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15-012
NO.
STATE OF NEBRASKA
OFFICIAL
OCT 16 2015
DEPT. OF JUSTICE

SUBJECT: Constitutionality of LB 232 – the Nebraska College Choice Grant Program

REQUESTED BY: Senator Mark Kolterman
Nebraska State Legislature

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

You have requested our opinion concerning the constitutionality of LB 232, which would create the Nebraska College Choice Grant Program Act. Your letter explains that this bill "would provide state funds to resident students with financial need who attend Nebraska privately-controlled, nonprofit colleges and universities."

Noting that the language of the proposed College Choice Grant Program is quite similar to the Postsecondary Education Award Program (or "PEAP"), which was in effect from 1991 to 2003, you have asked us to revisit our prior opinion concerning the PEAP Act in which this office opined that the Act was constitutional. Op. Att'y Gen. No. 91037 (May 5, 1991). As our review of Nebraska law reveals that the law in this area has not changed significantly since our 1991 opinion, we conclude that LB 232 would also likely be held constitutional.

As drafted, LB 232 would provide "for awards made directly to eligible students demonstrating substantial financial need and shall be administered by the commission [the Coordinating Commission for Postsecondary Education] in conjunction with eligible postsecondary educational institutions." LB 232, §13. An "eligible" institution is a

"nonprofit institution not controlled or administered by any state agency or any political subdivision of the state" which is located in Nebraska and meets other statutory criteria. LB 232, § 7. An "eligible student" is a Nebraska resident who is enrolled as an undergraduate student at an eligible institution and who is eligible to receive student financial assistance as provided for in the Act. LB 232, § 8. Sections 13 and 14 of the proposed Act provide that the award is made directly to the eligible student, although section 13(2) also states that "[I]n order to reduce the costs of administering the act, the commission shall allocate the funds to be distributed pursuant to the act to the eligible postsecondary educational institutions which shall act as the agents of the commission in the distribution of funds to eligible students." Section 13 also sets forth the formula for the determination of the allocation amount for each institution.

The PEAP Act, which we discussed in Op. Att'y Gen. No. 91037, was enacted by the Legislature in 1991 Neb. Laws LB 647. Comparing the PEAP Act to LB 232, we agree that the pertinent provisions of each are quite similar. The definitions of "eligible student" and "eligible postsecondary educational institution" are very close in their wording. Further, the language of LB 232, § 13, provides that, in order to reduce administration costs, the awards are to be administered by the commission in conjunction with the educational institutions, which is nearly identical to § 12 of the PEAP Act. Both acts provide for an allocation formula by which the funds to be distributed are allocated to the eligible institutions and both provide that the institutions participate in the distribution of funds to eligible students. Finally, both acts state that the awards are made directly to eligible students.

In Op. Att'y Gen. No. 91037, we discussed three constitutional provisions, of which Neb. Const. art. VII, § 11 seems the most pertinent to our current discussion. Article VII, § 11 provides, in part, that "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. . ." In our analysis of the PEAP Act we stated at page 3 of the opinion that:

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

For those reasons we concluded that the PEAP Act was constitutional. We note that the Scholarship Award Program discussed in *Lenstrom* differed from the PEAP Act and LB 232 in that it did not include specific language stating that, for administrative purposes, the educational institutions would act as agents of the commission to assist in

distribution of the funds to eligible students. However, the Scholarship Award Program, the PEAP Act and the proposed Nebraska College Choice Grant Program all state that the funds will be provided directly to eligible students and such aid to individual students is not prohibited by the Nebraska Constitution.

The only pertinent Nebraska case decided subsequent to the 1991 opinion is *Father Flanagan's Boys Home v. Department of Social Services*, 255 Neb. 303, 583 N.W.2d 774 (1998). The issue in *Father Flanagan's* was whether a state agency was required to reimburse Father Flanagan's (or "FFBH"), a private educational institution, for the cost of regular education services which that institution provided to state wards. The state agency contended that the trial court's interpretation of Neb. Rev. Stat. § 79-445(2) so as to require payment to the private institution resulted in a violation of article VII, § 11. However, the Court held that a contract between the state agency and FFBH to provide educational services for state wards was distinguishable from a direct appropriation to a nonpublic school and upheld the constitutionality of the statute. In reaching its decision, the Court discussed the meaning of the term "appropriation" as follows:

> In the context of 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. v. Smith*, 217 Neb. 682, 688, 353 N.W.2d 267, 271 (1984). Here, there has been no appropriation of public funds to FFBH. Instead, a state agency has exercised its discretionary authority to contract for services necessary to fulfill a governmental duty and further a public purpose, namely, the state's duty to obtain a nonsectarian education for its wards.
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> *Father Flanagan's* at 315-16, 583 N.W.2d at 782.

Since our 1991 opinion was issued, this office has discussed art. VII, § 11 in several other opinions. For example, in Op. Att'y Gen. No. 95018 (March 9, 1995), we answered questions concerning grants awarded from the Education Innovation Fund. While we determined that certain direct grants to nonpublic schools would be constitutionally prohibited, we did not address grant awards to individual students in that opinion. In Op. Att'y Gen. No. 03020 (July 30, 2003), we concluded that payments from the Nebraska Soil and Water Conservation Fund to eligible landowners, including nonpublic schools and churches, were not "appropriations" as that term is used in art. VII, § 11. More recently, in Op. Att'y Gen. No. 15007 (May 6, 2015), we opined that payments for services pursuant to a contract with a nonpublic educational institution under the Oral Health Training and Services Fund would not violate that constitutional provision.

For the reasons above, we find no reason to change the opinions expressed in Op. Att'y Gen. No. 91037. Therefore, in our view, LB 232 would likely not be found to violate art. VII, § 11.

Sincerely,

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Lynn A. Melson
Assistant Attorney General

Approved by:

Attorney General

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

09-528-29