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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

January 7, 2003

The Honorable John Graham Altman, III
Member, House of Representatives
77 Folly Road
Charleston, South Carolina 29407

Dear Representative Altman:

You have requested our opinion "as to the legality of a certain provision of H.4879 (The Budget Proviso Codification Bill) which relates to distribution of state lottery funds to private educational institutions." By way of background, you provide the following information:

> [t]he Bill was passed in the waning hours of the 2002 legislative session and said *inter alia* three million dollars are granted for "Historically Black College and University Maintenance and Repair; $3,000,000;". The colleges that received this money are all private educational institutions and that appropriation seems to be directly prohibited by Article 11, Section 4 of the South Carolina State Constitution.

You request a formal opinion "stating whether or not these appropriations can be legal in view of direct Constitutional prohibition against such appropriations." It is your understanding "that this money has already been sent to these five private institutions in spite of the apparent direct conflict" and, therefore, you "further request [our] ... formal opinion as to how the state can recover this money if, in fact, it has already been sent to these private institutions.

Law / Analysis

Article XI, Section 4 of the South Carolina Constitution (1895) as amended) states 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 premise that when interpreting the Constitution, the Supreme Court applies rules similar to those relating to the construction of statutes. J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority, 336 S.C. 162, 519 S.E.2d 561 (1999). 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 Co. Sch. 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 unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction either to limit or expand the provision's operation. J.K. Construction, Inc., supra. Often, the Court looks to the records of the so-called "West Committee," [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" in determining the framer's intent. 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).

In addition, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. Noted the Court 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 must be presumed valid and constitutional. An Act will not be considered void 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 must be resolved favorably to the statute's constitutional validity. More than anything else, only a court, and not this Office, may strike down an Act of the General Assembly as unconstitutional. While this Office may comment upon what we deem to be an apparent unconstitutionality, we may not declare the Act void. In other words, a statute "must continue to be followed until a court declares otherwise." Op. Atty. Gen., June 11, 1997.

With these fundamental principles in mind, we now examine the appropriation of $ 3 million to South Carolina's Historic Black Colleges in light of Article XI, § 4's express language. This constitutional provision prohibits use of public funds or the credit of the State "for the direct benefit of any religious or other private educational institution." Clearly, the appropriation of lottery money constitutes "public funds" for purposes of the Constitutional prohibition. See, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) [to constitute public funds, "it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise ...."]. Thus, the crux of the issue here is whether the General Assembly, in appropriating $3 million to the Historic Black Colleges, has conferred a "direct benefit" upon private educational institutions in contravention of Art. XI, § 4.

The present Article XI, § 4 was substantially altered by constitutional amendment in the form of a vote of the people in 1972 and ratification by the General Assembly in 1973. Formerly, the constitutional provision existed as Article XI, § 9 which 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.

In Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971), this predecessor provision was applied by our Supreme Court to the question of the constitutionality of an Act of the Legislature which provided tuition grants to students attending independent institutions of higher learning in South Carolina. The Hartness Court noted that at least 16 of the 21 independent institutions of higher learning "are operated under the direction or control of religious groups or denominations." Id. Accordingly, in the view of the Hartness Court, such aid violated then existing Art. XI, § 9. The Court's reasoning was reflected as follows:

> [w]e reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid. The fact that only a portion of the tuition costs are covered by the grants from the state affects the matter only in degree. If State funds can be used to provide a portion of the tuition costs for attendance at religious schools, all could just as legally be paid, resulting in the support of such institutions entirely with State funds.

179 S.E.2d at 908.

The next year, the Court decided Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), concluding in that case 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. This legislation did not violate then Art. XI, § 9, the Court held. Referencing its earlier decision in Hartness, which Durham found was, based upon the facts, "inevitable," the Court distinguished Hartness 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, 90, 156 S.E.2d 421, 429 (1967).

192 S.E.2d at 203-204. Thus, in dicta, at least, the Durham Court carved out an exception to Hartness, i.e. where all students attending South Carolina's various institutions of higher learning, "whether public or private, sectarian or secular" are treated similarly, the State Constitution was not violated.

Following the Hartness and Durham decisions, the Constitution was amended by a vote of the people in 1972. The scope of new Article XI, § 4 was made much narrower than the former provision contained in Art. XI, § 9. In Op. Atty. Gen. No. 3687 (January 4, 1974), we summarized the contrast between the former and new provisions:

> [a] comparison of the amended version and the original provision, contained in Article XI, Section 9, reveals that the amended version is much less restrictive in prescribed connections between the State and private religious educational institutions, to wit: Section 4 no longer contains a prohibition against the "property" of the State being used in aid of any religious or sectarian institution. Likewise, the word "indirectly," referring in the original provision to the use of State property, credit or money in aid of religious or sectarian institutions, has been deleted from the amended Article XI, Section 4.

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 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 by the Committee through the following comments:

> [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 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. (emphasis added).

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. With that in mind, we have concluded that such expenditures of public funds as tuition grants, the loaning of textbooks to students, and the loaning of films to schools are primarily for the benefit of students. Such assistance, therefore, is not deemed to be a "direct benefit" to a "private educational institution." See, Op. Atty. Gen., June 5, 1973 (loaning of money to South Carolina students to attend out-of-state sectarian institutions); Op. Atty. Gen., Op. No. 94-14 (February 2, 1994) [tuition grants]; Op. Atty. Gen., Op. No. 3683 (January 4, 1974) [loaning of department of Education films to parochial schools denominational colleges and private schools]; Op. Atty. Gen., Op. No. 83-40 (July 12, 1983) [loaning of textbooks to six predominantly black colleges].

Applying the foregoing constitutional history, as well as the plain language of Art. XI, § 4, it is evident that an appropriation to South Carolina's historically black colleges contravenes the State Constitution as a "direct benefit" to "private educational institutions." If this constitutional prohibition is to retain any meaning, it must be deemed to prohibit a direct appropriation to certain private colleges and institutions of higher learning. As was stated in the West Committee Report, the provision was designed to insure "that public funds should not be granted outrightly to [private institutions of higher education]." Id.

The West Committee Report also stated that our courts should be guided by interpretation of Art. XI, § 4 "in conjunction with interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution." Id. A somewhat similar case in the area of the Establishment Clause which was decided by the United States Supreme Court is Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). There, the Court concluded that maintenance and repair grants to nonpublic schools, virtually all of which were Roman Catholic institutions in low-income areas, violated the Establishment Clause of the First Amendment. Nyquist placed emphasis upon the fact that the statute in question imposed no restrictions upon the school's use of the funds except that such funds be used for "maintenance and repair." The Court noted that

> [n]othing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absence appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools. (emphasis added).

413 U.S. at 773. In the view of the majority, the Court's earlier decisions, such as Everson v. Bd. Ed., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed. 790 (1971), cases in which the Court had approved financial expenditures involving private sectarian schools, were deemed inapposite. While it is true, noted the Court, that these cases approved "a form of financial assistance which conferred undeniable benefits upon private, sectarian schools," the majority, nevertheless, found that each possessed "distinguishing characteristics." The Nyquist Court emphasized that

> [i]n Everson, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial school children for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the 'verge' of impermissible state aid. ... In Allen [Bd. of Ed. v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968)] decided some 20 years later, the Court upheld a New York law authorizing the provision of secular textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in Tilton, the Court upheld federal grants of funds for the construction of facilities to be used for clearly secular purposes by public and nonpublic institutions of higher learning.

Observed the Court in Nyquist,

> [t]hese cases simply recognize that sectarian schools perform secular, educational functions and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian.

413 U.S. at 774-75. See also, Columbia Union College v. Clarke, 159 F.3d 151, 162 (4th Cir. 1998) [noting that "[t]he Supreme Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions ...," Fourth Circuit holds that direct state funding of general education courses at a "pervasively sectarian" educational institution is unconstitutional]; But see, Roemer v. Bd. of Public Works of Md.,426 U.S. 736, 758-59, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) [direct grants of public funds to private colleges which have religious affiliation but where "religion did not so permeate those colleges that their religious and sectarian roles were indivisible" did not violate the Establishment Clause]; Comm. for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) [use of public funds

to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law does not violate Establishment Clause].

Therefore, in our view, the appropriation in question contravenes Art. XI, § 4 of the South Carolina Constitution. Clearly, in amending this constitutional provision in 1972, this was precisely the type of "direct benefit" to a private educational institution with which the framers and the people were concerned and sought to prohibit.

We have considered, but rejected, one argument which might be made in support of the appropriation. Conceivably, it could be argued that the Legislature sought to provide sufficient public funding in terms of maintenance and repair of facilities at South Carolina's historically black colleges in order to further educational opportunities for all South Carolina citizens. Federal law authorizes federal funds to be paid to historically black colleges for the "construction, maintenance, renovation and improvement" of classrooms, libraries and other facilities. See, 20 U.S.C.A. § 1062. Congressional purpose in enacting the federal law was to "strengthen historically black colleges and universities" by authorizing the federal Department of Education to provide money grants to those schools. See, U.S. v. Fordice, 505 U.S. 717, 760, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). The Congressional findings contained in the federal legislation note that Congress desired to use grants to these institutions as a "remedy of enhancement of Black post secondary institutions to ensure their continuation and participation in fulfilling the Federal mission of equality of educational opportunity ...." 20 U.S.C.A. § 1060. The Legislature's precise purpose in providing for the appropriations which you question is not apparent; however, it could possibly be argued in defense of a challenge thereto that the General Assembly's purpose was to aid educational opportunity in South Carolina as opposed to the particular schools themselves. See, Op. Atty. Gen., Op. No. 83-40 (July 12, 1983) [loaning of textbooks to six predominantly black colleges is not unconstitutional].

The problem with any argument that the statute in question here serves an independent purpose is obvious. From the face of the statute, there is no indication whatsoever that the General Assembly intended primarily to aid students at all institutions of higher education as opposed to appropriating funds directly to certain private colleges. In addition, the appropriation for maintenance and repair is not to all South Carolina institutions of higher education, but only a portion thereof. Moreover, no limitation is placed upon the appropriation other than that such funds are provided "to the Commission on Higher Education to administer a construction and renovation fund for the historically black colleges and universities ...." Thus, we must reject any such argument here.

You have also requested our opinion as to "how the state can recover this money if, in fact, it has already been sent to these private institutions." Typically, in South Carolina, a taxpayer action is the mechanism for challenging an unconstitutional appropriation. Our Supreme Court recognized in Brown v. Wingard, 285 S.C. 478, 480, 330 S.E.2d 301 (1985) that "taxpayers ... have an interest in seeing that [public] ... officials disburse funds in a lawful manner." Moreover, as our Court of Appeals noted in Sloan v. School District of Greenville County, 342 S.C. 515, 519, 537 S.E.2d 299

(2000), "[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." [citing numerous South Carolina Supreme Court cases].

A number of South Carolina cases have been decided based upon a challenge by taxpayers to the constitutionality of legislation or of an appropriation. For example, in Shillito v. City of Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948), a case brought on behalf of Spartanburg County taxpayers, the Court held that an Act providing for an annual tax levy in the City of Spartanburg for the benefit of the Spartanburg City Firemen's Fund was special legislation in violation of the State Constitution. O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945) was a case brought by taxpayers which declared that the 1943 Act authorizing appropriations to reimburse county officers for the differences in their respective fees and salaries, because of legislative changes from a fee basis of compensation to one of salary, was unconstitutional as a grant of extra compensation for services rendered. In Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723 (1949), taxpayers challenged an act authorizing allocation of state tax funds to counties for construction of health centers and hospitals. Taxpayers were held to have standing to challenge an allegedly unconstitutional appropriation of tax funds in Myers v. Patterson, 315 S.C. 248, 433 S.E.2d 841 (1993). These cases all recognize that any taxpayer or group of taxpayers may challenge unconstitutionally appropriated funds.

Conclusion

In our opinion, the appropriation of lottery funds to South Carolina's Historic Black Colleges is prohibited by Art. XI, § 4 of the South Carolina Constitution as a "direct benefit" to certain private educational institutions. The result would be the same whether or not the appropriation is made to Historic Black Colleges or to any "religious or other private educational institution." The framers of the Constitution stated explicitly that the purpose of the constitutional provision is to prohibit "public funds [from being] granted outrightly to [private educational institutions]." On its face, this appropriation represents an outright grant of public funds to certain private colleges. No independent public purpose, consistent with Article XI, § 4, is suggested by the legislation.

Accordingly, it is our opinion that a court would find this appropriation to be prohibited by the South Carolina Constitution.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an