ATTORNEY GENERAL OPINION NO. 97-2

TO: The Honorable Dave Bivens
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. May the Idaho Legislature grant an income tax credit to a parent or legal guardian who complies with the state's compulsory education law by means other than the public school system?

2. If parents comply with the state's compulsory education law by enrolling their children in private sectarian schools, does the granting of a tax credit to the parents violate article 9, section 5 of the Idaho Constitution or First Amendment of the U.S. Constitution?

CONCLUSION

1. There appear to be no state or federal constitutional impediments which would prohibit the legislature from granting a tax credit to a parent or guardian who complies with the state's compulsory education law by means other than the public school system and without using public school resources. Whether the requirements of the state's compulsory education law are met by enrolling the child in a private non-sectarian school, a private sectarian school or through home schooling does not affect this conclusion.

2. Current U.S. Supreme Court interpretations of the First Amendment to the U.S. Constitution make it likely that a tax credit for nonuse of public schools would be deemed constitutional.

3. While the lack of case law makes it more difficult to predict how a court would rule on the constitutionality of such a proposal under article 9, section 5 of the

Idaho Constitution, it is probable that the contemplated tax credit would be upheld.

ANALYSIS

This question was raised after the 1997 Idaho Legislature considered HB 342, which would have granted a $500 tax credit to parents or guardians of school-aged children who did not enroll those children in a public school, yet were in compliance with Idaho's compulsory education law. HB 342 is similar to a 1995 initiative proposal for which the Office of the Attorney General provided a Certificate of Review.

As a matter of definition, the income tax credit provided by HB 342 should not be confused with a "school voucher" or a "tuition tax credit." A school voucher program provides government funds, in the form of a voucher, to parents who may then use that voucher to purchase education services for their children in any qualified public or private school. Under a voucher system, the government, in effect, provides direct payment to the private school for all or part of the child's tuition. Similarly, a tuition tax credit is granted only to those parents who pay tuition at a private or other school and is usually limited to the amount of tuition actually paid by the parent. The tuition tax credit differs from the voucher in that the credit goes to the individual to offset, in whole or in part, the payment of tuition. Courts differ on whether a tax credit is a transfer of government funds to the individual. HB 342, unlike the tuition tax credit concept, allows the full amount of the contemplated tax credit to each qualifying parent, as long as the child for whom the credit is claimed is not enrolled in a publicly supported school. It is not dependent upon the payment of tuition.

As a practical matter, there are only three educational settings in which a child could enroll which would qualify the parent to be eligible for the HB 342 tax credit: a private non-sectarian school, a private religious or sectarian school, or a home school. Because of the church-state concerns surrounding the First Amendment to the U.S. Constitution and the prohibition against sectarian appropriations found in article 9, section 5 of the Idaho Constitution, the analysis of HB 342 under both constitutions must be differentiated by the type of school in which the eligible student is educated.

I.

PRIVATE NON-SECTARIAN AND HOME SCHOOLS

The United States Constitution guarantees the right of parents to educate their children in non-public schools. Indeed, the Supreme Court recognized the duty, as well as the right, of parents to educate their children. In Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571 (1925), the Court

invalidated an Oregon statute which required virtually all school-age children to attend a public school. In striking down the statute, the Court said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

45 S. Ct. at 573.

The Idaho Constitution similarly recognizes the right and responsibility of parents to educate their children. In the case of Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P. 2d 225 (1957), the Idaho Supreme Court said,

> It must be conceded that under our constitution parents have a right to participate in the supervision and control of the education of their children. True, the constitution vests the legislature with plenary power as well as a specific mandate to provide for the education of the children of the state, article 9, section 1, and the board of education with general supervision of the public school system, article 9, section 2, but it cannot seriously be urged that in clothing the legislature and the board with such powers the people transferred to them the rights accorded to parenthood before the constitution was adopted. By article 1, section 21, such rights were retained by the people.

78 Idaho at 612.

The court went on to conclude, "In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer." *Id.* at 613.

For those parents who choose to educate their children in a non-sectarian private school or in a home school, the tax credit provided by HB 342 is simply a legislative recognition of the "high duty" enunciated in Pierce, and the right of the parent to educate his children recognized in Electors v. State Board. The legislature has broad authority to determine the provisions of tax law and may, under the constitutions of the United States and the State of Idaho, extend tax benefits to individuals who exercise their right to educate their children in a manner consistent with legislative policy.

Because the right to educate one's children is superior to any right of the state, there can be no question about the constitutionality of HB 342 as it applies to students in non-sectarian private schools and home schools. The issue of tax credits granted to parents whose children use sectarian or religiously oriented private schools requires further analysis. Arguments against the credit would center on allegations that it violates the Establishment Clause of the First Amendment to the U.S. Constitution and article 9, section 5 of the Idaho Constitution.

II.

SECTARIAN SCHOOLS

If enacted into law, HB 342 will undoubtedly grant tax credits to parents who send their children to private parochial or sectarian schools. A legal challenge to the law would most likely claim that this connection between the state and religious schools is a violation of both the federal and state constitutions.

A. 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.

The New York statute struck down by Nyquist contained three provisions, all of which were determined by the Court to violate the First Amendment. The statute provided for direct grants of state funds to private parochial schools for the purposes of "maintenance and repair" of school facilities owned and operated by the religious organization controlling the school. It also provided tuition reimbursement to low income taxpayers, and a tax deduction for tuition paid by parents who did not qualify as low income.

Ten years after Nyquist, 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 tax credit proposal at hand would provide a tax credit to parents of Idaho's non-public school students in much the same way that the Minnesota statute authorized an income tax deduction. In contrast, the New York statute targeted private school tuition payers as the beneficiaries of the statute, and went so far as to determine the specific dollar amount of tax relief each tuition deduction was worth. No such pre-determination is involved in the Idaho tax credit proposal.

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 who had actually paid tuition to a private school. HB 342 is not squarely analogous to the plan approved by the Supreme Court in Mueller because its benefits may be claimed only by parents of children who do not attend public school. It is, however, broader in its scope than the New York plan invalidated in Nyquist, since a parent may claim its benefits without regard to tuition payments. For example, the benefits under HB 342 would be available to parents of home-schooled children, whereas, under the statute struck down in Nyquist, only parents with a tuition receipt could claim the tax deduction.

The Court also favored the Minnesota tax plan because it channeled any assistance to parochial schools through individual parents, whereas under the statute struck down in Nyquist, at least some of the tax benefits were transmitted directly to parochial schools, and the remainder were tuition grants specifically targeted at parents who had paid tuition to a private school. HB 342 provides a benefit directly to parents, in a manner 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, S. Ct. at 3069.

As noted, the tax credit granted by HB 342 is not identical to the tax deduction approved by the Court in Mueller v. Allen, nor to the tax benefit plan struck down in Nyquist. However, inasmuch as the stated purpose of the bill is to reduce the financial burden on public schools and the tax credit will be available to any and all parents who do not avail themselves of public school services, the proposed credit is more like the one analyzed in Mueller. The neutral basis on which the tax credit is awarded is clear, and although there will be an incidental benefit to religious schools, that benefit, like the one

in Mueller, is remote and under the control of parents. Therefore, one is led to the conclusion that HB 342 will likely withstand a challenge under the U.S. Constitution.

B. Analysis Under the Idaho Constitution

The Idaho Constitution, article 9, section 5, provides in relevant 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, including parochial schools. Accordingly, the Idaho Supreme Court found the statute in violation of article 9, section 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 IX, 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 issued an opinion on the constitutionality of tuition tax credits or vouchers in a guideline dated February 7, 1995. In that guideline, 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 a "grant or donation of . . . money" to a church-affiliated school, which is specifically prohibited by article 9, section 5 of the Idaho Constitution. 1995 Idaho Att'y Gen. Ann. Rpt. 74.

The proposed legislation under review here differs from a tax credit for private school tuition which, following the Attorney General's previous analysis, may violate 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 was found to be a transfer of a state benefit to a religious school, or a tax credit which was conditioned upon payment of money by the taxpayer to a private religious school. Under the proposal found in HB 342, there is no requirement that the taxpayer pay any money to a private or church affiliated school before being able to claim the credit. The benefit flows to the taxpayer/parent, not to the school. HB 342 provides a benefit to parents for the stated purpose of relieving the burden on the state's public school system.

In Epeldi, the Idaho 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 to private schools may claim it. A tax credit for non-use of public schools does not directly benefit parochial schools.

While the constitutionality of HB 342 remains somewhat unclear, it is the opinion of this office that the proposed credit is probably constitutional inasmuch as any benefit to parochial schools is remote at best. The benefit under the proposed scheme flows to parents who choose not to educate their children within Idaho's public school system, not to the parochial schools. The granting of the credit is not conditioned on any payment by the taxpayer to a religious school. Neither the purpose nor the effect of the proposed initiative appears to violate Idaho's proscription regarding aid to religious or sectarian schools.

The Epeldi court emphasized the constitutional prohibition against "anything in aid" of a religious school. The test articulated in Epeldi could be broadly construed to forbid any government action that even remotely benefits religion. Such an interpretation would invalidate, among other things, section 63-3029A, Idaho Code, which provides a limited tax credit for donations made to Idaho private schools, including religious schools. By extending the logic of the Epeldi rule to its fullest reach, Idaho cities could not legally provide police and fire protection to churches and private schools--clearly an absurd result and one which would probably run afoul of the free exercise clause in the Frst Amendment to the U.S. Constitution.

Rather than focusing on any attenuated benefit to religion, the U.S. Constitution requires that no public fund or moneys be paid for anything in aid of any church or church-related school. Therefore, in order to be declared unconstitutional, the payment must first come out of a public fund and, second, it must be paid to a church or other religious enterprise. The tax credit in question arguably does not come out of any public fund and it certainly does not go to the aid of a church or another religiously controlled institution. The tax credit will only be available to parents, some of whom admittedly send their children to religious schools, but some of whom also school their children at home or in a non-sectarian private school. HB 342 meets the constitutional requirement that no appropriation be made to sectarian institutions. The tax credit provided by the bill may only be claimed by parents, and may be claimed without regard to the type of school their children attend.

As noted, 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. The credit is granted for contributions to sectarian schools. The benefit to private schools is far more direct under Idaho Code § 63-3029A, inasmuch as the granting of the credit is conditioned on the taxpayer giving money or something of value to the educational institution. In addition to Idaho Code § 63-3029A, Idaho tax statutes have long provided for a deduction for contributions to churches and other religious institutions, including schools. This deduction, against income, is not limited by dollar amount. Both the credit under Idaho Code § 63-3029A as well as the unlimited deduction under Idaho Code § 63-3022(l)(2) provide for more direct and substantial benefits to churches, religious institutions and schools than does the proposed tax credit for non-use of public schools. The long-standing and unquestioned acceptance of the credit found in Idaho Code § 63-3029A and the deduction found in Idaho Code § 63-3022(l)(2) lends support to the conclusion that the proposed credit is likewise constitutional.

Given the foregoing analysis, it is clear that there can be no question of the constitutionality of HB 342 as it applies to students in home schools and private non-sectarian schools. Given the clear intent of the bill to reduce the financial burden on public schools, it is virtually inconceivable that a court could uphold the tax credit for parents who educate their children in a home school or a non-sectarian private school, while invalidating the tax credit for parents who send their children to a parochial school. In fact, such a distinction is probably violative of the U.S. Constitution's First Amendment guarantee of the free exercise of religion.

While the constitutionality of HB 342 with respect to granting credits to parents whose children attend religious schools remains yet to be resolved by the Idaho courts, it is probable that the bill would be upheld as constitutional. The credit is not dependent

upon payment of money to a sectarian school, and any benefits to parochial schools are tenuous at best.

CONCLUSION

For the foregoing reasons, I conclude that HB 342 will likely be held to be constitutional under both the state and federal constitutions.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 63-3022(l)(2).
§ 63-3029A.

2. Cases:

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P. 2d 225 (1957).

Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971).

Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571 (1925).

3. Other Authorities:

U.S. Const. amend. I.
Idaho Const. art. 9, § 5.

DATED this 22nd day of August, 1997.

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