VOLUME NO. 36 **Opinion No. 65**

SCHOOLS AND SCHOOL DISTRICTS — Power of trustees — Rental of school premises; SCHOOLS AND SCHOOL DISTRICTS — Use of, by religious groups; Article X, Section 6(1) and Section 8, 1972 Montana Constitution; Section 75-8211, Revised Codes of Montana 1947.

HELD: Religious groups can use public school facilities on an occasional and short-term basis during nonschool hours upon securing permission from the school district trustees and paying a fair rental.

April 2, 1976

Mr. Donald E. White
Gallatin County Attorney
Courthouse
Bozeman, MT 59715

Dear Mr. White:

This is in response to an inquiry by your immediate predecessor in office, Mr. Thomas A. Olson, regarding the use of public school facilities by religious groups.

Mr. Olson has related that a youth organization known as "AWANA", a nondenominational religious group, wishes to rent a public school gymnasium for educational and recreational purposes during nonschool hours. Apparently use of the gymnasium is desired temporarily and infrequently, that is, for an occasional evening or weekend. To determine whether this arrangement would be lawful, the school district trustees are seeking advice on these questions:

1. What authority, if any, do they have in permitting school property to be used for religious activities?

2. Does it make any difference if the religious activities are regularly occurring events or short-term events?

3. Does it make any difference if the sponsoring religious organization pays a reasonable rent for use of the school facilities?

Special concern has been expressed over the possible effect of Article X, Section 6(1) of the 1972 Montana Constitution. That provision states:

> 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. (Emphasis added)

In a 1932 ruling Attorney General Foot interpreted Article XI, Section 8 of the 1889 Montana Constitution to preclude rental of a public school building to a church which planned to hold school there during the summer. Volume 14 Opinions of the Attorney General, pp. 361-365. Former Article XI, Section 8 is virtually identical to present Article X, Section 6(1).

The general authority of school district trustees to regulate the use of public school property is well settled in Montana. Article X, Section 8 of the 1972 Montana Constitution declares that "[t]he supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." Section 75-8211, R.C.M. 1947 specifically provides that "[t]he trustees of any district shall have the authority to rent, lease, or let any building or facilities of the district under the terms specified by the trustees." Such an enactment has been broadly interpreted by the Montana Supreme Court. In **Young v. Board of Trustees of Broadwater County High School.** 90 Mont. 576, 14 P.2d 725 (1931), this comment was made concerning the scope of section 1271, R.C.M. 1921, the former leasing statute:

> As evidencing legislative intent and progressive though on the subject, the foregoing section was amended by the (1931) legislative assembly by eliminating all restrictions and permitting the board to "rent, least or let" the described property to any "person or entities the board may deem proper" for any purpose and for such time and rental as the board may designate...

> The county board is vested with broad discretion in exercising statutory powers [citations omitted], and this rule must be presumed to have been known when it enacted the statute under consideration. Had that body desired to restrict the power to the renting of public school buildings for public entertainments of an educational nature, it would have found suitable words in which to express such a restriction. 90 Mont. at 580, 581.

While **Young** did not involve any religious questions, the sweeping authority of the school district trustees in renting school property was established in no uncertain terms. The only issue here thus becomes whether and to what extent the exercise of such authority is circumscribed by Article X, Section 6(1).

No legal ruling has yet been reported concerning Article X, Section 6(1), but in addition to the opinion of Attorney General Foot referred to earlier, there is the decision of **State ex rel. Chambers v. School District No. 10,** 155 Mont. 422, 472 P.2d 1013 (1970), interpreting former Article XI, Section 8. Inasmuch as the 1972 constitutional convention intended no substantive change between those provisions, such authorities may still be looked to for guidance. (See the Transcript of Proceedings, Montana Constitutional Convention, 1972, Volume VIII, pp. 6137 et seq., and the Education and Public Lands Committee Report, pp. 15-22.)

Attorney General Foot held flatly that the use of the school building by a church, even if rent was paid, violated the constitutional prohibition against the state making "any grant of lands or other property in aid of any church." But I do not think that opinion speaks to the present circumstances, for there is a considerable difference between a religious group utilizing public school facilities to house more or less permanently its own system of formal education and using them temporarily for a few gatherings.

Such a distinction was recognized in **Pratt v. Arizona Board of Regents,** 110 Ariz. 466, 520 P.2d 514 (1974). There it was held that the leasing of the Arizona State University football stadium to Billy Graham for a week at a fair rental value did not fall within the prohibitions of the Arizona Constitution that no public money or property should be appropriated for or applied to any religious purpose. Lease of the stadium to Reverend Graham was viewed as a "straight commercial transaction" which satisfied the twin keys of "fair rental value and the occasional nature of the use". **Pratt,** 520 P.2d at 517. The court summarized its opinion:

> Considering the historical setting in which this (constitutional) article was proposed and approved by the voters of our new state as well as the contemporary fabric o[f] our society today, we believe that the lease in question does not place the power, prestige or influence of the state behind Reverend Graham's religious beliefs and practices, nor, it being for a fair rental price, is it an appropriation or application of State property for religious purposes. **Pratt,** 520 P.2d at 517.

The annotation at 79 A.L.R.2d 1163-1167 discusses several cases to the same effect: **Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1,** 115 So.2d 697, 79 A.L.R.2d 1142 (Fla. 1959); **Nichols v. School Directors,** 93 Ill. 61 (1879); **Davis v. Boget,** 50 Iowa 11 (1878); **State ex rel. Gilbert v. Dilley,** 95 Neb. 527, 145 N.W. 999 (1914); **Baer v. Kolmorgen,** 181 N.Y.S.2d 230 (1958). Particularly significant are the decisions from Illinois, Nebraska, and New York since their respective constitutional provisions are as stringent as Article X, Section 6(1) of the 1972 Montana Constitution. At 79 A.L.R.2d 1167-1170 there is a subsequent annotation regarding cases contra to the foregoing. However, nearly all of these are Pennsylvania decisions based rather vaguely upon their state constitution, the real grounds being a statute (T. 24, §7-775, P.S.A.) which allows leasing of school property only for purposes relating directly to the instruction of pupils. Because that statute is much more restrictive than section 75-8211, those decisions have doubtful application to the instant case.

Oddly, the cases cited in support of Attorney General Foot's opinion all involved actual expenditures of funds to or on behalf of institutions under sectarian control. This fact was not at issue in his opinion, nor is it here. Such a payment was the crucial factor in **State ex rel. Chambers v. School District No. 10,** which held unconstitutional the hiring by the school district of teachers to teach secular subjects in a parochial high school. The debates surrounding Article X, Section 6(1) reveal that continued prohibition of such payments was the primary objective of the convention delegates. On the other hand, **Chambers** approved a statute (now section 75-7010) allowing private school pupils to ride on public school buses as long as their parents paid the proportionate share of the transportation. The court said such an arrangement clearly indicates **no public money is to be spent** for private school pupils either directly or indirectly. (Emphasis added) **Chambers,** 155 Mont. at 438-440. That situation is analogous to the one at hand, for in both instances money is paid into, not out of, the public coffer. **Chambers** at least suggests there is room for some accommodation of religious groups by the state without doing violence to our constitution. School rental payments thus appear to avoid the further question here of whether the trustees would make a "grant" of property by renting the gymnasium to AWANA.

In view of the foregoing, I conclude that religious groups can use public school property on an occasional and short-term basis, upon securing consent of the school district trustees. A fair rental should be charged for such use to preclude a "grant" of property under Article X, Section 6(1). Also, it is assumed such use will neither interfere with the use of the school for school purposes, nor cause any appreciable wear and tear which would require expenditure of public funds. In applying the admittedly subjective standard of occasional and short-term use, I am unable to say precisely how often is too often or how long is too long. The board of trustees may find it desirable to implement guidelines governing this matter, and rental as well, so that all prospective lessees — religious and otherwise — can be treated alike. Nothing in this opinion should be construed to mean that the trustees must lease school facilities; they clearly have

discretion to refuse. However, once the practice of leasing is generally instituted, it would be arbitrary and fundamentally unfair to discriminate among qualified lessees.

I do not perceive any federal constitutional question raised by the facts presented.

THEREFORE, IT IS MY OPINION:

Religious groups can use public school facilities on an occasional and short-term basis during non-school hours upon securing permission from the school district trustees and paying a fair rental.

Very truly yours,

ROBERT L. WOODAHL
Attorney General