



February 9, 2010

Commissioner Larry LeDoux
Department of Education and Early Development
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STUDENT ADVISORS

Dear Mr. LeDoux:

I am writing to you to request that the Department of Education and Early Development provide alternative testing dates for Russian Old Believer students eligible to take the High School Graduation Qualifying Exam (HSGQE) in the spring of 2010. Currently, the HSGQE is scheduled for the dates of April 6-8, 2010. Those dates fall during Holy Week for Russian Old Believer students, who follow a slightly different religious calendar from many other Christian sects.

Providing an alternative date for testing those students would permit a group of young Alaskans to complete their graduation requirements without conflict with the practice of their religion. The difficulty of accommodating eligible students with an alternative testing date either before or after the Old Believer Holy Week would not rise to a compelling state interest.

1. The Federal Free Exercise Clause Guarantees Russian Old Believers the Right to a Testing Schedule That Does Not Conflict with Religious Observance

The state's interests must bend in some cases in the face of conflict with sincere religious belief. In a seminal case, the United States Supreme Court ruled that the state of Florida could not refuse to award unemployment benefits to a woman who had been fired from her previous employment because she refused to work on the Sabbath. *Hobbie v. Unemployment Comm'n of Fla.*, 480 U.S. 136 (1987). The Court stated that a state may not "condition receipt of an important benefit on conduct proscribed by a religious faith. . . ." *Hobbie*, 480 U.S. at 140. Such impositions by the state upon religious practice have to be justified by "compelling state interests" to pass constitutional review. *Id.* The modest inconvenience to the state of providing alternate testing dates for Old Believer students will not likely qualify as a compelling state interest.

One federal court has specifically addressed the issue of graduation prerequisites that conflict with religious holidays. In *Smith by Smith v. Board of Education, North Babylon School District*, the federal appeals court for the Second Circuit held that the rights of an Orthodox Jewish student were not infringed when his high school graduation was scheduled for a Saturday, the student's Sabbath. 844 F.2d 90 (2d Cir. 1988). The court rested its decision on the fact that the school district only forced the student to choose between participation in the ceremony and his religious practice; the court took pains to note that the school was *not* forcing the student to choose between completing a prerequisite for a high school diploma and practicing his religion. *Id.* at 93. The court specifically said that such a requirement would likely run afoul of the First Amendment guarantee of free exercise of religion. *Id.*

For any seniors who have not yet passed the HSGQE, the only opportunity that the Department of Education and Early Development leaves them would be to wait until the fall, receiving no diploma, and take the HSGQE then. For other students, the scheduling of the exam will diminish the number of opportunities to pass the exam and will place them at a disadvantage relative to other students who would have a full and fair opportunity to complete the graduation requirements. Russian Old Believer students who wish to observe Holy Week would, depending on their age, either be denied the opportunity to graduate on time or would see their limited opportunities to take the HSQGE diminished.

2. The Free Exercise Clause of the Alaska Constitution Also Guarantees the Students the Right to an Alternate Date for Testing

The Alaska Free Exercise Clause is even more expansive in its protections of the religious citizen from coercion from the state. *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969) (“We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution.”). The Alaska law on religious freedom states that “to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief.” *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280–81 (Alaska 1994)

The individual meeting those requirements may only be forced to meet the state's otherwise neutral law when noncompliance would mean a “‘substantial threat to public safety, peace or order,’ or where there are competing governmental interests ‘of the highest order and ... [are] not otherwise served...’” *Id.* There is no question that the Russian Old Believer students are sincere in their beliefs, that the Russian Old Believer religion is a real religion, or that the tenet of Old Believers that one should not work or attend school during Holy Week is a sincere belief. As stated before, neither the convenience of the state nor the test-security concerns related to creating an alternate testing schedule should constitute a government interest “of the highest order.”

3. The Right to Education for All Alaskan Children Cannot Be Infringed

The Alaska Constitution guarantees to children the right to an education through “a system of public schools open to all children of the State.” Alaska Const., Art. VII, Sec. 1; *see also Hootch v. Alaska State School Sys.*, 536 P.2d 793, 799 (Alaska 1975) (construing the education provisions of the state constitution to include an individual right for school-aged children to obtain an education).

“[A]ll children” means just that – every child must have access to the educational system. Not only must every child be admitted to the school system, but each child must benefit from the system, including the opportunity to graduate from high school. The provision of the Alaska Constitution guaranteeing the right to education relied in part on the systematic denial of equal educational opportunities to particular groups of children within the state, usually based on their ethnicity or race. *See Hootch*, 536 P.2d at 800-01. The *Hootch* court analyzed the intent of the drafters of the Alaska Constitution particularly in light of the diversity of the Alaskan population and contrasted the “open to all” language in the Alaska Constitution with the language in other state constitutions describing a “uniform school system.”

“The phrase ‘open to all’ appears in lieu of the customary uniformity requirements. It seems likely that the drafters of the constitution had in mind the vast expanses of Alaska, its many isolated small communities which lack effective transportation and communication systems, and the diverse culture and heritage of its citizens. Since educational programs may well require special design to confront the divergent problems presented, a uniformity requirement in the Alaska education system might well prove unworkable.” *Hootch*, 536 P.2d at 803.

The Russian Old Believer students – along with the Alaska Native students addressed in *Hootch* – are precisely those members of “isolated small communities” with a unique “culture and heritage” whose educational needs require “special design” by the state. A refusal to institute an alternate testing date would prioritize “uniformity” and create difficulties for the students who seek to follow sincere religious beliefs. The Department should follow the court’s guidance and recognize that preserving the unique cultures of the citizens of Alaska requires a multi-faceted approach.

4. Request for Accommodation for Old Believer Students

We understand that the Kenai Peninsula Borough School District has brought this problem to your attention and filed several official requests for waivers for Old Believers in their communities. Our understanding is that the state’s response up to this point has been to reject these requests for accommodation. Considering the extensive efforts already made, we would request you to grant a waiver to Russian Old Believer students throughout the state and designate procedures for scheduling alternate testing dates for Old Believer students.

Commissioner Larry LeDoux, Dep't of Ed. and Early Development
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We hope to receive a reply to our request by February 22, 2010.

Sincerely,

Thomas Stenson
Staff Attorney
ACLU of Alaska Foundation

CC: Daniel Sullivan, Attorney General, State of Alaska