OFFICIAL OPINION NO. 3

January 27, 1967

CONSTITUTIONAL LAW—SCHOOLS AND EDUCATION—Providing School Bus Facilities for Children Attending Non-Public Schools.

Opinion Requested by House of Representatives, Indiana General Assembly.

This is in response to House Resolution No. 18, requesting an Official Opinion on the constitutionality of House Bill No. 1075.

House Bill No. 1075, commonly referred to as the "Fair Bus Bill," provides:

> "In the interest of the safety of the school children of the state, the school bus transportation authorized herein shall also be made available by each school corporation to non-public elementary and secondary school students residing within the confines of the corporation. The transportation thus provided non-public elementary and secondary school students shall be substantially equal to transportation provided public school students in similar circumstances. The governing body of any school corporation transporting said non-public school students residing in their district may purchase necessary equipment or contract for such transporting of non-public school pupils as may be necessary."

The question presented when viewed under the First Amendment to the Constitution of the United States and Art. 1, § 6, of the Constitution of Indiana, is neither novel nor profound as a question of constitutional law in American juris-

prudence. If anything, it is surprising, in light of the decisions, that the question still has vitality.

The Supreme Court of the United States in *Everson v. Board of Education,* 330 U.S. 1 (1947), with Justice Black speaking for the Court, held that reimbursement of fares by the school board to parents paying for public transportation for their children attending private schools was not violative of the First Amendment.

Indiana Attorney General James A. Emmert, later a Justice of the Supreme Court of Indiana, joined with the Attorney General of Illinois representing their respective states as amici curiae urging affirmance of the constitutionality of the New Jersey statute in the *Everson* case because of similar statutes in their respective states.

The Court similarly held that the First Amendment was not violated when the State supplied free textbooks to private schools in *Cochran v. Louisiana State Bd. of Education,* 281 U.S. 370 (1930). The Court reasoned in both the *Everson* case and the *Cochran* case that the activities involved were a legitimate use of the general welfare power of the State to provide for the education and safety of the children and of only speculative incidental benefit to the religious organization.

The *Everson* case clearly disposes of the question under the First Amendment.

We, therefore, turn to the question under the Indiana Constitution. Article 1, §§ 2, 3, 4, 5 and 6 of the Constitution encompass the same principles of freedom of religious practice and state established religions as the First Amendment. While, the wording may differ somewhat, the principles of constitutional law applicable to each are identical, particularly in light of the purpose of the provisions in the Indiana Constitution. Protective provisions on religion were an essential part of the Bill of Rights of the Indiana Constitution prior to the twentieth century since the Bill of Rights of the Federal Constitution had not been held directly applicable to the States. In *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), the First Amendment was made directly applicable to the states on a basis equal to its Federal application. The *Murdock* case,

in essence dispensed with the necessity of the same provisions in the State Constitutions. Nonetheless, they do exist in Indiana as well as her sister states and do have force and effect in form though not in substance.

The constitutional questions which you pose have been considered in several other states which have followed much the same reasoning as the *Everson* case in holding the statutes constitutional. *Bowker v. Baker,* 73 Cal. App. 2d 653, 167 P. 2d 256 (1946); *Nichols v. Henry,* 301 Ky. 434, 191 S. W. 2d 930 (1945); *Board of Educ. of Baltimore County v. Wheat,* 174 Md. 314, 199 A. 628 (1938); *Adams v. County Commrs.,* 180 Md. 550, 26 A. 2d 377 (1942). Also see *Dickman v. School Dist. No. 62,* 232 Or. 238, 366 P. 2d 533 (1961); *Chance v. Mississippi State Textbook Bd.,* 190 Miss. 453, 200 So. 706 (1941); *Southside Estates Baptist Church v. Board of Trustees,* 115 So. 2d 697 (Sup. Ct. Fla. 1959) and *Bradfield v. Roberts,* 175 U.S. 291, (1899).

The court in *Snyder v. Town of Newtown,* 147 Conn., 374, 161 A. 2d 770, 778, 779 (1960), in upholding the Connecticut statute under its Constitution, said:

> ". . . It aids the parents in sending their children to a school of their choice, as is their right. It protects the children from the dangers of modern traffic and reduces the hazard of contracting illness in bad weather. It is consistent with the present-day policy of gathering children into modern schools for better educational opportunities. It primarily serves the public health, safety and welfare and fosters education. In the light of our history and policy, it cannot be said to compel support of any church."

In the most recent decision considering the constitutionality of the "Fair Bus Bill", the Supreme Court of Pennsylvania held that the act did not violate the Pennsylvania Constitution relying upon the reasoning in the *Everson* case. *Rhoades v. School Dist. of Abington Township,* 424 Pa. 202, 226 A. 2d 53, 35 Law Wk. 2415 (1967). Justice Musmanno in referring to the attack on the act under the commonwealth's constitution said that "these assertions are so feeble of merit that they must fall in the slightest breeze of analysis."

A similar view has long existed in Indiana. The Attorney General, on two different occasions in 1936, had the opportunity to consider Acts 1933, ch. 54, § 1, Burns IND. STAT. ANN. § 28-2805 which provided for bus transportation for children attending private schools residing on or along the regular bus route, which is nearly identical to Acts of 1965, ch. 260, § 901, Burns § 28-3943, the Acts being amended by Bill 1075. On neither occasion did the Attorney General consider the constitutional questions, but instead interpreted the act in a somewhat favorable light for the children attending the private schools. 1936 O.A.G., p. 404; 1936 O.A.G., p. 415.

Similarly, as previously discussed, Attorney General Emmert filed an amicus curiae brief in the *Everson* case urging the rule that was adopted by the Court in its opinion. A similar view was reflected by the Supreme Court of Indiana in *State ex rel. Johnson v. Boyd,* 217 Ind. 348, 28 N.E. 2d 256 (1940).

The public policy that has evolved in Indiana through the Attorneys General and the State Supreme Court is like that in the *Everson* case favoring validity of statutes or conduct which is in the educational or safety interests of the school children although tinged with an incidental benefit to a religious group.

The reasoning and decision of the Supreme Court in the *Everson* case is of more than persuasive value since it involves a question of constitutional law nearly identical to the question that you pose. It stands as the cornerstone of the doctrine of constitutional law that State acts or conduct designed for the protection and well being of its youthful citizens will not be struck down on the basis of some incidental quasi religious benefit.

Also, inescapable is the fact that the Indiana statute was directly brought into issue in the *Everson* case by the amicus curiae appearance of the State of Indiana. The only difference between that Indiana Act and the one under consideration is the fact that the former statute made the providing of free bus transportation to private students discretionary with school officials and the present bill would make it mandatory. This difference is inconsequential.

One of the paramount duties of State government, under our governmental system, is education of the citizens. An equally paramount duty is the safeguarding of citizens from unnecessary hazards, particularly those precipitated by a mechanical and motorized society.

The principle underlining the validity of state statutes providing transportation for private school pupils is that the direct benefit is to the pupil and not the school they attend; and health, welfare and safety measures should be applied to all children regardless of race or religion.

Free bus transportation for pupils attending private schools has existed in Indiana since 1933 without federal or state judicial interference.

It is regrettable that a statute that has reflected the formal public policy of this state for thirty-four years should now precipitate divisive arguments between the citizenry that were peaceably laid to rest so many years ago.

In light of the *Everson* case and the long public policy of this state the assertions, as Justice Musmanno said, are so feeble of merit as to fall at the slightest breeze of analysis.

The law leads to but one conclusion. It is, therefore, my Opinion that House Bill 1075 is constitutional under the Constitution of the United States and the Constitution of Indiana.

It should be pointed out, however, in closing, that while the Bill is constitutional it is vague in that it does not specify to where or from where the transportation shall be provided. It merely refers to the duty of the school corporation to provide such transportation to students residing within the confines of the corporation. The Bill should specify the route or destination intended to be permissible in providing such transportation so as to avoid confusion and uncertainty in implementing the measure.