ALAN WILSON
ATTORNEY GENERAL

September 21, 2022

Mr. Tim Hardee
President
SC Technical College System
111 Executive Center Drive
Columbia, SC 29210

Dear Mr. Hardee:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> On behalf of the South Carolina Technical College System, I am requesting a formal opinion from your Office on the interpretation of S.C. Code Ann. § 59-142-40 ("Statute") as it relates to the amount of Need-based Grants Program funding ("Funding") that is required to be distributed by the South Carolina Commission on Higher Education ("CHE") to South Carolina's sixteen technical colleges.
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> The Statute in its entirety provides as follows:
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> > Funds must be allocated in a given year to institutions using a methodology that considers state resident Pell Grant recipients so that each public institution shall receive an amount sufficient to provide a similar level of support per state resident Pell recipient when compared to tuition and required fees. However, no institution shall receive a smaller proportion of funding than would be provided under the student enrollment methodology used in years prior to fiscal year 2008-2009. Funds must be awarded to eligible students according to the financial need of the student.
>
> The central issue is whether the first and second clauses of the Statute can be reconciled. The first clause requires the use of a methodology based primarily on the amount of an institution's tuition and fees ("Cost Methodology"), thereby resulting in a college that charges higher tuition and fees receiving more Funding per student than a college that charges lower tuition and fees. The second clause

refers to the "student enrollment methodology" ("Enrollment Methodology"), which calculates an institution's Funding amount based on the percentage of students enrolled there who are receiving such Funding, irrespective of the amount of tuition and fees charged.

Our agency's view is that the use of "however" in the second clause is significant in that it operates as the functional equivalent of "notwithstanding," thereby suggesting that the second clause takes precedence over the first. Insofar as our agency construes the term "smaller proportion" of Funding to mean smaller percentage of Funding, the second clause appears to nullify the first clause if applying the Cost Methodology would result in an institution receiving a smaller percentage of overall Funding than it would have received prior to FY 2008-09 - in which case the Enrollment Methodology would be used instead.

Law/Analysis

It is this Office's opinion that a court would likely hold the General Assembly intended for the second clause of S.C. § 59-142-40 to operate as an exception to the Pell-recipient methodology in the first clause. If an institution would receive less funding according to Pell-recipient methodology than the Enrollment Methodology, the second clause requires that such an institution receive an allocation according to the Enrollment Methodology. In application, however, this exception may apply to all institutions such that no institution would receive funds according to the Pell-recipient methodology. Therefore, it is this Office's opinion that a court may ultimately defer to the mode for allocating funds applied by the South Carolina Commission on Higher Education (the "Commission") since fiscal year ("FY") 2008-09. See Stuckey v. State Budget & Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("In construing an ambiguous statute, we give great deference to the government agency's consistent application of the statute."). While not directly called for in the statute, the Commission's benchmark incorporates the FY 2007-08 need-based grant appropriation amounts to calculate when the Enrollment Methodology exception applies. Although this conclusion is not free from doubt, this construction is arguably consistent with the legislative intent motivating adoption of the 2011 amendment; to allocate funds to public institutions according to the Pell-recipient methodology. Legislative clarification is needed to provide greater certainty regarding when the Enrollment Methodology is intended to apply.

As this appears to be a matter of first impression, it should be emphasized that the General Assembly's intent is the primary consideration in interpreting the terms of a statute. See Op. S.C. Att'y Gen., 2001 WL 957759 (July 18, 2001). Where the statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "A statute as a whole

must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). However, the Supreme Court of South Carolina has stated that where the plain meaning of the words in a statute "would lead to a result so plainly absurd that it could not have been intended by the General Assembly... the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect." Duke Energy Corp. v. S. Carolina Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). Lastly, when the General Assembly adopts an amendment to a statute, courts recognize a presumption that the General Assembly "intended to change the existing law." Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (internal citations omitted); see also Ellison v. Frigidaire Home Prod., 371 S.C. 159, 164, 638 S.E.2d 664, 666 (2006) ("We presume the legislature intends to accomplish something by its enactments and that it would not do a futile thing."). With these principles in mind, this opinion will next examine the legislative history of section 59-142-40 and its current language to determine the General Assembly's intent.

> As originally adopted in 1996, Section 59-140-40 read as follows:
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> The provisions of this chapter apply to eligible students beginning in the 1996–97 academic year. Funds must be allocated in a given year to institutions based on the percentage of the state full-time enrollment enrolled at the institutions in the preceding year. Funds must be awarded to eligible students according to the financial need of the student.

1996 Act No. 458, Part II, § 20A. This initial methodology based an institution's allocation on the percentage of the state full-time enrollment or, as described in the request letter, the "Enrollment Methodology." However, beginning in FY 2008-09, provisos were adopted that introduced an allocation methodology that considered an institution's tuition, fees, and Pell Grant recipients. The first proviso read:

> 6.28. (CHE: Need-Based Grant Allocation Methodology) Need-based grant funds for public institutions must be allocated using a methodology that considers state resident Pell Grant recipients such that each public institution shall receive an amount sufficient to provide a similar level of support per state resident Pell recipient when compared to tuition and required fees. However, no public institution shall receive less funding than would be provided under the methodology used in FY 2007-08.

2008-2009 Appropriations Bill H. 4800. In switching to the Pell-recipient methodology, Proviso 6.28 established an exception whereby an institution's minimum funding allocation would be at

least equal to that provided under the methodology used in FY 2007-08; again, the Enrollment Methodology. Subsequent provisos did not employ the phrase "less funding," but instead used the phrase "a smaller proportion of funding."

> 6.22. (CHE: Need-Based Grant Allocation Methodology) Need-based grant funds for public institutions must be allocated using a methodology that considers state resident Pell Grant recipients such that each public institution shall receive an amount sufficient to provide a similar level of support per state resident when compared to tuition and required fees. However, no public institution shall receive a smaller proportion of funding than would be provided under the student enrollment methodology used in past years.

2009-2010 Appropriations Bill H. 3560; see also 2010-2011 Appropriations Bill H. 4657 Proviso 6.20. Admittedly, the plain language of the exception clauses in these provisos refer only to methodology. Proviso 6.28 references the methodology used in the prior fiscal year of 2007-2008. While one could read the FY 2007-08 funding level into the bench mark for Proviso 6.28, the plain language of the proviso suggests the reference to FY 2007-08 was used to describe the methodology of the allocation; unlike the later provisos and the current language of section 59-142-40, proviso 6.28 does not explicitly name the student enrollment methodology. In contrast, provisos 6.22 and 6.20 directly the name the former methodology "the student enrollment methodology." These later provisos do not mention a specific fiscal year, but, instead, generally describe the student enrollment methodology as the method "used in past years."

Finally, in 2011 the General Assembly amended section 59-142-40 to codify the Pell-recipient methodology as the primary means of allocating need-based grant funding. See 2011 Act No. 74, Pt VI, § 17. As amended, section 59-142-40 reads:

> Funds must be allocated in a given year to institutions using a methodology that considers state resident Pell Grant recipients so that each public institution shall receive an amount sufficient to provide a similar level of support per state resident Pell recipient when compared to tuition and required fees. However, no institution shall receive a smaller proportion of funding than would be provided under the student enrollment methodology used in years prior to fiscal year 2008-2009. Funds must be awarded to eligible students according to the financial need of the student.

S.C. Code § 59-142-40 (2020). The statute incorporates similar language to that used in the exception clause of the latter provisos to explicitly name "the student enrollment methodology."

The statute also maintains the reference that this is the methodology "used in years prior to fiscal year 2008-2009." However, even in referencing that the methodology was used in prior years, the statute still does not mention a specific year from which to benchmark an allocation amount.

In light of this legislative history, this opinion will next address how a court may interpret section 59-142-40. Again, the primary rule of statutory construction is to give effect to the Legislature's intent. Our state courts initially begin this process by examining the plain language of the statute. See Hodges v. Rainey, supra. The plain language of the first sentence clearly supports concluding the General Assembly intended to change the method of allocating need-based grant funding from the student enrollment methodology to the Pell-recipient methodology. In contrast, the intent behind the second sentence is much less clear. As is described above, the second sentence is apparently intended to operate as an exception. An exception "identifies a category to which the general rule does not apply." State v. Sweat, 379 S.C. 367, 383, 665 S.E.2d 645, 654 (Ct. App. 2008), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010). The exception applies when an institution would "receive a smaller proportion of funding" under the Pell-recipient methodology than the student enrollment methodology. In such a case, the allocation to such an institution would be calculated according to the Enrollment Methodology. The request letter takes the position that "smaller proportion of funding" means a "smaller percentage of funding." A court may well adopt this interpretation as it is consistent with the common understanding of the word.[1]

While the plain meaning of the statutory text supports the South Carolina Technical College System's position, in application, the exception may swallow the rule. It should be noted that this Office does not have particular expertise in the administration of higher education funding. In conducting research for this opinion, we have reached out to the South Carolina Commission on Higher Education (the "Commission") as it is charged with making guidelines and adopting "regulations necessary to administer the need-based grant program." S.C. Code § 59-142-20. Therefore, we will defer to the Commission's experience in administering this program. See Kiawah Development Partners, II v. S.C. Department of Health & Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) ("[W]e give deference to agencies both

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[1] See Merriam-Webster Online, https://www.merriam-webster.com/dictionary/proportion (defining proportion as "2b: quota, percentage"); see also American Heritage College Dictionary 1097 (3d. ed. 1993)

> Proportion n. 1. A part considered in relation to the whole. 2. A relationship between things or parts of things with respect to comparative magnitude, quantity, or degree. 3. A relationship between quantities such that if one varies then another varies in a manner dependent on the first. 4. Agreeable or harmonious relation of parts within a whole; balance or symmetry.

because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations."). The Commission's Deputy Director and General Counsel, Georges Tippens, provided a memo addressing allocating funds in light of this exception.

> The second clause of the statutory section begins with "however," which, based on plain meaning, can override the previous clause: "However, no institution shall receive a smaller proportion of funding than would be provided under the student enrollment methodology used in years prior to fiscal year 2008-2009."
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> The second clause may be read a few ways. First, a reasonable interpretation of "proportion of funding" means percentage of funding. Reading the language this way, an argument could be made that an institution is entitled to its share of funding based on the previous student enrollment methodology prior to the first proviso in FY 2008-09. A reasonable interpretation may be that an institution's allocation would be based on the current fiscal year appropriation to the CHE. This is the proposal articulated by the South Carolina Technical College System. While the statutory language may allow for this interpretation, the practical effect would override the statutory change in 2011.
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> Because there is a finite amount of funding, if an institution were to receive its funding based on the student enrollment methodology and the current fiscal year appropriation, then all institutions would need to receive their allocation based on the student enrollment methodology. The result is if at least one institution were to gain from using a different methodology more than others, then the other institution(s) would receive less than they would have under another methodology.

Tippens Memorandum, at 4 (March 18, 2022) (emphasis added).[2]

Assuming the primary intent for adopting the 2011 amendment to section 59-142-40 was to codify a new method of allocating need-based grant funding according to the Pell-recipient methodology, a court would likely reject a construction that, in application, results in the allocations to all institutions still being made according to the student enrollment methodology as

[2] This Office's opinion cannot find facts, but will assume the description above is accurate for purposes of analysis. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions.").

it produces an absurd result or amounts to futile legislation. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); Duvall, supra ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law.").

If a court were to find construing section 59-142-40 according to the text's plain and ordinary meaning leads to an absurd result or a nullity, the court may next consider how the Commission has consistently applied the statute over the course of time. "A consistent mode of applying a statute by the responsible governing agency has been given considerable judicial deference in the construction of ambiguous statutes." Bunch v. Cobb, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979). Since the adoption of the initial proviso, the Commission's staff have consistently interpreted the exception to apply based on the share of funding available from FY 2007-08. That interpretation is:

> [T]he "However" clause is to read the "student enrollment methodology used in years prior to fiscal year 2008-09" to mean the dollar amount an institution would have received from the funding levels prior to FY 2008-09 rather than current funding levels. This interpretation is the one CHE staff have been using since FY 2008-09 when it allocates its funds.

Tippens Memorandum, at 4. The memorandum explains that this interpretation, in practice, allows for allocations according to the Pell-recipient methodology and also under what circumstances the exception applies.

> CHE staff have interpreted the hold harmless provision to include an institution's updated share of in-state, fulltime degree-seeking undergraduate students as a share of funding available in FY 2007-08. That is, an institution was guaranteed to receive the allocation it would have received from FY 2007-08 need-based appropriations based on updated enrollment proportions. However, an institution could receive a higher allocation based on the new Pell recipient methodology that factored Pell Grant recipients and the tuition and fee charges. It is important to note; however, that the minimum and maximums only work if the General Assembly appropriated need-based funding greater than what it appropriated during FY 2007-08. If the General Assembly were to appropriate at or below the FY 2007-08 levels, then each institution would receive its share based on

> headcount enrollment because of the hold harmless provision and the fixed pot of funds available.

Tippens Memorandum, at 2. As stated above, this interpretation has been used since the initial proviso. Id. at 4. The Legislature appears to have acquiesced to this construction because it maintained the same operative language to describe the exception in two subsequent provisos and when codifying section 59-142-40. If the General Assembly disapproved of the way the Commission was allocating funds, it could have changed the language used in the provisos or the statute to clarify that Commission's method of allocating funds was inconsistent with legislative intent. Duvall, supra ("[A] subsequent statutory amendment may also be interpreted as clarifying original legislative intent."). In consideration of both the absence of legislative clarification and that the Commission employed a consistent mode of allocation for over a decade, a court may well hold that the Commission's interpretation of section 59-142-40 complies with legislative intent.

We must caution, however, that a court may not agree that the way the Commission's staff has administered the statute comports with legislative intent.

> While the construction of a statute by the officials charged with its administration, which has been acquiesced in by the Legislature for a long period of time, should be given great weight, the final responsibility for the interpretation of the law rests with the courts. At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. While we are of course bound to weigh seriously such rulings, they are never conclusive.

Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n, 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951) (internal citations omitted). In light of this uncertainty, legislative clarification regarding when the Enrollment Methodology is intended to apply is needed.

Conclusion

It is this Office's opinion that a court would likely hold the General Assembly intended for the second clause of S.C. § 59-142-40 to operate as an exception to the Pell-recipient methodology in the first clause. If an institution would receive less funding according to Pell-recipient methodology than the Enrollment Methodology, the second clause requires that such an institution receive an allocation according to the Enrollment Methodology. In application, however, this exception may apply to all institutions such that no institution would receive funds according to the Pell-recipient methodology. Therefore, it is this Office's opinion that a court may ultimately defer to the mode for allocating funds applied by the South Carolina Commission on Higher Education (the "Commission") since fiscal year 2008-09. See Stuckey v. State Budget

& Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("In construing an ambiguous statute, we give great deference to the government agency's consistent application of the statute."). While not directly called for in the statute, the Commission's benchmark incorporates the fiscal year 2007-08 need-based grant appropriation amounts to calculate when the Enrollment Methodology exception applies. See Bunch v. Cobb, 273 S.C. 445, 452, 257 S.E.2d 225, 228 (1979) ("A consistent mode of applying a statute by the responsible governing agency has been given considerable judicial deference in the construction of ambiguous statutes."). Although this conclusion is not free from doubt, this construction is arguably consistent with the legislative intent motivating adoption of the 2011 amendment; to allocate funds to public institutions according to the Pell-recipient methodology. Legislative clarification is needed to provide greater certainty regarding when the Enrollment Methodology is intended to apply.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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