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ATTORNEY GENERAL OPINION NO. 79 - 51

The Honorable Dave Webb
State Representative
Kansas House of Representatives
State Capitol
Topeka, Kansas 66612

The Honorable W. Edgar Moore
State Representative
Kansas House of Representatives
State Capitol
Topeka, Kansas 66612

Re: Schools -- Higher Education -- Tuition Grants to Students
Attending Private, Sectarian Institutions

Synopsis: Students attending an accredited independent institution,
as defined by K.S.A. 72-6107(e), and otherwise eligible
for student aid under K.S.A. 72-6107 et seq., are eligible
for tuition grants thereunder regardless of the religious
policy of the institution.

* * *

Dear Representatives Webb and Moore:

This is in response to your letter of January 24, 1979, requesting
this office to determine whether needy students choosing to attend
sectarian institutions accredited by the North Central Accrediting
Agency are eligible to receive state funds. You believe the United
States Supreme Court has ruled that the sectarian nature of an
institution of higher education is no longer an issue in determining
whether a state statute, providing state aid to college students
choosing to attend sectarian institutions, violates the establishment
clause of the First Amendment of the United States Constitution.

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In Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974) Kansas citizens, residents and taxpayers commenced an action in the United States District Court for the District of Kansas alleging K.S.A. 72-6107 et seq., which provide tuition grants to students attending private institutions, violate the establishment clause of the First Amendment of the United States Constitution. The Kansas statute challenged in Bubb provides state aid in the form of tuition grants to eligible students attending independent Kansas institutions, accredited by the North Central Association of Colleges and Secondary Schools Accrediting Agency, and each accredited institution is sponsored, in varying degrees, by a church-related organization. Plaintiffs argued that state aid to students attending sectarian institutions violated the establishment clause of the First Amendment which prohibits government from either advancing or inhibiting religion. Plaintiffs reasoned that, although the government aid was provided to the student, the funds eventually benefitted the institution. College students attending state supported institutions are prohibited from receiving state aid under this statute.

In Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977) Tennessee citizens, residents and taxpayers brought an action challenging a Tennessee student aid program (T.C.A. 49-5013 et seq.). The Tennessee program provides state aid to students attending public colleges and universities, public vocational and technical institutions and non-public colleges and universities. Students eligible to receive state aid under the Tennessee program are not prohibited from attending sectarian institutions. Plaintiffs in Blanton, as in Bubb, alleged that the Tennessee statute was constitutionally impermissible, because some students receiving state aid chose to attend sectarian institutions, thereby benefitting those institutions in violation of the establishment clause of the First Amendment. The Kansas and Tennessee Federal District Courts reviewed the constitutionality of the respective state statutes in light of the tripartite test developed by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971). "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." Bubb at 887; Blanton at 100.

In applying the first and third prongs of the Lemon test, the federal district courts found that the legislative purpose of the respective plans was secular and did not involve the state extensively or excessively in the operation of any religious institution. The remaining issue in both cases was whether either plan had a primary effect

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that neither advanced nor inhibited religion. At the time of Bubb and Blanton, there was no Supreme Court decision which directly addressed the issue of general scholarships given to college students without regard to the type of institution they attended, whether public or private, sectarian or non-sectarian. Blanton at 100.

The Bubb court found that the Kansas statute was not unconstitutional on its face or in its application to students attending private colleges which did not incorporate an integral part of the religious mission of the sponsoring churches. Five colleges, however, were found by the court to be vehicles for inculcating religious doctrine and were, in fact, sectarian institutions. The court held that students choosing to attend a sectarian institution could not receive state aid under the grant program, because the provision of state aid to students attending sectarian institutions benefitted those institutions and had a primary effect of fostering religion in violation of the establishment clause. Bubb at 893.

It is especially pertinent to note that the Blanton court was well aware of the fact that some Tennessee students would use government funds to attend sectarian institutions. The Tennessee Federal District Court found that some of the private schools whose students benefitted from the program were operated for religious purposes, with religious requirements for students and faculty, and were permeated with the dogma of the sponsoring religious organizations. Blanton at 100. These institutions are, of course, of the exact character objected to in the Bubb decision. The Tennessee Federal District Court held, however, that the statute on its face and in its application did not offend the values protected by the establishment clause. Blanton at 105.

The United States Supreme Court affirmed without opinion the Blanton decision, at 434 U.S. 803, 54 L.Ed 2d 65 98 S.Ct.39 (1977). This is the first instance of the United States Supreme Court upholding the constitutionality of a state statute which provides, generally, funds to college students without regard to the type of institution they attend, whether public or private, sectarian or non-sectarian. Your question is whether in light of this decision Kansas college students choosing to attend sectarian institutions, and otherwise eligible under K.S.A. 72-1607 et seq., are eligible to receive state aid. The Kansas and Tennessee plans are different. The Kansas plan applies only to students attending independent institutions, while the Tennessee plan applies to all students attending institutions of higher education. In our opinion, this distinction is factual rather than legal.

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In reaching the conclusion that the Tennessee statute did not violate the values protected by the establishment clause, the Tennessee Federal District Court incorporated into its decision the criteria laid down in Durham v. McLeod, 259 S.C. 409, 192 S.E. 2d 202 (1972), in which the South Carolina Supreme Court determined that a statute which made available state monies in the form of loans to students to attend institutions of higher education, some of which were sectarian, did not violate either the Constitution of the United States or the Constitution of South Carolina. Blanton quoted the South Carolina Supreme Court's requirement that an act be "scrupulously neutral as between religion and irreligion and as between various religions," if it is to pass the primary effect prong of the Lemon test. Durham at 204; Blanton at 104. The South Carolina court laid down certain criteria to be used in testing the neutrality of a state statute: (1) emphasis of the statute must be on the student, rather than on the institution; (2) all eligible institutions must be free to compete for the students; and (3) the aid must be to higher education, but not to any institution or group of institutions. Durham at 204.

In measuring the Tennessee statute against this criteria, the Tennessee Federal District Court found that the emphasis of the act was on the student rather than on the institution, that the institutions were free to compete for the students who had money provided by the program, that no one religion was favored by the program and private and religious institutions were not favored over public institutions. Blanton at 104. Therefore, it found the Tennessee plan was constitutional on its face and in its application and did not offend the values protected by the establishment clause. Blanton at 105.

It is our opinion that the Blanton decision recognizes a state's power to enact a statute which provides aid directly to college students attending private institutions, some of which are sectarian, so long as the state provides aid to college students choosing to attend public secular institutions. The second prong of the Lemon test requires only that the statute's principal or primary effect be one that neither advances nor inhibits religion. The importance of a statute's effect under the Lemon test is analagous to the importance of a statute's effect when deciding whether a particular statute violates the equal protection clause under the Fourteenth Amendment. The equal protection clause of the Fourteenth Amendment does not deny a state the power to treat different classes of persons differently, so long as all persons similarly situated are treated alike. This is the exact requirement under Lemon's primary effect test.

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This conclusion is substantiated by the decision in Roemer v. Maryland Public Works Bd., 426 U.S. 736, 49 L.Ed.2d 179, 96 S.Ct. 2337 (1976), in which the United States Supreme Court upheld a state statute which provided grants to private colleges, among them religiously affiliated institutions, to be used for sectarian purposes. The Court stated:

"A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church The Court has enforced a scrupulous neutrality by the state as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." Id. at 745, 746.

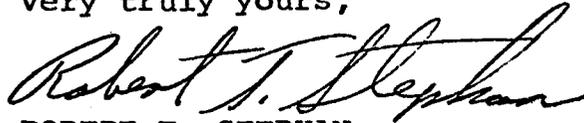
And, the Court reasoned that "religious institutions need not be quarantined from public benefits that are neutrally available to all," Id. at 746, and "[n]eutrality is what is required." Id. at 747. The Bubb court paid particular attention to the fact that any student attending a state institution of higher education automatically receives state aid at least equal to the amount a student receives under the Tuition Grant Program. For this reason, it is our opinion, that the primary effect of the Kansas statute is scrupulously neutral, as between religion and irreligion and as between various religions, and is therefore in harmony with the criteria laid down in Blanton. That is: (1) the primary effect of the statute does not favor students attending sectarian institutions over students attending state supported institutions; (2) all eligible institutions are free to compete for the students who have money provided by the state; and (3) no one religion is favored by the program, nor are private religious institutions favored over public institutions.

The Kansas Federal District Court for the District of Kansas decided the Bubb case without benefit of the U.S. Supreme Court's decisions in Roemer and Blanton, and we believe Bubb must be viewed in light of these later decisions. Therefore, it is our opinion that college students who are in need of financial aid may attend secular institutions and receive aid indirectly, or attend sectarian institutions and receive

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aid directly. In our judgment, Kansas students previously prohibited from receiving state aid under K.S.A.72-6107 et seq., if choosing to attend a sectarian institution, are now constitutionally eligible to receive such aid.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Alice L. Rawlings
Deputy Attorney General

RTS:ALR:ba