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The State of South Carolina

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February 21, 1990

The Honorable Michael T. Rose
Senator, District No. 38
Suite 606
Gressette Senate Office Building
Columbia, SC 29202

Dear Senator Rose:

You have requested the Opinion of this Office as to whether a school district legally may prohibit the Sunday use of its public school facilities by all churches in a nondiscriminatory manner, and you have asked for the authority for such prohibition. 1/ You have also asked whether a church has a right to use public facilities for church services on days the school facilities are not being used.

The following conclusions in a previous Opinion of this Office are applicable here:

> The law in South Carolina is obviously that the school board may make any arrangements that it cares to in regard to the incidental use of school property by private or public parties. But this discretionary power can be abused if the activities permitted on school property are other than incidental and casual in nature and conflict with school purposes.
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> It is well settled, however, that a school board, if it allows the school facilities to be used at all, must permit all individuals and organiza-

1/ This Opinion addresses only Sunday use of school property made by nonschool and nonstudent groups. The Equal Access Act (20 U.S.C. §4071, et seq.) addresses student initiated events.

> tions to use them if the purposes for which the facilities will be used are lawful. In other words, the school board may not discriminate. If the school board elects to make school facilities available it is required by constitutional provision, "...to grant the use of such facilities in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all". 1970 Ops. Atty. No. 3014 (November 2, 1970.)

Nothing in the above authority requires a school district to make its schools available at nonschool times to outside groups for nonschool-related purposes. See section 59-19-90(5) and (7) of the Code of Laws of South Carolina, 1976 [formerly section 21-230(5) and (7) of the 1962 Code as cited in 1970 Ops. Atty. Gen. No. 3014] and section 59-19-250; see also Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E.2d 470 (1950). However, as quoted above, if a school district "...allows the school facilities to be used at all, [it] must permit all individuals and organizations to use them if the purposes for which the facilities will be used are lawful." Therefore, the question arises as to whether use of school facilities by a religious group on Sunday would be lawful in view of United States Constitutional Provisions concerning the establishment of religion (Amendment I) and South Carolina Constitutional Provisions prohibiting Direct Aid to Religion (Art. XI §4). Such usage appears to be lawful provided that certain legal requirements are met.

A previous Opinion of this Office concluded that religious groups could use facilities of a recreation commission, but the Opinion stated that the use must be reasonable "...and not made so as to substitute a public facility in lieu of a permanent religious facility." Ops. Atty. Gen. (February 19, 1970). Although that Opinion addressed a recreational facility rather than a school, it is in accord with case law from other states as to usage of school property. A number of cases from other jurisdictions have considered the constitutionality of permitting religious groups to use school facilities during nonschool hours. See 79 A.L.R.2d 1148. Most of the recent cases concerning that issue have upheld the constitutionality of that use of the schools. See O'Hara v. School Board of Sarasota Co., 432 So.2d 1356 (1983); Country Hills Christian Church v. Unified School District, 560

F.Supp. 1207 (D.Kans. 1983); Resnick v. East Brunswick Tp. Bd. of Ed., 77 N.J. 88, 389 A.2d 944 (1978); Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 701 (Fla. 1959).

In Country Hills, supra, the federal district court found that a school district had created a "public forum" for the exercise of First Amendment Rights by opening school facilities to nonschool groups at a reasonable rent. The Court held that, having created a public forum, the school district could not exclude the church from the forum because of the religious content of its speech unless justifiable under the Constitution. Country Hills concluded that the Establishment Clause of the First Amendment did not justify excluding the Sunday religious services from school district facilities. The church plaintiff in that case proposed to pay rent for the facilities and had never requested to rent the facilities for a continuous series of services or on a long term basis.

Similarly, under the Establishment Clause and New Jersey constitutional provisions, Resnick held that religious groups which "...fully reimburse school boards for related out-of-pocket expenses may use school facilities on a temporary basis for religious services as well as educational classes." 389 A.2d at 960. The Court agreed with other decisions that "...truly prolonged use of school facilities by a congregation without evidence of immediate intent to construct or purchase its own building would be impermissible". 389 A.2d at 958. Ford v. Manuel, 629 F.Supp. 77 (ND Ohio 1985) reached a contrary conclusion as to religious education classes open to school children immediately before or after school hours. The Court found that the program was not constitutionally permissible because it took place when the schools were being used in connection with public education. Instead, here, the planned usage is on Sundays. See note 1, supra.

This authority indicates that, under the Establishment Clause, a school district could lawfully permit a church to use school property on Sundays provided that such usage did not conflict with school purposes and provided that the public facility was not substituted for a permanent religious facility. In addition, the above referenced February 1970 Opinion stated that the payment of rent would not be controlling but would be desirable as a means of countering a contention that expenditure of public funds has been made in aid of religion.

Resnick held that "[w]here essentially no public expense is incurred as a result of a benefit received by religious groups, [the Court] did not believe that the 'significantly religious'

character of those groups should preclude their receipt of such a benefit on the same terms as other groups of the same class, i. e., nonprofit organizations." 389 A.2d at 957. In Resnick, the school district made an out-of-pocket expense rental charge to nonprofit groups, including religious groups using its facilities, except that a higher charge was imposed for fund raising events and ones requiring the payment of admission.

In South Carolina, the charging of, at least, out-of-pocket expenses would also help to avoid any question of a violation of Act XI §4 of the South Carolina Constitution which provides that "[n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." (emphasis added). This constitutional provision has apparently not been construed by the Supreme Court as to any issue since it was modified in 1973 by, among other changes, deleting the prohibition on indirect benefits (See Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971)). Whether the reference to "religious or other private educational institution" in Art. XI §4 would apply to church educational functions such as Sunday School classes has not been decided by the Court, but a rental charge at least related to charges made to other nonprofit groups and to expenses would help to avoid a claim of unconstitutional aid to religion under the Establishment Clause as well as help to avoid a claim of "direct benefit" under Art. XI §4. See Ops. Atty. Gen. (February 19, 1970). Of course, what if any charge to make would be a factual decision for the school district to make. See section 59-19-250; 1975 Ops. Atty. Gen., No. 4044 (July 2, 1975); Resnick, supra. Finally, a lease of school property should be approved under section 59-19-250 which provides for the sale or lease of school property by school trustees with the consent of the county board of education or the county governing body if no county board exists. See Ops. Atty. Gen. (November 10, 1978).

In conclusion, the above authority indicates the following requirements with respect to the Sunday usage of school facilities by a church:

1. A school district cannot deny the usage of its facilities on a Sunday to a church for services if the usage meets the following requirements unless the school district does not permit any nonschool or nonstudent groups to use its facilities.

2. Usage of school for Sunday services by a church must meet the following legal requirements:

a. The usage must not interfere with school activities or school use of the property.
b. The usage must be temporary and not result in the substitution of school facilities for a permanent religious facility.
c. The school district should consider charging a rent that relates to the expenses of the district and the charges made to other non-profit organizations. Any lease of the school facilities should be approved under section 59-19-250.

Whether particular uses of school facilities would meet these standards are factual matters that would have to be resolved by a school district and a church desiring to use its facilities.

If you have any questions or if I may be of other assistance, please let me know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

JESjr/jps

REVIEWED AND APPROVED BY:

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