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February 22, 1980

Honorable John L. Martin
Speaker's Office
State House
Augusta, Maine 04333

Dear Speaker Martin:

You have orally requested an opinion as to whether, in the circumstances described below, the directors of School Administrative District No. 27 may permit a religious organization to conduct religious services at the St.Francis public elementary school. In particular, you have informed us of the following facts. The St. Charles Roman Catholic Church is located in St.Francis, Maine. Due to structural defects in the church building, it has become necessary to demolish the church and erect a new one on the same foundation. It is expected that construction of the new church will be completed within four to six months. The St.Francis school is a public elementary school located within SAD 27. You have inquired whether it is statutorily and constitutionally permissible for the directors of SAD 27 to allow the St.Charles Church to use the St.Francis school building to conduct religious services pending completion of the new church. You have indicated that church authorities are willing to pay a fair rental value for their use of the public school building. Moreover, you have indicated that the religious services to be conducted would be held during non-school hours and would not disrupt or interfere with the use of the school building for school purposes.[1] You have indicated that

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1. We understand that it is contemplated that St.Charles will use the school facilities to conduct its regular Sunday services as well as to conduct occasional religious services during the week.

St. Charles is actively pursuing its plans for construction of a new church and that its use of the public school would be temporary in nature. Finally, you have advised us that it is a common practice for the directors of SAD 27 to permit outside organizations to use St. Francis elementary school to conduct various activities such as meetings, dances and suppers.

Your question raises two distinct issues, namely, (1) whether the directors of SAD 27 have statutory authority to permit outside use of school facilities during non-school hours and (2) if such authority exists, whether the use of public school facilities, in the circumstances you have described, violates the First Amendment to the United States Constitution.

STATUTORY AUTHORITY

20 M.R.S.A. §473 enumerates the duties which school directors are required to perform. Among those duties is the following:

> "The management of the schools and the custody and care, including repairs and insurance on school buildings, of all school property in their administrative units; the use of school buildings shall not be denied to any person solely because use is requested for a political activity."

20 M.R.S.A. §473(1)(1965-1979 Supp.).

Initially, a question arises as to whether section 473(1) confers authority upon school directors to allow public school buildings to be used for non-school purposes during non-school hours.[2] For the reasons discussed below, it is our conclusion that pursuant to 20 M.R.S.A. §473(1) school directors do have authority to permit outside use of school premises during non-school hours.

In determining the meaning of a statutory enactment it is of "fundamental importance" to ascertain and give effect to the Legislature's intent. Paradis v. Webber Hospital, Me., ___A.2d___, slip op. at 4 (Opinion filed December 31, 1979). See also New England Tel. & Tel. Co. v. Public Utilities Commission, Me., 376 A.2d 448, 453 (1977). In attempting to determine the legislative intent underlying a particular statute, it is often helpful to examine the legislative history of the law in question. See, e.g. Finks v. Maine State Highway Commission, Me., 328 A.2d 791,797 (1974);

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2. It should be observed that 20 M.R.S.A. §306 (1965-1979 Supp.) grants specific authority to school directors "to lease any unused school buildings for educational or cultural purposes."

Austin v. State, 160 Me., 240, 244, 202 A.2d 794 (1964), cert. denied, 382 U.S. 1018 (1965). In construing a statute, the courts will avoid an interpretation which produces absurd or illogical results. See, e.g., Woodcock v. Atlass, Me., 393 A.2d 167, 170 (1978); Cornwall Industries Inc. v. Maine Department of Manpower Affairs, Me., 351 A.2d 546, 553 (1976). Moreover, it is presumed that the Legislature does not intend to enact meaningless legislation and, consequently, the courts will endeavor to construe a statute so as to avoid rendering it a nullity. Waddell v. Briggs, Me., 381 A.2d 1132, 1135 (1978); Goodwin v. Luck, 135 Me., 288, 230, 194 A.305 (1937). See also Op.Atty.Gen., October 9, 1979.

20 M.R.S.A. §473(1) was originally enacted by Chapter 332 of the Public Laws of 1897. It remained substantially unchanged until its amendment by Chapter 74 of the Public Laws of 1969. The 1969 amendment added the language providing that "the use of school buildings shall not be denied to any person solely because use is requested for a political activity." Unfortunately, our research has not uncovered any legislative debate concerning section 473(1), either when it was originally enacted in 1897 or when it was amended in 1969.

The language of 20 M.R.S.A. §473(1) is indeed broad and imposes upon school directors the responsibility of managing and caring for public school property and buildings. The question, however, is whether section 473(1) should be interpreted narrowly so as to permit school directors to manage and care for school property only insofar as it relates to school purposes or whether it should be given a broader interpretation so as to authorize school directors to permit outside use of school buildings during non-school hours.

That the Legislature intended school directors to have authority under section 473(1) to permit outside use of school buildings is supported, at least implicitly, by the language of the 1969 amendment. By virtue of Chapter 74 of the Public Laws of 1969, school directors were prohibited from denying the use of school buildings solely because the requested use was for a political activity. The fact that the Legislature expressly limited the authority of school directors to deny the use of school buildings for non-school purposes certainly suggests that the directors have the authority to allow such use in the first place. Implicit in the Legislature's enactment of P.L. 1969, c.74 was the recognition that 20 M.R.S.A. §473(1) granted authority to school directors to permit outside use of school buildings during non-school hours. As stated by the Maine Law Court, "[t]hat which is implied in the statute is as much a part of it as that which is expressed." White v. Shalit, 136 Me.65, 69, 1 A.2d 765 (1938). See generally C. Sands, 2A Sutherland Statutory Construction, §§ 55.02-55.03 at 380-83 (4th ed., 1973).

Furthermore, when construing a statutory provision, it is presumed that the Legislature did not intend to enact a useless law. See Waddell v. Briggs, supra; Goodwin v. Luck, supra. In this connection, the enactment of P.L. 1969, c.74 would have been totally unnecessary if school directors had no authority under 20 M.R.S.A. §473(1) to permit outside use of public school buildings. To interpret section 473(1) as not authorizing school directors

to permit outside organizations to use school buildings during non-school hours would have the effect of rendering P.L. 1969, c.74 a nullity. We do not believe the Legislature intended such an illogical result. See Land Management Inc. v. Department of Environmental Protection, Me., 368 A.2d 602, 603 (1977).

Based upon what we perceive to have been the Legislature's intent in enacting and amending 20 M.R.S.A. §473(1), it is our conclusion that school directors have statutory authority to permit school buildings to be used for non-school purposes during non-school hours. Moreover, nothing in section 473(1) suggests that school directors lack statutory authority to permit religious organizations to use school buildings during non-school hours. On the contrary, the broad language of section 473(1) indicates that school directors have discretion to decide whether, by whom and for what purposes, use of school buildings will be allowed.[3] Our conclusions find support in cases from other jurisdictions which have interpreted statutes similar to Maine's.[4] See e.g., Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 389 A.2d 944, 949-50 (1978); Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.1959). See generally Annotation, Use of School Property For Other Than Public School or Religious Purposes, 94 ALR 2d 1274 (1964); Schools, 68 Am.Jur. 2d §75 at 422.

THE CONSTITUTIONAL ISSUE

Having concluded that the directors of SAD 27 have statutory authority to permit St. Charles Church to use a public elementary school, on a temporary basis, to conduct religious services during non-school hours, it is now necessary to determine whether such action by the school directors violates the Establishment Clause of the First Amendment.

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3. The discretion of the school directors is, of course, subject to the requirement that "the use of school buildings shall not be denied to any person solely because use is requested for a political activity." 20 M.R.S.A. §473(1)(1965-1979 Supp.).

4. In a prior opinion of this office it was concluded that 20 M.R.S.A. §473(1) "applies only to the management of the schools for school purposes and does not include the right to lease to outside parties." Op.Atty. Gen., March 6, 1947. Obviously, our earlier opinion was issued prior to the amendment of section 473(1) by Chapter 74 of the Public Laws of 1969. In view of the Legislature's intent, as reflected in the 1969 amendment of section 473(1), that school directors have the authority to permit outside use of school buildings for non-school purposes, the opinion dated March 6, 1947 is overruled and should no longer be viewed as a valid opinion of this office.

THE ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution[5] mandates in relevant part, that

> "Congress shall make no law respecting an establishment of religion,..."

Article I, §3 of the Maine Constitution contains a similar prohibition.[6]

The United States Supreme Court has candidly acknowledged that cases arising under the Establishment Clause present "some of the most perplexing questions to come before this Court." Committee for Public Education v. Nyquist, 413 U.S. 756, 760 (1972). Nevertheless, during the course of its struggle to delineate the scope and meaning of the First Amendment, the Court has emphasized that the underlying purpose of the Establishment Clause is to place governmental entities, both state and federal, in a position of neutrality with respect to religion. See, e.g., Abington School District v. Schempp, 374 U.S. 203, 222 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952). As the Court observed in Everson v. Board of Education, 330 U.S. 1 (1947), the Establishment Clause was designed to erect a "'wall of separation between church and state.'" Id. at 16 quoting Reynolds v. United States, 98 U.S. 145, 164 (1878).

On the other hand, the Court has also stressed that the First Amendment's mandate of neutrality does not mean that the government must adopt an attitude of hostility towards religion. See Zorach v. Clauson, supra at 314. Not every governmental action affecting or benefitting religion contravenes constitutional principles. See, e.g., Walz v. Tax Commission, 397 U.S. 664 (1969); Board of Education v. Allen, 392 U.S. 238 (1968); Zorach v. Clauson, supra; Everson v. Board of Education, 330 U.S. 1 (1947). The line between governmental conduct which offends the Establishment Clause and that which is constitutionally acceptable is often a thin one, and is not always immediately visible. As Mr. Chief Justice Burger stated in Tilton v. Richardson, 403 U.S. 672, 678 (1971),

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5. The provisions of the First Amendment have been made binding on the states through the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 106 (1943).

6. Article I, §3, Me. Const., provides:

> "All men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship;-- and all persons demeaning themselves peaceably, as good

"we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."

While all governmental action affecting religion must be scrutinized to determine whether it violates the Establishment Clause, the Court has been particularly sensitive to those cases involving the delicate relationship between education and religion. See Abington School District v. Schempp, 374 U.S. 203, 230 (1963). (Brennan, J., concurring). Such cases generally involve two types of situations: those pertaining to attempts to provide public aid to sectarian educational institutions[7] and those involving religious activities in public schools. The question you have raised, namely, whether public school officials may permit the temporary use of school buildings by religious organizations to conduct religious services during non-school hours, is a case of the latter type.

In attempting to evaluate the constitutionality of permitting religious organizations to make temporary use of public school buildings for the purpose of conducting religious services during non-school hours, we are confronted with the fact that the United States Supreme Court has never addressed this precise issue. However, the Court has rendered several decisions involving the constitutional propriety of permitting certain religious activities to be conducted in public schools and an examination of those decisions may placeyour specific question in perspective.

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> members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

The Maine Law Court has held that the prohibitions in Article I, §3 are "no more stringent" than those embodied in the First and Fourteenth Amendments to the United States Constitution. Squires v. City of Augusta, 155 Me., 141, 164,153 A.2d 80, 88 (1959).

7. There have been numberous attempts by both state and federal governments to devise programs providing for public aid to sectarian educational institutions. See, e.g., Wolman v. Walter, 433 U.S. 229 (1977)(direct payments for field trip supervision, reimbursement for instructional material and equipment); Meek v. Pittenger, 421 U.S. 349 (1975)(instructional material and equipment); Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976)(federal aid for colleges); Hunt v. McNair, 413 U.S. 734 (1973)(state aid for colleges); Committee for Public Education v. Nyquist, 413 U.S. 756 (1972)(grants for maintenance and repair, tuition reimbursement grants, income tax relief);

In Engel v. Vitale, 370 U.S. 421 (1962) the Supreme Court held that New York's practice of requiring that each public school begin its school day with the reading of a prayer composed by state officials was "wholly inconsistent with the Establishment Clause." Id. at 424. The concept of governmental neutrality towards religion, as well as the principle that one's religious beliefs, or lack thereof, must be free from governmental interference, compelled the Court's conclusion that "it is no part of the business of government to compose official prayers for any group of American people to recite as part of a religious program carried on by government." Id.

A year later, the Court, in Abington School District v. Schempp, 374 U.S. 203 (1963), struck down a state law and a school board rule which required that each school day be opened with readings from the Bible and the recitation of the Lord's Prayer. The Court concluded that the holding of such religious exercises in the public schools was in "direct violation" of the First Amendment. Id. at 224.

In the first of two "release time" cases, the Supreme Court in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1943) invalidated a program whereby religious instructors were permitted to visit public school classrooms each week and teach religious classes to those pupils whose parents had consented. The Court expressed concern that the state's compulsory school attendance law was being utilized to provide religious groups with an audience for sectarian instruction.

> "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."

Id. at 212.

In the second "release time" case, Zorach v. Clauson, 343 U.S. 306 (1952), the Supreme Court distinguished McCollum and upheld a program whereby students were permitted to leave the public schools and attend religious instruction classes at nearby sectarian schools. The Court concluded that this program did not offend the Establishment Clause since the public schools were merely accommodating their schedules to a program of outside religious instruction.

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Levitt v. Committee for Public Education, 413 U.S. 472 (1972) (grants for testing and recordkeeping); Sloan v. Lemon, 413 U.S. 825 (1973)(tuition reimbursements); Tilton v. Richardson, 403 U.S. 672 (1971)(federal aid to colleges); Lemon v. Kurtzman, 403 U.S. 602 (1971)(textbooks, instructional materials, teachers salaries); Board of Education v. Allen, 392 U.S. 238 (1968)(textbooks); Everson v. Board of Education, 330 U.S. 1 (1947)(bus transportation). See also Op.Atty.Gen., January 7, 1980 (contracts with sectarian elementary and secondary schools).

In a series of decisions beginning with Everson v. Board of Education, supra, and continuing up to its most recent decision in this area, Wolman v. Walter, 433 U.S. 229 (1977), the United States Supreme Court has developed general principles applicable to Establishment Clause cases. Mr. Justice Blackmun articulated these principles in Wolman v. Walter, supra at 235-36:

> "The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive governmental entanglement with religion."[8]

See also Roemer v. Maryland Public Works Board, 425 U.S. 736, 748 (1976); Committee for Public Education v. Nyquist, 413 U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In addition to the three-prong test articulated above, the Supreme Court has indicated that the Establishment Clause was intended to minimize political debate concerning religious issues. Accordingly, in determining whether governmental action offends the First Amendment, it is appropriate to consider whether such action has a tendency to generate political divisiveness along religious lines. See Roemer v. Maryland Public Works Board, supra; Committee for Public Education v. Nyquist, supra; Lemon v. Kurtzman, supra.

The Court has cautioned that the tripartite test referred to above should not be rigidly applied to every fact situation in which the government interacts with religion. Rather, the "tests" are to be viewed as guidelines or yardsticks by which to measure compliance with the First Amendment's directives. See Meek v. Pittenger, 421 U.S. 349, 359 (1974); Tilton v. Richardson, 403 U.S. 672, 678(1971).

> "The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

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8. The above-quoted criteria employed by the Supreme Court to determine whether a statutory enactment contravenes the Establishment Clause is equally applicable to governmental action which is not specifically authorized by statute. See Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 206 (1948).

Walz v. Tax Commission, 397 U.S. at 669. Stated somewhat more simply by Mr. Justice Douglas, "[t]he problem, like many problems in constitutional law, is one of degree." Zorach v. Clauson, 343 U.S. 306, 314 (1952) citing Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 231 (1948).

ANALYSIS

Having set forth the principles applicable in Establishment Clause cases, it is now possible to assess the constitutional issue generated by your opinion request.[9]

1. The "Purpose" Test.

The threshhold inquiry into whether governmental conduct is permissible under the Establishment Clause is whether it has a secular purpose. It is our understanding that it is the policy of the school directors of SAD 27 to permit outside organizations, including religious ones, to use the St. Francis public elementary school for non-school purposes during non-school hours. We are persuaded that the purpose of this policy is secular in nature, namely, the utilization of a public school building to the fullest extent possible. See Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 389 A.2d 944, 954 (1978). The mere fact that school officials allow a religious organization to benefit from a general policy favoring outside use of school premises, does not convert a secular practice into a sectarian one. We conclude, therefore, that the practice of permitting temporary use of public school buildings by outside organizations, including religious organizations, has a secular purpose and does not violate the First Amendment's Establishment Clause on that ground.

2. The "Primary Effect" Test.

The Establishment Clause is violated if governmental action has a primary or principal effect which advances religion, even if such action has a purpose which is secular in nature.

Governmental action has a primary effect which advances religion "when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973). See also Meek v. Pittenger, 421 U.S. 349, 365-66 (1974). With respect to the use of St.Francis elementary school by St. Charles Church to conduct religious services during non-school hours, it is our understanding that church authorities are willing to pay a fair rental value for such use. In view of the fact that the church will pay a fair rental value for its use of the school building, such use will not involve an expenditure of public funds for a religious activity. See Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 389 A.2d 944, 951-52 (1978); Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514, 517 (1974); Southside Estates Baptist Church v. Board of

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9. For a more in-depth discussion of the "purpose" test, the "primary effect" test, the "entanglement" test, and the "political divisiveness" factor in Establishment Clause cases, see Op. Atty.Gen., January 7, 1980.

Trustees, 115 So.2d 697, 699 (Fla.1959). While it can be argued that the fair rental value will not compensate for the "wear and tear" on public property which church use of the school will entail, such expense has been characterized as de minimis. See, e.g., Resnick v. East Brunswick Township Board of Education, supra; Southside Estates Baptist Church v. Board of Trustees, supra; Nichols v. School Directors, 93 Ill.61 (1879). Moreover, the United States Supreme Court has indicated that such an "indirect, remote or incidental" benefit to religion does not necessarily result in a violation of the Establishment Clause. Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1971).

Furthermore, the use of the school building by St. Charles Church would not involve any disruption or interference with the regular school program at St. Francis. Unlike the "release time" program invalidated in Illinois ex rel. McCollum v. Board of Education, supra and the Bible and prayer services struck down in Abington School District v. Schempp and Engel v. Vitale, supra, the religious exercises in question here would not be conducted with the active assistance of school personnel, nor would they be directed to school children who are required to attend public school by virtue of the state's compulsory attendance law. See Abington School District v. Schempp, 374 U.S. at 299 (Brennan, J., concurring). Additionally, given the temporary and occasional nature of the use of the school building by St. Charles, there is no danger that a publicly supported structure will become a permanent place of worship. See Pratt v. Arizona Board of Regents, 110 Ariz., 466, 520 P.2d 514, 517 (1974); Southside Estates Baptist Church v. Board of Trustees, 115 So.2d at 700.

Finally, we consider it significant that the use of the school building by St. Charles has been necessitated by the fact that its own church has been rendered temporarily unavailable for safety reasons. This is not a situation where a religious organization seeks to use public property to conduct religious services simply because it is more convenient than constructing its own church. See Resnick v. East Brunswick Township Board of Education, supra. See also Abington School District v. Schempp, supra (Brennan, J., concurring).

Under these circumstances, we believe that permitting the St.Charles congregation to make temporary use, at a fair rental value, of the St. Francis public elementary school to conduct religious services during non-school hours, does not have a primary effect which advances religion, but represents an accommodation by school officials to the unique needs of a religious organization. See Zorach v. Clauson, 343 U.S. 306 (1952).

3. The "Excessive Entanglement" Test.

The third criterion which the United States Supreme Court has developed to evaluate Establishment Clause claims is the so-called "excessive entanglement" test. This concept of "excessive entanglement" is best understood if viewed as a mechanism to minimize the amount of governmental supervision or surveillance of religious activity, and has been described by one commentator as the "administrative entanglement" test. L. Tribe, American Cons-

titutional Law §14-12 at 866 (1978). Typically, excessive entanglement occurs when the government attempts to avoid a violation of the Establishment Clause on some other ground. For example, in Lemon v. Kurtzman, 403 U.S. 602 (1971) the Supreme Court invalidated two state statutes which provided for salary reimbursements to teachers in non-public elementary and secondary schools. The Court held that the state must be"certain" that those sectarian school teachers who had received public funds in the form of salary reimbursements were not teaching religious doctrines in the classroom, since otherwise the "primary effect" test would be violated. In order to be sufficiently certain that such a misuse of public funds was not occurring, the state would have to engage in "[a] comprehensive, discriminating and continuing...surveillance." 403 U.S. at 619. It is such surveillance or monitoring which entangles the government, to an excessive degree, with religion. See also Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

We do not envision that the temporary use of a public school building by a religious congregation, in the circumstances which we have described, will involve anything approaching the degree of governmental entanglement with religion which the United States Supreme Court condemned in Lemon v. Kurtzman, Wolman v. Walter and Meek v. Pittenger, supra. Since it is contemplated that the religious activities will be conducted during non-school hours, the amount of government supervision is minimal. See Resnick v. East Brunswick, 389 A.2d at 958. Moreover, as has been suggested earlier, the request by St. Charles Church to use the public elementary school in St. Francis was prompted by the fact that its own place of worship has been rendered unsafe for use. Accordingly, we do not anticipate that the school directors of SAD #27, or of any other school administrative district, will be confronted with repeated requests by religious groups to conduct religious services in public school buildings. Additionally, in view of the fact that church authorities are willing to pay a fair rental value for their use of a public facility, therewill be no expenditure of public funds and, consequently, there will be no need to monitor the application of such funds. Id. See also Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974).

Finally, a question may arise regarding the display and storage of religious artifacts, symbols and books in the public school. Initially, there can be no question that the display of such religious objects while the elementary school is in session cannot be tolerated. Resnick v. East Brunswick, supra at 958. With respect to the storage of such items, we believe that such action is constitutionally permissible as a "minimal accommodation" by school officials, provided it does not interfere with the needs of the school. However, we hasten to point out that it is the responsibility of school officials to ensure that religious objects are not openly displayed during school hours. While this does entail some degree of supervision by school officials over the religious activities being conducted at the school, we do not feel that it rises to the level of excessive governmental entanglement with religion, especially given the temporary and occasional use involved.

4. The "Political Divisiveness" Factor.

One of the factors which the United States Supreme Court has

considered relevant in evaluating Establishment Clause challenges is whether the governmental action in question has a tendency to generate political divisiveness and debate along religious lines. As expressed by the Court in Lemon v. Kurtzman, 403 U.S. at 623:

> "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

See also Roemer v. Maryland Public Works Board, 426 U.S. 735 (1976); Committee for Public Education v. Nyquist, 413 U.S. 756 (1972).[10]

The likelihood that the use of St. Francis elementary school by the St. Charles congregation will engender political tension along religious lines is significantly reduced by the fact that such use will not involve the expenditure of public funds. Moreover, the Supreme Court has indicated that the danger of political divisiveness along religious lines is greatest when the religious activity involved is of a continuing nature. See Lemon v. Kurtzman, 403 U.S. 602 (1971). Here, church authorities are actively pursuing plans to construct their own place of worship, and their use of a public facility to hold religious services will be of relatively short duration. Finally, in view of the fact that St. Charles will pay a fair rental value for its use of the school building and there will be little, if any, governmental supervision of the religious activities to be conducted at the school, it is unlikely that the public will perceive that school officials are sponsoring religion.

COURT DECISIONS

While the United States Supreme Court has not had occasion to address the question of the temporary use of a public school building by a religious organization to conduct religious services, several state courts have. However, there is a split among the jurisdictions as to whether such a practice is permissible. Most of the decisions which conclude that the practice is impermissible, were decided during the last century and were premised on statutory, not constitutional, grounds. On the other hand, the more recent decisions have upheld the practice, provided certain pre-requisites are met. For a general discussion of these cases, see Annotation, Use of Public School Premises For Religious Purposes During Non-School

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10. The Supreme Court has indicated that the "political divisiveness" factor is not an independent test under the Establishment Clause, but is a "warning signal" which will trigger greater judicial review of the challenged government action. See Committee for Public Education v. Nyquist, 413 U.S. at 797-98. See generally L. Tribe, American Constitutional Law §14-12 at 866 (1978).

Time, 79 ALR 2d 1148 (1961); Annotation, Sectarianism In Schools, 141 ALR 1144, 1153 (1942); Annotation, Sectarianism In Schools, 5 ALR 866, 886 (1920); Schools, 68 Am.Jur.2d §295 at 612.

In Hysong v. School District of Gallitzin Borough, 164 Pa. 629, 30 A. 482 (1894), a lower court enjoined the practice of permitting Catholic teachers to use a public school building after school to conduct religious classes. The Pennsylvania Supreme Court affirmed the lower court's decision but without any discussion of the issue. In Bender v. Streabich, 182 Pa.251, 37 A. 853 (1897) the court held that the use of a public school by a religious organization was improper on the ground that school property could not be used for anything other than school purposes. It should be noted that in neither Hysong nor Bender was the constitutional issue raised or decided.

Two other early cases have squarely held that the use of a public school by a religious organization to conduct religious exercises is impermissible. See Spencer v. Joint School District No. 6, 15 Kan.259 (1875); Scofield v. Eighth School District, 27 Conn. 499 (1858). In both cases, the courts rested their decisions on the principle that tax-supported buildings may only be used for public purposes. However, the court in Spencer v. Joint School District No. 6, supra touched upon the constitutional issue when it stated:

> "As you may not levy taxes to build a church, no more may you levy taxes to build a schoolhouse and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps no immediately perceptible injury to the building, and results in the receipt of immediate pecuniary benefit... The use of a public schoolhouse for a single religious or political gathering, is, legally, as unauthorized as its constant use therefor."

15 Kan. at 262-63.

Finally, the court in Baggerly v. Lee, 37 Ind.App. 139 (1905) enjoined a religious organization from using a public schoolhouse for religious purposes during the school year. However, the court expressly declined to reach the question of whether the church could use the school building during the summer months when school was not in session.[11]

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11. The decisions in Harfst v. Hoegen, 349 Mo. 808, 163 S.W. 2d 609 (1942) and Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 267 (1918) are sometimes cited for the proposition that the use of public schools to conduct religious exercises during non-school hours is improper. However, both of these cases involved situations in which public school officials paid a fee and sent children to parochial schools. We have recently declared that such a practice is unconstitutional. See Op. Atty. Gen., January 7, 1980.

There have also been several early state court decisions which have upheld the temporary and occasional use of public school buildings for religious purposes. See, e.g., Merryman v. School District No. 16, 43 Wyo. 376, 5 P.2d 267 (1931); State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999, 1000 (1914); Nichols v. School Directors, 93 Ill.61 (1879).

As can be seen from an examination of the foregoing cases, none of the decisions rested upon federal constitutional grounds. Of course, it must be remembered that the Establishment Clause of the First Amendment was not made applicable to the individual states until 1940 when the United States Supreme Court decided Cantwell v. Connecticut, 310 U.S. 296 (1940). The precedential value of these early cases is somewhat limited by virtue of the fact that none of them squarely confronted the First Amendment issue. However, two relatively recent cases have considered the question you have raised in the context of the Establishment Clause, and one of those has analyzed the issue in accordance with the three-part test formulated by the Supreme Court.

In the leading case of Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.1959), the Florida Supreme Court held that, in appropriate circumstances, a religious group may be permitted to use a public school building to conduct religious activities. Initially, the Court noted that the religious organization had requested use of the school facility pending construction of its own church. Moreover, there was no evidence indicating that the group's use of the school involved the expenditure of public funds. In concluding that the group's use of the school did not offend the First Amendment's Establishment Clause, the court emphasized that the holding of religious services at the school would occur only during non-school hours. Additionally, the court stressed the fact that the group's use of the school would be temporary in nature. The court stated:

> "...if the use of the school buildings were permitted for prolonged periods of time, absent evidence of an immediate intention on the part of the Church to construct its own buildings, we think it could hardly be contemplated that the public school system or its property could be employed in the permanent promotion of any particular sect or denomination."

115 So.2d at 700.

The most recent case to consider the question of whether a religious group may make temporary use of a public school building to conduct religious services during non-school hours is Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 389 A.2d 944 (1978). In Resnick, three religious groups were permitted to rent the facilities at a public elementary school for the purposes of conducting Sunday services as well as occasional meetings on week nights. All three groups were in the process of constructing their own churches. The trial court held, among other things, that the practice violated the First Amendment's Establishment Clause. Resnick v. East Brunswick Township Board of Education, 135 N.J. Super. 257, 343 A.2d 127 (Chan.Div.1975).

The New Jersey Appellate Division affirmed, Resnick v. East Brunswick Township Board of Education, 144 N.J. Super. 474, 366 A.2d 345 (App.Div. 1976), but the New Jersey Supreme Court reversed with two Justices dissenting.

Originally, the religious organizations in Resnick were simply paying a nominal rental fee for their use of the public school buildings. The majority in Resnick acknowledged that in order to satisfy constitutional standards, the churches would have to reimburse the schools for all out-of-pocket expenses. 389 A.2d at 951. In his dissent, Mr. Justice Clifford argued that the churches should be required to pay a fair rental value for their use of public school property. Otherwise, he argued, the religious groups would receive a "significant economic benefit" at the taxpayers' expense. 389 A.2d 965 (Clifford, J., dissenting).

The Resnick majority then proceeded to examine the use of the school buildings by the religious groups in light of the three-part test formulated by the United States Supreme Court. First, the court concluded that the purpose of permitting outside use of school facilities was secular in nature, i.e., increased use of the property for the common benefit of the community. 389 A.2d at 954. Second, in view of the fact that the churches would have to pay all out-of-pocket expenses connected with their use of the school buildings, the court held that such use did not have a primary effect which advanced religion. Id. at 957. Finally, the majority concluded that the use of the schools by the religious groups would involve a minimal amount of entanglement between them and the government. In upholding this practice, the majority was careful to point out that it would be permitted only for a reasonable period of time.

In his dissent, Justice Clifford expressed considerable concern that the religious groups involved had used the school property from five to seven years. 389 A.2d 967. Mr. Justice Canford also filed a dissent in which he stated flatly that "any use of publicly built and maintained buildings, especially public schools, for the stated purposes is antithetical to the fundamental principle of separation between church and state...." 389 A.2d at 968 (Canford, P.J.A.D., dissenting).

The decision in Resnick is the only reported case from a state's highest appellate court to analyze the temporary use of school facilities by religious groups in light of the guidelines articulated by the United States Supreme Court.[12] In Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974) the

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12. For a recent discussion of Resnick, supra, see COMMENT, 47 Fordham L. Rev. 622 (1979).

Arizona Supreme Court upheld the lease of the football stadium at the State University to Billy Graham for the purpose of conducting his well-known crusade. However, the Pratt decision is not entirely apposite since it involved a college stadium and not elementary or secondary school buildings. Nevertheless, the Arizona Supreme Court utilized the same standards as did the Florida Supreme Court in Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.1959). In upholding the lease agreement the court stressed the following factors: (1) the payment of a fair rental; (2) no interference with school activities; (3) temporary and occasional use.

In Lewis v. Manderville, 201 Misc. 120, 107 N.Y.S. 2d 865, 868 (Sup.Ct. 1951), the court upheld the practice whereby a religious group was permitted to conduct meetings at the fire department while repairs were being made on its own church.[13]

Finally, in his lengthy concurring opinion in Abington School District v. Schempp, supra, Mr. Justice Brennan appears to have expressed support for the proposition that, in certain circumstances, a religious organization may make temporary use of public buildings to conduct religious services.

> "The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize...the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood."

374 U.S. at 299 (Brennan, J., concurring).[14]

CONCLUSION

We have attempted to set forth, in some detail, the legal principles involved in the question you have raised. As is probably apparent, however, the issue of whether a religious organization may make temporary use of a public school building to conduct religious services is not free from doubt since neither

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13. The cases which have been discussed above are distinguishable from those involving student prayer or Bible groups which meet prior to, during, or after school hours. Several courts have held that permitting such student groups to use school premises to conduct religiously oriented meetings is unconstitutional. See Hunt v. Board of Education, 321 F. Supp. 1263 (S.D.W.Va.1971); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App. Div.1978); Johnson v. Huntington Beach Union High School, 68 Cal. App.2d 1, 137 Cal.Rptr.43, cert.denied, 434 U.S. 877 (1977). But see Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich.1965).

14. Earlier in his concurring opinion, Justice Brennan suggested that "the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of disaster or emergency" might

the United States Supreme Court nor any other federal court has ruled on it. In view of this lack of precedent from the federal courts, we find the decisions in Resnick v. East Brunswick Township Board of Education, 77 N.J. 88, 389 A.2d 944 (1978) and Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.1959) to be persuasive authority for the proposition that, in appropriate circumstances, school officials may permit a religious group to use the facilities at a public school to conduct religious exercises.

Accordingly, it is our conclusion that the school directors of SAD 27 may allow the St.Charles Church to use the St.Francis elementary school building to conduct religious services, provided the following conditions are met: (1) St.Charles must pay a fair rental value for its use of the public school building;[15] (2) the use of the building by St. Charles can only occur during non-school hours and must not disrupt or interfere with the use of the building for school purposes;[16] (3) it must be understood that St. Charles is actively pursuing its plans to construct a new church and that its use of the public school building is for a temporary period only.[17] Furthermore, we wish to emphasize that we find it significant that St. Charles' need to use the public school building is the result of structural defects in its existing church. Thus, we are not dealing with a situation

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be constitutionally supportable. 374 U.S. at 298. In making this statement, Justice Brennan cited Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.1959) and Lewis v. Manderville, 201 Misc. 120, 107 N.Y.S. 2d 865(Sup.Ct. 1950) with approval. 374 U.S. at 298, n.74.

15.Obviously, what constitutes the fair rental value of the St. Francis elementary school will have to be agreed upon by both church authorities and the school directors of SAD 27.

16. We wish to emphasize that the display of religious artifacts during school hours is not permissible and it is the ultimate responsibility of school officials to ensure that such items are not openly displayed while children are attending school.

17. We do not believe it is appropriate for us to set a definite time period after which St. Charles must cease using the facilities at the public school. Rather, we anticipate that the length of time involved will not exceed that which is reasonably necessary to enable St. Charles to construct its own church. See Resnick v. East Brunswick, 389 A.2d at 958-59; Southside Estates Baptist Church v. Board of Trustees, 115 So.2d at 700.

where a religious group, out of mere convenience or for financial considerations, chooses not to build its own place of worship to hold religious services, but seeks to utilize public property instead.[18]

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

Sincerely,

RICHARD S. COHEN
Attorney General

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18. We are aware that several prior opinions of this office have touched upon the issue you have raised but have not definitively answered it. See, e.g., Op.Atty.Gen., October 10, 1978; Op.Atty.Gen., June 20, 1962; Op.Atty.Gen., July 5, 1950; Op. Atty.Gen., September 1, 1943. To the extent that these earlier opinions are inconsistent with the conclusion reached in this opinion, they are overruled.