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ATTORNEY GENERAL OPINION NO. 81- 43

Ms. Mary Kathleen Babcock
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Wichita, Kansas 67202

Re: Schools--Miscellaneous Provisions--Auxiliary School Services

Synopsis: The provisions of K.S.A. 72-5392 et seq. do not repeal, by implication, the provisions of K.S.A. 72-1204 et seq. The latter remain in full force and effect, and there is no transfer of the responsibility to provide "basic hearing screening" to public school districts only.

The provision of a special education program that is designed to impact and involve every aspect of a child's remedial educational experience does not involve an excessive entanglement between church and state, even though designed by a public employee for a parochial school child, so long as said program is not forced upon parochial school teachers for inclusion in the classroom activities of the parochial school. Attorney General Opinion No. 81-27 affirmed.) (Cited herein: K.S.A. 72-1204, 72-1205, 72-5392, 72-5393.

* * *

Dear Ms. Babcock:

On behalf of the Board of Education of Unified School District No. 259, Sedgwick County, Kansas, you seek our opinion on several

questions concerning the provisions of K.S.A. 72-5392 et seq. As you explain, the statutes deal with the provision, by public school districts, of certain "auxiliary school services."

Regarding these statutory provisions, you ask:

> "1. Does §§72-5392, et seq., implicitly amend or repeal K.S.A. §§72-1204, et seq., and transfer the responsibility for all basic hearing screening to public school districts?
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> "2. Does the fifth sentence of §72-5393 contemplate that the enumerated therapeutic services and Special Education are to be provided on nonpublic school premises if practical?
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> "3. If the answer to Question 2 above is yes, does the provision of such services on parochial school premises violate either the First Amendment to the United States Constitution or the Kansas Constitution?
>
> "4. Is the provision of a Special Education program that is designed to impact and involve every aspect of a child's educational experience excessively entangling if designed by a public school for a parochial school child?"

Our office has received a number of inquiries concerning the provisions of K.S.A. 72-5392 et seq. Dr. Merle Bolton, Kansas Commissioner of Education, was one of those who inquired about said provisions. We responded to Dr. Bolton's inquiry by issuing Attorney General Opinion No. 81-27, a copy of which is enclosed herein. We believe the opinion to Dr. Bolton answers the second and third questions you present; thus, in this opinion, we shall respond to your first and last inquiries only.

Your first inquiry concerns the possible repeal, by implication, of K.S.A. 72-1204 et seq., by the enactment of K.S.A. 72-5392 et seq. Repeal by implication occurs where there is an irreconcilable conflict between the provisions of two statutes. In such cases, the latest expression of the legislature upon the subject must be regarded as the law, and it operates to repeal the earlier provision to the extent of the repugnancy in the two acts. See, Mannel v. Mannel, 186 Kan. 150 (1960) and the cases cited therein at 153. However, as stated by the Court in Jenkins v. Newman Memorial Hospital, 212 Kan. 92 (1973): "Repeals by implication are not

favored in the law and a former act will not be held to have been repealed by implication unless a later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect." Id. at Syl. ¶1. See also, In re Estate of Suesz, 228 Kan. 275, Syl. ¶1 (1980); City of Salina v. Jaggers, 228 Kan. 155, Syl. ¶2 (1980); and City of Overland Park v. Nikias, 209 Kan. 643 (1972).

The provisions of K.S.A. 72-1204 et seq. were enacted in 1969. See, L. 1969, ch. 361. Under those statutory provisions, the board of education of any school district and the governing authority of any nonpublic accredited school is required to "provide basic hearing screening without charge to every pupil in its schools during the first year of admission and not less than once every three (3) years thereafter." (Emphasis added.) K.S.A. 72-1205.

The provisions of K.S.A. 72-5392 et seq. were enacted in 1980. See, L. 1980, ch. 212. While the term "basic hearing screening" is not employed in those statutes, K.S.A. 72-5393, in relevant part, provides: "Speech and hearing diagnostic 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." (Emphasis added.)

The provisions of K.S.A. 72-1204 et seq. have not been repealed expressly by the legislature. However, the question has arisen whether the later enactment, K.S.A. 72-5392 et seq., repeals, by implication, the provisions of the earlier enactment, K.S.A. 72-1204 et seq. Given the above-quoted statements of the Court, the question resolves to whether there is such an irreconcilable conflict between K.S.A. 72-5392 et seq. and 72-1204 et seq. that the provisions of both acts cannot be given force and effect.

We believe no such irreconcilable conflict exists. The above emphasized language of K.S.A. 72-5393 clearly implies that the "speech and hearing diagnostic services," which the legislature had in mind when it enacted said statute, may or may not be provided in the public school district. However, under K.S.A. 72-1204 et seq., "basis hearing screening" is required to be provided. From these facts, we conclude the legislature did not intend to equate "speech and hearing diagnostic services" with "basic hearing screening." In our judgment, the former involves a much more sophisticated analyses than the latter. By statute, "basic hearing screening" means simply "a hearing testing program for each child conducted with a calibrated audiometer." K.S.A. 72-1204(c). Consequently, we concur in your assertion that the "hearing diagnostic services" contemplated by the legislature in K.S.A. 72-5393 apparently involve hearing diagnostic services beyond the basic hearing screening. If this interpretation is given to the two enactments, there is no

irreconcilable conflict between the provisions of K.S.A. 72-5392 et seq., and those of K.S.A. 72-1204 et seq. Said acts can be harmonized and both may operate independently without conflict, and there is no repeal by implication. Thus, in our judgment, both acts remain in full force and effect, and there is no transfer of the responsibility to provide basic hearing screenings to public school districts only.

The other inquiry to be addressed in this opinion is whether the provision of a special education program "that is designed to impact and involve every aspect of a child's educational experience" is excessively entangling if designed by a public school for a parochial school child.

This inquiry stems from a portion of the United States Supreme Court's decision in Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). In that case, the Court upheld the constitutionality of an Ohio statute, the wording of which is quite similar to K.S.A. 72-5393. The persons who challenged the statute asserted that the provisions thereof violated the principle of separation of church and state, established by the First Amendment to the United States Constitution.

Paragraphs (H) and (I) of section 3317.06 of the Ohio statute authorized the expenditure of public funds:

> "(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.
>
> "(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located." 53 L.Ed.2d at 730, footnote 12.

In discussing these provisions, the Court said the persons challenging the law conceded that the provision of remedial, therapeutic and guidance services in public schools, public centers or in mobile units is constitutional, if both public and nonpublic school students are served simultaneously. This concession by the appellants concerned Justice Marshall, as is made clear in footnote 13 of the opinion. See 53 L.Ed.2d at 731. The footnote states:

> "13. We believe the concession reflects appellants' understanding that the programs are not intended to influence the classroom activities in the nonpublic schools. Our Brother Marshall argues that certain stipulations regarding paragraph (H) announce that guidance counseling will include planning and selection of particular courses. Post, at 261, 53 L.Ed. 2d 740. We agree that such involvement with the day-to-day curriculum of the parochial school would be impermissible. We, however, do not so read the stipulations. Rather, we understand them to recognize that a guidance counselor will engage in broad-scale, long-term planning of a student's career choices and the general areas of study that will further those choices. Our Brother Marshall also argues that the stipulations refect an understanding that remedial service teachers under paragraph (I) will plan courses of study for use in the classroom. Ibid. Such a provision would pose grave constitutional questions. The stipulations, however, provide only that the remedial service teacher will keep the classroom teacher informed of the action taken. App 49. We do not understand the stipulations to approve planning of classroom activities." (Emphasis added.) 53 L.Ed.2d at 731.

In the text of the opinion, the Court states:

> "We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In Meek the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit 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 745, 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.
>
> "The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in Meek. [Footnote omitted.] The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in Meek arose from the nature of the institution, not from the nature of the pupils.
>
> "Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06(G), (H), (I), and (K) are constitutional." (Emphasis added.) 53 L.Ed.2d at 731-732.

In our judgment, the Court, in the footnote above quoted, was expressing its concern over public employees, i.e., therapists and remedial education teachers, planning courses of study for use in the parochial school classroom; that is, having a public employee dictate to an employee of a parochial school the content of instruction to be offerred in the parochial school classroom. It is unrealistic to interpret the Court's decision as providing that the therapist or remedial education teacher could not plan therapeutic programs or remedial education classes to be offerred the child outside his or her regular classroom. Such, in our judgment, is made clear by the above-emphasized statements of

the Court in the text of the opinion, and also is supported by statements made by Justice Marshall in his separate opinion. Specifically, in that opinion, he states:

> "Paragraphs (I) and (K) provide remedial services and programs for disabled children. The stipulation of the parties indicates that these paragraphs will fund specialized teachers who will both provide instruction themselves and create instructional plans for use in the students' regular classrooms. Id., at 47-48. These 'therapeutic services' are clearly intended to aid the sectarian schools to improve the performance of their students in the classroom. I would not treat them as if they were programs of physical or psychological therapy." (Emphasis added.) 53 L.Ed.2d at 741.

Thus, in our judgment, the provision of a special education program that is designed to impact and involve every aspect of a child's remedial educational experience is not excessively entangling, if designed by a public school for a parochial school child, so long as said program is not forced upon parochial school teachers for inclusion in the classroom activities of the parochial school. To paraphrase the Court, it can hardly be said that the supervision of public employees, i.e., remedial education teachers, to insure that they maintain a religiously neutral stance when performing their public function of providing remedial educational services to exceptional children, while on public premises, creates an excessive entanglement between church and state. So long as there is no supervision of parochial school employees by public employees on parochial school premises in providing the auxiliary school services specified in K.S.A. 72-5392, it is our judgment the provisions of K.S.A. 72-5392 et seq. do not foster an excessive entanglement of church and state.

Very truly yours,

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RTS:BJS:RJB:jm
Enclosure: Attorney General Opinion No. 81-27