

February 25, 1994

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

Dear Mr. Dodson:

I am responding to your request for an Attorney General's Opinion regarding the use and rental of school district facilities by sectarian groups. You have raised several questions concerning how such use relates to art. 9, § 5 of the Idaho Constitution as well as to federal and state case law on separation of church and state. Before answering the questions set forth in your letter, a brief overview of art. 9, § 5 of the Idaho Constitution and the relevant sections of the United States Constitution may be helpful.

1. Background--Constitutional Provisions

There are a number of state and federal constitutional provisions which are critical to the questions you have raised. It may be useful to review some of these provisions before beginning a legal analysis.

First, art. 9, § 5 of the Idaho Constitution prohibits public aid to religious organizations. It states in pertinent part:

Neither the legislature nor any . . . school district . . . 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

Under this Idaho provision, the state may not provide "aid" to religious societies from any public funds or monies.

The United States Constitution also addresses government involvement with religion. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech
.....

Under this federal constitutional provision, the state cannot establish a religion. Importantly, it also cannot prohibit the free exercise of religion or burden a religious group's right to free speech.

Finally, the Supremacy Clause of the United States Constitution states:

This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Supremacy Clause makes clear that, if a state constitutional provision or state statute is in direct conflict with the United States Constitution or a federal statute, the federal law is supreme and the state cannot use its own state constitution or statutes to circumvent the federal law. *See, e.g., Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160 (D. Idaho 1991). A state constitution may be "more protective of a right than an analogous provision of the federal Constitution--provided that protection of the state constitutional right does not infringe a competing federal guarantee." *Id.* at 1163 (emphasis added). In short, state law cannot be used to thwart federal requirements or federal protections.

With these principles as background, I will address your questions.

2. May Public School Property Be Rented/Leased to a Sectarian Organization for Sectarian Purposes, Considering Article 9, § 5 of the Idaho Constitution and Idaho Code § 33-601?

Turning first to Idaho Code § 33-601, it merely authorizes school boards:

1. To rent to or from others, school buildings and other property used, or to be used, for school purposes [and]

.....

7. To authorize the use of any school building of the district as a community center, or for any public purpose, and to establish a policy of charges, if any, to be made for such use.

This state statute provides little more than authority to rent or "authorize the use of" school facilities to non-school groups. It does not specifically address or limit such use if

religious organizations are involved. Hence, there is no reason to conclude that it would bar such rentals from occurring.

As to art. 9, § 5 of the Idaho Constitution, as noted, it does prohibit "aid" to religious groups. Here again, however, there is no reason to construe art. 9, § 5's language as an absolute prohibition of a rental arrangement, assuming the arrangement included a fee commensurate with the actual cost of using the facility. Rather, art. 9, § 5 simply bars usage without commensurate compensation. (*See* discussion below at pp. 6-7.) In short, neither Idaho Code § 33-601 nor art. 9, § 5 of the Idaho Constitution specifically addresses, let alone prohibits, rental agreements with religious groups.

3. When Does the Federal Constitution Require that Public School Property Be Rented or Leased to Sectarian Organizations?

State law does not prohibit school districts from renting public school facilities to religious organizations. Nor does it require them to do so. Idaho Code § 33-601(1) and (7) simply authorizes rental or use of the facilities, and art. 9, § 5 of the Idaho Constitution requires a fee be charged once such usage has been made available. (*See* below at pp. 6-7 for a more complete discussion of this issue.) Importantly, however, there are instances when the United States Constitution does require that religious organizations be allowed to use public school facilities. Although, under state law, a school district is not required to open its facilities to the public, according to the United States Supreme Court, once it has chosen to do so, the United States Constitution forbids it from barring religious groups from using those facilities.

The most recent United States Supreme Court opinion on this issue is Lamb's Chapel v. Center Moriches Union Free Sch. Dist., ___ U.S. ___, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). There, the U.S. Supreme Court reviewed a complete prohibition against after-hours use of public schools by religious groups in a context where school districts had already allowed after-hours use of their school property by a number of other secular organizations. Pursuant to a New York statute, the Center Moriches School District had adopted a rule allowing use of school property for social, civic and recreational purposes. However, the school district refused to allow a Christian film series about family issues and child-rearing to be shown in a public school, reasoning this would violate both the state and federal establishment clauses.

Their policy was challenged and, on appeal, the Supreme Court held that the Free Speech Clause of the First Amendment prohibits discrimination against religious perspectives in public school buildings when those buildings are generally open to the public and are not being used for school purposes. The Court further held that the claimed defense--that such use by a religious group would violate the Establishment Clause requirements of separation of church and state--was unfounded. The showing of the film would not have been during school hours, would not have been sponsored by the

school, and would have been open to the public, not just to church members. Noting that the district property had repeatedly been used by a wide variety of private organizations, the Court held that "under these circumstances . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." 113 S. Ct. at 2148. The U.S. Supreme Court did recognize that there might be instances when the need to ensure separation of church and state under the Establishment Clause by public schools could outweigh the free speech rights of religious groups. "[T]he interest of the State in avoiding an Establishment Clause violation 'may be a compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment" 113 S. Ct. at 2148. Nevertheless, in the case before it, the Court applied the three-part Lemon test established in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and found that the usage of the school facility after school hours for a Christian film series did not violate the Establishment Clause.

Based on the language set forth in the Lamb's Chapel case, it is the opinion of this office that, once a school district chooses to allow use of its facilities as to the community in general or for other public purposes pursuant to Idaho Code § 33-601(1) and (7), the school district has created at least a limited open forum, and it cannot deny access to this forum to a religious group solely because the content of its speech is of a religious nature. To do so would be to unconstitutionally discriminate against the religious group and violate its members' First Amendment rights. Of course, a school district is not required to open its facilities for non-school usage at all. But, once it has chosen to do so, those facilities must be made available in a non-discriminatory manner.

4. If Public School Property is Rented/Leased to a Sectarian Organization, What Guidelines Should Be Imposed Regarding Terms of Rental, Frequency of Use and Factors for Calculating Rental Fees?

The Supreme Court has held that if a school district allows non-school organizations to use its facilities during non-school hours, it cannot deny access to those facilities by religious groups solely because of the religious nature of their speech. The next question, then, is what terms the school districts should impose in any rental agreement with religious organizations.

a. Length and Frequency of Use and the Establishment Clause

In considering terms of a rental agreement, one factor which must be weighed is the length and frequency of use. Prolonged use by a religious organization can raise problems under the Establishment Clause.

In 1959, for example, the Florida Supreme Court held that "prolonged" use of school facilities by a congregation "without evidence of immediate intention to construct

its own building" would be impermissible. Southside Estates Bapt. Church v. Bd. of Trustees, Sch. Dist. No. I, 115 So. 2d 697, 700 (Fla. 1959) (emphasis added). Almost two decades later, the New Jersey Supreme Court, in Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944 (N.J. 1978), held that temporary use of a public school facility by a religious group for worship services was neither excessive entanglement nor a violation of the Establishment Clause. Importantly, however, in its decision, the Court also stated:

Our only real concern under the entanglement test is with the lengthy use of these school premises by some of the religious groups. At some point, such continuous use will surely implicate the Board in the promotion of religion.

Id. at 958. Worth noting again here is the language in Lamb's Chapel that, while the use of school facilities after school hours for a Christian film series did not violate the Establishment Clause, there might be other instances where a different conclusion would be reached.

These opinions, taken together, suggest that not only must school districts be aware of free speech concerns when renting space to church facilities, they must also be concerned with the Establishment Clause and its requirement that the state maintain a separation of church and state. These cases indicate that, at some point, prolonged and continuous use of a school facility by a religious group, as opposed to temporary or occasional use, may create an Establishment Clause concern.

In short, districts should be aware that, when they approve a request from a religious group for use of their facilities on an ongoing basis, at some point, prolonged use by the religious group may violate the Establishment Clause. Whether or not there is, in fact, a violation is a fact-based question. School districts would be prudent to consult with their legal counsel to ensure that no such violations occur. Cases that should be taken into account by their legal counsel include Wallace v. Washoe Cnty. Sch. Dist., 818 F. Supp. 1346 (D. Nev. 1991) (school district had a limited open forum, and a non-permanent use of school facilities did not run afoul of the Establishment Clause); Pratt v. Ariz. Bd. of Regents, 520 P.2d 514 (Ariz. 1974) (court upheld the lease of a university stadium to the Reverend Graham for a seven-day period); Southside Estates Bapt. Church v. Bd. of Trustees, Sch. Dist. No. I, 115 So. 2d 697 (Fla. 1959) (court upheld the "temporary" use of school buildings for Sunday worship); Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944 (N.J. 1978) (court upheld temporary use of school facility, but suggested prolonged use by a religious group with no intent to procure its own building could violate the Establishment Clause). Of relevance also is a guidance memorandum from Washington State (which has a constitutional provision very similar to Idaho's) in which advice on what constitutes "occasional use" is offered. *See* Appendix B.

b. Rental Fees

A second issue relating to terms of a rental agreement is whether the districts must charge religious organizations fees for using their buildings.

Idaho Code § 33-601(7) permits a school board to establish a policy for charges. It does not require that charges be made. However, as noted above, art. 9, § 5 of the Idaho Constitution prohibits the state from providing public aid to religious organizations. This raises two questions. The first is whether allowing religious organizations free access to school facilities constitutes "aid" for purposes of art. 9, § 5. The next question is, assuming that free access is prohibited "aid," how can districts charge religious organizations for use of their schools' facilities without thereby violating the U.S. Constitution's prohibition against discriminatorily burdening religious speech?

Turning to the first question, allowing religious groups free use of school facilities without charging them at least the actual cost of such use probably constitutes "aid" under art. 9, § 5 of the Idaho Constitution. The most recent Idaho Supreme Court opinion addressing public aid to a religious group is Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971). There, the court found that furnishing free transportation to parochial school students violated art. 9, § 5:

While the legislative goal to aid all students in obtaining an education is commendable, nonetheless, the constitution of this state in explicit terms has declared that public aid of churches and church schools is prohibited.

94 Idaho at 398, 488 P.2d at 868. In a similar determination, the Idaho Attorney General concluded that state funds set aside for the Idaho College Workstudy Program for post-secondary students could not be given to students attending post-secondary institutions controlled by a church, sectarian or religious denomination without violating art. 9, § 5 of the Idaho Constitution. 1989 Idaho Att'y Gen. Ann. Rpt. 42. While neither the Idaho Supreme Court ruling nor the Idaho Attorney General's decision directly addressed the free use of public school facilities by religious organizations, each underscores that the Idaho Constitution is very restrictive when it comes to public aid for religious groups.

Although the case law from other jurisdictions is sparse, a few courts have directly reviewed the question of whether the use of public school facilities by religious groups constitutes "aid" to religion. In Pratt v. Arizona Bd. of Regents, 520 P.2d 514 (Ariz. 1974), the Arizona Supreme Court considered whether leasing a state university football stadium for a series of religious services violated its state prohibition against using public funds to aid a church. The court concluded that the "aid" prohibition had not been violated in that instance because the stadium was leased and not donated to the religious group. Significantly, the court emphasized that, absent the fair rental arrangement, there would have been a constitutional problem. This opinion is especially significant for

Idaho because Arizona's constitutional prohibition against aid to religious organizations is similar to our own.

In Resnick, 389 A.2d at 951, the New Jersey Supreme Court considered whether use of public school facilities by religious groups violated their state constitutional provision guaranteeing that no person would be obliged to pay "taxes" for "building . . . any church or . . . for the maintenance of any . . . ministry." The court concluded that, so long as churches that used public school facilities were charged the "out-of-pocket expenses of the board directly attributable to the use by the religious body," the state constitutional requirements were met. *Id.* Free usage would have violated the New Jersey Constitution.

Given these cases, school districts should assume that free usage of their facilities by religious organizations does constitute "aid" for the purposes of art. 9, § 5. Consequently, to carefully avoid the Idaho Constitution's prohibition against using public funds "in aid of any church or sectarian or religious society," a school district that allows religious organizations to use its facilities should charge or assess at least the marginal cost (that is, out-of-pocket expenses) of that use.¹

Given that districts must charge religious organizations at least the marginal cost of using school facilities, the next question is how this can be accomplished without violating the United States Constitution. As noted, the First Amendment prohibits the state from discriminating against religious groups based on the content of their speech. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., ___ U.S. ___, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). Moreover, this prohibited discrimination does not only take the form of absolutely barring religious groups from open forums to which other groups have access. Charging religious groups more than non-religious groups for the same use of those forums is also a form of prohibited discrimination.

In Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 811 F. Supp. 1137 (E.D. Va. 1993), for example, a church challenged a school board policy of charging the church more than other community groups to use school facilities. The board's policy provided that during the first five years of use religious organizations were to be charged at the same rate as other non-profit organizations. However, the policy further stated that during the sixth year, religious groups were to pay double the rental rate; during the seventh year, triple the rate; and during the eighth year, four times the non-profit rate. No other group was subject to this escalating fee. The reviewing court held that "[b]y charging religious groups alone the escalating rental fee scale and having no compelling interest . . . to rationalize the higher rate, the School Board violate[d] a fundamental premise of the Free Speech clause." 811 F. Supp. at 1140 (emphasis added). The court concluded the policy was unconstitutional.²

Clearly, it is important that school districts that allow outside groups use of their facilities have a policy in place that sets forth the different categories of organizations who may use the facilities and the charges that will be assessed. In order to comply with art. 9, § 5 of the Idaho Constitution, that fee schedule, at a minimum, should charge religious groups at least the marginal cost of usage. However, because of the U.S. Constitution, the fee schedule must not discriminate against religious groups by charging other comparable groups less solely because their speech is nonreligious in nature. Any fee schedule established must be content-neutral in terms of its classifications for fees and comparable groups must be charged at the same rate.

This is not to say that some content-neutral categories cannot be established. A district could, for example, distinguish between usage of its facilities by school-affiliated versus non-school-affiliated organizations and exempt school-affiliated organizations from charges. Likewise, the district could exempt government organizations from paying fees or partially subsidize them by reduced fees as this is, again, a content-neutral distinction based instead upon one government entity assisting another.

However, we reiterate that, in complying with art. 9, § 5, and charging religious groups a use fee, it is important that districts not violate the United States Constitution by charging other comparable groups, such as political organizations or other private nonschool-affiliated groups, a lower fee or no fee at all. While charging religious groups for actual costs may be necessary under art. 9, § 5, this charge must be levied in a nondiscriminatory manner against all comparable groups to avoid free speech concerns.

CONCLUSION

In summary, court rulings have held that if a school district allows its facilities to be used by outside organizations, the district must also allow religious groups to have the same access to those facilities. However, long-term or permanent use of school facilities by a religious group may violate the Establishment Clause of the U.S. Constitution. A district policy should address this issue of long-term use. Moreover, the clear prohibition against use of public funds to support religious or sectarian activities found in art. 9, § 5 of the Idaho Constitution suggests that when a religious group uses a public school facility, a charge for the use that at least equals the marginal cost of using the facility for the specified period of time should be assessed. However, because the U.S. Constitution prohibits discriminating against religious groups, other comparable organizations must also be charged this fee at the same rate.

As a practical matter, at least one publication offers suggestions to school districts. In Discrimination Against Religious Viewpoints Prohibited in Public Schools: An Analysis of the Lamb's Chapel Decision, 85 Ed. Law Rep. 387 (commentary by David Schimmel, J.D.), the author sets forth several guidelines regarding the use of school buildings by religious groups. These may be helpful to you and I have enclosed them as

Appendix A. As noted above, I have also enclosed as Appendix B a 1978 excerpt from a memorandum by the Washington State School Superintendent. Because Washington has a constitutional provision similar to art 9, § 5 of the Idaho Constitution, excerpts from this Washington memorandum may provide guidance on Idaho constitutional concerns.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office. I hope the information provided is helpful in advising school districts. I realize this is not an easy issue and the case law is not always clear. If you have any questions, please do not hesitate to call.

Sincerely yours,

ELAINE EBERHARTER-MAKI
Deputy Attorney General
State Department of Education

APPENDIX A

1. The First Amendment does not generally require public schools to allow outside groups to use their facilities.

2. If public schools allow some community groups to use their facilities after school hours to present films, speakers, or forums on one or more subjects, they cannot prohibit religious groups from presenting their views on the same subjects. Such viewpoint discrimination against a religious perspective (or any other legitimate perspective) is a violation of the Free Speech Clause of the First Amendment.

3. Nevertheless, public schools may restrict or prohibit religious speech or religious activities on their property, if necessary, to avoid violating the Establishment Clause.

4. There is no unanimity among the justices concerning what test should be applied to determine what activities violate the Establishment Clause. However, the Court's use of the *Lemon* and "endorsement" tests in *Lamb's Chapel* suggests that educators should use *Lemon* or both of these tests to determine when use of school facilities by religious groups or for religious purposes may be prohibited.

Discrimination Against Religious Viewpoints Prohibited in Public Schools: An Analysis of the *Lamb's Chapel* Decision, 85 Ed. Law Rep. 387, 395-96 (commentary by David Schimmel, J.D.).

APPENDIX B

What constitutes an "occasional" use is not readily computable pursuant to any magic formula. Common sense would, however, appear to dictate that a particular school building or complex of buildings be used in whole or part only on an infrequent ad hoc basis for the conduct of religious activities. Regular use of a particular building or complex for normal religious activities, e.g., each Sunday for religious services, is obviously more apparent to the public and fraught with the danger that the public will view the religious group(s) as having established a degree of permanency at the location, thus, lending the prestige of the government to the particular religious group(s).

....

[T]he principal and specific violations of the federal and state constitutions to be guarded against are: 1) an express or recognizable purpose or intent on the part of the school district of aiding or supporting religion; 2) support of religion in terms of preference for a particular religion to the exclusion of others; 3) support of religion in terms of the placement of the authority and/or prestige of the school district behind a particular religion or religion generally; 4) excessive administrative relationships with religious groups as a consequence of their use of school buildings; 5) excessive political divisiveness in the community as a consequence or likely consequence of the use of school buildings for religious purposes; and 6) direct and indirect financial support of religion.

Excerpts from Memorandum dated February 27, 1978, to Austin from Patterson (Washington State Superintendent of Public Instruction).

¹ This office interprets "out-of-pocket expenses" to mean the marginal or additional cost of using the facility for the specified period of time, including costs associated with opening and closing the building, additional heating, cooling, lights, cleaning and whatever other maintenance or operating costs are related to the group's use of the building at that time. See Resnick, 389 A.2d at 951. The important point here is that the district must be able to show that it did not use its public funds, in effect, to subsidize a religious activity in district-owned property.

² I also reviewed the two other cases you suggested: Zobrest v. Catalina Foothills Sch. Dist., ___ U.S. ___, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993), and Hoppock v. Twin Falls Sch. Dist., 772 F. Supp.

1160 (D. Idaho 1991). In Zobrest, the U.S. Supreme Court held that the Establishment Clause does not lay down an absolute barrier to placing a public employee in a sectarian school as a sign language interpreter. In Hoppock, the U.S. District Court for Idaho held that, under the federal Equal Access Act, if a school district has a limited open forum (that is, allows student groups that are not directly related to the curriculum), then secondary students attending those schools have a right to form student-initiated prayer groups. For the purpose of answering your question about rental fees, neither Hoppock nor Zobrest is particularly useful. The ruling in Hoppock is limited to the federal Equal Access Act which applies only to secondary student organizations and does not extend to public or private organizations wishing to use school facilities. The Court in Zobrest examined only the U.S. Constitution. As noted earlier, the Idaho Constitution is more prohibitive and it may be that placement of a public employee in a sectarian school as a sign language interpreter would violate the state's constitution. See Goodall v. Stafford Cnty. Sch. Bd., 930 F.2d 363 (4th Cir. 1991), *cert. denied* ___ U.S. ___, 112 S. Ct. 188, ___ L. Ed. 2d ___ (1992).