



STATE OF KANSAS

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October 28, 1976

ATTORNEY GENERAL OPINION NO. 76- 330

The Honorable Joseph C. Harder
Majority Floor Leader
of the Kansas Senate
Moundridge, Kansas 67107

Re: Schools and Colleges--Tuition Grants--Eligibility

Synopsis: Students attending a Kansas independent college which maintains a mandatory chapel attendance requirement are ineligible for participation in the Kansas tuition grant program, under the decision of a three-judge panel of the Kansas federal district court in *Americans United for Separation of Church and State v. Bubb*, of February 27, 1974, and this holding is not overruled or otherwise disturbed by the decision of the United States Supreme Court in June, 1976, upholding state aid to independent Maryland colleges, for those colleges had no such mandatory attendance requirements.

* * *

Dear Senator Harder:

You inquire concerning the eligibility of students attending Central College, McPherson, Kansas, for participation in the Kansas tuition grant program, which is authorized by K.S.A. 1975 Supp. 72-6107 *et seq.*

Central College, you advise, is an "accredited independent institution" as defined by K.S.A. 1975 Supp. 72-6107(e). It is a junior college affiliated with the Free Methodist Church of North America, but the church exercises no formal control or supervision over the operation of the school. It maintains open enrollment and is accredited by the North Central Association of Colleges and Secondary Schools.

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The participation of Kansas independent schools and colleges in the tuition grant program was challenged in *Americans United for Separation of Church and State v. Bubb*, 379 F.Supp. 872 (D.Kan. 1974), in which the court upheld the constitutionality of the Kansas tuition grant program, but in which it also held that five Kansas colleges could not constitutionally participate in the program because of certain features of their respective programs. In reaching its decisions, the court applied a threefold test stated thus:

"[W]e must analyze the tuition grant program using a three pronged test developed by the [United States Supreme] Court over many years. 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." 379 F.Supp. at 887.

The Kansas act was approved on the first and third of these criteria. However, the participation of certain colleges in the program was disapproved on the basis of the second point, for the court found, from an examination of the "overall operation of each institution" that each functioned impermissibly to establish or advance religion through the use of money received from the tuition grant program. Specifically, the court stated thus:

"A . . . consideration is whether the Colleges require attendance of pupils at religious activities. We do not believe that state aid must be disallowed because the opportunity for religious participation exists at these Colleges . . . but if participation is either explicitly or implicitly mandatory we must conclude the Colleges are serving primarily a religious purpose. The evidence shows, however, that only three Colleges require some form of religious participation by the students We find that because of the requirement of religious participation by students, state aid to these Colleges fosters religion and is therefore impermissible." [Emphasis supplied.] 379 F.Supp. at 892.

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The question is raised whether this holding is in any way altered by the decision of the United States Supreme Court in *Roemer v. Board of Public Works of Maryland*, ___ U.S. ___, 49 L. Ed. 2d 179 (June 21, 1976), in which the Court upheld direct noncategorical grants to private colleges in Maryland under a 1971 law of that state. The Court stated thus:

"To answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements."

Implicitly, the Court recognized that no single feature of the program of an institution should be seized upon as determinative of its secular or sectarian character. Rather, the "relevant factors . . . are to be considered 'cumulatively' in judging the degree of entanglement" 49 L. Ed. 2d at 199. This admonition is borne out by the exhaustive canvass of the operations of the colleges in that case both by the District Court and by the Supreme Court on review.

In Opinion No. 74-187, Attorney General Vern Miller wrote concerning the eligibility of Mid-America Nazarene College for participation in the state scholarship award program. He concluded thus:

"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."
[Emphasis supplied.]

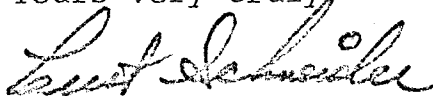
It appears that the primary obstacle to participation of students attending Central College in the tuition-grant program is the requirement of mandatory chapel. You indicate that in April, 1975, Mr. Robert Kelly, the officer then administering the tuition-grant program, reviewed the Student Handbook and Catalog of Central College, and advised the College informally that it was fully eligible for tuition grants except for the mandatory chapel feature of its program. No other aspects of its program appeared to draw eligibility in question.

Thus, in light of *Roemer, supra*, you pose the question whether the State of Kansas may deny tuition grant eligibility to students attending Central College solely on the ground that it has mandatory chapel without regard to any other factors in its educational environment.

Quite correctly, you point out that in *Roemer*, the Court recognized that all aspects of the program of an educational institution must be considered together, and that no single feature may be isolated as determinative whether it has a pervasively sectarian purpose. However, in *Americans United, supra*, the Kansas federal district court also explored in great detail the many facets of the program of each college involved in that case. The court did emphasize the factor of mandatory participation in religious exercises as a major factor, concluding, as pointed out above, that "if participation is either explicitly or implicitly mandatory we must conclude the Colleges are serving primarily a religious purpose." Nothing in *Roemer* suggests, explicitly or implicitly, that such a determination is in error. None of the Maryland colleges involved in that case required mandatory participation in chapel or comparable religious exercises. The required theology courses were academic, the Court pointed out. Obviously, it may be argued that the District Court unduly relied upon mandatory chapel too greatly as reflecting an overall sectarian purpose of the three schools, Sterling, Tabor, and Hesston, which has such requirements. However, the federal district court has expressly barred students attending those three schools from participation in the program for that single reason, *i.e.*, that a mandatory chapel requirement reflected a pervasive sectarian purpose of the schools. Nothing in *Roemer* suggests in any fashion that this judgment is in error. If, of course, the Supreme Court had upheld aid to Maryland colleges which had mandatory chapel or other mandatory religious exercises, it could well be argued that standing alone, this feature was alone no longer sufficient to deny eligibility for participation in the tuition grant program. That, however, was not the case in *Roemer*, and the decision in *Americans United* remains undisturbed.

Accordingly, I must conclude that under the decision of a three-judge panel of the United States District Court for the District of Kansas, in *Americans United for the Separation of Church and State v. Bubb*, 379 F.Supp. 872 (D.Kan. 1974), that students attending Central College of McPherson are ineligible for participation in the Kansas tuition grant program so long as the College maintains a mandatory chapel attendance requirement, notwithstanding no other feature of the educational program of the College reflects a prohibited sectarian purpose.

Yours very truly,



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