ALAN WILSON
ATTORNEY GENERAL

March 21, 2011

The Honorable Lawrence K. Grooms
Senator, District No. 37
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Grooms:

You seek an opinion regarding Senate Bill 414, the Education Opportunity Act. Specifically, you ask "whether the provision of scholarships and tax credits under S.414 violates Article XI, Section 4 of the South Carolina Constitution."

By way of background, you provide the following information:

> The relevant provisions of S. 414 provide for (1) the receipt of scholarships by students to attend independent primary or secondary schools of their choice; (2) the receipt of a tax credit for tuition paid for a student to attend an independent primary or secondary school of his choice; and (3) the receipt of a tax credit for contributions made to student scholarship organizations. Under S. 414, the students and their parents or guardians are the direct beneficiaries of the scholarship funds and they decide where to use such funds, not the government. Similarly, where tax credits are received for tuition paid or for contributions made to student scholarship organizations, the persons or entities paying tuition or making such contributions are the direct beneficiaries of the tax credits under the legislation. Moreover, the parents or guardians who received tax credits decide where the tuition is paid, not the government.
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> Article XI, Section 4 of the South Carolina Constitution, also known as "the Blaine Amendment," provides that "(n)o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." My own independent research regarding the Blaine Amendment reveals that the Constitution was amended by a vote of the people in 1972, and as a result the scope of Article XI, Section 4 was made much narrower than its precursor contained in Article XI, Section 9. Specifically the word "indirectly," referring in the original provision to the use of public funds or credit in support of religious or private schools, was deleted from the amended Article XI, Section 4, such that the current provision only prohibits direct public financial support to religious and private schools.
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> The South Carolina Attorney General's Office has previously addressed this constitutional provision several times. In a 2003 opinion, the Attorney General examined

Article XI, Section 4 against the backdrop of the Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 (1969) [West Committee] and reached this conclusion:

> Examination of the Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 (1969) [West Committee] is particularly enlightening as to the intent of the framers in transforming former Article XI, § 9 into the present day Art. XI, § 4. The distinction which the framers sought to create between permitting the use of public funds to assist students, who themselves choose to attend private institutions of higher education, and prohibiting the government subsidization of those same private colleges is readily apparent in the West Committee's Final Report. This distinction was made clear by the Committee through the following comments:
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> > The Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, the Committee feels that public funds should not be granted outrightly to such institutions. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word 'indirectly" currently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs ... Report, at 100-101.

Thus, the framers of Art. XI, § 4, the people who voted for the amendment, as well as the General Assembly which ratified it, ***drew the line of demarcation between a violation and non-violation of the provision as being dependent upon whether the particular aid primarily benefits the student or the institution itself.*** Op. S.C. Att'y Gen., 2003 S.C. AG LEXIS 3, at *10-12 (Jan. 7, 2003)

Law / Analysis

Senate Bill 414, if enacted, would create the "Educational Opportunity Act" by adding Article 6 to Chapter 63 of Title 59 in the SC Code of Laws of 1976. The Act provides in summary, as follows:

> 1) a qualifying student is eligible to receive a scholarship to attend an independent school if he or she meets certain conditions, and the value of those scholarships may not exceed the greater of 50% of the state's projected allocation to the resident public school district of the student or the statewide base student cost according to Section 59-20-20;
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> 2) one may be allowed to take a tax credit if the person files state income tax for tuition paid for a qualifying student to attend an independent school upon certain conditions. A tax credit may not be taken if same student's enrollment in independent school is terminated;
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> 3) South Carolina Budget and Control Board must calculate savings to the state derived from the provisions of this article;
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> 4) To provide for a tax credit for a person who teaches a qualifying student at home;
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> 5) To allow a corporation or person to claim a credit against state income tax or franchise fees for a contribution made to a student scholarship organization;
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> 6) An "independent school" is defined as a school "other than a public school," requiring compulsory attendance, and one which does not discriminate on grounds of race, color or national origin.

S.414, Session 119 (2011-2012). The express purpose of the Act, as stated therein, is to "... allow maximum freedom to parents and independent schools to respond to and provide for the educational needs of children without governmental control ... ."

We turn now to analysis of the constitutional provisions in question. Article I, Section 2 of the South Carolina Constitution requires in pertinent part that

> [t]he General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ... .

Article I, Section 2 is similar to the Establishment Clause of the First Amendment to the United States Constitution. Moreover, Article XI, § 4 further provides that

> [n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.

We begin with the basic premise that in any interpretation of the South Carolina Constitution, those rules relating to the construction of statutes are equally applicable. J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999). Most importantly, the intent of the framers and the people who adopted the Constitution is paramount. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973). Moreover, the particular words used in the Constitution should be given their plain and ordinary meaning. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998). Interpretation of the Constitution is guided by the "ordinary and popular meaning of the words used ... ." Abbeville School Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999) (internal citation omitted). The Court must give clear and ambiguous terms their plain and ordinary meaning without resort to subtle or forced construction either to limit or expand the constitutional provision's operation. J.K. Construction, supra. Oftentimes, in ascertaining the framers' intent, the Court examines the records of the so-called "West Committee," chaired by then Lt. Governor John C. West. [Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, which was "charged in 1969 with recommending amendments to the Constitution of 1895."] See, e.g. Joytime Distributors and Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647, 651 (1999); Williams v. Morris, 320 S.C. 196, 464 S.E.2d 97 (1995); State ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980).

Significant, too, is the fact the South Carolina Supreme Court has often recognized the powers of the General Assembly to be plenary, unlike those of the federal Congress which possesses only those powers enumerated in the United States Constitution. As the state Supreme Court emphasized in State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956),

> [t]he powers of the General Assembly are plenary and not acquired from the constitution and it may enact such legislation as is not expressly or by clear implication prohibited by the constitution.

Accordingly, any act of the General Assembly is presumed valid and constitutional. A legislative act will not be declared void by the courts unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly is resolved in favor of the statute's constitutional validity. Importantly, only a court, not this Office, may strike down an act of the General Assembly as unconstitutional; while the Attorney General may, in his opinion, comment upon what is deemed an apparent unconstitutionality, he may not declare the act void. In other words, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Turning now to the specific provisions of the South Carolina Constitution implicated by your question, we first address the "Establishment Clause" contained in Article I, § 2. As the South Carolina Supreme Court stressed in Hunt v. McNair, 258 S.C. 97, 187 S.E.2d 645, 647 (1972), affd., 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973),

> [t]he language of the first amendment to the Constitution of the United States and the language of Article I, Section 4 [now §2], of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions. The establishment clauses are intended to afford protection against sponsorship, financial support and active involvement of the government in

> religious activity. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

In other words, the Court has recognized that the Establishment Clause in the South Carolina Constitution is coextensive with that of the federal Constitution.

Accordingly, the United States Supreme Court's reasoning in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), a case upholding Ohio's Pilot Scholarship Program against a challenge under the federal Establishment Clause, also provides considerable guidance concerning any application of Article I, § 2 of the state Constitution to a South Carolina student aid program. In Zelman, the United States Supreme Court relied upon its previous decisions in Mueller v. Allen, 463 U.S. 388 (1983), Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481 (1986) and Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) to sustain the Cleveland scholarship program. The Court summarized these predecessor cases and characterized them as making clear

> ... that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religion mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not the government, whose role ends with the disbursement of benefits.

536 U.S. at 652.

A similar analysis would, the Court concluded, result in the Ohio Scholarship plan being upheld as constitutionally valid. The Zelman Court, therefore, opined:

> [w]e believe that the program challenged here is a program of true private choice consistent with Mueller, Witters, and Zobrest, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of all schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

Id., at 653. See also Locke v. Davy, 540 U.S. 712, 719 (2004) ["Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and

private choice of recipients ... (citing cases) As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology ...."].

Based upon the Court's reasoning in Zelman, we are of the opinion that S.414 would pass constitutional muster under Article I, § 2 of the South Carolina Constitution. As noted above, our Supreme Court has concluded that the federal Establishment Clause and the Establishment Clause in the South Carolina Constitution are co-extensive. Hunt v. McNair, supra. In our opinion, the South Carolina Supreme Court would likely follow Zelman's analysis with respect to any Establishment Clause challenge under the South Carolina Constitution and, therefore, would uphold S.414 under Article I, § 2.

Next, we examine the constitutionality of the S.414 program under Article XI, § 4 of the state Constitution. Article XI, § 4 bans the use of public funds "for the direct benefit of any religious or other private educational institution." (emphasis added). The present Article XI, § 4 was substantially rewritten by constitutional amendment in the form of a vote of the people in 1972 which was ratified and became effective in 1973.

The earlier version of present Article XI, § 4 existed as Article XI, § 9, which had provided in pertinent part that

> [t]he property or credit of the State of South Carolina ..., or any public money, from whatever source derived shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

Dedication to religious tolerance and avoidance of religious entanglement in government has been of considerable importance to South Carolina from its founding. See, Op. S.C. Atty. Gen., April 24, 1969 and authorities cited therein. Article XI, § 9 was adopted as part of the original Constitution of 1895 and was designed to remedy a perceived loophole in the 1868 Constitution. The Constitution had required that in order for a violation in this regard to occur, a religious sect or sects must have had "exclusive" right to, or control of any part of the school funds of the State. See, 3 Underwood, The Constitution of South Carolina, p. 167. As can be seen, the 1895 version, in the form of Article XI, § 9 was thus substantially strengthened.

This Office has recognized repeatedly over the years the purpose of previous Article XI, § 9 and the breadth of the provision to accomplish the framers' goal. Former Attorney General McLeod, in 1967, characterized Article XI, § 9 as "very broad in scope" and a provision which "prohibits any aid or maintenance, whether direct or indirect, to any sectarian organization." Op. S.C. Atty. Gen., March 27, 1967. (emphasis added). Subsequently, in 1970, in Op. S.C. Atty. Gen., Op. No. 2906 (May 26, 1970), we concluded that "expenditure of public funds for the transportation of students to private, church-supported schools would contravene this section of our Constitution." The fact that the students, rather than the schools, were the principal beneficiaries of the aid did not, in our view, alter the conclusion because the assistance to the institutions was forbidden, nonetheless, by the inclusion of the word "indirect" in Article XI, § 9. As well, Attorney General McLeod in Op. S.C. Atty. Gen., July 25, 1969, expressed the opinion that "the use of public funds paid directly to a religiously controlled institution for

the support of indigent patients is in violation of Article II, Section 9 of the Constitution of South Carolina, which prohibits the direct or indirect aid of any institution which is controlled, wholly or in part, by a religious denomination."

The various interpretations by our courts also emphasize the broad sweep of former Article XI, § 9, the predecessor to present Article XI, § 4. In Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723 (1949), the South Carolina Supreme Court, when faced with the issue of applying former Article XI, § 9 to the State's use of surplus funds to assist eleemosynary hospitals, concluded that "the plain meaning of [Article XI, § 9] ... is that no public funds may be allocated in any manner to any hospital or health center which is, quoting, 'wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.'" 56 S.E.2d at 727.

Many years later, former Article XI, § 9 was again interpreted by our Supreme Court in Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971). There, the question of the constitutionality of an Act providing for tuition grants to students attending South Carolina's independent institutions of higher learning came before the Court in the form of a challenge that the tuition grants program in reality constituted aid to religious institutions. Significantly, at least 16 of the 21 independent institutions of higher education were "operated under the direction or control of religious groups or denominations." Id. The Court observed that then Article XI, § 9 did "not attempt to distinguish between aid which is designed primarily to benefit the religious function of a school and that which is intended to benefit the school in other capacities." 179 S.E.2d at 908.

The totality of circumstances surrounding the tuition grants program in question, together with the breadth in scope of former Article XI, § 9, was, in the Court's view, simply too great a constitutional obstacle to overcome. Included as part of the tuition grants program were the following criteria:

> [u]nder the terms of the Act, the tuition grant is made available to the student only after he has been accepted by or is registered in the particular eligible institution of his choice. After the tuition grant has been made, it is unlawful for the student to expend the funds for any purpose other than in payment of his tuition at the institution he is authorized to attend under the tuition grant. It is conceded that the tuition grant is not made directly to the school, but is made to the student who is required to pay it to the school selected by him. The funds are paid to the student only as a member of the selected school.
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> The close tie of the participating schools to the tuition grant is further demonstrated by the administrative control provided by the Act. The administration of the tuition grants is placed in a committee consisting of eight representatives of the participating institutions, plus two ex officio members of the General Assembly, with the power to make rules and regulations within the terms of the Act. The method of appointment of the members of the committee is not stated. However, since sixteen of the twenty-one eligible schools are religious schools quite conceivably all, and most likely a majority of the committee controlling the administration of the Act would come from schools controlled by the religious groups.

Id. Therefore, in the Hartness Court's opinion, "[w]hile it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." Id. Although the state assistance to these private colleges was "indirect" to be sure, such assistance, nevertheless, "constitute[d] aid to such institutions within the meaning of, and prohibited by, Article XI, Section 9, of the Constitution of South Carolina." As Professor Underwood has aptly assessed the tuition grants program challenged in Hartness, "[e]ven though the grant was to the student, the conditions and restrictions placed on the grant make it certain that a private school, most of which are religiously controlled, ultimately would receive the funds." Underwood, id., at 177.

Importantly, the very next year, the state Supreme Court decided Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), also a case challenging student aid under Article XI, § 9. However, in contrast to Hartness, the Court in Durham held that an Act of the Legislature authorizing the Budget and Control Board as the State Education Assistance Authority to make, insure or guarantee loans to students to defray their expenses at institutions of higher learning did not violate former Article XI, § 9. The Authority was authorized to issue bonds made payable solely from repayment of student loans, grants to the Authority and revenues earned by the Authority. Such bonds did not constitute a debt of the State or any political subdivision. All money received by the Authority were deemed trust funds to be held and applied solely toward carrying out the purposes of the Act. Student borrowers were required to be residents of the State, but could attend any eligible institution whether located in South Carolina or some other state.

Referencing its earlier Hartness ruling, which the Court characterized as "inevitable," the Durham Court distinguished that case this way:

> [i]n this case, the emphasis is on aid to the student rather than to any institution or class of institutions. All which provide higher education, whether public or private, sectarian or secular, are eligible. The loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank. This is aid, direct or indirect to higher education, but not to any institution or group of institutions. Even if it were conceded that the loan fund is public money within the meaning of Article XI, Section 9, it would require a strained construction to hold that participation by students attending Wofford, Furman, and like institutions, as well as by those attending the University of South Carolina, Clemson University and the like, offends this constitutional restriction. However, we think it clear that the student loan fund under the Act is held by the Authority as a trust fund, and that no public money or credit, within the meaning of Article XI, Section 9, is employed in making or guaranteeing loans. Cf. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421, 429 (1967).

192 S.E.2d at 203-204.

In 1969, even before Hartness and Durham had been decided, the Committee to Make a Study of the Constitution of 1895 ["West Committee"] considered various proposals to loosen Article XI, § 9's broad restrictions to permit tuition grants to students attending religiously sponsored colleges. Underwood, id., at 171. The concern was that so many students in South Carolina were attending private colleges and universities in the State, and yet, no public assistance could be provided those students because of the broad sweep of Article XI, § 9. One scholar has paraphrased the question before the West

Committee as whether "the prohibition on the use of government funds in a manner that only indirectly aids a church-operated college, such as scholarships that make it more feasible for low- and middle-income students to attend such schools, be removed from the constitution?" Id. Following considerable discussion and the solicitation of competing views, the Committee recommended a solution which ultimately became the present Article XI, § 4, a provision stating that "[n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." Professor Underwood has noted that "[i]n recommending what eventually became Article XI, section 4 of the revised 1895 Constitution, the West Committee took the more modest position of recommending the deletion of the ban on indirect aid but retained the prohibition on direct grants." Id., at 173.

In its final Report, the West Committee clearly distinguished between such direct grants to sectarian and other private schools and tuition assistance and other scholarships made to students themselves. The line of demarcation which the Committee sought to create was one between constitutionally permitting the use of public funds to assist students who make the choice of whether to attend a public or private institution on one hand and continuing to prohibit government subsidization of sectarian and other private schools on the other. In the Committee's words,

> [t]he Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of private institutions, the Committee feels that public funds should not be granted outrightly to such institutions. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" concurrently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs ....

Report, at 100-101.

It is also important to note that at least one legal commentator has concluded that the revision of the Constitution in the form of Article XI, § 4 now gives South Carolina a constitutional provision which would permit a properly drafted student assistance program under the State Constitution. Kemerer, "State Constitutions and School Vouchers,"120 Law Rep. 1, 13-14 (1997). Kemerer observes that Article XI, § 4 "now conforms more closely to the South Carolina Supreme Court's ruling in Durham v. [McLeod, supra]. Id. This author's pertinent analysis is as follows:

> [t]he [Durham] decision is important for two reasons. First, the channeling of funding to the family or to the student who then has a wide selection of public and private institutions from which to choose is an important design feature in school voucher programs because it tends to attenuate the relationship between the state and sectarian private schools ... .

> Second, the exclusion of sectarian private schools from a general voucher program raises questions of religious discrimination and denial of free exercise rights under both federal and state constitutions.

Id.[1]

Also of considerable significance is the fact that the West Committee's Final Report states that, when drafting Article XI, § 4, the Committee was guided by "interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution." Id., at 99. That being true, Zelman v. Simmons-Harris and predecessor cases such as Mueller v. Allen, supra, Witters v. Wash. Dept. of Servs. for Blind, supra and Zobrest v. Catalina Foothills School Dist., supra would undoubtedly be relied upon by our Supreme Court in any challenge to a state student aid program under both Article XI, § 4 as well as Article I, § 2. Where such plan "is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn direct government aid to religious schools wholly as a result of their own independent private choice ...," the program likely will pass muster not only under the Establishment Clauses of the federal and state Constitutions, but would be found to be constitutional pursuant to Article XI, § 4 as well. Zelman, supra; Durham v. McLeod, supra.

This Office has reached similar conclusions with respect to analogous student aid situations. In an opinion dated June 5, 1973, we addressed the issue of whether "'[i]t is now within the law to make payment to students from South Carolina attending sectarian schools.'" When the opinion was written, new Article XI, § 4 had only recently been ratified. Therein, we referenced the West Committee's intent

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[1] Cases in other jurisdictions have reached conflicting conclusions regarding the constitutionality of similar programs under the relevant state constitution. Compare, Opinion of the Justices to the Senate, 514 N.E.2d 353 (Mass. 1987) [tax deductions for tuition and other educational expenses to parents of parochial schools constitutes aid to sectarian schools]; Opinion of the Justices, (Choice in Education), 616 A.2d 478 (N.H. 1992) [program allowing parents dissatisfied with child's public school to send child to any state-approved school, including private and parochial schools with "sending" school paying 75% of tuition expenses, violates state constitution prohibiting appropriations "towards the support of the schools of any sect or denomination"]; Weiss v. Bruno, 509 P.2d 973 (Wash. 1973) [grants which assist disadvantaged students in attending schools of their choice, constitutionally infirm]; Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979) [state program providing grants to students in private colleges is a "direct benefit" to those colleges in violation of Alaska Constitution]; with Bd. Ed. of Cent. Sch. Dist. No. 1 v. Allen, 20 N.Y. 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), affd., Bd. of Ed. v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) [state's textbook loan program to parochial schools is valid]; Hughes v. Bd. Ed., 154 W.Va. 107, 174 S.E.2d 711 (1970), cert. denied and appeal dismissed, 403 U.S. 944, 91 S.Ct. 2274, 29 L.Ed.2d 854 (1971) [once a county board elects to provide transportation to all children living more than two miles from school, denial of transportation attending private schools violates their right to equal protection and religious freedom]; Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) [funds may be provided third parties so long as the program is on its face neutral between sectarian and secular alternatives and the decision as to where to attend is made by the third party].

in removing the word "indirectly," from the Constitution, referenced above. Accordingly, we advised that "... the South Carolina Constitution no longer contains a prohibition against indirect benefit, in the form of tuition payments to South Carolina students, to sectarian schools." With respect to the Establishment Clause question, we referenced Hunt v. McNair, supra, then on appeal to the United States Constitution.

Op. S.C. Atty. Gen., Op. No. 3687 (January 4, 1974) reached a similar conclusion concerning the loaning by the Department of Education of educational films to public schools and colleges as well as parochial schools, denominational colleges and private schools. In that opinion, we relied upon Hunt v. McNair, supra and applied the three-prong test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1972) in addressing the validity of the statute in question under the federal and State Establishment Clauses. The United States Supreme Court in Hunt had noted that the revenue bond statute at issue there possessed a "manifestly" secular purpose inasmuch as the "benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation." Hunt, 93 S.Ct. at 2873. Likewise, we found that the film loan program had as its primary effect not "to foster or impede religion, but rather to further the general educational development of students who attend private as well as public schools ...." Op. No. 3687, supra.

With respect to the program's validity under Article XI, § 4, again, we relied upon the West Committee Report. Our conclusion was that the film loan program, which operated even-handedly with respect to all institutions of higher education - public and private, sectarian and secular alike -, was valid under the State Constitution's Article XI, § 4 provision. We opined:

> [t]he express intent of the framers of the revised constitutional provision which was approved by the people and ratified by the General Assembly was to prohibit aid to religious and other private educational institutions only if it directly benefitted such an institution. The educational films, albeit paid for by public funds, are purchased not for the benefit of private institutions but rather for the use of the State educational system. Furthermore, the loan of these films to private institutions would not directly benefit the institution itself, but the student who attends such an institution and learns from the loaned films.
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> It would appear clear, therefore, that the practice is an example of the type of program intended to be constitutionally permissible under amended Article XI, Section 4 of the South Carolina Constitution.

And in Op. S.C. Atty. Gen., Op. No. 94-14 (February 2, 1994), this Office concluded that allowing residents attending Columbia Bible College to receive assistance through the State's Tuition Grants Program contravened neither the Establishment Clause nor Article XI, § 4. Relying upon Witters v. Wash. Dept. of Services for the Blind, and Zobrest v. Catalina Foothills School Dist., supra, we found that "[a]mong eligible institutions, the decision as to where to use a tuition grant is that of the student rather than of the [Higher Education] Commission." For those same reasons, in our opinion, Article XI, § 4 was not violated. We reasoned that

> Hartness v. Patterson, 255 S.C. 503, 505, 179 S.E.2d 907 (1971), held that tuition grant money violated a previous version of this constitutional provision which prohibited aid for the "indirect" as well as direct benefit of such institutions. The problem in that

> case was that the aid was indirect, but this constitutional provision has since been amended to delete this provision. Therefore, since Hartness did not indicate that the aid would be for the direct benefit of the institution, the tuition grants assistance for students attending Columbia Bible College should not be violative of present art. XI, § 4. Although Hartness held that the tuition grant money was "of material aid to the institution to which it is paid", it does not appear to be of any more aid to the institution than the benefits upheld in Witters.

In an opinion dated May 14, 1998, we concluded that the federal, as well as state, courts would uphold a properly drafted student assistance program. Citing Lemon v. Kurtzman, supra and Mueller v. Allen, supra, we advised that where student aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion and is made available to both religious and secular beneficiaries on a nondiscriminatory basis, the program would pass constitutional muster. See, Agonisti v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.E.2d 391 (1997).

And, in an opinion, dated April 29, 2003, we concluded that S.203, a Bill which would establish the South Carolina Higher Education Equalization Program, did not violate Art. XI, § 4. The Bill was designed to "assist low income, educationally disadvantaged students, rather than providing direct aid to colleges and universities." We cautioned in that opinion that such funds, generated by the State Lottery, "could not be used as a non-federal match for any ordinary capital improvement such as renovating an administrative building or constructing a physical plant, but could be used only for the purposes set forth in the Bill, such as purchasing books or films ...."

Neither are other provisions of the South Carolina Constitution violated by S.414. Article XI, § 3 requires the General Assembly to "provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." Again, the South Carolina Constitution is not a grant of power, but a limitation upon the authority of the General Assembly. Seigler, supra. Our Supreme Court has consistently recognized that the framers of the state Constitution have placed the principal responsibility for providing free public education with the General Assembly. Richland Co. v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). The Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education. Abbeville Co. School Dist. v. State, 335 S.C. 58, 515 S.E.2d 535 (1999). Our Supreme Court has recognized that Article XI, § 3 of the South Carolina Constitution gives the Legislature "wide discretion in determining how to go about accomplishing its duty" under that provision of the Constitution. Horry County School Dist. v. Horry County, 346 S.C. 621, 552 S.E.2d 737 (2001). Accordingly, we do not deem Article XI, § 3 as imposing a prohibition upon the General Assembly's enactment of S.414.

Neither do we perceive Article X, § 11 which prohibits the pledging or loaning of the State's credit "for the benefit of an individual company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution" to be a bar to S.414. Clearly, education is a valid public purpose permitted under this provision. See, Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949). Our analysis of Article XI, § 3 above thus disposes of any question under Article X, § 11.

Conclusion

Based upon the foregoing authorities, we are of the opinion that S.414 would be upheld as facially valid under the South Carolina Constitution. Our courts would analyze the constitutionality of any such scholarship or tax credit program – whether use of the scholarships or tax credits involve public or private, sectarian or secular schools - as the United States Supreme Court did in upholding the Ohio Pilot Scholarship Program in the Zelman case. Similarly, the South Carolina case of Durham v. McLeod, which validated the student loan program at issue there, would serve as a guiding precedent for concluding that S.414 would, on its face, pass constitutional muster under Article XI, § 4 of the State Constitution.

So long as the program in question is based upon neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis, such a program would likely survive constitutional scrutiny even in its application. As our Supreme Court has previously held in Durham, the aid must, in reality, be to the student, rather than to any institution or group of institutions. As we concluded in an earlier opinion regarding tuition grants, so long as "the decision of where to use the [financial aid] ... is that of the student ..." rather than the government, the aid program will likely be held constitutional. Use of public funds in such case where, as here, the student, rather than the institution, is the primary beneficiary, constitutes only an "indirect" benefit to the particular school or educational institution. As the United States Supreme Court recognized in Locke v. Davey, supra - there, in the context of the federal Establishment Clause - use of the scholarships and tax credits are, in S.414, the "independent and private choice of recipients."

Accordingly, it is our opinion that S.414, if enacted would be upheld as constitutional.

Sincerely,

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Deputy Attorney General

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