

VOLUME NO. 36**Opinion No. 5****CONSTITUTIONAL LAW — School Funds, Religious Purpose
SCHOOLS AND SCHOOL DISTRICTS — Districts, Funds, Religious
Purpose****Article V, Section 11, Montana Constitution (1972)****Article X, Sections 6 and 7, Montana Constitution (1972)****Section 75-6601, R.C.M. 1947****Section 75-7521, R.C.M. 1947**

HELD: An elementary school district composed entirely of property belonging to the North Harlem Hutterite Colony would be eligible to receive public monies for school purposes without violating any provision of the 1972 Montana Constitution.

April 28, 1975

Mr. William M. Solem
Blaine County Attorney
P.O. Box 597
Chinook, Montana 59523

Dear Mr. Solem:

You have requested my opinion on the following question:

Whether an elementary school district composed entirely of property belonging to the North Harlem Hutterite Colony would be eligible to

receive public monies for school purposes without violating Article X, Section 6, Montana Constitution (1972).

You have also indicated that the elementary school district in question was created by order of the Blaine County superintendent of schools on February 18, 1975, and that students other than those belonging to the North Harlem Colony would be eligible to attend school within the district.

Article X, Section 6, Montana Constitution (1972), provides:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Also relevant is Article V, Section 11, Montana Constitution (1972), which provides:

(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

The purpose of these constitutional prohibitions is to prevent public funds from being spent in support of sectarian schools.

Clearly, their theoretical foundation is the Establishment Clause of the First Amendment to the United States Constitution. In *State ex rel. Chambers v. School District No. 10*, 155 Mont. 422, 472 P.2d 1013 (1970), the Montana Supreme Court discussed at length a provision in Montana's 1889 Constitution similar to Article X, Section 6, above, and drew the same conclusions.

However, the facts of the *Chambers* case are fundamentally different from the present ones. In *Chambers*, a public school board planned to make a levy and expend public funds for the employment of teachers in a **parochial** school. Here, the school you have described is a **public** school. As a matter of circumstance, its entire student body may be pupils of the Hutterite faith, but this factor alone does not alter its public character. What is critical is that the school itself remains under the authority, control, and operation of the public school system by public school personnel and open to all persons eligible to attend this public school. Article X, Section 7, Montana Constitution (1972); section 75-6601, R.C.M. 1947. Since the information you have provided indicates that such is the case here, there is no prohibition against expending public funds for this school.

For these reasons, I have deliberately refrained from discussing the possible impact of the United States Supreme Court decisions on Establishment questions. My research discloses that all of these cases involve some readily identifiable sectarian institution or practice (e.g., a school, a prayer). Because

neither of these appears to exist in the instant situation, an Establishment question is simply not reached.

Caveat: The county superintendent, by her order, may have created an enclave laden with potential violations of both the Establishment and Free Exercise Clauses of the First Amendment. All parties concerned should be advised as to the restrictions placed on the practice of religion in public schools. See, for example, Article X, Section 7, Montana Constitution (1972) ("No sectarian tenets shall be advocated in any public educational institution in this state.") and section 75-7521, R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

An elementary school district composed entirely of property belonging to the North Harlem Hutterite Colony would be eligible to receive public monies for school purposes without violating any provision of the 1972 Montana Constitution.

Very truly yours,
ROBERT L. WOODAHL
Attorney General