MINNESOTA CONSTITUTIONAL STUDY COMMISSION

EDUCATION COMMITTEE
COMMITTEE REPORT

This report constitutes committee recommendations to the Constitutional Study Commission. See the Final Report for the Commission's action which in some cases differed from the committee recommendations.

November, 1972

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The Commission adopted all of the Committee's recommendations contained in this report.

REPORT OF THE EDUCATION COMMITTEE

CHAPTER I

INTRODUCTION

The Education Committee has considered provisions of the Minnesota Constitution relating to Education. These provisions are primarily contained in Article VIII of the Constitution.[1]

The committee has also studied other provisions of the Constitution relating to education, particularly Article I, Sec. 16.

The committee initiated its study by contacting the individuals and groups who have an interest in educational matters. This included those who, over the years, have been involved in educational issues before the Legislature and others who asked to be added to our mailing list. The committee asked these individuals and groups to identify problem areas in the Minnesota Constitution which require consideration. The committee staff also did research in the area of education law to identify other issues.

The committee then concentrated on three major problem areas for further study:

(1) Aid to non-public schools (Chapter II of this report.)

(2) Equalization of public school finance; this problem is sometimes referred to as the state financing of the full costs of elementary and secondary education (Chapter III of this report.)

(3) The organization of higher education in the State, including the question of the constitutional status of the University of Minnesota. (Chapter IV of this report.)

In addition, the committee gave summary attention to two other topics:

(1) The organization of the State Department of Education

(2) The restrictions on the investment and use of the Permanent School Fund and the Permanent University Fund. These topics are discussed in Chapter V of this report.

In making our recommendations, the committee has constantly kept in mind the limitation of our task. We are discussing problems with the state Constitution. We view the Constitution as establishing a broad framework for governmental power, within which the designated authorities may establish and alter particular policies. Hence we have approached our task with the presumption that the Constitution should be a simple document, delegating authority and responsibilities, but should not contain specific instructions on matters of detail. These may better be worked out, from time to time,

by the Legislature and by other public agencies to which responsibility for public education may be entrusted.

As our findings indicate, we believe that the present Constitution has served admirably in this respect. It has delegated power and responsibility for public education, without impeding the process of change which inevitably will take place. It has left the Legislature free to deal with changes in educational patterns and problems as they arise.

In addition, we have looked at our task as one of identifying problem areas and suggesting necessary change. This change might take the form of addition, amendment, or deletion. We have not drafted an "ideal" education article, but have worded from the structure of the existing Constitution.

Public Hearings

In the course of our deliberations, we have held three public hearings, covering four of the topics discussed. The first public hearing was held March 17, 1972, in St. Paul. It was a joint meeting with the Finance Committee. The committee heard testimony regarding Article VIII, Secs. 1, 2 (first paragraph), and 4. Our conclusions on the basis of this testimony are set forth in Chapters III and V of this report.

The second public hearing was held on May 4, 1972, in Moorhead. It centered on problems of higher education in the State. The constitutional provisions involved are Sections 3 and 5 of Article VIII. The committee also heard testimony from

representatives of institutions which are not specifically mentioned in the Constitution. The recommendations and conclusions of the committee are set forth in Chapters IV (organization of higher education) and V (finance) of this report.

The third and final public hearing was held on June 5, 1972, in Mankato. It centered on the question of financial aid to non-public schools. Two constitutional provisions are directly involved here. The second paragraph of Article VIII, Sec. 2, deals with this question. Article I, Sec. 16, also sets forth similar language. Our recommendations on this issue are included in Chapter II of this report.

The committee has received generous cooperation from government officials and from members of the public in its inquiries. We have been provided with financial and statistical data, memoranda and opinions. The committee is most grateful for this assistance.

CHAPTER II

AID TO NON-PUBLIC SCHOOLS

The Issue

Do the provisions of the Minnesota Constitution which prohibit aid to sectarian schools require amendment or change? The Minnesota Constitution contains two such provisions, one in the Bill of Rights and one in the Education article. The issue which the Commission must face is whether these two sections prescribe the proper relationship between church and state in Minnesota.

Over the past decade, the public treasury has provided some support or services to children in non-public schools and to their parents. Some of this support has been in the form of specific services, like transportation. Other support has been in the form of payments or tax rebates in the amount of tuition payments to the parents of children in such schools.

Policy decisions which the people of Minnesota may reach in this regard are, of course, subject to the restrictions of the First and Fourteenth Amendments to the United States Constitution, respecting the establishment of religion.

The Constitutional Provisions

Two provisions of the Minnesota Constitution deal directly with this question. The first is in the Bill of Rights, Article I, Sec. 16. It was part of the original 1857 Constitution of the State. It provides:

Freedom of conscience; no preference to be given to any religious establishment or form of worship. Sec. 16. The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

The other provision is the second paragraph of Article VIII, Sec. 2. It was added to the Constitution in 1877. It is a form of the so-called "Blaine Amendment," which was added to many state constitutions at about that time. The section provides:

Public schools in each township to be established. Sec. 2. The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the State.

Prohibition as to aiding sectarian school. But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

Two other Minnesota constitutional provisions have bearing on the sectarian aid and establishment question. Article IV, Sec. 33, deals with special legislation and provides in part that the Legislature cannot enact local or special laws "authorizing public taxation for a private purpose." The other provision involved in the sectarian aid/establishment issue is

Article XX, Sec. 1, requiring that "taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes." Minnesota cases indicate that the public nature of an aid is not destroyed by incidental aid to private institutions, if the primary purpose of the legislation was to provide public aid, although these cases do not directly deal with the problem of aid to sectarian education.[2]

These Minnesota constitutional provisions must be read in the light of the United States Constitution. The First Amendment provides, in part:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof,...

The Fourteenth Amendment has made these same restrictions applicable to the states. Consequently, whatever language the Minnesota Constitution contains, government in Minnesota may not violate the provisions of the United States Constitution.

While case law interpreting the limits of the Minnesota provision has been sparse, judicial decisions interpreting the application of the First Amendment to the states have been plentiful.

The most recent and significant state case is Americans United v. Independent School District 622.[3] It was a challenge brought against the implementation of a state law requiring certain school districts to provide bus transportation for students of non-public schools within their territory. The law was supported on the theory that it benefited the children involved, not the parochial schools, and on the basis that it

was not aid to education. While the Minnesota Supreme Court affirmed the constitutionality of the particular statute in question, Minnesota Statutes Section 123.76, the state court warned that the particular statute went to the brink of constitutional permissibility. The opinion states:

> In holding that L. 1969, c.570, authorizing public transportation of parochial school students, does not violate Minn. Const. Art. 8, § 2, prohibiting the use of public money for the support of parochial schools, we do so with the conviction that this legislation brings us to the brink of unconstitutionality. [4]

In deciding the case, the Minnesota Supreme Court appeared to hold that the Minnesota Constitution's provisions on the question of state aid to non-public schools are more stringent than those of the United States Constitution.

The United States Supreme Court has long sustained the constitutionality of free public bus transportation for children attending parochial schools.[5] Everson was sustained, as Americans United seemingly was, because the statute had a general safety or welfare public purpose (safety of school children) and the "aid", if any, was for the benefit of the child, not the school.

To sustain Minnesota's public transportation for parochial students, the Minnesota court seemingly relied on the traditional basis that the law provided a benefit to the child, not the parochial school; however, other states, interpreting their constitutions more stringently than the federal provision, have rejected Everson on the theories:

1-that the sectarian institutions are relieved of the

expense of bringing the child to school;

2-that transportation programs are more easily identifiable as an element essential to the parochial schools than, for example, police or fire protection;

3-that the costs incurred by the State are not more than would exist if these students were attending public schools;

4-that the legislation is merely a legitimate exercise of the police power.

For example, the Wisconsin Supreme Court accepted the first three arguments in dealing with a similar Wisconsin constitutional provision in a case involving public transportation for parochial students.[6]

After the decision in Americans United, the Minnesota Legislature provided a personal income tax credit for parents who send their children to a non-public school. (See Minnesota Statutes 290.086.) A non-public school is a non-profit elementary or secondary school, other than a public school, located in Minnesota, which complies with the Civil Rights Act of 1964, and fulfills the requirements of the State's compulsory attendance laws.

Two limitations reduce the permissible credit. The maximum amount of credit per pupil unit may not exceed $100 during 1971 and 1972. In subsequent years, this amount may be increased by the same percentage that state aid to public schools is increased, but the amount of the credit may never exceed the actual cost to the parents of sending a child to a non-public

school. The ratio of the tax credit to the cost for education in non-religious subjects for each non-public school pupil also cannot exceed the ratio of the average state foundation aid per pupil unit for public schools to the average total maintenance cost per pupil unit in the public schools. In brief, non-public schools can't get more aid than public schools.

The constitutionality of this program was challenged in a suit in Ramsey County District Court. On July 5, 1972, the District Court upheld the plan, holding that there was no prohibited aid to sectarian education, since payments are made to the parents, not to the schools. The plaintiffs have indicated that they will appeal the decision.

Federal Constitutional Standards

Whatever provision is contained in the Minnesota Constitution, state relationships with churches and religious schools will be restricted by federal constitutional standards. The applicable provisions of the First Amendment have been extended by the courts to state governments as well.

In a 1971 decision, Chief Justice Burger outlined the criteria which the Supreme Court has used. He stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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 government entanglement with religion.[7]

All of these criteria present difficult problems of interpretation. What is a "secular legislative purpose"?

The value of this criterion is that it gives deference to the findings and conclusions of the Legislature.[8] The problem, of course, is that almost any legislation or program can or does have secular purposes, and any determination of whether this is unconstitutional is necessarily highly subjective.

As regards the second criterion, "primary effect," many of the same problems of specific application exist. One authority has suggested it means "first order, fundamental effect"; another suggests as a criterion that the church may not receive a greater share of the benefits than the state;[9] and yet another suggests that "primary" should be considered as any independent secular effect, regardless of possible additional religious effects.[10]

In the application of these standards, one approach is the "child benefit theory." This theory would permit a state to assist the child or his parent, but not the parochial schools themselves.

The third criterion was set out in a 1970 case where the Supreme Court indicated it was utilizing a new criterion,[11] whether the challenged statute could result in an "excessive government entanglement with religion."

The most recent Supreme Court case involved a Pennsylvania statute granting financial support to non-public elementary and secondary schools through reimbursement for teachers' salaries, textbooks and instructional materials in specific secular courses; and a Rhode Island statute authorizing payment to non-public

elementary school instructors of a supplement equal to 15 per cent of their annual salary.[12] Both statutes were ruled unconstitutional. On the same day the Supreme Court upheld provisions of the Higher Education Facilities Act of 1963 (20 U.S.C. § 701-58) which permitted federal construction grants for the building of non-public college and university facilities.[13]

Why the different results in Lemon and Tilton? The criteria outlined do not appear to compel the differing decisions. Excessive entanglement and the need for financial surveillance are arguably involved in building construction, as in teachers' salaries, textbooks (approved numerous times before Lemon) and instructional materials. The courts may be distinguishing between higher education on the one hand, and elementary and secondary schools on the other. Or they may be distinguishing "hardware," buildings, buses, books, from "software," personnel and more intimate involvement in parochial education. Whatever the federal standard, it will provide a minimum protection for the separation of church and state in Minnesota.

Other State Constitutions

Many other state constitutions contain provisions similar to that in the Minnesota Constitution. The Wisconsin provision has been cited in a footnote above. A summary review of constitutions of other states indicates that at least half have provisions providing some detailed restriction on the use of public funds to support parochial schools.[14]

The Model State Constitution restricts itself to a simple paraphrase of the United States Constitution: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof,..."[15]

The committee does not believe that the provisions of other state constitutions are particularly important in this field, because of the different historical developments in other parts of the nation.

Present Positions

The Education Committee cannot expound the meaning of the constitutional provisions in detail. That is the work of the courts. Our purpose was to see if there was a need for constitutional change. If so, we were instructed to recommend direction for that change and its content.

We conducted a public hearing in Mankato on June 5, 1972. We invited representatives of parochial and private school organizations to that hearing, as well as representatives of groups which have opposed the various education aid programs which have been proposed in the Legislature. Several interested citizens also responded to our notice of hearing and appeared to present testimony.

On the basis of this hearing, we have concluded that there is no support for any change in the two constitutional provisions relating to aid to sectarian schools. All of those who appeared before us seemed basically satisfied with the language of the

present Constitution.

We should make it clear that this satisfaction stems, in large degree, from confidence on the part of both the opponents and proponents of the system of aid enacted by the 1971 Legislature that they will prevail in the litigation currently under way. Those who favor the school aid program believe that tax credits or payments to parents avoid the literal prohibitions of these sections and are constitutionally permissible. Those who oppose it appear to believe that it exceeds the "brink" which the Minnesota Supreme Court delineated in Americans United and involves the establishment of religion prohibited by the United States Constitution. They believe that they will be successful on appeal.

However unfounded the hopes and expectations of one or the other group may be, neither group has provided enthusiastic support for constitutional amendment. In the absence of such support, we do not believe that constitutional change is desirable or attainable. Our basic approach to the problem of constitutional improvement has been to call for revision only where the present language is serving as an impediment to the operation of state government. All seem to agree that it is not serving as such an impediment. In these circumstances we cannot recommend revision.

The committee believes that no change is possible in a field such as this, unless the proposal receives substantial public support. Given the general acceptance of this constitutional language, we do not believe that sufficient public support

could be generated for any change.

In taking this position, we bear in mind the warning voiced by Chief Justice Burger in a 1971 case. In striking down the Pennsylvania and Rhode Island programs discussed above, he stated:

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect...To have states or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency....[16]

Since a constitutional amendment would have to be submitted to the voters of the state, we believe that all of the evils of sectarian division on political issues would exist. Given the difficulty of amendment to the state Constitution, this division would undoubtedly insure defeat.

Apart from these practical considerations, we believe that the Constitution should remain unaltered. Clearly an

unnecessary entanglement between state and church must be avoided. This is not simply a matter of good policy, but a dictate of the United States Constitution. Everyone appears to agree that it is a desirable result. The present Minnesota Constitution provides relatively clear guidelines to be followed in implementing this mandate. We think it should be retained.

Accordingly, this committee recommends no change in the constitutional provisions prohibiting aid to sectarian education.

III. EQUALIZATION OF SCHOOL FINANCES

The Issue

Financial support for elementary and secondary education has been a recurrent problem both for local school districts and for the Legislature. The question presented to the committee was whether the Constitution should dictate that all (or some specified portion) of the costs of public elementary and secondary education should be borne by the state treasury.

Thus the question presented to the committee is narrower than that which may be presented to the Legislature. We do not face the question of whether state support or total state financing of education is sound policy. Rather, we must address the question of whether this policy is so strongly supported that the Legislature should be given no alternative but to adhere to it.

The Present Constitution

The present Minnesota Constitution contains two provisions which bear upon this question directly. They are Article VIII, Sec. 1, and Article VIII, Sec. 2, first paragraph. Both provisions were contained in the original state Constitution, although the latter provision has been renumbered due to other amendments. They provide:

Uniform system of public schools. Section 1. The stability

of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools.

Public schools in each township to be established. Sec. 2. The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the state.

These constitutional provisions authorize the Legislature to establish a system of public schools. The Minnesota Supreme Court has held that the language of Section 2 merely requires a school for each township, not one in each township.[17]

Early litigation established that the responsibility for establishing a general system of education was upon the state. Nevertheless, the state has long relied upon property taxes to finance a substantial part of the costs of public school education. These property taxes are levied and collected by the local school districts. This method has been upheld by the state courts against challenges based on these sections and other provisions of the Minnesota Constitution.

Ad valorem taxes, levied on the property within a given school district, have traditionally been the principal source of financial support for public education in this state. In the earliest years, townships were given authority to levy taxes for school purposes. Township schools have been displaced by school districts, which retain that power.

Throughout the history of the State, there has been some "state aid" for public schools. In the earliest years this came exclusively from interest on the state Permanent School Fund, a

trust fund established from the proceeds of the "school lands." The disposition of this fund is discussed in Chapter V of this report.

More recently, the Legislature has established more direct plans for assisting in school financing. Each session of the Legislature now makes direct appropriations, according to an established formula, for the support of local school districts. The formula is based on the number of students enrolled in the district, subject to certain adjustments. In addition to this regular system, there has been emergency state assistance for financially distressed school districts. A small part of the revenue necessary to support these programs comes from the state Permanent School Fund. The bulk is raised through regular taxation.

The current plan for school finance is established in Laws 1971, Ex. Sess., c. 31, art. XX. The impact of these laws will be discussed below.

Arguments for Change

The substantial majority of witnesses who presented testimony to the committee favored either extension of the state-aid system or a complete state assumption of the costs of education. The witnesses were, however, aware that this could be accomplished by legislative action without constitutional amendment. Most of them appeared satisfied with leaving the constitutional language unchanged while pressing for legislative enactment of their programs.

The arguments for increasing the role of state government in school financing are based upon the distribution of assessed

valuations, upon a claimed statewide responsibility for education, and upon the nature of the property tax itself.

Since property taxes are levied upon the assessed valuation of a school district, districts with high valuations can raise more revenue than districts with lower valuations, if both use the same rate of taxation. Valuations, however, do not vary directly with the number of students or the cost of education. Consequently, some school districts with high assessed valuations but few students have been able to provide large revenues and expanded educational opportunities, while other districts with lower assessed valuations and more students have had to levy maximum property taxes to maintain bare essential programs.

The ratio of assessed valuation to number of students varies tremendously throughout the state. The problem is exacerbated in the metropolitan areas where commercial and industrial property contributes to the local tax base but places no burden on the local schools, while the employees who work in those plants may well live in another district, sending their children to schools to which they contribute only a residential tax. The consequence is that "poor" districts, those with a lower valuation per pupil, have greater difficulty in providing equal educational opportunity for their students than other districts.

The Legislature has, over the years, recognized this problem. It now provides school aids which are adjusted in terms of the local property tax effort. It also has provided emergency aid for districts which cannot provide basic education when levying the maximum tax permissible.

Critics of the present system claim that dependence on local assessments provides an irrational distribution of public resources. They argue that the quality of education should not depend upon the accident of a child's geographical location. To some extent these critics have based their claims upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. That clause provides that "No state shall...deny to any person equal protection of the laws."

In several states courts have upheld claims of parents or taxpayers from "poor" school districts that the present system of school financing is unconstitutional. The most notable case is Serrano v. Priest, a 1971 California Supreme Court decision.[19] In that case, the court held that the disparity denied the students equal educational opporunity. Since the court viewed education as a "fundamental interest" and the distinction on geographic and wealth bases was "constitutionally suspect," the court invalidated the California system of school finance. Other courts have held similar plans unconstitutional.[20]

Judicial opinion is not, however, uniform.[21] Some courts have upheld similar financing plans.[22] The United States Supreme Court has agreed to review the general question during its 1972-73 term.[23] Until such review is completed, and made applicable to this state, the commission must assume that the present plan meets constitutional criteria. If the courts hold that statewide financing is required by the United States Constitution, no question remains for us to consider. In such a case the

Legislature will have a mandate to act in only one way. If the courts hold that statewide financing is permissible, but not required by the Federal Constitution, the Legislature would be free to act.

Some individuals have claimed that the language of the present Minnesota Constitution also requires statewide financing. This issue is also currently before the Federal District Court in St. Paul, in conjunction with a challenge based upon the United States Constitution. The state challenge is based primarily upon the language of the sections cited above, which require the Legislature to establish a "general and uniform" system of schools, and which also require the Legislature to make provision for a "thorough and efficient system" of schools. Challengers claim that this language requires a system of statewide financing for education, in order to insure the uniformity which the Constitution calls for.

Again the committee is not in a position to adjudge those issues which are subject to judicial determination. In the absence of a final court ruling on the question, the committee must rely upon the decades of experience with the property tax system and assume that its constitutionality will be upheld. If the courts hold that the language of Article VIII, Secs. 1 and 2, requires statewide financing, the duty of the Legislature will be clear and it will have few alternatives. If the courts hold otherwise, the Legislature may continue the present system, alter the percentage of state support, or adopt complete financing.

Another argument for full state financing has been that the State should recognize its obligation in modern society. The mobility of modern society means that individuals are no longer closely connected with one locality throughout their lifetime. Responsibilities for education should be allocated to those larger areas which will provide them homes througout their lives.

Some states have accepted this approach as a matter of policy. Hawaii has long provided full financing of education from the state treasury.

Support for some form of state financing for schools has been widespread. Recently the President's Commission on School Finance recommended that state governments assume responsibility for substantially all of educational finance, leaving local districts the option of providing a relatively modest supplement through local taxation.

The text of the recommendation is:

> The Commission recommends that state governments assume responsibility for financing substantially all of the non-federal outlays for public elementary and secondary education, with local supplements permitted up to a level not to exceed 10 percent of the state allocation.
>
> The Commission further recommends that state budgetary and allocation criteria include differentials based on educational need, such as the increased costs of educating the handicapped and disadvantaged, and on variations in educational costs within various parts of the state.[23a]

The Commission also recommended federal "incentive grants" to encourage states to implement statewide financing.

The state Constitution does not now hinder the implementation

of this recommendation, should the Legislature see fit to do so. Implementation of such a program would require substantial annual state expenditures. More than $400 million is now raised by local taxes; if full state financing is adopted, this will be added to the general state budget, in addition to present state aid programs.

The opponents of such a proposal stress the importance of local control of education. They point to the long and satisfactory history of elected local school boards controlling local schools. In particular, they point to the responsibility of these boards to local communities for educational policy and for the level of financial support. The opponents of state financing fear that state financing might lead to less rigorous control of school finance, and thus eventually lead to higher taxes.

Both proponents and opponents of change appear to agree that there is merit in the present constitutional language. It permits the Legislature to address the problem periodically and to adopt solutions which meet the changing circumstances of the times. The present Constitution appears to permit the Legislature to decide all of the questions to which testimony was directed, without placing these questions on the ballot for popular referendum as constitutional amendments.

Recommendation

The committee recommends no change in the sections on school financing. After evaluating the testimony and exhibits presented to it, the committee came to the conclusion that the

precise system of state assistance to public education and the precise formulas for such assistance are properly in the domain of the Legislature. The present constitutional language grants the Legislature ample powers to deal with these problems, providing flexibility which a constitutional enactment would eliminate.

Unless a decision is made to provide 100% state aid for education, a constitutional provision would need to specify the formula for distribution of funds. We believe that such a formula would be entirely inappropriate in the Constitution. Rather, this is better left to legislative determination. The exigencies of the situation will dictate both the level and distribution of the funds. This is an area in which flexibility has been an advantage in allowing the Legislature to adapt educational programs to the changing circumstances.

We are convinced that state aid is a permanent feature of school financing and are not concerned with the remote possibility that the Legislature might some day repeal state aid laws or reduce the support given to public education. By its very nature public education draws support from every part of the state.

We do not believe that a case has been made for a constitutionally mandated 100% funding requirement. Even the President's Commission recommended that there be some permission for limited supplementary local school financing. To provide otherwise would create a financially rigid, lock-step, statewide educational

system which does not appear to be desirable. Our recommendation would not preclude the Legislature from following this course if, at any future time, a majority of the legislators thought that statewide financing was the wise alternative.

The committee, of course, takes no position on the issues currently being litigated. If the courts hold that statewide financing is required by the United States Constitution, the State must conform. If the courts hold that the present system of state financing is contrary to the Minnesota Constitution, nothing in this recommendation would stand in the way of immediate legislative implementation of such a decision.

CHAPTER IV

THE ORGANIZATION OF HIGHER EDUCATION

The Issues

Higher education presents two issues of constitutional dimensions for consideration by the Commission. The first issue is whether the Constitution should contain language regarding the structure of institutions of higher education. If so, what should that structure be? Although there are several state systems of higher education, including the University of Minnesota, the State College System, the Junior College System, and the Vocational-Technical Schools, the Constitution provides only for the University. The others are statutory bodies.

The second question relates to the constitutional language which provides for the University. It provides a certain autonomy for the institution. Is this a desirable result?

We address these two questions separately. A third topic, relating to the Permanent University Fund, is the subject of Chapter V of this report.

A. HIGHER EDUCATION IN GENERAL

Constitutional Language and Statutory Provisions

There is no language in the Constitution dealing with higher education in general. Article VIII, Sec. 3, deals specifically with the University of Minnesota.

Acting under its general authority, the Legislature has established state colleges, junior colleges, and area vocational-technical schools. State colleges and junior colleges are governed by two

separate boards of trustees. Area vocational-technical schools are governed by the State Board of Education and the local school boards.

The Legislature has also created a Higher Education Coordinating Commission, to coordinate the activities of these institutions, the University of Minnesota, and the private colleges and universities in the State. The Coordinating Commission is thus a statutory body, not established in the Constitution.

Nature of the problem

Two interrelated problems arise. 1. Should the system of higher education in Minnesota be a unitary one with responsibility centered in a single governing body or should there be separate governing bodies for different kinds of institutions? 2. Should the Constitution spell out the organization of higher education in the state?

The status of the University of Minnesota is necessarily involved in these determinations. Its situation is discussed in detail below, but must also be mentioned here. Any change in the Constitution would necessarily involve reconsideration of the status of the University.

1. The first question is whether there should be a unified state board to oversee all forms of higher education. Wisconsin has recently adopted statutes which merge the governing bodies of the former University of Wisconsin and the former state university system (which is the Wisconsin equivalent of the Minnesota state college system). Apparently the intention is to provide more effective coordination and fairer allocation of resources between the several institutions of higher learning.

The Committee requested testimony on this issue at its May 4 meeting in Moorhead. There was no support for unification of the several systems of higher education under the management of one board. Representatives of both the University of Minnesota and the State College System opposed unification. They expressed the view that the different educational objectives of the different kinds of institutions were best met by a separate governing board.

The Committee agrees that each of the systems of higher education has a separate educational mission. While there is some overlapping of purpose and a clear need for coordination, we believe these different purposes are best served by separate administration.

If there were only one governing body to oversee all public institutions of higher learning within the state, that body might lose sight of the varying objectives of different kinds of institutions. The magnitude of its task would require it to delegate much of its authority to administrators in the various sub systems and on various campuses. This would create another level of bureaucracy in the educational system, and the governing board would be further removed from problems of the institutions. The new level of administration necessary to serve the unitary state board and implement its decisions would, we believe, be undesirable.

Accordingly, the Committee recommends that the basic structure of higher education in the state be unchanged.

The Committee has been concerned, however, that structures for coordination of higher education programs be strengthened, In making appropriations, the Legislature needs to ascertain that there is not unnecessary duplication of programs or facilities. The Higher Education Coordinating Commission has performed this

task in the past. It is a body created by the Legislature (Minnesota Statutes, chapter 136A, as amended by 1971 Laws, chapter 269). It has the duty of engaging in long-range planning and reviewing plans for curricular change or development at various kinds of institutions in the State. It has the power to review and recommend, but not the power to control the governing bodies of the various state institutions. The commission also coordinates the plans of public institutions with those of the private colleges and universities in the State.

The Committee is of the opinion that this form of coordination is a healthy middle way between total centralization and total decentralization of control. It leaves the responsibility for decision-making with the governing boards of the various institutions, but this responsibility must be exercised in the light of the plans and activities of others. We do not believe that any of these boards act capriciously. If they disagree with the recommendations of the Coordinating Commission, they remain free to act, but they face the burden of defending their positions before the Legislature when next requesting appropriations. We believe that this is a sensible solution.

The powers of the Higher Education Coordinating Commission have expanded as confidence in its work has grown. The 1971 Legislature added the duty to review curricular proposals and changes to its long-range planning authority.

This Committee believes that the Higher Education Coordinating Commission should also be given authority to review and make recommendations on the budgetary requests of the several institutions of public education. The Legislature could use the assistance of such a neutral body in assessing the relative merits and priorities

of the several institutions. The Committee believes that the Coordinating Commission should exercise the same kind of review and recommendatory function it now possesses with regard to curricular matters but should not have the power to veto or cut a proposed budget. It should only have the power to review a budget with respect to the total educational expenditures of the State and the needs of other institutions. If the governing body of that institution declines to endorse a proposed request, it should be free to go to the Legislature with its original request; it would, however, face a certain burden of justifying its insistence upon that amount.

This proposal does not impair the autonomy of the University of Minnesota, since the Regents of that institution are free to act without regard to the recommendations of the Coordinating Commission, although they would do so with the special burden of persuasion mentioned above. The proposal would only spell out procedures for the Regents to follow in approaching the Legislature with fund requests. The other institutions are clearly subject to statutory regulations.

At the Moorhead hearings, the representatives of the University and the other institutions agreed that this would be the most satisfactory system of coordination.

The Committee recommends that the Legislature amend Chapter 136A of the Minnesota Statutes to provide the kind of financial review we have suggested above.

2. Since we recommend that the present structure of higher education be retained, we turn to the question of whether it ought to be written into the Constitution. Chancellor G.Theodore Mitau

of the State College system testified at our Moorhead meeting. While he expressed a mild proference for a constitutional status for his institution, he agreed that the statutory provision had served well.

No one has shown disadvantages resulting from the present structure. It has permitted the Legislature to be flexible in its approach to the problems of higher education. That flexibility will undoubtedly continue to be responsibly exercised. Spelling out the organization of the several governing boards in the Constitution would add unnecessary detail to our fundamental document. It might create difficulties in adapting to future situations. We believe this would be unwise.

The Committee is of the opinion that there is no need for constitutional change spelling out the organization of higher education.

B. THE UNIVERSITY OF MINNESOTA

Constitutional language

Article VIII, Sec. 3, of the Minnesota Constitution provides:

> The location of the University of Minnesota, as established by existing laws, is hereby confirmed, and said institution is hereby declared to be the University of the State of Minnesota. All the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto the said university; and all lands which may be granted hereafter by Congress or other donations for said university purposes, shall vest in the institution referred to in this section.

The courts have held that this language "incorporates" the charter of the University into the State Constitution.[24] Thus, the Legislature cannot amend the charter by an ordinary law. Apparently it would require a constitutional amendment to make such an alteration.

The original charter was passed by the Territorial Legislature in 1851 (Territorial Laws, 1851, c.3). It provides for a Board of Regents of twelve members, elected by the Legislature for six-year terms. The act vests the "government of the University" in the Board of Regents. The courts have held that this provision gives the Regents a great deal of autonomy from legislative control.

Arguments for and against change

This autonomy of the University has been the primary focus of critics of the present Constitution. Representative Ernest Lindstrom appeared at our May 4 hearing in Moorhead, requesting that we study this problem, but not recommending any specific change.

The state courts have established the autonomy of the University based upon this constitutional section. The precise boundaries of autonomy are far from clear. Charter vests the government of the University in the Board of Regents. Thus the University seems to be immune from specific legislative directives to take certain action or to refrain from taking certain action.

Committee investigation has indicated that the Legislature exerts substantial authority over the University. Through the wise exercise of this authority, the Legislature can guide the University in making braod policy decisions, while abstaining from matters of detail, which are more properly left to the governing body of that institution.

Legislative control can be exercised through the appropriation process. The Legislature has repeatedly placed "riders" on appropriation measures or passed special appropriations for limited purposes. Such enactments can serve to direct the general policy of the University, particularly by allocating funds to particular fields of study, without entangling the Legislature in unnecessary detail.

The dependence of the University upon state appropriations permits the Legislature to exercise a kind of persuasive supervision. As legislators make known their collective opinion about certain matters, the University becomes aware of potential adverse financial consequences.

As discussed above, we recommend that the University, along with other institutions of higher education, be required to submit financial requests to the Higher Education Commission for review and recommendation. The Legislature will thus have information and impartial recommendations which will strengthen its wise control over the financial affairs of the University.

Clearly the Legislature is not powerless in dealing with the University. It can strongly influence, and perhaps control, questions of major policy. The Regents simply cannot afford to ignore legislative influence on such matters. On questions of administration, however, the Regents retain autonomy. The Committee believes that this balance between legislative authority and administrative responsibility is desirable for any state institution. The present constitutional provision protects this balance for the University.

At the public hearing in Moorhead, Dr. Malcolm Moos, President of the University, testified in favor of retaining autonomy. He pointed out that two other great state universities with which the University of Minnesota is often compared, those in California and Michigan, have similar constitutional status. While the Committee finds this comparison interesting, it does not rely upon it in making its recommendation. The recommendation is based on the need for balancing academic independence and fiscal responsibility. Dr. Moos also discussed this point at length in his testimony. By its very nature, freedom of academic inquiry will sometimes generate political

opposition. The legal autonomy of the academy serves to insulate, but not to isolate, it from the exigencies of daily political life. The long history of the development of academic freedom in this country is a valuable guide to our future constitutional course.

The Committee believes that the present constitutional structure of the University is adequate and proper. We recommend that Article VIII, Sec. 3, be retained in its present form.

The Committee is aware that in recommending retention of the University's constitutional status, but not recommending the addition of constitutional provisions for other state institutions of higher learning, the University is being treated differently from the other State systems. We are making this recommendation because we believe that the present constitutional system has worked well and does not require alteration. We would not recommend change solely for the sake of symbolism or constitutional symmetry. We believe that the University is sufficiently responsive to legislative direction on questions of broad policy and financial control. Since we have seen no clear need for change, we do not recommend any change.

V. OTHER ISSUES

The Committee also briefly discussed two other issues in the course of its deliberations. We deal with these in summary fasion.

A. ORGANIZATION OF STATE EDUCATION DEPARTMENT

The Minnesota Constitution contains no specific language dealing with the organization of the State Education Department. The organization of the department, the constitution of the State Board of Education, the provisions for selection and term for the Commissioner of Education, and other details are spelled out in statutes.

Many state constitutions contain specific provisions regarding the composition of a state board of education and the selection of a chief state school officer. In view of the increasing role of state government in the field of education, some states have made the chief school officer a Secretary of Education, a member of the Governor's cabinet and politically responsible for the operation of his department. Other states have sought to insulate the chief school officer behind a non-partisan long-term state board. We do not make a choice between these approaches. We do not believe that the Constitution should dictate a choice. We believe, rather, that this should be left to the Legislature.

The Legislature currently has power to establish the form of the State Education Department, the imposition of constitutional language would simply impede the ability of the Legislature to respond to changing circumstances.

B. PERMANENT SCHOOL FUND AND PERMANENT UNIVERSITY FUND

At the March 17 joint hearing with the Finance Committee, the Committee received testimony regarding the investment and management of the Permanent School Fund and the Permanent University Fund. At its May 4 hearing, it received further testimony regarding the Permanent University Fund.

These funds are established and controlled by Article VIII, Sections 4, 5, 6 and 7. Land, timber and other assets of the Permanent School Fund are sold from time to time to add to the cash principal of the fund. This cash is invested by the State Investment Board; the proceeds are distributed to local school districts as part of the school aids. This interest provides only a part of the school aid appropriated by the Legislature. The remainder must be met from general taxation.

The Permanent University Fund was similarly established. It is managed by the Board of Regents. Its proceeds go to support the University.

Two kinds of questions seem to arise with regard to these issues. The first regards the nature of limitations on investment and management of the funds. These are properly questions for the Finance Committee and not the Education Committee. We take no position on them.

The second type of question involves the management and conservation of state lands which remain subject to the trusts. We believe that these issues are properly ones for the Finance Committee and/or Natural Resources Committee. Accordingly we take no position on them.

VI. SUMMARY OF CONCLUSIONS

In summary, the Committee recommends that there be no amendment to the constitutional provisions relating to education.

Because of the widespread support for the present language and the absence of any call for revision, we recommend retention of the present language of Article I, Sec. 16, and Article VIII, Sec. 2, par. 2, relating to aid to sectarian education.

We recommend no change in the language relating to financing of education, believeing that the present language of Article VIII, Secs. 1 and 2, grants the Legislature wide discretion to adjust the school aid programs to modern needs.

We recommend against the addition of language relating to higher education in general. We also recommend against change in the language relating to the University. The present system seems to have worked well and does not require alteration.

We recommend that the Legislature provide by statute for review of budget proposals of all state institutions of higher education by the Higher Education Coordinating Commission.

We recommend no addition to the Constitution regarding the organization and function of the State Department of Education. We believe these matters can be best handled by legislative enactment.

Since we believe that they are within the province of other committees of this Commission, we are making no recommendations on the question of the disposition and investment of the Permanent School Fund and the Permanent University Fund.

NOTES

1. Throughout this report, references are made to the provisions as they stand in the present text of the Constitution. The Education Committee is aware that the Structure and Form Committee is making recommendations on the rearrangement and reorganization of the Constitution. Those proposals are cross-indexed to the present numbering system. For the sake of simplicity, we refer only to the Constitution as it presently stands.

2. Burns v. Essling, 156 Minn. 171, 174, 194 N.W. 404, 405 (1923).

3. Americans United v. Independent School District No. 622, 288 Minn. 196, 179 N.W. 2d 146 (1970).

4. Ibid., 288 Minn. at 410.

5. Everson v. Board of Education, 330 U.S. 1 (1947).

6. State ex rel. Reynolds v. Nusbaum, 17 Wisc. 2d 148, 156-157, 115 N.W. 2d 761, 765 (1962). Article I, Sec. 18, of the Wisconsin Constitution provides: "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." As a consequence of this decision, the Wisconsin Constitution was amended in 1967 to permit the transportation of parochial school students. Wisconsin Constitution, Article I, Sec. 23.

7. Lemon v. Kurtzman, 403 U.S. 602, 612-3 (1971) (citations omitted).

8. See Note, 56 Minn. L. Rev. 189, 193-4 (1971).

9. See Giannella, "Religious Liberty, Non-establishment, and Doctrinal Development," 81 Harv. L. Rev. 513, 533 (1968); Hammett, "The Homogenized Wall," 53 A.B.A.J. 929, 932 (1967).

10. Choper, "The Establishment Clause and Aid to Parochial Schools," 56 Calif. L. Rev. 260 (1968).

11. Walz v. Tax Commission, 397 U.S. 664 (1970).

12. Lemon v. Kurtzman, 403 U.S. 602 (1971).

13. Tilton v. Richardson, 403 U.S. 672 (1971).

14. See Columbia University, Legislative Drafting Research Fund, Index Digest to State Constitutions, p. 370 and appendix.

15. Section 1.01.

16. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

17. In re Dissolution of School District No. 5, 257 Minn. 409, 102 N.W. 2d 30 (1960).

18. Associated Schools of Independent School District No. 63 v. School District No. 83, 122 Minn. 245 (1913). Courts had earlier upheld the organization of local school districts: Board of Education of Sauk Centre v. Moore, 17 Minn. 412 (1871), Curryer v. Merrill, 25 Minn. 1 (1878).

19. 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971).

20. For a discussion of the applicable federal law, see Schoettle, "The Equal Protection Clause in Public Education," 71 Columbia L. Rev. 1355 (1971). See also the decision of the Federal District Court for Minnesota in Van Dursatz v. Hatfield, No. 3-71 Civ. 243 (1971).

21. See Schoettle, op. cit., supra.

22. Burrus v. Wilkerson, 310 F. Supp. 572 (W. Va. 1969), aff'd mem. 397 U.S. 44 (1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D., 1968), aff'd mem. 394 U.S. 322 (1969).

23. San Antonio Independent School District v. Rodriguez, 40 Law Week 3576 (May 30, 1972).

23a. The President's Commission on School Finance, Schools, People and MOney: The Need for Educational Reform, p.36.

24. State ex rel. University v. Chase, 175 Minn. 259, 220 N.W. 951 (1928); State ex rel. Sholes v. University, 236 Minn. 452, 54 N.W. 2d 122 (1952).

APPENDIX

RESEARCH PAPERS PREPARED FOR THE COMMITTEE

Jon Hammarberg, "Trends in Financing Public Schools" February 15, 1972

Joseph Hudson, "State Aid to Sectarian Education", May 15, 1972

WITNESSES PRESENTING EVIDENCE TO THE COMMITTEE

Meeting of March 17, 1972 -- St. Paul

Robert E. Blixt, Executive Secretary, State Investment Board
Mrs. Joseph Brink, St. Joseph, Minnesota
C.B. Buckman, Deputy Commission, Department of Natural Resources
Howard Casmey, Commissioner, Department of Education
Hugh Holloway, Superintendent, Independent School District #191, Burnsville
Mary Jo Richardson, State Board of Education.
Roy Schulz, Minnesota Real Estate Taxpayers Association

Meeting of May 4, 1972 -- Moorhead

James V. Brinkerhoff, Vice-President, University of Minnesota
Richard Hawk, Executive Secretary, Higher Education Coordinating Commission
Ernest A. Lindstrom, State Representative
G. Theodore Mitau, Chancellor, State College System
Malcolm Moos, President, University of Minnesota

Meeting of June 5, 1972 -- Mankato

Henry J. Bromelkamp, Minnesota Citizens for Educational Freedom
LeRoy Brown, Minnesota Catholic Conference
Alice Cowley, St. Paul
Franklin G. Emrick, Minnetonka
Linn J. Firestone, President, Jewish Community Relations Council
A.L. Gallop, Minnesota Education Association
William Korstad, Council for Minnesota Association of School Administrators and Minnesota School Principals
Jo Malmsten, Minnesota Congress of Parents and Teachers
John F. Markert, Minnesota Catholic Conference
Victor Schulz, State Representative
W.A. Wettergren, Minnesota School Boards Association
Henry Winkels, Minnesota Federation of Teachers

OTHERS WHO SUBMITTED LETTERS

Robert F. Arnold, Executive Secretary, Minnesota Association of Elementary School Principals

LeRoy Brown, Director, Education Department, Minnesota Catholic Conference

Edgar M. Carlson, Executive Director, Minnesota Private College Council

Gerald W. Christensen, Director of State Planning Agency

Jerry W. Deal, President, Minnesota Real Estate Taxpayers Association

A. L. Gallop, Executive Secretary, Minnesota Education Association

Thomas H. Hodgson, Executive Director, Citizens for Educational Freedom

Dr. John S. Hoyt, Jr., Chairman, Edina Board of Education

Reymond E. Maag, Assistant to the President, Minnesota South District of the Lutheran Church, Missouri Synod

John F. Markert, Executive Director, Minnesota Catholic Conference

David E. Mikkelson, Assistant Hennepin County Attorney

W. A. Wettergren, Executive Secretary, Minnesota School Boards Association

ORGANIZATIONS AND INDIVIDUALS ON COMMITTEE MAILING LIST

Association of Secondary School Principals, David Meade
Catholic Education Center, Rev. John Gilbert
Citizens for Educational Freedom, Minn. Chapter, Thomas Hodgson
Commissioner of Education, Howard B. Casmey
Metropolitan Student Coalition, Miss Debra Conner
Minnesota Association of Elementary Principals, Robert Arnold
Minnesota Association of School Administrators
Minnesota Catholic Conference, John Markert
Minnesota Catholic Education Association, LeRoy Brown
Minnesota Council of Churches
Minnesota District of Lutheran Churches, Dr. Raymond Maag
Minnesota Education Association, A.L. Gallop
Minnesota Farm Bureau, Vern Ingvalson
Minnesota Federation of Teachers, Edward Bolstad
Minnesota Higher Education Coordinating Commission
Minnesota Private College Council
Minnesota Public Interest Research Group, Mark Vaught
Minnesota School Boards Association, W.A. Wettergren
Minnesota State College Student Association, Dan Quillin
Minnesota State Junior College Student Government Association
Minnesota State Junior College Board
Minnesota Student Association, Jack Baker
Minnesota Taxpayers Association, Charles P. Stone
Minnesota Vocation Association
Parent-Teacher Association
State Board of Education
State College Board
State Planning Agency, Eileen Baumgartner
Vocational-Technical Education Division
University of Minnesota, Dr. Malcolm Moos
University of Minnesota Board of Regents, Elmer L. Andersen

Mrs. Alice Cowley
Senator Harold Krieger
Mrs. Joseph Brink
Mrs. Barbara Jones
Dr. Hugh Holloway
Representative Verne Long
Mr. Van Mueller
Senator Paul Overgaard
Representative Harvey Sathre
Mr. Roy Schulz
Mr. John Yngve