

## **ART.XVIII. Free Exercise of Religion, support of public schools, use of public money or credit for schools and institutions.**

Section 2. No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institution or to students or parents or guardians of students attending such institutions.

Section 3. Nothing herein contained shall be construed to prevent the Commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, speech impaired or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospital, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Section 4. Noting herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

Section 5. This amendment shall not take effect until October first next succeeding its ratification and adoption by the people.

### Editorial Note-

This article, in its original form, was adopted by the legislatures of the political years 1854 and 1855, and approved and ratified by the people May 23, 1855.

The present provisions of this article, with the exception of Section 2, were inserted by Art XLVI [Sec. 148] of the Amendments, which was submitted, by the delegates in convention assembled, August 30, 1917, to the people, and by them ratified and adopted November 6, 1917.

Section 2. Of this article contains the text of Article CIII [Sec. 249] of the amendments, which was adopted by the General Court of the political years 1972 and 1973, and approved by the people November 5, 1974. Said Art. V CIII [Sec. 249] of the amendments amended Section 2 of Art. XLVI [Sec. 148] of the amendments, which is Section 2 of this article.

### Cross References--

As to instruction in school for the deaf and the blind and other provisions relating to special education, see ALM GL c15 et seq

As to payment by towns for tuition and transportation of high school pupils in other towns, see ALM GL c71, Sec 6

For the text of this article in its original form, see [Sec. 120] of the Constitution of the Commonwealth in its original form set out in the appendix, infra

As to restriction of the credit of the Commonwealth, see section 1 of Art LXXII [Sec. 192] of the Amendments

As to religious societies, see Art XI [Sec. 113] of the Amendments

### Federal Aspects--

### Annotations--

Furnishing free textbooks to sectarian school or student therein. 93 ALR2d 986

Validity of local or state denial of public school courses or activities to private or parochial school students. 43 ALR4th 776

### Law Reviews--

State constitutional restrains on the privatization of education, 72 BU L Rev 381, March 1992

Note, Rethinking the incorporation of the establishment clause: a Federalist view. 105 Harv L Rev 1700, May 1992

### CASE NOTES

#### 1. Construction, generally

For a long discussion, and decision, by the United States Supreme Court relative to the power of a state to utilize its tax-supported public school system in aid of religious instruction, see *Illinois v Board of Education*, 333 Us 203, 92 L ed 649, 68 S Ct 461.

Constitutionality of certain statutes. -As to the constitutionality of a statute which authorizes a town to appropriate money to aid the trustees of a private school to build a schoolhouse, see *Jenkins v Andover*, 103 Mass 94.

The term "religion" in section 1 has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. *Nicholls v Lynn*, 297 Mass 65, 7 NE2d 577, 110 ALR 377.

The amendment shows an intention not to interfere with the performance of legal obligations already entered into. *Milton v Atty. Gen.* 314 Mass 234, 49 NE2d 909.

Sale of public land to religious institution – The sale (presumably for value) of parklands by a municipality to a religious institution is not violative of this section. *Brooks v Boston*, 334 Mass 285, 135 NE2d 13.

The limitation in this section is only on the way in which public money can be spent for the general purpose, and passage of this amendment has not made it any less true that education of the public is in the category of general objectives for which public money can be spent, and an educational purpose which is public, as a category inclusive of the purpose of privately operated institutions which benefit the public, continues therefore to be meaningful and significant notwithstanding the amendment. *Worcester v New England Institute, etc.* 335 Mass 486, 140 NE2d 470.

Purpose of “Anti-Aid” amendment –The substantial purpose of that portion of Art 46, Sec. 2, appearing after the first semi-colon, the “Anti-Aid” amendment, so called, was to prevent direct assistance to private or sectarian charitable institutions and to preclude expenditure of public funds or appropriations for them. Opinion of the Justices (1968) 354 Mass 779, 236 NE2d 523.

Legislative history of Article 46 amending instant article. –See opinion of Justices (1970) 357 Mass 836, 258 NE2d 779.

Effect of 1917 Constitutional amendment. –The first portion of Sec. 2 of the instant Article (to the first semicolon) as it now reads closely resembles former Article 18 as adopted in 1855, and the remainder of the section was first inserted as a result of the 1917-1918 Constitutional Convention. Opinion of Justices (1970) 357 Mass 836, 258 NE2d 779.

Purpose of Article 46 of Amendments is to prevent aid from appropriated funds to be given to nonpublic institutions. Opinion of Justices to House of Representatives (1978, Mass) 1978 Adv Sheets 1, 371 NE2d 1349.

Use of public money to pay salaries of chaplains of Massachusetts House of Representatives and Senate is not unconstitutional. *Colo v Treasurer & Receiver General* (1979, Mass) 1979 Adv Sheets 1893, 392 NE2d 1195.

No public aid is involved where private institution pays fair market value for public property. *Benevolent & Protective Order of Elks, Lodge No. 65 v Planning Bd. Of Lawrence* (1988) 403 Mass 531, 531 NE2d 1233, later proceeding 403 Mass 563, 531 NE2d 1254.

Purpose of Anti-Aid Amendment to Massachusetts constitution is to prevent transfer of appropriated funds to non-public institutions, *Benevolent & Protective Order of Elks, Lodge No. 65 v Planning Bd. Of Lawrence* (1988) 403 Mass 531; 531 NE2d 1233, later proceeding 403 Mass 563, 531 NE2d 1254.

Massachusetts Constitution does not protect possession of marijuana and hashish for religious purposes. *Commonwealth v Nissenbaum* (1989) 404 Mass 575, 536 NE2d 592.

Religious freedom is not and cannot be, absolute. *Commonwealth v Nissenbaum* (1989) 404 Mass 575, 536 NE2d 592.

Appropriation for religious worship at state institutions. –The expenditure of money at the various insane hospitals and other state institutions for the purpose of affording inmates therein the opportunity for worship is not prohibited by the provisions of this article. 5 Op AG 510.

## 2. Schools and education

Inclusion of invocation and benediction by member of clergy at public high school graduation ceremony is forbidden by establishment clause where public school officials direct performance of such exercise and state, in practical sense, compels attendance; state may not place students who object to such exercise in position of having to either participate or protest. Invocation and benediction are not rendered valid by fact that attendance is voluntary in strict legal sense, prayers were anticipated to be brief, there was attempt to make prayers inclusive and acceptable to most, and for many persons such occasion traditionally involves prayer would lack significance without such religious exercise. *Lee v Weisman* (1992, US) 120 L Ed 2d 467, 112 S Ct 2649, 92 CDOS 5448, 92 Daily Journal DAR 8669, 92 Daily Journal DAR 9801.

A state statute under which teachers of secular subjects in church-related elementary schools might receive up to a 15% annual salary supplement, which statute required that the teacher be employed in a nonpublic school at which the average per-pupil expenditure on secular education was less than the public school average, that the nonpublic schools' financial records be subject to audit by the state, that the teacher teach only subjects offered in public schools and using public school teaching materials, and agree in writing not to teach a course in religious instruction while receiving salary supplements, was unconstitutional under the religion clauses of the First Amendment, as fostering, by its cumulative impact, excessive entanglement between government and religion. *Lemon v Kurtzman* (1971) 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105, reh den 404 US 876, 30 L Ed 2d 123, 92 S Ct 24 and on remand (DC Pa) 348 F Supp 300, affd 411 US 192, 36 L Ed 2d 151, 93 S Ct 1463.

A state statute under which financial aid was furnished to church-related elementary and secondary schools by way of the state's "purchase" of certain "secular educational services" by reimbursing the schools for the cost of teachers' salaries, textbooks and other materials in specified secular subjects, which statute provided that the nonpublic school seeking reimbursement maintain prescribed accounting procedures, that the accounts be subject to audit by the state, that books and other instructional materials be approved by the state, and prohibited reimbursement for any course containing subject matter expressing religious teaching or the morals of form of worship of any sect, was unconstitutional under the religion clauses of the First Amendment, as fostering, by its cumulative impact, excessive entanglement between government and religion. *Lemon v Kurtzman* (1971) 403 US 602, 29 L Ed 745, 91 S Ct 2105, reh den 404 US 876, 30 L Ed 2d 123, 92 S Ct 24 and on remand (DC Pa) 348 F Supp 300, affd 411 US 192, 36 L Ed 2d 151, 93 S Ct 1463.

Power to authorize a town to raise money for an agricultural college, *Merrick V Amherst*, 94 Mass (12 Allen) 500.

Appropriation in aid of a private school, *Jenkins v Andover*, 103 Mass 94.

Appropriation for tuition fees. *Fiske v Huntington*, 179 Mass 571, 61 NE 260.

No inhibition on appropriations for institutions of higher learning. –Article XVIII of the amendments now superseded by Art XLVI, relating to moneys raised by taxation in the towns and cities for the support of public schools, requires that such moneys shall be disbursed exclusively for the support of such common schools and shall not be diverted to any other kind of school maintained in whole or in part by any religious sect. But there is no constitutional prohibition of appropriations for higher educational institutions, societies or undertakings under sectarian or ecclesiastical control. Opinion of Justices, 214 Mass 599, 102 NE 464.

Statute allowing institutions to obtain animals for experimental purposes, not in violation, Chapter 49A which permits certain institutions licensed under the chapter, to obtain animals for experimental purposes, since it involved no grant or appropriation of public property within the meaning of the instant article, is not unconstitutional as being in violation of the instant article, *Massachusetts Soc. P.C.A. v Commissioner of Public Health*, 339 Mass 216, 158 NE2d 487.

Proposed purchase of secular education from nonpublic school invalid. –Proposed legislation providing for the "purchase" of secular educational services from nonpublic schools by reimbursing such schools from public funds for the reasonable cost to the school of furnishing such services, where such reimbursement would be substantial, would be in violation of the second portion of Sec. 2 of the instant Article because such assistance to a nonpublic school from public funds would constitute "adding" such

schools within the prohibition of Sec. 2; because Sec. 2 forbids aid to appropriated funds to any non public institutions not coming within the very limited exceptions found in Secs. 2 and 3, and because the proposed assistance to schools would not come within any of such exceptions. Opinion of Justices (1970) 357 Mass 836, 258 NE2d 779.

Proposed legislation to make payments to parents of children attending religious or private schools instead of public schools would violate Sec. 2 of Article 46 of the Amendments because it would involve an indirect form of aid to nonpublic schools in violation of the prohibition contained in said Sec. 2, nor would the result be altered by the fact that another portion of the legislation might state a public purpose. Opinion of Justices (1970) 357 Mass 846, 259 NE2d 564.

Section 2 not violative of Federal constitution in that it denies certain parents their share of tax funds. –Section 2 of Article 46 of the Amendments insofar as it would deny assistance from public funds to parents of children attending nonpublic schools would not violate the equal protection clause of the Federal Constitution on any theory that it would deprive such parents of a share of public funds because such parents and their children have equal access to public schools and if they choose not to use such facilities they are not being deprived of anything, and because such parents are not entitled to exemption from taxes for the supported schools merely because they do not make use of them. Opinion of Justices (1970) 357 Mass 846, 259 NE2d 564.

1975 Amendment (St 1975, c652) to GL c 71 Sec. 48, requiring school committee to loan textbooks to pupils attending private schools, both sectarian and non-sectarian, offends constitutional provision forbidding use of public money or property for maintaining or aiding private schools. Bloom v School Committee of Springfield (1978, Mass) 1978 Adv Sheets 2110, 379 NE2d 578.

Sundry general benefits to pupils of private schools, such as bussing, health services, and meals, exemption from property taxation, do not constitute use of public money for aiding private schools. Bloom v School Committee of Springfield (1978, Mass) 1978 Adv Sheets 2110, 379 NE2d 578.

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Statutory purpose of 766 does not fall within prohibition of Constitutional anti-aid amendment, Commonwealth v School Committee of Springfield (1981, Mass) 1981 Adv Sheets 502, 417 NE2d 408.

Chapter 766 does not in any way support ongoing maintenance of private schools by lessening financial burden of those who have elected private school education. Commonwealth v School Committee of Springfield (1981, Mass) 1981 Adv Sheets 502, 417 NE2d 408.

Anti-aid amendment of Massachusetts's constitution does not prevent school committee from entering into agreements with private schools and institutions to provide special education programs for children with special needs, which could not be met by programs available in public schools. Commonwealth v School Committee of Springfield (1981, Mass) 1981 Adv Sheets 502, 417 NE2d 408.

Important purpose of 1974 revision of anti-aid amendment was to tighten prohibition of public support for religious education; secondary purpose was to protect state and municipal treasuries from growing pressure of interest groups in search of private appropriations. Commonwealth v School Committee of Springfield (1981, Mass) 1981 Adv Sheets 502, 417 NE2d 408.

Proposed legislation which would provide tax deductions for certain educational expenses (tuition, textbooks and transportation) incurred by taxpayers whose dependents attended public or nonprofit private primary and secondary schools would violate Sec. 2 of Article 46 of Amendments to constitution, the so-called "anti-aid" amendment. Opinion of Justices to Senate (1978) 401 Mass 1201, 514 NE2d 353.

Selling of parcel of property taken for urban redevelopment project to college as redeveloper did not violate Anti-Aid Amendment to constitution, even though sale price was less than city's cost to acquire property. Benevolent & Protective Order of Elks, Lodge No. 65 v Planning Bd. Of Lawrence (1988) 403 Mass 531, 531 NE2d 1233, later proceeding 403 Mass 563, 531 NE2d 1254.

Schoolhouses cannot be used for religious worship –The proposed article of amendment to the Constitution, prohibiting sectarian legislation, and the support of sectarian institutions from public funds, would prevent cities or towns from allowing a schoolhouse or schoolhouses therein to be used from time to time for the purpose of religious worship by religious sects or denominations, even if the permission to use the same for the said purpose were granted without discrimination to the various different religious denominations and sects applying therefore. 1 Op AG 430.

Appropriation to private institution under a pre-existing contract is valid. –An appropriation by the legislature in furtherance of a pre-existing agreement to provide moneys for a term of years to certain private institutions of learning is valid, under this article. 5 Op AG 309.

The payment of moneys to the New England Asylum for the blind, later changed to the Perkins Institution and Massachusetts School for the Blind, does not constitute a contractual obligation on the part of the Commonwealth, and as the management of the institution is not under the exclusive control of the Commonwealth, further payments to it by the commonwealth are prohibited under the provisions of the "anti-aid" amendment. 5 OP AG 315.

This section prohibits the expenditure of public funds for training in private schools. 1966-1967 Op AG 64.

Marlborough Plan unconstitutional. –The "Marlborough Plan," involving a shared time and dual student enrollment arrangement between public and parochial schools, violates United States Constitution Amendment 1 and Mass. Const. [Sec. 120]. 1971-1972 Op AG, No. 4.

ALM Constitution Amendment Article 18, which generally restricts the use of state funds to public purposes does not proscribe public funding grants-in-aid to independent, postsecondary, non-degree institutions of skilled training and education since the proposed grants-in-aid are permitted by that express exception of the Amendment for the funding of private higher educational institutions and because it does not conflict with the objectives and purposes of the Amendment, that is, to clearly prohibit public support for religious schools and institutions and to prohibit such aid to nonsectarian schools. 1980-1981 Op Atty Gen No. 15.

### 3. Secular organizations and activities

The flag salute and pledge of allegiance in a public school ceremony do not in any just sense relate to religion. They are not observances, which are religious in nature. They are wholly patriotic in design and purpose. Nicholls v Lynn, 297 Mass 65, 7 NE2d 577, 110 ALR 377.

Town may appropriate money for hospital established under testamentary trust. –A hospital established under a testamentary gift to a town in trust for the establishment of the hospital is a public hospital as opposed to a hospital not publicly owned which may not be aided by public money under the instant article, and the town under its right to appropriate money for public hospital uses may give financial aid to the hospital, and it may condition such financial aid upon reasonable investigation to satisfy itself that funds appropriated will be expended wisely. *Mahoney v Atty. Gen* 346 Mass 709, 195 NE2d 540.

Section 3 does not require reimbursement in full. –There is nothing in Sec. 3 of the instant article which requires a holding that the Legislature may not fix reimbursements to a hospital from a municipality for care furnished to persons in need of public assistance at a rate lower than the expense of care necessarily incurred because such reimbursement is entirely a creature of statute and the Legislature may limit the right as it sees fit. *Massachusetts Gen. Hospital v Cambridge*, 347 Mass 519, 198 NE2d 889.

Article not violated if public money not to be use. –Proposed legislation creating an authority to furnish assistance to educational institutions without distinguishing among public, private and sectarian institutions would not violate the “Anti-Aid” provisions of Art 46 Sec. 2 where the funds to be used were to be raised by the authority and would involve no grant or appropriation of public funds nor pledge of public credit. *Opinion of the Justices* (1968) 354 Mass 779, 235 NE2d 523.

City of Boston and Commonwealth could give their interest in funds established by private bequest of Benjamin Franklin to Boston University without violating Article 46. *Opinion of Justices to House of Representatives* (1978, Mass) 1978 Adv Sheets 1, 371 NE2d 1349.

Payment by Commonwealth of public funds to charitable corporation for repair and renovation to battleship USS Massachusetts did not violate Anti-Aid Amendment to Massachusetts’s constitution. *Helmes v Commonwealth* (1990) 406 Mass 873, 550 NE2d 872.

*Appropriation for upkeep of room in state house for use of veterans. –A bill providing for the assignment of a room or rooms in the state house for the free use of the United Spanish War Veterans would be constitutional, if enacted, for the assignment of a room or rooms for this purpose is for a public purpose and there is nothing in this article that prevents the Commonwealth assigning rooms for this purpose. 5 Op AG 526.*

As the duly authorized representative of the grant recipient, I certify that the grant recipient assures compliance with each of the Forms listed above.	
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