



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

April 20, 1992

ATTORNEY GENERAL OPINION NO. 92- 55

The Honorable Rick Bowden
State Representative, Ninety-Third District
State Capitol, Room 281-W
Topeka, Kansas 66612

The Honorable Richard Rock
State Senator, Thirty-Second District
State Capitol, Room 401-S
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Bill of
Rights--Religious Liberty; Voucher System Program;
Sectarian Schools; Constitutionality

Constitution of the State of Kansas--
Education--Finance; Voucher System Program;
Sectarian Schools; Constitutionality

Synopsis: The three versions of the voucher system program
proposed by the legislature permit sectarian
schools to obtain reimbursement of the vouchers by
the state board of education, thereby resulting in
a violation of section 7 of the bill of rights of
the Kansas constitution and section 6 of article 6
of the Kansas constitution. The voucher system
program as proposed is unconstitutional. Cited
herein: Kan. Const., Bill of Rights, § 7; Kan.
Const., art. 6, § 6; U.S. Const., Amend I.

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Dear Representative Bowden and Senator Rock:

As legislators for your respective districts, you request our opinion regarding the constitutionality of legislation which establishes a voucher system program for purposes of acquiring educational services. Varying versions of the program have been proposed in 1992 House Bill No. 2853, 1992 Senate Bill No. 633, and 1992 Senate Substitute for House Bill No. 2892.

Under all three versions of the voucher system program the parents of a program eligible child may receive upon request a voucher from the state board of education. The voucher may be exchanged for the provision of educational services at a participating school selected by the child's parents. Any school that enters into the appropriate agreement with the state board of education is a participating school. All public schools except those excluded by the state board of education are required to become participating schools. Any nonpublic school which is accredited by the state board of education and which maintains an open enrollment policy may become a participating school. The parents of the program eligible child are required to present the voucher to the participating school attended by the child. The participating school, in turn, presents the voucher to the state board of education for its redemption, and credits the account of the child for an amount equal to the value of the voucher. The only participating school precluded from receiving a voucher is the public school which the child is entitled to attend under any other provision of law. None of the versions of the voucher system program prohibit sectarian schools from participating in the program and submitting vouchers for redemption to the state board of education.

The establishment clause of the constitution of the United States, made applicable to the states through the fourteenth amendment, provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first amendment's guarantee is more than a pledge that no single religion will be designated as a state religion. School District of City of Grand Rapids v. Ball, 473 U.S. 373, 381, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985). It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional. Id. The establishment clause instead primarily proscribes sponsorship, financial support, and active involvement of the sovereign in religious activity. Id. The United States Supreme Court implemented in Lemon

v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) a three-pronged test to be applied in determining whether legislation comports with the establishment clause. Under the Lemon test: (1) the legislature must have adopted the law with a secular purpose; (2) the statute's principal or primary effect must be one that neither advances or inhibits religion; and (3) the statute must not result in an excessive entanglement of government with religion. Edwards v. Aguillard, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

As noted by the United States Supreme Court in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983):

"[T]he Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words constituting that Clause. . . . It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.' [Citations omitted.]" Mueller, 463 U.S. at 392-93, 103 S.Ct. at 3065-66.

It certainly appears at first glance that the versions of the voucher system program proposed by the Kansas legislature have been drafted to conform with the legislation upheld in Mueller, supra, and Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986). However, many state constitutions prove to be far more restrictive than the establishment clause regarding public support of sectarian institutions. 16A Am.Jur.2d Constitutional Law, § 477 (1979); see Witters, 474 U.S. at 491, 106 S.Ct. at 754. Therefore, our initial consideration will be a review of section 7 of the bill of rights of the Kansas constitution and section 6 of article 6 of the Kansas constitution.

The Kansas constitution provides:

"The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. . . ." Kan. Const., Bill of Rights, § 7.

. . . .


"(c) No religious sect or sects shall control any part of the public educational funds." Kan. Const., art. 6, § 6.

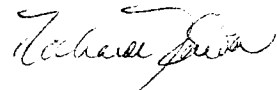
It is clear that no religious sect can lawfully control our school funds, nor can sectarian doctrines be taught lawfully in our public schools. Wright v. School District, 151 Kan. 485, 486 (1940). Also, "no person shall be compelled to pay tithes or taxes to secure or maintain a place where any form of religious worship shall be conducted, or where any sectarian or religious doctrine is taught; nor shall any form of religious worship be conducted, or any sectarian or religious doctrine be taught, in any place supported by the imposition of taxes." Billard v. Board of Education, 69 Kan. 53, 56 (1904).

The courts have long recognized that sectarian schools pursue two goals, religious instruction and secular education. Meek v. Pittenger, 421 U.S. 349, 366, 95 S.Ct. 1753, 1763, 44 L.Ed.2d 217 (1975); Board of Education v. Allen, 392 U.S. 236, 245, 88 S.Ct. 1923, 1927, 20 L.Ed.2d 1060 (1968). "Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' [Lemon, 403 U.S.] at 657, 91 S.Ct. at 2133 (opinion of Brennan, J.)." Meek, 421 U.S. at 366, 95 S.Ct. at 1763-64. Therefore, if the state confers money upon a sectarian school, the result is, unavoidably, state support of a form of worship. The state has no power to impose a tax on the citizens of Kansas to aid sectarian schools. See A.T. & S.F. Railroad Co. v. City of Atchison, 47 Kan. 712, 714 (1892). Because the three versions of the voucher system

program proposed by the legislature permit sectarian schools to obtain reimbursement of the vouchers by the state board of education, the voucher system program results in a violation of section 7 of the bill of rights of the Kansas constitution and section 6 of article 6 of the Kansas constitution. The voucher system program as proposed is unconstitutional.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Richard D. Smith
Assistant Attorney General

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