LETTER OPINION
2005-L-24

September 21, 2005

The Honorable Tim Flakoll
State Senate District 44
1350 2nd St N
Fargo, ND 58102-2725

Dear Senator Flakoll:

Thank you for requesting my opinion regarding the constitutionality of sections 10 and 11 of the Higher Education appropriation bill, Senate Bill 2003, 2005 N.D. Leg. (S.B. 2003). Although your letter references section 10 and 11 only, the amendments contained in section 26 must also necessarily be addressed by your questions. Because the last sentences of sections 10 and 11 and the amendments contained in section 26 of S.B. 2003 appear to appropriate moneys and require their use in a manner inconsistent with article VIII, section 5, of the North Dakota Constitution, I conclude a court presented with this issue would likely find that those provisions are unconstitutional as applied to the University of Mary, Jamestown College and Trinity Bible College. Because of my resolution of the state constitution issue, I do not believe it is necessary to determine whether those provisions violate the establishment clause of the First Amendment to the United States Constitution.

ANALYSIS

All legislative enactments are presumed constitutional. N.D.C.C. §1-02-38. A party attacking a statute must prove that it is unconstitutional beyond all reasonable doubt. All doubts must be resolved in favor of constitutionality. Stokka v. Cass County Elec. Coop., 373 N.W.2d 911, 914 (N.D. 1985). This high standard is reinforced in the requirement that at least four justices of the North Dakota Supreme Court must agree that a statute is unconstitutional. N.D. Const. art. VI, § 4.

The language at issue in S.B. 2003 is underlined in the following:

> **SECTION 10. EDUCATION INCENTIVE PROGRAMS.** The funding appropriated for education incentive programs in subdivision 1 of section 3

of this Act, may be allocated to education incentive programs as determined by the state board of higher education, including the reduction or elimination of specific programs, and the state board of higher education may determine the appropriate number of years of program eligibility for each education incentive program. The board may allocate up to $150,000 of the funding for providing doctoral incentives to students at private baccalaureate degree-granting institutions.

SECTION 11. FEDERAL, PRIVATE, AND OTHER FUNDS – APPROPRIATION. All funds, in addition to those appropriated in section 3 of this Act, from federal, private, and other sources, received by the institutions and entities under the control of the state board of higher education are appropriated to those institutions and entities, for the biennium beginning July 1, 2005, and ending June 30, 2007. All additional funds received under the North Dakota-Minnesota reciprocity agreement during the biennium beginning July 1, 2005, and ending June 30, 2007, are appropriated to the state board of higher education for reimbursement to institutions under the control of the board and for student financial assistance grants. Twenty-three and one-half percent of the additional funds must be used for student financial assistance grants for students at private baccalaureate degree-granting institutions.

SECTION 26. AMENDMENT. Section 15-62.2-01 of the North Dakota Century Code is amended and reenacted as follows:

15-62.2-01. Student financial assistance and scholars programs - Establishment - Administrative responsibility. The North Dakota student financial assistance and scholars programs are established to provide grants or scholarships, or both, to assist the following students:

1. Resident undergraduate students pursuant to section 15-10-19.1.
2. North Dakota resident students who have attended and graduated from a high school in a bordering state pursuant to section 15-40.2-10, who are attending qualified institutions of postsecondary education within North Dakota.
3. North Dakota resident students who, because of physical or mental handicap as certified by a physician, are attending postsecondary institutions out of state due to the lack of special services or facilities, or both, necessary to meet the postsecondary educational needs of the handicapped students within North Dakota.

> 4. Scholars who qualify and are selected for scholarships pursuant to sections 15-62.2-00.1 and 15-62.2-03.1 through 15-62.2-03.5.
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> A student must be in substantial need of financial assistance to receive grants under the student financial assistance program. The state board of higher education shall administer the student financial assistance program and the scholars program. At least twenty-three and one-half percent of the funds appropriated for the student financial assistance program must be allocated to students at private baccalaureate degree-granting institutions with the remaining funds allocated to students at public and American Indian institutions.

The items contained in the Higher Education appropriation bill that are at issue are the appropriations for student financial assistance grants and education incentive programs. The student financial assistance grants are administered pursuant to N.D.C.C. ch. 15-62.2. Under this program, financial assistance grants are provided to students at both private and public schools based upon need. Under S.B. 2003, however, a minimum of twenty-three and one-half percent of the appropriated dollars are required to flow to private institutions regardless of the needs priority of all eligible students attending both private and public schools.

The education incentive programs encompass the teacher shortage loan forgiveness program and the technology occupations loan program under N.D.C.C. §§ 15-10-37 and 15-10-38. Students or graduates from both private and public institutions may participate in the teacher shortage loan forgiveness program and technology occupations loan program. In addition, education incentive program money has been used to encourage doctoral graduate students. This money has been used to do such things as hire additional faculty and provide stipends to graduate students. No specific program of direct financial aid for students engaged in doctoral studies has been established. In section 10 of S.B. 2003, $150,000 is appropriated to provide doctoral incentives to students at private institutions.

You state in your letter the only "private baccalaureate degree-granting institutions" in North Dakota are the University of Mary, Jamestown College and Trinity Bible College, and the only private institution offering a doctorate degree is the University of Mary. The MedCenter One College of Nursing (MedCenter), however, is also technically a private, baccalaureate degree-granting institution. Nonetheless, as you note, and as is discussed below, all three of the institutions you mention are affiliated with religious organizations. MedCenter does not appear to be religiously affiliated, but is comparatively small in size and offers a very limited program.

Your question is whether the above underlined language is constitutional given the following prohibition in the North Dakota Constitution: "No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school." N.D. Const. art. VIII, § 5. In order for article VIII, § 5, to affect the pertinent language in S.B. 2003, the plain language of that provision requires three elements to be present: (1) "money raised for the support of the public schools" (2) must have been "appropriated to or used for the support of" (3) "any sectarian school." N.D. Const. art. VIII, § 5.

The first issue is whether the private institutions you have identified are sectarian schools within the meaning of this constitutional provision. In Gerhardt v. Heid, 267 N.W. 127 (N.D. 1936), the North Dakota Supreme Court considered the meaning of "sectarian school:"

> When the framers of the Constitution provided that "no moneys raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school," they doubtless had in mind sectarian schools as then commonly understood; that is, schools affiliated with or operated by, or under the control or governing influence of, some religious denomination or sect.

Id. at 131 (emphasis added). This office has acknowledged and relied on that definition as recently as 2003. N.D.A.G. 2003-L-06.

Information available from the three institutions you mention indicates that all three are "affiliated with" a religious denomination or sect. The University of Mary states it is "the only Catholic university in North Dakota." 2004-2006 Undergraduate Bulletin, University of Mary, at 2. Jamestown College is affiliated with the Presbyterian Church. Jamestown College Catalog 2003-2005, at 8. Finally, Trinity Bible College is affiliated with the General Council of the Assemblies of God. Academic Catalog of Trinity Bible College, at 8-9 (Nov. 15, 2004). Since all three institutions are affiliated with different religious denominations, all three are "sectarian schools" as that phrase is used in N.D. Const. art. VIII, § 5.

The next question is whether the moneys appropriated by S.B. 2003 were "raised for the support of the public schools of the state." N.D. Const. art. VIII, § 5. The North Dakota Supreme Court interpreted the restriction present in article VIII, § 5, of the North Dakota Constitution to "forbid[] the appropriation of public funds for the support of sectarian schools." Gerhardt v. Heid, 267 N.W. 127, 134 (N.D. 1936). Thus, the question does not require a conclusion that the moneys were specifically "raised for the support of the public schools," but only that the moneys were "public funds." Id.

"Public funds" are those "collected by an officer or agent of the state for a state-wide public purpose, by authority of law." Billey v. N.D. Stockmen's Assoc., 579 N.W.2d 171, 174 (N.D. 1998). Moneys held by the state and subject to legislative appropriation are, therefore, public funds. Accordingly, the moneys sections 10, 11, and 26 of S.B. 2003 seek to appropriate are public funds for purposes of N.D. Const. art. VIII, § 5.

The final question is whether the moneys were "appropriated to or used for the support of" the sectarian institutions. The "student financial assistance grants" in section 11 of S.B. 2003 are not directly appropriated to the institutions; the moneys are directed to students of those institutions. Presumably the intent of section 10 of S.B. 2003 is also to provide the incentives to the students rather than directly to the school. But the amounts made available to students attending these institutions are directly limited by the appropriation and not the independent decisions of the students themselves.

In Sheldon Jackson College v. State of Alaska, 599 P.2d 127 (Alaska 1979), the Alaska Supreme Court considered the constitutionality of a program designed to give grants to private college students. Alaska had a constitutional prohibition similar to N.D. Const. art. VIII, § 5, that prohibited "the payment of money from public funds 'for the direct benefit of any religious or other private educational institution.'" 599 P.2d at 128 (quoting Alaska Const. art. VII, § 1). The Court initially noted that United States Supreme Court precedent considering "constitutional provisions governing aid to private schools have generally been perceived as requiring neutrality rather than hostility from the state." Id. at 130. "[A] benefit flowing only to private institutions, or to those served by them, does not reflect . . . neutrality and non-selectivity." Id. In concluding the grant program was unconstitutional, the Court reasoned as follows:

> [T]hough the tuition grants are nominally paid from the public treasury directly to the student, the student here is merely a conduit for the transmission of state funds to private colleges. . . . Simply interposing an intermediary "does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court has held with unvarying regularity that one may not do by indirection what is forbidden directly."

Id. at 132 (quoting Wolman v. Essex, 342 F.Supp. 399, 415 (S.D. Ohio), aff'd mem., 409 U.S. 808 (1972)). Other courts have made similar observations. See, e.g., Opinion of the Justices to the Senate, 514 N.E.2d 353, 356 (Mass. 1987) ("If aid has been channeled to the student rather than to the private school, the focus still is on the effect of the aid, not on the recipient."); McDonald v. School Board of the Yankton Independent School Dist. No. 1 of Yankton, 246 N.W. 2d 93 (S.D. 1976) (holding unconstitutional a program requiring school districts to loan school books to private school students under a similar

constitutional provision); Gaffney v. State Dep't of Educ., 220 N.W.2d 550, 557 (Neb. 1974) ("All the [cases discussed] emphasize that the court must examine the character of the aided activity rather than the manner or the form in which aid is given.").

In this case, the only individuals eligible to receive the designated moneys are those attending private institutions. In fact, the only individuals eligible to receive the $150,00 made available for doctoral incentives in section 10 of S.B. 2003 are those attending the University of Mary. Under section 11 of S.B. 2003, students attending private institutions will receive twenty-three and one-half percent of the available monies regardless of need or the independent decisions of the prospective students themselves. Thus, the required element of "neutrality" is completely absent.[1]

This office previously considered a somewhat related issue. In a 1946 opinion, this office considered whether a school board that provided a $10 payment to parents for transporting their own children to school, in lieu of the school district busing the children, could provide that payment to parents whose children went to parochial school, rather than public school. N.D.A.G. Letter to Peterson (Sept. 13, 1946). This office cited the constitutional prohibition against providing public funds to sectarian schools in determining the school board would be "paying out public tax money for a purpose not contemplated by the Constitution." Id. "If such money were paid to the patron for transporting his children to a parochial school, it would be a diversion of public moneys for a purpose prohibited by the Constitution and the statutes of the state." Id. Thus, this office has looked past the conduit through which funding is provided if the ultimate effect of that funding would be to support a sectarian school.

Accordingly, it is my opinion that a court faced with your question would likely hold that the appropriation of $150,000 for doctoral incentives for students at private baccalaureate degree-granting institutions (University of Mary) violates N.D. Const. art. VIII § 5. It is also my opinion that a court would likely hold that the requirements contained in sections 11 and 26 of S.B. 2003 that establish an appropriated minimal amount (twenty-three and one-half percent) of monies that will flow to private institutions in the form of student financial assistance grants also violates N.D. art. VIII § 5.

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[1] Statements made during the Legislative Assembly's consideration of the provisions provide further clarification that the Legislative Assembly intended the grants and incentives were to be "appropriated to or used for the support of" the state's private institutions of higher education. See Hearing on S.B. 2003 Before the Senate Appropriations Conference Comm., 2005 N.D. Leg. (Apr. 21); Hearing on S.B. 2003 Before the House Appropriations Comm., 2005 N.D. Leg. (Mar. 30). Notably, there is a complete absence of any discussion of any public purpose served by the public expenditures in question, and none that can be reasonably discerned, other than one of support for North Dakota's private institutions of higher learning.

The Supreme Court has described the effect of finding legislation unconstitutional as follows: "[U]nconstitutional legislation is void and is to be treated as if it never were enacted." State v. Clark, 367 N.W.2d 168, 169 (N.D. 1985). Not all of S.B. 2003 is void, however; the "unconstitutional portions of a statute can be severed from constitutionally viable portions," leaving the constitutional portions valid, if it is clear the Legislative Assembly would have so intended. Id. at 169-170.

In this case, S.B. 2003 contains the entire appropriation for the North Dakota University System. One can quite safely say the Legislative Assembly intended to provide an appropriation for the North Dakota University System. Further, the only change made by section 26 of S.B. 2003 was to add the problematic language to N.D.C.C. § 15-62.2-01; the entire remainder of N.D.C.C. § 15-62.2-01 had existed without the problematic language for ten years. Thus, the Legislative Assembly clearly intended the remaining provisions in S.B. 2003 to be effective without the problematic language. That would include student financial assistance grant programs provided for by N.D.C.C. § 15-62.2-01 and funded by section 11 of S.B. 2003. To the extent those programs evenhandedly provide moneys to students at all institutions of higher learning within the state based on need, and without specific regard to whether the student is attending a private institution, the programs are permissible.

The applicable S.B. 2003 provisions may also implicate the First Amendment to the United States Constitution. Payments to parents of students attending sectarian schools, or to the students themselves, have repeatedly been challenged as violating the establishment clause. See, e.g., Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (reviewing previous decisions). The First Amendment's establishment clause prohibits Congress and, via the Fourteenth Amendment, see, e.g., Zelman, 122 S.Ct. 2460, the states, from enacting laws that have the purpose or effect of advancing religion. U.S. Const. amend. I.

In evaluating establishment clause challenges, a statute's neutrality appears to be most important.

> [T]he Establishment Clause simply requires neutrality. This requirement of neutrality is expressed in the Lemon [v. Kurtzman, 403 U.S. 602 (1971)] Test, which requires that (1) the challenged government practice have a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. The Lemon test was refined by the Supreme Court in Agostini [v. Felton, 521 U.S. 203 (1997)]. The first prong of the Lemon test remained the same; however, the Court reformulated the excessive entanglement prong of the test to include it in the inquiry into the second prong – the primary effect test.

Johnson v. Economic Development Corp. of the County of Oakland, 241 F.3d 501, 512 (6th Cir. 2001) (internal citations omitted).

Justice O'Connor's concurring opinion in Zelman puts the neutrality requirement in succinct focus:

> Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause.

Zelman, 536 U.S. at 669.

Because of my resolution of the state constitution issue, however, I do not believe it is necessary to discuss whether those provisions violate the establishment clause of the First Amendment to the United States Constitution.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).