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OPINION	:	No. 80-109
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of	:	<u>FEBRUARY 5, 1980</u>
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The Honorable H. L. Richardson, Senator, Twenty-Fifth District, requests an opinion on questions we have phrased as follows:

If the California Constitution were amended to provide for a voucher program as a means to distribute state funds to parents for their children's education:

1. Would a church-operated school, offering a religious-oriented curriculum, constitutionally qualify to receive voucher funding?
2. Would a private school, not church-operated, offering a religious oriented curriculum or related religious activities on a voluntary or on a mandatory basis, constitutionally qualify to receive voucher funding?

## CONCLUSIONS

1. An amendment of the California Constitution that authorized a voucher program by which a voucher for each school age child would be provided to the parents who could deliver it to a public school or to a private school of their choice for which the school would receive public funding, which program would have the effect of distributing public funds to church-operated elementary-level and secondary-level schools, would be unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution. A church-operated school thus could not qualify constitutionally to receive such voucher funding.

2. The second question necessarily involves questions of fact, thus we are unable to provide a categorical answer. We conclude generally that a private school, not church-operated, offering a religious-oriented curriculum or related religious activities on a voluntary basis could constitutionally qualify to receive voucher funding if the effect of the government aid had only a “remote, indirect, and incidental” effect upon religion and adequate provision were made to ensure that the public funds thus provided were used only for secular purposes, which effort did not require substantial reporting requirements and governmental regulation. A private school, not church-operated, that “mandates” its pupils to participate in a religious-oriented curriculum would be eligible for such voucher funding only if it met the criteria by which a voluntary religious program would be tested and, in addition, the school were determined not to be a “sectarian” or “religious” school so that the analysis and conclusion set forth in response to the first question would not be applicable.

## ANALYSIS

The opinion request refers to a “voucher program” that operates to distribute state funds to parents to pay for their children’s education. Without purporting to pass upon the constitutionality of any particular “voucher program,”<sup>1</sup> we believe the essential elements of such a program would include provisions establishing a right on the part of parents or guardians of children of school age to have their children attend either public or nonpublic schools, at the elementary and secondary grade level, as the parent or guardian chooses. Such a voucher program might contemplate the existence of more than one type of “public” school. An essential feature of such a system would be to provide to the parent or guardian a choice as to the kind and quality of education to be provided to his or her children. Pursuant to this plan, every child of school age would be entitled to a “certificate”

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<sup>1</sup> See Comment, “Educational Vouchers: Addressing the Establishment Clause Issue” for a discussion concerning three types of educational voucher programs, 11 Pacific Law Journal 1061 (1980).

or “voucher” which would be “redeemable” for educational purposes at a public school or a qualified “nonpublic” school at the elementary and secondary grade levels. The “redemption” feature of the plan contemplates the school presenting the “certificate” or “voucher” to the state in return for which the school will receive public funds in an amount generally determined to be the reasonable cost of providing an appropriate level of education to such children. We assume, for purposes of this opinion, that an essential feature of such a plan would be a condition that no private school would be ineligible to redeem such certificates or vouchers because it offers instruction involving moral or social values, philosophy, or religion.

The First Amendment to the United States Constitution provides, in part, that “. . . Congress shall make no law respecting an establishment of religion . . .,” which clause has been applied to the states through the Due Process Clause of the Fourteenth Amendment. (*Everson v. Board of Education* (1947) 330 U.S. 1, 8; *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303.)

In *Wolman v. Walter* (1977) 433 U.S. 229, it was stated that:

“The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the [United States Supreme] 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 government entanglement with religion. See *Roemer v. Maryland Public Works Ed.* (1976) 426 U.S. 736, 748; *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 772–773; *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612, 613.”

We turn to an analysis of the leading case, *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. 756. In 1972, the State of New York enacted a statute that, among other things, established a “limited plan<sup>2</sup> providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.” (N. Y. Laws, 1972, ch. 414, § 2.)

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<sup>2</sup> “To qualify, . . . a parent must have an annual taxable income of less than \$5,000. The amount of reimbursement is limited to \$50 for each grade school child and \$100 for each high school child. Each parent is required . . . to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.” (*Committee Public Education v. Nyquist*, *supra*, 413 U.S. at p. 764.)

The New York State Legislature included in its statute certain findings including one that stated “[s]uch assistance is clearly secular, neutral and nonideological.” (*id.*, § 559(3), N. Y. Ed. Law, art. 12–A.)

The United States Supreme Court declared that the New York state tuition plan was unconstitutional on the basis that it failed the “principal or primary effect” test applicable to issues involving the Establishment Clause of the United States Constitution. (*Committee for Public Education v. Nyquist, supra*, 413 U.S. at p. 780.)

In support of its decision, the Court stated:

“There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*:

“No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.’ 330 U.S., at 16.

“The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the ‘wall of separation’ required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State’s program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.

“In *Everson*, the Court found the bus fare program analogous to the provisions of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U.S., at 17–18. Such services, provided in common to all citizens, are ‘so separate and so

indisputably marked off from the religious function,' *id*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. 'Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.' 392 U.S., at 244–245.

“The tuition grants here are subject to no such restrictions. There has been no endeavor ‘to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.’ *Lemon v. Kurtzman*, *supra*. at 613. Indeed, it is precisely the function of New York’s law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.” (*Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at pp. 780–783; fns. omitted.)

While the issue in *Nyquist* involved a reimbursement by the state with respect to a tuition program rather than a voucher program, the court’s subsequent analysis appears applicable to either type of use of public funds:

“Although we think it clear, for the reasons above stated, that New York’s tuition grant program fares no better under the ‘effect’ test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

“First, it has been suggested that it is of controlling significance that New York’s program calls for *reimbursement* for tuition already paid rather

than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township v. Schempp*, *supra*, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. 374 U.S., at 222–223. MR. JUSTICE BRENNAN’S concurring views reiterated the Court’s conclusion:

“Thus the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims . . .’ *Id.*, at 288.

“A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the District Court that ‘[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance.’ 350 F. Supp., at 668.

“Second, the Majority Leader and President pro rem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school’s total expenses. The New York statute limits reimbursement to 50% of any parent’s actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from ‘voluntary contribution, endowments and the like.’ On the basis of these two statistics, appellees reason that the ‘maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic school.’ And, ‘since the

compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses,' the New York statute provides 'a statistical guarantee of neutrality.' It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, *supra*, at 777–779, and it can fare no better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.'

“Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only 'low-income parents' are aided by this law, and without state assistance their right to have their children educated in a religious environment 'is diminished or even denied.' It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, e.g., *Everson v. Board of Education*, *supra*; *Walz v. Tax Comm'n*, *supra*, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion. However great our sympathy, *Everson v. Board of Education*, 330 U.S., at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' *ibid.*, and notwithstanding the 'high social importance' of the State's purposes, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly implanted.” (*Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at pp. 785–789; fn. omitted.)

Subsequently, in *Wolman v. Walter*, *supra*, 433 U.S. at pages 250–251, the Court found unconstitutional a state program that, among other things, authorized the expenditure of funds for the purchase and loan to pupils attending nonpublic schools (or to

their parents) of instructional materials and instructional equipment of the kind in use in the public school and which was “incapable of diversion to religious use.” (*Wolman v. Walter, supra*, at p. 248.)

The Court stated that its conclusion that a State of Ohio statute was unconstitutional:

“ . . . is compelled by the Court’s prior consideration of an analogous issue in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). There the Court considered, among others, a tuition reimbursement program whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of \$50 to \$100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson v. Board of Education*, 330 U.S. 1 (1947), and the book program in *Allen*, there ‘has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.’ “413 U.S., at 783, quoting *Lemon v. Kurtzman*, 403 U.S., at 613. The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better. Accordingly, we hold §§ 3317.06(B) and (C) to be unconstitutional.” (*Wolman v. Walter, supra*, 433 U.S. at pp. 250–251; fns. omitted.)

In a footnote, the Court further explained its *Nyquist* decision as follows:

“In many respects, *Nyquist* was a more difficult case than the present one. First, it was at least arguable in *Nyquist* that the tuition grant did not end up in the hands of the religious schools since the parent was free to spend the grant money as he chose. 413 U.S., at 785–786. No similar argument could be made here since the parties have stipulated expressly that material and equipment must be used to supplement courses. App. 37. Second, since the grant in *Nyquist* was limited to 50% of tuition, it was arguable that the grant should be seen as supporting only the secular part of the church-school enterprise. 413 U.S., at 787. An argument of that kind also could not be made here, for *Meek* makes clear that the material and equipment are inextricably connected with the church-related school’s religious function. (*Wolman v. Walter, supra*, 433 U.S. at p. 251, fn. 17.)

There does not appear to be a constitutionally significant basis for distinguishing between a state program providing public funds to parents that may be used to pay tuition in church-operated schools before the school year commences (a state voucher program) and a state program providing public funds to reimburse parents for tuition in church-operated schools after the school year is completed (New York program overturned in *Nyquist*). (See also *Public Funds for Public Schools of N.J. v. Byrne* (1979) 590 F.2d 514, 519–520.)

Even if we assume that such a constitutional amendment would pass the “secular purpose” test on the basis that the amendment were to provide that its purpose was to enhance the quality of secular education as to all pupils covered by the compulsory attendance laws, see *Lemon v. Kurtzman* (1971) 403 U.S. 602, 613, the providing of public funds to church-operated schools under such a circumstance would violate the “primary effect” test and the “excessive entanglement” test. (*Sloan v. Lemon* (1973) 413 U.S. 825; *Committee for Public Education v. Nyquist, supra*, 413 U.S. 756; *Levitt v. Committee for Public Education* (1973) 413 U.S. 472.)

We are thus forced to conclude that a provision of the California Constitution, assuming that it were amended to so provide, authorizing a voucher program by which public funds were provided to parents, which program would have the effect of distributing public funds to elementary-level or secondary level church-operated schools would be declared unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution. Accordingly, a church-operated school, offering a mandatory religious-oriented curriculum, would not qualify constitutionally to receive such voucher funding.

The second question inquires whether a “private school,” not church operated, offering a religious-oriented curriculum or related religious activities<sup>3</sup> on a voluntary or on a mandatory basis could qualify constitutionally “to receive voucher funding.”

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<sup>3</sup> See generally. Education Code section 51511 which reads as follows:

“Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, art, or music or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental so or illustrative of matters properly included in the course of study.”

(*Cf.* 58 Ops. Cal. Atty. Gen. 263, 269 (1975).)

A more difficult issue is presented when one considers the issue solely with respect to private schools that are not church-operated or owned, which private schools offer a religious-oriented curriculum on related religious activities on a voluntary or on a mandatory basis.

First, we note that there are several provisions of the California Constitution that operate to prevent public funds from being used to support private schools, irrespective of the religion issue. Thus, any amendment of the California Constitution would have to eliminate those constitutional impediments as well in order to receive public funds.

The California Constitution, article IX, section 8 provides in part that: “No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; . . .”

In addition, California Constitution, article XVI, section 5 provides in part:

“Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; . . .”

If one were to assume that the courts would give effect to an amendment of the California Constitution, of the type described, notwithstanding the provisions of article IX, section 8, and article XVI, section 5, one must still consider the applicability of the Establishment Clause of the First Amendment of the United States Constitution.

The issue thus raised by the decisions of the United States Supreme Court involves distinguishing between the “secular” on the one hand and the “sectarian” on the other hand. The United States Supreme Court has recognized the separability of the religious and secular functions of church related *colleges* and universities that were “not pervasively sectarian” in character, and upheld the public funding of the secular functions. Our discussion of these cases in 60 Ops. Cal. Atty. Gen. 103, 108–110 (1977) is particularly relevant:

“The area of public funding or subsidizing of private education has long been fraught with heated and divisive constitutional litigation, most of it under the First Amendment to the United States Constitution.

“The so-called ‘establishment clause’ of that amendment has been interpreted to mean that ‘[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.’ *Everson v. Board of Education*, 330 U.S. 1, 16(1947).

“The impact of this rather rigid rule was later softened somewhat when the Supreme Court in several cases recognized the separability of the religious and secular functions of church related colleges and universities which were ‘not pervasively sectarian’ in character, and upheld the public funding of the secular functions.

“It must be noted, however, that the court placed such funding under most careful scrutiny. In *Tilton v. Richardson*, *supra*, 403 U.S. at 680–681, the public funding of certain buildings to be used for secular purposes was approved only because the court found ‘no evidence that religion seeps into the use of any of these facilities.’ For example, there were no religious symbols in or on any of the funded buildings, and no religious education or practices were conducted in them. The court also struck down a portion of the statute at issue which would have removed the ‘secular use only’ restrictions from the publicly funded buildings after 20 years. The court pointed out that ‘the unrestricted use of a valuable property [after 20 years] is in effect a contribution of some value to a religious body.’ 403 U.S. at 683.

“In *Roemer v. Maryland Public Works Bd.*, *supra*, 426 U.S. 736, 49 L. Ed. 2d 179, the Supreme Court upheld a Maryland statute which provided for noncategorical grants to ‘private institutions of higher learning’ in that state.

“The court’s finding of constitutionality was based on the provisions of the act in question which restricted such funds from use for ‘sectarian purposes’ and required documentation and verification that no sectarian uses were planned or undertaken. 49 L. Ed. 2d at 184–185. The court’s opinion makes it quite clear that without these restrictions it would not have upheld the act.”

In that opinion, 60 Ops. Cal. Atty. Gen., *supra*, at pages 106–108, we considered the meaning of the phrase “a public or private nonsectarian school, institution, or agency” as it appeared in a state statute (§§ 6870–6874.6 of the former Ed. Code, commonly known as the Sedgwick Act; repealed by Stats. 1977, see ch. 1247) wherein we stated:

“The phrase is not ambiguous on its face, assuming that each word used in it has a definite meaning. It has been suggested, however, that the meaning of ‘nonsectarian’ is not definite, that the term might refer either to the ownership or affiliation of the school or institution, or to its purpose and method of operation.

“In seeking to find the ordinary and usual meaning of the word, we look first to its dictionary definition. Webster’s *New World Dictionary of the American Language* (Second College Edition, 1972) defines ‘nonsectarian’ as: ‘not sectarian; not confined to or affiliated with any specific religion.’ Funk & Wagnall’s *Standard College Dictionary* (1973) lists the definition as: ‘Not restricted to or associated with any one religion, sect, or faction.’

“These definitions indicate that one would not properly call an entity ‘nonsectarian’ if it were ‘affiliated with’ or ‘associated with’ a particular religious group. Thus, if a religious group founded and operated a school for handicapped children, that school would not ordinarily come within the dictionary definition of ‘nonsectarian,’ whatever its method of operation.

“We have found no case law which clearly sets forth the precise meaning the courts have attributed to the word ‘nonsectarian’ when they have used it in judicial opinions.

“However, we are given some guidance by the contexts in which the word has been used, and conversely, the contexts in which it was not used.

“*Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio, 1972), involved the constitutionality of tax credits for parents whose children received a nonpublic education. The court, in reviewing the nature of nonpublic schools in the State of Ohio, contrasted ‘religious affiliated schools’ with ‘nonsectarian [schools].’ The clear implication of this use of words is that a school which is affiliated with a religious group would not have been considered ‘nonsectarian’ by the court.

“In a very similar manner the court in *Americans United For Sep. of Church & State v. Dunn*, 384 F. Supp. 714, 717 and 722 (M.D. Tenn., 1974) contrasted ‘religiously affiliated institutions [of higher education]’ with ‘nonsectarian colleges and universities.’ The implication is the same.

“Also of interest is the language used by the United States Supreme Court in *Tilton v. Richardson*, 403 U.S. 672 (1971). In that case, the court

discussed aid to church related colleges and universities ‘whose predominant higher education mission is to provide their students with a secular education.’ 403 U.S. at 687. The opinion further points out that admissions were not limited to members of the founding religious group, and that students were not required to participate in religious observances. 403 U.S. at 686. Yet nowhere does the court refer to such institutions as ‘nonsectarian.’ On the contrary, they are referred to as ‘church-related’ and ‘religiously affiliated.’

“In *Hunt v. McNair*, 413 U.S. 734, 743 (1973), the Supreme Court described the colleges which it had earlier discussed in *Tilton v. Richardson*, *supra*, as ‘[not] pervasively sectarian.’ The same description was found to apply to the Baptist College at Charleston (South Carolina), which the court discussed in *Hunt*. In its recent decision in *Roemer Maryland Public Works Bd.*, *supra*, 426 U.S. 736, 49 L.Ed.2d 179, 191, the court again used the phrase ‘not pervasively sectarian’ to describe religiously affiliated institutions that operate in a manner which is secular in most of its aspects.

“We conclude from the cited and similar uses by courts of the term ‘nonsectarian’ and related terms that such use is consistent with the dictionary definition set forth above. That is, an institution which is owned by, operated by, affiliated with, or associated with a religious group or sect would not be described as ‘nonsectarian.’

Thus, it appears that a private school, although not “church-Operated,” that “mandates” its pupils to participate in a religious-oriented curriculum nevertheless could be determined by the courts to be a “sectarian” or “religious” school,<sup>4</sup> thus making the analysis set forth in response to the first issue applicable to such a school. See generally, “‘Religion and Religious Institutions’ under the First Amendment” 7 *Pepperdine Law Review* 313 (1980).

If a program of voucher-funding of elementary and secondary education were to be limited to only those private schools that were not sectarian in character, it is conceivable that the program would be determined not to violate the Establishment Clause of the First Amendment of the United States Constitution if the funds nevertheless were made available to private schools that offered religious instructions or related religious activities on a voluntary basis. (See *Roemer v. Maryland Public Works Bd.*, *supra*, 426 U.S. 736.)

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<sup>4</sup> According to information provided in California State Department of Education, *California Public Schools Selective Statistics 1976–1977* (1978), approximately 80 percent of the students attending private schools in California in 1976, were enrolled in church-affiliated schools.

A voucher program benefitting private secular schools, in which some religious instruction was offered on a voluntary basis, would have to satisfy the three tests used by the courts to determine whether the establishment clause is being violated by the governmental activity. We see no difficulty with such a program meeting the “secular purpose” test. In applying the “primary effect” test, whether such a program would be held not to violate the Establishment Clause would depend upon whether in its operation the program has only a remote, indirect, and incidental” effect upon religion. (See *Calif. Teachers Assn. v. Riles* (1980) 109 Cal. App. 3d 989; *Bowker v. Baker* (1946) 73 Cal. App. 2d 653, see generally, the discussion in Tribe, *American Constitutional Law*, p.812 (1978).)

The test that might be most critical with respect to the operation of such a voucher plan would be the “excessive entanglement” test, depending upon the degree to which the religious instruction offered by such a private, nonchurch-operated school permeated the curriculum and other activities of the school. In *Lemon v. Kurtzman*, *supra*, Chief Justice Burger, writing the majority opinion, stated that in assessing the degree of entanglement the Court should examine: (1) the character and the purpose of the institution benefitted, (2) the nature of the aid provided by the government, and (3) the resulting relationship between the government and religion. (*Lemon v. Kurtzman*, *supra*, 403 U.S. at p. 615.) Thus, one important factor would be whether the purpose of such a private school would be to teach and foster religious beliefs and religious ideals.

The nature of the aid to be provided would require an examination of whether the operation of the program would assist the school in its funding of its voluntary religious instructional offerings. Assuming that the aid were effectively limited by the amendment to the secular instructional program, it appears that the Supreme Court would require that a functional auditing system existed that ensured that the public funds were used only for secular purposes, as a condition necessary to constitutional approval of the program.

In *Committee for Pub. Ed. and Religious Liberty v. Regan* (1980) – U.S. –; 100 S. Ct. 840; 48 LW 4168; 40 CCH Bull. B841, the Supreme Court upheld a New York statute<sup>5</sup> that provided for direct cash reimbursement to private schools for the cost of administering state-prescribed examinations and for grading them. The Court, in a five-to-four decision, determined that the services for which private schools would be reimbursed ‘are discrete and clearly identifiable’ and as such neither requires nor permits excessive entanglement of the state with religion nor does it have the primary effect of advancing the sectarian aims of the nonpublic schools. (– U.S. at p. –; 48 LW 4168; 40 CCH S. Cr. Bull. at B856–B857.)

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<sup>5</sup> The New York statute being construed by the Court was an amended version of that New York statute declared unconstitutional in *Lemon v. Committee for Public Education*, *supra*, 413 U.S. 472.

In *Committee for Public Education v. Regan, supra*, – U.S. at p. –; 100 S. Ct. at p. 846, the Court noted that the statute authorizing state aid provided for an effective auditing system that ensured that public funds were used only for secular purposes. However, the Court noted that “under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services.” (*Id.*, at p. 849.) On the other hand, in *Walz v. Tax Commission* (1970) 397 U.S. 664, Chief Justice Burger stated that there would be excessive entanglement if the effort to ensure that the government aid did not benefit religion required substantial reporting and administrative regulation. (*Walz v. Tax Commission, supra*, 397 U.S. at p. 675.) The degree of state activity necessary to effective enforcement of its secular effort would thus be a key factor in determining whether such a program would be constitutional.

The second question necessarily involves questions of fact, thus we are unable to provide a categorical answer. We conclude generally that a private school, not church-operated, offering a religious-oriented curriculum or related religious activities on a voluntary basis could constitutionally qualify to receive voucher funding if the effect of the government aid had only a “remote, indirect, and incidental” effect upon religion and adequate provision were made to ensure that the public funds thus provided were used only for secular purposes, which effort did not require substantial reporting requirements and governmental regulation. A private school, not church-operated, that “mandates” its pupils to participate in a religious-oriented curriculum would be eligible for such voucher funding only if it met the criteria by which a voluntary religious program would be tested and, in addition, the school were determined not to be a “sectarian” or “religious” school, so that the analysis and conclusion set forth in response to the first question would not be applicable.

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