b) Sec. 4 of Act 272 and Sec. 7 of Act 146, P.A. 1919, M.S.A. § 14.1 et seq., authorizes the promulgation of rules and regulations for the control of venereal diseases, and with this authority the Commissioner of Health, with the concurrence of the State Council of Health, may promulgate regulations to carry out the purpose of the acts.

c) In view of the answers to the above questions, it is not necessary to answer this one.

FRANK J. KELLEY,
Attorney General.

630819.1

CONSTITUTIONAL LAW: First Amendment to the Constitution of the United States, Article I, Sec. 4, and Article IX, Sec. 11 of the Revised Constitution of Michigan.

SCHOOLS: Transportation of public and nonpublic school students.

Act 241, P.A. 1963 is constitutional under the test of the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution of the United States.

Act 241, P.A. 1963 is in accord with the Revised Constitution of 1963, both as to Article I, Sec. 4 and Article IX, Sec. 11 thereof.

No. 4177 August 19, 1963.

Hon. William J. Leppien
State Senator
1103 Cornelius Street
Saginaw, Michigan

In your recent letter you have asked for my opinion in answer to the following question:

> Does Act 241, P.A. 1963 violate either the First Amendment to the Constitution of the United States or Article I, Sec. 4 of the Revised Constitution of Michigan 1963, adopted by the electorate on April 1, 1963?

Act 269, P.A. 1955, as amended, is known as the School Code of 1955, being C.L.S. 1956, § 340.1 et seq.; M.S.A. 1959 Rev. Vol. § 15.3001 et seq. Sec. 592 of the School Code of 1955 empowers a board of education, in its discretion, to provide bus transportation for students in attendance in private or parochial schools when the school district provides transportation for its students to the public school. The statute requires elementary and high school pupils to be treated equally when transportation is afforded nonpublic school students.

The legislature has amended Sec. 592 of the School Code of 1955 and other pertinent sections thereof through Act 241, P.A. 1963, effective July 1, 1964. Because the Public Acts of 1963 have not been published, we quote the provisions of Act 241, P.A. 1963, in full, as follows:

> "Sec. 590a. Any school district transporting or paying for transportation of any of its resident pupils, except mentally and physically

handicapped children under section 774 of this act, or children enrolled in special education classes, shall transport or pay for the transportation of every resident child in the elementary and high school grades for whom the school district is eligible to receive an allotment from the school aid fund for transportation pursuant to section 11 of Act No. 312 of the Public Acts of 1957, as amended, attending either the public or the nearest state approved nonpublic school available to which nonpublic school the child is eligible to be admitted, in the school district, without charge to the resident child, his parents, guardian or person standing in loco parentis to the child. No school district shall be required to transport or pay for transportation of any resident child living within 1½ miles, by nearest traveled route, to the public or state approved nonpublic school in which he is enrolled. No school district shall be required to transport or pay for the transportation of any resident child attending a nonpublic school who lives in an area less than 1½ miles from a public school in which public school children are not transported, except that the school district shall be required to transport or pay for the transportation of such resident child from the public school within such area to the nonpublic school he attends. The state approved nonpublic school is defined as one complying with the provisions of Act No. 302 of the Public Acts of 1921, being sections 388.551 to 388.558 of the Compiled Laws of 1948."

"Sec. 590b. No school district shall be required to transport or pay for the transportation of resident children to state approved nonpublic schools located outside the district unless the school district transports any of its resident children, other than mentally and physically handicapped children under section 774 of this act or children enrolled in special education classes, to public schools located outside the district, in which case the school district shall transport or pay for the transportation of resident children attending a state approved nonpublic school at least to the distance of the public schools located outside the district to which the district transports resident children and in the same general direction."

"Sec. 591. The board of any school district may enter into a contract with any other district or with private individuals to furnish transportation for nonresident pupils attending public and state approved nonpublic schools located within such district or in other districts. In no event may the price paid for such transportation be less than the actual cost thereof to the district furnishing the same."

"Sec. 592. Children attending public and the nearest state approved nonpublic school available, to which nonpublic school the child may be admitted, shall be transported along the regular routes as determined by the board of education to public and state approved nonpublic schools. Transportation to public and the nearest state approved nonpublic school located within or outside the district to which nonpublic school the child is eligible to be admitted shall be provided in accordance with rules and regulations promulgated by the superintendent of public instruction, which rules shall not require

the transportation or payment for transportation for nonpublic school children on days when public school children are not transported. Nothing contained in this act shall be construed to require or permit transportation of pupils to a state approved nonpublic school attending in the elementary grades where such transportation is furnished by the district for high school pupils only, nor to require or permit the transportation of pupils to a state approved nonpublic school attending the high school grades where such transportation is furnished by the district for elementary pupils only. All vehicles used for the transportation of children shall be adequate and of ample capacity."

"Sec. 600. The superintendent of public instruction shall have authority by himself or someone designated by him, to review, confirm, set aside or amend the action, order or decision of the board of any school district with reference to the routes over which pupils shall be transported, the distance such pupils shall be required to walk, and the suitability and number of the vehicles and equipment for the transportation of the pupils."

I shall first consider this legislation in the light of the First Amendment to the Federal Constitution, which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The law is well settled that through the Fourteenth Amendment the Establishment Clause and the Free Exercise Clause contained in the First Amendment to the Constitution of the United States are binding upon the states. *Cantwell v. State of Connecticut,* 310 U.S. 296; *Gideon v. Wainwright,* 372 U.S. 335.

It must follow that the provisions of Act 241, P.A. 1963 must conform to both the Establishment Clause and the Free Exercise Clause of the First Amendment.

Act 241 requires, inter alia, that any school district transporting or paying for the transportation of any of its resident pupils, shall furnish transportation without discrimination to every resident child in the elementary and high school grades for whom the school district is eligible to receive an allotment from the school aid fund for transportation, regardless of whether the child is attending the public or the nearest state approved nonpublic school available.

On June 17, 1963 the United States Supreme Court in *School District of Abington Township v. Schempp,* 374 U.S. 203, 10 L. ed. 2d 844, struck down state statutes which required daily reading of the Bible and recitation of the Lord's Prayer in the public schools of Pennsylvania. In this decision Justice Clark, speaking for the Court, laid down the text by which Act 241, P.A. 1963 must be measured:

"The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative

> power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Can it be said that the purpose and primary effect of Act 241, P.A. 1963 is the advancement or inhibition of religion? An examination of other Michigan statutes governing education may be helpful in making this determination.

Compulsory attendance at school has long been the established policy in Michigan. Sec. 731 of the School Code of 1955, as amended by Act 134, P.A. 1962, provides in pertinent part:

> "(a) Except as provided in section 732 and subject to the provisions of subsection (b), every parent, guardian or other person in this state, having control and charge of any child between the ages of 6 and 16 years, shall send such child, equipped with the proper textbooks necessary to pursue his school work, to the public schools during the entire school year, and such attendance shall be continuous and consecutive for the school year fixed by the district in which such child is enrolled. In school districts which maintain school during the entire year and in which the school year is divided into quarters, no child shall be compelled to attend the public schools more than 3 quarters in any one year; but a child shall not be absent for any 2 consecutive quarters."

Under Sec. 732 of the School Code of 1955, children are not required to attend the public schools, said section providing in part:

> "In the following cases, children shall not be required to attend the public schools: (a) Any child who is attending regularly and is being taught in a private, parochial or denominational school which has complied with all the provisions of this act and teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which such private, denominational or parochial school is located; * * *."

Parents or persons standing in *loco parentis* who fail to comply with the compulsory education laws are deemed guilty of a misdemeanor, and upon conviction thereof are subject to penalty by fine and/or imprisonment, pursuant to Sec. 740 of the School Code of 1955.

The Northwest Ordinance and successive constitutions, including the new Constitution of 1963, Article VIII, Section 1, have provided that:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

These portions of the School Code of 1955 express the public policy of the state to be that parents or persons standing in their place must educate their children at the risk of criminal penalty. The Michigan Supreme Court has underscored the wisdom of this policy in *Messmore v. Kracht,* 172

Mich. 120, when, in upholding a statute concerning truant children, it remarked:

> "These measures are justified upon the theory that in a republic all the citizens should be so educated as to be able, when attaining maturity, to intelligently act upon the questions awaiting solution by adult citizens."

At the same time the legislature has recognized the rights of parents to select nonpublic schools for the education of their children. The right of parents to select nonpublic church-related schools for the education of their children is guaranteed by the Constitution. *Pierce v. Society of Sisters,* 268 U.S. 510.

It must be observed that the mandate of compulsory education which recognizes the right of parents to send their children to private, parochial or denominational schools must be read in the light of the standards imposed upon such nonpublic schools by the legislature through the provisions of Act 302, P.A. 1921, being C.L. 1948, § 388.551 et seq.; M.S.A. 1959 Rev. Vol., § 15.1921 et seq. Nonpublic schools that meet the standards of the state serve and implement the public policy and purpose underlying the compulsory education laws. Act 241, P.A. 1963, as shown later herein, by affording transportation for children attending both public and nonpublic schools on a nondiscriminatory basis assures the regular and safe attendance of Michigan children at state approved schools, both public and nonpublic, and is a further implementation of the policy expressed in the Michigan Constitutions and our compulsory education laws.

The Establishment Clause of the First Amendment was recently considered by the United States Supreme Court in *McGowan v. Maryland,* 366 U.S. 420, a case wherein complainants were attacking the so-called "Sunday Closing Law" of Maryland on the basis that Sunday is the Sabbath day of Christian sects and that same was an unconstitutional promotion of Christianity. In holding that the main purpose of the statute was to provide a uniform day of rest for all citizens so as to insure the public health and well-being, Chief Justice Warren, for the Court, stated:

> "* * * [I]t is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare or society, wholly apart from any religious considerations, demands such regulation."

The constitutionality of Act 241, P.A. 1963, when tested by the First Amendment, is determined by the decisions of the United States Supreme Court.

In *Everson v. Board of Education,* 330 U.S. 1, a New Jersey statute authorized local school districts to make rules and contracts for the transportation of children to and from schools. Pursuant to this statute a township board of education authorized reimbursement to parents of money expended by them for the expense of bus transportation on regular commercial lines, including transportation to nonpublic, church-affiliated schools. In rejecting the contention that the statute forced residents of the school

district to pay taxes for the support and establishment of religious schools in violation of the First Amendment, the Court said:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."

The court concluded that a statute assisting children to secure a secular education served a public purpose. The state of New Jersey did not contribute public money to any school, rather the statute helped parents to get their children, regardless of their religion, safely and expeditiously to state approved schools.

Sec. 592 of the School Code of 1955, prior to its amendment by Act 241, P.A. 1963, provided transportation for nonpublic school children in the discretion of the board of education only. Thus transportation of such children was optional. The statute was ruled to be in accord with the First Amendment to the Constitution of the United States by Attorney General Thomas M. Kavanagh in O.A.G. 1955-56, Vol. I, page 469.

Although the ruling in *Everson* was determined by a vote of 5 to 4, the decision is still the law of the land. It was used extensively as a precedent in *School District of Abington v. Schempp,* supra, and was the controlling precedent in *Sherbert v. Verner,* 374 U.S. 398, 10 L. ed. 2d 965. In *Sherbert* a statute providing for unemployment compensation benefits but denying them to a member of the Seventh-Day Adventist Church because of her refusal to work on her Sabbath Day was held to be offensive to the Free Exercise Clause of the First Amendment to the Constitution of the United States. The court ruled that the statute, in requiring a choice between following the precepts of one's religion on the one hand and forfeiting welfare benefits on the other, imposed a burden upon the free exercise of religion in violation of the Free Exercise Clause of the First Amendment. The court concluded by stating:

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson v. Board of Education,* 330 U.S. 1, 16, 91 L. ed. 711, 724, 67 S Ct 504, 168 A.L.R. 1392."

The holding in *Sherbert* is clear. A statute providing public welfare benefits may not discriminate against persons because of the religion or the lack of religion of any person, without offending the Free Exercise Clause of the First Amendment. Under the decision in *Everson* the United States Supreme Court has ruled that bus transportation of children to state

approved, church-related, nonpublic schools is a public welfare benefit. Act 241, P.A. 1963 affords the public welfare benefit of bus transportation to children in attendance at school, both public and nonpublic, without discrimination because of the religion or lack of religion of any child.

The purpose and primary effect of Act 241, P.A. 1963 is to assist parents in complying with the compulsory education laws in that their children are able to secure an education in safety and good health. This is in fulfillment of a secular legislative purpose that neither advances or inhibits religion.

These precedents and the clear public policy of the State of Michigan on the matter of compulsory education compel the conclusion that Act 241, P.A. 1963 is in complete harmony with the First Amendment to the Constitution of the United States.

We now turn to a consideration of Act 241, P.A. 1963 in the light of the provisions of Article I, Sec. 4 of the Michigan Constitution of 1963, which is identical to the provisions of Article II, Sec. 3 of the Constitution of 1908, and provides:

> "Sec. 4. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

Consideration must also be given to Article IX, Sec. 11 as it was approved by the Constitutional Convention on the third reading on May 11, 1962. In pertinent part this section provided as follows:

> "There shall be established a state school aid fund which shall be used exclusively for the support of public education and school employees' retirement systems as provided by law. * * *"
>
> Journal of Constitutional Convention, 1961 No. 136A, p. 17.

The restriction of the moneys in the state school aid fund for the support of *public* education on third reading by the Constitutional Convention became a matter of public controversy in that such restriction could serve to bar the use of such funds from the state school aid fund so constituted for transportation of nonpublic school students.

On July 31, 1962, in a speech delivered in Detroit, Michigan, Governor John B. Swainson criticized the proposed revised constitution, as approved on the third reading by the Constitutional Convention, and the Detroit Free Press in reporting his remarks made the following observation:

> "The Governor lashed at a provision which he said would prohibit school districts, at their discretion, from using school buses to transport pupils to and from nonpublic schools.

" 'This kind of discrimination against children is insupportable,' he charged."

Detroit Free Press, August 1, 1962, Metropolitan Final Edition, page A-3.

See also Grand Rapids Press, August 1, 1962, page 28.

The question so raised appeared to be well taken. The cost of bus transportation of children to both public and nonpublic schools has been paid in large measure by the people of the state of Michigan through the state school aid fund established by them in Article X, Sec. 23 of the Constitution of 1908, as amended by the people in 1952, and paid out as provided by the legislature in Sec. 11 of Act 312, P.A. 1957, as amended by Act 267, P.A. 1959, M.S.A. 1961 Cum. Supp. § 15.1919(61). Where other state constitutions have earmarked school aid funds exclusively for the support of public schools or public education, state statutes authorizing bus transportation for nonpublic school students, to be financed with moneys from such state school aid funds, have been held to violate the state constitution. *Sherrard v. Jefferson County Board of Education,* 171 S.W. 2d 963; *Mitchell v. Consolidated School District,* 135 P 2d 79.

On August 1, 1962 the Constitutional Convention reconvened to conclude its work. In reporting the proposed work of the convention on that day, the Detroit News, in its Final Edition in a story appearing on pages 1-A and 9-A, made the following observation:

"The GOP caucus also decided: * * *

"Corrections in the document will be accepted. One would clarify the right of public school buses to transport parochial school students along the regular line of travel. * * *"

See also Jackson Citizen Patriot, Home Edition, August 1, 1962, page 1.

Upon recommendation of the Chairman of the Committee on Style and Drafting to the Constitutional Convention on August 1, 1962 by vote of 136 to 5, the Convention approved a number of amendments, including an amendment to Article IX, Sec. 11, to read in pertinent part as follows:

"There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems as provided by law. * * *"

After the vote was taken to amend Article IX, Sec. 11 the minutes of the Convention showed the following:

"The following is the explanation of the vote submitted by Messrs. Faxon, Jones, Nord, Norris and Young:

" 'The reason for our voting "no" in the change proposed by the committee on style and drafting is that the change made in Article IX on finance and taxation in Sec. 11 was substantive in form and should have been considered as such.' "

This final action taken by the Constitutional Convention on August 1, 1962, was duly reported by the press.

The Detroit Free Press, on August 2, 1962 on pages 1-A and 2-A, covered the final work of the Convention and made the following statement:

> "One change will clarify the school-aid fund-limitation which some lawyers had interpreted as outlawing the Michigan practice of allowing parochial school students to ride public school buses.
>
> "Gov. Swainson called attention to the language on Tuesday in a statement issued in Detroit. It was discussed Tuesday night also in party caucuses.
>
> "DELEGATES SAID on Wednesday the language had never been intended to interfere with the transportation of parochial students but the change was made to remove any question of intent."

In a story appearing in the Detroit News, Final Edition, August 2, 1962, on page 12-A, the final actions of the Constitutional Convention were noted and the following observation made:

> "Besides finishing work and ordering the vote on the new constitution on next April, they also * * *
>
> "Adopted a variety of minor amendments, including ones to make sure that parochial school students may ride public school buses along regular routes of travel and that municipalities are exempt from voter eligibility limitation on certain tax village increases above the 15-mill limitation."

The State Journal published in Lansing, Michigan, on August 1, 1962, Home Edition, pages A-1 and A-2, reported the conclusion of the Constitutional Convention and stated as follows:

> "A provision of the document which had recently been questioned as a possible barrier to allowing parochial school children to ride on public school buses was reworded Wednesday.
>
> "One delegate said that the convention had no intention of upsetting existing law which permits the practice. The problem was resolved by a simple change in phrasing along with other adjustments in punctuation and grammar recommended by the convention's style and drafting committee."

The action of the Constitutional Convention in regards to the change in the language of Article IX, Sec. 11 was also published in numerous other Michigan newspapers, but the above quotations are indicative of the history of the times surrounding the deliberations of the framers of the revised Constitution.

The Michigan Supreme Court has never had occasion to pass upon the question with which we are here confronted, but two Attorneys General have had occasion to rule upon similar questions thereto. On March 14, 1939 Attorney General Thomas Read rendered an opinion in a letter to Senator Joseph A. Baldwin regarding proposed House Bill No. 66 of that year. The Bill read:

> "The board of education of any school district which furnishes transportation for resident pupils shall furnish transportation for children residing within the district who attend private or parochial schools of elementary or high school grades. * * *"

Attorney General Read found the proposed Bill not violative of the provisions of Article II, Sec. 3 of the Constitution of 1908, which is identical to the provisions contained in Article I, Sec. 4 of the new Michigan Constitution. In a brief filed amicus curiae in the *Everson* case, supra, Attorney General Foss O. Eldred attached a copy of the Read opinion and said:

> "The opinion referred to was still the opinion of the Attorney General of Michigan."

On November 8, 1948, in a letter directed to the Reverend Edward T. Walling, Port Huron, Michigan, Attorney General Eugene F. Black stated that he had made an exhaustive review of the subject and concluded, inter alia:

> "Third: The legislature clearly has constitutional authority to provide for transportation of parochial school students, whether they be resident or nonresident of the district."

House Bill 66, 1939 Legislature, the subject of inquiry to Attorney General Thomas Read, was approved by the Michigan Legislature and became Act 38, P.A. 1939, effective September 29, 1939. Since that time Michigan children in attendance at nonpublic schools had been transported to school at the option of the board of education of the resident school district. Such transportation has been borne in large part by the state from the state school aid fund as indicated above.

It is significant that the Constitutional Convention of 1961 took no steps to expressly bar such bus transportation and as has been observed, significant changes were made in Article IX, Sec. 11 to continue the use of state school aid fund moneys established thereunder to be expended for the transportation of all Michigan school children without discrimination as to the school of attendance.

This history of the work of the Constitutional Convention and the record of communication of the work for the understanding of the people of Michigan have been recited herein with care because the history of the times is significant in the matter of construction of the constitutional provisions. *The People on the relation of Bay City v. The State Treasurer,* 23 Mich. 499; *Bacon v. Kent-Ottawa Metropolitan Water Authority,* 354 Mich. 159.

As a delegate to the Constitutional Convention of 1961, the recitation of the history of the times of the Constitutional Convention and its communication for the understanding of the people, particularly as to Article IX, Sec. 11, is well known to you since you are recorded as having approved the amendment to Article IX, Sec. 11 by the Convention of August 1, 1962.

An examination of the precedents in other jurisdictions finds substantial authority to support the constitutionality of Act 241, P.A. 1963.

Comparable state statutes authorizing the expenditure of public money for the transportation of children to church-related, nonpublic schools when tested by similar state constitutional provisions relating to separation of church and state have been upheld by a number of state courts. The leading case is *Everson v. Board of Education,* 44 A 2d 333, affirmed by the United States Supreme Court in 330 U.S. 1. The state Constitution of New Jersey barred the giving of direct or indirect aid to sectarian schools. The New

Jersey court of appeals held that the statute which provided for transportation at public expense of children in attendance at church-related, nonpublic schools served a public need in that it helped parents to fulfill the obligation imposed upon them by the compulsory education laws.

In *Snyder v. Town of Newton,* 161 A 2d 770, the Connecticut Supreme Court upheld a state statute authorizing public funds to be spent for bus transportation of all children to public and private schools. The Connecticut Constitution prohibited compulsion of any person to join or support any congregation, church or religious association. The court concluded that the statute not only assisted parents in sending the children to the school of their choice, but the statute also fostered the health and safety as well as the education of the children by safeguarding them from the hazards of modern traffic.

The Kentucky Supreme Court in *Nichols v. Henry,* 191 S.W. 2d 930, 932, found constitutional a statute empowering the use of public funds for bus transportation of public and nonpublic school children. The Kentucky state constitution circumscribed preferences to any religious sect, society or denomination. The court ruled that the legislature in authorizing such bus transportation was exercising the police power "for the protection of childhood against the inclemency of the weather and the hazards of present day highway traffic."

In *Bowker v. Baker,* 167 p 2d 256, the court upheld a statute providing for bus transportation at public expense for nonpublic school children when tested by a California constitutional provision prohibiting the use of public money for the support of sectarian or denominational school. The court held that the direct benefit of the statute flowed to the child in providing for his safety and in the promotion of his education, with only an indirect benefit to the nonpublic school; *Board of Education of Baltimore County v. Wheat,* 199 A 628. See also *Quinn v. School Committee of Plymouth,* 125 N.E. 2d 410, and *Squiers v. Inhabitants of the City of Augusta,* 153 A 2d 80.

There are precedents holding to the contrary but these precedents are not controlling. Under a comparable constitutional provision, the court in *State v. Nusbaum,* 115 N.W. 2d 761, declared unconstitutional a state statute authorizing the transportation of nonpublic school students to the location of the public school. The Wisconsin constitution prohibited the use of public money for the benefit of "religious societies, or religious or theological seminaries." In a divided opinion, the majority of the court rejected the child benefit theory and held that the school was the beneficiary of the statute. *Nusbaum* is not persuasive for three reasons. Unlike Michigan where the constitutional history and the history of the times of the Revised Constitution reveal that special effort was made to phrase the state's school aid fund provision (Article IX, Sec. 11) so as to insure the availability of such funds to pay for bus transportation of all children, including the transportation of children to nonpublic schools, the constitutional history of the state of Wisconsin reveals that the Wisconsin electors in 1946 rejected a constitutional amendment making moneys from the state school aid fund established therein available for transportation of nonpublic school children. See dissenting opinion of Mr. Justice Fairchild.

page 772 of the opinion. Secondly, Act 241, P.A. 1963, in the main, provides for transportation of resident children *to* the nearest nonpublic school within the district. Thus, the statute can be advanced as an aid to parents in complying with the compulsory education laws of the state and as a safety and health measure in securing the attendance of children at school in furtherance of a public purpose. On the other hand, the Wisconsin statute provided for those in attendance in nonpublic schools to be transported to the public school only. Thus, it is difficult to support the statute as a health and safety measure as far as children are concerned and as an aid to the parents to comply with the compulsory education law when the statute provides that the children are to be delivered to the public school when they are in attendance at nonpublic schools. Finally, the people of Wisconsin did not adopt their revised Constitution after bus transportation of nonpublic school students at public expense had been provided for more than 23 years.

Where a statute is capable of more than one construction, one consistent with constitutionality and the other inconsistent, the court will consider the constitutional construction as one presumptively intended by the legislature. *Sullivan v. Michigan State Board of Dentistry,* 268 Mich. 427.

The right of parents to select church-related, nonpublic schools for the education of their children is safeguarded by the Constitution. *Pierce v. Society of Sisters, supra.* The decision in *Everson* is sound authority for the proposition that school bus transportation is a public welfare benefit. *Sherbert* holds that the Free Exercise Clause of the First Amendment demands that public welfare benefits be extended to all qualified persons and cannot be denied to any person because of his belief or lack of belief. Act 241, P.A. 1963, makes a public welfare benefit, i.e., bus transportation to both public and nonpublic schools, available to all persons regardless of their belief or lack of belief. If Article I, Sec. 4 of the Revised Constitution can be construed to bar transportation of children in attendance at church-related, nonpublic schools in the light of *Sherbert,* it could be argued that this portion of the Michigan Constitution appears to be in conflict with the Free Exercise Clause of the First Amendment to the Constitution of the United States. I am persuaded that such construction of Article I, Sec. 4 of the Revised Constitution is not required. With the known history of 23 years of bus transportation of Michigan children to public and nonpublic schools the framers of the Revised Constitution and the people in approving the Revised Constitution did not bar bus transportation to children in attendance at church-related, nonpublic schools.

Under the authority of *Everson and Sherbert* and the numerous state cases cited herein, I am constrained to rule that Act 241, P.A. 1963, provides a public welfare benefit to parents and children — to parents by helping them to get their children to school so that they are in compliance with the compulsory education laws, and to children by transporting them in good health and safety to school so that they may be educated as good citizens in the community. Parents and children, therefore, are the direct beneficiaries of the intendments of Act 241, P.A. 1963, not the school that has been selected for the education of the children.

Therefore, it is my opinion that Act 241, P.A. 1963, is constitutional

when tested by the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution of the United States. Further, it is my opinion that Act 241, P.A. 1963, is in accord with the Revised Constitution of 1963, both as to Article I, Sec. 4 and Article IX, Sec. 11 thereof.

FRANK J. KELLEY,
Attorney General.

630926.1

UNIFORM COMMERCIAL CODE: Filing fees.
COUNTIES: Register of deeds.
FEES: Chattel papers.

Chattel instruments or financial statements appearing on non-standard size paper may be filed with the filing officer upon tender of the filing fee of $1.00 in accordance with Section 9403 of the Uniform Commercial Code unless the filing officer declines to accept the documents because they appear on nonstandard size paper. In that event, such documents may be filed upon tender of a filing fee of $1.50 for each paper so filed in accordance with Section 9408 of the Uniform Commercial Code.

No. 4191 September 20, 1963

Hon. James M. Hare
Secretary of State
The Capitol
Lansing, Michigan

You recently requested my opinion on whether Section 9408[1] of the Uniform Commercial Code made it mandatory that a register of deeds charge 50¢ extra for filing chattel instruments or financing statements submitted on nonstandard paper. An examination of the legislative history of this section has been made. The House of Representatives amended Enrolled Senate Bill No. 1014 by adding a new section to stand as Section 9408 as follows:

> "The secretary of state or register of deeds need not accept for filing a financing statement or chattel paper unless it is prepared on paper 8½ by 13 inches in size and of not less than 16 pound weight."[2]

The Senate did not concur in that amendment and a conference committee was appointed which recommended that the bill be adopted with Section 9408 amended to read as follows:

> "Register of deeds need not accept at standard rates after January 1, 1964 chattel instruments or financing statements for filing unless prepared on paper 8½ x 13 inches in size, with a ½ inch in length and width allowed for tolerance before such papers shall be deemed nonstandard, and of not less than 16 pound weight. Nonstandard chattel

[1] Act 174, P.A. 1962, as amended by Act 223, P.A. 1963, being M.S.A. Curr. Mat § 19.9408 (page 751).
[2] 1963 House Journal, No. 53, page 1186.