TUITION GRANTS

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K – STATE CAPITOL
JUNEAU 99811

May 11, 1976

The Honorable Jay S. Hammond
Governor
State of Alaska
Pouch A
Juneau, Alaska 99811

Re: Constitutionality of state's tuition grant program

Dear Governor Hammond:

Since we issued our March 16, 1976 opinion which concluded that a proposal for the state to enter a contract for educational services with Alaska Methodist University was impermissible under the Alaska Constitution, considerable interest and discussion has been focused on the constitutionality of the state's tuition grant program, AS 14.40.776-14.40.801. Of special significance have been two carefully written and researched legal opinions directed at that precise issue and reaching opposite conclusions. The Legislative Affairs Agency has issued an opinion to the effect that the tuition grant program violates Article VII, Section 1 of our constitution. On the other hand, Ely, Guess & Rudd, a private firm representing Sheldon Jackson College, has concluded that the tuition grant program is valid under both our state constitution and the First Amendment to the United States Constitution. You have now

asked that we provide you with our opinion on the matter, concurrently advising the Commissioner of Administration whether further payments of state funds for the tuition grant program would be consistent with our constitution.

BACKGROUND

The present tuition grant program was established by the legislature in 1972 to equalize tuition rates paid by students attending private postsecondary educational institutions in the state with those rates paid by students at the University of Alaska and state community colleges. The private colleges, as the result of increasing costs and decreasing endowments, had been required to raise their tuition rates to levels above those charged by the state-subsidized University of Alaska. Students were becoming unable or unwilling to pay the higher charges.

The tuition grant program was designed to help reverse or at least reduce this increasing cost/decreasing revenue trend by making available to each Alaska resident attending one of the private colleges in the state a grant equal to the difference between the tuition rate charged by the private college and that charged by the state institution located in the same city. By equalizing the tuition payments in this manner, it was hoped that cost would not be a factor in the student's decision of whether to attend one of the state's private or public institutions; that the decision of

where to go to college would be made based on where he desired to go, not on where he could afford to go. The program has apparently been moderately successful. Alaska Methodist University, although now closing its doors, has been able to operate for the past several years in the face of constant financial difficulties. Sheldon Jackson College has recently enjoyed increasing enrollments and relative financial stability, receiving in excess of $600,000 through the tuition grant program in the current school year. To date, these are the only two educational institutions which have benefited from the program.

DISCUSSION

The tuition grant program, like the direct loan program discussed in our earlier opinion, must be measured by two basic legal standards. First, it is necessary to analyze whether or not the Federal Constitution bars a program of this nature. Second, even assuming the program is valid from a federal Constitutional viewpoint, the Alaska Constitution must be considered separately, for, as we noted in our opinion, our constitution contains particular limitations on aid to education beyond those contained in the federal document.

In that earlier opinion which concerned the state contracting with A.M.U., we reviewed the various criteria applied by the courts in determining whether a program

violated federal Constitutional restrictions. The key question in the analysis is whether an educational program violates the Establishment Clause of the First Amendment because a given educational institution of higher learning is "religious" in nature. 1/ The basic criteria for that analysis include whether the institution imposes religious restrictions on admissions, requires attendance at religious activities, requires instruction in and adherence to a particular theology or doctrine, requires that its personnel have a particular religious affiliation, adheres to a stated sectarian purpose, or is under direct control of a particular sectarian organization. 2/ Under the federal Constitution, not all state aid to private colleges is barred. Only that aid which goes to institutions "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission" 3/ is barred by the

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1/ The U.S. Supreme Court has now recognized a significant distinction between church-affiliated institutions at the elementary-secondary level and the postsecondary level which, in certain situations, will lead to the conclusion that state aid to church-related colleges is valid even though similar aid to parochial elementary-secondary schools would violate the Establishment Clause. Tilton v. Richardson, 403 U.S. 672 (1971), Hunt v. McNair, 413 U.S. 734 (1973).

2/ Tilton, supra, Horace Mann League v. Board of Public Works, 220 A.2d 51 (Maryland, 1966), and Weiss v. Bruno, 509 P.2d 973 (1973).

3/ Hunt, supra at 743.

Establishment Clause. Stated another way, are the institution's "operations . . . oriented significantly towards sectarian rather than secular education"? 4/

The major benefactor of the tuition grant program, were it to continue, would be Sheldon Jackson College. There is, of course, an issue as to the religious nature of that institution. We have received certain information from the Legislative Affairs Agency and Ely, Guess & Rudd, counsel for the College, about the operations of that school. On the basis of those facts, which in light of our subsequent analysis there is no reason to challenge, we would be able to conclude that Sheldon Jackson is not an "instrument of the church for purposes of indoctrination or proselytizing." 5/ Therefore, were it not for our subsequent conclusion that the tuition grant program violates the Alaska Constitution, we would have little reluctance in concluding that state aid to Sheldon Jackson or other nonreligious schools in the form of tuition grants is valid.

However, Alaska's constitution does go beyond the federal prohibition to religious institutions, providing in

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4/ Id. at 744.

5/ Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 880 (D. Kansas, 1974). This case, decided after the Tilton/Hunt distinction between secondary and higher education was acknowledged by the Supreme Court, upheld in a detailed and carefully reasoned opinion, the constitutionality of a Kansas tuition grant program quite similar to our own as it was applied to some 19 church-related colleges operating in the state.

Section 1 of Article VII that:

> No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Under this constitutional provision, the question of whether or not Sheldon Jackson or any other school is "religious" is basically irrelevant, for even if it is not, it is certainly a private educational institution. The relevant question under the Alaska Constitution is whether or not the tuition grant program constitutes a "direct benefit" to a private school. We believe that it does.

There are essentially two basic positions on the issue of when an institution is benefited by an expenditure of public funds. The first position, generally referred to as the "child benefit theory" 6/, approaches various state-supported programs which provide a benefit to an institution from the standpoint of whether the benefit is primarily to the institution or to the students of the institution. The alternative analysis looks beyond the child to determine whether or not the institution receives a benefit from the state program. 7/

6/ See, for example, the U. S. Supreme Court's opinion in Everson v. Board of Education, 330 U.S. 1, 7 (1947).

7/ See, for example, the dissenting opinion of four Justices in Everson, id.

The Alaska Supreme Court has confronted the choice between these alternatives directly. In 1961, the Court in Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), rejected the "child benefit theory," inquiring instead whether or not the state-supported program (in that case bussing of parochial school students) also provided a benefit to the private school. In holding that the furnishing of transportation to parochial school students at public expense did constitute such a direct benefit to the school, the Alaska Court in essence adopted the dissenting opinion of the United States Supreme Court decision in Everson v. Board of Education, 330 U.S. 1 (1947). In Everson, the majority had held such transportation to be consistent with the federal Constitution. The dissenters disagreed, and their views were found most persuasive by the Alaska Supreme Court. In holding transportation of students a direct benefit to the institution, the Alaska Court stated:

> Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. 8/ (emphasis added)

8/ Everson, id. at 47-49.

If the Alaska Court viewed bus transportation as a direct benefit to a private institution, it would follow that the state's tuition grant program, which provides partial payment of tuition to private institutions, would be an even more direct benefit to the private school. While under that program, the applicant for the grant is the student 9/ and the check is made payable to the student as well as the institution 10/, those facts are insufficient to alter the result, since the student, by law, is required to apply the grant to his tuition expenses. 11/ As we indicated in our earlier opinion concerning A.M.U., the Matthews opinion compels the conclusion that "any financial aid to a private institution such as AMU, whether provided directly or as an incidental effect from a student benefit program, would violate Section 1, Article VII of the Constitution."

Alaska is not alone in taking a "restrictive view" 12/ of its constitution's proscription against aid to private educational institutions. The highest courts of numerous other states have held various state programs, including

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9/ AS 14.40.791 and 14.40.796

10/ AS 14.40.786(a)

11/ AS 14.40.776(a)

12/ Roberts v. State, 458 P.2d 340, 342, N.Y. (1969).

tuition grants 13/, bussing of parochial students 14/, furnishing of text books for parochial students 15/, and other forms of aid to private schools 16/ to be invalid under similar state constitutional provisions. Many of these decisions were rendered after the Alaska Supreme Court's decision in Matthews, and would, we believe, support that Court's adherence to its original view of what constitutes a "direct benefit" under Article VII, Section 1. Under that view, the tuition grant program would be invalid. 17/

13/ Rogers v. Swanson, 219 N.W.2d 726 (Nebraska, 1974); Weiss v. Bruno, 509 P.2d 973 (Washington, 1973); Klinger v. Howlett, 305 N.E. 2d 129 (Illinois, 1973); Miller v. Ayres, 191 S.E.2d 261 (Virginia, 1972); Hartness v. Patterson, 179 S.E.2d 907 (South Carolina, 1971); Almond v. Day, 89 S.E.2d 851 (Virginia, 1955).

14/ Epeldi v. Engelking, 488 P.2d 860 (Idaho, 1971); Spears v. Honda, 499 P.2d 130 (Hawaii, 1969); McVey v. Hawkins, 258 S.W.2d 927 (Missouri, 1953); Visser v. Nooksack Valley School District No. 506, 207 P.2d 198 (Washington, 1949).

15/ Gaffney v. State Department of Education, 220 N.W.2d 550 (Nebraska, 1974); Dickman v. School District No. 62C, Oregon City, 366 P.2d 533 (Oregon, 1961).

16/ Synod of Dakota v. State, 50 N.W. 632 (South Dakota, 1891) (contracting for services).

17/ At least three of these cases, Spears, supra; Epeldi, supra; and Dickman, supra relied, in part, on the Alaska court's refusal, in Matthews, to adopt the "child benefit" theory.

We realize that our conclusion is not free from debate. It has, for instance, been argued that the Alaska Supreme Court's analysis of the meaning of the Alaska Constitution in the Matthews case was dicta since the basic resolution of the issue in that case was under the terms of the no longer existent Organic Act. Heavy reliance on that distinction, however, could be very misleading. The court in Matthews apparently felt that there was a real issue of whether a law authorizing bussing which was invalid under the Organic Act could be revived through a new and different state constitutional provision. Accordingly, the court specifically and comprehensively interpreted Article VII, Section 1 of the Alaska Constitution and its analysis on this point is obviously more significant than the often casual judicial remarks characterized as dicta. It has also been argued that the Matthews case cannot be relied on too heavily since it was decided by a three-judge court, none of whose members presently serve on the five-person Alaska Supreme Court. There is, of course, always the possibility of a newly constituted court changing a prior judicial decision on a subject. However, in this instance the reasoning of the Matthews case has been reinforced by decisions from other states discussed earlier, and we believe there is little chance of the court completely reversing itself on the issue. While our court has not been hesitant to break new ground, it does give credence to the doctrine of stare decisis and I think we must conclude in

the absence of indications to the contrary that it will honor its earlier interpretation of the constitutional provision. In any event, I feel that this office has an obligation to interpret the law as it has been announced by the Supreme Court, at least until that Court changes its interpretation.

It is therefore our conclusion that the present tuition grant program is in violation of the Alaska Constitution. In reaching that conclusion, we are not unmindful of the significant effect of the decision. Individual students who have enrolled in institutions dependent upon the tuition grant program may find their educational futures much in jeopardy. The very existence of Sheldon Jackson College may be at stake. We have real hesitancy in creating such enormous impact through the simple means of the issuance of an opinion of this office. Yet, the law requires that we issue legal opinions to state agencies, and if we conclude as we have that payment under the tuition grant program would be an unconstitutional expenditure of state funds, we see no choice but to advise the Commissioner of Administration to stop payment.

Mindful of the consequences of this opinion, we contacted the attorneys for Sheldon Jackson last week. I advised them that we were prepared to issue an opinion which would effectively terminate payments under the tuition grant

programs. I told them this so as to permit them the opportunity to mount a legal challenge to our ruling. I have been advised by the attorneys for Sheldon Jackson that within a day or two after the issuance of our opinion they will go into court here in Juneau seeking a declaratory judgment that the tuition grant program is constitutional and also seeking a restraining order and preliminary injunction to keep the program in operation until courts have had an opportunity to rule upon the question. At such time as they present a proposed restraining order to the court, a judge will have an opportunity to make at least an initial analysis of this program. If the judge believes that the plaintiffs have a reasonable prospect of prevailing on the merits, he will issue a restraining order directing the state to continue payments until this legal issue is resolved. If, on the other hand, the judge concludes not merely that our opinion is correct, but that the plaintiffs have no reasonable chance of proving it incorrect, he will refuse to issue a restraining order and no further state funds will be expended on the program. This procedure will mean that there will be a judicial review of our action directing the Commissioner of Administration to terminate this program. I frankly welcome that. I think on an issue of this significance, when so many people are involved and the amount of state expenditures is substantial, that while this office should not hesitate to carry out its obligations to interpret the

law, it should permit affected parties every opportunity to review the decision of this office in the proper judicial forum. We intend to continue our efforts in that regard, but, pending a judicial order, we are instructing the Commissioner of Administration to terminate all financial payments under the tuition grant program and to notify recipients that no further funds will be forthcoming.

Yours very truly,

Avrum M. Gross
Attorney General

and

Ronald W. Lorensen
Assistant Attorney General

AMG:as

cc: The Honorable Andrew S. Warwick
Commissioner of Administration

Several weeks ago, the Department of Law issued an opinion concerning direct state aid to AMU. As a result of that opinion which stated that such aid was unconstitutional, legitimate questions were immediately raised about the already existing tuition grant program--a program which has been in effect for over five years. While support has been appropriated annually for the period, the voices charging "unconstitutional" have increased in number and volume. I therefore requested legal guidance on the issue from the Department of Law, through the mechanism of seeking an Attorney General's opinion on the constitutionality of the tuition grant program.

In response to my request, the Attorney General has advised me that his opinion is that the student tuition grant program is unconstitutional and that the state must stop payments on that program.

It is anticipated that court action will be sought by advocates of the program, alleging its constitutionality and seeking to require the State to continue support. Frankly, I believe that such action is appropriate. A decision with such a far-reaching effect on private and public higher education and possibly on related training programs should ultimately be determined by the courts.

At this time it is the view of this administration that a constitutional amendment should be placed on the ballot. Only in this manner can we determine whether the public intends to prohibit all state funding relationships with private educational institutions and organizations. It is generally accepted that the separation of church and state must be maintained and aid to religious institutions is a far clearer issue than

direct or indirect aid to private institutions.

There is already a constitutional amendment proposed in the House that, according to the advice of the Attorney General, would address the issue clearly. That amendment would simply drop the prohibitions against direct or indirect aid to private institutions, but would keep the religious prohibition. I will encourage legislators to support placing the question before the public this fall. I am assured that the legislative leadership is as concerned about the effect of an unconstitutional determination in this area as I am. Regardless of what court action may or may not occur, it is my hope that the public can help make the future determination at the ballot box.