LEGAL UPDATE

HOW FAR DO WE OPEN THE BACK DOOR?

A Critical Look at Government Aid to Church Schools

By Mitchell A. Tyner

Here's an offer you can hardly refuse. You're the principal of an elementary school in a large urban area. The church family includes several students who need remedial tutoring. Unless they get special help their lack of academic skills will seriously handicap their future. But such help is totally beyond the budget of your school. You've been forced to tell their parents to either enroll the children in public school and risk losing them to the church or place them in your school and risk a chance they they will not achieve academically. It's a cruel choice.

One day a representative of the local public school system comes to your office. He tells you that government respects the contribution to society made by religious schools such as yours. Government also realizes that some of your students need programs that you can't provide. In an effort to accommodate the church's commitment to operating a school and the government's equally legitimate interest in meeting the needs of all children, the school board has a plan.

They have formed a new corporation. Funded by local government, its mission is to provide remedial education for schools like yours. To do that, the corporation will place a trailer-classroom on your school property. It will provide instructional materials, personnel, and a tutorial program specifically designed to mesh with your classroom schedule. In return you will lease to the corporation the land on which the trailer sets. You will receive approximately five dollars per month in return for leasing the land.

The authorities are willing to provide a classroom, teacher, and materials, and will pay you to accept them. Is this too good to be true? Probably—and it may be unconstitutional. But it's very close to a deal offered recently to one of your peers in the midwestern United States.

In 1985, the United States Supreme Court reviewed cases involving very similar programs in Grand Rapids and New York City.[1] In Grand Rapids, the local school district adopted two programs—Shared Time and Community Education—that provided classes, in private schools at public expense, in classrooms located in and leased from the private school. The Shared Time program offered classes to supplement the school's core curriculum. Shared Time teachers were full-time state employees, but a large percentage had previously taught in religious schools. The Community Education Program offered classes in private schools after the close of the regular school day. The teachers were part-time public employees who for the most part were also full-time employees of the same private schools.

The New York City program differed slightly from that in Grand Rapids. Both used Title I funds to pay public employees to teach remedial education classes in religious schools.[2] New York City, in addition, instituted a system of monitoring the religious content of Title I classes and the rooms in which they were conducted, hoping thereby to forestall legal challenges to the program.

It didn't work. The Court found that both programs violated the Establishment Clause of the First Amendment.

The pattern for analyzing Establishment Clause cases was set by the Supreme Court in 1971 in the case of *Lemon v. Kurtzman*.[3] The Court said that a statute or other governmental action challenged as an establishment of religion must (1) have a secular purpose (2) have a primary effect that neither advances nor inhibits religion, and (3) not produce excessive entanglement between religion and government.

Applying that structure to the Grand Rapids case, the Court ruled that the programs had the primary effect of advancing religion. According to the Court, teachers, though paid by the state, may be influenced by their pervasively sectarian surroundings, and subtly indoctrinate the students in religious tenets. Also, the symbolic union of church and state inherent in the provision of state employees in church-owned schools conveyed a message of state support for religion to both students and the general public. Finally, the Court said that the program aided religion by partially relieving the school of its responsibility to teach secular subjects.

The Court reacted more sympathetically to New York City, noting the system of monitoring religious content in those programs. According to the Court, such monitoring might deflect challenges under the secular purpose and primary effect sections of the *Lemon* test. However, monitoring publicly funded classes in religious schools to prevent religious inculcation is by its very nature so intrusive as to violate the third section of the law. It causes excessive entanglement between church and state. It's a catch-22.

Title I has evolved into Chapter I of a revised statute.[4] Instead of leasing space *in* church schools, government leases space *near* church schools on which to place a trailer. The motivation and the services provided remain the same. The essentially cosmetic changes were made to create a slightly different situation from that condemned by the Supreme Court. If the front door has been closed, you try the back door.

What's wrong with that? If government can provide bus transportation and textbook loans, why can't it provide remedial instruction in state-owned property on leased ground near a church school?

Aren't the real beneficiaries the children, not the church? Those questions ultimately must be answered by the Supreme Court. It almost certainly will have the opportunity to do so.

Are the facts sufficiently different to allow the Court to approve the plan? Perhaps. It should be noted that the Grand Rapids and New York City decisions were made on 5-4 votes, and that Justice Powell joined the majority in both cases. How Justice Kennedy will vote on such matters remains to be seen. His vote could easily lead to an opposite result. If that happens and the Court approves such programs, the church must carefully consider the Court's ruling as it appraises its options.

Pending such clarification by the Court, Adventist schools would be well advised to avoid participation in such schemes. For more than a century the church has been a staunch supporter of church-state separation. While it is only a *modus vivendi* in the United States, not a biblical doctrine, separationism—a mutual restraint by both religion and government from involvement in each other's affairs—has generally produced results conducive to religious freedom.

That doesn't mean that all state aid to students is unacceptable (no American SDA college could long exist without government loans to students). We should not reject any good thing that legitimately enhances Adventist education. But we must also ensure that our preaching and our practice concur. For an Adventist school to accept state aid under a program subsequently found to violate the separation of church and state would not only be regrettable, it would be embarrassing. □

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REFERENCES

[1] *Grand Rapids v. Ball,* 105 S. Ct. 3261 and *Aguilar v. Felton,* S. Ct. 3232.

[2] 20 USCA 2740.

[3] *Lemon v. Kurtzman,* 92 S. Ct. 2046.

[4] 20 USCA 3806.