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91018

MAR 20 1991

DATE: March 20, 1991

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

REQUESTED BY: Senator Timothy J. Hall
Nebraska State Legislature

OPINION BY: Don Stenberg, Attorney General
L. Steven Grasz, Deputy Attorney General

You have requested an opinion as to the constitutionality of the tuition tax deduction proposed in LB 332 of the Ninety-Second Legislature, First Session (1991). Specifically, you have asked us to consider the constitutionality of this proposal in light of the Nebraska Supreme Court's decision in Cunningham v. Lutjeharms, 231 Neb. 756, 437 N.W.2d 806 (1989).

Section one of LB 332 would amend Neb.Rev.Stat. §77-2716.01 (Reissue 1990) by adding subsection (4) thereto, 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

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> 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, 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.

For the reasons set forth below, it is the opinion of the Attorney General LB 332 does not violate the Constitution of the State of Nebraska or the Constitution of the United States.

Article VII, §11 of the Constitution of the State of Nebraska provides public funds may not be appropriated to a school not owned or controlled by the State:

> 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 benefits of LB 332 would clearly be available on a nondiscriminatory basis to state tax payers whose dependents attend nonprofit private and parochial schools as well as public schools. At issue then, is whether the tuition tax deductions contained in LB 332 constitute an appropriation of funds to non-state owned or controlled schools.

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 University v. Smith, 217 Neb. 682, 688, 353 N.W.2d 267 (1984).

The Nebraska Supreme Court has repeatedly held Art. VII, §11 should be interpreted literally. Thus, §11 "prohibits appropriations by the Legislature to nonpublic schools." Cunningham v. Lutjeharms, 231 Neb. 756, 759, 437 N.W.2d 806 (1989) (emphasis in original); State ex rel. Creighton, 217 Neb. at 689; 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.

Consistent with the holdings in Cunningham, Bouc, and Lenstrom, we find that LB 332 does not authorize an appropriation of funds to nonpublic schools. 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. Therefore, it is our opinion LB 332 does not violate Art. VII, §11.

As to the question of whether LB 332 violates the Establishment Clause of the First Amendment to the Constitution of the United States (made applicable to the states through the Fourteenth Amendment), it is the opinion of the Attorney General LB 332 is constitutionally sound.

The United States Supreme Court's most well-developed "tests" for application of the Establishment Clause were set out in Lemon v. Kurtzman. These tests are as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion." . . .

Lemon v. Kurtzman, 403 U.S. 613, 91 S.Ct. 2105, 2111 (1971).

In Mueller v. Allen, 463 U.S. 388, 394, 103 S.Ct. 3062, 3066 (1983), the United States Supreme Court upheld a Minnesota statute which, like LB 332, allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending public or private elementary or secondary school. Mueller v. Allen is dispositive of the Establishment Clause issues arising from LB 332. The tax deduction provided for in LB 332 has a secular legislative purpose. See Mueller v. Allen, 463 U.S. at 394. "A State's decision to defray the cost of educational expenses incurred by parents - regardless of the type of schools their children attend - evidences a purpose that is both secular and understandable." Id. at 395.

LB 332 does not have the primary effect of advancing religion. See Mueller v. Allen, 463 U.S. at 396-397. Here, as in Mueller, "the deduction is available for educational expenses incurred by all parents. . . ." Id. at 397. Likewise, "Public funds become available only as a result of numerous private choices of individual parents of school-age children." Id. at 399. As the Supreme Court noted, "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefits at issue in this case." Id. at 400. Furthermore, under LB 332, as under Minnesota's statute, "If parents of children in private schools choose to take special advantage of the relief provided by [the bill] it is no doubt due to the fact that they bear a particularly great financial burden in educating their children." Id. at 402.

Finally, LB 332 does not excessively entangle the State in religion. See Mueller v. Allen, 403 U.S. at 388. See also Cunningham, 231 Neb. at 763.

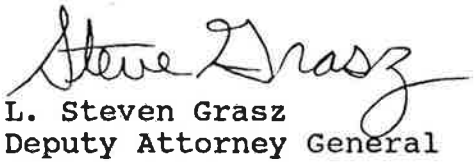
In conclusion, LB 332 violates neither Neb.Const.Art. VII, §11 nor the Establishment Clause of the First Amendment to the

Constitution of the United States. Attorney General Opinion No. 89012 dated March 9, 1989, is hereby expressly overruled.

Respectfully submitted,

Sincerely yours,

DON STENBERG
Attorney General



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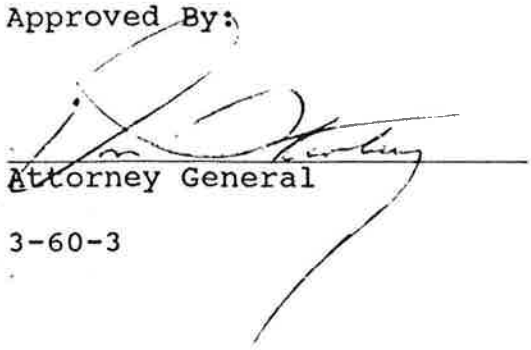

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