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15-007

NO.
STATE OF NEBRASKA
OFFICIAL
MAY 06 2015
DEPT. OF JUSTICE

SUBJECT: Constitutionality of Oral Health Training and Services Fund Under Neb. Const. art. VII, § 11

REQUESTED BY: Senator Heath Mello
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

On April 30, 2015, we received your opinion request regarding the constitutionality of an Oral Health Training and Services Fund that is proposed in the Appropriation Committee's budget recommendations in Section 173 of AM 829 to LB 657, Section 38 of AM 831 to LB 661 and subsection (13) of AM 1246 to LB 662. Your letter refers to a particular case, *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984), in which the Nebraska Supreme Court discussed art. VII, §11 of the Nebraska Constitution. Therefore, it is our understanding that your concerns involve that constitutional provision. For the reasons set forth below, we conclude that contract payments from the Fund to both public and private institutions for oral health services and oral health workforce development as proposed in this legislation would not violate art. VII, §11 of the Nebraska Constitution.

As noted in your opinion request, AM 831 to LB 661 provides that the intent of this legislation is to develop a workforce in the practice of dentistry and oral health care, to disperse the workforce to assist at-risk populations and to focus efforts where most needed. You explained that Nebraska has a severe shortage of oral health care providers, that 82 counties are shortage areas in pediatric dentistry and that a majority of the 93 counties are general dentistry shortage areas. Under AM 831 as adopted by the Legislature on April 30, 2015, the Coordinating Commission for Postsecondary Education would administer the Oral Health Training and Services Fund and enter into a contract for certain oral health services and oral health workforce development. To be eligible to enter into a contract, an applicant would need to be "a corporation exempt for federal tax purposes under section 501(c)(3) of the Internal Revenue Code" and to submit a plan "to provide oral health training, including assistance for the graduation of

at least seventy-five dental students annually" and to provide discounted or charitable oral health services. In addition, the applicant must submit five letters of intent with school districts or federally qualified health centers to provide discounted or charitable oral health services. The plan must also include a proposal to provide training at a reduced fee to those students who agree to practice dentistry in shortage areas and a proposal to provide services using telehealth as defined in Neb. Rev. Stat. § 71-8503.

In your request letter, you stated that both private and public institutions may apply for the contract funds. You further explained that a question was raised as to the constitutionality of the legislation and you cited the case of *State ex rel. Creighton University v. Smith* in which Neb. Const. art. VII, § 11 is discussed. Article VII, § 11 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. . . ." However, the Nebraska Supreme Court has held this constitutional provision does not prevent the state from contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.

The Supreme Court has analyzed art. VII, § 11 and upheld statutes that authorize the transportation of nonpublic school students on public school buses, grant scholarships for financial assistance to students attending nonpublic institutions, reimburse nonpublic educational institutions for the education of state wards, and that require public schools to lend textbooks to students in nonpublic schools. See *State ex rel. Bouc v. School Dist. Of City of Lincoln*, 211 Neb, 731, 320 N.W.2d 472 (1982); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *Father Flanagan's Boys Home v. Dep't of Social Services*, 255 Neb. 303, 583 N.W.2d 774 (1998); and *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806 (1989).

In *State ex rel. Creighton University v. Smith*, a contract between the state and a nonpublic medical school involving cancer research was found constitutional. In *Smith*, Creighton University sought a writ of mandamus requiring the state to consider its contract proposal for cancer research submitted pursuant to Neb. Rev. Stat. § 81-638. This statute appropriated funds to the Department of Health and Human Services to be distributed as grants and contracts for cancer research to the University of Nebraska and other postsecondary educational institutions. The Court recognized the state's constitutional authority to contract for a public purpose, held that the act (§§ 82-637 through 81-640) was constitutional, and affirmed the issuance of a writ of mandamus requiring the state to consider Creighton University for these grants and contracts. "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." *Id.* at 688, 353 N.W.2d at 271. The fact that a nonpublic institution derives a benefit from the contract "does not transform payments for contracted services into an appropriation of public funds proscribed by article VII, § 11 . . . ." *Id.* at 689, 353 N.W.2d at 272. "The act, §§ 81-637 through 81-640, does not set aside state money for Creighton's special use and does not vest in Creighton any right to receive state funds. Under these circumstances there is no appropriation of public funds to Creighton." *Id.* at 690, 353 N.W.2d at 272.

We must then determine whether contract payments pursuant to the Appropriations Committee's proposed legislation would be considered "appropriations."[1] The public purpose is set out in the intent language of the legislation as providing for the development of a skilled and diverse workforce in order to provide for the oral health of all Nebraska residents, especially at-risk populations. You have explained that both public and private institutions may apply for the contracts to be administered by the Coordinating Commission for Postsecondary Education. To the extent that a question has arisen regarding the eligible applicants for these contracts, it is our understanding that further amendments are being considered which would clarify that both public and private institutions may apply for the contracts. Applying the principles set forth in *Smith*, it appears to us that the Legislature has the right to contract with both public and private entities to achieve its public policy objectives and that, with this further clarification, the contract funds would not be considered "appropriations." Therefore, since the legislation, on its face, would not authorize appropriations to nonpublic schools, it would not violate Neb. Const. art. VII, § 11.

Sincerely,

DOUGLAS J. PETERSON
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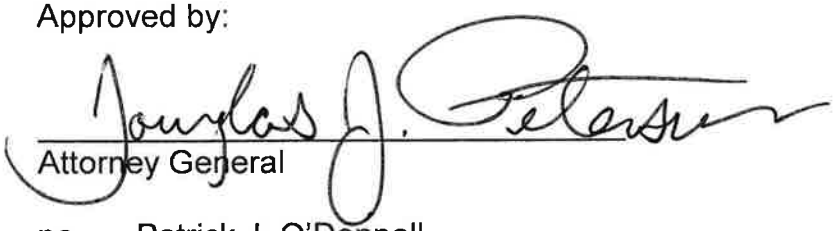
Lynn A. Melson
Assistant Attorney General

Approved by:



Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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[1] In our Op. Att'y Gen. No. 03020 (July 30, 2003), we discussed Neb. Const. art. VII, § 11 and concluded that payments from a Nebraska Soil and Water Conservation Fund to eligible landowners, including nonpublic schools and churches, were grants to achieve environmental objectives, not "appropriations." In an earlier opinion, Op. Att'y Gen. No. 95018 (March 9, 1995), we discussed the same constitutional provision in connection with grants awarded from the Education Innovation Fund and determined that certain direct grants to nonpublic schools would be prohibited. Upon review, we consider the more recent 2003 opinion to be more consistent with Nebraska caselaw, including the *Smith* case.