



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 3, 2016

The Honorable Ronald Nate
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Idaho's Opportunity Scholarship – Our File No. 16-54028

Dear Representative Nate:

You requested an opinion regarding whether Idaho's Opportunity Scholarship may be used for attendance at parochial schools and the interplay with art. IX, sec. 5 of the Idaho Constitution. You also requested an analysis as to whether this prohibition violates the Free Exercise Clause of the United States Constitution.

Idaho's Opportunity Scholarship was developed, in part, to "[p]rovide access to eligible Idaho postsecondary education through funding to remove financial barriers[.]" Idaho Code § 33-4303(1)(c). When a student is awarded the Idaho Opportunity Scholarship, the payment is made from the state treasury "annually to an eligible Idaho postsecondary education Institution." Idaho Code §§ 33-4303(7), (9)(a). Additionally, Idaho Code § 33-4303(7) appears to prohibit payment directly to the student. Eligible institutions include,

Any educational organization located in Idaho that is:

- (i) Operated privately
- (ii) Classified as not-for-profit under state law;
- (iii) Under the control of an independent board and not directly controlled or administered by a by a public or political subdivision; and
- (iv) Accredited by an organization recognized by the state board as provided in § 33-2402, Idaho Code.

Idaho Code § 33-4303(2)(b).

Idaho's Constitution provides that:

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; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facility authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society through loans, leases, or other transactions.

Idaho Const., art. IX, § 5. The Idaho Supreme Court has interpreted this provision to “more positively enunciate the separation between church and state than did the framers of the United States Constitution.” *Epeldi v. Engelking*, 94 Idaho 390, 395 (1971).

In *Epeldi*, the Court addressed whether the “allocation . . . of state funds to the several school districts pursuant to [statute] for the purpose of transportation of the parochial students is constitutional.” *Id.* at 391. The Court found that allocation violated this provision because “[t]he Idaho Const. art. 9, § 5, requires [the] court to focus its attention on the legislation involved to determine whether it is in ‘aid of any church’ and whether it is ‘to help support or sustain’ any church affiliated school.” *Id.* at 395. “[W]hile we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.” *Id.* at 396.

This office has previously been requested to review several other education funding programs under art. IX, sec. 5. Following the analysis and interpretation provided by the *Epeldi* Court, this office has consistently concluded that funding, whether direct or indirect, of parochial schools, violates the Idaho Constitution. *See* 1989 Idaho Att’y Gen. Ann. Rpt. 42 (Att’y Gen. Op. No. 89-5) (Idaho’s College Work Study Program as applied to postsecondary institutions controlled by a church, sectarian, or religious denomination, violates art. IX, sec. 5); 1989 Idaho Att’y Gen. Ann. Rpt. 119 (Att’y Gen. Guideline dated Feb. 23, 1989) (extension of a “voucher plan” to parochial schools would run afoul of the Idaho Constitution); 1992 Idaho Att’y Gen. Ann. Rpt. 54, 55 (Att’y Gen. Guideline dated Feb. 7, 1992) (“[A] statutory voucher or tax credit system for parents of schoolchildren attending private schools would violate the Idaho Constitution.”); 1995 Idaho Att’y Gen. Ann. Rpt. 74 (Att’y Gen. Guideline dated Feb. 7, 1995) (“[T]here are potential constitutional

issues associated with income tax credits for tuition payments to private schools for children attending K-12.”).

Based upon the *current* text of the statute, the payment would be made directly from the State to the religious institution. With this in mind, a qualifying student attending a religiously affiliated school would trigger a direct payment from the State to a category of institution prohibited by art. IX, sec. 5. Scholarship dollars pay tuition and fees which, in turn, fund the operations of schools. Thus scholarships for attendance at parochial schools would constitute a payment from the State in support of a school controlled by a church.

As to your second question – whether Idaho’s prohibition for state funds to be used for payment to a religious institution violates the Free Exercise Clause of the United States Constitution – this remains an open question. Currently pending before the United States Supreme Court is *Trinity Lutheran Church v. Pauley*, Docket No. 15-577, which will address whether the exclusion of religious programs due to a state constitutional provision similar to Idaho’s from a statutorily neutral aid program violates the First Amendment and Equal Protection Clauses. The court of appeals opinion in *Trinity Lutheran Church* under review by the Supreme Court is reported at 788 F.3d 779 (8th Cir. 2015).

In *Trinity Lutheran Church*, the church operated a daycare open to both church members and the general public. The church applied to Missouri’s Scrap Tire Grant Program to receive materials to resurface its playground for both daycare children and neighborhood children. The application was denied solely on the basis that Missouri’s constitution prevents payment or aid in support of a church. The question presented before the United States Supreme Court is whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concerns. Given the identical state constitutional language in *Trinity Lutheran*, the outcome of this case could directly affect the legality and application of Idaho’s similar constitutional provision. Oral argument before the Supreme Court will not take place until next fall. A decision is therefore likely a year away.

Despite this open question, the Supreme Court has previously held that the exclusion of a scholarship from use to pursue a degree in devotional theology does not violate the Free Exercise Clause. See *Locke v. Davey*, 540 U.S. 712, 715 (2004). In that case, a Washington postsecondary scholarship was available to students on a merit and need basis and awarded to both public and private school attendees unless the student was pursuing a degree in devotional theology. The funds were paid directly from the state treasury to the school. *Id.* at 717. The Court found that because there was nothing in Washington’s constitution, “nor in the operation of the Promise Scholarship Program, . . . [to] suggest[] animus toward religion[]” that there was no violation of the Free Exercise Clause. *Id.* at 725. While Washington’s prohibition was more narrowly focused than Idaho’s, Idaho’s statute is facially neutral and does not suggest animus toward religion. Further, given Idaho’s statutory history paired with the *Locke* decision, it is presumed that Idaho’s application that prevents payment

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of the Idaho Opportunity Scholarship to parochial institutions directly is also permissible under the Free Exercise provision. In other words, under existing case law, it cannot definitively be stated that Idaho's prohibition of state treasury money paid to a parochial school under Idaho's Opportunity Scholarship would violate the Free Exercise Clause.

I hope that you find this analysis helpful.

Sincerely,



BRIAN KANE
Assistant Chief Deputy

BK/tjn