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ATTORNEY GENERAL OPINION NO. 82-145

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

Constitution of the United States--First Amendment--
Establishment of Religion; Separation of Church and
State

Synopsis: The conclusion reached in Attorney General Opinion
No. 81-27 is expanded to provide that therapeutic
psychological and speech and hearing services may
be provided, constitutionally, at a location phys-
ically unified with a sectarian institution, so
long as the location is religiously neutral. Any
such location, at a minimum, must be free of reli-
gious symbols, contain material and equipment
separate from that used in the remaining portion
of the sectarian institution, and be under the
control of public employees who are not subject
to the supervision of the sectarian school's admin-
istrators. Cited herein: K.S.A. 72-5392; U.S. Const.,
Amend. I.

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Dear Dr. Bolton:

On February 2, 1981, we issued Attorney General Opinion No.
81-27 to you in regard to K.S.A. 72-5392, which concerns the

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provision of therapeutic psychological and speech and hearing services by public school districts. In that opinion, we noted the decision of the United States District Court for the Southern District of New York in National Coalition for Public Education and Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980), an appeal of which had been filed with the United States Supreme Court. We had anticipated the Supreme Court would hear the appeal of that case and provide additional guidance concerning questions involving the constitutional requirement of separation of church and state. U.S. Const., Amend. I. However, the Supreme Court refused to hear that appeal. National Coalition for Public Education and Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980), app. dismissed 449 U.S. 808, 101 S.Ct. 55, 66 L.Ed.2d 11 (1980), reh. den. 449 U.S. 1038, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980).

The refusal of the United States Supreme Court to review the Harris decision has prompted us to review the federal cases that have been decided in this area of the law and elaborate further on the conclusion stated in our prior opinion. Based upon this review, we are persuaded that we should expand upon the conclusion reached in Attorney General Opinion No. 81-27.

A careful review of Harris reveals that the Court upheld the provision of Title I services on the premises of parochial schools, because the services were not provided at a location within those schools which had "the characteristics of the pervasively sectarian schools described by the [United States] Supreme Court." National Coalition for Public Ed. v. Harris, 489 F. Supp. 1248, 1262 (S.D.N.Y. 1980).

The fact the classrooms used to provided Title I services in the parochial schools of New York City were not "pervasively sectarian" is repeated no less than seven times by the Court in Harris. The Court, in essence, held those classrooms, although physically located on the parochial school premises, nonetheless were "truly religiously neutral locations," "comparable to the arrangement approved in Wolman [v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977)]." 489 F. Supp. at 2168.

In describing the actual location at which Title I services were provided, the Court said:

"In Wolman, the 'religiously neutral locations' where private school students received remedial services were 'neither physically nor educationally identified with the functions of the nonpublic school.' [Citations omitted.] In New York City, Title I services are provided on the premises of the parochial schools, typically in classrooms

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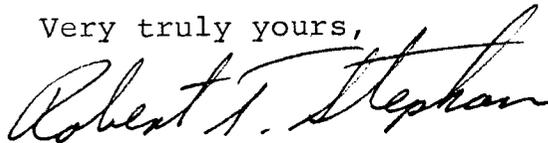
set aside for that purpose. Although physically unified, secular and nonsecular instruction remain educationally distinct. Title I classrooms are free from religious symbols, contain separate materials and equipment, and are run solely by public school employees who are not subject to the supervision of private school administrators. Title I teachers and supervisors develop their own curricula, and no lessons have any religious or ideological content." 489 F. Supp. at 1264.

In regard to these settings, the Court said: "As described above, the typical nonpublic school where Title I services are provided in New York does not fit the Supreme Court's profile of a pervasively sectarian institution." 489 F. Supp. at 1267.

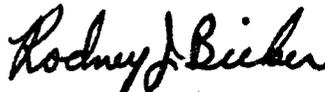
In Attorney General Opinion No. 81-27, we said: "[W]e must regard it as settled that the United States Constitution prohibits the furnishing of . . . [therapeutic psychological and speech and hearing] services, at public expense and by public employees on parochial school premises." *Id.* at 3. However, because of the U.S. Supreme Court's refusal to hear the appeal in Harris, we think it appropriate to qualify the statement in concert with the lower court's decision in that case. Accordingly, it is our opinion that the U.S. Constitution prohibits the furnishing of these services at public expense and by public employees at a location which is pervasively sectarian in character. It is our further opinion, however, that the premises of a sectarian institution, under proper circumstances, may be religiously neutral in character. Such a location, at a minimum, must be free of religious symbols, contain material and equipment separate from that used in the remainder of the sectarian institution, and be under the control of public employees who are not subject to the supervision of the sectarian school's administrators.

As expanded herein, the conclusion reached in Attorney General Opinion No. 81-27 is hereby affirmed.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General