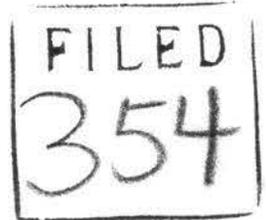


CONSTITUTIONAL LAW:
PHYSICIANS:
COMMISSION ON HIGHER EDUCATION:
SCHOOLS:
MEDICAL SCHOOLS:
EDUCATION:
RELIGION:
CONTRACTS:

An agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

OPINION NO. 354



December 19, 1968

Honorable Ben Morton
Executive Secretary
Missouri Commission on Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Mr. Morton:

This opinion is in answer to your request concerning the constitutionality of a proposal that the state contract with private medical and osteopathic schools in a long range plan to make maximum use of existing facilities and staff, and to provide for the recruitment of young people for the medical profession. This proposal is viewed as one method by which state goals can be accomplished to afford maximum benefits from the use of state funds and in addition strengthen the private institutions now engaged in physician training.

You have also advised us that the Commission indicated that they intend to request legislation to authorize a state agency to administer the program.

It is recognized that the participants of the contract with the State of Missouri as well as the nature of the contract itself necessarily at this point is rather flexible and that other alternatives may have to be considered. Without going into detail concerning the proposal at this time, we will attempt to summarize the principles involved and reach the question of constitutionality regarding the various facets of the proposal.

The major provisions of the contract would require the schools to contract to admit qualified Missourians at a required tuition plus fees charge no greater than similar charges required of medical students by the University of Missouri; require cooperation by the schools with the Missouri Commission on Higher Education or other

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appropriate bodies to recruit students for the medical professions; require the state to pay the schools for each Missourian enrolled in an entering class equal or exceeding the average number of Missourians enrolled during a base period and, further, require the state to pay an additional amount per each school per year per student added to the enrollment over the base line.

The questions presented are whether the proposal which contemplates the use of state funds violates the Missouri Constitution as being within the prohibition of Article III, Section 38(a), which states that the General Assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit to any private person, association, or corporation; whether it is violative of similar constitutional provision contained in Article III, Section 39; whether it is in violation of Missouri Constitution, Article I, Sections 5, 6, 7, and Article IX, Section 8, which relates to the doctrine of separation of church and state.

Article III, Section 38(a), states in full as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Article III, Section 39, paragraphs 1 and 2, states as follows:

"The general assembly shall not have power:

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

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"(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;"

With respect to the constitutional prohibitions above cited, we note first of all that the basic question is whether or not the public funds are expended for a public purpose.

Our Constitution, Article IX, Section 1(a), indicates that the people of Missouri recognized and declared that a general diffusion of knowledge and intelligence was essential to the preservation of the rights and liberties of the people. An examination of the various statutory provisions enacted pursuant to Article IX of the Constitution indicate that the legislature of this state consistently throughout the years has fixed its attention upon effectively providing that the tenets of the Constitution be constructively applied to meet the tremendous change in our social philosophy recognizing that, in line with the programs authorized by the federal government, the education of the people of this state has a direct relationship to the health and welfare of the people. An outstanding example of the legislative declaration of policy is contained in Section 173.095, RSMo Supp., 1967, wherein the legislature stated:

"* * * the general assembly of the state of Missouri declares that state assistance to students of higher education and vocational school students will benefit the state economically and culturally and is a public purpose of great importance."

In addition, with respect to the particular proposal we note that the Missouri Commission on Higher Education views the proposed contract as one method by which state goals can be accomplished, afford maximum benefits from the use of state funds and reach the overall long-range goal of supplying more physicians for the citizens of the state.

We note that the Missouri Supreme Court in State ex rel Garth v. Switzler, 143 Mo. 287, 45 S.W. 245 (1898) held unconstitutional a special tax used to provide gratuitous grants entitling individuals to enter free of matriculation fees and attend any department, school or college of Missouri University and have paid to them, while attending the university, monthly payments for defraying the expenses of school attendance. We conclude that Switzler does not apply to the present situation where the proposal contemplates a contract and exchange of consideration with the school for the instruction of students.

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For the same reasons we conclude that related cases such as Simmons Medicine Company et al. v. Ziegenheim, 145 Mo. 368 (1898), are not controlling.

The legislature of the state has long recognized without question their obligation to provide for the health, education and welfare of the people. In our Opinion No. 396, dated 12/10/64, to the Honorable John M. Dalton, we held that the legislation relating to establishment of Missouri State Council on the Arts and defining the Council's powers and duties would not violate the provisions of Article III, Section 38(a) and Section 39 prohibiting the granting or giving of public property or money to private persons.

We conclude that the proposal does not violate these constitutional prohibitions and that the purpose and nature of the proposal is consistent with the furtherance of the public policy of this state to provide for the health, education and welfare of the people.

Insofar as private schools are concerned the question still remains whether or not a contract with a school that is sectarian in nature would violate the provisions of the Missouri Constitution, Article I, Sections 5, 6, and 7, and Article IX, Section 8.

Article I, Section 5, states:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

Article I, Section 6, states:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

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Article I, Section 7, states:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Article IX, Section 8, states:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

The other constitutional prohibitions are, of course, applicable to the states by incorporation of the First Amendment of the Bill of Rights into the Fourteenth Amendment of the Constitution of the United States.

In considering this question we assume that the amount proposed to be paid to the sectarian institutions is fair consideration for the services rendered.

The question of separation of church and state has, in its practical application, always been a very perplexing one. It is clear that the sovereign body may deal with a sectarian institution as an entity and not as a sectarian institution in the sense that the institution does not receive public funds or involve the use of public power in aid of the particular religious establishment.

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In Kintzele v. City of St. Louis, 347 S.W. 2d 695 (1961) the Supreme Court of Missouri upheld the sale of land by the St. Louis Land Clearance for Redevelopment Authority to St. Louis University for the reason that the Authority's actions did not deprive others of the right to bid for the land, that the University paid not less than the fair value of the land and that the sale was made pursuant to all equitable requirements of law without fraud, bad faith, caprice, or misconduct. In comparing a similar situation involving Fordham University the Supreme Court of Missouri approved the holding of the New York Court of Appeals in finding that since the sale is an exchange of considerations and not a gift or subsidy no aid to religion is involved and a religious corporation cannot be excluded from bidding. It appears from the holding of the court in Kintzele that contracts with sectarian institutions are not invalid per se and that to deal with such a sectarian institution differently than others may be a violation of the constitution. In this latter respect we note particularly the provisions of our Missouri Bill of Rights above cited prohibiting discrimination.

Our earlier Missouri cases recognized definite constitutional conflicts wherein the sectarian school was integrated into the public school system. Berghorn v. Reorganized School Dist. #8, 260 S.W. 2d 573 (1953) and Harfst v. Hoegen, 163 S.W. 2d 609 (1941). In Hoegen the court further held that the prohibitions contained within the Missouri Constitution respecting public aid for religious purposes and institutions go even farther than those of some other states in that it is an explicit interdiction against the use of public money for religion. It appears, however, that the problems confronting the court in Harfst v. Hoegen and Berghorn v. Reorganized School Dist. #8 do not exist in the proposal.

Although we are not in fact considering a "grant" as such in the proposal it is interesting to note that the Supreme Court of Vermont in a decision handed down October 1, 1968, Vermont Educational Buildings Financing Agency v. Mann, applying the standards of Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed 2d 844, 83 S. Ct. 1560 (1963), held that the Establishment Clause of the United States Constitution can be interpreted as permitting the grant of public funds to a church-related but not dominated college. The court found that the main purpose of the act under which the grant was made was to promote the welfare of the people of Vermont and that the act does not discriminate for or against any particular religion. In another recent decision by the Supreme Court of the United States, Board of Education v. Allen, U.S. 20 L.Ed 2d 1060, 88 S. Ct. (1968), the court also applied the Abington "primary effect" test, ascribed to by eight justices, for distinguishing between forbidden involvements of the state with religion and those contracts which the Establishment Clause permits.

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"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ."

We believe that the standards set forth by the Supreme Court of the United States are applicable in determining whether the provisions of the Missouri Constitution are violated.

We have found it necessary to pass upon the church-state question not because we believe it to be a deterrent in effecting the contract as proposed but for the simple reason that the question has to be considered in any contract between a part of the sovereign body and a sectarian organization. In this respect it is our conclusion that the mere fact that a medical school may be affiliated with or a part of a sectarian institution does not in and of itself preclude its participation in the proposed contract. What is important is that there be fair consideration given by the school in return for what it receives from the state, and the absence of any facts that would indicate the advancement of religion.

Where, as here, there is fair consideration between the state and the institution, there is no grant prohibited by the Constitution either as an aid to private individuals or as an aid to religion.

We conclude that education is a public purpose and that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

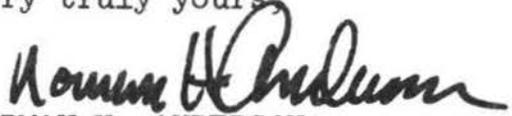
CONCLUSION

It is the opinion of this office that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enc: Op. 396, Dalton, 12/10/64