



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**JOHN L. HILL  
ATTORNEY GENERAL**

May 24, 1973

*Overrules M-861  
and M-391*

The Honorable A. M. Aikin, Jr.  
Chairman, Senate  
Committee on Finance  
Austin, Texas

Letter Advisory No. 47

Re: The constitutionality of  
Appropriations for Tuition  
Equalization grants

Dear Senator Aikin:

On behalf of the Senate Committee on Finance, you have requested our opinion as to whether the appropriation made for Tuition Equalization Grants is constitutional under the United States and Texas Constitutions.

The appropriation appears as Item 16 of the Appropriations to the Coordinating Board, Texas College and University System, and is based upon Senate Bill 56 adopted by the 62nd Legislature in 1971 (p. 2529, Ch. 828), Article 2654h, Vernon's Texas Civil Statutes. That act authorizes the Coordinating Board, Texas College and University System, to provide tuition equalization grants to Texas residents enrolled in approved private Texas colleges or universities, based on financial need.

The issue involved here was first before this office in 1969, and was passed upon in Opinion No. M-391 (1969) which found constitutional provisions of bills purporting to do much the same thing as our present statute. That opinion, however, relied almost entirely upon a conclusion that such grants had a "public purpose," and were thus not barred under Article 3, § 51, Constitution of Texas which prohibits grants to individuals - - an analysis still adequate when secular institutions only are involved. In its brief treatment of the question of separation of church and state, the opinion concluded, applying then existing law, that such grants to students attending denominational schools were also constitutional, "the test being not who receives the money, but the character of the use for which it is expended."

The issue was next before this office in 1971 when the Attorney General was asked to pass upon the constitutionality of a proposed statute which later became Article 2654h. Applying what was then thought to be the federal constitutional test, this office found the proposed legislation to be

constitutional. The test applied was a two-fold one, and inquired only (1) whether the proposed statute had a "secular legislative purpose," and (2) a "primary effect that neither advances nor inhibits religion." This was the test which had been set out in Board of Education v. Allen, 392 U. S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968). However, Opinion No. M-861 made the specific reservation that it was subject to the final outcome of cases then before the United States Supreme Court. Tilton v. Richardson, 403 U. S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971) and Lemon v. Kurtzman, 403 U. S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) have been decided subsequent to the issuance of Opinion M-861.

These later decisions make clear that there is now an additional test to be applied in determining Establishment Clause constitutionality under federal law. That is, in addition to the two tests stated above, there must be a determination that the statute will not foster "an excessive government entanglement with religion." Lemon v. Kurtzman, supra.

The three-pronged test was applied by this office in its Opinion No. M-1036 (1972), holding unconstitutional a bill proposing a contractual arrangement between the proposed Taylor County Junior College District and private church related colleges of Abilene, on the basis that such contracts would require "excessive entanglement" between church and state.

Applying these federal constitutional tests to the legislation before us, it is our opinion that Article 2654h does reflect a "secular legislative purpose." It states:

"In order to provide the maximum possible utilization of existing educational resources and facilities within this State, both public and private, the Coordinating Board, Texas College and University System, is authorized to provide tuition equalization grants to Texas residents enrolled in an approved private Texas college or university, based on student financial need, but not to exceed a grant amount of more than that specified in the appropriation by the Legislature."

Further, § 7(b) of the Act provides that the Coordinating Board shall make such regulations as may be necessary to comply with the provisions of "Article I, Section 7, Article III, Section 51, and other parts of the Texas Constitution." The Texas Constitution prohibits control or interference with religion (Article I, § 6), appropriation of money or property for the benefit of sects, religious societies, or theological or religious seminaries (Article I, § 7 referred to specifically in Article 2654h) and appropriation of permanent or available school funds to sectarian schools (Article 7, § 5).

As to the second and third elements of the three-pronged test, we are of the opinion that the statute must be examined both on its face, and in its factual manner of administration. We are unable to say, from examining the statute itself, that its primary effect would be to advance or inhibit religion. Nor are we able to say, from the face of the Act, that it would necessarily "foster an excessive government entanglement."

We have not been asked to pass upon, and do not pass upon, the constitutionality of any particular grants to specific individuals attending particular schools. Indeed, that fact finding process is beyond both the scope of your request and the competence of this office. The courts have reviewed, in passing upon these questions, the precise nature of the schools and programs involved, the precise percentage of public funds going to denominational schools, and a host of other factual matters which can only properly be determined by an administrative body or a court.

We are therefore unable to say that Article 2654h is unconstitutional under the United States Constitution.

In view of its stated and proper secular legislative purpose, and in view of its specific language requiring compliance with the Texas Constitution, we are likewise unable to declare Article 2654h unconstitutional under the Texas Constitution. Again, we have not been called upon to factually review the administration of this program.

However, in view of the change in the tests under the federal constitution since our last opinion on this subject, and in view of the general tightening of standards on the subject, we feel it appropriate that we discuss some of those decisions, since their standards will be applied to any future court consideration of the constitutionality of grants under this program.

Walz v. Tax Commission, 397 U. S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409, (1970), held to be valid and constitutional a provision of New York law which exempts from property taxation certain properties such as churches, libraries, museums, and religious schools.

Tilton v. Richardson, 403 U. S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091, (1971), held that the Higher Education Facilities Act of 1963 (20 U. S. C. , § § 711-721) which authorizes and provides for grants to colleges and universities including those with religious affiliations, such grants to be used for the construction of buildings and facilities which have an expressly secular and non-religious purpose and use, does not violate the Establishment provision of the First Amendment.

The opinion in Tilton notes the difference in impact of religious education on pre-college students and says:

"There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' [citation to Walz.] There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and post graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students."

Lemon v. Kurtzman, supra, and Robinson v. DiCenso, 403 U. S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105, (1971), held unconstitutional Rhode Island and Pennsylvania statutes which provide for payment of parts or portions of the teachers salaries or other expenses involved in operating private, parochial or sectarian schools.

Lemon v. Kurtzman, supra:

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and involvement of the sovereign in religious activity. (403 U. S. at 612)

"The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance . . . .

"A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs . . . .

". . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . . (403 U. S. at 621)

. . . .

"The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." (403 U. S. at 622)

Wolman v. Essex, 342 F. Supp. 399, affirmed by memorandum, 409 U. S. 808, 34 L. Ed. 2d 69, 93 S. Ct. 61 (1972), held that an Ohio statute which provides for the use of public funds to reimburse parents for part of the tuition expense incurred by them in sending their children to private or parochial schools was unconstitutional in view of the Establishment provision of the First Amendment.

Arguments were recently heard by the United States Supreme Court in several cases which may strongly affect church/school solutions under the Federal Constitution: Lemon v. Sloan, 340 F. Supp. 1356 (E. D. Pa., 1972), concerning tuition reimbursements to parents of private or parochial elementary and high school students; Committee for Separation of Church and State v. Nyquist, 350 F. Supp. 655 (S. D. N. Y., 1972), involving building maintenance grants to parochial schools, tuition grants to impoverished students at such schools, and tax exemptions for the parents of other children attending such schools; Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio, 1972), involving tax exemptions to parents of children at private or sectarian elementary or high schools; and Hunt v. McNair, 187 S. E. 2d 645 (S. C. 1972) pertaining to a construction grant plan at the college and university level.

It may also be significant to note that numerous federal programs for the assistance of students at the college level, including colleges which have denominational affiliations, have not been struck down as First Amendment violations. Some of these programs are: Educational Opportunity Grants, 20 U. S. C. 1061-1069; Loans to Students, 20 U. S. C. 1071 et seq.; (church related schools would qualify as eligible institutions in both of these programs, 20 U. S. C. 1085), Professional Development Grant, 20 U. S. C. 1090 et seq.; Public Service Fellowship, 20 U. S. C. 1134c et seq.; Work Study Program, 42 U. S. C. 2751 et seq.; as well as Education and Training Allowance to Veterans provided in 38 U. S. C. 1631, et seq.

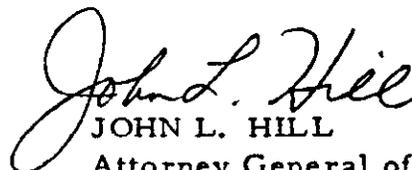
We should also point out that the church/state provisions of the Texas Constitution are more precise and restrictive than those of the federal charter. See Church v. Bullock, 109 S. W. 115 (Tex. 1908) and the case which it affirmed, Church v. Bullock, 100 S. W. 1025 (Tex. Civ. App., 1907). Texas courts have never applied the "public purpose" rationale to uphold aid to sectarian institutions. See Ex parte Conger, 357 S. W. 2d 740 (Tex. 1962).

We are of the opinion that Article 2654h, and the appropriation of funds for that program, reflect a proper secular legislative purpose and are constitutional, so long as the Coordinating Board under its regulations, administers the program so as to avoid the advancement or inhibition of religion and so as to avoid the use of public funds or property for the benefit of sects, religious societies, or theological or religious seminaries, in turn avoiding "excessive entanglements." To the extent that Opinions M-391 (1969) and M-861 (1971) rely on different constitutional standards, they are to be disregarded.

The foregoing represents, we believe, the present state of the law. However, we would suggest caution in view of the fact that the United States Supreme Court has before it for decision several cases which involve these same situations.

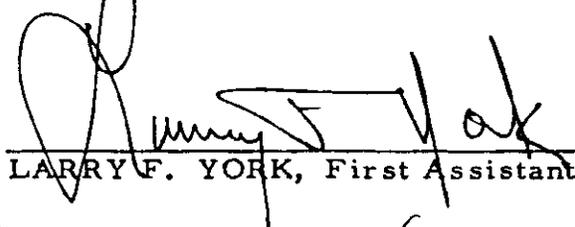
In addition to those authorities cited above, see Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545 (D. Vt., 1972); Brusca v. Missouri, 332 F. Supp. 275 (E. D. Mo., 1971); Powers v. First National Bank of Corsicana, 161 S. W. 2d 273 (Tex., 1942); Trustees of Union Baptist Ass'n. v. Huhn, 26 S. W. 755 (Tex. Civ. App., 1894, writ ref.); Blair v. Odin, 3 Tex. 288 (1848); Gabel v. Houston, 29 Tex. 366 (1897); Jernigan v. Finley, 90 Tex 204 (1848); State v. City of Austin, 331 S. W. 2d 737 (Tex., 1960); Friedman v. American Surety Co. of New York, 151 S. W. 2d 570 (Tex., 1941); Davis v. City of Lubbock, 326 S. W. 2d 699 (Tex. 1959); State v. Nusbaum, 198 N. W. 2d 650 (Wis., 1972); Miller v. Ayres, 191 S. W. 2d 261 (Va. 1972); Hartness v. Patterson, 179 S. E. 2d 907 (S. C. 1971); Attorney General Opinions V-940 (1949), O-7128 (1946), O-5354 (1943), O-5307 (1943), O-4220 (1941), O-2832 (1940), and O-2412 (1940). Compare Attorney General Opinions C-644 (1966) and C-719 (1966).

Very truly yours,

  
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APPROVED:

  
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