

1983 S.C. Op. Atty. Gen. 60 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-40, 1983 WL 142711

Office of the Attorney General

State of South Carolina

Opinion No. 83-40

July 12, 1983

*1 The Honorable James L. Solomon, Jr.

Assistant Director

South Carolina Commission on Higher Education

1429 Senate Street

Columbia, South Carolina 29201

Dear Jim:

On behalf of the Committee on Implementation of the State Desegregation Plan of the Commission on Higher Education, you have requested that this office advise you as to whether State Desegregation Plan funds may be used to purchase textbooks for the use of students enrolled in private colleges. The students are participants in a Medical University of South Carolina summer program which is open to students from all colleges but draws primarily from six in-state predominantly black institutions of which four are private. The program is designated to encourage enrollment of black students in health care programs by assisting them in identifying career goals and attempting to enhance their knowledge of the facts and procedures related to health care. The textbooks would be intended to help the students continue their study in the health career area. They would be loaned to the six predominantly black colleges involved because of their students' participation in and resource needs for the health care program. The loan would be limited to the duration of this health career program and the books would be placed on reserve in the schools' libraries for the use of participants in the summer program only. The proposed money to be used for purchase of the textbooks comes from funds for the implementation of the South Carolina Plan for Equity and Equal Opportunity in the Public Colleges and Universities (Plan). The expenditure would be intended to serve one of the purposes of the Plan by helping to increase minority enrollment in graduate programs at MUSC.

This opinion addresses the question of whether the proposed expenditure would constitute impermissible state aid to religious or other private interests. All of the four private colleges involved in the program are church supported.

The United States Supreme Court has held that '... a legislative enactment does not contravene the Establishment Clause (First Amendment, U. S. Constitution) if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion and if it does not foster an excessive government entanglement with religion.' [Committee For Public Education v. Regan](#), 444 U.S. 646, 63 L.Ed.2d 94, 102, 100 S.Ct. 840 (1980). Although the money here would not be spent under specific legislative authorization, this test has apparently not been confined to reviews of legislation and it should be applicable here. See, [Malnak v. Yogi](#), 592 F.2d 197 (3rd Cir. 1979). Under this test, the textbook purchases would appear to be constitutional. The purchase would be primarily for the valid secular purposes of education, health care and desegregation. Although the books would not be loaned to individual students as they were in the textbook loan program approved in [Board of Education v. Allen](#), 392 U.S. 236, 20 L. Ed.2d 1060, 88 S.Ct. 1923 (1968), they would be used only for the direct benefit of the students enrolled in the health care program and ownership of them would remain with the State. For this reason and because none of these private schools appear to be pervasively sectarian (see, *infra*), the aid would not seem to have the primary effect of advancing religion. [Roemer v. Maryland Public Works Board](#), 426 U.S. 736, 49 L.Ed.2d 179, 191, 96 S.Ct. 2337 (1976); [Meek v. Pittinger](#), 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975); [Hunt v. McNair](#), 413 U.S. 734, 37 L.Ed.2d 923, 93 S.Ct. 2868 (1973).¹ Finally, the third factor of entanglement would not appear to be a problem here. This factor has sub-parts which have been identified by the Supreme Court and include the character of the institutions, the form of aid, the process of its disbursement and political divisiveness. [Roemer](#), *supra*. Here, the schools appear to be ones that perform essentially secular educational functions which

are separable from religious activity. Id.; Hunt, supra. Thus, the need for close surveillance of the secular use of these books is correspondingly reduced. Roemer, supra. The distribution to the colleges of the loaned textbooks is, in itself, unlikely to create impermissible entanglement of church and State. Finally, political divisiveness appears to be unlikely here in view of the very limited scope of the program and the amount of money in question, \$12,000.00.

*2 For the above reasons,² the proposed expenditure does not appear to constitute unconstitutional government involvement with religion; however, the United States Supreme Court itself recognizes that Establishment Clause cases are difficult and that its decisions have sacrificed 'clarity and predictability for flexibility'. Regan, supra, 63 L.Ed.2d at 107. Therefore, the permissibility of a program such as that considered here is not entirely free from doubt.

For many of the same reasons outlined above the proposed program would also not appear to violate Article XI, Section 4, Constitution of South Carolina, 1895, as amended, which bars payment of public funds for the direct benefit of religious or other private educational institutions. The benefit to the colleges in contrast to the students affected, would here appear to be merely indirect and the public benefit would greatly outweigh any incidental private gain. See, 78 C.J.S., Schools and School Districts, § 5, pp. 612–613; see, Article X, Section 11, Constitution of South Carolina, as amended.

If we may be of further assistance, please contact us.

With best regards, I am

Sincerely yours,

T. Travis Medlock

Footnotes

1 This office has not undertaken an investigation or study of the nature of these schools; however, Hunt found '... no basis to conclude that [Furman University's] operations [were] oriented significantly toward sectarian rather than secular education.' 37 L.Ed.2d at 931. Although Furman would not be a participant in the program in question, it is a church supported liberal arts college as appear to be the colleges proposed to receive the textbooks.

2 The three-part test stated above was only recently reaffirmed by the Supreme Court in Mueller and Noyes v. Allen, — U.S. —, 51 U.S.L.W. 5050 (June 28, 1983) in the context of a state's allowance of a tax deduction to taxpayers for educational expenses, including textbooks.

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