based private school. The basic thrust of your argument appears to be that, as a school dependent in part upon the fees collected as tuition, our rules operate to deny your "sole" remedy in cases of default on tuition payments. The argument continues that if Dowling High School cannot withhold transcripts until arrearages are eliminated, the school has no reasonable alternative to coerce payment. Since nonpublic schools are not similarly situated to the public schools (by virtue of direct state and federal funding assistance to the latter), you contend that our rules operate to your financial disadvantage and they do not have a similar negative impact on the public schools.

The equal protection inquiry begins with the question whether the law (or regulation here) claimed to have an adverse impact on a certain class is facially neutral, and if so, whether it was nevertheless adopted with an invidiously discriminatory purpose. The rule in question does not, on its face, make any distinction between public and nonpublic schools; it is, therefore, a "facially neutral" regulation. Further, we can detect no intent to discriminate.

The Department's purpose in adopting the rule was and is to protect the pupils within our borders who seek to transfer schools. Without the permanent and cumulative records, a receiving school is greatly hampered in providing continuity of education to the incoming pupil, and the pupil suffers the consequences. School officials would not be able to conclude definitively that a transferring senior student, for example, will be able to meet the district's or school's graduation requirements if the administration does not have an accurate and reliable record of credits obtained prior to the transfer. This clearly operates to the disadvantage of a transferring student.

Thus, it would appear that the intent of the rules is to protect the transferring student and insure that his or her education continues with a minimum of disruption. We see this purpose as a reasonable basis for adopting the rules and one which does not create an inference of intent to discriminate.

Absent facial discrimination and discriminatory purpose, the next step in the equal protection analysis is whether the class of persons who may experience incidental harm from the operation of the regulation is a "suspect" class. We know of no authority holding that nonpublic schools constitute a "suspect class." If the classification does not burden a suspect class, the state need only show that a rational basis exists for the regulation. We think the protection of a pupil's ongoing education is such a purpose, and so conclude there is no violation of equal protection.

Moreover, there is authority for the basis of these rules in case law. See Valentine v. Independent School District, 191 Iowa 1100, 193 N.W. 434 (1921) (School district could not withhold diploma as disciplinary action against student when graduation requirements were completed); Perkins v. Board of Directors, 56 Iowa 476, 9 N.W. 356 (18) (rule requiring student to make payment for damages or suffer suspension held invalid). An Iowa Attorney General's opinion is also helpful. 1966 O.A.G. 254 (School cannot withhold a student's report cards pending payment of certain dues or educational fee).

In addition, based upon legal contract theories, the tuition agreement proposed by your Board is enforceable against the parents of the student, but not against the minor student. (A contract with a minor is voidable; Iowa Code § 599.2(1985). See also Iowa Code § 597.14; § 613.16.) In a sense, the student is a third party beneficiary to the contract between the parents or guardians and the Dowling/St. Joseph Board. Our rules have, among other objectives, the implicit tenet that a student should not be penalized for the parents' inability to pay a fee or fine.

Although public schools do not collect tuition on resident students, many nonresidents pay to attend in other districts. Consequently, the same provisions apply to public schools serving nonresident students as apply to tuition-based schools. The public school cannot withhold credit or records for nonpayment and remain in compliance with our standards. Outstanding unpaid fees, including library fines or broken equipment replacement costs also fall under this category and the public schools are without the withholding remedy just as your school is. It is clear the rules operate no differently when applied to public and nonpublic schools.

Finally, we must also point to the voluntariness of seeking approval from the state. Although we do not question the advantages approval status brings to the nonpublic school, the fact remains that the choice to seek approval is a voluntary one. Iowa laws do not require approval for parochial and other nonpublic schools as they do for public schools.

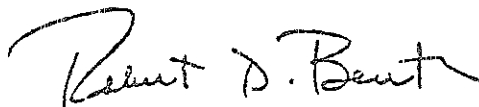
5. We are also disinclined to address the constitutional question of infringement of first amendment freedoms. It is not clear from your Petition whether you are raising a "free exercise" argument or an "establishment clause" argument, but we will assume for the purposes of this Ruling that the former clause is potentially at issue here.

We think that the voluntariness of a nonpublic school's decision to seek approval is dispositive of the issue of unconstitutional infringement. Nevertheless, in determining whether a particular governmental action would run afoul of the First Amendment, the inquiry revolves around whether the acts in question are "intended to interfere with religious beliefs and practices or have the effect of doing so." Walz v. Tax Commission, 397 U.S. 664, 669 (1970). Neutrality is the goal.

Wisconsin v. Yoder teaches us that the initial step in a free exercise analysis is whether the regulation in question impinges, burdens, or chills the free exercise of sincerely held religious beliefs. If there is no burden, the regulation is upheld. If a burden is found, then the court will apply a balancing test to determine whether the state has a compelling interest in the regulation sufficient to override the burden.

In our opinion, nothing in the rules at issue today interferes with the religious beliefs and practices of Dowling High School. The need for security or a secured interest to discourage a breach of a tuition contract does not, in our view, even touch upon religious beliefs or practices. Nothing in the above stated intent of the rules even whispers of lack of neutrality. If Dowling is forced to take parents to court, Small Claims or otherwise, or to find an alternative to their contemplated practice of securing payment by withholding grades or diplomas, that is not a religious issue, but a contractual, administrative, and fiscal oriented decision. We correspondingly answer your fifth question in the negative.

Sincerely,



Robert D. Benton, Ed.D.
Commissioner of Public Instruction

RDB:tag-d