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DEPARTMENT OF LAW OPINION NO. 70-7 (R-41)

REQUESTED BY: THE HONORABLE DAN HALACY
Arizona State Senator
Chairman
Arizona State Committee on Education

QUESTION: Does Senate Bill 45, introduced January 14, 1970, before the Arizona State Senate, 29th Legislature, Second Regular Session, violate any of the provisions of the United States Constitution or the Arizona State Constitution?

ANSWER: No. See body of opinion.

INTRODUCTION

Since this particular opinion is likely to receive broader distribution than any this office has recently rendered, it seems appropriate to briefly review the nature of an opinion of the Attorney General and its significance. Except in a few limited specific instances, e.g., A.R.S. § 42-1532, the opinions of this office are advisory only. They are expressed to our clients in much the same way as a private law firm advises its clients concerning the law and its effect. On occasion our opinions are disregarded by our clients, as they are by private clients of their lawyers. Historically, an even fewer number have proven to be in error, either by subsequent court tests or legislation, or by a review and reversal by the Attorney General's office itself.

The rendering of a formal opinion, such as this one, is a quasi judicial function which is performed in much the same way an appellate court renders a decision. When a request is received, it is assigned to the lawyer in this office who possesses the most experience and expertise in that particular area to research and write a tentative draft opinion. In routine matters, he must obtain the review and concurrence of two other Assistant Attorneys General before his draft is submitted to the Chief Assistant and the Attorney General for final review and approval.

In cases involving questions of statewide importance, affecting many, if not all of our clients, or in questions involving major pieces of legislation, or novel, innovative or controversial matters of legislative or administrative law, additional measures are taken to review and double check the legal authority, language and organization of our opinion. Thereafter, a second draft is routed to most of the lawyers in the office, requesting comments, ideas and criticism. These drafts are then discussed and debated. After this refining process, the final draft is reviewed by the Attorney General and his top level staff assistants prior to publication.

The opinion of the Attorney General is only a legal determination of the effect of, or the constitutionality of, a law, or a hypothetical or real set of facts as applied to a particular law or constitutional provision. It is not an opinion as to its advisability, desirability or feasibility. These decisions are the people's, through their elected legislators and governor, and through the initiative and referendum processes. In the final analysis, only the judiciary has the ultimate review of the constitutionality and legality of any statute or its application.

THE FEDERAL CONSTITUTIONAL QUESTION

The application of the First Amendment to questions involving education has been passed upon several times by the United States Supreme Court, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571, 39 A.L.R. 468 (1925); Cochran v. Louisiana State Board of Education, 281 U.S. 370, 74 L.Ed. 913, 50 S.Ct. 335 (1930); Everson v. Board of Education, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392 (1947); Board of Education v. Allen, 392 U.S. 236, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968).

The most recent case, Board of Education v. Allen, *supra*, was a case involving a First Amendment objection to legislation in New York which required the state to lend textbooks free of charge to all children in private sectarian and non-sectarian schools. In Allen, *supra*, the United States Supreme Court re-examined its prior decisions and affirmed the standard first

set forth in the case of Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963). Therein the Court set forth a standard by which to test legislation designed to achieve a public objective through religiously affiliated educational institutions. The Supreme Court in Abington, supra, stated as follows at 374 U.S. 222, 10 L.Ed.2d 858:

"The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Supreme Court applied the purpose and primary effect test to the New York statutes in Allen and reasoned as follows:

"The express purpose of § 701 was stated by the New York legislature to be furtherance of the educational opportunities available to the young. * * * The law merely makes available to all children the benefits of a general program to lend school books free of charge." 392 U.S. at 243, 20 L.Ed.2d at 1065.

The Child Benefit Theory was lifted to a new level of authority by the Supreme Court in the Allen textbook case, supra. The Supreme Court held that the law was constitutional, for the reason that the law aids the children, not the schools:

". . . [N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U.S. at 243, 20 L.Ed.2d at 1066.

This theory is not a new one. In 1930 the Supreme Court based its decision in Cochran v. Louisiana State Board of Education, supra, on that doctrine. The Court said that the State of

Louisiana may lend secular textbooks to children in church related schools:

"The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries." 281 U.S. at 375, 74 L.Ed. at 914.

The Child Benefit Theory was repeated by the Supreme Court in Everson v. Board of Education, supra:

"The state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18, 91 L.Ed. at 725.

The United States Supreme Court in the Everson case held that a New Jersey statute permitting reimbursement to parents for bus fares of children attending both parochial and public schools did not violate the First Amendment of the United States Constitution. In that case the Court held that the "establishment" clause of the Federal Constitution prohibits the states from establishing a church or supporting the religious activities of sectarian institutions. The Court pointed out that the providing of transportation for school children to parochial schools is generally in the same category as other government services provided to parochial schools.

Since 1947 the Supreme Court has used the Child Benefit Theory in conjunction with the legislative purpose-primary effect test in a number of church-state cases. If either legislative purpose or the primary effect of the law is to help or hinder religion, the law is invalid. On the other hand, if both the legislative purpose and the primary effect of the law are secular, the law is valid even though an incidental benefit comes to religion.

The Supreme Court explicitly applied that test in Everson, supra. The Court said the legislative purpose and primary effect of the law were a general program to help parents get their children safely and rapidly to school. The Court also noted that there were secondary effects that aided religion and went on to say that such aid did not make the law unconstitutional because:

". . . [T]hat [First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. at 18, 91 L.Ed. at 724.

The legislative purpose and primary effect of bus ride legislation are secular; any benefit to religion is incidental, a secondary benefit, a by-product of the law. The Court in Allen, supra, also recognized that an incidental benefit does come to religion:

"Perhaps free books make it more likely that some children choose to attend a sectarian school, but * * * that does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244, 20 L.Ed.2d at 1066.

The critical question in Cochran, Everson and Allen cases was this: do church related schools serve a public purpose; do they give a secular education? The Court in the Allen decision observed that religious schools pursue two goals, religious instruction and secular education. The state may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Court went on to point out that, beginning with Pierce v. Society of Sisters, supra, there is a long line of court decisions that recognize the fact that church related schools do give a secular education, and that the state has an interest in the quality of that secular education.

Senate Bill 45, as introduced, neither advances nor inhibits religion, but by its terms falls within the Abington test, and complies with the strictures of the establishment clause of the United States Constitution, in that the proposed legislation has as its purpose to make an educational grant to the benefit of the parent or guardian of a pupil enrolled and regularly attending an approved non-public common or high school, and the primary effect of the bill neither advances nor inhibits religion, but directly benefits the child and parent. Construed in a light most favorable to upholding its constitutionality, the purpose and intent of Senate Bill 45 is to promote the secular education of children attending non-public schools. Senate Bill 45 limits the aid to children attending an approved, non-public school, whether private or parochial, which teaches secular subjects to pupils at ages and grades corresponding to public school instruction and complies with standards of course content and qualifications comparable to those of a public school, as determined by the Superintendent of Public Instruction.

THE ARIZONA CONSTITUTIONAL QUESTION

The Arizona Constitution, 1 A.R.S., provides as follows:

Article II, § 12, in part:

"* * * No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. * * *"

Article IX, § 10:

"No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

The language of the above quoted provisions of our Arizona Constitution, standing alone, would seem to leave little doubt about this question. Our Arizona Supreme Court, however, like its federal counterpart, has found it appropriate to view old language in light of modern times and problems. While we may not all agree with all the results, the decisions are clear, and are binding upon us.

The decision which dictates the conclusion reached in this opinion is Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967). Although considerable portions of that decision will be set out herein, the reader is commended to the full text of that opinion as being the most well-reasoned opinion on this subject in the United States today. The Community Council decision was an action wherein the Community Council, an Arizona non-profit corporation as petitioner, sought an order for Writ of Mandamus compelling Jewel W. Jordan, Arizona State Auditor, and Jack Williams, Governor of the State of Arizona, to approve certain vouchers representing reimbursements to the petitioner for State Welfare Department share of relief expenditures made by the Salvation Army. The State Auditor rejected the claims on the grounds that it conflicted with the provisions of the Arizona Constitution regarding aid to religious organizations.

The Court held that there are certain situations where appropriations or reimbursements will not be construed as violations of the Arizona constitutional provisions. Justice Lockwood, speaking for a unanimous court, succinctly stated the issue:

"The issue placed in its proper perspective is whether the state or any of its agencies can choose to do business with and discharge part of its duties through denominational or sectarian institutions without contravening constitutional prohibitions." 102 Ariz. at 451.

The Court immediately refused to adopt the strict view that no public monies may be channeled to religious organizations for any purpose whatsoever without, in fact, aiding the church contrary to constitutional mandate:

"We do not agree that such was the intent of the framers of the above cited constitutional provisions [Article II, § 12, and Article IX, § 10, supra]. The prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state, the

thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches. But the doctrine of separation of church and state does not include the doctrine of total non-recognition of the church by the state and of the state by the church. The state constitutional provisions must be viewed in light of contemporaneous assumptions concerning the appropriate sphere of action for each institution. History is clear that as a state evolves from one decade to another the role of the state 'transcends traditional boundaries and assumes new dimensions' necessitating a revision of the idiomatic meaning of 'separation' to align it with 'the new realities if original purposes and expectations are to be realized'. See Giannella, Religious Liberty, Non-establishment, and Doctrinal Development, 80 Harvard Law Review 1381, 1383 (May, 1967)." 102 Ariz. at 451.

The Court carefully reviewed decisions from Illinois and Georgia concerning the economic effect of the alleged "aid", and while it put to rest some of the sham between full reimbursement and limited reimbursement, it approved "aid" under what it labeled a "partial matching plan". The language of the Court here is instructive, not only as to the constitutionality of the statute before us, but also as to its potential problems in administration and application:

"We most heartily agree with the majority decision in Bennett [Bennett v. City of La Grange, 153 Ga. 428, 112 S.E. 482, 22 A.L.R. 1312 (1922)] that whether it be full reimbursement or less than full reimbursement, 'aid' in fact has been given to the religious organization. But contrary to the Bennett majority we also agree with the single sentence dissent in the case stating this type of 'aid' is not the type of 'aid' prohibited by the constitutional provision of Georgia which is similar and somewhat narrower than our own constitutional provisions.

"'Aid' in the form of partially matching reimbursement for only the direct, actual costs of materials given entirely to third parties of any or no faith or denomination and not to the church itself is not the type of aid prohibited by our constitution. The 'aid' prohibited in the constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion. We also hold that in order to fulfill the original intent of the constitution, the word 'aid' like the word 'separation' must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past." (Emphasis added.) 102 Ariz. at 453.

The Court also discussed the so-called "Child Benefit Theory" as referred to in Everson and Cochran, supra. In adopting a "True Beneficiary Theory", the Court spoke thusly:

"Briefly, the theory is that it is not the school or sectarian institution that is receiving the benefits of the appropriation but the child itself. Placing this theory in the present adult-child context of the case before us, we choose to more accurately call the doctrine the "True Beneficiary Theory". * * * [W]e shall ignore those who are not in fact the real or true beneficiaries and we hold that the payments are made in effect from the state--not to the Salvation Army, but to those who actually profit from the disbursements--to the individuals and families who are destitute and receive the emergency aid." 102 Ariz. at 455.

Several cautions in administration of the act and the use and accounting of funds are raised by the Court in Community Council v. Jordan, supra. First, the fact that less than an absolute accounting of the portion of permissible aid was not required in an emergency situation, indicates the contrary principle in the non-emergency type of aid before us:

"Thus, it is conceivable that in any one period even though there are 40% of the people who would qualify for state emergency relief, the cost of providing for these people may be less than 40%. Nevertheless, the Welfare Department would be required to pay 40% under the contract. Notwithstanding such a possibility, this court is of the opinion that the emergency nature of the aid required to be rendered dictates a practical approach to a practical problem. There is neither time nor personnel sufficient to make a completely accurate adjustment. This is emphasized in light of the fact that much of the aid is given during the evening and on weekends when the Department of Public Welfare is closed. Further, a lengthy interview followed by an investigation and a subsequent authorization is not compatible with the speed that an emergency situation demands. If enough time and care is taken to determine that a bona fide emergency does exist and that reasonable standards are used in making this determination, this is sufficient under the circumstances." 102 Ariz. at 455.

Accounts must clearly reflect that none of the funds provided by Senate Bill 45 go other than for the secular education it is designed to aid.

The Court also makes it clear that there can be no discrimination as to who would be eligible for the aid. There can be no requirement as to race, creed, religion, national origin, church preference or membership, chapel, religious instruction, etc., in the approved non-public schools:

"However, this court is cognizant of the fact that the aid is not rendered in a vacuum. Those who apply for and receive aid realize more or less that it comes through a religious organization. The Salvation Army is an arm of the Christian Church. It has been held that the Salvation Army is a sectarian institution. *Bennett v. City of La Grange*, supra. Further, those receiving the aid

probably do not realize that a major portion of the help is financed by the state. But it is to be noted that participation in a specific religion is not a requirement to obtaining aid. No Salvation Army literature or pamphlets are displayed or distributed at the Welfare Center. A few pictorial representations of Jesus Christ are displayed, as well as a few signs concerning chapel services at 6:00 P.M. daily. Attendance at the chapel services, which are conducted by ministers of various churches in the community on a rotating basis, is voluntary. The mass feeding facility at the Emergency Shelter is opened at 6:30 P.M. immediately adjacent to the chapel and may be entered from doors opening from the chapel itself, or from a door leading to the main entry from the street. All persons physically presenting themselves at the mass feeding facility are given a meal cafeteria style on a first come, first served basis. No one is required to identify himself or to make application or answer any question as a condition precedent to obtaining food at this facility. Attendance at chapel services is not a condition precedent to obtaining food, although persons attending chapel services secure prior entry into the mass feeding facility. Of course, if for any reason those not attending chapel services could not obtain food, this would immediately raise the question of religious preference at the expense of the state, and render unconstitutional the payments through the Community Council to the Salvation Army.

"A different facility housed at the Welfare Center is the Harbor Light Alcoholic Center. Persons in need of assistance are asked to complete an application form. This form asks, inter alia, what the individual's religious preference is, if any. The information obtained is used in attempting to obtain further assistance for the applicant and for statistical purposes. Assistance is not refused

to persons who have no religious affiliation, nor to persons of any particular religious affiliation."
(Emphasis added.) 102 Ariz. at 456.

Finally, the Court's holding itself notes the careful, but responsive, course the Court intends to follow through these troubled waters, and warns that no substantive deviations will be tolerated:

"We hold that the constitutional prohibitions against furnishing aid or support to any religious worship, exercise or instruction, and against using public funds to aid any church or private or sectarian school or public service corporation must be rigidly enforced in context of the contemporary fabric of our society and in light of its needs. However, under the facts in this case, where the state is paying less than the actual cost of food, lodging, clothing, transportation, cash assistance, laundry and cleaning given to the destitute in emergency situations and paying nothing for administration, there is not an unconstitutional aiding of the conduit through which such things are made available." (Emphasis added.) 102 Ariz. at 456.

CONCLUSION

It is thus the opinion of the Attorney General of Arizona that Senate Bill 45, as introduced in the Arizona State Senate, 29th Legislature, Second Regular Session, is not violative of any provision of the United States Constitution or the Arizona Constitution.

Respectfully submitted,


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