October 6, 1977

EDWARD J. BAMBACH, *Executive Director*
New Jersey Educational Facilities Authority
120 Sanhican Drive, Suite 2A
Trenton, New Jersey 08618

FORMAL OPINION 1977—No. 21.

Dear Mr. Bambach:

You have asked whether religious services organized by students and conducted in facilities leased by the Educational Facilities Authority to Ramapo College violate the New Jersey Educational Facilities Authority Law. For the following reasons, it is our opinion that the incidental use of college facilities by students for these purposes does not conflict with the provisions of the Law.

We have been informed that within the past few years Catholic masses have been organized by resident students at the College. They have been conducted weekly and on church holidays in a conference room of the campus life building. Rooms in the campus life building are generally reserved by students for various activities and in this instance Catholic students reserve the conference room by submitting a reservation request to the director of student activities. A Catholic priest has been invited by these students to conduct the masses. The campus life building has several rooms available in addition to the conference room in which the masses have been held. The reservation of the conference room for the masses has never prevented other students from using the campus life building at the same time. Furthermore, officials of Ramapo College have indicated that students have organized a weekly mass in student dormitory apartment living rooms. College officials have neither encouraged nor discouraged students to conduct masses nor have they organized such activities on their behalf. We also have been informed that these religious activities have no relationship whatsoever to the educational curriculum of Ramapo College.

The New Jersey Educational Facilities Authority Law, N.J.S.A. 18A:72A-1 *et seq.*, is designed to provide funds to finance the construction of dormitories and educational facilities for public and private institutions of higher education. The statute created the New Jersey Educational Facilities Authority (Authority) within the Department of Higher Education to provide financial assistance in order to enable institutions of higher education to construct these facilities. The educational facilities which may be constructed are defined by the act, but expressly exclude "any facility used or to be used for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3.

Under this statutory framework, the Authority has acquired land and constructed buildings to be used as a dormitory and campus life building at Ramapo College. The Authority has, in turn, leased these facilities to the College pursuant to separate lease agreements for each facility. Each lease contains a covenant against the use of the facility for sectarian instruction or religious worship.

The question, therefore, is whether this conduct by Catholic students at Ramapo College falls within the legislative prohibition against the use of that facility for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3.

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The question, therefore, is whether this conduct by Catholic students at Ramapo College falls within the legislative prohibition against the use of that facility for sectarian instruction or as a place for religious worship. The legislative history of the act does not provide any definitive insight into this prohibition. It may be assumed, however, that it was designed by the Legislature to insure that state aid provided by the act would support a secular and not a religious educational function consistent with the Freedom of Religion Clause of the First Amendment.* This implicit legislative purpose was referred to by the New Jersey Supreme Court in its decisions in *Clayton v. Kervick,* 56 N.J. 523 (1970), *vacated* 403 U.S. 945 (1971), *reconsidered* 59 N.J. 583 (1971). In the first *Clayton* decision, the Supreme Court held the act to be consistent with the Establishment Clause, since its primary effect neither advances nor inhibits religion. The court noted that in order to insure that the assistance provided by the act would not fall within the prohibition of the Establishment Clause, the Legislature expressly excluded from its definition of an educational facility any facility used or to be used for sectarian instruction or as a place for religious worship. This legislative purpose was further pointed out in the reconsideration of the question in *Clayton II.* In that decision the court concluded that the legislative scheme satisfied the requirements of the First Amendment expressed by the United States Supreme Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and *Tilton v. Richardson,* 403 U.S. 672 (1971). The court stated that even though a loan transaction under the act may confer a benefit to a sectarian institution, the primary effect of the statute would not improperly aid religion. As stated by the court:

> "the facility may never be used for sectarian purposes. Our statute can be construed to meet that demand. As already noted, N.J.S.A. 18A:72A-3, in its definition of an educational facility, provides that it shall not include any facility 'used or to be used for sectarian instruction or as a place for religious worship.' The words 'to be used' can be read to satisfy this constitutional requirement . . . ." *Clayton* at 599-600.

Thus, the legislative prohibition against the use of these facilities for religious purposes spelled out in N.J.S.A. 18A:72A-3 was designed to avoid active governmental sponsorship, involvement or aid to religion inconsistent with the requirements of the Establishment Clause.**

The incidental and voluntary use of the facilities of the Authority at Ramapo College for religious activities organized by resident students would not conflict with the Establishment Clause and thus does not fall within the prohibition of the statute. The campus life building and dormitory serve secular purposes to provide students with an activities center and convenient living accommodations. By permitting voluntary religious worship among other activities in these facilities, the State has not advanced religion but is merely fulfilling their primary secular purposes. Any accommodation or benefit for a religious group resulting from this activity is purely incidental to their essential secular purposes. Accordingly, since the Authority and College do not sponsor, encourage or participate in this religious activity, there is not present the type of governmental activity proscribed by the Establishment Clause and falling within the intent of the statute.

Furthermore, to interpret the statute to prohibit voluntary worship by resident

students at Ramapo would inhibit the practice of religion and would raise a serious question under the Free Exercise Clause of the First Amendment. The United States Supreme Court explained the import of this Clause in *Zorach v. Clauson*, 343 U.S. 306 (1952). In that case, school authorities cooperated with the religious needs of its students by permitting them to take religious instruction, if they wished, elsewhere than upon the school premises. Students who wished to participate were released from school early in the day so that they might do so, while pupils who did not wish to participate were kept in the classrooms until the end of the school day. The Court held that this practice was a permissible accommodation by the secular authorities to meet the religious needs and desires of its citizens. The Court stated:

> "We are a religious people whose institutions presuppose a Supreme Being. *We guarantee the freedom to worship as one chooses.* We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." (Emphasis added.) 343 U.S. at 313-314.

Also, in *Everson v. Board of Education*, 330 U.S. 1 (1947), local school authorities provided for reimbursement to parents of parochial school students for the costs of transporting their children between home and school on public transportation pursuant to N.J.S.A. 18:14-8. In upholding this form of governmental aid under the Freedom of Religion Clause, the court said:

> ". . . 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.

More recently, in *Keegan v. University of Delaware,* 349 A.2d 14 (Del. Sup. Ct. 1975), the Delaware Supreme Court struck down under the Free Exercise Clause a

college regulation prohibiting religious worship in the commons room of a dormitory. The court held that an absolute ban on religious worship constituted an unjustifiable burden on the free exercise of religion, since the commons area was made available for general student use and only the religious activities forbidden therein. See also *Pratt v. Arizona Board of Regents,* 520 P.2d 514 (Ariz. Sup. Ct. 1974). Similarly, in *Lewis v. Mandeville,* 107 N.Y.S. 2d 865 (Sup. Ct. 1951), the use of an auditorium in a municipal firehouse for religious worship was determined to be constitutional. Since the facility was made equally available to religious or non-religious groups, the court concluded that the use of the auditorium for religious worship could not be prohibited under the freedom of worship provision in the New York Constitution.

In *Zorach, Everson* and *Keegan*, therefore, while school authorities facilitated the observance of religious practices, they did not in any way combine with, direct, or influence them. There are clear examples of permissible uses of government resources to constitutionally promote an accommodation of the religious interests of the public. Similarly, voluntary religious worship by resident students in the campus life building and dormitories on the college campus would constitute an incidental accommodation by the State of the religious interests and needs of its student body.

Consequently, an interpretation of the statute to impose an absolute bar to voluntary religious worship would subject it to serious constitutional question under the Free Exercise Clause. Legislation, whenever possible, should be construed to avoid any constitutional infirmity. *Schulman v. Kelly*, 54 N.J. 364, 370 (1969). Therefore, it should not be assumed that the Legislature intended to foreclose the incidental use of these facilities to accommodate the religious needs of the student body, but rather intended to prohibit active sponsorship or involvement by the State in an affirmative way in religious activity. Thus, based upon the facts provided to us, it is our opinion that the provisions of N.J.S.A. 18A:72A-3 would not preclude voluntary religious worship by resident students at educational facilities assisted and maintained by the Authority and Ramapo College.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

*The First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment provides in pertinent part:

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

** In this respect, the New Jersey Educational Facilities Authority Law enacted in 1966 is substantially similar to the Higher Education Facilities Act passed by Congress in 1963. The Act authorizes federal grants and loans to "institutions of higher education" for the construction of a wide variety of "academic facilities" but expressly excludes "any facility used or to be used for sectarian instruction or as a place for religious worship . . . ". The United States Supreme Court in *Tilton v. Richardson, supra*, held that insofar as the Act authorizes federal aid to church related universities to be used exclusively for secular educational purposes, it did not violate the Religion Clauses of the First Amendment. The Court noted that:

> "The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient insti-

tutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction training or worship." *Tilton, supra*, at 679-680.

This congressional purpose to avoid governmental sponsorship, financial aid or involvement in the religious activities of recipient institutions is similar to the legislative purpose underlying the exclusion of facilities used for sectarian instruction or religious worship in N.J.S.A. 18A:72A-3.

December 1, 1977

RALPH P. SHAW, *Chief Examiner and Secretary*
Department of Civil Service
State and Montgomery Streets
Trenton, New Jersey 08625

FORMAL OPINION 1977—No. 22.

Dear Mr. Shaw:

You have asked for our advice as to the legitimate duties and responsibilities of special police officers appointed in municipalities throughout the state. In particular, you have asked whether special police may consistent with the civil service laws perform the duties and responsibilities of regular permanent members of a municipal police force. Although your inquiry is directed toward local civil service jurisdictions, the issue has equal application to both civil service and non-civil service communities.*

We have been informed that special police officers perform a variety of police related work. In many instances they are used to perform general police duties in a fashion similar to members of the regular force. Some municipalities use special police officers to perform only certain specified police responsibilities such as acting as a police dispatcher. Other municipalities use them for spectator or traffic control, either on a regular basis such as school or church crossing guards or in emergent situations. Finally, special police officers are often used to provide additional protection and security for banks, taverns, construction projects, railroad yards and amusement or public parks.

It is necessary to consider the statute authorizing the appointment of special police officers, civil service law and police training statutes in making a determination as to the appropriate responsibilities of a special police officer. N.J.S.A. 40A:14-146 provides for the appointment of special police officers. The statute authorizes the governing body of any municipality to appoint special police personnel for terms not to exceed one year. They are declared " . . . not (to) be members of the police force . . . ." and they may be removed without cause or hearing. Special police officers may be furnished badges and charged a fee for the issuance of a certificate of appointment. Special police officers serve under the supervision of the municipal police chief