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LETTER REPORT

PRELIMINARY ASSESSMENT OF THE LEGAL FEASIBILITY OF ANTI-DART-OUT TRAINING PROGRAMS

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INTRODUCTION

This is a letter report prepared under Contract DOT-HS-7-01536 that addresses the legal feasibility of programs to train young children not to dart out into streets in front of traffic.

The research and analysis leading to the preparation of this letter report was conducted by staff of the Policy Analysis Division of the Highway Safety Research Institute (HSRI) of The University of Michigan under sponsorship of the National Highway Traffic Safety Administration (NHTSA).

BACKGROUND

More than one-half of all child pedestrian accidents are attributable to "dart-outs." A dart-out occurs when a child enters the street at midblock, often from between parked cars; this frequently occurs because the child had failed to search for and detect approaching traffic.

The proposed Anti-Dart-Out Training Program (ADOTP) recognizes that children, in spite of warnings and other negative feedback, will nonetheless enter streets while playing. Therefore, the approach taken by ADOTP is to teach children safe crossing behavior through practice of the correct procedure which, when learned, will prevent children from darting out (Dueker and Berger 1977).

A version of ADOTP was developed (Dueker 1975) and field-tested (Dueker and Berger 1977) by Applied Science Associates, Inc. (ASA) of Valencia, Pennsylvania. The ADOTP program developed by ASA is directed at children in kindergarten through third grade, and involves both classroom instruction--including presentation of a safety film—and safety games. Some of the games are played in classrooms using simulated streets and traffic, while others take place on actual streets where traffic is carefully controlled. Children who learn correct safety practices are rewarded with safety patches and certificates of achievement. Initial training is given during kindergarten, and is followed by refresher training and practice through the third grade. Thus, the ADOTP approach consists

of four concepts: re-creating play situations that lead to darting out; reinforcing correct crossing behavior; ensuring permanent learning by children; and practicing safe behavior (Dueker and Berger 1977).

It is likely that ADOTP will be offered primarily by kindergartens and elementary schools as a part of their curricula; however, this program might also be offered by schools as an extracurricular activity, or by community organizations as a public service. The identity of the organization sponsoring ADOTP, and the manner in which the program is funded, may generate legal issues. Other legal issues may result from the manner in which ADOTP is taught. These legal issues, and the possible law-based constraints that they raise, will be discussed in the next section.

DISCUSSION OF LEGAL CONSTRAINTS

- Constitutional/Statutory Authority To Offer ADOTP

A school that wishes to include ADOTP as part of its curriculum is unlikely to face significant legal barriers to initiating such a program. State statutes typically grant local school boards broad authority to determine the markeup of primary school curriula (1); some states in fact require that some form of safety education be offered by schools (2), and others specifically permit safety education in schools (3). Thus, school boards have clear authority to offer ADOTP as a part of the public school curriculum. By the same reasoning, administrators of nonpublic schools are also authorized to institute this program.

Because ADOTP requires the investment of instructors' time and entails some costs for the purchase or rental of training materials, some school authorities may choose not to fund their own programs. If this is the case, a state that wishes to offer ADOTP to all school children may be forced to fund the program. Governmental funding of public schools presents no legal difficulties. On the other hand, attempts to subsidize ADOTPs offered by church-affiliated institutions would violate the Establishment Clause of the First Amendment to the U.S. Constitution (4). Specifically, government action must meet three criteria to be upheld as constitutional under the Establishment Clause (5): it must have a valid

secular purpose; it must have a primary effect that neither advances nor inhibits religion; and it must not entail excessive entanglement of the state in religious matters. Public funding of ADOTPs conducted in church-affiliated schools meets the first two criteria. Not only does ADOTP further the valid secular purpose of reducing child pedestrian accidents through appropriate safety instruction (6), but the content of ADOTP is also "value-neutral" in religious terms, the same as driver education (7) or such auxiliary services as speech therapy (8). However, recent court decisions indicate that public subsidies to church-affiliated schools create the potential for "excessive entanglement" of the state in religious matters. This is so because close administrative oversight is required to ensure that a church-affiliated school does not divert any public subsidies to religious education (9). The resulting involvement of state officials in church affairs is intimate enough to constitute the excessive entanglement (10) which violates the Establishment Clause. Therefore, direct funding of church-affiliated ADOTPs is prohibited by the Constitution.

Although direct subsidies are not permissible, there exist several alternative means by which a state could make ADOTP available to sectarian school pupils. These include shared-time programs and offering ADOTP as an optional course after school hours. Shared-time programs allow sectarian pupils to attend public schools for certain courses that public schools are in a better financial position to offer. Owing to the cost of ADOTP training materials, the shared-time approach might be considered; however, such programs would themselves raise significant legal issues. First of all, a school board must have the statutory authority to offer a particular course on a shared-time basis; such authority varies from state to state (11). Second, even if the requisite statutory authority exists, the status of shared-time programs with respect to the Establishment Clause has not been resolved by the U.S. Supreme Court. It is possible that shared-time ADOTP programs would be upheld as constitutional: these, as mentioned earlier, are geared toward a valid secular purpose (Choper 1968, pp. 335-37) and are "value-neutral" in religious terms (Sky 1966, pp. 1449-55); furthermore, unlike the case of

direct subsidies, shared-time programs do not demand pervasive state oversight to prevent the intrusion of religious instruction, since ADOTP would be taught by public school teachers on public school premises.

Should a school board attempt to offer ADOTP outside normal school hours, the fact that sectarian school pupils would attend the course raises no substantial legal issues. State laws ordinarily provide for "attendance zones" from which public schools draw their pupils (12), and provide that pupils who live outside an attendance zone must pay tuition to attend a school within the zone (13). So long as ADOTP pupils either live within the zone or pay tuition, the fact that they are enrolled in church-affiliated schools would not prevent their attendance at ADOTP. Even so, legal issues might arise concerning the school system's authority to offer ADOTP after regular school hours. This is so because the powers of school boards to conduct extracurricular programs normally are limited to those specifically granted them by statute. For example, specific statutory provision is often made for child care (14), kindergarten (15), vocational education (16), adult education (17), and interscholastic athletic competition (18). However, these provisions do not provide for schools conducting educational programs directed at school-age children not enrolled in the public schools; and as a result they do not appear to authorize ADOTP as such. Therefore, school boards that contemplate initiating ADOTP as an extracurricular community service may face significant legal constraints arising from their lack of statutory authority to do so.

In sum, school boards have clear authority to offer ADOTP as part of the public school curriculum, and the same holds true for nonpublic school authorities. Where nonpublic schools are church-affiliated and choose for financial reasons not to conduct their own ADOTP, public funds cannot be used to subsidize programs in those schools. A state may instead attempt to make ADOTP available to sectarian school pupils through shared-time programs, or as an extracurricular activity open to all pupils; however, both of these approaches may encounter serious legal constraints unless they are authorized by statute. A private organization that chooses to conduct ADOTP would, of course, encounter no such barriers.

- Criminal and Civil Liability of ADOTP Sponsors and Teachers.

Organizations that sponsor ADOTP may expose themselves to liability as a consequence of their offering the program. One form of potential liability that stems from ADOTP itself involves local "jaywalking" ordinances. One assumption on which ADOTP is based is that young children invariably will cross streets at midblock, for example, to retrieve a lost ball or to buy products from a vendor vehicle. Since it is unrealistic to expect children to use crosswalks in these instances, ADOTP instead supplements the traditional "cross at the green" and "cross at the corner" warnings by teaching children how to make safe midblock crossings. This exposes ADOTP to attack for "teaching children to jaywalk." Whether a midblock crossing is jaywalking depends on where the crossing takes place and on the specific pedestrian ordinances in force. The Uniform Vehicle Code provisions (19), which are followed in many states, are generally aimed at preventing midblock crossings only in central business districts and other busy areas of cities. Some municipal ordinances extend the UVC provisions and also prohibit some or all midblock crossings in residential areas (English, Conrath, and Gallavan 1974, pp. 91-108) (20). It is in these localities that jaywalking ordinances are most likely to constrain ADOTPs. Although pedestrians are rarely cited for crossing violations--especially outside central business districts—jaywalking ordinances may cause ADOTP sponsors to fear civil law consequences, such as being held liable for injuries to a child who crosses midblock and is struck by a vehicle. These consequences are not likely to occur: darting out can hardly be said to have been caused by ADOTP; moreover, ADOTP continues to **discourage** children from making midblock crossings; and finally, ADOTP is intended to reduce the risky behavior of child pedestrians. Nevertheless, a school board planning to implement ADOTP should not only be aware of the local pedestrian ordinances but should also secure the cooperation of local police officials before proceeding. Allegations that the schools are "encouraging pupils to break the law" could, from a policy standpoint, be damaging to ADOTP.

Sponsors and teachers involved in ADOTPs also face those civil

consequences normally encountered by owners of property. A school board or community organization conducting an ADOTP assumes an obligation to protect pupils from dangerous conditions of its premises that it either knows of or might have discovered had it made a reasonable inspection beforehand (Prosser 1971, pp. 338-91, 392-95) (21). Sponsors and teachers also may encounter civil liability if they fail to exercise reasonable care in their instructional methods and their lack of care results in injury to an ADOTP pupil. For example, one aspect of ADOTP involves practice crossings on blocked-off streets under controlled conditions; careless supervision of this exercise could result in a traffic crash causing serious injury to a child. Nevertheless, civil liability resulting from defects on the sponsor's premises or from negligent instructional methods will not be a significant constraint. These forms of civil liability are not peculiar to ADOTP but rather are similar to those faced by educational institutions in general, and these risks can be covered by liability insurance. In addition, ADOTPs conducted by public schools are, in most states, immune from civil suits (Harley and Wasinger 1976, pp. 33-53) (22). This is so on account of the doctrine of sovereign immunity, which protects a state from being sued without its consent (Prosser 1971, pp. 970-87). Although most states recently have abolished or at least limited their immunity from suits (23), certain discretionary actions or uniquely governmental services--which may include the operation of public schools (24)--continue to be protected. It should be noted, however, that individual ADOTP instructors could be held liable for negligent supervision of their classes (25). Where the ADOTP sponsor is a private nonprofit organization, it may in some states be protected by the doctrine of charitible immunity. However, since the recent trend of the law has been to abolish or limit this doctrine (Prosser 1971, pp. 994-96), private ADOTP sponsors should not rely on it as a defense to civil liability.

Therefore, the exposure to civil liability faced by ADOTP sponsors and teachers is for the most part similar to that of schools in general. There is, however, one important exception, namely the existence of jaywalking ordinances in some localities. Such ordinances may cause school

authorities to resist ADOTP owing to a fear of criminal or civil liability, discourage the local police from cooperating with the ADOTP sponsors, and give rise to criticisms that ADOTP sponsors are "teaching children to jaywalk."

CONCLUSIONS AND RECOMMENDATIONS

ADOTP, by its very nature, is designed to be taught to all kindergarten and elementary school pupils. There are no significant legal constraints to instituting ADOTP in public schools; nor are church-affiliated schools prohibited from choosing to offer ADOTP. Because of the cost of ADOTP training materials, some schools may choose not to offer the program without outside funding. Governmental subsidies to public schools face no legal barriers, but granting public funds to church-affiliated schools is a violation of the U.S. Constitution and therefore prohibited. There are two alternatives to direct funding of sectarian institutions--shared-time programs and extracurricular ADOTP programs—which would make ADOTP available to sectarian school pupils while avoiding entanglement of the state in church affairs. However, appropriate statutory authority--which does not exist in all states--is required to operate these programs.

Thus, we conclude that ADOTP is a legally feasible countermeasure approach. Implementation of the training program will require careful attention to the problem of publicly-funding sectarian school pupils. Consideration must also be given to local ordinances governing pedestrians. As the general structure of the ADOTP is legally sound, conflict with local laws on "jaywalking" is likely to be the exception rather than the rule. When encountered, the advise and cooperation of local officials should be sought to develop modifications in either the training program or the local law that will allow implementation of this highway safety countermeasure.

FOOTNOTES

1. Statutes conferring broad curricular powers include: MICH. COMP. LAWS ANN. § 380.1282 (Supp. 1978-79); and OKLA. STAT. ANN. tit. 70, § 11-103(8) (West Supp. 1978-79). Curricular decisions made by a school board normally will be upheld by courts unless the board abused or exceeded its authority under the statute; see, e.g., State Tax Commission v. Board of Education, 146 Kan. 722, 73 P.2d 49, 52 (1937); Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90, 99 (1972); and Brewton v. Board of Education, 233 S.W.2d 697, 699-700 (Mo. 1950).

2. See, e.g., CAL. EDUC. CODE § 51202 (West 1978); MD. EDUC. CODE ANN. § 7-408 (1978); OHIO REV. CODE ANN. § 3313.60(H) (Page Supp. 1978); S.C. CODE § 59-29-60 (1977); VA. CODE § 22-235 (1973); and WIS. STAT. ANN. § 118.01(4) (West 1973).

3. See, e.g., ILL. ANN. STAT. ch. 122, § 27-17 (Smith-Hurd 1962).

4. U.S. CONST. amend. I provides in part: "Congress shall make no law respect an establishment of religion, or prohibiting the free exercise thereof." This provision has since been applied to the states through the Due Process Clause of the Fourteenth Amendment.

5. Lemon v. Kurtzman, 403 U.S. 602 (1971).

6. Dicenso v. Robinson, 316 F. Supp. 112, 118-119 (D.R.I. 1970) (three-judge court), aff'd, sub nom. Lemon v. Kurtzman, 403 U.S. 602 (1971).

7. In re Proposal C, 384 Mich. 390, 185 N.W.2d 9, 21-22 (1971).

8. Protestants and Other Americans United for Separation of Church and State v. Essex, 28 Ohio St. 2d 79, 275 N.E.2d 603, 607-608 (1971). In Meek v. Pittenger, 421 U.S. 349 (1975), the U.S. Supreme Court ruled that publicly-funded auxiliary services were unconstitutional when provided by staff members of church-affiliated schools. The one-to-one pupil relationships involved afforded too many chances for such staff members to subtly inject religious beliefs. However, in Wolman v. Walter, 433 U.S. 229 (1977), the Court upheld such auxiliary services when provided in sectarian schools by public employees, who were believed less likely than sectarian school employees to inject religious belief. Reading Wolman and Meek together makes clear that auxiliary services, as such, are value-neutral in religious terms--it is the staff member's own orientation that creates

potential Establishment Clause problems.

9. Walz v. Tax Commission, 397 U.S. 664, 675 (1970), quoted with approval in Lemon v. Kurtzman, 403 U.S. 602, 662 (1971). Without pervasive state oversight of school expenditures, it is possible that church-affiliated institutions could, by sophisticated bookkeeping techniques, use state-provided funds to subsidize religious instruction. In this regard see, Berghorn v. Reorganized School District, 364 Mo. 121, 260 S.W.2d 573 (1953).

10. DiCenso v. Robinson, supra, 316 F. Supp. 112, 119-120 (D.R.I. 1970); see also, Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970) (three-judge court), aff'd mem., sub. nom. Sanders v. Johnson, 403 U.S. 955 (1971); and Opinion of the Justices, 357 Mass. 836, 258 N.E. 2d 779, 781 (1970).

11. Compare, IOWA CODE ANN. § 257.26 (West Supp. 1978-79) [specifically authorizing school boards to offer shared-time programs]; Morton v. Board of Education, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966) [construing school boards' authority over curriculum to include offering of shared-time programs]; and In re Proposal C, 384 Mich. 390, 195 N.W.2d 9, 17-20 (1970) [same] with LA. REV. STAT. ANN. § 17:153 (West 1963) [prohibiting public schools from operating in combination or combination with nonpublic schools]; and Special District v. Wheeler, 408 S.W.2d 60 (Mo. 1966) [holding that authority of school boards did not include offering of shared-time programs, and that such programs violated the state's compulsory education law].

12. See, e.g., MICH. COMP. LAWS ANN. § 380.1283 (Supp. 1978-79).

13. See, e.g., MICH. COMP. LAWS ANN. § 380.1401 (Supp. 1978-79).

14. See, e.g., MICH. COMP. LAWS ANN. § 380.1285 (Supp. 1978-79).

15. See, e.g., MICH. COMP. LAWS ANN. § 380.1286 (Supp. 1978-79).

16. See, e.g., MICH. COMP. LAWS ANN. § 380.1287 (Supp. 1978-79).

17. See, e.g., MICH. COMP. LAWS ANN. § 380.1293 (Supp. 1978-79).

18. See, e.g., MICH. COMP. LAWS ANN. §§ 380.1289, 380.1521 (Supp. 1978-79).

19. UNIFORM VEHICLE CODE § 11-503(c) (1968) provides that between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk. In addition, UNIFORM VEHICLE CODE §§ 15-102(a)(18) (1968) and 15-107 (1968) authorize local authorities to prohibit pedestrians from crossing midblock in business districts, and

on other designated highways.

20. In 1974 the National Committee on Uniform Traffic Laws reviewed laws relating to pedestrians in fifty randomly selected cities. In several cities--such as Knoxville, Tennessee; South Bend, Indiana; and Tampa, Florida—ordinances appeared to prohibit all midblock crossings, including those in residential areas. Several other cities—such as Portland, Oregon and St. Louis, Missouri--prohibited midblock crossings within 150 feet of a crosswalk; thus these ordinances prohibited some but not all midblock crossings in residential areas. Other ordinances prohibited midblock crossings on through streets or on specific named streets.

21. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Pickard v. City and County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

22. See, e.g., Zawadzki v. Taylor, 70 Mich. App. 545, 246 N.W.2d 161 (1976) [school district immune as a governmental function]; Lamont Independent School District v. Swanson, 548 P.2d 215 (Okla. 1976) [school board liable only to extent of insurance coverage]; and Bernhard v. Kerville Independent School District, 547 S.W.2d 685 (Tex. Civ. App. 1977) [school district immune while exercising governmental functions].

23. Typical court decisions dealing with sovereign immunity include: Davies v. City of Bath, 364 A.2d 1269 (Me. 1976) [abrogating the defense]; Jones v. State Highway Commission, 557 S.W.2d 225 (Mo. 1977) [same]; and Whitney v. City of Worcester, --- Mass. ---, 366 N.E.2d 1210 (1977) [limiting application of the defense]. Some states have abolished sovereign immunity by popular vote; in this regard see, e.g., MONT. CONST. art. II, § 18; or by legislation, see, e.g., OHIO REV. CODE ANN. § 2743.02 (Page Supp. 1978); and WASH. REV. CODE ANN. § 4.92.090 (Supp. 1978). Other states have abolished their immunity only with respect to certain activities; in this regard see, e.g., MICH. COMP. LAWS ANN. §§ 691.1402 (1968) [defective maintenance of highways]; 691.1405 (1968) [negligent operation of state-owned motor vehicles]; and 691.1406 (1968) [inadequate maintenance of public buildings].

24. Statutes immunizing governmental bodies from liability for performing governmental functions include: 28 U.S.C.A. § 2680(a) (West 1965); ALASKA STAT. § 09.50.250(1) (1973); MICH. COMP. LAWS ANN. § 691.1407 (Supp. 1978-79); and UTAH CODE ANN. § 63-30-3 (Supp. 1978-79).

25. See, e.g., Baird v. Hosmer, 46 Ohio St. 2d 273, 347 N.E.2d 533 (1976); but see, Kobylanski v. Chicago Board of Education, 63 Ill. 2d 165, 347 N.E.2d 705 (1976) [teacher immune from liability where negligence was not "wilful" or "wanton"; 4-3 vote].

REFERENCES

Choper, The Establishment Clause and Aid to Parochial Schools, 56 CAL. L. REV. 260 (1968).

Dueker, R.L. 1975. Threat detection training programs for child pedestrian safety. Volume I: Conduct, results, and recommendations. Final report. National Highway Traffic Safety Administration report DOT-HS-801-450.

Dueker, R.L., and Berger, S.S. 1977. Experimental field test of proposed anti-dart-out training programs. Volume II: Implementation guidelines and training materials. Final report. Valencia, Pennsylvania: Applied Science Associates, Inc.

English, J.W.; Conrath, C.W.; and Gallavan, M.L. 1974. Pedestrian laws in the United States. In Traffic Laws Commentary 3(3). Washington, D.C.: National Committee on Uniform Traffic Laws and Ordinances.

Harley and Wasinger, Governmental Immunity: Despotic Mantle or Creature of Necessity, 16 WASHBURN L. J. 12 (1976).

Prosser, W.L. 1971. Handbook of the law of torts. 4th ed. St. Paul: West Publishing Company.

Sky, The Establishment Clause, the Congress, and the Schools: An Historical Perspective, 52 VA. L. REV. 1395 (1966).