VOLUME NO. 38 OPINION NO. 26

CONSTITUTIONAL LAW - School district attendance units on Hutterite colony premises;
RELIGIOUS ORGANIZATIONS - Establishment of school district attendance units on property owned by;
SCHOOL BOARDS - Closure of attendance units, contracts for attendance unit financing: applicability of state law to; lease of school facilities from Hutterite colony;
SCHOOL DISTRICTS - Attendance units: applicability of state law to, establishment of on Hutterite colony premises;
1972 MONTANA CONSTITUTION - Article II, section 5, Article V, section 11, Article X, section 6;
MONTANA CODE ANNOTATED - Sections 20-6-502, 20-6-509, 20-6-625, Title 20, chapter 9, part 1.

HELD: 1. A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district.

2. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved and the trustees have no authority to make an agreement to the contrary.

3. Since operational costs of an attendance unit on the premises of a Hutterite colony must be budgeted and financed in the manner provided by law, any agreement between the trustees of the school district and the colony for private financing of any part of those costs would be unenforceable.

6 July 1979

John V. Potter, Jr., Esq.
Meagher County Attorney
Meagher County Courthouse
White Sulphur Springs, Montana 59645

Dear Mr. Potter:

You have requested my opinion concerning a proposal to establish a separate attendance unit of White Sulphur Springs School District No. 8 on the premises of a Hutterite colony located in the district. You have asked whether the proposed separate attendance unit would be barred from

receiving public funds on constitutional grounds. The board of trustees of the school district has asked whether such an attendance unit may be established for a one year trial period, subject to termination by either the board or the colony at the end of the school year, and whether the board and the colony may agree that the colony will pay the difference, if any, between the cost of operating the attendance unit and the amount the district receives under the foundation program which is attributable to the number of students enrolled at the attendance unit.

There is no question that the Hutterite colony involved is a religious organization and as you have noted, Montana's Constitution makes clear that virtually any form of public aid to church related schools would be improper. See Mont. Const., art. II, § 5; art. V, § 11, and especially art. X, § 6. The last provision expressly prohibits state aid to sectarian schools and is essentially the same as Article XI, Section 8 of the 1889 Montana Constitution. In State ex rel. Chambers v. School District No. 10, 155 Mont. 422, 437, 472 P.2d 1013 (1970), the Supreme Court found that article XI, section 8 of the former Constitution:

> States in no uncertain terms that no school district can directly or indirectly appropriate or pay from public funds to aid the support of any school controlled in whole or in part by any church, sect or denomination.

In Chambers the Court held the levy and use of public funds to pay salaries of parochial school teachers at Anaconda Central High School was barred by the constitutional prohibition then embodied in article XI, section 8. Since the present constitution is no less restrictive it may be assumed the Supreme Court would reach the same conclusion now if it was presented with a similar factual situation.

The situation you describe, however, is fundamentally different from Chambers because the proposed attendance unit in all respects would be a public school operated by the district, not a private school operated by a religious organization. It appears that the attendance unit would be staffed by a certified teacher hired and paid by the school district and that the school's curriculum would be the same as that offered at any other public school of similar size. It does not appear that the colony would exert control or supervision over the teacher or inject sectarian dogma or influence into the course of study. Furthermore, while the

attendance unit would be located on colony premises, it would be open to children without regard to their religious affiliation. Under these circumstances it cannot be said that the attendance unit would be church controlled.

An element of the proposal which might implicate a constitutional issue is the fact that the colony would provide a building to the district for school purposes during school hours at a nominal or no rental cost. However, neither Chambers nor any other state or federal court decision of which I am aware has held as a matter of constitutional law that a public school governing body may not contract for the lease of property solely because the property is owned by a sectarian rather than a secular organization. Under section 20-6-625, MCA (section 75-8209, R.C.M. 1947), the school trustees are authorized to lease suitable buildings from any person when it is in the best interests of the district to do so.

It is true that if it established a separate attendance unit on colony premises the school board would be accommodating the Hutterites to some extent. Nevertheless, both the school board and the colony have an interest in assuring that school-age Hutterite children are given the opportunity to receive a basic secular education. Where the interests of the state and religion incidentally coincide accommodation is not precluded on constitutional grounds unless the state thereby becomes excessively entangled in the affairs of religion. See Lemon v. Kurtzman, 403 U.S. 602 (1971). There is no indication the attendance unit would require special scrutiny on the part of the school board to determine whether the teacher's role or performance is exclusively secular. Nor does it appear that the relationship between the school board and the colony would be essentially different from a relationship between the board and any other lessor of school facilities. In my opinion the proposal you describe would not necessarily result in an impermissible church-state entanglement which would violate the state or federal constitutions.

Turning to the questions which have been raised with respect to the implementation of the proposal, it should be noted that state laws apply with the same force and effect whether the attendance unit is located on or off colony premises. Therefore, the opening of the proposed school is governed by section 20-6-502, MCA (section 75-6602, R.C.M. 1947). Nothing in that statute expressly prohibits or allows the operation of a school on a "trial basis" subject to termina-

tion at the request of the school trustees or the residents of the affected area. Section 20-6-509, MCA (section 75-6607, R.C.M. 1947), however, provides that the trustees alone have the authority to close a district school, "when it is in the best interest of the pupils affected." An agreement whereby the colony could unilaterally close the school would contravene the express and exclusive authority granted the trustees in this regard and would therefore be unenforceable. A law established for a public reason cannot be compromised by private agreement. § 1-3-2104, MCA (§ 49-105, R.C.M. 1947); State ex rel Neiss v. District Court, 162 Mont. 324, 328, 511 P.2d 979 (1973).

Of course, if the lease agreement was for one year and the colony chose not to renew it, the colony may effectively close the separate attendance unit if no similar space were available for its continued operation.

Your final question concerns the propriety of an agreement between the school district and the colony to the effect that if operational costs of the attendance unit exceed foundation program monies attributable to the average number belonging at the attendance unit the colony will pay the excess expenses.

Operational costs of all district schools must be budgeted in accordance with the provisions of Title 20, chapter 9, part 1, MCA (Title 75, chapter 67, R.C.M. 1947). The trustees of a district may exceed the district's foundation program amount in adopting the general fund budget, but they may do so only in the manner permitted by law. § 20-9-113, MCA (§ 75-6707, R.C.M. 1947). Nothing in the applicable statutes permits a school board to adopt a separate budget for one of the district's schools and to pass along any part of the school's operational expenses to a private organization, by agreement or otherwise.

In addition, equalized school financing would be impossible if every school in the State could derive support on the basis of funding agreements between local residents and individual school boards. Any such agreement would defeat the purpose of the comprehensive scheme the legislature has enacted to provide for the State-wide equalization of school financing.

THEREFORE, IT IS MY OPINION:

1. A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district.

2. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved and the trustees have no authority to make an agreement to the contrary.

3. Since operational costs of an attendance unit on the premises of a Hutterite colony must be budgeted and financed in the manner provided by law, any agreement between the trustees of the school district and the colony for private financing of any part of those costs would be unenforceable.

Very truly yours,

MIKE GREELY
Attorney General