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January 4, 1980

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ATTORNEY GENERAL OPINION NO. 80- 3

Merle D. Bolton
Commissioner of Education
Kansas Department of Education
State Education Building
120 East Tenth Street
Topeka, Kansas 66612

Re: Schools--Use of Tax Funds--Providing of
Instructional Materials to Private and
Parochial Schools

Synopsis: In the absence of any statutory authority
empowering it to do so, the board of educa-
tion of a unified school district may not
spend district funds for instructional
materials and services which are then
given or loaned to private or parochial
schools within the district.

* * *

Dear Mr. Bolton:

On behalf of Unified School District No. 500, Kansas City,
Kansas, you have requested our opinion on the following
question:

"Does a board of education have authority
to spend tax funds for the financing of
instructional materials and services for
private and parochial schools without
specific statutory authority?"

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Specifically, you inform us that the district is interested in determining whether its funds (both from property tax collections and state appropriations) may be used for such purposes as either giving or lending textbooks, instructional materials, audiovisual materials, library books and other instructional materials to private and parochial schools. However, the inquiry does not extend to those programs authorized or required by either federal or state legislation, such as those dealing with special education or with materials and equipment furnished under federal funding programs which are required to be provided to such schools on a loan basis.

In our opinion, the answer to your inquiry must be in the negative. We have been unable to find any statutory authority for the use of district funds in such a manner, and it is the rule in Kansas that no generalized residue of implied power exists in the absence of such authority. This general rule was reiterated in State ex rel. McAnarney v. Rural High School District No. 7, 171 Kan. 437 (1951) thus:

"In this state it has long been the rule that school districts . . . have only such powers as are conferred upon them by statute, specifically or by clear implication, and that any reasonable doubt as to the existence of such power should be resolved against its existence." 171 Kan. at 441. (citations omitted.)

See also Wichita Public Schools Employees Union v. Smith, 194 Kan. 2 (1964).

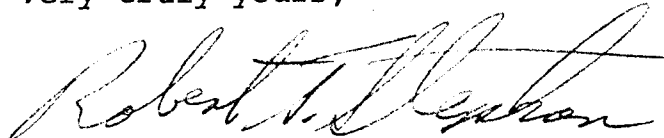
Accordingly, the district has no authority, express or implied, to use public funds in the manner you describe. We note that a bill which would have authorized the provision of such materials, as well as various health-related services, was introduced in the 1979 Legislature (House Bill No. 2953), but died in the House of Representatives before coming to a vote. Additionally, we note that, even when enacted, similar measures have been found unconstitutional in several states as violative of either the constitution of the United States or of the individual states, or both. See, e.g., Public Funds for Public Schools of New Jersey v. Marburger, 358 F.Supp. 29 (D.N.J. 1973), aff'm. 417 U.S. 961 (1974); People ex rel. Klinger v. Howlett, 56 Ill.2d 1, 305 N.E.2d 129 (1973); Weiss v. Bruno, 82 Wash. 2d 199, 509 P.2d 973 (1973); Gaffney v. State Dept. of Education, 192 Neb. 358, 220 N.W.2d 550 (1974); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), cert. den. 419 U.S. 1111 (1975); In re Constitutionality of 1974 Public Act 242, 394 Mich. 41, 228 N.W.2d 772 (1975).

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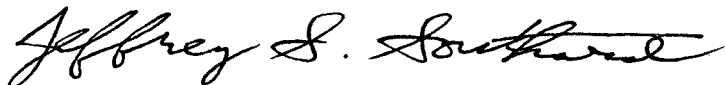
The constitutional provisions discussed in the above cases concern prohibitions against recognizing an "establishment" of religion, and while the Kansas Constitution has not yet been construed in this regard, similar provisions do exist therein. For example, see Art. 6, §6(c) of the Kansas Constitution ("no religious sect or sects shall control any part of the public educational funds") and §7 of the Kansas Bill of Rights ("nor [shall] any preference be given by law to any religious establishment or mode of worship"). Accordingly, absent any definitive Kansas case law construing these provisions within the context of your request, this opinion is specifically limited to the lack of any statutory authority, and does not pass on the probable validity or invalidity of legislative measures, such as 1979 House Bill No. 2453.

In conclusion, in the absence of any statutory authority empowering it to do so, the board of education of a unified school district may not spend district funds for instructional materials and services which are then given or loaned to private or parochial schools within the district.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk