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STATE OF NEBRASKA
OFFICIAL
APR 15 1994
DEPT. OF JUSTICE

DATE: April 12, 1994

SUBJECT: Parochial School Access to Telecomputing Services Provided by Educational Service Units

REQUESTED BY: Joe Lutjeharms, Commissioner of Education

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's Opinion as to whether Educational Service Units (ESU's) in Nebraska may provide telecomputing services to parochial schools. Specifically, you have inquired whether ESU's may serve as a "hub" for parochial schools to obtain Internet services in light of Article VII, section 11 of the Nebraska Constitution.

I. Background

A. Role of Educational Service Units in Telecomputing

Educational Service Units serve as educational service providers in the states' system of elementary and secondary education. Neb. Rev. Stat. § 79-2201.02 (1987). In addition to other authorized activities, ESU's may "contract for educational services with the board of any other educational service unit, any school district, any other educational agency, or any appropriate state or federal officer or agency. . . ." Neb. Rev. Stat. § 79-2208(3) (1987).

In the area of telecomputing, Neb. Rev. Stat. § 79-2225 (Supp. 1993) provides:

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> Each educational service unit shall provide, in cooperation with the State Department of Education, access for all school districts within the geographical area served by the unit to telecomputing resources through the installation of necessary equipment at each educational service unit location and provide support for training users to meet their specific telecomputing needs. The purchase of and planning for equipment and software for the educational service units shall be coordinated by the department and shall be compatible with a statewide plan for telecomputing agreed upon by the Department of Administrative Services and the State Department of Education. Educational service units may enter into agreements pursuant to the Interlocal Cooperation Act to carry out this section.

According to information provided with your request, the major activity currently under way in ESU's, under this statute, is providing access to the "Internet" computer network. Internet resources include university library card catalogs, texts of U.S. Supreme Court decisions, geographical survey information, agricultural research, market reports, weather information, and many other resources. An estimated two million computers worldwide are connected to Internet.

In order to provide access to Internet, "hubs" are currently being set up at ESU's. Schools or persons obtaining service through the hub pay for phone line service and the maintenance and support services provided by ESU's. They must also purchase their own computer hardware. It is our understanding that school officials, teachers and children do not physically go to the ESU hub, and users are connected to the hub only by phone line. According to information contained in your request, you are uncertain as to how much of the overhead costs paid by tax dollars (such as administrators' salaries, rent, and other operating expenses of the ESU's which support the "Internet" operation) are charged back to the parochial schools.[1]

B. <u>Nebraska Constitution</u>

The Nebraska Constitution provides:

> Notwithstanding any other provision in the Constitution, <u>appropriation of public funds shall not be made to any school or institution of learning not owned</u>

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[1]In addition to the property taxes paid by parochial school parents to support ESU's.

> or exclusively controlled by the state or a political subdivision thereof; Provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.

Neb. Const. art. VII, § 11 (emphasis added).

II. Legal Analysis

The legal question presented here is whether the provision of parochial school access to telecomputing services provided by ESU's constitutes an appropriation of public funds to non-state institutions.

The Nebraska Supreme Court has repeatedly held art. VII, § 11 should be interpreted literally. Thus, section 11 "prohibits appropriations by the Legislature to nonpublic schools." ***Cunningham v. Lutjeharms***, 231 Neb. 756, 759, 437 N.W.2d 806 (1989); ***State ex rel. Creighton University v. Smith***, 217 Neb. 682, 689, 353 N.W.2d 267 (1984); ***State ex rel. Bouc v. School Dist. of City of Lincoln***, 211 Neb. 731, 736, 320 N.W.2d 472 (1982); ***Lenstrom v. Thone***, 209 Neb. 783, 787, 311 N.W.2d 884 (1981). As the court has made clear, "[Article VII, § 11] says what it means and means what it says." ***Lenstrom***, 209 Neb. at 788.

The "appropriation of public funds" in the context of art. VII, § 11 has been defined by the Nebraska Supreme Court as follows: "Regarding appropriation of public funds, to appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case." ***State ex rel. Creighton***, 217 Neb. at 688.

Consistent with the holdings in the above referenced decisions, we find that the provision of parochial school access to telecomputing services provided by ESU's does not constitute an appropriation of funds to nonpublic schools. There is no setting apart or assignment of funds to parochial schools by merely allowing access to a computer network under the circumstances described above. As in ***State ex rel. Creighton***, "The act . . . does not set aside state money for [a parochial school's] special use and does not vest in [parochial schools] any right to receive state funds. Under these circumstances, there is no appropriation

of public funds to [a parochial school]." ***State ex rel. Creighton Univ. v. Smith***, 217 Neb. at 690. Furthermore, any indirect benefit to such institutions does not violate art. VII, § 11. "[A]ny benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed to be an 'appropriation to' that institution." ***Bouc***, 211 Neb. at 737, 320 N.W.2d at 476.

In conclusion, we see no constitutionally significant difference between a parochial school student utilizing a library card catalog through Internet access or by physically visiting the library. In both instances, the student is utilizing a publicly funded educational resource, but no "appropriation" to a non-public institution is involved.[2]

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

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[2]Although your inquiry did not mention the federal Establishment Clause, we note that there is no apparent problem in this area either. "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion.' (citation omitted)it follows under our prior decisions that provision of that service does not offend the Establishment Clause." ***Zobrest v. Catalina Foothills School Dist.***, 113 S.Ct. 2462, 2467 (1993). Furthermore, it is quite possible that denying parochial school children access to 21st century electronic "libraries," such as Internet, would be constitutionally suspect under Equal Protection and/or Free Exercise requirements.