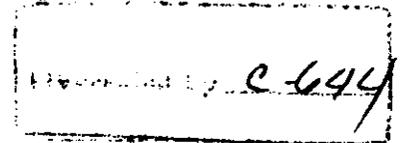




**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN
~~WILLIAMSON~~
ATTORNEY GENERAL

AUSTIN 11, TEXAS



Honorable J. J. Brown, Director
Vocational Rehabilitation Division
State Department of Education
Austin, Texas

Dear Sir:

Opinion No. 0-2412

Re: Authority of the Vocational Rehabilitation Division of the State Department of Education to pay tuition of physically handicapped persons in denominational schools.

We have your letter requesting an opinion on the above subject which reads as follows:

"Several years ago the Vocational Rehabilitation Department in the State Department of Education patronized denominational schools and the Comptroller's Department brought up the question as to the legality of the State Department of Education patronizing denominational schools. Mr. Gaynor Kendall who at that time was Assistant Attorney General made an exhaustive study of this matter and told the Director of Vocational Rehabilitation, J. J. Brown, that he felt sure that if a ruling was made it would be to the effect that the Vocational Rehabilitation Department could not patronize a denominational school. We did not ask that a ruling be made but simply withdrew all students from denominational schools. From time to time the question is again brought up by various denominational schools as to why physically handicapped people cannot have their tuition paid in denominational schools."

In addition to the facts set out in your letter, you have advised us that it is the practice of your department to select the school and course of training which will be best adapted to the needs and talents of the applicant; that you pay no money to the applicant, but make payment of tuition direct to the school.

We understand that vocational rehabilitation is administered by your department under the authority of Senate Bill

No. 86, Chapter 23, Acts of the 1st Called Session of the 41st Legislature, 1929, and pursuant to the regulations of the Federal Board for Vocational Education as provided by an Act of Congress passed June 2, 1920, and amended June 5, 1924, entitled "An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise, and their return to civil employment." The Federal and State governments both contribute funds for carrying out the purposes of your department.

Your question resolves itself to a determination of whether or not the payment of tuition by your department to denominational schools for the training of persons eligible for assistance is prohibited by Article I, Section 7, of the Constitution of Texas which reads as follows:

"No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purpose."

The exact question here involved has never been directly passed upon by the appellate courts of Texas, so far as we have been able to ascertain. The above quoted constitutional provision, however, clearly prohibits state aid to religious institutions. Does the payment of tuition constitute aid to the institution?

In *Jernigan v. Finley*, 90 Tex. 205, 38 S. W. 24, the Texas Supreme Court in construing the analogous provision, Art. VII, Sec. 5, which reads in part, ".....And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same or any part thereof ever be appropriated to or used for the support of any sectarian school. . . ." declared: "The Legislature cannot do by indirection what it cannot do directly."

We believe that if State monies were used to pay the tuition fees of students in denominational schools the State would thereby be contributing indirectly to the support of such schools.

The Supreme Court of South Dakota in *Synod v. State* (1891) 2 S. D. 366, 50 N. W. 632, held that the payment of tuition of certain students, by the state, to a Presbyterian university was an appropriation for "the benefit of" a sectarian school in violation of Art. VI, Sec. 3, of the South Dakota Constitution which provided that "no money or property

of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

A similar provision in the Constitution of Kentucky was held to prohibit the payment, by the State, of tuition of certain pupils in a sectarian school. *Williams v. Stanton Graded Common School Dist.*, 173 Ky. 708, 191 S. W. 507. The Kentucky Court of Appeals declared:

". . . to make clear and certain our determination to preserve the spirit of the Constitution and its efforts to keep separate church and school, we not only hold that it is a violation of the Constitution to appropriate any part of the common school fund 'in aid of any church, sectarian, or denominational school', but equally unlawful for the trustees of any common or graded school, or educational institution supported in whole or in part by public funds raised by taxation, or dedicated to common school purposes, to enter into any contracts, agreements or arrangements through or under which such school or educational institution may be brought directly or indirectly under the influence, control, or supervision of any denominational or sectarian institution or school."

The Wisconsin Supreme Court declared in *State et rel Van Straten v. Milquet*, 180 Wis. 109, 192 N. W. 392, that a school district bus might not carry any children to a parochial school.

See also: *Cook County v. Chicago Industrial School*, 125 Ill. 540, 18 N. E. 183; *State ex rel Nevada Orphan Asylum v. Hallock* (1882) 16 Nev. 385; *Otkin v. Lawkin*, 56 Miss. 764; *Jenkins v. Andover*, 103 Mass. 94.

Under the foregoing authorities we believe that your department is forbidden by Art. I, Sec. 7, of the Texas Constitution, *supra*, to pay tuition of any persons in denominational or sectarian schools.

Honorable J. J. Brown, page 4

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Yours very truly

ATTORNEY GENERAL OF TEXAS

BY s/Walter R. Koch
Walter R. Koch
Assistant

WRK:GO:wc

APPROVED AUG 16, 1940
s/Grover Sellers
FIRST ASSISTANT
ATTORNEY GENERAL

This Opinion Considered And Approve In Limited Conference