

Opinion No. 79-07

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OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Representative Nick L. Salazar, Executive-Legislative Bldg., Room 311-D, Santa Fe, New Mexico 87503; Representative Vernon N. Kerr, Executive-Legislative Bldg., Room 305-C, Santa Fe, New Mexico 87503

EDUCATIONAL INSTITUTIONS

Proposed legislation to expend state money for tuition equalization grants to students attending private colleges and universities in the state raises questions of constitutionality under the First Amendment to the United States Constitution and Article IV, Section 31, Article IX, Section 14 and Article XII, Section 3 of the New Mexico Constitution.

QUESTIONS

Are any constitutional questions raised by a bill which essentially provides that sum of money be appropriated to the Board of Educational Finance for allocation as grants to students for the purpose of defraying tuition costs at private colleges and universities?

CONCLUSIONS

Yes.

ANALYSIS

House Bill 12 now under consideration by the First Session, Thirty-Fourth Legislature would appropriate \$150,000 to the Board of Educational Finance for the purpose of making tuition equalization grants to New Mexico residents enrolled in approved private New Mexico colleges and universities. Such grants would be allocated on the basis of financial need in accordance with the qualifications established in the bill and subject to regulations to be adopted by the Board of Educational Finance.

The stated purpose of the Act is:

"To provide for the maximum possible utilization of existing higher educational resources and facilities within New Mexico, both public and private, to prepare students for productive lives and for the assumption of the duties of citizenship."

OPINION

Regardless, however, of the merits of House Bill 12 or the public purposes it may serve, such a tuition grant program necessarily raises constitutional questions which should be taken into account by the legislature in its deliberations:

A. ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT, UNITED STATES CONSTITUTION

The Establishment Clause requires the separation of church and state. That is, the "state must confine itself to secular objectives, and neither advance nor impede religious activity." **Roemer v. Board of Public Works of Maryland**, 426 U.S. 736, 747 (1976). House Bill 12 authorizes tuition grants to students at any "private or independent colleges, unversicated {*16} within New Mexico and which meet program standards and accreditation comparable to public institutions . . ." To the extent sectarian institutions may be included under this provision, House Bill 12 is subject to review under the Establishment Clause.

In **Roemer v. Board of Public Works of Maryland, supra**, the United States Supreme Court reiterated the "three part test" it had established in **Lemon v. Kurtzman**, 403 U.S. 602 (1971) which requires that a state law in aid of private schools (1) have a secular legislative purpose; (2) have as a primary effect neither the advancement nor inhibition of religion; and (3) not foster an excessive governmental entanglement with religion. Under this test, tuition reimbursement programs for elementary and secondary school students have been held to violate the First Amendment when the benefit to sectarian schools is not specifically restricted. **Committee for Public Education and Religious Liberty v. Nyquist**, 413 U.S. 756 (1973); **Sloan v. Lemon**, 413 U.S. 825 (1973).

Tuition grant programs for college and university students such as that proposed in House Bill 12 have been challenged in state courts under the **Lemon v. Kurtzman** test. In **State ex rel. Rogers v. Swanson**, 219 N.W.2d 726, 735 (Neb. 1974) the Court found a proposed act providing private college tuition grants for students in violation of the First Amendment because there was "no attempt made in the bill to restrict the use of tuition funds provided by the state solely to secular subjects." See also **Opinion of the Justices**, 280 So. 2d 547 (Ala. 1973).

However, in **Americans United v. Rogers**, 538 S.W.2d 711 (Mo. 1976), **cert. denied** 429 U.S. 1029, the Court found that a college tuition grant program had the requisite secular purpose; that its primary effect was not religious; and that governmental involvement was minimal. Moreover, other kinds of grants to private colleges and universities have been sustained. See, e.g., **Hunt v. McNair**, 413 U.S. 734 (1973); **Roemer v. Board of Public Works of Maryland, supra**. Although the question, therefore, remains somewhat unsettled, the weight of authority would suggest that absent a restriction of tuition grant funds to non-sectarian purposes, a program of unrestricted cash payments for tuition expenses may be unconstitutional.

B. ARTICLE IV, SECTION 31, NEW MEXICO CONSTITUTION

Article IV, Section 31 prohibits appropriations for educational purposes to be made to persons not under the absolute control of the state. House Bill 12 may not, however, actually violate this provision in that the legislative appropriation is not made to the students but to the Board of Educational Finance, a state agency which would control the expenditure of the appropriation. Such distinctions have been held to exempt appropriations from the prohibitions of Article IV, Section 31. In **State ex rel. Interstate Stream Commission v. Reynolds**, 71 N.M. 389, 396, 378 P.2d 622 (1963) the Court explained that the fact that others "may incidentally benefit from the appropriations made to the State Engineer, who has absolute control of their expenditure, does not put them within the classifications of this section." See also Opinion of the Attorney General No. 71-74 dated June 9, 1971.

C. ARTICLE IX, SECTION 14, NEW {*17} MEXICO CONSTITUTION

Article IX, Section 14 prohibits the state from making a donation to any person. A donation within the meaning of this section has been defined as a gift, "an allocation or appropriation of something of value, without consideration." **Village of Deming v. Hosdreg Company**, 62 N.M. 18, 303 P.2d 920 (1956). Under the terms of House Bill 12, a grant to a student would appear to be an outright gift as there is no consideration or benefit accruing to the state in exchange for the grant nor any provision that the grant be repaid. Compare, Medical Student Loan Act, Sections 21-22-1 **et seq.**, NMSA 1978. Outright gifts to individuals are in violation of Article IX, Section 14, **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957), and the fact that the appropriation may be "serving a highly commendable public purpose" does not, in New Mexico, exempt it from this constitutional prohibition, **Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041 (1915). Compare, **Americans United v. Rogers**, *supra*.

Finally, although Article IX, Section 14 does not prohibit the state "from making provision for the care and maintenance of sick and indigent persons," House Bill 12, as drafted, does not necessarily establish that a tuition equalization program for students with financial needs falls within this proviso.

D. ARTICLE XII, SECTION 3, NEW MEXICO CONSTITUTION

Article XII, Section 3 prevents state money from being used "for the support of any sectarian, denominational or private school, college or university." To the extent that the tuition grants proposed under House Bill 12 are made to the students upon their application, and not to the private colleges, institutions and universities, the bill does not authorize the direct support of private schools. This distinction may be sufficient to avoid a violation of Article XII, Section 3. See Opinion of the Attorney General No. 76-6, dated February 9, 1976. Indirect support to a religious order was upheld in **Zellers v. Huff**, 55 N.M. 501, 236 P.2d 949 (1951), where the Court found that although the public money paid to members of a religious order teaching in the public schools would go to the religious order, it was not support in violation of Article XII, Section 3.

The drafters of House Bill 12 apparently anticipated constitutional problems with the tuition grant program by providing at Section 10 of the bill that the "board of educational finance shall make such regulations as may be necessary to comply with the provisions of Article 4, Section 31, Article 9, Section 14, Article 12, Sections 3 and 9 and other provisions of the New Mexico Constitution." See also Opinion of the Attorney General 69-6, dated February 4, 1969. While some constitutional problems with House Bill 12 may be remedied by board regulation, the legislature cannot delegate to the board the authority to make any substantive changes in the act which may be constitutionally required.

"It is well established that the legislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty." **State ex rel. McCulloch v. Ashby**, 73 N.M. 267, 387 P.2d 588 (1963). If in order to cure a constitutional defect in House Bill 12 is it necessary, for example, to provide for loans instead of grants, the authority to so {*18} modify or abridge a statute cannot be delegated.

In conclusion, it is the opinion of this office that House Bill 12 presents questions of constitutional validity, some of which may not be resolved by regulation of the Board of Educational Finance.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General