

ANNEX B

ANALYSIS OF "MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION," ISSUED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, MARCH 28, 1961¹²⁷

The conclusions of this Memorandum may be summarized as follows: (1) "across-the-board" grants and loans to church-related schools are unconstitutional; (2) tuition payments for all pupils in church-related schools are equally invalid; (3) the providing of milk, lunches, and bus transportation to pupils in church-related schools appears to be constitutional; (4) loans for special purposes not closely related to religious instruction, such as the loans in Title III of the National Defense Education Act, are probably constitutional; (5) how far the principle of special purpose loans may be extended is difficult to ascertain.¹²⁸

These conclusions apply only to elementary and secondary church-related schools. The inclusion of church-related colleges and universities in federal aid to higher education is fully supported by the Department in the body of the Memorandum.¹²⁹

In a subsequent memorandum, dated June 27, 1961, the Department of Health, Education, and Welfare explicitly sustained the constitutionality of certain proposed amendments to Title III of the National Defense Education Act insofar as they would authorize loans to private non-profit elementary and secondary schools, including church-related institutions, for the purposes of providing "special educational facilities" and "physical development facilities." Since this second memorandum is only an application of the constitutional position developed in the first, it needs no special treatment here.

Owing to the wide publicity given to the first HEW Memorandum, it has been judged advisable to present here a somewhat detailed analysis. Necessarily, this results in some repetition of the discussion of the principal cases, already treated in the body of this study. The Memorandum states that there is a "paucity of Supreme Court precedent" with respect to government aid to education in church-related schools.¹³⁰

¹²⁷ The Memorandum has been printed in Senate Doc. No. 29, 87th Cong. 1st Sess. 7 (1961). All page references to the Memorandum [hereinafter cited as HEW Memorandum] are to the edition in this issue of the Georgetown Law Journal.

¹²⁸ HEW Memorandum 351-53.

¹²⁹ Id. at 377-81.

¹³⁰ Id. at 355.