

Subject

*Schools - Pupils
Tuition*

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Cassett 1827



STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

June 14, 1974

Opinion No. 74- 187

Marlin C. Schrader
Administrative Officer
State Education Commission
Capitol Federal Building
Topeka, Kansas 66603

Dear Mr. Schrader:

On April 17, 1974, the State Education Commission declared Mid-America Nazarene College ineligible to participate in the tuition grant program authorized by K.S.A. 72-6107 et seq., because the college has not altered its published practices and such practices did not conform to standards of eligibility set forth in Americans United for Separation of Church and State v. Bubb, W-5351, decided earlier this year by the United States District Court for the District of Kansas. Under 1974 Senate Bill 969, enacted by the Kansas Legislature, the administration of the state scholarship program was transferred from the State Board of Education to the State Education Commission. You inquire whether Mid-America Nazarene College is eligible to enroll recipients of Kansas state scholarships awarded pursuant to Senate Bill 969.

Determination of this question requires some consideration of the similarities and differences between the two programs. The tuition grant act contains no declaration of legislative purpose. The court recited the twofold purpose of the act, "to provide needy students with financial assistance to attend private colleges and to indirectly give the private colleges financial aid so that they could remain open," a purpose which, the court observed, benefits not only the eligible students and private colleges, but also provides an economic benefit to the state, reducing the potential burden on tax-supported institutions. Tuition grants are available only to students attending an "accredited independent institution," being an institution of higher education located in Kansas maintaining an open enrollment, not operated by any state agency or subdivision of the

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state, and accredited by the North Central Association of Colleges and Secondary Schools. It was objected that the act unlawfully and in violation of the Equal Protection Clause established a class of students limited to those attending private colleges, and thus discriminated against the class of students attending state colleges and universities. The court found no discriminatory or unequal treatment between the two classes, for a "student attending a state institution of higher learning automatically receives state aid at least equal to the amount a student may receive under the tuition grant program. Moreover, the court found that the state had a "legitimate interest in advancing the welfare of its college population and of its private educational institutions," and that the classifications drawn by the statute bore a reasonable relationship to this legitimate state interest and objective.

However, the court inquired further, beyond the equal protection questions, to whether the act violated the safeguards of the First Amendment to the United States Constitution, applying a three-pronged test articulated by the United States Supreme Court:

"For the Statute to be constitutional it must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and finally, the statute must not foster an excessive government entanglement with religion."

The court focused its attention upon the "primary problem" as

"not whether a state may provide financial aid to schools with a sectarian mission but whether those colleges eligible for state aid under the tuition grant program do indeed serve a sectarian mission."

The court continued its inquiry and the basis therefor thus:

"We do not believe the Kansas-tuition grant program should be automatically invalidated because the qualifying colleges have a formalistic relationship with the sponsoring churches. Instead we will look at the overall operation of each institution to discern whether religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."

After a detailed discussion of a number of factors, the court concluded that five of the colleges involved

"serve a substantially sectarian mission. The tuition grant program with respect to these five colleges has

the effect of fostering religion and is therefore violative of the First Amendment's establishment clause With respect to the other Kansas church colleges there is no primarily sectarian mission being served and hence no infringement of the establishment clause."

The tuition grant and state scholarship programs are similar in many respects. The amount of award to a student under each program is defined to be the amount of the student's "financial need," which is defined in each act generally as "the difference between a student's available financial resources and such student's total anticipated expenses to attend" the institution. Under each program, payment is made by issuance of a warrant to the student, which is delivered to the institution in which the student is enrolled. The amount of a state scholarship may not exceed \$500 in any year. Senate Bill 969, § 3. The amount of each tuition grant may not exceed the lesser of the total tuition and required fees of the student for two semesters or its equivalent, or the sum of \$1,000. K.S.A. 72-6109. Under § 1(e) of Senate Bill 969, an "eligible institution" is defined to mean

"an institution of post-secondary education which maintains open enrollment, and is located in Kansas and includes area vocational schools as defined in K.S.A. 72-4412, Kansas technical institute, community junior colleges as defined in K.S.A. 1973 Supp. 71-701, colleges and universities under the control of the state board of regents, Washburn university of Topeka and accredited independent institutions as defined in K.S.A. 72-6107."

Thus, state scholarships may be awarded to students attending a broad range of educational institutions, whereas tuition grants are restricted to those attending independent accredited colleges, as defined above.

Prior to its repeal by Senate Bill 969, K.S.A. 72-6801 set out an elaborate declaration of legislative findings of fact and objectives of the state scholarship program. Essentially, the objectives of the act as stated were those found by the court to be served by the tuition grant program, i.e., to enable students suffering from lack of financial resources to attend institutions of higher education of their choice, public and private, with the resulting benefit to the state of more evenly distributed burden of enrollment among the public and private institutions of the state.

Clearly, the state scholarship program serves a secular legislative purpose, substantially analogous to that approved by the

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court in Americans United, supra, and thus meets the first of the three criteria applied by the court there.

The second criteria applied to the tuition grant program was whether it operated to advance, or render impermissible assistance to, religion. The court, as indicated above, analyzed the structure, operation and program of the participating institutions to determine whether the colleges eligible for aid under the tuition grant program did indeed serve a sectarian mission. The court enjoined further award of grants to students attending the colleges which were found to "serve a substantially sectarian mission."

Inescapably, the same criteria applied in that case to the tuition grant program must be applied to the state scholarship program here. If an institution is found to "serve a substantially sectarian mission," award of state scholarships to students of that institution necessarily have the same effect as the award of tuition grants attending that institution, i.e., the "effect of fostering religion," on the basis of which the court enjoined. Any educational institution which includes in its overall program one or more of the features which the court identified in Americans United, supra, as violations of the establishment clause of the First Amendment when supported by public funds may not participate in the state scholarship program administered by the State Education Commission under 1974 Senate Bill 969. On the basis of the action of the Commission on April 17, 1974, which was in full accord with the decision of the court in Americans United, supra, it is our view that Mid-America Nazarene College is ineligible to enroll recipients of Kansas state scholarships awarded under Senate Bill 969.

Yours very truly,

VERN MILLER
Attorney General

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