November 29, 1965

HONORABLE FREDERICK M. RAUBINGER
Commissioner, Department of Education
225 West State Street
Trenton, New Jersey

FORMAL OPINION 1965—NO. 4

Dear Commissioner Raubinger:

You have requested our opinion as to whether dual enrollment programs involving the attendance at public elementary and seconday schools of students from private and parochial schools for selected educational purposes violate the First Amendment to the Constitution of the United States. We are advised that dual enrollment programs, a concept commonly referred to as "shared time", encompass a wide variety of situations. You have described "shared time", as involving a formula or concept whereby students attending private schools on a full time basis are permitted to attend public schools and avail themselves of particular educational programs, services or facilities therein.

In connection with this inquiry, you have submitted a list of questions posed by several local school districts pertaining to particular "shared time" programs. They are as follows:

May a school board maintain and finance a program by which private school students, grades K to 8, can participate in the regular Physical Education and Health courses ordinarily provided at the public schools?

May a school board allow private school students to use public school facilities such as the gym, playground or auditorium during the school day?

May a school board include in its regular music classes or orchestral programs private school children and provide instruments for them?

May the school board provide specialized supplementary speech instruction for private school students having a need for such training at the public school?

May a school board provide special services ordinarily provided for public school students, such as psychological evaluations, speech therapy, physical examinations, and the like, to private school children within the district?

All of these related questions can be answered in terms of the one overriding issue: Is the basic concept of shared time constitutional? More specifically, may the State through the instrumentality of its local boards of education permit private school students to attend regular or special classes in the public schools on a part time basis and provide educational services and facilities for such students without violating the First Amendment?

For the reasons set forth herein, we are of the opinion that a local school board may adopt a program of shared time or dual enrollment whereby pupils attending private schools may participate in given educational programs or services offered at the public schools. Initially, it is necessary to consider the question of shared time within the general framework of the State school laws and in the context of the school community. Public schools are financed through public moneys. A large measure of this support is derived from local property taxes which are levied on and paid by all property owners in the community. Such taxes are levied generally and without

regard to whether a particular taxpayer has children or whether his children attend private or public institutions. Further, under our compulsory education law, not only does every child in the district have the right to attend the public schools but he is required to attend either the public school or some equivalent private school. N.J.S.A. 18:14-14. Correlatively, parents have a constitutional right to choose the type and character of education they feel best suited for their children, be it sectarian or secular. *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). The crucial issue may thus be framed in these terms: Does the exercise by a parent of his constitutional right to send his child to a nonpublic school effectively prohibit boards of education from offering the child *some* of its services and facilities when he would otherwise be entitled to *all* of its services and facilities?

The First Amendment, in pertinent part, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is no longer open to debate that this proscription as fully inhibits state action as it does federal, through the operation of the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Sills v. Hawthorne Board of Education,* 84 N.J. Super. 63 (Ch. Div. 1963), *aff'd* 42 N.J. 351 (1964).

Further, any such inquiry must be made with reference to the Amendment's intrinsic dichotomy, the legal distinction between the Free Exercise and the Establishment Clause. The Supreme Court has distinguished the former as follows:

> "The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Abington School District v. Schempp,* 374 U.S. 203, 222, 223, 83 S. Ct. 1560, 1572 (1963).

The factual situations under consideration posit the transference of children *from* sectarian schools *to* public schools for purposes which are purely educational and wholly unrelated to religion. It is difficult to envision how this voluntary movement of students from sectarian institutions to secular schools for limited educational purposes could possibly infringe upon the Free Exercise Clause. There is no element of governmental compulsion whatsoever directed toward nonobserving persons to partake in religious experiences.

As previously noted, citizens have a constitutional right to provide their children with the type of education they see fit, be it religious or secular. It has never been judicially suggested that the exercise of this basic right to forego a public education in favor of one which is private or sectarian precludes a person from availing himself of any state supported educational service or facility. If the option to have a private or sectarian education were to result in the forfeiture of other public educational programs or activities, this could seriously discourage or inhibit private or sectarian schooling and might well approach that compulsion which the Free Exercise Clause interdicts and belie the position of "wholesome new neutrality" which the State must assume in religious matters. *Abington School District v. Schempp, supra.*

The neutrality mandated by the Free Exercise Clause is grounded in a rationale "which recognizes the value of religious training, teaching and observance, and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Abington School District v. Schempp, supra* at 374 U.S. 222. The simple economics of modern education is making it increasingly evident that private schools may not be able to keep abreast of the many new developments and innovations which a technological society demands of a school system. Without shared time, a child enrolled in a private school may have to forego many of the necessary but expensive services made available by the public schools. This premise may be superimposed upon the factors already noted, that all taxpayers bear the burden of supporting public schools without regard to whether their children attend them, that each child has the right to attend the public schools, and that parents may constitutionally select some form of equivalent nonpublic education for their children if they deem it in their best interests. We are therefore of the opinion that the concept of shared time does not abridge the Free Exercise Clause.

Dual enrollment or shared time must also be measured against the Establishment Clause of the First Amendment, the infringement of which does not depend upon the element of compulsion. *Abington School District v. Schempp, supra,* which invalidated state statutes and regulations which required daily readings from the Holy Bible in the public schools as contravening the Establishment Clause, has served to crystallize the meaning and scope of that provision. The opinion, after noting that the Court in eight decisions had consistently held "that the clause withdrew all legislative power respecting religious belief or the expression thereof", articulated a serviceable rule against which future State action might be measured to determine constitutionality.

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 374 U.S. 222, 83 S. Ct. 1571.

The purpose of dual enrollment programs is grounded in the State's vital interest in the universal improvement of the educational standards and achievements of its children irrespective of the schools they attend. It is a fact that a large percentage of children attend private schools.[1] It is also a fact that, nationally and locally, the foremost problem confronting government is the provision of an adequate education for all of its citizens so as to make of each and every pupil a productive member of society. It is noteworthy that Congress, in its enactment of the "Elementary and Secondary Education Act of 1965", has adopted the dual enrollment concept. 79 Stat. 27 *et seq.* (P.L. 89-10). The House Committee on Education and Labor articulated the underlying need for the Act as follows:

> "The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower

> retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rate of our 18-to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy." Report No. 143 accompanying H.R. 2362 (March 8, 1965).

It is therefore clear that a state's dual enrollment program aimed at providing improved educational services to educate school pupils to the same extent that they are provided for public school pupils, thereby increasing the general community level of education, has a valid secular governmental purpose.

The remaining issue is whether dual enrollment has "a primary effect that neither advances nor inhibits religion." *Abington, Ibid.* It cannot be denied but that dual enrollment programs will result in certain residual advantages to the private schools participating therein. When the private school is a sectarian institution it might be said that these indirect advantages serve to advance religion. The acceptance of this proposition does not solve the problem. There are many areas wherein a state is permitted to adopt a course of action which is advantageous to religious institutions. For example, the state may pave a public road giving convenient access to a church and it may assign policemen to direct traffic during church hours. It may provide for or finance the transportation of students to parochial schools. *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).It may supply fire and police protection. It may grant organized religions immunity from civil suit. In all of these instances, religion, in general and in particular, is advanced. Yet this result is but an incident to a larger and more direct undertaking by the state, namely, to exercise its police power in the interest of the general welfare. Thus, a governmental act does not approach the stage of constitutional inhibition whenever it results in the advancement of religion but only when that advance represents the direct and primary goal of that act.

The primary effect of dual enrollment is colored by its overriding purpose, that is, to raise the overall level of educational achievement for all pupils within a given jurisdiction without regard to the character of the school attended. The primary effect is, simply, the accomplishment of this end.

But, from a constitutional vantage, whether an effect is primary or incidental is a matter of degree and, more significantly, of methodology. The resolution of the issue is aided by a synthesis of several Supreme Court decisions which have dealt with these questions.

A point of contrast is the case of *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 848 (1948). There, the court invalidated a released time program under which sectarian instructors were brought into the public school to teach religion during the school day to those students voluntarily desiring to attend. The court ruled as follows:

> "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*. . . ." 333 U.S. at 209-210, 212.

McCollum is certainly distinguishable from the classic dual enrollment situation. Here, instead of religious teachers coming into the public school to instruct in sectarian doctrine, pupils from private and parochial schools attend the public schools to receive instruction and services which are wholly secular. Tax-supported public schools are not in any way used for the dissemination of religion.

Subsequently, the Court upheld an inverted released time plan by which public school pupils were released during the school day to attend religious classes at the various religious institutions. In *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), the Court determined that the State, through its public schools, was not directly participating in religious instruction. Rather, recognizing that voluntary religious instruction was in the best interests of its students and contributed to their general welfare, it cooperated with organized religions to achieve this goal.

These cases may be viewed from the vantage of the contemporary test set forth in *Abington, supra,* to ascertain compliance with the Establishment Clause. Putting aside Free Exercise considerations, the enuciated purposes in both *McCollum* and *Zorach* were the same, namely, to enhance the welfare of public school students by enabling them to secure desired religious instruction. The primary effect of the scheme in *Zorach* was the achievement of this purpose through means which did not entail the State's active participation in promulgating religious instruction but by the mere accommodation of both the students and the churches. In contrast, the methodology of *McCollum* resulted in placing the tax-supported facilities at the disposal of the churches and to surrender that authority normally attendant on the public school teacher to the religious instructor. In *McCollum,* then, the advancement of religion was both direct and primary, while in *Zorach* it was incidental.

Parenthetically, it may be noted that the fact situation in *Zorach* is strikingly similar to that in the concept of shared time, differing only in point of departure. In both situations students receive secular education in the public schools and sectarian education in parochial institutions. In neither situation is the religious instructor cloaked in the authority of public school teachers. In neither situation is religion taught on tax-supported premises. In both cases an incidental advantage accrues to sectarian interests. The only variation, which does not appear significant in terms of constitutional considerations, is that in *Zorach,* public school children adjourn to sectarian institutions for religious learning, while in dual enrollment, sectarian based students attend public schools for secular instruction.

The case of *Everson v. Board of Education, supra,* furnishes more direct support for the shared time concept. There, the court upheld a program under which the school district of Ewing Township, New Jersey, financed the transportation on public conveyances of both public and parochial school children pursuant to N.J.S.A. 18:14-8. In *Everson* there was a substantial expenditure of tax monies in behalf of parochial school children. While the State's underwriting of transportation costs advanced religion in the incidental sense that it facilitated attendance at parochial schools, the primary purpose and effect of the scheme was to benefit the resident

school children by ensuring adequate transportation to and from their schools, regardless of the character of the school attended.

Since the purpose of shared time is essentially secular, and its primary effect is not the direct advancement of religion but, rather, the provision of greater educational opportunities for students in general, we are of the opinion that the Establishment Clause is not thereby violated.

With equal reasoning, the New Jersey Constitution in no way inhibits the utilization by the public schools of dual enrollment. The Religious Freedom provision, *N.J. Const., Art.* I, *par.* 3, states, *inter alia,* that "no person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience." The Establishment section, *N.J. Const., Art.* I, *par.* 4, provides that "there shall be no establishment of one religious sect in preference to another;. . ."[2] In the context of shared time, there is far less ambiguity with respect to the express language of these provisions than appears in the First Amendment to our Federal Constitution. Furthermore, the New Jersey Court of Errors and Appeals considered them no bar to the Ewing school district's program for public and parochial school transportation discussed heretofore. *Everson v. Board of Education,* 133 N.J.L. 350 (E. & A. 1945). Based upon the limited historical data and available decisional law construing these provisions, it would seem that dual enrollment does not transgress the Church and State provisions of the State Constitution.

It is therefore our opinion that a board of education may maintain a dual enrollment program without violating the First Amendment to the United States Constitution or the comparable provisions of the Constitution of New Jersey.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey
By: JOSEPH A. HOFFMAN
Deputy Attorney General

1. The estimated school population for the State of New Jersey in 1965 is as follows: Full-time day elementary and primary public schools; 1,263,800; Full-time day elementary and primary private schools, 334,200. Digest of Educational Statistics (1965 Ed.) Bulletin 1965, No. 4, U.S. Office of Education, Dept. of Heath, Education and Welfare.

2. The language of these sections has remained substantially unchanged throughout the history of New Jersey. See *N.J. Const.* 1844, *Art.* I, *pars.* 3 and 4, *N.J. Const.* 1776, *Arts.* 18 and 19. There is a surprising lack of legislative history on these provisions.