STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#91037

STATE OF NEBRASKA
OFFICIAL
MAY 8 1991
DEPT. OF JUSTICE

DATE: May 8, 1991

SUBJECT: Constitutionality of Postsecondary Education Award Program Act

REQUESTED BY: Senator Douglas A. Kristensen

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

You have requested an opinion as to the constitutionality of LB 647, the Postsecondary Education Award Program Act (the "Act"). Specifically, you have expressed concern regarding the constitutionality of the Act under Article III, section 18 and Article VII, section 11 of the Constitution of the State of Nebraska.

For the reasons set forth below, we conclude the Postsecondary Education Award Program Act does not violate the Constitutions of Nebraska or the United States.

The Act

The Postsecondary Education Award Program Act authorizes scholarships to be made directly to eligible students demonstrating substantial financial need, under the administration of the Coordinating Commission for Postsecondary Education. The Act is to be funded from cigarette tax revenue.

Section twelve of the Act provides: "The . . . Act shall provide for awards made directly to eligible students demonstrating substantial financial need and shall be administered by the commission in conjunction with eligible postsecondary educational institutions." (Emphasis added.)

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Section 13 provides: "An award may be given to an eligible student for attendance at an eligible postsecondary educational institution if: (1) The award is made directly to the eligible student rather than to the . . . institution."

Section 14(1) provides that any unused funds are to be remitted to the commission by the student.

For purposes of the Act, "Eligible postsecondary educational institution" is defined in section six as:

> independent, not-for-profit institutions (1) Located in Nebraska; (2) Primarily engaged in instruction of students; (3) Satisfying the provisions of Nebraska law relating to the approval, licensure, and accreditation of colleges and universities; and (4) Offering courses and programs of instruction to regularly enrolled undergraduate students who reside in Nebraska and have received high school diplomas or their equivalent.

Section 13(6) provides that an award may not be given to an otherwise eligible student if the student is "pursing a course of study which is pervasively sectarian and creditable toward a theological or divinity degree. . . ."

Article III, Section 18

Article III, section 18 of the Constitution of Nebraska prohibits the Legislature from passing special laws granting "to any corporation, association or individual any special or exclusive privileges. . . ."

Although the Nebraska Supreme Court once held that statute similar to the Act violated Article III, §18, see State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974), more recent decisions do not support this view. See State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982).

A test for determining compliance with Article III, §18 was set out by the Nebraska Supreme Court as follows:

> The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.

United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956). Applying this test to the present facts, it is clear the Act utilizes a reasonable classification based on real differences of situation and circumstances surrounding the members of the class.

> While the statute in question establishes a class of students limited to those attending private colleges, the statute in no way discriminates against the class of students attending state colleges and universities. Any 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.

State ex rel. Rogers v. Swanson, 192 Neb. at 143 (Clinton, J. and McCown, J.J., dissenting) (quoting Americans United for Separation of Church and State v. Bubb, 379 F.Supp. at 885). See State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. at 737, 741 (1982) (rejecting contention that statute providing transportation to private school students violated Article III, §18).

As the Court stated in Bubb, "Admittedly two classes of college students exist, but both are treated similarly and thus the Statute creates no discrimination between the two classes." Americans United for Separation of Church and State v. Bubb, 379 F.Supp 872, 885 (D.Kan. 1974). Thus, the Act does not violate Article III, section 18.

Article VII, Section 11

Article VII, section 11 of the Constitution of the State of Nebraska prohibits the appropriation of public funds "to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; . . ." (Emphasis added).

The Act does not provide for appropriation of funds to any school or institution. The Act authorizes scholarship awards directly to eligible students. This distinction is constitutionally significant.

The question of whether the Act violates Article VII, Section 11 is controlled by a series of Nebraska Supreme Court decisions subsequent to Rogers v. Swanson.

In Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981), the Nebraska Supreme Court upheld the constitutionality of the Scholarship Award Program. This statute is very similar to the

present Act, but covers students attending both public and private educational institutions. The court expressly rejected the contention that the statute violated Article VII, §11. Id. at 788. Article VII, §11 prohibits appropriations to a nonpublic school. It does not prohibit such aid to individual students attending nonpublic schools. See Cunningham v. Lutjeharms, 231 Neb. 756, 759, 437 N.W.2d 806 (1989) (textbooks for children in private schools); State ex rel. Creighton University v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984); State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982) (bus transportation for children in private schools).

Since the Act does not authorize appropriations to private schools, it does not violate Article VII, §11.

The Establishment Clause

Although not specifically addressed in your opinion request, an analysis of the Act under the Establishment Clause of the First Amendment is also appropriate. A review of the decisions in this area leads to the conclusion the Act does not violate the Establishment Clause.

In Americans United for Separation of Church and State v. Bubb, 379 F.Supp. 872 (D.Kan. 1974), the court upheld a Kansas program called Tuition Grants for Private Institutions which provides for tuition grants to qualified students enrolled at private Kansas colleges and universities. Under the Kansas law (as under the Act) "only those students choosing an independent college . . . are eligible to receive tuition grants under the statute." Id. at 875. Also, under the Kansas statute (as under the Act) the tuition grants are paid to the student by the accredited independent institution. Id. at 876. In other words, the private school acts as a conduit for distributing the scholarship funds to the students. Based on the similarity of the Act to the Kansas statute, as well as the underlying constitutional principles, we conclude the Act does not violate the Establishment Clause.[1] See

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[1] While it is clear the Act would survive an Establishment Clause challenge, it is less clear what analysis would be applied by a court. It is likely a court would find, as stated in Bubb that:

> It is time to paint with a broad brush and hold that a tuition grant to permit study at a religiously oriented college is not fostering religion. It is merely giving a grown man or woman the right to study secular and/or sectarian ideas as the individual sees fit. Only by such

Americans United for Separation of Church and State v. Blanton, 433 F.Supp. 97 (M.D.Tenn. 1977), aff'd, 434 U.S. 803 (upholding Tennessee's Student Assistance Program). See also d'Errico v. Lesmeister, 570 F.Supp. 158 (D.N.D. 1983); Smith v. Board of

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> a policy will we have both academic and religious freedom.

Bubb, 379 F.Supp. at 896 (Brown, Chief District Judge, concurring). This result is especially likely in light of Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 106 S.Ct. 748 (1986). In Witters, the United States Supreme Court (Justice Marshall writing for the majority) held the State of Washington could extend assistance to a student studying at a Christian college and seeking to become a pastor, missionary, or youth director, without violating the Establishment Clause.

It is significant that a majority of the Justices (in concurring opinions) indicated that they would apparently go even further than the holding of the majority opinion, but that it was unnecessary to do so in this case. Id. at 753-55. Three concurring justices sharply criticized the Washington Supreme Court, stating, "Under the Washington Supreme Court's approach, the government could never provide aid of any sort to one who would use it for religious purposes, no matter what the characteristics of the challenged program. This Court has never taken such an approach." Id. at 754 (Powell, J.; Burger, C.J.; Rehnquist, J., concurring).

Furthermore, under the majority opinion in Witters, it is clear a state may make education grants to students pursing religious studies and degrees. Id. at 751. See also Phan v. Commonwealth of Virginia, 806 F.2d 516, 522 n.9 (4th Cir. 1986). Thus, it is unnecessary, under the constitution, to include the restrictions contained in Section 13(6) of the Act. Although there appears to be no clear consensus at this time, section 13(6) may be subject to constitutional challenge on Equal Protection or Free Exercise grounds. A review of decisions in this area indicates confusion on the part of some courts and legislatures. Some courts apply the same "pervasively sectarian" analysis to statutes authorizing aid to individuals as they do to statutes authorizing aid to religious institutions. It is clear under Witters this is not appropriate when the aid in question is to individuals. Similarly, it appears some statutes, such as the Act, contain restrictions on the use of aid which would be necessary for programs distributing aid directly to religious institutions, but unnecessary where the aid goes to the individual. See Witters, 106 S.Ct. at 751.

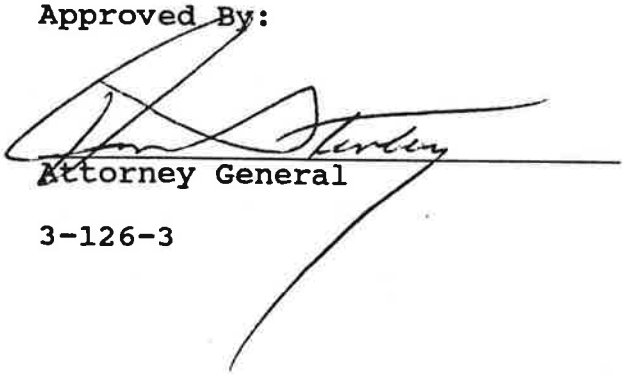
Governors of University of North Carolina, 429 F.Supp. 871 (W.D.N.C. 1977), aff'd, 434 U.S. 803 (North Carolina program providing tuition grants "to private colleges in the state, including those with church relations"); 1978 Report of the Attorney General 232 at page 355 (concluding LB 743, the scholarship loan program which was the subject of Lenstrom v. Thone did not violate the Establishment Clause.)

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

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