N.D.A.G. Letter to Evenson (July 5, 1989)

July 5, 1989

Ms. Donna Evenson
North Dakota Council on the Arts
Black Building, Suite 606
Fargo ND 58102

Dear Ms. Evenson:

Thank you for your May 1, 1989, letter concerning the Local Education in the Arts Planning Program as administered by the North Dakota Council on the Arts ("Council"). Your letter questions the eligibility of the Catholic Schools of the Diocese of Fargo to receive a grant from this program because of the separation of church and state doctrine. I apologize for the delay in responding to your letter.

The doctrine of separation of church and state arises from the first amendment of the United States Constitution. This amendment states, in part, that Congress shall make no law respecting an establishment of religion.

The Local Education in the Arts Planning ("LEAP") Program appears to be a program established by the National Endowment for the Arts designed for local administration of grants to establish artistic and cultural programs. 20 U.S.C.S. 954 (1976). The LEAP grants include federal funds. According to the materials enclosed with your letter, LEAP program grants are not intended to be used for programs such as visiting or touring artists, but rather for costs associated in developing a school district's plan. Permissible expenditures include expenses for local planning committee meetings, consultants involved in areas such as leadership training, long range planning, curriculum, or evaluation, and attendance at annual state or regional meetings and planning seminars.

The federal statute is neutral with respect to the eligibility of a religious organization to receive a program grant. Furthermore, the statute does not address monitoring of program grants, although there is a provision for termination of grants where statutory requirements are not being satisfied. 20 U.S.C.S. 954(h) (1976). You state in your letter, however, that the council intends to monitor the planning progress of grant recipients.

The United States Supreme Court has not specifically addressed the issue raised here. It has, however, on numerous occasions reviewed the subject of public moneys received by a parochial school.

In its review of state action with respect to the establishment clause, the Court has stated that the three pronged test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), should be invoked. Under that test, for a statute or program benefiting a parochial school to be found constitutional, 1) it must have a secular legislative purpose; 2) its principal or

primary effect must be one that neither advances nor inhibits religion; and 3) it must not foster an excessive government entanglement with religion.

It is doubtful that the LEAP program violates the first or the second prong of the Lemon v. Kurtzman test. The act appears to have a valid secular purpose (i.e., the advancement of arts education for all students). It also seems unlikely that a court would conclude that the act has the primary effect of advancing or inhibiting religion. The act is neutral on its face with respect to whether a grantee's status is that of a sectarian or purely secular institution. See Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). The recipients of the act's benefits do not appear to be exclusively or even primarily church-related institutions. See Meek v. Pittenger, 421 U.S. 349, 365-66 (1975). Furthermore, there is the absence of any "crucial symbolic link" between government and religion; the Court has found that such a link violates the establishment clause. See Grand Rapids School District v. Ball, 473 U.S. 373 (1985). The act's principal effect, thus, is neither to advance nor to inhibit religion.

It is the final prong of the Lemon v. Kurtzman test that raises questions. The third prong requires an analysis of whether a grant to the Fargo Catholic Diocese schools would lead to an excessive government entanglement with religion. Most of the recent U.S. Supreme Court cases interpreting the establishment clause have divided over the "entanglement" portion of the Lemon test. This has been especially true for programs benefiting parochial schools.

In its interpretation of the establishment clause in these cases involving public aid benefiting parochial schools the Court has not drawn any "bright lines" with regard to what aid is permissible and what aid violates the establishment clause.

In Everson v. Board of Education, 330 U.S. 1 (1947), the Court upheld a New Jersey statute under which the state provided free transportation to school to both public and private school children. There the Court noted that the state was contributing no money to the private schools; it was not supporting them. The Court concluded that the New Jersey statute met the first amendment's requirement that "the state . . . be a neutral in its relations with groups of religious believers and non-believers" because the "legislation, as applied, [did] no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Id. at 18.

In Board of Education v. Allen, 392 U.S. 246 (1968), the Supreme Court upheld a New York statute requiring local public school authorities to lend textbooks free of charge to students, including private school students. In Allen, as in Everson, the Court found that the law provided a general benefit available to all school children, both public and private. The Court in Allen also noted that the books were furnished at the student's request and remained within the state's ownership: "Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." Id. at 243-44. In addition, the Court discussed the fact that only secular books were approved by the state and that the state had an interest in seeing how accredited private schools fulfilled

their secular teaching functions. Id. at 244-48. The court held, therefore, that the New York statute was constitutional on its face. Id. at 248-49.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court struck down a Rhode Island statute and a Pennsylvania statute which involved state payments for parochial school teachers' salaries. Under the Pennsylvania statute the state reimbursed private schools for the cost of teachers' salaries, as well as textbooks and instructional materials. Id. at 609-10. Under the Rhode Island statute the state paid 15% of each teacher's annual salary directly to those private school teachers who were teaching secular subjects. Id. at 607-09.

The Court first considered the Rhode Island statute. Id. at 515-620. In its discussion the Court stated that teachers are not like textbooks: "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Id. at 617. The Court also stated that it could not overlook the danger of the teachers here (who were employed by schools that were run by and dominated by a particular religious group) would be unable to separate secular teaching and religious doctrine, id. at 617-19: "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion," id. at 619. The Court then stated that to avoid this problem the state would have to engage in "comprehensive, discriminating, and continuing state surveillance [of teachers] to ensure that . . . the First Amendment [would be] respected." Id. at 619. The Court next found that ever. this surveillance would not make the statute constitutional: "[t]hese prophylactic contacts will involve excessive and enduring entanglement between state and church." Id. The Court, therefore, held the Rhode Island statute unconstitutional. Id. at 619-20.

The Court then considered the Pennsylvania statute (which involved reimbursement of teachers' salaries and the cost of textbooks and instructional materials to the private schools). Id. at 620-22. The Court found that the Pennsylvania statute had the same constitutional difficulties as the Rhode Island statute and that the Pennsylvania statute had "the further defect of providing state financial aid directly to the church-related school." Id. at 621. The Court stated that such direct payments to religious organizations are '"pregnant with involvement"' (quoting Walz v. Tax Commission, 397 U.S. 664, 675 (1970)), and create "an intimate and continuing relationship between church and state," 403 U.S. at 621-22. The Court held that this involvement resulted in an unconstitutional entanglement between church and state. Id.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Supreme Court considered a Pennsylvania statute under which public employees provided "auxiliary services" to private schools students at state expense on private school grounds. Those "auxiliary services" included counseling, testing, psychological services, speech and hearing therapy, and teaching and related services for exceptional students, remedial students, and the educationally disadvantaged. The state also provided textbooks and instructional materials and equipment. Id. at 351-55. In Meek the Court upheld the provisions of the statute providing textbooks, id. at 359-62, but the Court struck down the remaining provisions of the statute.

The Court determined that the provisions of the statute authorizing providing instructional materials and equipment to the private schools was unconstitutional because parochial schools were the primary beneficiary of this provision. The Court decided, therefore, that such grants would advance religion (and violate the second prong of the Lemon test). Id. at 362-66.

The Court then stated that it need not decide whether the statute's remaining provisions (concerning services such as remedial and enrichment classes) constituted a prohibited advancement of religion because those provisions would lead to impermissible excessive entanglement. See id. at 368-72. The Court found that the public employees involved here performed their services in an "atmosphere dedicated to the advancement of religious belief." Id. at 371. Thus, there was a possibility that even though public, not private, employees were providing the state-funded services, those services could be fostering religion. This possibility created the need for continuing surveillance. Id. at 372. The Court concluded that, as in Lemon, the fact that the state would need to engage in substantial surveillance of the parochial schools to ensure that the public moneys were not being used for religious instruction would lead to a constitutional violation because that surveillance in and of itself would lead to an excessive entanglement between church and state. Id. at 368-72.

Then in Wolman v. Walter, 433 U.S. 229 (1977), the Supreme Court considered an Ohio statute under which the state provided to private school students standardized tests; textbooks; diagnostic speech, hearing, and psychological services; therapeutical, remedial, and guidance services (offered outside of the private schools by public employees); instructional materials and equipment; and field trips.

In Wolman a plurality of the Court upheld the constitutionality of the testing and textbook provisions of the statute. The textbook provision was upheld on the basis of the Court's prior decisions in Meek and Allen. Id. at 238. With regard to standardized testing, the Court found that the state had a legitimate interest in seeing That its minimum standards were being met, that the private school did not control the content or result of the test, and that there was no need for supervision in the private school. Id. at 240-41.

A majority of the Court upheld the diagnostic and therapeutic services portions of the statute. With regard to the diagnostic services, the Court noted that public employees performed the services, they were done only to assess pupils' deficiencies or needs, and that any treatment would take place off the private school premises. Id. at 241. The Court distinguished Meek (which had held the provision of such services unconstitutional) on the basis that the services in Meek involved counseling or teaching and here only diagnosis was involved. The Court found that this case, thus, involved a much reduced risk of religious indoctrination going on during the contact with the student. Id. at 243-44. With regard to the therapeutic services, the Court distinguished Meek (in which the Court had struck down a statute providing such services to private students), finding that here the therapy was to be performed outside of the private schools, outside of the "pervasively sectarian atmosphere of the church-related school." Id. at 247-48.

A majority of the Court then held unconstitutional the statutory provisions giving private schools instructional materials and equipment (on the basis of the Court's decision in Meek discussed above) and field trips. With regard to field trips, the Court stated that the field trip provision was unconstitutional because the parochial schools would control the frequency and timing of the field trips: "Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid." Id. at 253. The Court also found that the field trips would be supervised by private school teachers, creating an impermissible perception of a blurring between the sectarian institution and the state and again raising the surveillance problem. Id. at 253-54. The Court concluded that the field trip section of the statute was, thus, unconstitutional. Id. at 255.

In Committee for Public Education v. Regan, 444 U.S. 646 (1980), the Court held that a New York statute appropriating public funds to reimburse private schools for performing state-mandated testing services was constitutional. The tests in question were standardized tests consisting entirely or largely of objective questions with multiple-choice answers. Id. at 655-56. The Court found that although the statute provided for direct cash reimbursement to nonpublic schools for administering and grading the tests, that reimbursement did not invalidate the statute. Id. at 657. Quoting the district court with approval, the Supreme Court wrote:

'[p]utting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect.'

Id. at 658. The Court then determined that the funding could be administered without excessive entanglement, noting that the schools seeking reimbursement must maintain separate accounts for the services and keep records for auditing. The Court stated that this "reimbursement process . . . is straightforward and susceptible to the routinization that characterizes most reimbursement schemes." Id. at 659-60. The Court concluded that the statute would cause no excessive entanglement. Id. at 660-61.

The Supreme Court most recently addressed this issue of the relationship between the establishment clause and parochial schools in a pair of companion cases in 1985. See School District of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).

In Grand Rapids the Court considered two programs adopted by the Grand Rapids school district to provide remedial and enrichment programs to students in private schools. Under one program public school teachers taught classes to private students in private school classrooms that the district had "leased"; the classes were intended to supplement core curriculum courses and included remedial and enrichment mathematics and reading, as well as art, music, and physical education. Id. at 375-76. The second program involved

classes taught by private school teachers (who were paid by the public school district) after the close of the regular school day. Those classes included arts and crafts, languages, home economics, drama, humanities, and other classes. Id. at 376-77. The Court found that forty of the forty-one schools at which these programs operated were sectarian institutions. Id. at 379.

The Court concluded that the challenged programs had the effect of promoting religion in three ways: first, the state-paid instructors could be indoctrinating students in particular religious tenets at state expense; second, the symbolic union of church and state inherent in the provision of public classes in religious school buildings could imply state support of a particular religion; and third, the "programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." Id. at 397. The Court decided, therefore, that the programs violated the establishment clause of the first amendment. Id.

Aquilar concerned a very similar program under which federal Title I funds were used to pay the salaries of public school employees who taught in parochial schools. See Aguilar, 473 U.S. at 404, 409. The most significant difference between the Grand Rapids programs and the New York program at issue in Aguilar was the fact that the Aguilar program contained a system for monitoring the religious content of the classes in the religious schools. Id. The Supreme Court held that this supervisory system would not save the program from being found unconstitutional because "the supervisory system . . . inevitably results in the excessive entanglement of church and state." Id. In other words, the Court decided that even if the monitoring provision resulted in the program not advancing religion, the monitoring program itself resulted in excessive entanglement; in either case, the program violated the establishment clause.

Considering all of these cases, it is apparent that the Supreme Court has not developed any definitive standard by which one can easily judge whether a particular program benefiting a parochial school or its students violates the establishment clause of the Constitution. It is, therefore, very difficult for me to advise the Council on how to respond to a grant application from the Catholic Schools of the Diocese of Fargo.

However, I can identify the relevant factors that the Supreme Court seems to find most decisive in considering whether a program or statute violates the establishment cause: 1) whether the program involves direct aid to a parochial school; 2) whether the program will be of primary benefit to students and their parents or to the parochial schools; 3) whether surveillance or supervision will be necessary to ensure that religious indoctrination is not part of the program being administered by public funds; 4) whether the state or the school will have control over the publicly funded program; 5) whether the program will create "blurring" or a public perception of a "blurring" between the state and the church; and 6) whether the program is a general program that is only of incidental benefit to parochial schools or parochial school students.

Applying these factors to this case, it appears that a court could conclude that a grant of the federal funds to the Catholic Schools of the Diocese of Fargo would violate the establishment clause.

First, this program involves a direct grant of money to the Diocese's parochial schools themselves. The Supreme Court has upheld only one direct aid case, i.e., Regan, the standardized testing case. Grand Rapids, 473 U.S. at 393. I believe the facts in the instant case, which involve discretionary actions related to curriculum planning and development, differ significantly from the facts in Regan, which concerned state-mandated standardized testing. Here the Diocese would be using the public moneys for a much broader range of actions, actions that could have the effect of promoting religion. Such direct aid would, thus, be more likely to be questioned than the type of aid at issue in Regan. It would also be more difficult for the public agency to monitor the parochial schools' actions to determine whether public funds were being used for any religious purposes.

Second, although the Fargo parochial school children certainly would benefit from the improved arts curriculum available to them as a result of the LEAP program, it seems that the most direct beneficiary of the LEAP grant would be the parochial schools themselves. The funds would be used for a parochial school employee to plan curriculum for the school. This is not a case of direct services to the children.

Third, there appears to be a danger that the grant funds could be used to advance religious or moral teaching, even assuming, as I do, that the Diocese personnel would act in good faith to use the funds only for secular curriculum planning. The Diocese's grant application demonstrates that it is committed to providing an education in a religious context and that religious instruction is a part of its teachings as a whole. The grant application further states that the arts curriculum to be developed with the LEAP funds would include "historical-cultural perspectives of the various art areas." Given these facts, it is possible that a court would conclude that there is a risk that the federal funds would be used to further a religious education. To prevent this the Council would have to monitor carefully the Diocese's use of the funds to determine whether religious principles are being furthered with the grant funds. As the Supreme Court held in several of the cases discussed above, this need to supervise closely the church's use of the funds results in an excessive entanglement of church and state.

Fourth, the Diocese and not the Council would have primary control over and the right to exercise discretion in the handling of the funds.

Fifth, this program may or may not cause a blurring (or a perception of a blurring) between the church and the state. On one hand, a person paid with public funds will be working for the church. On the other hand, there will probably be little direct contact between this person and students or the public.

Sixth, the LEAP program is a general program in which the Diocese would be only an incidental participant.

There are, therefore, factors that weigh both ways in this determination. In addition, a court may apply entirely different standards and factors in this very difficult area of the law. However, taking all of these factors into account and considering the Supreme Court's decisions in the cases discussed above, a court could conclude that a grant of LEAP program funds to the Catholic Schools of the Diocese of Fargo would constitute an excessive entanglement between government and religion in violation of the establishment clause of the United States Constitution.

I hope this discussion is helpful to you. I am sorry that I cannot give you a more definitive answer but this is a complex, continuously changing area of the law that cannot be easily interpreted. Therefore, it is impossible for me to give you an opinion that clearly concludes that a grant here would be either constitutional or unconstitutional. Again, I apologize for the delay in responding.

Sincerely,

Nicholas J. Spaeth

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