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NO.
STATE OF NEBRASKA
OFFICIAL
MAR 9 1995
DEPT. OF JUSTICE

DATE: March 6, 1995

SUBJECT: Whether Nonpublic Schools May Benefit Directly or Indirectly from Grants Awarded from the Education Innovation Fund

REQUESTED BY: Ross N. Tegeler, Chairman
Excellence In Education Council

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

On behalf of the Excellence In Education Council ["Council"] you have requested that this office render "a legal opinion regarding the eligibility of private and parochial schools to receive funds and/or services either directly or indirectly as a result of grants funded by the Education Innovation Fund." You indicate that the Council has been operating under the premise that only public school districts are eligible to receive funds or services in any type of grant award. Your request to us, however, was prompted by the Council's receipt of an inquiry on this issue from an attorney representing parochial schools.

The Education Innovation Fund

Upon the Legislature's enactment of LR 24CA in 1991, a constitutional amendment was placed on the ballot which "permit[ted] Nebraska voters to decide in the November 1992 general election whether the State shall operate and regulate a statewide lottery. . . ." Introducer's Statement of Intent on LR 24CA, 92nd Neb. Leg., 1st Sess., March 11, 1991 (Statement by Senator Dennis Baack, Principal Introducer). The use of lottery proceeds was to be directed "for charitable or community betterment purposes." *Id.*

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The proposed constitutional amendment was adopted by a majority of voters in November, 1992. Thus, the Nebraska Constitution now provides that "[t]he Legislature may establish a lottery to be operated and regulated by the State of Nebraska. The proceeds of the lottery shall be appropriated by the Legislature for the costs of establishing and maintaining the lottery and for other purposes as directed by the Legislature." Neb. Const. art. III, § 24 (Cum. Supp. 1994). During the legislative session immediately following the November, 1992, general election, LB 138 was enacted to create the "State Lottery Act," Neb. Rev. Stat. § 9-801 - § 9-841 (Cum. Supp. 1994). *See* Committee Statement on LB 138, 93rd Neb. Leg., 1st Sess., January 25, 1993 (Committee on General Affairs).[1]

1. Current Statutory Provision.

The Education Innovation Fund has been established by the Legislature.[2] It is funded with a specified percentage of proceeds received from the operation of lottery games conducted pursuant to the State Lottery Act. Neb. Rev. Stat. § 9-812(1) (Cum. Supp. 1994). To date, approximately $9.5 million of lottery proceeds have been deposited into the Education Innovation Fund. Each fiscal year, the Governor may allocate monies available in the Fund for disbursement

> through incentive grants to encourage the development of strategic school improvement plans by school districts for accomplishing high performance learning and to

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[1] In 1991, the Legislature had, as a companion bill to LR 24CA, enacted LB 849, a measure detailing how lottery proceeds were to be disbursed. That legislation, however, could not implement a state lottery due to a principle of law which provides that "[a]n act of the legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act." ***State ex rel. Rogers v. Swanson***, 192 Neb. 125, 128, 219 N.W.2d 726, 729 (1974). Therefore, the Unicameral was required to take legislative action implementing a state lottery subsequent to adoption of the constitutional amendment.

[2] In two prior opinions we have addressed several issues of statutory construction of Neb. Rev. Stat. § 9-812 pertaining to the Education Innovation Fund. *See* Op. Att'y Gen. No. 94-092 (November 23, 1994)(discussing public meetings, public records, and major competitive grant eligibility issues); Informal Op. Att'y Gen. No. I94-020 (May 10, 1994)(determining the nature of entities which may receive incentive grants).

> encourage schools to establish innovations in programs or practices that result in restructuring of school organization, school management, and instructional programs which bring about improvement in the quality of education.

Neb. Rev. Stat. § 9-812(2) (Cum. Supp. 1994).

The statute further provides that "[s]uch grants are intended to provide selected school districts, teachers or groups of teachers, nonprofit educational organizations, educational service units, or cooperatives funding for the allowable costs of implementing pilot projects and model programs." *Id.* Regulations establishing procedures regarding the selection and administration of grants awarded from the Education Innovation Fund have, pursuant to Neb. Rev. Stat. § 9-812(2) (Cum.Supp. 1994), been promulgated by the Nebraska State Board of Education. *See* 92 NAC 89 (1994).

2. Pertinent Constitutional Provision.[3]

Overarching the statutory provisions pertaining to the Education Innovation Fund is the mandate of our state constitution that "appropriation of public funds[4] shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ." Neb. Const. art. VII, § 11 (1989). In construing this provision, the Nebraska Supreme Court has determined that "[article VII, § 11] says what it means and means what it says." ***Lenstrom v. Thone***, 209 Neb. 783, 788, 311 N.W.2d 884, 888 (1981) (quoting ***Gaffney v. State Department of Education***, 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974)). Therefore, the court has directed "that this section of the Nebraska Constitution . . . prohibits appropriations by the Legislature to nonpublic schools." ***Cunningham v. Lutjeharms***, 231 Neb. 756, 759, 437 N.W.2d 806, 809 (1989) (emphasis in original); ***See also State ex rel. Creighton Univ. v. Smith***, 217 Neb. 682, 353 N.W.2d 267 (1984); ***State ex rel. Bouc v. School Dist. of City of***

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[3] This section pertains only to Article VII, § 11 of the state constitution. See a brief discussion of issues arising under the United States Constitution on page 8 of this opinion.

[4] We deem the term "public funds" to encompass proceeds accruing to the Education Innovation Fund. Despite the fact that these monies are not raised by taxpayer assessments, they are collected by the State of Nebraska in the operation of its lottery. Furthermore, disbursement and appropriation of the lottery funds have been specified by the Legislature's enactment of Neb. Rev. Stat. § 9-812.

Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982); *Lenstrom*, 209 Neb. 783, 311 N.W.2d 884.

Discussion

Based upon the provisions of Neb. Rev. Stat. § 9-812 and Article VII, § 11, we now address your inquiry. You have posed a series of questions which, for purposes of our analysis, we address as follows:

1. Are either a nonpublic school[5] or its teachers eligible to be direct recipients of grants awarded from the Education Innovation Fund when such grants are for the benefit of the nonpublic school, its staff, or its students?

a) Grant Awards to Nonpublic Schools.

The Education Innovation Fund statute clearly provides that either school districts, teachers or groups of teachers, nonprofit educational organizations, educational service units, or cooperatives may be "selected" for "funding for the allowable costs of implementing pilot projects and model programs." Neb. Rev. Stat. § 9-812(2)(Cum.Supp. 1994); *See also* Op. Att'y Gen. No. I94-020 (May 10, 1994) at 3. Regulations promulgated pursuant to the statute define a "school district" to mean "a public school system organized to provide education in elementary and/or secondary grades accredited under 92 NAC 10." 92 NAC 89, § 002.09. Having been properly promulgated, the definition contained within this regulation has the effect of statutory law. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). We find this regulatory interpretation of the term "school districts" to be consistent with parameters which have been established by the court in reviewing whether various statutes accord with Article VII, § 11 of the state constitution.

What Article VII, § 11 prohibits is "appropriations by the Legislature to nonpublic schools." *Cunningham*, 231 Neb. at 759, 437 N.W.2d at 809. "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 Univ.*, 217 Neb. at 688, 353 N.W.2d at 271.

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[5] "A [`nonpublic school'], for purposes of our opinion, is synonymous with [`private school'], both of which include church-related schools." *Cunningham*, 231 Neb. at 758, 437 N.W.2d at 809.

At issue in the ***State ex rel. Creighton Univ.*** case was whether the State was prohibited by this constitutional provision from contracting with a private university to conduct cancer research in the university's medical college. The university's research was to be conducted under statutes which authorized grants and contracts for research of cancer and smoking-related diseases. ***Id.*** at 684, 353 N.W.2d at 269 (construing Neb. Rev. Stat. § 81-637 - § 81-640 (1981)). Examining the nature of who would benefit by the state entering into the contract, the court found that "[t]he primary purpose and principal objective of the state's contract regarding cancer research is improved public health in Nebraska . . . . [P]ublic funds are used for a public purpose -- the promotion and search for good health as a benefit to all citizens of Nebraska. . . ." ***Id.*** at 690, 353 N.W.2d at 272. The court held that the statutes at issue were not violative of Article VII, § 11. Key to its holding was the determination that the statutes did "not set aside state money for [a nonpublic school's] special use and [did] not vest in [a nonpublic school] any right to receive state funds." ***Id.***

We do not find the grant award process authorized by Neb. Rev. Stat. § 9-812(2) to be comparable to the statutory scheme held valid by the court in ***State ex rel. Creighton Univ.*** The award of either a "minigrant" or a "major competitive grant" directly to a nonpublic school from the Education Innovation Fund would set aside state funds for the school's special use and would vest in that school the right to receive the amount of funds specified by a grant. Such a direct award falls within the "appropriation of public funds" which is prohibited under Article VII, § 11 of the Nebraska Constitution. Therefore, a nonpublic school may not be a direct recipient of grants awarded by the Education Innovation Fund.

b) Grant Awards to Nonpublic School Teachers.

Our response to your inquiry regarding whether teachers employed by nonpublic schools may be direct grantees of Fund awards is fact-dependent. As we have previously noted to you, it is difficult to render a legal opinion on general questions without having the benefit of specific grant proposals before us. ***See*** Op. Att'y Gen. No. 94-092 at 3-4. We will, however, set forth and analyze two hypothetical situations in order to provide the Council with guidelines as it considers future grant applications.

Hypothetical "A": An individual who is employed as a social studies teacher at Brownell Talbot High School in Omaha, Nebraska, has collaborated with a group of 3 other teachers, all of whom are employed by the Omaha Public School District, in

developing an alternative program for high-school dropouts.[6] The innovative program will be directed to a group of Omaha-area students, aged 15 - 17, who have stopped attending classes. The program is directly related to a facet of the Omaha Public School District's strategic school improvement plan. The group of teachers will conduct their alternative program on Saturday mornings at a public library. The group of teachers have applied, collectively, for a major competitive grant.

Under this hypothetical, the awarding of an incentive grant to the group of teachers would not be "an appropriation of public funds to a nonpublic school" as prohibited under the state constitution. While the Brownell Talbot teacher (and the school) would arguably receive an indirect benefit from participating in the grant project, such indirect benefits are not proscribed. The court has expressly rejected the argument that the provision of indirect benefits to a nonpublic school violates Article VII, § 11. ***Bouc***, 211 Neb. at 737, 320 N.W.2d at 476.

Hypothetical "B": An individual who is employed as a math teacher at St. Teresa Elementary School in Lincoln, Nebraska, applies for a major competitive grant in order to purchase lap top computers which will be used to conduct training programs for all of the math teachers at the school in order to increase their ability to work with educational technology in their classrooms.[7]

In this situation, again, an award to the teacher would not be an appropriation "<u>to a nonpublic school</u>." The awarding of such a grant, however, would likely violate the principle of Article VII, § 11 in that the incentive grant would set aside state money for use only by a nonpublic school teacher in a nonpublic school setting and would benefit the school's teachers and its students. ***See State ex rel. Creighton Univ.***, 217 Neb. at 684, 353 N.W.2d at 272.

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[6] Neb. Rev. Stat. § 9-812(2) expressly authorizes major competitive grants to be awarded from the Fund to "groups of teachers." In addition, one of the purposes for which incentive grants may be awarded includes "[a]lternative programs for students, including . . . dropouts."

[7] Neb. Rev. Stat. § 9-812 provides that an individual teacher may apply for a major competitive grant. The statute further provides that incentive grants may be awarded for "[t]raining programs designed to benefit all teachers at all levels of education by increasing their ability to work with educational technology in the classroom."

Moreover, even if there were deemed to be no constitutional prohibition to the grant award under Hypothetical "B," we find that such an award would not be possible unless two additional requirements were complied with: first, that a school district have in place a strategic improvement plan and, second, that the teacher's innovative proposal as set forth in the hypothetical be directly related to the strategic improvement plan. *See* Neb. Rev. Stat. § 9-812(2). Since the term "school district" refers to public schools, the teacher's proposal would have to relate directly to a public school district's strategic school improvement plan. We find it difficult to envision a circumstance in which a public school district's strategic self-improvement plan would contain provisions for the training of nonpublic school teachers. As well as setting forth a novel educational proposal, each Education Innovation Fund application must comply with the statutory requirements of Neb. Rev. Stat. § 9-812 before an incentive grant may be awarded.

2. Are either a nonpublic school, its staff, or its students eligible to <u>indirectly receive services</u> as beneficiaries of a grant awarded to an eligible recipient?

As noted earlier herein, the Nebraska Supreme Court has expressly rejected the argument that the provision of indirect benefits to a nonpublic school violates Article VII, § 11. ***Bouc***, 211 Neb. at 737, 320 N.W.2d at 476. This principle was discussed in one of our prior opinions. In that opinion, we addressed the legal issue of whether the provision of parochial school access to telecomputing services provided by educational service units constituted an appropriation of funds to non-state institutions. *See* Op. Att'y Gen. No. 94-027 (April 15, 1994). We concluded that no constitutional violation existed under the facts provided to us. Given that educational service units are eligible to apply for "major competitive grants," we use the facts of our prior opinion to illustrate an example of indirect services which may validly be provided to nonpublic school students.[8]

We examined a situation in which educational services units ["ESUs"] were established as focal points, or "hubs," for providing telecomputing services, specifically, access to the "Internet." "Schools or persons obtaining service through the hub [paid] for phone line service and the maintenance and support services provided by the ESU[]. They . . . also purchase[d] their own computer hardware." Op. Att'y Gen. No. 94-027 at 2. This

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[8] In setting forth this example, we assume that all statutory requirements of Neb. Rev. Stat. § 9-812 would be satisfied by any grant applicant proposing a similar project.

office determined that "the provision of parochial school access to telecomputing services provided by ESU's does not constitute an appropriation of funds to parochial schools merely by allowing access to a computer network under the circumstances described above." *Id.* at 3. We concluded that there existed "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." *Id.* at 4.

Our conclusion was based upon the court's precedent in reviewing whether the provision of various services would violate the Nebraska Constitution. The general rule developed in the court's line of cases is that "any benefit that may inure to [a nonpublic school which] is merely incidental . . . cannot be deemed to be an `appropriation to' that institution." ***Bouc***, 211 Neb. at 737, 320 N.W.2d at 476.

United States Constitution

The federal Constitution prohibits enactment of any law "respecting an establishment of religion." U.S. Const. amend. I. This provision is applicable to the states through application of the fourteenth amendment to the U.S. Constitution. One aspect to consider in determining whether a governmental program abridges the establishment clause is to determine whether the program will foster "excessive government entanglement with religion." ***Lemon v. Kurtzman***, 403 U.S. 602 (1971). In ***Wolman v. Walter***, 433 U.S. 229 (1977), the Supreme Court noted that States could permissibly provide "church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students . . . [could be provided without] offend[ing] the Establishment Clause . . . ." *Id.* at 242 (citations omitted).

> On the other hand, ***Wolman*** affirms that providing nonpublic schools maps and charts, teaching and counseling services, and the funding for student fields trips are offensive to the establishment clause of the U.S. Constitution when the nonpublic school would be the direct recipient of the items or services or when it would involve close supervision of nonpublic school teachers to ensure the nonreligious use of the items, funds, and services. That necessary supervision would constitute excessive government entanglement.

Cunningham, 231 Neb. at 762-63, 437 N.W.2d at 811.

Conclusion

We have concluded that nonpublic schools may not be direct recipients of incentive grants awarded from the Education Innovation Fund. Depending upon the facts of a particular proposal, a nonpublic school teacher might qualify as "major competitive grant" recipient. Finally, the provision of indirect services or benefits to a nonpublic institution, its teachers, or students, will not likely violate either the state or federal constitutions.

Sincerely,

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Approved:

Attorney General