



STATE OF KANSAS

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Attorney General

May 14, 1975

Opinion No. 75- 219

Mr. Max Bickford  
Executive Officer  
Kansas Board of Regents  
Suite 1416, Merchants National  
Bank Tower  
Topeka, Kansas 66612

Dear Mr. Bickford:

Senate Bill No. 355, enacted during the 1975 legislative session, authorizes the State Board of Regents to award scholarships to not more than twelve qualified students at the University of Kansas School of Medicine, in amounts not to exceed \$6,000 per student for each calendar year. Under section 2, any student awarded a scholarship must

"sign an agreement that, unless sooner separated from such school of medicine, such person will complete the required courses of instruction and, will enter into an approved primary care (family practice, general medicine, pediatrics, gynecology and obstetrics) residency program and following the successful completion of such program, will engage in practice of primary care medicine in any areas of the state of Kansas designated by the board of regents."

The Board is authorized to designate for such purposes "those areas of the state in which there is an insufficient number of persons engaged in the practice of primary care medicine." In addition, the Board is authorized to assume and repay debts incurred by, and make loans to, persons in connection with the completion of medical education, and medical residency and internship programs, the recipients

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being obligated in the same manner as scholarship recipients to provide primary care for a prescribed period of time as set out above, for a period of not to exceed two years.

Section 5(b) provides that after the recipient has engaged in the practice of primary care medicine for the required period of time, the recipient shall be fully discharged from any obligation to the Board. However,

"A recipient of any scholarship, loan or debt repayment awarded under this act who fails to engage in such practice of primary care medicine for the required period of time, immediately shall incur the obligation to repay to the state board of regents an amount equal to twice the total amount of money paid on behalf of such person." [Emphasis supplied.]

You inquire whether this repayment provision is valid. It is clearly a draconian penalty, and plainly unenforceable.

In Beck v. Negli, 153 Kan. 721, 114 P.2d 305 (1941), the court stated the applicable criteria thus:

"In determining whether contractual agreements are to be treated as penalties or as liquidated damages, courts look behind the words used by the contracting parties to the facts and nature of the transaction. . . . The instrument must be considered as a whole, and the situation of the parties, the nature of the subject matter and the circumstances surrounding the execution taken into account. There are two considerations which are given special weight in support of a holding that a contractual provision is for liquidated damages rather than a penalty -- the first is that the amount stipulated is conscionable, that it is reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach; and the second is that the nature of the transaction is such that the amount of actual damages

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resulting from default would not be easily  
and readily determinable." 153 Kan. at 726.

Under the terms of section 5(b), the obligation to repay double the amount paid by the Board to or on behalf of the student becomes due immediately upon failure of the physician to satisfy the primary care practice obligation, no matter how slight or negligible the default may be. A physician with a two year obligation, e.g., may practice for twenty two months, for example, and then discontinue his practice for reasons which are personally exigent, but which are not sufficient to excuse the breach. Notwithstanding the physician has provided entirely satisfactory care in a practice for by far the greater period of time required by the agreement, the double repayment obligation becomes immediately due.

Assuming a total default of the primary care practice obligation, the double repayment obligation bears no relationship whatever to any probable or presumptive loss to the Board of Regents. The damage to the Board is arithmetically determinable, being the amount of money it had paid to or on behalf of the student or resident. Certainly, a total default in the practice obligation denies the services of that physician to some community in the state which lacks a sufficient number of physicians. In one fashion, of course, it may be argued that such a community is "damaged" by loss of services. Those "damages" in a monetary sense are entirely conjectural and indeterminable. Certainly, the amount of money paid to the student or resident by the Board is in no way reflective of any such "damages." And, of course, the repayment obligation runs to the Board itself, and not to any conceivably identifiable injured party. Lastly, we do not hesitate to conclude that the amount required to be repaid is simply unconscionable.

Plainly, the double repayment obligation was intended by the Legislature, and indeed would so operate, as a penalty. Any such provision included in an agreement entered into the Board and a recipient of a scholarship, loan or debt payment would be absolutely void and unenforceable.

You inquire further whether it would be within the authority of the Board of Regents under this statute to adopt rules and regulations which would require some other type of repayment,

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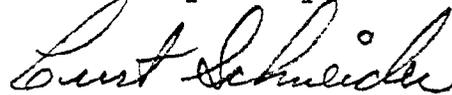
including interest at a legal rate from the time of default.  
Section 4 sets forth the authority of the Board under this act:

"The state board of regents shall:  
(a) Adopt rules and regulations establishing criteria for the selection of recipients of scholarships; for the selection of recipients of loans and debt payments; for the determination of debts eligible for payment;  
(b) accept application for and make the final selection of all persons eligible to receive funds . . . and (c) . . . designate those areas of the state in which there is an insufficient number of persons engaged in the practice of primary care medicine."

The Board is thus authorized to adopt criteria for the selection of participants in the scholarship, loan and debt repayment programs, to select recipients, and to designate areas for practice. The Board is not authorized to alter the terms of the agreements with those whom it selects, however, for those terms are fixed by statute, including the conditions for discharge. The Board has no authority to prescribe a rate of interest for money due it upon any breach of contract other than that prescribed by law. K.S.A. 16-201. In the event of breach or default in the practice obligation by any recipient, the remedies of the Board are those of any contracting party upon breach, total or partial, i.e., an action for damages.

The act authorizes the Board to award scholarships, loans and debt payments, but does not require it to do so. In view of the foregoing, the Board will doubtless wish to consider whether the objectives of the act may still be served, despite the invalidity of the double repayment provision.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General

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