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October 29, 1985

ATTORNEY GENERAL OPINION NO. 85-146

Rodney J. Bieker, Director
Legal Services Section
Kansas State Department of Education
120 East 10th Street
Topeka, Kansas 66612

Re: Schools -- State Department of Education -- Application of Kansas Internship Plan to Private Parochial Schools

Synopsis: The participation by parochial schools in the Kansas internship plan would not violate the Establishment Clause of the First Amendment. However, the state's payment of a cash stipend to senior teachers supervising and assisting interns at parochial schools would not withstand a constitutional challenge. Cited herein: U.S. Const., First Amend.

* * *

Dear Mr. Bieker:

As legal services director of the State Department of Education, you request our opinion concerning the ability of parochial schools to participate in the department's proposed teacher internship plan. Under this plan, first-year teachers will be supervised and assisted by a panel of professional educators pursuant to an individualized professional development plan. Interns who successfully complete the program will be recommended for teacher certification. You advise that participating school districts will be compensated by the state at a rate of $1,000 per intern. The $1,000 stipend is to be paid to the senior teacher who has the responsibility for managing the intern's

planned professional activities. You inquire whether parochial schools may participate in the internship plan and, if so, whether senior teachers at such schools may receive the stipend without violating the Establishment Clause of the First Amendment.

In determining whether a particular state action is an improper "law respecting an establishment of religion," the United States Supreme Court has applied a three-part test:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz [v. Tax Comm'n, 397 U.S. 664, 674 (1970)]." Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, (1971).

The United States Supreme Court has recently reaffirmed that state action alleged to violate the establishment clause should be measured against the Lemon criteria [Grand Rapids School District v. Ball, ___ U.S. ___, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985)], and has detailed the restraints imposed on state involvement with teachers in non-public schools. See generally, Aguilar v. Felton, ___ U.S. ___, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985).

In Lemon, the Court examined a Rhode Island statute providing for a 15% salary supplement to teachers in non-public schools at which the average per-pupil expenditure on secular education was below the average in public schools, conditioned on the teachers giving only courses offered in public schools and agreeing not to teach courses in religion. The Court noted the "substantially different ideological character" between textbooks and teachers by stating:

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious

> control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education." 403 U.S. at 617.
>
> "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculpate its tenets, will inevitably experience great difficulty in remaining religiously neutral." Id at 618.

The Court found the "potential for impermissible fostering of religion," but based its holding upon its finding that the comprehensive, discriminating, and continuing state surveillance required to ensure the absence of religious content, would constitute excessive entanglement.

Similarly, in Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), the United States Supreme Court invalidated a state program that offered guidance, testing, remedial and therapeutic services performed by public employees on the premises of parochial schools. The Court found that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.

A recent decision of the U.S. District Court in Stark v. St. Cloud State University, 604 F.Supp. 1555 (D. Minn. 1985), appears to be most analogous to the facts of this case. In Stark, the district court held unconstitutional a state university's policy which allowed students to satisfy their student teaching requirement at parochial schools. Under the policy, non-public schools were paid a standard rate of $6.00 per quarter hour for each student teacher placed therein. The policy provided that students who chose to be placed in a non-public school would be made aware that any involvement on their part in any religious aspect of the school's program was "exclusively between the parochial school's personnel and the student teacher." Accommodations were to be made for any university supervisors who, based on religious grounds, objected to supervising a placement at a non-public school. The policy included no other specific references to any religious aspects of a non-public school's program.

In finding the policy violative of the Establishment Clause, the court stated:

> "The undisputed facts in this action, interpreted in light of the above case-law, establish that the University policy violates the Establishment Clause. The challenged policy allows the placement of public university student-teachers at a parochial school in any one of the substantive academic areas for which teachers are certified. The Department's hands-on role in the program is the weekly on-site supervision of the placement by a faculty member including discussions with both the student-teacher and the parochial teacher. The sum of the various aspects of the program is that a much greater entanglement with a pervasively sectarian setting occurs than is permissible under the Court's decisions in this area.
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> "In fact, the on-site teaching of the full range of academic subjects creates an even greater danger of fostering religion than the programs involved in _Meek_, _Wolman_, _Americans United for Separation of Church and State_, and _Felton_. The policy does not establish any procedures to ensure that the public university students and the university supervisors maintain the necessary strict religious neutrality. Rather, '[a]ny involvement by the student teacher in any religious aspect of a private parochial school's program is exclusively between the parochial school personnel and the student teacher.' . . . Thus, the danger that the student-teacher might intentionally or unintentionally engage in the impermissible inculcation of religion is real and not insubstantial. To ensure this did not occur would require 'comprehensive, discriminating and continuing state surveillance'. _Lemon_, 403 U.S. at 619, 91 S.Ct. at 2114. This surveillance by itself is a constitu-

tionally excessive entanglement of church and state.

"Furthermore, the participants in the program are by definition all supportive of the placement in a parochial school and therefore no incentive exists for complaint. Felton, 739 F.2d at 65. The nonpublic school, its cooperating teacher, and its students are all accustomed to coloring the educational experience with religious content and perspective. They are unlikely to notice or complain if the student teacher is included in or initiates that type of experience. The student teacher will have agreed to the placement in a parochial school and, therefore, often will be supportive of its religious milieu. The lack of incentive to complain is even greater than in those cases involving fully licensed teachers because the university student is at an impressionable stage of teacher preparation and subject to the influences of the parochial instructor who, is, in effect the tutor. The university supervisor must also be a willing participant in the parochial placement and the oversight provided is limited. 'Because "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion", reliance could not be placed simply "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools."' Felton, 739 F.2d at 65-66 (quoting Lemon, 403 U.S. at 619, 91 S.Ct. at 2114; and Meek, 421 U.S. at 369, 95 S.Ct. at 1765).

"Accordingly, there must be active and extensive surveillance, which has not been provided, to prevent the fostering of religion. Yet, under Meek this very surveillance constitutes excessive entanglement. Meek, 421 U.S. at 372, 95

> S.Ct. at 1776; Felton, 739 F.2d at 64 & n. 16.
>
> "The policy also fails to provide any express restrictions on the use of the state funds that are provided to the parochial school for the placement of a student teacher in its classrooms. Even though it appears that the monies actually paid to date have been used for secular purposes, there is no prohibition against their being used wholly or primarily to advance religion. In addition, the surveillance necessary to ensure this did not occur simply increases the already constitutionally excessive entanglement." 604 F.Supp. at 1563-64.

We find the Kansas internship plan distinguishable in several important respects from the student teaching policy held unconstitutional in Stark. First, under the Kansas internship plan, the intern is an employee of the parochial school, not a student of a state university. We recognize that such an intern would likely be teaching in a pervasively sectarian environment, and would be at an impressionable state of teacher preparation, subject to the influences of the senior teacher who is responsible for managing the interns planned professional experiences. Although the intern, as an employee of the parochial school and a first-year teacher, might intentionally or unintentionally foster religion, the state's involvement with that intern is minimal. The intern is not affiliated with the state, is not compensated by the state, and is not supervised by an employee of the state. Accordingly, we do not view the intern's participation as state action which has the primary effect of advancing religion.

Secondly, under the plan the committee responsible for supervising and assisting the intern does not include a representative of a state college or university. The "assistance committee" responsible for assisting, supporting, and assessing the intern consists solely of "in-house" personnel: a certified practicing "senior teacher," and a certified practicing administrator. Accordingly, the plan does not compel a comprehensive, discriminating, and continuing state surveillance in the parochial schools. Although the plan requires an intern to attend two 7-hour seminars conducted by an approved college, university, or

school district, and requires the assistance committee to be trained by the State Department of Education, we view these and other minimal contacts between the state and those participating in the internship plan as "minor and unobtrusive." See New Jersey State Bd. of Higher Educ. v. Board of Directors of Shelton College, 90 N.J. 470, 448 A.2d 988 (1982). The plan does not require the day-to-day administrative supervision of the state in religious activities, and,in our opinion, does not entail the excessive entanglement proscribed by the First Amendment. Accordingly, we believe that participation by parochial schools in the Kansas internship plan would not violate the Establishment Clause of the First Amendment.

We next examine the question of whether the Establishment Clause would be offended by the state's payment of a $1,000 stipend to a senior teacher at a parochial school for that teacher's participation in the internship plan. The Supreme Court has dispelled the "notion that a religious person can never be in the state's pay for a secular purpose." Roemer v. Maryland Public Works Bd., 426 U.S. 736, 746 & n. 13, 96 S.Ct. 2337, 2345 & n. 13, 49 L.Ed.2d 179, 188 & n. 13 (1976). However, such arrangements are permissible only when a valid secular purpose exists and the danger of aiding sectarian values is circumscribed. Stark v. St. Cloud State Univ., supra, at 1564. Neutrality is required, Roemer, 426 U.S. at 747, and the state must be certain that subsidized teachers do not inculcate religion. Lemon, 403 U.S. at 619.

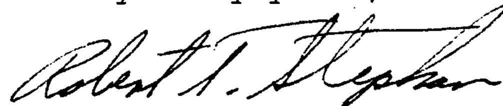
We have no hesitancy in recognizing the internship plan's primary secular purpose of improving the quality of teacher preparation in Kansas. However, we cannot ignore the danger of aiding sectarian values from the state's payment of a stipend to senior teachers. Although labeled a "stipend" and not a salary supplement or a cash subsidy, we find the cash payment to a senior teacher in a parochial school indistinguishable from that held unconstitutional in Lemon. Even if the stipend payment process is straightforward and susceptible to the routinization that characterizes most reimbursements schemes, the services for which the senior teacher is being compensated are not discrete and clearly identifiable. Compare Committee for Public Education v. Regan, 444 U.S. 646 L.Ed.2d 94 (1979) (N.Y. statute authorizing the use of public funds to reimburse church-sponsored and secular non-public schools for performing various testing and reporting services mandated by state law did not contravene the Establishment Clause.)

The touchstone under the Establishment Clause is not how much public support any one religious institution or instructor receives, but rather that public funds are used to support religion in general. A school district or other governmental body cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means. Doe v. Aldine Independent School District, 563 F.Supp. 883 (S.D. Tex. 1982).

Because of the varying and interpersonal nature of the services performed by a senior teacher for an intern, we doubt the state could show that its compensation to senior teachers would serve the state's legitimate secular ends without any appreciable risk of being used to transmit or teach religious values or to foster an ideological outlook. In short, no effective means exists to insure that the direct cash payments to senior teachers at parochial schools would cover only secular services.

While it is always difficult to predict what a court will say on a matter involving First Amendment questions, we believe that while participation by parochial schools in the Kansas internship plan would withstand a constitutional challenge, the direct cash payment to senior teachers at such schools would not.

Very truly yours,



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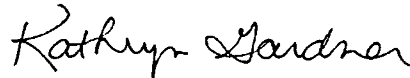

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