

July 24, 1995

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Entitled "Non-Public Education Enhancement Act"

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue. Further, under the review statute, the Attorney General's recommendations are advisory only, and the petitioner is free to accept or reject them in whole or in part.

BALLOT TITLE

When the initiative is filed, our office will prepare a short ballot title and a long ballot title. The ballot titles should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, petitioner may submit proposed language in keeping with the standards for ballot titles. If petitioner submits such language, it will be considered by the Attorney General's staff as it drafts the ballot titles.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative provides a \$500 state income tax credit to parents of compulsory-education-aged children who do not attend public school. The stated purpose for the initiative is "to encourage non-public education growth and to alleviate the pressure and expense of overcrowded schools." The initiative proposal would allow parents of non-public school students between the ages of 7 and 16 to claim the credit for any tax year in which the student did not attend an Idaho public school.

The Attorney General has previously addressed the questions of private school tuition tax credits and voucher systems. The proposals that prompted those opinions fundamentally differed from this initiative proposal which is a tax credit for non-use of

public schools. The issue of taxpayer support of private schools still remains and therefore it will be addressed.

Although this initiative is distinguishable from previous efforts to support private schools, similar constitutional concerns remain. If enacted into law, this proposal will probably encourage some parents to remove their children from public school and enroll their children in private parochial schools. Whenever it appears that tax dollars are being used to support a religious institution, the proposal must be analyzed under the Constitutions of both the United States and Idaho.

ANALYSIS UNDER THE U.S. CONSTITUTION

The United States Supreme Court, in Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973), declared certain tax benefits to religious schools unconstitutional. In that case, taxpayers challenged a New York statute which, among other things, granted benefits to parents of non-public school students. The Court struck down the scheme, citing the Establishment Clause limitations that require a state to neither advance nor inhibit religion.

Ten years later, in the case of Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983), the Supreme Court held that a Minnesota law providing a tax deduction for tuition, school books, and school transportation expenses for both public and private school students was constitutional. In comparing the Minnesota law to the New York statute struck down in Nyquist, the Court drew several distinctions. First, the tax deduction for tuition expenses was only one of many deductions available to Minnesota taxpayers. The invalid statute in Nyquist was criticized by the Court as “granting thinly disguised ‘tax benefits,’ actually amounting to tuition grants, to the parents of children attending private schools.” Mueller, 103 S. Ct. at 3066. The initiative proposal at hand would provide a tax credit to parents of Idaho’s non-public school students. Such a credit differs from both the tax deduction allowed in Mueller and the outright grant struck down in Nyquist. However, the Mueller Court expressed its preference for a tax scheme based on a tax deduction rather than a tax credit.

The Mueller Court spoke approvingly of the availability of the tax deduction to all parents of school-aged children. The Nyquist benefits were available only to parents of non-public school children. The present initiative limits its benefits to parents of children who do not attend public school, distinguishing it from the plan approved by the Court in Mueller. It is, however, broader in its scope than the New York plan invalidated in Nyquist, since, for example, the benefits under Idaho’s proposed initiative would be available to parents of home-schooled children.

The Court also favored the Minnesota tax plan because it channeled any assistance to parochial schools through individual parents, whereas in Nyquist, at least some of the tax benefits were transmitted directly to parochial schools. The proposed initiative provides a benefit directly to parents, similar to the Minnesota plan. The Court expressed the importance of this distinction, saying, “Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no ‘imprimatur of State approval’ can be deemed to have been conferred on any particular religion, or on religion generally.” Mueller, 103 S. Ct. at 3069, citing Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981). The Court went on to say, “The historic purposes of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.” Mueller, 103 S. Ct. at 3069.

The constitutionality of the proposed initiative under the First Amendment is a debatable issue. However, the proposed initiative’s grant of the tax credit to parents of all non-public school students—home-schooled, private non-sectarian, and private parochial—coupled with the absence of a direct financial benefit to parochial schools, makes it probable this proposal will be upheld under the U.S. Constitution.

ANALYSIS UNDER THE IDAHO CONSTITUTION

The Idaho Constitution, art. 9, § 5, states in part:

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

In interpreting this article, the Idaho Supreme Court has held that Idaho’s constitution more positively enunciates the separation between church and state than does the Constitution of the United States. Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971). In Epeldi, the court decided a case involving a statute that mandated school districts to provide transportation to students attending private schools within the district’s boundaries. This was found to be a benefit to the private schools. The Supreme Court found the statute in violation of art. 9, § 5 of the Idaho Constitution. The court

reasoned that, since some of the private schools benefiting from the law were religious or church-affiliated schools, the provision of transportation for their students was a government appropriation in aid of a sectarian institution and, thus, unconstitutional.

The Epeldi court established a simple test, drawn from the constitution itself, to determine the validity of the statute. The court said:

The Idaho Constitution Article 9, section 5, requires this court to focus its attention on the legislation involved to determine whether it is in “aid of any church” and whether it is “to help support or sustain” any church affiliated school.

94 Idaho at 395, 488 P.2d at 493.

The Attorney General has recently provided an opinion on the constitutionality of tuition tax credits or vouchers. In a guideline issued to a state representative on February 7, 1995, the Office of the Attorney General opined that a tax credit for private school tuition is, like the bus service in Epeldi, an unconstitutional appropriation in aid of a sectarian institution. In arriving at that opinion, the Attorney General analyzed the tuition tax credit plan under the Idaho Constitution and determined that the credit was most likely a “grant or donation of . . . money” to a church-affiliated school, which is specifically prohibited by art. 9, § 5 of the Idaho Constitution. 1995 Idaho Att’y Gen. Ann. Rpt. —, —.

The initiative proposal under review here differs from a tax credit for private school tuition, which, following the Attorney General’s previous analysis, violates the Idaho Constitution. It is also clearly distinguishable from the private school transportation statute which was struck down in Epeldi. In those cases, the state aid to the private school was more direct than the aid proposed by this initiative. If this initiative were approved, it is theoretically possible (albeit unlikely) that no benefit whatsoever will accrue to church affiliated schools. In Epeldi, the Supreme Court determined that transportation was a benefit to the private school. In the case of a tuition tax credit, only those parents who pay tuition may claim it. A tax credit for non-use of public schools does not necessarily benefit parochial schools in the same way as the more direct tuition tax credit or free bus transportation.

Presently, Idaho Code § 63-3029A offers an income tax credit for charitable contributions to Idaho’s public or private non-profit institutions of elementary, secondary or higher education. Presuming Idaho Code § 63-3029A is constitutional, it follows that this proposed initiative is likewise constitutional. It can be logically argued that there is little to distinguish between the benefits received by private schools under Idaho Code § 63-3029A and those under the proposed initiative.

The constitutionality of this proposed initiative under the Idaho Constitution is also a debatable question. However, given that any benefit to parochial schools is remote, it follows that the proposed credit may well pass constitutional muster. The benefit under the proposed scheme flows to parents who choose not to educate their children within Idaho's public school system and not to the parochial schools. Neither the purpose nor the effect of the proposed initiative appear to violate Idaho's proscription regarding aid to religious or sectarian schools.

ISSUES RELATING TO IDAHO'S INCOME TAX STATUTES

There are at least five tax-related issues which should be addressed by the drafters of this initiative:

A. Differential Treatment of Taxpayers

The initiative requires a student for whom the tax credit is received be a resident of Idaho for 270 days of the taxable year. If a parent from another state moves into Idaho during the summer and begins home schooling, that parent will be ineligible for the tax credit. This residency distinction between taxpayers identical in all other respects may violate the Commerce Clause of the U.S. Constitution. The drafters may wish to draft language that would allow a partial or pro rata tax credit for part-year Idaho residents.

B. Definition of "Qualified Dependent"

The proposed initiative incorporates the definition of "qualified dependent" from Internal Revenue Code § 151(c)(3). That section of the Code does not define qualified dependents, but refers to children who may be claimed as dependents. The drafters of this initiative should clarify the definition of "qualified dependent." The initiative should also clearly state that only the taxpayer who is entitled to claim the dependent exemption for the child may claim the tax credit for nonuse of public schools.

C. Pupils Transferred to Neighboring States

Idaho Code § 33-1403 allows border school districts to transfer students to schools in neighboring states. The cost of tuition for such a student is paid by the State of Idaho and the school district involved. This initiative, as it is currently drafted, would permit the parent of such a student to claim the tax credit even though the child has been educated in a public school at the state's expense. The drafters should remedy this apparent inconsistency.

D. Statutory Interpretation

The proposed initiative provides the tax credit for parents of students who do not attend an Idaho public school. If a student attends a public school, even for part of a school year or on a limited dual enrollment basis, then his or her parent will be precluded from claiming the credit.

E. Effective Date

The initiative will be presented to the voters in November 1996, which is after the deadline date for printing of state tax forms. Since the Tax Commission will not know whether the initiative has passed or failed, the tax form must include some explanatory language and a conditional tax credit. This problem may be alleviated by changing the effective date of the initiative from January 1, 1996, to January 1, 1997.

CONCLUSION

It is difficult to forecast where the United States Supreme Court will draw the line between actions that constitute impermissible "aid" to religious institutions and those which are permissible benefits to individual taxpayers. The Idaho Supreme Court also has not clearly ruled on this question. The constitutionality of statutory provisions involving questions of income tax relief which might be construed as having the effect of aiding religious educational institutions is an extremely difficult issue. However, it appears the proposed initiative may well pass constitutional muster. The petitioner is advised to consider making the suggested statutory revisions in order to make the proposed initiative compatible with Idaho's statutory tax scheme.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import and that the conclusions set forth above have been communicated to the petitioner, John Slack, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

KIRBY D. NELSON
Deputy Attorney General