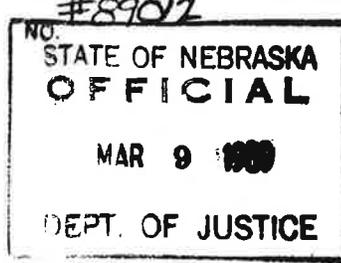


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: March 9, 1989

SUBJECT: Constitutionality of legislative act providing state income tax deductions for educational expenses incurred by individuals whose dependent(s) attend public or private elementary or secondary schools in this state which are nonprofit.

REQUESTED BY: Senator Elroy M. Hefner  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Harold Mosher, Assistant Attorney General

In your letter to this office under date of February 23, 1989, you inquire if LB 346 of the Ninety-first Legislature, First Session (1989), is constitutional. The same is hereinafter discussed.

If enacted into operative law, §1 of LB 346 would amend Neb.Rev.Stat. §77-2716.01 (Supp. 1988) by adding subsection (4) thereto, which is quoted below, and thus create a state income tax deduction as follows:

(4)(a) Every resident individual shall be allowed to subtract from federal adjusted gross income the actual amount paid to others for tuition, textbooks and transportation during the tax year not in excess of one thousand one hundred dollars for each dependent in grades kindergarten through six and one thousand seven hundred dollars for each dependent in grades seven through twelve attending a public or nonpublic elementary or secondary school. No deduction shall be allowed under this subsection unless the school is located in the state, is not operated for profit, does not discriminate on the basis of race, color, or national origin, and fulfills the school term requirements prescribed in section 79-201.

(b) For purposes of this subsection:

(i) Textbooks shall mean and include books,

L. Jay Bartel  
Elaine A. Catlin  
Delores N. Coe-Barbee  
Dale A. Comer  
David Edward Cygan  
Lynne R. Fritz  
Denise E. Frost

Yvonne E. Gates  
Royce N. Harper  
William L. Howland  
Marilyn B. Hutchinson  
Donald E. Hyde  
Vanessa R. Jones

Kimberly A. Klein  
Charles E. Lowe  
Lisa D. Martin-Price  
Steven J. Moeller  
Harold I. Mosher  
Fredrick F. Neid

Bernard L. Packett  
Marie C. Pawol  
Kenneth W. Payne  
Douglas J. Peterson  
LeRoy W. Sievers  
James H. Spears

Mark D. Starr  
John R. Thompson  
Susan M. Ugal  
Terri M. Weeks  
Melanie J. Whittamore  
Linda L. Willard

instructional materials, and equipment used in teaching the elementary or secondary instructional program prescribed by the rules and regulations of the State Board of Education. Textbooks shall not include books, instructional materials, or equipment used in the teaching of religious tenets, doctrines, or worship or for extracurricular activities;

(ii) Transportation shall not include transportation to and from extracurricular activities; and

(iii) Dependent shall mean a person for whom the individual claims a dependency exemption on his or her federal income tax return.

Sec. 2. That original §77-2716.01, Revised Statutes Supplement, 1988, is repealed.

LB 346 would obviously create a state income tax deduction for amounts expended on three types of education-related expenditures: tuition, textbooks and transportation.<sup>1</sup> The proposed state income tax deduction would be available to taxpayers whose dependents attend public schools as well as to those whose dependents attend private and parochial schools operated not for profit. The bill expressly excludes from the definition of "textbooks" any "books, instructional materials, or equipment used in the teaching of religious tenets, doctrines, or worship or for extracurricular activities." In an Opinion of the Justices to the Senate, 514 N.E.2d 353, 356 (Mass. 1987), the Supreme Judicial Court of Massachusetts had before it a proposed legislative bill almost identical to LB 346. Upon examining the statutory scheme and the anticipated functioning of that proposed legislation, the court stated:

\* \* \*. A deduction for tuition and textbook expenditures would be of little or no benefit to parents of public elementary or secondary school students. Public school students receive their education, including textbooks, from municipalities in the Commonwealth free

---

<sup>1</sup> The State of Nebraska authorizes school districts to provide transportation for public school and private school students pursuant to Neb.Rev.Stat. §79-487 (Reissue 1987). The statute was held constitutional in State ex rel. Bouc v. School District of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982), at least in part, because the legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from school.

of charge. G.L. c 71 (1986 ed). Therefore, the benefits of these proposed tax deductions would flow exclusively to those taxpayers whose dependents attend private schools and, as a result, to the private school themselves.

In our State, public school students receive their education, including textbooks, from school districts free of charge. Neb. Const., Art. VII, §1. Therefore, the benefits of the proposed tax deductions in LB 346 would flow exclusively to those taxpayers whose dependents attend private schools and, as a result, to the private schools themselves.

Neb. Const., Art. VII, §11, provides in pertinent part: "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; \* \* \*." The message is bold and clear. Recognition of religious freedom is expressed in §4 of Article I of the Constitution of Nebraska and recognition of the unitary principle is expressed in §11 of Article VII of the Constitution of Nebraska by the prohibition of an appropriation under any guise to any educational institution other than the public school (with two exceptions, neither of which is pertinent to your inquiry).<sup>2</sup> It is clear that LB 346 involves an "appropriation of public funds" within the meaning of §11 of Article VII of the Constitution of Nebraska. The fact that the expenditure here takes the form of a tax deduction rather than a direct payment out of the State's treasury does not alter the result, for it has long been recognized that the subsidies or tax expenditures of this sort are the practical equivalent of direct government grants. See, Opinion of the Justices to the Senate, supra; Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). See also, Surrey, Pathways to Tax Reform (1973); and Surrey, Tax Incentives as a Device for Implementing Government Policy; A Comparison with Direct Expenditures, 83 Harv. L. Rev. 705 (1970).

---

<sup>2</sup> The United States Supreme Court's decision in Mueller v. Allen, 463 U.S. 388 (1983), in which a Minnesota statute providing tax deductions for educational expenditures was held not to violate the establishment clause of the First Amendment to the United States Constitution, need not enter our analysis. The language of Neb. Const., Art. VII, §11 is much more specific than the First Amendment.

Senator Elroy M. Hefner  
March 9, 1989  
Page -4-

Thus, the form of payment to a private school is not dispositive on the issue of whether the payment is prohibited by the Constitution. If the aid has been channeled to individual taxpayers rather than to the private school, the focus still is on the effect of the aid, not on the recipient. In other words, the "Legislature cannot do indirectly what the Constitution prohibits it from doing directly." See, United Community Services v. Omaha National Bank, 162 Neb. 786, 798, 77 N.W.2d 576, 587 (1956).

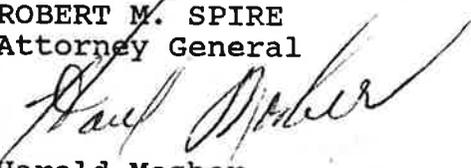
The effect of the aid in LB 346 is underscored by the fact that the proposed state income tax deduction is essentially a reimbursement for private school tuition and textbooks. The aid is not limited to benefits that are remote from the essential function of the schools, benefits such as transportation and police and fire protection. Rather, the aid provided in LB 346 would underwrite the teaching function, the school's essential enterprise. Thus, LB 346 would support the on-going maintenance of private school education.

#### Conclusion

After considering the criteria discussed above, we are of the opinion that if LB 346 were enacted into operative law, it would violate Neb. Const., Art. VII, §11, at least in so far as it authorizes a state income tax deduction for amounts expended on tuition and textbooks for students of private elementary and secondary schools. We therefore answer your question "Yes." LB 346, in our opinion, is unconstitutional.

Respectfully submitted,

ROBERT M. SPIRE  
Attorney General

  
Harold Mosher  
Assistant Attorney General

Approved:

  
Attorney General

cc: Patrick J. O'Donnell  
Clerk of the Legislature  
20-33-13