ALAN WILSON
ATTORNEY GENERAL

December 12, 2012

Keith R. Powell, Esquire
Childs & Halligan, P.A.
Post Office Box 11367
Columbia, South Carolina 29211

Dear Mr. Powell,

We received your letter requesting an opinion on behalf of your client, the Center for Educator Recruitment, Retention and Advancement (CERRA), concerning the organization's authority to negotiate or settle debts owed to it by individuals who fail to meet the terms of scholarships received through participation in the Teaching Fellows Program. By way of background, you explain that CERRA was established by the South Carolina Commission on Higher Education (CHE) in 1985 following the passage of the Education Improvement Act. You also provide us with the following information:

> For many years, CERRA has been directed, through State Budget provisos, to conduct a Teaching Fellows Scholarship Program. The FY 2012 Budget provides, for example:
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> > 1A.10. (SDE-EIA; XI.F.2-CHE/Teacher Recruitment) Of the funds appropriated in Part 1A, Section 1, XI.F.2. for the Teacher Recruitment Program, the South Carolina Commission on Higher Education shall distribute a total of ninety-two percent to the Center for Educator Recruitment, Retention, and Advancement (CERRA-South Carolina) for a state teacher recruitment program, of which seventy-eight percent must be used for the Teaching Fellows Program specifically to provide scholarships for future teachers ....
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> As explained in CERRA's Q-and-A publication to applicants:
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> > Q: What are the 'payback' provisions in the program?
> >
> > A: The amount of time it takes to "work off" a fellowship depends on the number of years the fellow receives funds. The fellow owes one year of teaching in an SC public school for every year he or she receives funds. Each Teaching Fellow has five years following graduation to satisfy the teaching requirement. If a Teaching Fellow does not meet this requirement, he or she is obligated to repay the appropriate portion of the award with interest....

In carrying out these duties, CERRA has developed promissory notes that seek to protect the State's financial interest in these repayments. CERRA's program promissory notes specify that CERRA acts on behalf of the State of South Carolina. A surety is required. It happens from time to time that the college student fails to perform the tasks or achieve those attainments that permit deferment or forgiveness of the loan. CERRA's promissory notes contain provisions for repayment of these loans, and in most cases the debtors or their sureties on their notes do tend to honor these obligations.

CERRA has used in some cases, after unsuccessful direct contacts, a collection agency. Collection fees are added to the outstanding debt, not paid from the recovered proceeds. CERRA also uniformly takes the position that these are "educational loans" which general Bankruptcy Court decrees do not discharge absent the required judicial findings of hardship in the discharge order. Recently, CERRA also has referred some cases to the Tax Refund Offset Program. CERRA is also investigating using the DOR's GEAR Program under S.C. Code Ann. § 12-4-580(A). Each debt consists of three elements: (1) the loan principal, (2) accrued interest, and (3) any collection services fees that may have accrued if the file was referred to collection.

There are a number of cases where the debtor, be it the original borrower or that borrower's surety on the note, has offered to "settle" the claims with CERRA. Recently, after some cases where substantial compromise offers were made, CERRA has decided that settlement in appropriate cases would be a viable *option* for administration of these programs, provided CERRA has some or can obtain some clear legal authority or authorization to compromise the debts on behalf of the State. While these claims are often substantial on a personal level, each individual case may be too small to merit the investment of substantial government-paid legal services.

Thus, I have been asked to write your office for advice, clarity, and/or instructions on if, when and how CERRA may compromise these claims in proper cases. While the claims themselves are not dubious, in many cases the prospect of obtaining a superior financial result for the State by rejecting a compromise is in some doubt. Because program funds that are recouped could be "re-used" to support the policy goals of the programs, CERRA believes that in some cases the ability to accept compromises and apply the proceeds to promote the State goals and programs supporting teacher recruitment and quality.

The South Carolina Supreme Court has noted "the wide scope of the authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." Cooley v. S.C. Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445, 451 (1943). The Court in that case cited 81 A.L.R. 124, which observes, "The general authority of the attorney general, at common law under the various constitutional and statutory provisions, to compromise or settle disputes in litigation in which the state is an interested

> party, and to direct dismissal of the proceedings, so far at least as the public interest is concerned, provided there is doubt and an honest dispute as to the state's rights and the compromise or settlement is a bona fide one, is well settled." 81 A.L.R. 124 (1932). Obviously, compromising liquidated claims of the government must be pursued prudently and carefully, lest the private debtor in effect receive an unwarranted gift of public resources.

With this information in mind, you ask whether CERRA has the authority to compromise these claims in appropriate cases and, if not, whether the Attorney General can delegate such authority to CERRA. If it is our opinion that all such settlements must be approved individually by the Attorney General, you ask for instructions on when to involve our office and how to prepare and submit such requests for approval.

Law/Analysis

Under the facts you present, a Teaching Fellow who fails to effectively "work off" his or her loan owes the remaining balance of the loan to the State of South Carolina. It is widely acknowledged that, unless otherwise prohibited or constrained by its constitution, a state legislature has the power to compromise, settle, or release a debt or obligation owed to the state:

> A state legislature may release a debt due the state unless such release is prohibited by constitutional provisions.
>
> Except so far as restrained by its constitution, a state has power through its agents to make an amicable settlement or adjustment with its debtors. The legislature may release a debt due the state, unless release, remittance, postponement, or diminution of obligation is prohibited by constitutional provisions. Such a prohibition applies whether the liability is due or not, if it is fixed, but does not apply to an indebtedness or obligation which is not an indebtedness, obligation, or liability of the state.

81A C.J.S. States § 267; see also Ross v. Cochise County, 20 Ariz. 167, 169, 177 P. 931, 932 (Ariz. 1919) ("Unless prohibited by the Constitution, the Legislature may release a debt due to the state"); Sloan v. Calvert, 497 S.W.2d 125, 127 (Tex. Civ. App. 1973) (holding statute cannot have effect of releasing or extinguishing obligation to state where legislature has been denied such power under constitution).

The South Carolina Constitution is void of any provision prohibiting or otherwise restricting the Legislature's power to compromise, settle, or release a debt due to the State. The Constitution does, however, contain two provisions stating that "[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted." S.C. Const. art. X, § 10; S.C. Const. art. XVII, § 2. Although these provisions only expressly authorize the Legislature to provide for claims *against* the State, our Supreme Court has held that the Legislature is not constitutionally prohibited from providing for claims *by* the State. Unisys Corp. v. S. Carolina Budget & Control Bd. Div. of Gen. Services Info. Tech. Mgmt. Office, 346 S.C. 158, 551 S.E.2d 263 (2001). The Court provided the following reasoning in support of its holding:

> The State Constitution is a limitation upon and not a grant of power to the General Assembly. Army Navy Bingo, Garrison No. 2196 v. Plowden, 281 S.C.

> 226, 314 S.E.2d 339 (1984). "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.

Id. at 169, 551 S.E.2d at 269-70.

Based on the above authorities, debts owed to the State may be compromised, settled, or released by the Legislature. However, we are not aware of any enactment by the Legislature compromising, settling, or releasing the debt of any Teaching Fellow. In the absence of any such legislative action, we are of the opinion such debts generally may only be extinguished by the payment thereof. Therefore, it is the opinion of this Office that CERRA lacks the authority to compromise or settle the debt a Teaching Fellow owes to the State as a result of his failure to "work off" the balance of his loan.

As to your questions concerning the Attorney General's authority to compromise or settle such obligations owed to the State, we note that the office of the Attorney General is a constitutional one. See S.C. Const. art. V, § 24 ("The Attorney General shall be the chief prosecuting officer of the State"); S.C. Const. art. VI, § 7 ("There shall be elected by the qualified voters of the State ... an Attorney General"). Our Supreme Court has repeatedly recognized that the Attorney General has broad authority under the Constitution, statutory law, and the common law in carrying out the duties he possesses under the same. As the Court stated in State v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537, 560 (1929):

> As the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction, to the contrary, exercise all such *power* and *authority as public interests may, from time to time, require*, and may institute, conduct and maintain all such suits and *proceedings* as *he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection* of *public rights*.

In Cooley v. S.C. Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445, 450-51 (1943), the Court found the various statutes relating to the powers and duties of the Office were indicative of "the wide scope of the authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." Furthermore, the Court observed in Condon v. State, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), that "the Attorney General has broad statutory authority and common law authority in his capacity as chief legal officer of the State to institute actions involving the welfare of the State and its citizens ...."

Several authorities have recognized the authority of a state attorney general to intervene in actions and proceedings involving matters of state interest. See Op. S.C. Att'y Gen., 2011 WL 5304078 (Oct. 26, 2011) ("Of course, the Attorney General may intervene in an action") (citing Sloan v. S.C. Bd. of Physical Therapy, 370 S.C. 452, 636 S.E.2d 598 (2006)); 7 Am. Jur. 2d Attorney General § 6 ("In the exercise of these common law powers, an attorney general may ... intervene in all suits or proceedings

which are of concern to the general public"); 7A C.J.S. Attorney General § 61 ("The attorney general may intervene in civil actions and proceedings of concern to the public").

In addition, several authorities have specifically recognized the Attorney General's authority to settle or compromise claims or suits in which the State is an interested party. See Cooley, 204 S.C. 10, 28 S.E.2d at 451 ("[Attorney General] may enter into compromises and settlements of suits in which the State is an interested party"); 7A C.J.S. Attorney General § 63 ("The attorney general may make any disposition of such actions he or she deems best for the interest of the state"); 7 Am. Jur. 2d Attorney General § 30 ("The attorney general may enter into binding compromises and settlements of suits in which the state is an interested party where there is doubt and an honest dispute as to the state's rights, and the compromise or settlement is a bona fide one").

Moreover, the Attorney General is afforded broad discretion in performing such duties:

> As the chief law officer of the state, the attorney general is vested with a broad range of discretion in the performance of public duties and in determining what matters are of interest to the public. The attorney general also has wide discretion in determining what actions must be taken in protecting what the attorney general conceives to be the best interest of the state and its citizens. The exercise of this discretion is a necessary and proper function of the office of attorney general.

7A C.J.S. Attorney General § 31.

In light of the above authorities, it is our opinion that the Attorney General has the power to compromise or settle debts owed to the State under CERRA's Teaching Fellows Program. In exercising this power, the Attorney General is afforded broad discretion in determining whether to initiate or intervene in an action for the purpose of compromising or settling the claim. We note that because the determination of whether to compromise or settle a debt owed the State requires the exercise of discretion and judgment, the power the make such a determination may not be delegated to CERRA. See 7A C.J.S. Attorney General § 27 ("duties involving the exercise of discretion and judgment for the public good generally cannot be delegated but must be performed in person [by the Attorney General]"). If there are specific claims CERRA believes should be compromised or settled, the organization should submit documentation to this Office specifically requesting that the Attorney General consider whether to negotiate or settle such claim. All pertinent information related to the claim should be included for consideration.

Conclusion

It is the opinion of this Office that CERRA lacks the authority to compromise or settle a debt a Teaching Fellow owes to the State as a result of his failure to effectively "work off" the balance of his loan. While the Legislature has the power to compromise, settle, or release a debt owed to the State, we are aware of no legislative enactment exercising such power with regards to any debts owed to the State pursuant to the Teaching Fellows Program. In the absence of any such legislative action, we believe such debts may, as a general rule, only be extinguished by the payment thereof.

Notwithstanding the above, it is our opinion that the Attorney General has the authority to compromise or settle such debts owed to the State if he determines it is in the best interest of the State to

do so. This conclusion is consistent with the broad authority and duties of the Attorney General as set forth in the Constitution, statutory law, and the common law. In particular, several authorities recognize the authority of the Attorney General to initiate or intervene in actions or proceedings involving matters of state interest, as well as the authority to compromise or settle claims in which the State is an interested party. Moreover, the Attorney General is afforded broad discretion in the performance of his duties. Because the determination of whether to compromise or settle a debt owed to the State requires the exercise of discretion and judgment, the power to make such a determination may not be delegated to CERRA. Thus, it is our opinion that the Attorney General may, in his discretion, initiate or intervene in a matter involving a debt owed to the State by a Teaching Fellow. If there are specific claims CERRA believes should be compromised or settled, the organization should submit documentation to this Office specifically requesting that the Attorney General consider whether to negotiate or settle such claim. All pertinent information related to the claim should be included for consideration.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General