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DATE: September 5, 1991

SUBJECT: Validity of Neb.Rev.Stat. §85-994(6) and Neb.Rev.Stat. §85-9,152(6) (Section 13(6) of LB 647, 92nd Legislature, 1st Session)

REQUESTED BY: Coordinating Commission for Post Secondary Education

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

For purposes of implementing the State Scholarship Award Program Act and the Post Secondary Education Award Program Act, you have requested an Attorney General's Opinion on the constitutionality of subsection six of Neb.Rev.Stat. §85-994 (Cum.Supp. 1990) and an identical provision contained in section 13(6) of LB 647, 92nd Legislature, 1st session (to be codified at §85-9,152(6)).

Section 85-994 provides:

> An award may be given to an eligible student for attendance at an eligible postsecondary educational institution if:
>
> (1) The award is made directly to the eligible student rather than to the eligible postsecondary educational institution;
>
> . . .
>
> (6) The individual is not pursuing a course of study which is pervasively sectarian and creditable toward a theological or divinity degree;
>
> . . .

Likewise, section 13(6) of LB 647 provides:

> An award may be given to an eligible student for attendance at an eligible postsecondary educational institution if: . . .
>
> > (6) The eligible student is not pursing a course of study which is pervasively sectarian and creditable toward a theological or divinity degree. . . .

In Attorney General Opinion No. 91037, dated May 5, 1991, we stated that under Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 106 S.Ct. 748 (1986), "it is clear a state may make education grants to students pursing religious studies and degrees. . . Thus, it is unnecessary under the constitution, to include the restrictions contained in section 13(6) [of LB 647]." We also noted that section 13(6) may be subject to constitutional challenge on Equal Protection or Free Exercise grounds.

Your request now places the issue of the validity of this provision, and the identical provision in §85-994(6) [the "Course Content Requirements"], squarely before us.

We conclude these Course Content Requirements are invalid and unenforceable. The Course Content Requirements are in contradiction of express language within the same statutes requiring that the scholarship programs be administered in a manner which does not discriminate on the basis of creed. Likewise, they are contrary to federal law requiring the scholarship programs to be open to students pursuing post secondary education, without regard to creed or course of study.

Because we find the Course Content Requirements are invalid and unenforceable under federal and state statutory law, we need not address whether the Course Content Requirements are also unconstitutional under the Equal Protection, Free Exercise or Establishment Clauses of the federal Constitution.

I. State Scholarship Award Programs Must Be Administered in a Nondiscriminatory Manner

Nebraska Revised Statutes Section 85-997 (Cum.Supp. 1990) provides "The Commission shall discharge the authority granted it under the State Scholarship Award Program Act without regard to any student's race, creed, color, national origin, ancestry, age, sex or handicap." (Emphasis added). This same requirement is contained in section 16 of LB 647.

Just as a provision expressly denying scholarships to students pursuing African American studies would tend to discriminate on the basis of race, color or ancestry; and just as a provision expressly denying scholarships to students pursing Women's Studies would tend to discriminate on the basis of sex, a provision denying scholarships to those pursing "pervasively sectarian" studies discriminates against students on the basis of creed (religious beliefs), in direct violation of §85-997 and LB 647, section 16.

It is a cardinal rule of statutory construction that effect must be given, if possible, to the whole statute and every part thereof, and the different provisions should be reconciled, so far as practicable, so as to make them consistent, harmonious, and sensible. See State v. Black, 195 Neb. 366, 238 N.W.2d 231 (1976); Van Patten v. City of Omaha, 167 Neb. 741, 94 N.W.2d 664 (1959). Thus, the Course Content Requirements must be examined to see if they can be harmonized with the requirement that the scholarship programs be conducted in a non-discriminatory manner.

A review of the legislative history of §§85-994 and 85-997, as well as First Amendment case law, leads us to conclude the Course Content Requirements in question were likely added to the eligibility requirements for scholarship recipients for the sole reason of compliance with the then perceived necessity of doing so to satisfy Establishment Clause concerns. Sections 85-997 and 85-994 can be harmonized only if the religious-based course content test for eligibility contained in §85-994 is required to satisfy Establishment Clause concerns. This conclusion is supported by the express language of section 85-980 which provides:

> The legislature hereby finds and declares that: . . .
>
> (4) The state can enhance its educational objectives by the development of financial aid programs, including programs which enable the state to fully qualify for federal student aid funds made available to the state through the Federal SSIG program under authority of Section 415 of the Higher Education Act of 1965, as amended, and related acts; and
>
> (5) To avoid the application of a double standard in carrying out its educational programs, the state needs to make certain that all students who qualify for aid stand equal to each other before the law, and that they be given the freedom, within reasonable and constitutional limits, to select the institutions of their choice in which to pursue their educational goals.

(Emphasis added.)

Thus, the state scholarship program statutes seek to make scholarship assistance available to "all students who qualify", within constitutional limits. In light of Witters, 474 U.S. 481, it is now clear there is no constitutional requirement that the government examine a student's course of study to see if it is "acceptable" in terms of religious content, before granting a scholarship.

This statutory construction is also consistent with the Nebraska Constitution, which recognizes the importance of religious instruction. Article I, Section 4 of the Nebraska Constitution deals exclusively with religious freedom. This section prohibits the state from giving preference to "any religious society" and from "interference with the rights of conscience." It also provides: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own made of public worship, and to encourage schools and the means of instruction." See State ex rel. Rogers v. Swanson, 192 Neb. 125, 144 (1974) (Clinton and McCown dissenting). In Swanson, the dissenting judges stated "The words in this section of the Constitution directing the passage of suitable laws to encourage schools certainly mean more than a mere statutory exhortation of encouragement. The term "pass suitable laws" can only mean laws which have an effect and which require implementation. This section of our Constitution cannot refer to the common schools of the state, the mandatory establishment of which is required by the specific provisions of Article VII, section 1. . . ." See also Gaffney v. State Department of Education, 192 Neb. 358, 379 (1974) (Clinton, McCown, dissenting) ("Article I, Section 4, therefore can refer only to `schools and the means of instruction,' other than the public schools. . . ."). It is important to note that although the above quoted opinions were dissenting opinions when written, they appear to be consistent with the current majority view of the law. See Cunningham v. Lutjeharms, 231 Neb. 756 (1989); 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).

In conclusion, therefore, the Post Secondary Education Award Program Act and the State Scholarship Award Program Act must be construed so as to give effect to the requirement that the scholarship programs be conducted in a nondiscriminatory manner and without regard to the content of otherwise eligible courses of study.

II. The Provisions Contradict Federal Law and Are Thus Invalid Under the Supremacy Clause

The Course Content Requirements also contradict federal law governing scholarship awards under the Higher Education Act.

Federal law provides:

> [T]he Secretary is authorized to make payments to [a] State for paying up to 50 percent of the amount of student grants pursuant to a State program which -
>
> . . .
>
> (5) provides that, effective with respect to any academic year beginning on or after October 1, 1978, all nonprofit institutions of higher education in the State are eligible to participate in the State program, except in any State in which participation of nonprofit institutions of higher education is in violation of the constitution of the State or in any State in which participation of nonprofit institutions of higher education is in violation of a statute of the State which was enacted prior to October 1, 1978; . . ."

20 U.S.C. §1070C-2(5) (1990) (emphasis added).

Neither the Constitution of the State of Nebraska nor any state statute enacted prior to October 1, 1978 prohibit private nonprofit institutions of higher education from participation in state scholarship programs under 20 U.S.C. §1070C-2(5). See Lenstrom v. Thone, 209 Neb. 783, 34 N.W.2d 884 (1981). Thus, state scholarship programs receiving federal funds must be administered so as to include students at all eligible nonprofit institutions of higher education, without regard to the content of their course work. To do otherwise would conflict with the purpose of the federal law. Federal law provides "It is the purpose of this part, to assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education by - . . . (3) providing for payments to the states to assist them in making financial aid available to such students; . . ." 20 U.S.C. §1070 (1990). "Eligible" students are defined in 20 U.S.C. §1091 which provides: "In order to receive any grant . . . under this subchapter . . . a student must - (1) be enrolled or accepted for enrollment in a degree, certificate, or other program leading to a recognized educational credential at an institution of higher education that is an eligible institution. . . ."

To further restrict the definition of "eligible" student by imposing a content-based test on the student's course of study would frustrate the purpose and intent of the federal law. See Beth Rochel Seminary v. Bennett, 624 F.Supp. 911, 915 (D.D.C. 1985), aff'd, 825 F.2d 478 (D.C. Cir. 1987) ("Congress was concerned with providing student financial aid to [students in] a broad range of postsecondary institutions.") (In Beth Rochel Seminary, a private nonprofit educational institution for Jewish women offering postsecondary education in Judaic Studies was determined to be an ineligible institution for purposes of the Higher Education Act. The seminary failed to qualify as an "eligible institution" not because of the content of the student's course work, but because the school was not accredited and failed to satisfy the alternative requirements for eligibility.) It must be stressed that the scholarship assistance in question flows directly to the students and not the educational institutions. Federal law clearly contemplates that students attending private secular or religious educational institutions be eligible for scholarship assistance.

Under the Supremacy Clause, U.S.Const. art. VI, cl.2, federal law supersedes conflicting state law. See Chapman v. Union Pacific Railroad, 237 Neb. 617, 467 N.W.2d 388 (1991). Whereas, section 13(6) of LB 647 and §85-994(6) conflict with requirements of federal higher education program statutes, these provisions are invalid and unenforceable.

Sincerely yours,

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Approved By:

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