

OFFICIAL OPINION NO. 69-13, Lease or purchase of facilities to be used for public school classrooms from a church or sectarian school organization

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Gordon A. Diedrich
Superintendent of Public Instruction
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 69-13

Lease or purchase of facilities to be used for public school classrooms from a church or sectarian school organization

Dear Mr. Diedrich:

You have requested my official opinion based upon this factual situation:

"The Hawthorne School, operated by the Independent School District of Sioux Falls, Minnehaha County, South Dakota, is in need of additional classroom space. The Hawthorne School is located directly across the street from the premises of St. Josephs Parochial School, operated by the Roman Catholic Diocese of Sioux Falls." "The school district, in obtaining the necessary classroom facilities, is faced with the alternatives of acquiring mobile classrooms, renting or purchasing private premises and remodeling the same for school uses, or renting available classrooms in the St. Josephs Parochial School."

With this factual situation as a background, you have submitted seven (7) separate questions for me to answer. For brevity, I will generally discuss the problem involved and such questions separately.

BACKGROUND

By virtue of our Enabling Act, and Section 1 of Article VIII of our Constitution, the Legislature has a duty to provide free public schools within the state. In pursuance to the

rationale, as expressed by **Robinson v. Schenk**, (1885) 102 Ind. 307, 1 NE 698 (in construing a comparable constitutional provision) the creation of a system of local school districts satisfies the constitutional mandate.

However, in this state, as in all other states, there has developed with the public school system, a system of private, sectarian, or parochial schools, commencing with kindergarten and proceeding through higher education. The present questions raise the line of demarcation between the public school system and the sectarian school system, as such is effected by Section 16 of Article VIII of our Constitution (which forbids the use of public moneys "to aid sectarian schools,") and the mandate of SDC 1960 Supp. 15.3103 which provides:

"No sectarian doctrine may be taught or inculcated in any public school of the state."

The leading case interpreting our constitutional provision is **Synod of Dakota v. State** (1891) 2 SD 366, 50 NW 632.

Since at least 1899 at various times this office has been called upon to consider the constitutional provision by attempting to draw the line between what is and what is not "aid for sectarian schools." To list all of such former opinions would seem unduly repetitious. Representative of opinions relative to the questions are opinions reported in 1967-68 AGR 6 and 167; and 1931-32 AGR 314, and 331.

This office has consistently held that in cases of leasing of property for public school purposes, the fact that such property may be owned by a sectarian group of itself is not the important, the controlling question. The question turns upon whether or not such sectarian group may actually operate or manage such school. It seems prevalent throughout the opinions of this office that the influence of the sectarian institution may be considered in drawing the line between what is permissible under the constitutional mandate and what is condemned thereby.

If such classroom or school will be actually under the operation of a sectarian group, the use of public funds for such purposes is condemned. If, however, such instructions and classrooms are under the control of the public school officials, the fact the building may be rented from a sectarian institution does not condemn such rental. This was pointedly held in the opinion reported in 1917-18 AGR 254.

As background for your inquiries, it would seem axiomatic if a school districts has no authority to rent facilities to be used as classrooms, but must directly own such premises, then many of your questions must be answered in the negative-that the school district has no such authority-without approaching the question of renting such premises from a sectarian institution. However, SDC 1960 Supp. 15.2105, as last amended by Chapter 74 of the Session Laws of 1963 authorizes "any school board" to "purchase" or "rent" schoolhouses. It is my opinion that this authority to "rent" a schoolhouse certainly is broad enough authorization to "rent" room or rooms to be used as "classrooms."

QUESTION 1: CAN A SCHOOL DISTRICT BOARD LEGALLY RENT A CLASSROOM FROM A PAROCHIAL SCHOOL AND HOLD PUBLIC SCHOOLIN SUCH RENTED CLASSROOM AT THE SAME TIME DURING THE SCHOOL DAY THAT THE PAROCHIAL SCHOOL IS IN OPERATION IN THE SAME BUILDING?

QUESTION 2: COULD SUCH CLASSROOM BE RENTED FROM THE PAROCHIAL SCHOOL TO BE USED AS A PUBLIC SCHOOL CLASSROOM AT A TIME THE PAROCHIAL SCHOOL IS NOT IN SESSION?

These two questions may be answered together. As pointed out it is in fact the management and direction of the public school that is of importance. Likewise, as I have stated, the influence of the sectarian school upon the public school must be considered.

In factual situation No.1, I am unable to give a definite YES or NO answer. I believe you would agree with me that there may be a sectarian influence on the public school classroom arising from the very fact that public school was being simultaneously held with the sectarian school. The local school board must weigh this effect, along with the whole situation, to determine the wisdom and propriety of operating public school classrooms simultaneously with the sectarian school academic pursuits. Viewing the whole matter in a conservative manner, and recognizing the reason for the constitutional mandate, it would seem the best policy suggests not to operate such public school classroom in a parochial school at the same time that the sectarian school was functioning. However, the actual facts may require such policy cannot be followed.

Factual situation No.2, of course, is further from the division line between what is constitutionally permitted and what is constitutionally condemned. It too, however, may not be given a clear YES and NO answer, for consideration must be given to the patent

question: "Will sectarian influences affect the public school child from the very environment where the classes are being held?"

The answer to this question is one which the local school board must conscientiously and honestly answer itself. This factual situation, while presenting a problem moving away from the dividing line between that which is permissible and that which is condemned, then this, as No.1, presents a delicate question.

QUESTION 3: CAN A SCHOOL DISTRICT RENT A BUILDING FROM A PAROCHIAL SCHOOL WHICH IS NOT USED FOR SCHOOL PURPOSES BY THE PAROCHIAL SCHOOL, AND USE THE SAME FOR PUBLIC SCHOOL CLASSES OR ACTIVITIES?

QUESTION 4: CAN A SCHOOL DISTRICT BOARD LEGALLY RENT A CHURCH BUILDING, OR A PORTION THEREOF, A TD USE IT FOR PUBLIC SCHOOL PURPOSES AT A TIME WHEN SUCH IS NOT BEING USED FOR CHURCH PURPOSES?

As I have pointed out, the ownership of the premises is not the deciding factor. The operation of the public school, by public school officials, and the influences of the sectarian entity thereon is of importance. This was made clear in the reported opinion of 1917-18 AGR 254.

It would be out of keeping with the opinions of this office to condemn such rental on the sole ground that such property was owned by a sectarian entity.

So long as such public school is operated under the direction of the school district board, my answer to these two questions must be YES.

QUESTION 5: IF ANY OF THE ABOVE SITUATIONS ARE LEGALLY PERMISSIBLE, WOULD THE PUBLIC SCHOOL BE ENGAGED IN A PROPRIETARY FUNCTION WHICH WOULD MAKE IT SUBJECT TO TAXATION?

SDC 57.0311(3) authorizes an exemption from general taxation, of "all property belonging to any charitable, benevolent, or religious society, and used exclusively for charitable, benevolent or religious purposes." This is the general exemption statute for either the sectarian school or the churches involved in the previous questions.

In limitation of such exemption, the Legislature has promulgated SDC 57.0311(3) (c).

"If the property above referred to, other than farm lands, shall be occupied partly by a charitable, benevolent or religious society, and the remaining part is occupied, rented or used for purposes other than the object for which such society or institution was primarily organized, such portion of property as is so occupied, rented or used for other than the purposes for which the society or institution owning the same or having the exclusive use of the same was organized, shall be taxed as other property of the same class is taxed, in the proportion as the value of such part shall bear to the entire property."

My predecessors have interpreted the intent of this clause to mean that when property owned by an exempt organization is leased to another tax-exempt organization having the same, or consistent objectives, the tax exemption is not lost by such leasing. Thus, in 1939-40 AGR 556 the leasing of a building of one fraternal organization to another fraternal organization was held exempt. In 1957-58 AGR 190 the leasing of a portion of the South Dakota Educational Association's premises to the South Dakota High School Athletic Association was held exempt from taxation on the grounds that the purposes and objectives of both societies were consistent with each other. Likewise, in the same opinion, the lease of room to the Department of Indian Education, an entity of state government, was exempt as the purposes of such state department coincided with the purposes of SDEA.

The principle of these opinions, and the intent of the statute, was exemplified in the opinion reported in 1961-62 AGR 65 wherein the facts showed that the South Dakota State Medical Association—an exempt organization—leased rooms in its buildings to the South Dakota Nurses Association, the South Dakota State Board of Medical and Osteopathic Examiners and the National Foundation for Infantile Paralysis. The lease of such rooms to such tax-exempt organizations was held consistent with the purposes of the Medical Association, so the exempt status was maintained. Space, however, was let to the South Dakota Medical Services, Inc., organized in pursuance to SDC 1960 Supp. 31.17B. However, under SDC 1960 Supp. 31.17B13 such corporations were designated as non-tax exempt entities. Therefore, the portion of the premises rented to such Medical Services, Inc., was subject to assessment and taxation for the reason such corporation was not tax exempt.

In the situation you have presented, it is clear that as a school district is tax exempt, its classrooms are tax exempt. This is true as to such classrooms in property owned by such school district. In the case of leasing of premises, certainly the purpose of public education must be considered identical or similar to the purposes of a sectarian school, so the tax exemption would not be obliterated by a lease for a lawful purpose. While there may be a

distinction shown between the purposes of a church and public education-certainly, the objects of each, in a broad perspective, are amicable and consistent one with the other. It is my opinion that the lease of church properties for use as a classroom for a public school district would not destroy the tax exemption enjoyed by such church.

The answer to Question 5 must be NO.

QUESTION 6: CAN A PAROCHIAL SCHOOL OR CHURCH GRANT THE FREE USE OF ITS BUILDINGS, OR A PORTION THEREOF. FOR THE USE AS A CLASSROOM FOR A PUBLIC SCHOOL DISTRICT WHEN SUCH CLASSROOM IS UNDER THE DIRECTION OF A SCHOOL DISTRICT EMPLOYEE, PAID FROM PUBLIC SCHOOL FUNDS, WHEN A SECTARIAN SCHOOL OR CHURCH SERVICE IS BEING CONDUCTED WITHIN SUCH FACILITY AT THE SAME TIME?

The answer to this question must be the same as given to Question 1, unless a distinction can be made between the "free use" of such premises from a rental for monetary consideration. In my opinion the "free use" of the premises is identical with a leasing of such premises without monetary consideration.

It is settled in the law of Landlords and Tenants that the reservation of a rent, while customary, and usual, is not essential to the creation of the relationship of landlord and tenant. (See 51C CJS p 34, Landlord and Tenant Sec. 2(2) (a) Reservation of Rent.) The consideration for the agreement creating the relationship need not be in money, but may be any consideration sufficient to support the contract. **Story v. Lyon Realty Corp.**, 308 Mass 66, 30 NE 2d 845. In **Gillespie v. Hendren**, 98 Mo. App. 622, 73 SW 361 the court held that when the tenant occupied the premises with the owner's permission, the refusal to pay any money as rent whatsoever would not destroy the relationship of landlord and tenant.

In my opinion there is nothing either unethical, sinister, or unlawful in the rental or leasing of property to a public school district for use as public school classrooms, when no monetary consideration is required, so that such a lease would be invalid, while if any monetary consideration were payable such would be valid. I can see no distinction between the answer to this question because of "free use" of the premises than in the situation where monetary consideration is provided for in such lease.

QUESTION 7: CAN A SCHOOL DISTRICT BOARD PURCHASE PROPERTY FROM A PAROCHIAL SCHOOL OR A CHURCH?

As I have heretofore stated, a school district may purchase schoolhouses. This statutory authorization does not provide that property may not be purchased from a sectarian school or a church. If such property is necessary for school purposes and the school board may lawfully purchase the same, the fact it may be owned by a religious organization or a sectarian school organization of itself does not disqualify such purchase.

My answer to Question NO.7 is YES.

Respectfully submitted,

Gordon Mydland
Attorney General