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ATTORNEY GENERAL OPINION NO. 89-5

TO: Rayburn Barton
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is the Idaho College Work Study Program established under chapter 44, title 33, Idaho Code, unconstitutional as applied to postsecondary institutions with religious affiliations?

CONCLUSION:

Yes. The Idaho College Work Study Program established under chapter 44, title 33, Idaho Code, as applied to postsecondary institutions controlled by a church, sectarian or religious denomination, violates art. 9, § 5, of the Idaho Constitution.

ANALYSIS:

The 1989 legislature announced the public policy and purpose of the work study program in what is now codified as Idaho Code §§ 33-4402 and 4404:

The legislature hereby recognizes and declares that it is in the public interest to assure educational opportunity to Idaho postsecondary students. The Idaho work study program is an employment program designed to allow resident needy students to earn funds to assist in attending accredited institutions of higher education in Idaho.

....

The purpose of the program is to expand employment opportunities for resident students. Employment may be in jobs at accredited institutions of higher education or in approved off-campus jobs. Students with financial need are to benefit through the program, and to do so while gaining work experience. Accordingly, efforts should be made whenever possible to provide job opportunities to students which relate to their academic and career goals.

Funds under this program may be used to pay up to eighty percent (80%) of earnings in on-campus jobs. Program funds may also be used to pay up to fifty percent (50%) of earnings for approved off-campus jobs where the jobs are directly related to the student's course of academic study and the employer pays fifty percent (50%) of the earnings. Program funds may also be used to fund up to ten percent (10%) of the total match required for the federal college work study program. Idaho program funds used as match will be governed by federal college work study policy. However, institutional funds used for federal matching purposes shall not be less than the amount allocated for the prior year.

The state board of education is directed to allocate program funds to eligible institutions based upon fall full-time equivalent enrollment in a manner established by board rule. Generally, employment which is allowable under the federal college work study program is allowed under the Idaho program. Each institution's financial aid office is responsible for ensuring that disbursements are made for appropriate work. Students must be paid by check or instrument which may be cashed by students on their own endorsement without further restrictions. The institution may credit earnings to the student's account only with written permission from the student. Idaho Code §§ 33-4401 through 33-4409.

The Idaho College Work Study Program does not violate the establishment clause of the first amendment of the United States Constitution. In Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), the Court held that the use of financial aid pursuant to Washington's vocational rehabilitation program to finance training for the ministry at a Christian college does not violate the establishment clause. The three-part test established in Lemon

v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), was applied. First, the secular purpose of the legislation was clear. Second, the Court found that the primary effect of the legislation did not advance religion. Considerations were that the money was paid directly to the student, the aid was available without regard to the sectarian-nonsectarian nature of the benefitted institution, and the record did not indicate that any significant portion of the aid expended as a whole would be used for religious education. The Court did not discuss directly the third prong of the test - that the legislation must not foster excessive government entanglement with religion.

On remand, however, the Washington Supreme Court held that the statute violates that state's constitutional provision prohibiting the appropriation of public money for religious instruction. Witters v. Washington Comm'n for the Blind, 112 Wash.2d 363, 771 P.2d 1119 (1989).

Applying the principles of Witters, the Idaho Work Study Program does not violate the United States Constitution. The purpose of the work study program, to expand employment opportunities for resident students, is secular. The primary effect of the legislation does not advance religion. Although the aid would be funneled through the colleges, their involvement would largely consist of fund disbursement and recordkeeping, which would not result in excessive entanglement.

The Idaho College Work Study Program does, however, violate art. 9, § 5, of the Idaho Constitution as construed by the Idaho Supreme Court. That section provides:

Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; . . .

The Idaho Supreme Court in Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), held that a statute which provided for the allocation of public funds to provide transportation for

private school students, including students enrolled in parochial schools, violates art. 9, § 5. The court specifically rejected the "child benefit" theory, i.e., the contention that the public assistance "is being furnished to the children and not to the institution and hence does not constitute any aid or benefit to the sectarian institution." 94 Idaho at 394, 488 P.2d at 864. The court likewise rejected the forerunner of the three-part Lemon test.

Idaho Const. art. 1, § 3, guarantees the exercise and enjoyment of religious faith and prohibits requiring a person to attend religious services, to support any particular religion or to pay tithes against his consent. Since these provisions of the Idaho Constitution are comparable to the free exercise and establishment clauses of the first amendment to the United States Constitution, the Idaho Supreme Court in Epeldi determined that the framers of the Idaho Constitution "intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution" when they included the art. 9, § 5, prohibition of appropriations in aid of any church or to help support and sustain any sectarian school. Epeldi, 94 Idaho at 395, 488 P.2d at 865. The court found that since an effect of the legislation was to aid parochial schools by bringing students to them, the legislation violated the Idaho Constitution.

The legislation establishing the Idaho College Work Study Program provides that jobs which are allowed under the federal college work study program generally are acceptable under the Idaho program. Neither the Idaho statutes nor the federal statutes limit the application of the Idaho Work Study Program to college educational institutions which are not sectarian. Since an effect of the legislation providing for the Idaho College Work Study Program is to use state funds to pay up to eighty percent of the salaries of students working for sectarian postsecondary institutions, the legislation clearly violates art. 9, § 5, by helping to support postsecondary institutions controlled by churches, sectarian or religious denominations.

A closer question is presented by the provisions of the Idaho College Work Study Program that allow program funds to be used to pay up to fifty percent of earnings for approved off-campus jobs. Since the legislation requires that the money be paid directly to the student without restriction, the benefit to the institution is not as clear. Several states with constitutional provisions similar to Idaho's prohibition of support to religious institutions have considered the constitutional validity of financial aid legislation. Legislation has been upheld so long as

it included provisions requiring that there be no sectarian bent in the curriculum, Americans United for Separation of Church and State Fund v. State, 648 P.2d 1072, 1075, 1083-85 (Colo. 1982); that an approved educational institution have an independent governing board and academic freedom, Id., Americans United v. Rogers, 538 S.W.2d 711, 721-22 (Mo.), cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); or that eligible educational institutions not be of predominantly sectarian character, Alabama Educ. Ass'n v. James, 373 So.2d 1076, 1078-81 (Ala. 1976).

The Washington Supreme Court considered legislation which created an agency to purchase loans made to eligible students by financial and educational institutions. That state's constitution provides:

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian influence.

Wash. Const. art. 9, § 4. The Washington Constitution further states:

No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Wash. Const. art. 1, § 11. Although the Washington legislation, like the Idaho legislation in question, did not require the money be used for tuition, the court stated:

Part of the loaned funds will most certainly be used to pay tuition, and the remainder will benefit the college in many ways by assisting the student to stay in school. . . .

Washington State Higher Educ. Assistance Auth. v. Graham, 34 Wash. 2d 813, 529 P.2d 1051, 1054 (1974). Using language from a previous case, the Washington court stated:

"Any use of public funds that benefits schools under sectarian control or influence--regardless of whether that benefit is characterized as 'indirect' or 'incidental'--violates this provision."

Id., 529 P.2d at 1053-54 (quoting Weiss v. Bruno, 82 Wash.2d 199, 509 P.2d 973, 981 (1973)).

In consideration of the Idaho Supreme Court's strict interpretation and application of art. 9, § 5, in Epeldi, 94 Idaho at 396, 488 P.2d at 866, the use of public funds to pay up to fifty percent of the earnings from approved off-campus jobs of students of an educational institution controlled by a church, sectarian or religious denomination also would violate the Idaho Constitution. Although the money is paid directly to the student, the award of funds is based upon the student's financial need, meaning the student's financial ability to meet the institutionally defined cost of education. Idaho Code § 33-4403(3) (1989). Like the Washington loan program, the Idaho funds likely would be used to pay tuition and would support the institution by assisting the student to stay in school. Providing Idaho College Work Study Program funds to students of an institution controlled by a church, sectarian or religious denomination in this manner would violate the Idaho Constitution.

AUTHORITIES CONSIDERED:

Constitutions:

First Amendment, U.S. Constitution.

Article 9, § 5, Idaho Constitution.

United States Statutes:

42 U.S.C. § 2753(b)(1)(C) (1989).

Idaho Statutes:

Idaho Code §§ 33-4401 through 33-4409 (1989).

United States Cases:

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986).

Idaho Cases:

Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971),
cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343
(1972).

Other State Cases:

Witters v. Washington Comm'n for the Blind, 112 Wash.2d 363,
771 P.2d 1119 (1989).

Americans United for Separation of Church and State Fund v.
State, 648 P.2d 1072, 1075, 1083-85 (Colo. 1982).

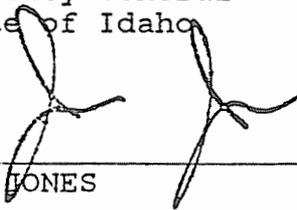
Americans United v. Rogers, 538 S.W.2d 711, 721-22 (Mo.),
cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632
(1976).

Alabama Educ. Ass'n v. James, 373 So.2d 1076, 1078-81
(Ala. 1976).

Washington State Higher Educ. Assistance Auth. v.
Graham, 34 Wash. 2d 813, 529 P.2d 1051, 1054 (1974).

DATED this 7th day of June, 1989.

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Analysis by:

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cc: Idaho Supreme Court
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