February 7, 1995

Honorable Fred Tilman
Idaho House of Representatives
HAND DELIVERED

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

Re: Legal Analysis of Potential Church/State Constitutional Issues Associated With an Idaho Income Tax Credit for Tuition Payments for Private Schools for Children in K-12

Dear Representative Tilman:

QUESTION PRESENTED

Your inquiry to the Office of the Attorney General posed the following question: Would there be potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12?

CONCLUSION

I conclude that there are potential constitutional issues associated with income tax credits for tuition payments to private schools for children attending K-12. I have analyzed the constitutional questions under both the state and federal constitutions. I conclude that the issues are too close to call under the United States Constitution and that tuition tax credits for private schools are probably unconstitutional under the Idaho Constitution.

ANALYSIS

1. Analysis Under the First Amendment to the United States Constitution

This is a question that has been presented to the Attorney General's Office on previous occasions. On February 15, 1985, Deputy Attorney General Patrick J. Kole advised Representative J.F. Chadband that there were two lines of thought on the question. Kole also included an analysis prepared by Idaho Education Association attorney Byron Johnson the previous year, on March 15, 1984. Johnson's analysis concluded that tax credits for tuition payments to parochial schools would be unconstitutional under the First Amendment to the United States Constitution and under art. 9, sec. 5 of the Idaho Constitution. With regard to the First Amendment, Johnson opined:

In *Mueller v. Allen*, [463 U.S. 388,] 103 S. Ct. 3062, [77 L. Ed. 2d 721] (1983), the Supreme Court held as constitutional a statute similar to HB 698, but providing for an income tax deduction instead of an income tax credit. As indicated in my letter of March 12, 1984, the amount of the credit does not depend on the tax rate of the individual taxpayer. Because the credit provides a benefit to the taxpayer regardless of the tax rate, it appears more similar to the system of reimbursing parents that was struck down by the Supreme Court in *Committee for Public Education v. Nyquist*, [413 U.S. 756,] 93 S. Ct. 2955, [37 L. Ed. 2d 948] (1973), than it does to the deduction in *Mueller*.

The distinction between tax credits, tax exclusions, and tax deductions for educational expenditures was succinctly pointed out by the court in *Koysdar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio, E.D. 1972), which was affirmed by the United States Supreme Court in *Grit v. Wolman*, 413 U.S. 901 (1973). In this case the district court stated:

> [T]ax credits are more direct than income tax exclusions or deductions. When a state grants a total exemption, . . . exempted institutions are no longer taxable entities and do not appear on the tax roles of the state. In that situation there is no longer any tax relationship between the exempted entity and the state; consequently, far less danger exists, if the exempted institution is a religious one, that abrasive contacts, arising out of tax liability will occur along religious lines. Slightly more direct than exemptions are tax deductions and exclusions which tend to be inverse to income and go to reduce the base upon which a percentage tax is levied.
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> A tax credit, to the contrary, is a dollar for dollar forgiveness against the net payable tax as finally computed, after all exclusions and deductions have been taken. A credit, therefore, while perhaps less intensive than direct grants, tends to involve the state more directly in assisting the benefited enterprise than do either exemptions or deductions. 353 F. Supp. at 763-4.

The court held that the statute providing tax credits to parents who incurred educational expenses was unconstitutional under the First Amendment. I reach the same conclusion about HB 698.

Mr. Johnson (now Justice Johnson) made an important point concerning the distinction between tax credits and tax deductions in the federal cases. I will begin my analysis with a review of the precedents he discusses and move on to several others. In Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973), the United States Supreme Court struck down five sections of a New York statute that provided for direct payment to private schools, partial tuition tax credits for lower income taxpayers for private school tuition, and reductions in taxable income of up to $1,000 for middle-income taxpayers who pay at least $50 per year in private school tuition. *Id.* at 773-94, 93 S. Ct. at 2966-76. On the issue of tuition grants through tax credits, the Court observed: "[T]hese grants could not, consistently with the Establishment Clause, be given directly to sectarian schools." *Id.* at 780, 93 S. Ct. at 2969. Because the tuition grants made no attempt to segregate sectarian and non-sectarian functions (*e.g.*, religious instruction vs. transportation of students), the effect was to aid sectarian schools contrary to the First Amendment. *Id.* at 783, 93 S. Ct. at 2970-71. Moreover, the tax benefits for middle-income taxpayers were struck down, in part, because they bore no relationship to actual expenditures, as would a true deduction. *Id.* at 790, 93 S. Ct. 2974.

The case of Koysdar v. Wolman, 353 F. Supp. 744 (D.C. Ohio 1972), *affirmed sub nom.* Grit v. Wolman, 413 U.S. 910, 93 S. Ct. 3062, 37 L. Ed. 2d 1201 (1973), which Johnson also cited in his letter, was likewise a case dealing with tax credits. There the statute gave a tuition tax credit against the sum of the taxpayer's income, excise, sales and property tax obligations, *i.e.*, it restored from the treasury unsegregated general revenues already collected and was held unconstitutional as direct state aid to religion.

Nyquist was probably the high water mark of restrictive interpretation of the Establishment Clause in the area of assistance to students or the families of students attending private schools. In Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983), the United States Supreme Court probably began an erosion of Nyquist when it upheld Minnesota's state income tax deductions available to parents for their tuition and transportation expenses, be their children in public or private school. *Id.* at 390, n.1, 103 S. Ct. at 3064, n.1. Mueller characterized Nyquist as a case in which "we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children attending private schools." *Id.* at 394, 103 S. Ct. at 3066. Mueller elaborated that Nyquist struck down outright grants to low-income parents because they did not take the form of ordinary tax benefits and noted that the tax reductions struck down were unrelated to the amount of money actually spent by any parent on tuition, but were calculated on the basis of a formula contained in the statute. In contrast, Minnesota's deduction was a genuine tax deduction based upon actual (although capped) expenditures. *Id.* at 396, n.6, 103 S. Ct. at 3068, n.6.

Mueller also noted that one reason why the Nyquist scheme was struck down was that tuition grants were provided only to parents with children in non-public schools. In contrast, the Minnesota deduction was available for tuition and transportation expenses for students in both public and private schools. *Id.* at 398, 103 S. Ct. at 3068. Moreover, the Minnesota scheme at issue in Mueller channeled all assistance that it might provide to parochial schools through individual parents; it was not part of a larger scheme that was intertwined with direct aid to private schools. *Id.* at 399, 103 S. Ct. at 3069.

A stand-alone tuition tax credit available only to parents for tuition payments to private schools does not exactly fit in either the Mueller or Nyquist facts, but I believe it is closer to Nyquist than to Mueller. It was distinctions between the statutory schemes at issue in Nyquist and Mueller—*e.g.*, the unavailability of the credit to public schools parents, the difference between a true tax deduction based upon actual expenditures as opposed to tax benefits arbitrarily figured under a formula without relationship to actual expenditures—that persuaded Deputy Attorney General Margaret Hughes that a pure private school tuition tax credit was unconstitutional in her guideline of February 7, 1992, to Representative Myron Jones. 1992 Idaho Att'y Gen. Ann. Rpt. 54.

As Hughes noted, it is difficult to reconcile Mueller and Nyquist and the later case of Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), which held that a blind student could use state vocational rehabilitation assistance to attend a religious college, focusing in part upon the religious neutrality of providing rehabilitation assistance for education of the blind. Further, since Hughes prepared her analysis, the Court has decided Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462, 2467, 112 L. Ed. 2d 1 (1993), which held that the provision of a sign language interpreter at public expense for a deaf student attending a parochial school did not offend the Establishment Clause because the function of providing sign language translation for deaf students is part of a religiously neutral general social program.

I think there has been a softening of the First Amendment Establishment Clause jurisprudence regarding the constitutionality of state provided benefits that taxpayers and students may decide to use in either secular or religious schools. The current trend of the United States Supreme Court might allow a private school tuition tax credit to pass constitutional muster, but the Supreme Court would have to overrule Nyquist or distinguish it on very narrow grounds.

2. Analysis Under the Idaho Constitution

The issue to be analyzed is whether tax credits for private school tuition would be unconstitutional under art. 9, sec. 5 of the Idaho Constitution. I have parsed that section below as follows:

§ 5. Sectarian appropriations prohibited.—Neither the legislature nor any county, city, town, township, school district, or other public corporation,

[1] shall ever make any appropriation, or pay from any public fund or moneys whatever,

[a] anything in aid of any church or sectarian or religious society, or

[b] for any sectarian or religious purpose, or

[c] 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;

[2] nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation,

[a] to any church or

[b] for any sectarian or religious purpose;

[3] 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.[1]

There is a small body of case law under art. 9, sec. 5 of the Idaho Constitution. It does not address the precise questions that you have presented on tuition tax credits. In Epeldi v. Engelking, 94 Idaho 390, 48 P.2d 860 (1971), the court considered state officers' refusal to allocate appropriated funds to local school districts to allow nonpublic school students to ride school districts' buses and the officers' defense that the statute providing for transportation of nonpublic school children was unconstitutional under art. 9, sec. 5. The court struck the statute down under art. 9, sec. 5 of the Idaho Constitution:

> It is clear under *Everson v. Board of Education*, [330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)], that furnishing public funds to parents of students attending parochial schools to aid the students in attendance at those schools is not prohibited by the First Amendment of the United States Constitution. *Board of Education v. Allen*, [392 U.S. 236, 88 S. Ct. 1923,

20 L. Ed. 2d 1060 (1968)], holds that the furnishing of secular textbooks by school authorities for use by students in parochial schools, likewise is not contrary to the First Amendment.

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.

This section in explicit terms prohibits any appropriation by the legislature or others (county, city, etc.) or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school, etc. . . . [I]t 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 Idaho Const. art. 9, § 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. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, both the "child benefit" theory discussed in *Everson v. Board*, *supra*, and the standard of *Board of Education v. Allen, supra, i.e.*, whether the legislation has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion." In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.

94 Idaho at 395, 488 P.2d at 865.

In Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1974), the court considered a statute that would allow the Idaho Health Facilities Authority (IHFA), an authority established by the state, to use its funds to refinance the outstanding debt of hospitals operated by churches or sectarian or religious societies. The court found this provision unconstitutional under art. 9, sec. 5, for the following reasons:

The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of

> the United States, *Bradfield v. Roberts*, 175 U.S. 291, 20 S. Ct. 121, 44 L. Ed. 168 (1899). But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States. *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971).
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> . . . The moneys which the Idaho Health Facilities Authority was to give to the hospitals involved comes from the sale of that Authority's bonds, and thus the moneys are "public" since their source is the proceeds of the sale of a bond of a "public body politic and corporate." *State v. Musgrave*, [84 Idaho 77, 370 P.2d 778 (1962)]. Further, the refinancing of existing debt or the lending of money for reconstruction and equipping of a building consists of giving "aid" to the building's owner. Therefore, the agreements between the hospitals and the Authority support and commit public moneys to the hospitals, and if those hospitals are owned and/or operated by "any church or sectarian or religious society," the Constitution of the State of Idaho has been violated. *Epeldi v. Engelking, supra*.

96 Idaho at 509, 531 P.2d at 597.

Based upon Epeldi, Hughes opined to Representative Jones that tuition tax credits were unconstitutional because they ultimately aid the schools. Mr. Johnson reached the same conclusion, but his analysis of art. 9, sec. 5 of the Idaho Constitution was not specifically grounded in the case law:

> As stated in my letter of March 12, 1984, the effect of HB 667 would be to help support or sustain educational institutions controlled by churches, sectarian or religious denominations by allowing a taxpayer who makes payments to such an institution for tuition, textbooks and transportation to receive a credit from the state. This amounts to an indirect payment of public funds in aid of such an institution. Despite the fact that HB 698 removes the possibility of a payment to the taxpayer where the credit exceeds the amount of the tax liability of the taxpayer, the tax credit continues to be an indirect payment of public funds. The distinction between tax credits and tax exemptions, as set forth above, is not a meaningless distinction. A tax credit amounts to an indirect appropriation of tax monies, rather than merely a system of determining the taxable income of a taxpayer. Therefore, it is my opinion that HB 698 is unconstitutional under Article IX, Section 5 of the Idaho Constitution.

A tuition tax credit is not an appropriation for transportation of students to a parochial school, which was found unconstitutional in Epeldi, nor a direct loan of public funds to a religiously controlled hospital, which was found unconstitutional in IHFA. Nevertheless, under precedent of the Idaho Supreme Court, a tax credit can be unconstitutional if it is for an unconstitutional purpose or has an unconstitutional effect.

In Village of Moyie Springs, Idaho v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960), the court considered a statute authorizing municipalities to issue bonds for acquisition of manufacturing, industrial or commercial enterprises and held it to be violative of the constitutional prohibition against any municipality lending its credit in aid of a corporation, notwithstanding that the bonds were revenue bonds and there would be an incidental or indirect benefit to the public. The court stated:

> We are mindful that under art. 7, § 5 [of the Idaho Constitution], the legislature has plenary power to grant such exemptions [from taxation] "as shall seem necessary and just." An exemption which arbitrarily prefers one private enterprise operating by means of facilities provided by a municipality, over another engaged, or desiring to engage, in the same business in the same locality, is neither necessary nor just. In this instance the exemption is intended to be granted by the legislature for an unconstitutional purpose, and for that reason also is not "necessary and just."

82 Idaho at 349-50, 353 P.2d at 775. Thus, there is a practice in Idaho of analyzing the purpose of tax exemptions and striking them down if the court determines that they have an unconstitutional purpose. There is also a practice of striking down direct aid to school children if it has the effect of aiding sectarian institutions. As the court said in Epeldi:

> In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.

94 Idaho at 395, 488 P.2d at 865.

Epeldi and IHFA are not precisely on point on the issue of tuition tax credits. Epeldi dealt with an appropriation of funds to deliver children to the parochial school door and IHFA with public funds used for direct loans to hospitals run by religious organizations. Epeldi and IHFA did not deal with the subtler issue of whether tuition tax credits are a "pay[ment] from any public fund or moneys . . . to help support or sustain any school, academy, seminary, college, university . . . controlled by any church,

sectarian or religious denomination" or "a grant or donation of . . . money . . . to any church or for any sectarian or religious purpose." But, there is case law from Oregon suggesting that tax credits are grants from the state. In Keller v. Dept. of Revenue, 12 Or. Tax 381, 1993 WL 55294, the court characterized a tax credit as an exemption from liability from a tax already determined and admittedly valid and thus concluded tax credits were essentially grants by the state. *Cf.* Keyes v. Chambers, 307 P.2d 498, 501 (Ore. 1957), upon which Keller is based.

Under a literal parsing of art 9, sec. 5, a tuition tax credit is not an "appropriation or pay[ment] from any public fund"; but it is most likely a "grant or donation of . . . money" to which art. 9, sec. 5, would apply. Thus, I opine that the Idaho Supreme Court would conclude that art. 9, sec. 5, directly prohibits tuition tax credits to private schools.

Moreover, based on cases like Moyie Springs and Epeldi, it is my opinion that the Idaho Supreme Court would go beyond the analysis of whether tax credits are payments of public moneys or grants and whether parents (rather than religious schools) receive the direct benefits of tuition tax credits; it would likely look to determine whether there is an unconstitutional purpose or effect to benefit religious education in the tax credits. An argument focusing narrowly on the words of art. 9, sec. 5, would have some chance of passing constitutional muster if the court were to accept the underlying premises that this provision should be parsed as a statute and that tax credits are not grants of money or other personal property (forgiveness of taxes), but little likelihood of prevailing if the court's analysis looked to broad underlying constitutional analyses of purpose and effect. In my opinion, the Idaho Supreme Court is more likely to follow the latter path and hold tuition tax credits for private schools to be unconstitutional.

Sincerely yours,

MICHAEL S. GILMORE
Deputy Attorney General

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[1] I note from the materials that you provided to me that the first two subdivisions of this section of the Idaho Constitution are somewhat more restrictive than article 10, § 6 of the Montana Constitution with regard to their provisions regarding aid or assistance to sectarian schools. That section of the Montana Constitution has not been construed in reported decisions, but its predecessor section under Montana's 1889 Constitution has. State ex rel. Chambers v. School District No. 10 of the County of Deer Lodge, 472 P.2d 1013 (Mont. 1970) (school board cannot constitutionally levy for employment of teachers in parochial school). While an analysis prepared for the Montana Legislature addresses the constitutionality of providing tuition tax credits to children privately educated, I hesitate to follow that path. Idaho's scanty jurisprudence on this subject is not comprehensive, but it seems better developed than Montana's and as well developed as any of its sister states in the West, as the following survey of leading opinions under various state constitutions' education articles and similar sections prohibiting sectarian aid show:

Alaska: Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979) (tuition grants to student to attend private schools reflecting differences between public and private school tuition are unconstitutional—no cases on tuition tax credits).

California: Board of Trustees of Leland Stanford Junior University v. Cory, 79 Cal. App. 3d 661, 145 Cal. Rprt. 136 (1978) (tuition grant to student to attend private medical school is constitutional, but direct payment to private school is not—no cases on tuition tax credits).

Colorado: Americans United for Separation of Church and State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982) (higher education grants to students who attend public or private universities are not unconstitutional, but statute forbade grants to students to attend pervasively sectarian institutions, so constitutionality of aid to pervasively sectarian institutions was not at issue—no cases on tuition tax credits).

Nevada: State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882) (appropriation of $X per orphan per year for orphans in sectarian orphanage is unconstitutional—no cases on tuition tax credits).

Utah: Gobler v. Utah State Teachers' Retirement Board, 192 P.2d 580 (Utah 1948) (state cannot constitutionally credit teacher's retirement account for time teacher spent teaching in parochial school—no cases on tuition tax credits).

Washington: Weiss v. Bruno, 509 P.2d 973 (Wash. 1973) (statute providing financial assistance for needy or disadvantaged students attending public or private schools was unconstitutional unless sectarian schools receive no benefits from grants—no cases on tuition tax credits).