STATE OF KANSAS

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March 9, 1978

ATTORNEY GENERAL OPINION NO. 78-117

The Honorable Joseph C. Harder
Chairman
Senate Education Committee
3rd Floor - State Capitol
Topeka, Kansas 66612

Re: Schools--State Aid--Establishment of Religion

Synopsis: 1978 House Bill 2102, providing for distribution of monies from the state safety fund to nonpublic schools violates the Establishment Clause of the First Amendment of the United States Constitution.

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Dear Senator Harder:

You inquire concerning 1978 House Bill 2102, which proposes to amend K.S.A. 8-272 concerning distribution of the state safety fund created by K.S.A. 8-267. As amended any "public or nonpublic school accredited by the state board of education conducting an approved course in driver training" shall be entitled to participate in the fund. You inquire whether the proposed amendment would violate either the First and Fourteenth Amendments to the United States Constitution, Article 7 of the Kansas Bill of Rights, and Article 6, § 6(c) of the Kansas Constitution.

Under the bill, moneys in the state safety fund shall be distributed to the respective schools on order of the State Board of Education

> "in the ratio that the number of pupils in each school in attendance for such complete courses bears to the total number of pupils

> in all schools in attendance for such complete courses . . . ."

The amendment further states thus:

> "No moneys in the state safety fund shall be used for any purpose other than that specified in this section or for the support of driver improvement programs. The state board of education shall prescribe all forms necessary for reporting in connection with this act."

The bill must be viewed in light of the First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, that "Congress shall make no law respecting an establishment of religion." In reviewing various forms of state assistance to nonpublic students and schools, the United States Supreme Court has applied a three-pronged test, articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 745, 91 S. Ct. 2105 (1971).

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion." 403 U.S. at 612-613.

In *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1946), the Court upheld a New Jersey law authorizing reimbursement to parents of both public and parochial students of monies expended by them for the transportation of their children to both public and private schools:

> "[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. . . . The State

> contributes no money to the [parochial] schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 17, 18.

In *Board of Education* v. *Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968), the Court upheld a New York statute which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending private parochial schools:

> "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose [to further the educational opportunities available to the young]. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, . . . in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243-244.

In *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973), the Court held invalid provisions for direct money grants from the state to be used for the maintenance and repair of school facilities and equipment, relying in important part on the fact that the payments were not restricted to the upkeep of facilities used exclusively for secular purposes.

In *Meek* v. *Pittenger*, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975), the Court reviewed certain Pennsylvania laws designed to furnish assistance to nonpublic church-related elementary and secondary schools. The forms of assistance were two-fold. First, it authorized the furnishing of "auxiliary services" to all children residing in nonpublic elementary and secondary schools meeting the state's compulsory attendance requirements. The "auxiliary services" included

> "counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, 'and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.'"

Secondly, the Secretary of Education was authorized to lend directly to nonpublic schools "instructional materials and equipment," which were defined to include maps, charts, sound recordings, films, projection equipment, recording and laboratory equipment, and other materials as well.

Although the Court upheld the textbook loan provisions, it held invalid the remaining assistance described above, stating in part thus:

> "It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. . . . But the massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental." 421 U.S. at 364-365.

Although the aid of equipment and materials is facially neutral and nonideological, the Court concluded that this form of direct aid inescapably resulted in direct and substantial advancement of the religious educational mission of the church-related schools. The benefits derived from the equipment and materials constituted a material enrichment of the schools' resources, the application of which could not reasonably be viewed as limited exclusively to the sectarian educational programs of the schools.

Concerning the auxiliary services, which would be furnished by public employees rather than employees of the church-related schools in which they would work, the Court likewise found an impermissible advancement of religion:

> "The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' . . . And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities. . . . [Auxiliary services personnel] are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious beliefs is constantly maintained. . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S. at 370-372.

In *Wolman v. Walter*, 433 U.S. 229, ___ L. Ed. 2d ___ (1977), the United States Supreme Court reviewed an Ohio act authorizing various forms of assistance to nonpublic and church-related elementary and secondary schools: loans of textbooks which were approved for use in public schools to nonpublic school students; the expenditure of public funds to supply nonpublic school students with standardized tests and scoring services which were in use in the public schools to measure students' progress in secular subjects; furnishing speech and hearing diagnostic services to pupils attending nonpublic schools; furnishing therapeutic, guidance

and remedial services relating to psychology, speech, hearing, guidance and counselling, to all students, including the deaf, blind, emotionally disturbed, crippled and physically handicapped students, all by public employees and not by private school personnel; furnishing instructional material and equipment; and furnishing of funds for school trips. The Court invalidated provisions for field trips and furnishing instructional materials and equipment to nonpublic schools, and upheld the remaining kinds of assistance.

Under the three-pronged test quoted from *Lemon v. Kurtzman, supra,* the amendment may be viewed as serving a legitimate secular legislative purpose, the promotion of driver training and improvement available to all students equally, whether in public or private schools, in the interests of public highway safety. Secondly, nothing in the statute belies an "excessive government entanglement with religion." Indeed, it suggests no entanglement whatever. Lastly, it may be argued, certainly, that aid to driver education neither advances nor inhibits religion. It is on this score, however, that the amended bill is most questionable. The payments authorized by amended House Bill 2102 are made directly to nonpublic schools, as well as public schools. Although the monies must be used only for the support of approved courses of driver training, and will be applied presumptively to the purchase and rental of equipment, and payment of teaching and support personnel, there is no provision for enforcement of this use restriction, for overview or audit of the expenditures, or for sanctions in the event the monies are applied to other uses. Moreover, the payments result in a direct enrichment of the recipient nonpublic schools. We have no information or factual data concerning the nature of the nonpublic schools in this state. We assume, for the purposes of this opinion, that the preponderance of private secondary schools in which driver education is furnished are sectarian schools. Under *Meek v. Pittenger, supra,* when direct aid, even though earmarked for secular purposes, flows to educational institutions in which religion is so pervasive that a substantial portion of its functions are involved in its religious mission, that aid may have the impermissible primary effect of advancing religion. The direct state aid which might flow to such schools under the bill may not be "massive," as in *Meek v. Pittenger, supra.* The quantum of aid is not, however, a measure of validity under the First Amendment.

In support of the bill, it may be argued, as the Court has consistently stated, that a state may include church-related schools in programs furnishing bus transportation, school lunches, public health facilities and the like, which are secular and nonideological services unrelated to the primary, religious-oriented

educational function of the sectarian school. The "indirect and incidental benefits" to church-related schools from those programs do not offend the constitutional prohibition against the establishment of religion. Thus, the state may provide support for a broad class of general welfare services for children attending both public and private schools, regardless of the incidental benefit that accrues to church-related schools. Here, however, the benefits which nonpublic schools receive under the act are neither incidental nor indirect. The amended bill provides specifically for direct aid, and the entire purpose of the amendment is to make such aid directly available to nonpublic schools, a preponderance of which we assume to be church-related secondary schools, for the support of one component of their educational curriculum, *i.e.*, driver education and improvement. The secular nature of those courses does not negative the apparent result of the bill to enrich in a not unsubstantial measure the financial resources of a number of schools with a pervasively religious character to be devoted to the support of their various educational programs.

Viewing the act thus, it is my judgment that state aid from the school safety fund which would be paid to nonpublic church-related schools under 1978 House Bill 2102 if enacted would violate the establishment clause of the First Amendment of the United States Constitution. Accordingly, it is unnecessary to reach the further questions raised under § 7 of the Kansas Bill of Rights or Article 6, § 6(c) of the Kansas Constitution.

Yours truly,

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CTS:JRM:kj