1974 WL 27574 (S.C.A.G.)

Office of the Attorney General

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***1** The loaning by the State Department of Education of educational films to public schools and state colleges so as to include parochial schools, denominational colleges and private schools would be constitutional; specific legislative authority, however, is required to implement the practice.

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State Superintendent of Education

An inquiry into the constitutionality of the practice by the State Department of Education of loaning educational films to parochial schools, denominational colleges and private schools involves, first, a consideration of the practice in light of the 'establishment of religion' clause of the First Amendment to the U. S. Constitution. In Hunt v. McNair, 258 S.C. 97, 187 S.E.2d 645, aff'd, —— U.S. ——, 93 S.Ct. 2868, 37 L.Ed.2d 923 (June 25, 1973), the U. S. Supreme Court reaffirmed the three principles laid down in Lemon v. Kurtsman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1972), for determining whether a challenged statute violates the Establishment Clause:
"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster 'an excessive, entanglement with religion." Lemon v. Kurtzman, supra, 403 U.S. at 612-613.' Hunt v. McNair, supra (Slip Op. at 6).

The practice, then, whether implemented pursuant to a statute enacted by the legislature or pursuant to a regulation promulgeted by the Education Department, must meet the three criteris hereinabove specified.

The purpose of the practice would be a patently secular one in that the films are educational in nature and would be available to both public and private institutions, regardless of religious affiliation or not, on the same basis. The introductory paragraph of the Act involved in Hunt v. McNair, supra, declared, inter alia:
'It is hereby declared that for the benefit of the people of the State, . . . it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable in stitutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, . . .' S.C. Code Ann. § 22.41 (Cum. Supp. 1971).

The Court recognized that the Baptist College at Charleston and other private institutions of higher education provided these benefits to the State. Hunt v. McNair, supra, Slip Op. at 7. These same private colleges and universities, as well as private primary and secondary schools, would be the intended benefactors of the practice herein discussed they, in turn, provide the same benefits to the State in terms of furnishing an education with no attendant drain on public funds. State assistance to these institutions in the form of loaned educational films would have no purpose beyond that of aiding the State itself in its duty to educate its citizenry.

***2** As to the second criterion of 'primary effect,' the Supreme Court stated:

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'Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has been rejected. E.g., Bradfield v. Roberts, 175 U.S. 291 (1899); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Tilton v. Richardson, supra.' Hunt v. McNair, supra (Slip Op. at 8).

The primary effect of the practice would not be to foster or impede religion but rather to further the general educational development of students who attend private as well as public schools; and, in the specific instance of the lending of films to private colleges, one effect would be to assist State-accredited teacher education programs.

The third element of 'excessive entanglement with religion' is lacking in the practice in that the Education Department would merely make available on loan educational films which the institutions request; the Department would take no affirmative action other than to furnish the desired films. In Hunt v. McNair, supra, the Act in question allowed the Educational Facilities Authority to inspect the involved projects to insure that they were not used for religious purposes and to participate in the menagement decisions of the institutions; the Supreme Court held that the practical operation of these broad powers did not constitute excessive entanglement with religion. The very limited involvement of the Education Department with the borrowing private institutions would present even less entanglement.

It is clear, therefore, that the practice would not violate the Establishment Clause as most recently interpreted in Hunt v. McNair, supra.

The practice must be next considered in light of the South Carolina Constitution and, more specifically, the recently amended Article XI of the Constitution.

Article XI, Section 4 of the Constitution now provides:
'No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.' . . .

A comparison of the amended version and the original provision, contained in Article XI, Section 9, reveals that the amended version is much less restrictive in proscribed connections between the State and private and religious educational institutions, to wit: Section 4 no longer contains a prohibition against the 'property' of the State being used in aid of any religious or sectarian institution. Likewise, the word, 'indirectly,' referring in the original provision to the use of State property, credit or money in aid of religious or sectarian institutions, has been deleted from the amended Article XI, Section 4. As the Comment of the framers of the revised Constitution indicate;
'. . . By removing the word 'indirectly' the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs . . ..' Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 99 (1969).

***3** In an opinion already issued by this office, the practice of loaning money to students who are South Carolina residents but who attend out-of-state sectarian institutions was adjudged velid under the loosaned Constitutional provision prohibiting only direct benefit to religious or other private educational institutions. See, Letter to Mrs. Rebecca M. Connelly, June 5, 1973. The practice of loaning films to private educational institutions would be even less questionably of direct benefit to the recipient institutions than is the already approved practice of loaning money to students to enable them to attend such institutions.

The word, 'credit,' as it appears in the amended Constitutional provision, should be construed to have its actual and commonly understood meaning. Hatchett v. Nationwide Ins. Co., 244 S.C. 425, 431, 137 S.E.2d 608 (1964), Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d 736 (1963). The Oxford English Dictionary (1961), Vol. II, p. 1155, defines 'credit' as:

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'Trust or confidence in a buyer's ability and intention to pay at some future time, exhibited by entrusting him with goods, etc. without present payment . . .. Any note, bill, or other document, on security of which a person may obtain funds.'

'Credit,' therefore, cannot be construed within its ordinary and natural meaning to be a synonym for 'property' and thereby include State-owned films, See also, Elliott v. McNair, 250 S.C. 75, 86, 156 S.E.2d 421 (1967) (construing 'credit' as used in Article X, Section 6, of the South Carolina Constitution to mean the pecuniary liability of the State.)

The expressed intent of the framers of the revised constitutional provision which was approved by the people and ratified by the General Assembly was to prohibit aid to religious and other private educational institutions only if it directly benefitted such an institution. The educational films, albeit paid for by public funds, are purchased not for the benefit of private institutions but rather for the use of the State educational system. Furthermore, the loan of these films to private institutions would not directly benefit the institution itself, but the student who attends such an institution and learns from the loaned films.

It would appear clear, therefore, that the practice is an example of the type of program intended to be constitutionally permissible under amended Article XI, Section 4 of the South Carolina Constitution.

Likewise, Article X, Section 6 of the Constitution which provides, inter alia:
'The credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation; . . .'

would not be violated by the practice inasmuch as the word, 'credit,' in the provision has been held to mean the pecuniary liability of the State. See, Elliott v. McNair, supra.

The remaining question is whether the practice must be instituted pursuant to legislation or whether the Education Department already has the authority to loan the films.
***4** 'Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them. This power cannot be varied or enlarged by usage or by administrative construction. Executive and administrative officers, boards, departments, and commissions have no powers beyond those granted by express prevision or necessary implication.' 81 C.J.S. States § 58 at 977-8.

'Administrative agencies possess powers expressly granted them and also powers that are theirs by necessary implication.

"Such bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonable and necessary implication, or such as are merely incidental to the powers expressly granted . . .. Any reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power . . .." Piedmont and Northern Railway Co. v. Scott, et al., 202 S.C. 207, 24 S.E.2d 353; 73 C.J.S. Public Administrative Bodies and Procedures § 50.' Opinion No. 2213, 1967 Op. Atty. Gen. 7.

Section 21-45 of the 1962 South Carolina Code of Laws, as amended, specifies the general powers of the State Board of Education, including the power to:
'(1) Adopt policies, rules and regulations not inconsistent with the laws of the State for its own government and for the government of the free public schools . . .. (10) Assume such other responsibilities and exercise such other powers and perform such other duties as may be assigned to it by law or as it may find necessary to aid in carrying out the purpose and objectives of the Constitution of the State.'

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Only these two subsections contain language which, arguably, could be construed to allow the Department to implement the practice without additional legislation; Section 21-45(1), however, speaks to the internal organization or set-up of the Department rather than to the authority to adopt rules regulating the Department's conduct vis a' vis private educational institutions. Section 21-45(10) grants to the Board the authority to exercise such powers as it may deem necessary to carry out the aims of the South Carolina Constitution, apparently, without additional legislation. Indirect aid to private educational institutions, however, is not an objective of the State Constitution; rather, it is merely a practice not prohibited by the Constitution.

Moreover, the framers of the amended Article XI, Section 4 in their Comments stated:
'By removing the word 'indirectly' the General Assembly could . . . perhaps contract with religious and private institutions for certain types of training and programs.' [Emphasis added.]

They intended, therefore, that the legislature enact laws consistent with the new constitutional provision and not that the Education Department initiate programs or practices by its own authority without enabling legislation. In the past, legislation controlling the State's involvement with private educational institutions has been enacted, viz., the granting of scholarship grants to students attending private schools, pursuant to Sections 21-297 et seq. of the 1962 Code.

***5** In the absence of already existing authority vested in the Education Department and in light of past practices as well as intentions expressed for the future, the practice of loaning educational films to religious and other private educational institutions, while constitutional, requires the enactment of appropriate legislation.

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