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ATTORNEY GENERAL OPINION NO. 82- 51

Honorable Paul "Bud" Burke
State Senator, Ninth District
Room 143-N, State Capitol
Topeka, Kansas

Re: Schools--Boards of Education--Lease of School
Buildings By Religious and Other Organizations

Synopsis: If a board of education permits school buildings of the district to be leased by numerous non-school related groups and organizations when those buildings are not in use for school purposes, the board has created a forum generally open for use by such groups and organizations. Having created this open forum, the board cannot exclude a group or organization on the basis of the religious content of the group's intended speech. Such an exclusion is not justified as maintaining separation of church and state under the Establishment Clause of the First Amendment to the United States Constitution. Cited herein: K.S.A. 72-8212, U.S. Const., Amend. I.

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Dear Senator Burke:

You seek our opinion on whether the refusal of a board of education to lease a public elementary school building to a religious organization for the purpose of conducting worship services therein during noninstructional hours, when the board permits various other groups to lease the building, violates the constitutional rights of the members of the church, guaranteed by the First Amendment to the Constitution of the United States.

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You explain that the board of education involved in this matter has adopted rules and regulations, pursuant to the authority granted in K.S.A. 72-8212, allowing the use of school buildings, when those school buildings are not in use for school purposes. Those rules and regulations, in part, provide:

"School facilities are provided by taxpayers of the District for the primary purpose of meeting the educational needs of students. School activities shall have first priority for facility use. When school facilities are not in use for school programs, they may be made available at reasonable times and reasonable rates to recognized community organizations whose activities are of general interest to the community and whose use of the school facility is for a community purpose. 'Community purpose' includes but is not necessarily limited to educational, cultural, political, and recreational activities generally open to the public at large. No group or organization shall be allowed to use school facilities for private profit-making purposes. School-related organizations, such as parent-teacher associations, shall have priority over non-school related organizations" (Emphasis added.)

The rules and regulations define three categories of organizations, i.e., (1) school related groups or organizations, such as the parent-teacher association; (2) non-school related organizations, including "political parties" and "groups and organizations requiring membership fees, special fees and/or monthly dues, and which are generally organized for the purpose of offering their participants and spectators certain recreational programs or other programs for community betterment," including "the YMCA, YWCA, home associations, church organizations [non-religious meetings], and other such organizations"; and (3) "[a]ny group or organization . . . not meeting the definition of any of the aforementioned categories" (Emphasis added.)

The rules and regulations also specify that no charge shall be required of school related groups or organizations, while other groups or organizations are charged rental rates or fees prescribed in the rules and regulations. The rules and regulations also state:

"In addition to any of the above rates, the school administration reserves the right to increase same for the purposes of air-conditioning, security guards, additional

custodial requirements, school district administration requirements, or other specifics which are not within the policy rates but are necessary for the protection of school property and those in attendance."

From the provisions of the rules and regulations relating to the fees to be charged for the use of the school facilities by non-school related groups or organizations, it is quite clear that the school district will receive rental amounts in excess of the amount necessary to fully compensate the district for all expenses incurred in allowing the use of the school facilities. In short, no cost is incurred by the school district or, consequently, by the taxpayers of the school district, in allowing the use of the school facilities.

Finally, the rules and regulations expressly provide that school facilities shall not be rented to non-school groups before 5:00 P.M. on school days.

You explain that, in the past, the board of education has steadfastly refused to allow the rental of any of the school facilities to various religious groups, including "Youth for Christ" and "Jehovah Witnesses," on the grounds that such action would violate the doctrine of separation of church and state embodied in the First Amendment to the Constitution of the United States.

Recently, an organized church, having no church building in which to hold its religious services, made application to the school district to lease one of the elementary school auditoriums for the purpose of conducting therein the religious services of the church. The school district, consistent with its longstanding policy, denied the request on the basis that no religious services may be conducted in public school buildings. You ask whether the board's refusal to lease these school premises to the church, for the purpose of conducting religious services in those premises, violates the First Amendment rights of the members of the church, since the board leases these facilities to other, various groups.

We note, initially, Spencer v. School District, 15 Kan. 259 (1875), wherein the Kansas Supreme Court said: "The public school-house cannot be used for any private purposes. . . . The use of a public school-house for a single religious or political gathering, is, legally, as unauthorized as its constant use therefor." Id. at 262-263.

However, we also note that in 1876, the legislature enacted a law specifically allowing the use of school buildings for purposes other than education. Therefore, the Spencer case is noted only for its historic value and we note the board has the authority to lease school facilities for use by non-school related organizations, when those facilities are not being used for school purposes, under the authority of K.S.A. 72-8212.

Having discussed this preliminary matter, we turn our attention to resolution of the question posed. In essence, that question resolves to whether the doctrine of separation of church and state, embodied in the First Amendment to the Constitution of the United States, prohibits the board of education from leasing school facilities to religious organizations, during non-instructional hours, for the purpose of conducting religious services in those facilities, although various other groups are allowed to lease those facilities, including "church organizations" so long as the church organization plans to conduct a "non-religious meeting." (The words in quotations are used in the Board's rules and regulations.)

The facts presented in this matter are quite similar, with one major exception, to those involved in Widmar v. Vincent, U.S. _____, 50 USLW 5062, Case No. 80-689, decided December 8, 1981. This case involved the University of Missouri at Kansas City, a state university. The University, pursuant to a written policy, made its facilities generally available for the activities of student groups who had registered with the University. A registered student religious group, that previously had received permission to conduct its meetings in University facilities, was informed that it could no longer do so, because of a University regulation prohibiting the use of University buildings or grounds "for purposes of religious worship or religious teaching." Member of this religious group, "Cornerstone," brought suit in federal district court challenging the University's regulation. Among other things, the students alleged that the regulation unlawfully discriminated against those student groups who engaged in religious activity and discussion and, therefore, violated the student's rights of freedom of speech and equal protection of the laws under the First and Fourteenth Amendments to the U. S. Constitution.

The Federal District Court, in its decision, Chess v. Widmar, 480 F.Supp. 907 (WD Mo. 1979), found that the regulation not only was justified, but was required by the Establishment Clause of the First Amendment, which states: "Congress shall make no law respecting an establishment of religion"

The decision was appealed to the Court of Appeals for the Eighth Circuit. The Court of Appeals reversed the decision of the district court. Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980). The Court of Appeals viewed the regulation as a "content-based" discrimination against religious speech, for which the Court could find no justification. The Court of Appeals specifically held that the Establishment Clause does not prohibit "a policy of equal access," under which facilities are made available to groups and speakers of all kinds. 635 F.2d at 1317. On December 8, 1981, the Supreme Court of the United States affirmed the decision of the Court of Appeals, stating:

"Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create a forum in the first place. See, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, 'where the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

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"Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S.Ct. 2559 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948). In order to justify discriminatory exclusion

from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See Carey v. Brown, 447 U.S. 455, 461, 464-465 (1980)." (Footnotes omitted and emphasis added.) 50 USLW at 4063-4064.

In the case, the University attempted to show a "compelling state interest," by claiming that the University could not allow the use of its facilities by religious groups and speakers for "religious worship and religious speech," on the same terms as it allowed those facilities to be used by other groups, because such action was prohibited by the Establishment Clause. In rejecting this claim, the Supreme Court said:

"We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: 'First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster "an excessive government entanglement with religion."' Lemon v. Kurtzman, 403 U.S. 601, 612-613 (1971). See Committee for Public Education v. Regan, 444 U.S. 646, 653 (1980); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748 (1976).

"In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the 'primary effect' of advancing religion.

"The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See Healy v. James, 408 U.S. 169 (1972). In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

"We are not oblivious to the range of an open forum's likely effects. It is possible--perhaps even foreseeable--that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion. Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973); see, e.g., Roemer v. Board of Public Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1972); McGowan v. Maryland, 366 U.S. 420, 422 (1961).

"We are satisfied that any religious benefits of an open forum at UMKC would be 'incidental' within the meaning of our cases. Two factors are especially relevant.

"First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy 'would no more commit the University . . . to religious goals,' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities. Chess v. Widmar supra, at 1317.

"Second, the forum is available to a broad class of non-religious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. See, e.g., Wolman v. Walter, 433 U.S. 229, 240-241 (1977); Committee for Public Education v. Nyquist, supra, 413 U.S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits

to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.' Roemer v. Maryland, 426 U.S. 736, 747 (1976) (plurality opinion); quoted in Committee for Public Education v. Regan, 444 U.S. 646, 658, n. 6 (1980). At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.'" (Footnotes omitted and emphasis added.) 50 USLW at 4064-4065.

The Supreme Court concluded by saying:

"The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards." 50 USLW at 4066.

We have quoted the Widmar decision at such great length because, in our judgment, the facts of that case are very similar to the facts of this case. Specifically, the board of education involved here, like the University of Missouri at Kansas City (UMKC), allows the use of its facilities by a wide variety of organizations and groups. The board's rules and regulations specifically mention "the parent-teacher association," "parent clubs," "political parties," and "groups and organizations . . . offering their participants and spectators certain recreational programs or other programs for community betterment, [including] the YMCA, YWCA, homes associations, church organizations (non-religious meetings), and other such organizations." In addition, the board's rules and regulations speak of "[a]ny group or organization requesting the use of school facilities and not meeting the definition of . . . [either of two categories of groups or organizations established in the rules and regulations for rental rate purposes] will be assigned in a special, specific category with rental rates assigned by the administrative staff." Therefore, it is clear the board of education allows the use of its facilities by a wide range of non-school related groups and organizations, including "church organizations (non-religious meetings)."

From this fact, it is evident the board of education "has created a forum generally open for use" by many groups and organizations, including political parties and church organizations, so long as the church organizations plan to conduct non-religious meetings. The "open forum" is the school district facilities, when those facilities are not in use for school purposes, specifically after 5:00 P.M. on any school day, and at "reasonable times" on non-school days. Having created this forum, it is incumbent upon the board to justify its exclusion of any group from the use of the forum. Here, like in Widmar, the governing body of a public agency is discriminating against particular groups (i.e., "church organizations"), based upon the desire of those groups to use a generally open forum to engage in religious worship and discussion. Such worship and discussion, however, are forms of speech and association protected by the First Amendment. Widmar, supra. Since this action is based upon what may be said by the group, only a compelling state interest can justify that action. Here, again as in Widmar, the justification alleged is the Establishment Clause of the First Amendment to the United States Constitution.

This claimed justification cannot be rejected solely on the basis of the Supreme Court's decision in Widmar. We have stressed that while the facts of that case are very similar to the facts presented here, there is one major difference. That difference is the fact we are here concerned with the use of public elementary school facilities, not the facilities of a state university. As was said by the District of Columbia Circuit Court of Appeals in O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979):

"Because of their [elementary and secondary schools'] central and delicate role in American life, and because of the unique susceptibility of their captive audience, children, to coercion, the public schools have a special insulation from religious ceremony. Different considerations apply to colleges and universities, where the likelihood of coercion is less, and to other forums where free exercise values demand accommodation of religious belief." (Footnotes omitted and emphasis added.) Id. at 936.

The "delicate role" of public elementary and secondary schools is recognized in all the cases of the United States Supreme Court involving religious activities within the public schools, during the school day. See, e.g., Engle v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); and McCullum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed.2d 649 (1948).

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Also, one of the "factors" the Supreme Court relied upon in Widmar to conclude that religion would be benefited only "incidentally" by a policy of equal access was that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices." (Emphasis added.) 50 USLW at 4065.

Thus, we are of the opinion that Widmar v. Vincent, supra, is not, by itself, conclusive of the question you pose. In this case, consideration must be given to the fact the "public forum" provided is the public elementary and secondary schools. In this case, therefore, it must be determined whether the exclusion of religious organizations from use of the school buildings for the purpose of conducting religious services in those buildings is justified, by serving the compelling state interest of maintaining separation of church and state.

We find no United States Supreme Court case where the issue presented is the same as the issue presented here. However, we have found two state supreme court decisions, one from the State of New Jersey and one from Florida, where the court was called upon to answer this issue. In both cases, the high courts concluded that the Establishment Clause of the First Amendment did not prohibit the temporary use of public schools by religious organizations for the purpose of conducting religious worship services in the schools. The New Jersey case is Resnick v. East Brunswick Tp. Bd. of Ed., 77 N.J. 88, 389 P.2d 944 (1978), and the Florida case is Southside Estates Bapt. Church v. Bd. of Trustees, 115 So.2d 697 (Fla. Sup.Ct. 1959). Again, the high courts of these two states upheld such use, although in the Florida case, the record did not indicate whether any rent was paid, and in the New Jersey case, rental charges approximated only the cost of janitorial services.

We have reviewed those cases quite carefully and, frankly, are not persuaded by the logic employed by those courts to sustain the use of the school buildings, for neither case addresses what we perceive to be the paramount consideration in resolving whether a compelling state interest exists to deny religious organizations the right to lease school buildings on the same basis as other organizations are allowed to lease such buildings.

This paramount consideration is whether a policy of allowing religious organizations and numerous other groups to lease school facilities during evening hours and on weekends indicates the state has placed its imprimatur on religion, and thus, impermissibly advances religion, or whether such a policy of equal access merely accomodates religious interests to the same extent that secular interests of other organizations are accomodated.

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The fundamental concern running through all the United States Supreme Court decisions which have invalidated religious activities in the public schools or state aid to religious organizations is well stated in Brandon v. Board of Ed. of Guilderland Cent. Sch., 635 F.2d 971 (1980), cert. denied _____ U.S. _____, 50 USLW 3486 (1981), where the Court states:

"Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. See Roemer v. Board of Public Works, supra, 426 U.S. at 750, 764, 96 S.Ct. at 2346, 2353 (1976); Abington, supra; Engel, supra; Chess v. Widmar, supra, 635 F.2d 1310; Tribe, supra § 14-5 at 825. An adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school. O'Hair v. Andrus, 613 F.2d 931, 936 (D.C. Cir. 1979) Leventhal, J.). Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, 'Tis Education forms the common mind./Just as the twig is bent, the tree's inclin'd.' (Epistle to Lord Cobham)." Id. at 978.

Thus, our paramount concern is whether a policy of equal access to school facilities during non-school hours by various groups, including religious organizations, creates misconceptions in the minds of children over the appropriate roles of church and state, and leaves those children with the impression that the state has placed its imprimatur on religious activities.

Our concern is dissipated by two considerations. First, as noted in Brandon: "The semblance of official support is less evident where a school building is used at night, as a temporary facility by religious organizations, under a program that grants [equal] access to all charitable groups" (emphasis added, 635 F.2d at 978-979), than is present when those facilities are used for religious activities during the school day, while children are in a "captive audience" setting.

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Secondly, and more importantly in our judgment, is the fact our schools do "play the unique role of transmitting to our youth basic and fundamental values" of democracy and fundamental principles under our constitution. Brandon, supra, at 978.

One of the fundamental principles to be transmitted is that religion must be protected from "the corruptive influences of secular statism," while at the same time, "the state" must be protected from domination and control by "the church." Brandon, supra at 974-975. To ensure that both the state and religion prosper, the framers of the Constitution wrote the Establishment and Free Exercise clauses of the First Amendment. These clauses were enacted so both religion and the state would be "freed from the undesirable effects each presented to the other." Id. However, these clauses do not require that the government be hostile toward religion. They require only that the government maintain a "policy of neutrality toward religion." Tilton v. Richardson, 403 U.S. 672, 685-686, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

Another fundamental principle to be transmitted to our youth is the fact our constitution provides equal rights to all persons to freely associate with others and to freely express thoughts and ideas, although those thoughts and ideas are rejected by "the majority."

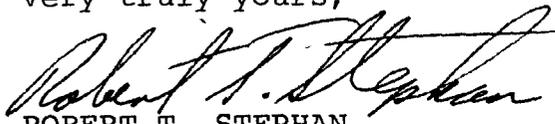
Now, we ask, are these principles instilled in our children under a policy that discriminates against certain groups solely on the basis of what those groups say, or are these principles inculcated through a policy of equal treatment for all groups. We believe the scales weigh heavily in favor of the latter policy.

When the foregoing consideration is coupled with the fact that the semblance of state support for religion is minimal under a policy of equal access to school facilities at periods of time not reasonably connected with instruction during the school day, we perceive no compelling state interest to justify a board of education excluding religious organizations from the privilege of leasing school buildings on the same terms and conditions as other non-school related groups are allowed to lease those buildings, particularly when such exclusion is invoked only if the group intends to conduct "religious meetings." Such an exclusionary policy is "content-based" discrimination, which discrimination,

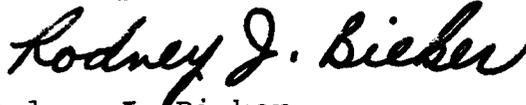
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in our judgment, cannot be justified on the basis of a compelling state interest. Therefore, we conclude that such a policy cannot be followed.

Very truly yours,



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Attorney General of Kansas



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