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ATTORNEY GENERAL OPINION NO. 81-27

Dr. Merle R. Bolton
Commissioner of Education
State Department of Education
120 East 10th Street
Topeka, Kansas 66612

Re: Schools--Miscellaneous Provisions--Therapeutic Psychological and Speech and Hearing Services

Synopsis: To be consistent with requirements of the United States Constitution, the provisions of K.S.A. 72-5393 can, and must, be construed as neither requiring nor authorizing the provision of therapeutic psychological and speech and hearing services, at public expense and by public employees, on parochial school premises. Instead, said provisions must be construed as requiring that such services be provided at the "truly religiously neutral locations" specified in the statute, i.e., in the public schools of the school district, in public centers, or in mobile units located off the parochial school premises. Cited herein: K.S.A. 72-5392, 73-5393, U.S. Const., Amend. I, XIV.

* * *

Dear Dr. Bolton:

You seek our opinion on whether certain provisions of K.S.A. 72-5393 authorize a unified school district to provide, at public expense and through the services of public employees, therapeutic psychological and speech and hearing services on parochial school premises.

Two decisions of the United States Supreme Court relate directly to the issue presented by your inquiry. In Meek v. Pittenger,

421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), the Court held unconstitutional a portion of a Pennsylvania statute which authorized certain services, including therapeutic speech and hearing services, to be provided, at public expense and by public employees, on parochial school premises.

In a later case, Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), the United States Supreme Court said:

> "In Meek the Court acknowledged the danger that publically employed personnel who provide services analogous to those at issue here [i.e., 'therapeutic psychological and speech and hearing services to pupils attending nonpublic schools' (433 U.S. at footnote number 12)], might transmit religious instruction and advance religious beliefs in their activities. But, as discussed in Part V, supra, the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. 421 U.S., at 371, 44 L.Ed.2d 217, 95 S.Ct. 1753. See also Lemon, 403 U.S., at 618-619, 29 L.Ed.2d 734, 91 S.Ct. 2105. The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in Meek does not arise." (Emphasis added.) 433 U.S. at 247.

Notwithstanding the above referenced decisions of the United States Supreme Court, there should be noted the decision of the United States District Court for the Southern District of New York in National Coalition for Public Education and Religious Liberty v. Harris, 489 F.Supp. 1248 (1980), an appeal of which is pending before the United States Supreme Court. There, the court upheld the use of funds appropriated under the Elementary and Secondary Education Act of 1965 (Title I funds) for the provision of remedial education of parochial school students in the City of New York by public school teachers of the city on the premises of parochial schools during regular school hours. The decision indicates that the separation of church and state required by the First Amendment to the U.S. Constitution in the field of education is not yet firmly established. However, until a final decision is rendered by the United States Supreme Court on the appeal of the New York case, we believe it incumbent on us to base our opinion on the Court's statement in Wolman, supra. Pursuant to that decision, the provision of therapeutic

psychological and speech and hearing services is permissible under the First Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment (see Meek v. Pittenger, supra, at 421 U.S. 351), only "[s]o long as these types of services are offerred at truly religiously neutral locations." (Emphasis added.) 433 U.S. at 247. Therefore, we must regard it as settled that the United States Constitution prohibits the furnishing of such services, at public expense and by public employees, on parochial school premises. Thus, the question in the instant matter is whether the provisions of K.S.A. 72-5393 authorize a practice which violates a prohibition provided in the United States Constitution.

The statute here under consideration is far from a model of clarity. In pertinent part, it provides:

> "[1] Any school district which provides auxiliary school services to pupils attending its school shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private, nonprofit elementary or secondary school whether such school is located within or outside the school district. No school district shall be required to provide such services outside the school district. Any such school district may provide auxiliary services to all pupils attending a private, nonprofit elementary or secondary school located within the school district whether or not all such pupils reside in the school district. [2] Speech and hearing diagnostic services and diagnostic psychological services, if provided in the public schools of the school district, shall be provided in any private, nonprofit elementary or secondary school which is located in the school district. [3] Therapeutic psychological and speech and hearing services and programs and services for exceptional children, which cannot be practically provided in any private, nonprofit elementary or secondary school which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises as determined by the school district . . . ." (Emphasis and bracketed numbers added to facilitate further discussion.)

It is apparent that the first three sentences of the statute specify those pupils for whom a public school district is either required or authorized to provide auxiliary school services. It is important to note that the duty to provide such services is imposed upon each "school district," which term is defined in K.S.A. 72-5392 to mean "any public school district organized under the laws of this state." (Emphasis added.)

The statute next requires that certain diagnostic services, if provided in the public school, "shall be provided in any private, nonprofit elementary or secondary school which is located in the school district." Unfortunately, while the statute requires that the prescribed diagnostic services be provided, it fails to specify by whom such services are to be provided. Thus, the question arises whether such services are to be provided by the public school district (i.e., at public expense and by public employees), or by the private, nonprofit school.

In our judgment, the legislative intent, based upon the context of the statute, is that such diagnostic services are to be provided by the public school district in (i.e., on the premises of) any private, nonprofit elementary or secondary school located in the school district. This conclusion is supported by the fact the diagnostic services required to be provided are part of the "auxiliary school services" public school districts are required to provide under that portion of K.S.A. 72-5393 which follows bracketed number 1 in the above quote, and, as indicated above, the duty of providing such auxiliary school services is imposed upon the public school districts. However, the duty imposed upon public school districts to provide diagnostic services in parochial schools is permissible under the First Amendment. (See Wolman v. Walter, supra.)

Finally, the statute requires that certain therapeutic services (as distinguished from diagnostic services),

> "which cannot be practically provided in any private, nonprofit elementary or secondary school which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises." (Emphasis added.)

Here, again, there is a question as to upon whom the legislature is imposing the duty to provide the therapeutic services, i.e., the public school district or the private, nonprofit school; but,

for the reasons specified above in regard to whose duty it is to provide diagnostic services, it must be concluded that said duty is being imposed upon the public school district.

However, the further question arises as to where these services are to be provided. Inferentially, the statute authorizes them to be provided in the private schools, since it requires such services to be provided in designated public locations whenever the same cannot be "practically provided" in the private schools. As previously noted, though, the United States Supreme Court has determined that therapeutic services such as those specified in 72-5393 can be provided at public expense and by public employees only if such services "are offered at truly religiously neutral locations." Wolman v. Walter, supra, at 433 U.S. 247.

Given that conclusion of the Court, the question becomes: Can the provisions of K.S.A. 72-5393 be interpreted to be constitutionally valid? In our judgment, they can. Since the high court has interpreted the United States Constitution to preclude the rendering of therapeutic services such as those mentioned in K.S.A. 72-5393 at public expense and by public employees on parochial school premises, it is proper to conclude that such services cannot be "practically provided" in private, nonprofit, parochial elementary and secondary schools, and, thus, must be provided in the alternative public locations specified in the statute.

In Harris v. Shanahan, 192 Kan. 629 (1964), the Court said:

> "It is the court's duty to uphold legislation rather than defeat it. It is presumed that the legislature intended to pass a valid law. If there is any reasonable way to construe legislation as constitutionally valid it should be so construed. (Parker v. Continental Casualty Co., 191 Kan. 674, 383 P.2d 937, and cases cited.)" (Emphasis added.) Id. at 635.

Therefore, it is our opinion that the provisions of K.S.A. 72-5393 can, and must, be construed as neither requiring nor authorizing the provision of therapeutic psycholocial and speech and hearing services, at public expense and by public employees, on parochial school premises. Instead, said provisions must be construed as requiring that such services be provided at the "truly religiously

neutral locations" specified in the statute, i.e., in the public schools of the school district, in a public center, or in mobile units located off the parochial school premises.

Very truly yours,

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