

February 7, 1992

Honorable Myron Jones
Idaho House of Representatives
STATEHOUSE MAIL

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

Re: Proposed Amendment to the Idaho Constitution, art. 9, sec. 5

Dear Representative Jones:

This letter addresses your inquiry concerning whether legislation authorizing vouchers or tax credits to parents whose children attend private schools violates the Idaho Constitution. It is my opinion that the Idaho Constitution, art. 9, sec. 5, as written, prohibits such legislation. Your proposed amendment to art. 9, sec. 5 appears to overcome this prohibition, at least as to vouchers. There may be additional concerns under art. 9, sec. 6. Moreover, the analysis does not end here. Legislation authorizing tax credits or vouchers to parents whose children attend private schools also raises questions under the first amendment of the United States Constitution. Each of these issues will be discussed.

AID TO CHURCH-AFFILIATED SCHOOLS

The first issue to be addressed is whether a statutory voucher or tax credit system for parents of schoolchildren attending private schools would violate the Idaho Constitution. The clearest constitutional prohibition against such a statutory system is art. 9, sec. 5, which states:

§ 5. 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; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private,

not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

The Idaho Supreme Court reads this provision to require a stricter separation between church and state than does the United States Constitution. Epeldi v. Engelking, 94 Idaho 390, 395, 488 P.2d 860, 865 (1971), *cert. denied* 406 U.S. 957 (1972). The Idaho Supreme Court has determined that the provision absolutely prohibits legislative appropriations which help "support or sustain" any church affiliated school. *Id.*

In determining whether a statutory tax credit or voucher system violates this standard, a threshold issue is whether it is significant that the system is available to parents of "private" schoolchildren as opposed to "parochial" schoolchildren. Under *Epeldi*, if the vouchers or tax credits are, in practice, given to parents of parochial school students, they violate art. 9, sec. 5. In Epeldi, the supreme court addressed a statute which authorized the board of trustees of each district to provide transportation for "public" and "private" school pupils. The supreme court held that providing such transportation services to parochial schools violated the state constitution. Thus, a statute which, on its face, provides vouchers or tax credits to parents of private schoolchildren will be deemed unconstitutional if those vouchers or tax credits are available to parents whose children attend private schools affiliated with a church.

A second issue is whether there is any constitutional significance if the aid takes the form of a tax credit as opposed to a voucher. Art. 9, sec. 5, prohibits any appropriation or payment "from any public fund or moneys whatever" to aid a church-affiliated school. A voucher system would require an appropriation or payment from a public fund. But what of tax credits? It is clear that a tax credit falls within the terms of art. 9, sec. 5. It has long been recognized that tax deductions or credits can be the equivalent of direct expenditures of public funds. See Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983); Comm. for Public Education v. Nyquist, 413 U.S. 756 (1973) (money involved in tax benefit is a charge made against the state treasury). The Massachusetts Supreme Court recently addressed this issue when it held that a tax deduction for parents of children attending private schools violates the Massachusetts Constitution. Opinion of the Justices of the Senate, 514 N.E.2d 353 (Mass. 1987). The court stated:

[T]he fact that the expenditure here takes the form of a tax deduction rather than a direct payment out of the Commonwealth's treasury does not alter the result Tax subsidies or tax expenditures of this sort are the practical equivalent of direct government grants.

Id. at 355. Thus, like a voucher, a tax credit will violate the terms of art. 9, sec. 5.

Another question implicated is if there is any legal significance, under art. 9, sec. 5, that the public monies are paid to the parents rather than directly to the parochial school. Again, the answer is "no." The Idaho Supreme Court has reasoned that aid need not be given directly to a church-affiliated school to pose a constitutional problem. Rather, aid given to the students' families will be held to violate art. 9, sec. 5, if that aid ultimately has the effect of assisting the school. Thus, for example, in *Epeldi, supra*, the court concluded that art. 9, sec. 5, prohibits the state from providing bus services to parochial school students, as these services eventually benefit parochial schools "by bringing to them those very students for whom the parochial schools were established." *Id.* at 396, 488 P.2d at 866. Thus, even though vouchers and tax credits are given to parents rather than directly to a parochial school, they violate art. 9, sec. 5, because they will ultimately aid the school.

PROPOSED AMENDMENT

Anticipating that a statute providing tax credits or vouchers to parents of children in private schools might violate art. 9, sec. 5, you have prepared an amendment to this constitutional provision which states:

Nothing in this section shall prohibit the legislature from creating and funding an educational voucher system for Idaho students.

You ask whether this amendment is sufficient to override constitutional concerns under art. 9, sec. 5.

As a preliminary matter, your amendment only addresses vouchers. Thus tax credits would still be suspect. If it is a tax credit system you are proposing, I recommend you mention tax credits in your amendment to art. 9, sec. 5.

Additionally, your amendment does not expressly state that a voucher system could be used for parochial schools. Thus, in interpreting this new language, a court would have to decide whether to construe the amendment so as to essentially nullify the core of art. 9, sec. 5, or try to reconcile the amendment with art. 9, sec. 5, by allowing a voucher system for public and nonchurch-affiliated private schools while disallowing vouchers for church-affiliated private schools. If your intent is to enact a voucher system which can be used by parents of parochial school pupils, I recommend that you clarify your amendment so that church-affiliated schools, as well as other types of schools, clearly fall within its provisions.

Finally, you must consider art. 9, sec. 6, of the Idaho Constitution, which essentially prohibits religious instruction in publicly funded schools. It further states that no teacher or district can receive public school monies if their schools are not conducted

"in accordance with the provisions of this article." There can be little doubt that parochial or church-affiliated schools provide religious instruction. Consequently, if you are proposing a voucher or tax credit system for parents of children attending parochial schools, you will have to amend art. 9, sec. 6, as well as art. 9, sec. 5.

In sum, a voucher or tax credit system violates art. 9, sec. 5, of the Idaho Constitution. Your proposed amendment alleviates some of the concerns under this article. However, your amendment should be clarified in the ways mentioned. In addition, you may also need to amend art. 9, sec. 6.

ESTABLISHMENT CLAUSE

While your proposed amendment to art. 9, sec. 5, of the Idaho Constitution alleviates some problems posed by the Idaho Constitution, your efforts to establish a voucher or tax credit system will nevertheless remain futile if such a system violates the first amendment of the United States Constitution. Thus, although you have not requested it, an examination of the first amendment is necessary.

The first amendment prohibits the government from establishing or promoting religion. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The United States Supreme Court presently applies a three-part test to determine whether legislation violates the establishment clause of the first amendment. To be upheld, legislation must reflect a clearly secular legislative purpose, it must have a primary effect that neither advances nor inhibits religion, and it must avoid excessive government entanglement with religion. *Id.* at 773.

The United States Supreme Court has applied this test to several legislatively enacted education funding schemes challenged under the establishment clause. In Nyquist, *supra*, the Court considered a program that gave a partial tax credit to parents of children in private schools. The program also provided an outright tuition reimbursement for poor parents whose children attended private schools. The Court struck down the program, holding that its primary effect was to aid religion. In reaching its decision, the Court noted that the majority of private schools which stood to benefit from the program were parochial and that the state could not avoid first amendment restrictions by funnelling the aid through the parents to the parochial school. The *Nyquist* Court viewed the program as an "ingenious" plan for authorizing the government to pick up bills for religious schools. *Id.* at 784.

A decade later, in Mueller v. Allen, 463 U.S. 388 (1983), the Court addressed a similar issue when it considered tax deductions for educational expenses, including tuition, transportation and textbooks, which were available to parents of children

attending both public and nonpublic schools. This time the Court reached a different result, upholding the tax deduction plan.

The Court distinguished Nyquist on two grounds. First, the Court reasoned that a tax deduction was different from a tax credit or outright grant, noting that deductions for charitable contributions to churches are routinely allowed. More importantly, the Court asserted that the statute at issue in Mueller was facially neutral because, unlike the Nyquist statute, it applied to parents of children attending public as well as private schools. The Court concluded that as the assistance was for a broad class of beneficiaries, the primary effect was not to advance religion. In reaching this conclusion, the Court appeared unconcerned that 96 percent of the tax deductions were taken by parents of children attending parochial schools. Also of little concern to the Court was that most of the deductible expenses, such as tuition, transportation and textbooks, were provided free by public schools and therefore these deductions were not, in practice, available to parents of children attending public schools. Finally, contrary to its position in Nyquist, the Court in Mueller appeared impressed that the aid went to the parents as opposed to directly to the school. The Court, through Justice Rehnquist, concluded that because the aid went first to the parents, their individual choice was required before the aid reached a parochial school and, therefore, the state was not placing its imprimatur on religion. *Id.* at 399.

The Nyquist and Mueller opinions are difficult to reconcile. Added to this is Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986), the most recent Supreme Court opinion considering the validity of educational funding schemes under the establishment clause. Witters involved what were essentially vouchers. The vocational educational program at issue provided direct aid to visually handicapped persons attending a vocational school for the blind. The petitioner was attending a Christian college to be trained as a pastor and he sought to take advantage of the assistance program. Despite the distinction drawn in Mueller between deductions and direct grants, the Supreme Court unanimously ruled that the state's direct payment to the petitioner for his education at the Christian college would not advance religion in a manner inconsistent with the establishment clause.

Justice Marshall authored the opinion and, in an extremely narrow holding, reasoned that the aid in this particular instance was valid as the vast majority of state aid provided overall under the challenged program did not go to church-affiliated schools. There were also a number of broader concurring opinions which relied heavily on Mueller. For example, giving Mueller a sweeping reading, Justice Powell concluded that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [establishment clause] because any aid to religion results from the private choices of individual beneficiaries." Witters at 490-91 (J. Powell concurring).

With this in mind, we now address your proposed voucher and tax credit system. In your letter, you state the vouchers and tax credit would be available to parents of children attending private schools. If your system is not available to all parents, including those of children attending public schools, it will fall directly within the Nyquist holding and probably be deemed unconstitutional. To avoid this problem, you can propose a tax credit or voucher system available to all parents.

However, even this will not guarantee success. The Supreme Court has yet to uphold a tax credit or voucher system where the majority or even a substantial portion of the state aid eventually goes to church-affiliated schools. As noted, Mueller drew a distinction between tax deductions versus tax credits or direct payments. Granted, this distinction was largely ignored in Witters. However, Witters involved a narrow set of facts in which only an inconsequential portion of the state aid eventually went to church-affiliated schools. Thus, whether the Court would allow a voucher or tax credit system, even one available to all parents, in which a substantial portion of the funds is eventually funnelled to church-affiliated schools remains an open question. Certainly, the line-up on the Court has changed and the Court appears now to take a less stringent stand on the establishment clause than in the past. Nevertheless, legislation such as yours, at the very minimum, invites a court challenge and bears a chance of being held invalid.

If you intend to pursue this legislation, I suggest that you weigh the possibility that it could be held unconstitutional. I further recommend that your legislation encompass the following. First, any voucher or tax credit system should be available to all parents of schoolchildren, including parents whose children attend public schools. Second, the system should be as broad based as possible, including expenses which parents of children attending public schools might encounter, such as tutoring or summer school. While these recommendations will not guarantee the constitutionality of a voucher or tax credit system, they will at least enhance the likelihood that such a system could withstand judicial scrutiny.¹

CONCLUSION

A statute enacting a voucher or tax credit system for parents of children attending private schools violates art. 9, sec. 5, of the Idaho Constitution. It may also violate art. 9, sec. 6. Your proposed amendment to art. 9, sec. 5, overcomes some of the concerns

¹ Worth noting is that Idaho has its own establishment clause which states that no person shall be required to support any religious denomination. *See* art. I, sec. 4. The Idaho Supreme Court is free to conclude that Idaho's establishment clause is more protective than the federal establishment clause. If construed more strictly, the court might have difficulty reconciling art. I, sec. 4, with your proposed amendment.

under this provision. However, as discussed above, you may want to clarify your amendment so that it expressly covers a tax credit system as well as aid to parochial schools. In addition, art. 9, sec. 6, may also have to be amended before a statutory voucher or tax credit system is valid under our state constitution.

The establishment clause contained in the first amendment of the United States Constitution is also a concern. Presently, it is an open question whether an educational tax credit or voucher system violates the federal establishment clause. To help avoid federal constitutional concerns, I recommend that your voucher or tax credit system be available to all parents. In addition, I recommend that it be broad based and encompass expenses likely to be encountered by parents of children attending public schools. Such expenses might include, for example, private tutoring or summer school.

If you have any questions, please let me know.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General