January 27, 1975

OPINION LETTER NO. 43
Answer by letter-Klaffenbach

FILED
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Harold P. Robb, M.D., Director
Department of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101

Dear Dr. Robb:

This letter is in response to your question asking:

> "Can the Department of Mental Health utilize appropriated funds to pay for the costs of care, treatment and education of its patients placed in a nursing home under Section 202.831 V.A.M.S., where the owner or operator of the nursing facility is a church or religious organization; . . ."

Section 202.831, RSMo Supp. 1973, provides in pertinent part:

> "1. The head of a state mental facility, with the consent of the person responsible for the commitment of the patient or of one of the parents, if living, having been first obtained, may place any patient, except those committed as criminally insane, in a licensed boarding, or licensed nursing home or family home upon such terms and conditions as he deems proper when he believes that such family care would benefit the patient. . . ."

We are aware that it has been administrative practice since the enactment of Section 202.831 to place patients in qualified nursing homes regardless of the fact that some such homes are owned or operated by religious organizations and that such practice has existed for a long period of time. Similar practices

have existed in other areas, such as juvenile placements, and have been accepted without question.

In analyzing the legal questions raised by your question, we have exhaustively examined the Missouri and Federal Constitutions and statutes and court opinions. We have given sincere and in depth consideration to the various and myriad problems involved.

We are of the view that the legislature, in enacting Section 202.831 and related sections and in amending the same from time to time, must have been aware of the fact that a large number of such homes are connected in some way or another with religious groups and, in fact, that such services would not be so readily available if the placement facilities of such organizations were not utilized by the state to full advantage.

Further, in such premises, we do not believe that we are in a position to condemn the making of such placements as being unconstitutional. The courts have consistently followed the rule that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. Banc 1962). We do not believe that the existing practices of the Department of Mental Health under Section 202.831 are so clearly in conflict with the Constitution as to warrant an opinion by this office that they are unlawful.

It is reasonably anticipated that litigation will arise with regard to this question or with respect to the question raised by the Honorable Lawrence J. Lee and answered this date (copy enclosed) concerning similar placements under the provisions of House Bill No. 474, First Regular Session, 77th General Assembly, relating to the education of the developmentally disabled and other handicapped children. In the event of such litigation, this office would have the obligation of defending the practices of state officials authorized under existing Missouri law.

Therefore, this office will presume that the answer to your question is in the affirmative unless and until a court of competent jurisdiction holds to the contrary.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion Letter No. 42 - 1975