June 21, 1965

HON. FREDERICK M. RAUBINGER
Commissioner of Education
Secretary, New Jersey State
Board of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION 1965—NO. 1

Dear Commissioner Raubinger:

The New Jersey State Board of Education has requested our opinion with respect to whether voluntary student organizations, which have as their primary purpose the conduct of religious observances and activities and which may be sponsored by or affiliated or identified with specific religious denominations, may function at the State colleges and be permitted the use of college facilities in which to conduct their various activities and programs.

You have stated that there are numerous student organizations which function on the campuses of the State colleges. These organizations, such as debating societies, theatrical groups, intramural athletic teams, language groups, history clubs, political clubs, social organizations, and the like, generally engage in various extracurricular activities. All such student organizations, including the basically religious organizations to which you refer and similar groups, must seek permission in order to operate on campus. It is customary, in this connection, for authorization to be obtained from the student government association at each college or from the president of each college. No organization, whatever its nature or purposes, is permitted to engage in activities at any State college without having first secured such permission. All student organizations thus approved are required to have an advisor, a member of the college faculty, whose function is to oversee the activities of the particular group in a general way in order to provide continuing assurance that the organization will not act in any manner inconsistent with college policies or inimical to the best interests of the college and its students. Such a faculty advisor, therefore, serves as a liaison between the students of the organization and the college officials insofar as general college policy is concerned. Approval of a student organization to function on college campuses, you indicate, does not imply affirmative official approbation of its particular purposes, goals or activities. It merely denotes that such an organization satisfies a reasonable extracurricular need of the students and is not otherwise inconsistent with the overall educational interests of the college, its faculty and students.

With respect to the student religious groups referred to in your inquiry, you inform us that these are voluntarily organized by interested students. These associations are usually sponsored by or affiliated or identified with their respective religious denominations in order that college students of a particular religious faith might effectively be provided with the opportunity to participate in and enjoy religious experiences and activity while in college. Such religious societies have been in existence for some time and presently function at a large number of the colleges and universities, both public and private, throughout the United States. Frequently, the religious denomination with which the particular student religious organization is associated assigns a clergyman to aid, supervise and counsel the students with respect to religious observances and other activities. Such clergymen receive no remunera-

tion or other compensation from the colleges; they are not members of the faculty and do not in any manner enjoy faculty status or privileges. The clergyman supervising each of the student religious groups communicates and deals officially with the college through the faculty advisor assigned to the group.

The primary activities of such religious organizations consist of (1) meetings for the conduct of club business, religious discussions, lectures and other related activity, (2) religious services, and (3) religious counseling and advice. Social and recreational activities are also sponsored by such groups. You have advised us further that a number of organizations, among which are Canterbury Clubs, Lutheran Associations, Newman Clubs and Hillel Societies, fit the foregoing general description.

College facilities commonly utilized for the aforementioned activities of such organizations include classrooms, lecture halls, meeting rooms or student unions not otherwise occupied for educational courses or programs. Students receive no academic credit, official recognition or standing, or special privileges by virtue of their voluntary participation in any of the religious societies.

Your question is prompted by recent decisions of the Supreme Court of the United States dealing with the extent to which the State or any of its instrumentalities is limited by the First Amendment to the United States Constitution with respect to religious activities of students within its jurisdiction. For the reasons stated herein, we have reached the conclusion that permitting religious societies to function at the State colleges, as described herein as other extracurricular organizations now operate at the State colleges, would not contravene Federal constitutional standards.

We reach this conclusion, after a consideration of relevant decisional law, on several bases. First, permitting voluntary student religious organizations so to function would not constitute an intrusion by the State or any of its instrumentalities in the religious observances of its citizens. Second, by permitting such groups to function and to use college facilities for their activities without officially sanctioning their specific programs or objectives and without giving them any standing or recognition as a part of the college curriculum, it is clear that the State colleges would only be accommodating the religious needs and desires of those students in the college community who wish to partake of such activity and could not be deemed to b requiring, prescribing or even suggesting the pursuit of any religious or devotion practices either generally or specifically.

The United States Constitution, in its First Amendment, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Though referring to the powers of Congress, this Freedom of Religion Provision h by virtue of the passage of the Fourteenth Amendment, long been held to ren "the legislatures of the states as incompetent as Congress to enact [laws respecti an establishment of religion or prohibiting the free exercise thereof]." *Cartwel Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1939). See a *Everson v. Board of Education,* 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711 (19 *Cf., Near v. Minnesota,* 283 U.S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357 (19 *Gitlow v. New York,* 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); *v. Hawthorne Board of Education,* 84 N.J. Super. 63 (Ch. Div. 1963), *aff'd.* 42 1 351 (1964). Thus, the interpretations placed upon the Freedom of Religion Provi of the First Amendment by the Supreme Court of the United States, as well as

very language of the Provision itself, must be considered as absolutely binding upon the States and their instrumentalities and agencies. See *Sills v. Hawthorne Board of Education, supra.*

The Freedom of Religion Provision consists of two distinct but interrclated portions, the "establishment clause" and "free exercise clause". The interrelationship of these two clauses was clearly demonstrated by a recent case decided by the Supreme Court of the United States, *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). There, the statutory and regulatory requirements of Maryland and Pennsylvania that the Holy Bible be read or the Lord's Prayer be recited at the opening of each school day were held to violate the "establishment clause".

In striking down these practices, the Court held that the "establishment clause" clearly prohibits the states from instituting any form of prayer or worship for its citizens to follow, whether sectarian or non-sectarian, and whether participation therein is voluntary or required. Patently, what is proscribed by the "establishment clause" in this regard is not the institution of any particular form of prayer, but rather the very establishment by the State of a religious or devotional exercise as part of the prescribed curriculum within any public educational system. See also, *Engel v. Vitale,* 370 U.S. 421, 430-431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). It was further recognized that the actual and possible compulsion upon those students who might not wish to participate in such ceremonies but who might do so out of fear or embarrassment would contravene the "free exercise clause", notwithstanding that they could be excused therefrom upon parental request.

While the presence of both "free exercise" and "establishment" questions was clear in *Abington School District v. Schempp, supra,* the interrelationship of these two clauses is often subtle, occurring by way of interaction one with the other. See *Engel v. Vitale, supra.* Thus, the practical or resultant disestablishment of sectarian education, an excessive application of the "establishment clause" effectively limiting or barring religious expression, might well be deemed to be violative of the free exercise guaranty. See *Quick Bear v. Leupp,* 210 U.S. 50, 28 S. Ct. 690, 52 L. Ed. 954 (1908); *Zorach v. Clauson,* 343 U.S. 306, 314, 72 S. Ct. 679, 96 L. Ed. 954 (1952). See also, *Everson v. Board of Education, supra,* 330 U.S. at 16. *Cf., Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Correlatively, excessive affirmative official action encouraging citizens in the exercise of their respective religions may violate the establishment prohibition. See *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648 (1948). See also, *Abington School District v. Schempp, supra,* 374 U.S. at 246-248, and separate opinion at 296-299.

A basic principle which emerges from the cases is that the religious guarantees of the First Amendment are best observed by "wholesome neutrality" on the part of the State toward matters sectarian. See *Abington School District v. Schempp, supra; Engel v. Vitale, supra.* But the duty to be neutral should not be taken to impose a requirement of abstention or abnegation; rather, it obliges a State to steer a careful course between the constitutional prohibition against establishment on the one hand and the constitutional guaranty of free exercise on the other. See *Everson v. Board of Education, supra.*

The act of permitting voluntary student religious groups to function at the State colleges and to use college facilities for their activities would not do violence to the principle of neutrality. Furthermore, it is wholly dissimilar from the practices dealt with in *Abington* and *Engel, supra.* In so acting, the State colleges would not be instituting any form of prayer or other religious observance or exercise contrary

to the "establishment clause" of the First Amendment. They would not be prescribing the time, place or mode of worship. They would not be lending the force of secular authority or official imprimatur to enforce religious practices, nor would they be involving the State in any affirmative way in the religious experiences of its citizens. Additionally, insofar as these religious societies involve the voluntary participation of students, acting without duress, compulsion or restraint, there is involved no transgression of the "free exercise clause" of the First Amendment. Thus, neither *Abington School District v. Schempp, supra,* nor *Engel v. Vitale, supra,* apply to limit the State colleges from acting in the manner contemplated by your inquiry or to require them to prohibit the functioning on campus of voluntary student religious societies.

McCollum v. Board of Education, supra, might, at first blush, be thought to require a contrary result. There a program was instituted whereby teachers of various faiths were brought into the school system to teach their respective religions to those students who wished to participate. This instruction was given as part of the public school schedule during the regular school day. Those students who did not wish to participate were assigned to study halls or the like during the period of this instruction. The Court held:

> "The. . .facts. . .show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. . . .
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> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." 333 U.S. at 209-210, 212.

The *McCollum* decision is distinguishable from the situation with which we are here concerned. There, it is to be noted, religious instruction was a recognized part of the school curriculum in a compulsory educational system, *i.e.* one in which pupils were legally obliged to participate. Part of the official educational program of the school district involved, specifically, religious classes. The school authorities in sponsoring such instruction, actually brought religion teachers into the classroom for this express purpose. In contrast, the functioning of voluntary religious societies on the campuses of the State colleges would be a strictly *extra* curricular endeavor. No teachers would be furnished by the State colleges for the purpose of providing

sectarian education. Student participation would in no way be recognized as part of the academic curriculum, nor would students receive any credit toward their academic standing or other privileges as a result thereof. The attendance of pupils at the State colleges is not compulsory. The activities of these organizations at the State colleges, in short, would not be integrated as part of the State's compulsory educational machinery.

This distinction is buttressed by a consideration of *Zorach v. Clauson, supra.* There the school authorities did not prescribe religious instruction as part of the curriculum but rather, cooperated with the religious wants and needs of the citizens by permitting students to take religious instruction, if they wished, elsewhere than upon the school premises. Official recognition was accorded this activity, however, to the extent that the students who wished to participate therein were released from school early in the day so that they might do so, while pupils who did not wish so to participate were kept in the classrooms until the close of the school day. The Court held this practice not to be an impermissible combination of the functions or responsibilities of church and state but rather an accommodation by the secular authorities to the religious needs and desires of the citizens.

In this respect, *Everson v. Board of Education, supra,* is analogous. Local school authorities made provision for reimbursing the parents of parochial school students for the costs of transporting their children between home and school on public transportation, as permitted by N.J.S.A. 18:14-8. This practice was upheld by the Court as being properly within the purview of the State's concern for the public welfare and because it was a measure in aid of the school children and their parents in contradistinction to being aid given the churches or their parochial schools as such. It should also be noted that the Court, in reaching this conclusion, said:

> "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power.*** New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." 330 U.S. at 16. See also, *Abington School District v. Schempp, supra,* 374 U.S. at 299 (separate opinion).

The basic difference between those of the foregoing cases in which the practices under review were struck down and those in which they were upheld is clear. In *McCollum, Engel* and *Abington,* the force of the State's authority through compulsory education had been lent to what were essentially religious observances. A fusion of religious and secular functions occurred when religious or devotional experience was made a part of the program of public secular education. The State, through its instrumentalities, was involving itself, to an appreciable extent, in the

religious practices of its citizens in contravention of the very foundations of the "establishment clause". See *Memorial and Remonstrance Against Religious Assessments, II Writings of Madison,* 183.

In *Zorach* and *Everson,* however, while school authorities facilitated observance of religious practices, they did not in any way combine with, direct, or influence them. *Zorach* and *Everson* are clear examples of affirmative governmental action and use of public resources amounting to constitutionally permissable cooperation with the religious interests of the citizenry; *McCollum, Engel* and *Abington* are graphic examples of unconstitutional interference or combination one with another.

The functioning of voluntary student religious societies on State college campuses would constitute an accommodation by the State of the religious interests and needs of a segment of the citizenry by rendering more convenient or easy to achieve religious experiences and observances by those who desire to do so. Under the circumstances set forth it would not amount to an institution, prescription, or lending of secular authority to religious activity. Moreover, it is clear that the colleges do not *establish* these organizations on the campuses by way of instituting them, prescribing them or otherwise lending secular authority to their programs or activities, but rather only permit their activities or meetings if the students enrolled desire to have them. The nature of a college campus as a community in itself cannot be overstated. In large part, the students enrolled seek and expect to partake of a full community existence within the confines of the institution. Their academic experiences are provided by the administration and faculty of the college. A large number of many different kinds of organizations, usually having been formed by the students themselves, provide for their social, recreational, political and other extracurricular needs and wants. So here, there is felt a need for religiously oriented organizations as one aspect of life in the college community. In granting permission for such voluntary groups to function and in providing facilities for their activities, the State colleges would merely be accommodating those students who wish to partake thereof and nothing more. To make such voluntary activities conveniently available to those students who wish to participate is not in any way tantamount to prescribing particular methods of religious or devotional observance nor would there be present any degree of compulsion such as was said to have occurred in *McCollum v. Board of Education, supra,* when Justice Black noted:

> "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes." 333 U.S. at 209-210. See also, *Abington School District v. Schempp, supra; Engel v. Vitale, supra. Cf., Abington School District v. Schempp,* 374 U.S. at 298-299 (separate opinion).

It must further be carefully noted that in *McCollum, Engel* and *Abington,* when the school authorities made certain types of religious exercise part of the curriculum, they were dealing with children on the primary and secondary level of public education. As was recognized by Justice Brennan in his concurring opinion in *Abington,* the opportunity not to participate in such exercise upon parental request was illusory for, as a practical matter, young children might well feel compelled to participate either because they would not wish to appear different from their follow students or because of a real or imaginary fear of being disciplined. 374 U.S. at 298-299. The functioning of voluntary extracurricular religious clubs on college campuses, in con-

trast, involves older college-age students. These are people who have the ability to make a free choice and competently to distinguish between that which is voluntary and that which is mandatory.,

It is our opinion, for the foregoing reasons, that the State colleges may permit voluntary, extracurricular student religious organizations, as they have been described herein, to function on State college campuses and make reasonable use of college facilities for their activities. Such action does not contravene the provisions of the First Amendment to the United States Constitution.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey

By: HOWARD H. KESTIN
Deputy Attorney General

September 14, 1965

HONORABLE JOHN A. KERVICK
Treasurer of the State of New Jersey
State House
Trenton, New Jersey

FORMAL OPINION 1965—NO. 2

Dear Mr. Kervick:

You have requested our opinion with respect to whether there could be established by the State a governmental authority to provide student dormitory and related facilities at the various State public colleges and the State University. You have also requested our opinion with respect to whether such a governmental authority could furnish dormitory and attendant facilities and other academic buildings and projects, such as libraries, laboratories and the like, for the benefit and use of students attending private colleges and universities in the State.

We are advised that this inquiry is prompted by specific requests, information and investigations of the Commissioner of Education who has underscored the great shortage of student residence and other related facilities at the various State higher educational institutions. It has also been indicated that there is a similar need on the part of many private institutions in the State and that there has been expressed an interest in developing a cooperative program between the State and such private institutions in order to facilitate and accelerate the construction of dormitory and incidental facilities and other needed academic buildings and projects. In this context the State Commissioner of Education and you ask whether it is legally possible for the State to embark upon such a program through a governmental instrumentality and whether such an instrumentality or public authority could function in a manner similar to the Dormitory Authority of the State of New York.

We are informed that the Dormitory Authority of the State of New York is a