

training and for the loyalty and public spirit demonstrated by his service for the preservation of his country.” 51 Pa.C.S. § 7102. Neither this section nor Section 7101, *supra*, limits the preference based on the type or place of service. A soldier is anyone who served in the armed forces of the United States after July 27, 1953. *Herskovitz v. State Civil Service Commission*, 111 Pa. Commonwealth Ct. 427, 534 A.2d 160 (1987).

It is my opinion and you are hereby advised that anyone who served in the armed forces of the United States since July 27, 1953, is a soldier for the purposes of the veterans’ preference provisions of the Military Code of Pennsylvania.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Sincerely,

Ernest D. Preate, Jr.  
Attorney General

#### OFFICIAL OPINION NO. 89-3

*Pennsylvania Departments of Education—Transportation of School Students—Free Transportation for Nonpublic School Students on Field Trips.*

1. The Public School Code provides generally for the free transportation of school students including transportation for field trips.
2. A field trip program under which private school students, including those attending sectarian schools, will participate in field trips, planned, conducted and paid for by public school districts is constitutional.
3. The Pennsylvania field trip program is distinguished from the Ohio program invalidated by the Supreme Court in *Wolman v. Walter*, 433 U.S. 229 (1977).

May 31, 1989

Honorable Thomas K. Gilhool  
Secretary  
Pennsylvania Department of Education  
333 Market Street, Harristown 2  
Harrisburg, PA 17126

Dear Secretary Gilhool:

You have asked for my opinion on the constitutionality of an arrangement under which private school students, including those attending sectarian schools, will participate in field trips planned, conducted and paid for by public school districts. It is my opinion and you are hereby advised that such a program, carried out under the Public School Code and the Act of December 29, 1972, P.L. 1726, No. 372, is constitutional.

Act 372 of 1972 amended the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Art. XIII, *as amended*, and, specifically, Section 1361 of the Act, 24 P.S. § 13-1361. This section of the Public School Code provides generally for free transportation of all students to and from school. It also provides, in pertinent part:

When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points within or without the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points within or without the Commonwealth in order to provide field trips as herein provided. Such transportation of pupils attending nonpublic schools shall be provided during regular school hours on such dates and periods that the nonpublic school not operated for profit is in regular session, according to the school calendar officially adopted by the directors of the same in accordance with provisions of law. 24 P.S. § 13-1361(1).

In *Springfield School District v. Dept. of Education*, 483 Pa. 539, 397 A.2d 1154 (1979), the Pennsylvania Supreme Court found Section 1361 of the School Code and the providing of free transportation to and from school to be constitutional. The court specifically noted, however, that the field trip provision of Section 1361 was not before the court, and the court did not consider its constitutionality. *Springfield School District v. Dept. of Education*, 483 Pa. 539, at 553, footnote 6. The court further noted that the state Attorney General had ruled the field trip provision to be unconstitutional in its application to sectarian nonpublic schools. 1977 Op. Atty. Gen. No. 15. See also, *McKeesport Area School Dist. v. Penna. Dept. of Education*, 446 U.S. 970, at 973 (1979).

The Attorney General's opinion declared the field trip provision to be unconstitutional because it is substantially similar to an Ohio field trip transportation statute which was declared to be unconstitutional by the

United States Supreme Court in *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

The Supreme Court decided that the Ohio statute was defective on several counts:

- 1) The nonpublic school plans and controls the timing, frequency and destinations of the trips and, thus, the program constitutes impermissible direct aid to nonpublic schools, and
- 2) The effect of a field trip is under the control of the teacher conducting it, and “where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product,” and
- 3) Public school authorities would not be able to insure the secular nature of field trips planned and conducted by nonpublic schools without close supervision of the teachers, thus creating “excessive and enduring entanglement between church and state.”

433 U.S. 229, at 253-254.

The constitutional defect which the Supreme Court found in the Ohio statute is based on the possibility of what might happen on any given field trip. Although the Court, quoting *Leman v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), stated that it “need not and [does] not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment,” the Court, nonetheless, invalidated the Ohio field trip transportation statute on its face without considering any evidence as to how the statute had actually been applied. *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562 (1988).

Under the Commonwealth Attorneys Act, the Attorney General is obligated to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction. 71 P.S. § 732-204(a)(3). It is my opinion that *Wolman v. Walter* is not controlling in the context you have raised, notwithstanding that the Supreme Court in *Wolman* declared the Ohio statute invalid on its face.

The Supreme Court has recognized that there is a basis for distinguishing between the validity of a statute on its face and its validity in particular

applications. *Bowen v. Kendrick*, 487 U.S. 589, at 602, 108 S.Ct. 2562, at 2570. Whether or not there was a record in *Wolman* on how the Ohio statute was implemented<sup>1</sup>, somewhere along the line the courts in that case made some assumptions about how the statute would be administered. The assumptions were that the timing, frequency, and destination of the trips were under the control of the nonpublic school, that a sectarian teacher might not be able to remain religiously neutral in conducting the field trip and that there was no technique public school officials could use to monitor the field trip program without excessively entangling themselves in the sectarian school's business. The decision in *Wolman* depends on these assumptions.

The opinions authorized by Section 204(a) of the Commonwealth Attorneys Act are advisory, not adjudicatory. Although I do not decide individual cases, no statute or program thereunder can be interpreted and analyzed wholly out of context. In this sense, despite the characterization of the *Wolman* decision as being a facial analysis, the assumptions used by the courts were determinative of the outcome. The assumptions took the place of a record on how the field trip transportation statute would be applied.

This current opinion is based on an analysis of the Pennsylvania statute as applied to the program described in your letter. Based on that information, the problems identified by the Supreme Court in *Wolman* do not attend the program proposed for Pennsylvania schools as set forth in your letter. In contrast to the program contemplated by the Ohio statute declared invalid in *Wolman*, in the Pennsylvania program it is my understanding that the public school will plan and control the timing, frequency and destinations of the field trips and will place public school teachers in control of the trip and its educational content. Because no authority is to be surrendered to the non-public schools, there is no need for the public school officials to entangle themselves in sectarian business.

The activity supported thus is substantially similar to transportation and, as such, is permitted under the authority of *Springfield School District v. Dept. of Education*, *supra*. All planning and implementation of the field trip transportation program must also be conducted according to all other requirements and restrictions set forth in the Public School Code and any other statute or regulation of the Department.

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1. The Supreme Court in *Wolman* does not refer to any record on how the statute was to be implemented, and, in *Bowen*, the Court acknowledged there was no such record. 108 S.Ct. 2562, at 2569.

It is my opinion and you are hereby advised that the Secretary of Education may authorize school districts to permit nonpublic school students to join public school field trips under the authority of Section 1361 of the Public School Code. You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Sincerely,

Ernest D. Preate, Jr.  
Attorney General

#### OFFICIAL OPINION NO. 89-4

*Department of General Services—Board of Commissioners of Public Grounds and Buildings—  
Sections 402 and 404 of the Fiscal Code—Auditor General.*

1. The Fiscal Code and the Constitution preclude the Auditor General from serving on the Board of Commissioners of Public Grounds and Buildings.
2. Attorney General's Opinion No. 9 of 1977 was correct in its conclusion and is affirmed.

August 18, 1989

Honorable David L. Jannetta  
Secretary  
Department of General Services  
515 North Office Building  
Harrisburg, PA 17120

Dear Secretary Jannetta:

You have requested my official opinion on the question of whether the Auditor General may serve as a member of the Board of Commissioners of Public Grounds and Buildings (Board). The Board is made part of the Department of General Services by Section 202 of the Administrative Code of 1929, 71 P.S. § 62. It is my opinion and you are hereby advised that the Constitution and the laws of Pennsylvania preclude the Auditor General from serving and, therefore, from voting as a member of the Board.