



STATE OF IDAHO

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February 23, 1989

The Honorable Janet S. Hay
Idaho State Representative
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: House Bill 223

Dear Representative Hay:

You have requested legal guidance from this office regarding House Bill 223. This bill, denominated the "open enrollment" proposal, would permit appropriated state funds to follow a student from one school or district to another. Therefore, it is, as you have noted, sometimes called a "voucher" plan. You question whether this proposal could be extended to include private and parochial schools. For the reasons stated below, it is my conclusion that extension of the plan to parochial schools would violate art. 9, § 5, of the Idaho Constitution.

Art. 9, § 5, of the Idaho Constitution provides as follows:

Sectarian appropriations prohibited. -- Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose.

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The Honorable Janet S. Hay
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Page 2

In the case of Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), the Idaho Supreme Court reviewed this constitutional provision. In that case the Idaho Supreme Court stated:

However, unlike the provisions of the federal constitution, the Idaho Constitution contains provisions specifically focusing on private schools controlled by sectarian, religious authorities. In considering the provisions of Idaho Const. art. 9, § 5, set out above, one cannot help but first be impressed by the restrictive language contained therein. . . . By the phraseology and dictation of this provision, it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution.

The court then held that the transportation of students to a parochial school on public school buses violated this provision of the Idaho Constitution.

Extending the voucher plan to parochial schools would run afoul of the Idaho Constitution, as interpreted by the court in the Epeldi case. This prohibition does not appear to apply to private schools operated by non-sectarian authorities. In order to pass constitutional muster, then, the provisions of the bill should be limited to public and non-sectarian private schools.

I hope that this answers your question. If there is anything further that I can provide, please advise.

Very truly yours,

PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK/tg