

Department of Justice  
Washington, D.C. 20530

15 MAY 1979

## MEMORANDUM FOR THE ATTORNEY GENERAL

Re: CETA Programs in Religiously-Affiliated Schools

On January 25, 1979, this Office responded to a request from the Solicitor of Labor for our views on the constitutional limitations on the placement of job trainees and employees in sectarian elementary and secondary schools under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.* In that opinion we reviewed the Supreme Court's decisions interpreting the First Amendment prohibition against government establishment of religion. We concluded that CETA participants were clearly barred from performing the functions of teachers, teachers aides, counselors, maintenance workers, and clerical assistants (in most cases). As to each category we found holdings in the Supreme Court's recent decisions that, in our view, foreclosed a contrary conclusion. We also concluded, however, that several other types of services either were clearly permissible under the controlling cases or were reasonably defensible. Among those that we found acceptable under the controlling decisions were health aides, kitchen workers, certain diagnostic and therapeutic services, and some forms of custodial child care.

Subsequent to the issuance of our opinion, you received statements of disagreement from a number of congressional leaders and other interested persons. Among the most comprehensive of the responses was a memorandum signed by Nathan Lewin, dated February 23, 1979. In light of the seriousness of the subject matter, and the strongly worded nature of the responses, you have asked us to reconsider several of the key issues that were involved in our opinion.

We have focused on two principal questions. First, can a reasonable case be made for the proposition that the placement of CETA participants in sectarian elementary and secondary

schools does not have a primary effect that advances religion? Stated differently, can it be fairly said that any benefit to the employing sectarian institution is designedly incidental? Second, has the Department of Justice by providing this advice to the Department of Labor overstepped the proper function of the Executive Branch, i.e., are we usurping a function belonging to the Judicial Branch by failing to recommend the broadest interpretation of the CETA religious institution provisions? For the reasons that follow, it is our conclusion that the employment of CETA participants in certain positions in religious elementary and secondary schools would have a primary effect that advances religion, and that it was proper for us to so advise the Department of Labor.

I.

Mr. Lewin's argument can be briefly summarized. In order to constitute the "establishment of religion" a program must have a primary effect that advances religion or the religious mission of sectarian institutions. If, however, the program only incidentally aids religion while achieving some legitimate nonreligious legislative purpose, that program will not be struck down under this clause of the First Amendment. Mr. Lewin points to the statutory provision requiring that trainees may only fill those jobs that are nonessential, i.e., those jobs that would not have been filled absent federal assistance.<sup>1/</sup> Based on this provision Mr. Lewin contends that CETA trainees must be employed only where the jobs they undertake are of no genuine benefit to the employing institution. Since, so the argument goes, any benefit to the schools is unintended and contrary to the statutory scheme, it cannot be said that the Act would have a primary effect beneficial to religion. Mr. Lewin's argument ignores the rather convincing legislative history of CETA that Congress fully intended that employers of job trainees would reap benefits from agreeing to employ them. It also ignores the reality that the CETA program could not hope to survive without offering a substantial quid pro quo

---

<sup>1/</sup> § 121(g)(1), 29 U.S.C. § 823(g)(1).

to the employer.

Several provisions of the Act demonstrate that Congress intended that CETA jobs would yield benefits to the entity creating the jobs. For example, section 122(c)(2), 29 U.S.C. § 824(c)(2), provides that public service employment programs of private organizations or institutions funded by prime sponsors shall only provide new services of general public benefit not customarily provided by State or local government or by a local education agency. Similarly, section 432(a)(1), 29 U.S.C. § 908(a)(1), authorizes funds for employer-grantees who will provide youth with employment and training opportunities in community betterment activities including park and neighborhood revitalization.

Several members of Congress addressed in floor debate the effect CETA is intended to have on the community by providing services that would otherwise not be provided. For example, Congressman Ford of Michigan stated in discussion of CETA on the House floor that the Act provides a means of "supplementing important community services." Cong. Rec. H8170 (daily ed. Aug. 9, 1978). Congresswoman Fenwick also commented that CETA "is being used to perform services that the cities cannot provide and that their budgets cannot cover," *id.* at H8177, and Congressman Seiberling spoke in some detail about the physical improvements and other benefit to the community in the Akron, Ohio, area resulting from CETA, *id.* at H8179. A final example is provided in the remarks of Congressman Bedell, *id.* at H8181, who stated that "[i]n addition to combating unemployment, the CETA program holds great potential for community development since its intent is to put people to work on useful public projects."

Senator Nelson, Chairman of the Labor and Public Welfare Subcommittee of the Senate Committee on Human Resources, in presenting the Committee's proposed version of the Emergency Employment Act of 1971, Pub. L. No. 92-54, 85 Stat. 146,<sup>2/</sup> on the Senate Floor, wholeheartedly endorsed the thoughts expressed in an article by Jerome M. Rosow, Assistant Secretary of Labor, in the Saturday Review of Literature of January 23, 1971,

---

<sup>2/</sup>CETA has its origins in the Manpower Development and Training Act of 1962, the Economic Opportunity Act of 1964, the Emergency Employment Act of 1971 and the Comprehensive Employment and Training Act of 1973.

in which Mr. Rosow stated:

I fear that if the job is not a real one, and if a man loses self respect by working in a job that has an image of being a program for castoffs on the dole, then he is not going to achieve independence. . . . In the past the idea was to search for a task that the unemployed could perform; little weight was given to its community benefit. The opposite approach is first to select a product or a service that is actually desired by the community. If we emphasize the product and perform a needed service to the community, the program will more nearly serve its function as an adjunct to regular employment.

Cong. Rec. S9318 (daily ed. April 1, 1971).

Another type of benefit resulting indirectly from the goal of CETA of putting people to work is indicated by the provision of section 123(h), 29 U.S.C. § 825(h), that "income generated under any program may be retained by the recipient to continue to carry out the program, notwithstanding the expiration of financial assistance for that program." This provision reflects that CETA's drafters contemplated that at least some forms of CETA employment would produce benefits to the employer and products other than the development of skills and income for the target group of trainees. The Senate Report recognizes that, in addition, businesses participating in CETA programs are relieved by the federal government of certain training, wage and benefit costs, S. Rep. No. 891, 95th Cong., 2d Sess. 78 (1978).

Possibly the strongest evidence that Congress expected that the work performed by CETA participants would be beneficial to the employer can be found in the several statements expressing the concern that CETA jobs not constitute "make work." The central point is made in the statement of congressional purpose set forth at the beginning of the Act; the purpose there stated is "to assure that training and other services lead to maximum employment opportunities and enhance

self-sufficiency." Section 2, 29 U.S.C. § 801. This goal plainly could not be realized if trainees were foreclosed from performing meaningful job tasks. This issue was addressed in the conference report accompanying CETA's predecessor--the Emergency Employment Act of 1971:

. . . [It must be] crystal clear that public service employment shall not be of the "dead end, make work" sort that is feared by the critics of public service employment.

It is the clear intention of the conferees that the program not be administered in such a way as to make of the jobs simply training "slots" with stipends, or, just as bad, a sort of disguised welfare, or transfer payment program. Such a result would be demeaning for the workers, waste taxpayers' money, and represent a fraud on the American people.

\* \* \*

At a time when the unmet needs in the public sector of the economy are so enormous--in health, teaching, and child care, in public safety and probation work, in conservation, and the environment--it would be tragic if the valuable skills and energies of those employed under this Act were wasted on meaningless jobs.

H. Rep. No. 310, 92nd Cong., 1st Sess. 13 (1971).<sup>3/</sup>

These goals are reemphasized in provisions relating to youth employment. Section 411, 29 U.S.C. § 893, explicitly

---

<sup>3/</sup> Senator Javits, ranking minority member of the Subcommittee on Labor and Public Welfare, in endorsing the Emergency Employment Act, emphasized that the Act contained safeguards against make work or dead-end jobs. Cong. Rec. S9322 (daily ed. April 1, 1971).

states that youth employment demonstration programs are not intended to provide make work opportunities for unemployed youth. Section 422(4), 29 U.S.C. § 900(4), defines another type of youth employment, "community improvement projects," as projects providing work which would not otherwise be carried out. The purpose of the youth programs is to train and provide employment to eligible youths on projects that would give them skills that will lead to meaningful employment opportunities, section 401, 29 U.S.C. § 891.

These references to the statute and its legislative history point out the premise upon which the CETA program was based--a federal employment training program, if it is to succeed, must endeavor to instill in trainees a sense that the work they perform is useful. The theme of CETA is that the unemployed can acquire valuable skills by working under the supervision of more experienced workers. But the Act is premised in significant part on the notion that the work must itself be meaningful. It would have been antithetical to this central premise of CETA for Congress to have imposed a requirement that participants perform only such functions as will confer no benefit on the employing agency. Congress' intent was to the contrary, and the Act's implementation by the Department of Labor has proceeded from the assumption that those who employ CETA trainees would realize benefits. Potential program sponsors--including religious institutions--apply for participation under CETA precisely because they foresee benefits. The program could not operate otherwise, depending as it does in significant part upon expressions of interest from employers. Given this structure, there is no room for concluding that CETA does not have a primary effect of benefiting those religious institutions that agree to serve as program sponsors.

To be sure, these employer benefits are not the primary effect of a properly run program under the Act, but the Court has frequently emphasized that a government program cannot survive scrutiny under the Establishment Clause simply because some legitimate consequence predominates. See, e.g., Committee for Public Education v. Nyquist,

413 U.S. 756, 783-84 n. 39 (1973). Unless it could fairly be concluded that the benefits to the religious institution are merely "incidental," the program could not be defended under the Court's cases. In light of the statutory framework and the supporting legislative history that contention is one that we do not believe can be sustained.

There is one additional aspect of Mr. Lewin's no-benefit argument that deserves analysis. If the Act were structured so that employers would reap no gains from the use of employees, there would be required some system to assure that result. That is, the Department of Labor would be required to develop a means of assuring that participants do not actually do work that is beneficial to the employer. It is this type of governmental supervision of employees within religious institutions that has led the Supreme Court to strike down state aid programs as posing a threat of excessive entanglement between the government and religion. 4/

In fact, the Act contemplates strict monitoring of subgrantees and subcontractors by prime sponsors and the Secretary of Labor for compliance with its restrictions, 5/ particularly if the recipients are nongovernmental organizations. 6/ Section

---

4/ See, e.g., Meek v. Pittenger, 421 U.S. 349, 369-72 (1975); Lemon v. Kurtzman, 403 U.S. 602, 615-22 (1971).

5/ See, e.g., § 103(a)(12), 29 U.S.C. § 813(a)(12); § 106(j), 29 U.S.C. § 816(j); § 121(q), 29 U.S.C. § 823(q); § 133(a), 29 U.S.C. § 835(a). See also, S. Conf. Rep. No. 1325, 95th Cong., 2d Sess. 133 (1978) (independent monitoring unit required of prime sponsors and Secretary to assess its adequacy annually); id. at 123 (Secretary to establish unit the sole responsibility of which is to monitor the CETA program).

6/ § 121(o)(3), 29 U.S.C. § 823(o)(3). See also S. Conf. Rep. No. 1325, 95th Cong., 2d Sess. 133 (1978) (independent monitoring program required of nongovernmental organizations).

133(a)(2), 29 U.S.C. § 835(a)(2), allows the Secretary to question employees and to conduct on-site inspections to assure that CETA funds are used in accordance with the statutory and regulatory provisions. A major concern found throughout the record of consideration of the 1978 amendments is the strengthening of the monitoring and auditing requirements to prevent or remedy program abuses. 7/ Included among the abuses specified in the Act was the use of funds for religious activities. Section 123(g), 29 U.S.C. § 825(g)...

Even if the statute itself did not require these types of continuing supervision and involvement, the Court's interpretations of the Establishment Clause would nonetheless impose them. It is not sufficient for the government to assume that the administrator of parochial school programs would not place CETA workers in positions that have a primary effect of aiding the sectarian institution. See Meek v. Pittenger, 421 U.S. at 369-72; Lemon v. Kurtzman, 403 U.S. at 618-19. Just as these cases found that a parochial school teacher might inadvertently entwine sectarian instruction with secular subject matter, so too might the administrator or supervisor of CETA teachers, librarians, counselors or CETA workers aiding sectarian employees in these functions, or most maintenance and clerical workers, inadvertently use these federally funded workers on a project that directly or indirectly advances the religious mission of the school. As the Court said in Meek, "a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" 421 U.S. at 371, quoting Lemon v. Kurtzman, 403 U.S. at 619.

Teachers and teachers' aides, counselors, library aides, and maintenance workers, clerical aides in most positions are like the teacher in Lemon who "cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and the subjective acceptance of the limitations imposed by the First Amendment." 403 U.S. at 619.

---

7/ See, e.g., S. Rep. No. 891, 95th Cong., 2d Sess. 42-44 (1978).



See also Wolman v. Walter, 433 U.S. 229, 254 (1977). 8/

The Supreme Court has noted another way in which entanglement problems can be created. In Lemon, the Court noted that wherever government support is given, with restrictions, to sectarian educational institutions there are likely to arise disputes between the religious authorities and those who administer the government program. 403 U.S. at 619. That same prospect would exist under this Act. CETA workers might, for instance, disagree with the sectarian school supervisors over whether the nature of the work promotes the religious mission of the school. The Act requires each recipient and prime sponsor to establish grievance procedures regarding the terms and conditions of employment, with appeal available to the Secretary of Labor. 9/ Investigations necessary to these grievance procedures raise a serious possibility of excessive governmental entanglement.

The cases upon which Mr. Lewin and others have relied for the proposition that mere "incidental" benefits to religious institutions do not occasion Establishment Clause problems, were all ones in which entanglements of the sort created by this program were not present. The textbooks for which public grants were allowed in Board of Education v. Allen, 392 U.S. 236 (1968), can be inspected once to determine their content. Public bus transportation of children to and from schools, including religious schools, as upheld in Everson v. Board of Education, 330 U.S. 1, 18 (1947), is "separate" and "indisputably

---

8/ The Court in Meek recognized that the fact that the workers were employees of a public intermediate unit rather than direct employees of the sectarian institution did not eliminate the need for continued surveillance. 421 U.S. at 371. It is, therefore, not a sufficient response here to argue that the sectarian schools are themselves not the employers but are merely serving as conduits.

9/ § 106, 29 U.S.C. § 816. See also S. Conf. Rep. No. 1325, 95th Cong., 2nd Sess. 123 (1978).

marked off from the religious function." The decision in Walz v. Tax Commissioner, 397 U.S. 664, 674-76 (1970), to uphold property tax exemptions to churches was based in significant part on the Court's conclusion that this would reduce entanglement. Those same contentions cannot be made in support of this statutory program. 10/

---

10/ Mr. Lewin has also made in his memorandum the related argument that CETA can be distinguished from other programs found by the Supreme Court to be violative of the Establishment Clause because religious institutions constitute a small percentage of all employers. In our view, in cases involving elementary and secondary schools, the Court has looked to the benefit received by those institutions. Americans United for Separation of Church and State v. Blanton, 433 F.Supp. 97, 103 (M.D. Tenn. 1977), aff'd mem., 433 U.S. 803 (1977), upheld a college tuition grant program made generally available to students in public and private schools. The Court in Blanton was careful to note that the program there under review was aimed at higher education and, like the Supreme Court's other cases, carefully drew the distinction between those institutions and elementary and secondary schools. E.g., Committee for Public Education v. Nyquist 413 U.S. at 782-83 n. 38.

It is true that most of the program sponsors under CETA are not religious institutions, but the point remains that religious institutions do constitute a significant percentage of the nonpublic educational institutions that serve as training sites.

## II.

The second issue raised by critics of our memorandum to Solicitor Claus, and addressed at some length by Mr. Lewin, is whether the Department of Justice and this Office have overstepped their appropriate function by rendering a legal opinion in this case. The argument can be summarized as follows. The issue of the constitutionality of CETA employee placement in religion-affiliated schools is susceptible of resolution by the courts. That being the case, it is the duty of this Department to defend the application of the program to church schools, even where it raises constitutional questions, until such time as there is an authoritative judicial determination of its constitutionality.

If the question, fairly put, were whether this Department would defend the constitutionality of an Act of Congress, we think we would have little quarrel with the argument. As you know, we have repeatedly acknowledged that the Executive Branch is obligated to defend and support those laws that Congress thinks are constitutionally proper at least so long as reasonable contentions can be made in their behalf. Indeed, in our prior research on this question we have located only a very few cases in which this Department has conceded the unconstitutionality of an Act of Congress. Each of these cases was one in which the constitutional flaw was patent. This, however, is not one of those cases.

The question posed to us by Labor was not whether the Act itself was constitutional. Rather, as our January 25, 1979 opinion should have made clear, the question we addressed was whether CETA might be applied to circumstances that Congress had not expressly addressed. In approaching that question we employed the well settled rule--reaffirmed this Term by the Supreme Court in its most recent Establishment Clause case, NLRB v. Catholic Bishop of Chicago, 47 U.S.L.W. 4283 (March 21, 1979), that Acts of Congress should be construed so as to be compatible with the Constitution unless it is clear that Congress intended a contrary result. In advising the Department of Labor on the proper contours of its implementing

CETA regulations we would have been remiss had we not advised that the Act should be applied so as to avoid these serious constitutional problems if that result could be achieved without acting contrary to a clear expression of Congress' intent. Because it has been suggested that our opinion does disregard Congress' intent we have reexamined the Act and its history to determine whether there exists any "clear expression of an affirmative intention of Congress," NLRB v. Catholic Bishop of Chicago, 47 U.S.L.W. at 4287, that CETA workers were to perform the functions of teachers, maintenance workers, and similar jobs in sectarian schools.

First, there is no provision in the statute that establishes whether Congress intended either to forbid or permit the several specific types of programs about which the Department of Labor inquired in seeking our opinion. There are only two provisions of the Act that touch in any way on the use of religious institutions. One provision instructs the Secretary of Labor to develop regulations that will assure against program abuses, including "the use of funds for . . . religious activities." Section 123(g), 29 U.S.C. § 825(g). The other provision simply states that participants may not be employed "on the construction, operation, or maintenance of so much of any facility as is used or to be used for sectarian instruction or as a place of religious worship." Section 121(a)(2), 29 U.S.C. § 823(a)(2). Mr. Lewin's argument rests on this latter provision and his conclusion is that CETA may operate in "areas set aside for nonsectarian activities or instruction." Lewin memorandum, at 8. His contention is that a reasonable argument can be made that this provision allows teachers, maintenance workers and others to be employed in religiously-affiliated elementary and secondary schools, and that this Department is required to make it. There is a short answer to this argument: In light of the Supreme Court cases there is serious doubt as to the constitutionality of such application of the programs and nothing in the legislative history suggests that Congress intended to impose a requirement of seriously questionable constitutionality in the Act.

Our opinion's conclusion that teachers, teacher aides, and maintenance workers were precluded from serving in

religious schools at the elementary and secondary level was premised on the holding of several Supreme Court decisions all of which stand for the proposition that the religious side of these institutions cannot be distinguished from the non-religious. Religious authority is an integral and pervasive attribute of sectarian schools that educate elementary and secondary students. NLRB v. Catholic Bishop of Chicago, 47 U.S.L.W. at 4286; Lemon v. Kurtzman, 403 U.S. at 616-17. As the Court said in Meek v. Pittenger, 421 U.S. at 366,

[t]he very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs. See Lemon v. Kurtzman, 403 U.S., at 616-17. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' Id., at 657.

The Court has spoken directly about the provision of teachers and maintenance personnel in its NLRB decision:

Only recently we again noted the importance of the teacher's function in a church school: Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. Meek v. Pittenger, 421 U.S. 349, 370 (1975).

47 U.S.L.W. at 4786. Levitt v. Committee for Public Education, 413 U.S. 472, 480 (1973), addressed the problem of separating secular from sectarian activities at this level of schooling and struck down funding of teacher-prepared tests because

the state could not meet its responsibility: ○

[T]he potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.

The Court in Committee for Public Education v. Nyquist, 413 U.S. at 774, found unconstitutional maintenance and repair payments to nonpublic elementary and secondary schools because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions." Thus, the Court has specifically and repeatedly addressed precisely the issue that Mr. Lewin would have the Department of Justice disregard. 11/

---

11/ The most recent three-judge court decision from the Southern District of New York, Committee for Public Education v. Levitt, 461 F.Supp. 1123 (1978), upon which Mr. Lewin argues we should have placed greater reliance is consistent with these Supreme Court cases and with our interpretation of them. In that case a New York statute which authorized the State to reimburse private schools for the cost of performing certain state-mandated pupil testing and record keeping was upheld. The court recognized that:

The concept that religion so pervades lower sectarian schools that even wholly secular instruction or equipment is always subject to the risk of religious orientation, rendering separation of secular and religious educational functions extremely difficult, has repeatedly been posed by the Supreme Court as an inherent problem faced in determining the constitutionality of state aid to sectarian schools.

Id. at 1127. The court went on to say, though, that:

(continued)

An examination of the history of CETA fails to provide a basis for the contention that, whatever the Supreme Court may have said on this question, Congress intended these forms of employment in sectarian schools to be permitted. Language identical to the operative CETA provisions has been contained in Congress' various manpower legislative efforts since as early as the Economic Opportunity Act of 1964. Section 113(a)(1)(B), 78 Stat. 512, of that Act provided:

---

(Continued)

Although Wolman does not expressly renounce Meek's theory that aid to a sectarian school's education activities is per se unconstitutional, it does revive the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Id. The court based approval of the statute in question on its view that:

[t]he secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.

Id. at 1128.

The Director is authorized to enter into agreements providing for the payment by him of part or all of the cost of a State or local program submitted hereunder if he determines, in accordance with such regulations as he may prescribe, that--

(1) enrollees in the program will be employed . . . (B) on local projects sponsored by private nonprofit organizations (other than political parties), other than projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship.

Congressman Perkins, Chairman of the House Committee on Education and Labor, argues in his letter to you of February 22, 1979 that:

The language in question directing the Department of Labor, in effect, to use sectarian as well as non-sectarian instrumentalities as training and work-experience sites had its beginnings in the Economic Opportunity Act of 1964 (P.L. 88-452). The original amendment to the Administration bill on this subject was adopted in the Committee on Education and Labor, amended by the Senate, and included in Section 113(a)(1) of the Work-Training Programs part of the bill. No section of either the Economic Opportunity Act, the Manpower Development and Training Act or the Comprehensive Employment and Training Act has received more careful review by the Congress than this one. I remind you that the Economic Opportunity Act was, for a number of years, annually reauthorized.

The Congressional purpose in the Economic Opportunity Act and the Comprehensive Employment and Training Act was, I think, abundantly clear. Rather than ignoring that Congressional intent, lawyers for the government are, I think, obliged to carry it out and to defend it.



It is true that the House Report on the Economic Opportunity Act states:

Participation by the widest possible range of community organizations is envisaged, provided, of course, that the programs they offer are available without discrimination throughout the community. Settlement houses, citizens associations, YMCA's and YWCA's, Protestant, Catholic, Jewish, and other youth organizations, and similar organizations, would all have a role to play.

H. Rep. No. 1458, 88th Cong., 2d Sess. 11 (1964). But the Report continues by explaining that this means that community facilities would be open to the public outside of their regular activities; the legislative history does not contemplate that training and work experience should be provided in the context of the regular programs of sectarian elementary and secondary schools:

Testimony before the committee has indicated that this kind of wide-ranging participation is essential in getting at the root causes of poverty in the community. Every community institution must serve multiple purposes. For example, school playgrounds might be open after school hours to accommodate all children in the neighborhood. Community centers and other buildings might be used to provide day care for pre school-age children, study centers, volunteer or professional tutoring programs, health and social work services, and special library services, and classrooms might be used for remedial instruction for groups of parents or children with language difficulties. Such programs would be separate from the regular required curriculum of any school or school systems. They would not involve sectarian instruction or religious worship or practice. General aid to elementary and secondary schools is not within the contemplation of this part, and is specifically barred. But other programs could be carried on by nonpublic as well as public institutions.

Id. (emphasis added).

Nowhere in the legislative history of the 1964 Act or of its successors, including the most recent CETA amendments, have we been able to find evidence that Congress intended to allow federal funds to be used to assist the religious missions of sectarian elementary and secondary schools.

One final note should be made with respect to Mr. Lewin's view of this Department's responsibility to defend the CETA program. He concludes that we are required to defend any "arguable" position. While we may disagree with the exact formulation of the Department's duty, we in fact did approach the drafting of our January 25 opinion with the goal of preserving Labor's flexibility to implement programs in religiously-affiliated schools wherever a reasonable case could be made in favor of the constitutionality of that undertaking. Thus, we approved the use of CETA trainees in food service related activities, nursing and health activities, diagnostic or therapeutic speech and hearing activities, and custodial child care activities. We did so precisely because we found that the Supreme Court had not foreclosed the issue and reasonable arguments could be made that their presence would neither advance religion nor pose excessive entanglements. As you know, we have been loudly criticized by the ACLU and others for having tolerated these categories. Indeed, the Civil Division's failure to settle the Wisconsin litigation was due in significant part to the fact that we would not concede that providing these activities was unconstitutional. We cannot expect to agree with the extreme positions on either side of the Establishment Clause debates; we can expect, however, that this Department and the Department of Labor will endeavor to apply and defend the law in a manner that realizes Congress' intent without violating a fair reading of the decisions of the Supreme Court.

### III.

What we have said above answers each of the main points raised by critics of our January 25 opinion and particularly those in the Lewin memorandum, but there is one additional comment in Mr. Lewin's treatment of this issue that deserves

a clear and direct response. On page 12 Mr. Lewin suggests that CETA employees performing maintenance work and other tasks could not possibly create Establishment Clause problems because they are "not likely to be individuals who are qualified to further the religious mission of the church or sectarian school." He contends that these people are too "undereducated, disadvantaged" to be of much use in "furthering religion." Some would be surprised, and I suppose offended, by the suggestion that there is a correlation between education and financial wherewithal, on the one hand, and the capacity to impart a religious message, on the other. The Free Exercise Clause assures Mr. Lewin the right to hold and express his own personal views on questions of religion, and I would not care to debate the question whether the poor and disadvantaged are less "qualified" than the affluent and fortunate to assist in the inculcation of religious values.

I would strongly object, however, to the suggestion that the religious "qualifications" of CETA trainees bears in any way on the constitutional question. The Supreme Court has managed now to decide cases involving virtually every category of employee--from teachers, to clerical employees, to janitors --without on any occasion finding it relevant to consider the educational level of the employee. The Supreme Court has assumed, correctly I would submit, that the janitorial personnel who clear the classrooms and the workers who maintain the sectarian schools contribute to the mission of those schools as do the teachers of religion. Committee for Public Education v. Nyquist, 413 U.S. at 778-80. It is difficult to imagine how the rules could be otherwise.

John M. Harmon  
Assistant Attorney General  
Office of Legal Counsel