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The State of South Carolina

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August 18, 1993

Bill J. Sams, Director
South Carolina Department of
Veterans Affairs
227 Brown State Office Building
1205 Pendleton Street
Columbia, South Carolina 29201-3789

Dear Mr. Sams:

You have advised that S.C. Code Ann. §59-111-20 was amended during the 1993 legislative session. You have asked for our opinion as to several questions which have arisen due to the amendment. After a brief discussion of §59-111-20 and the amendment thereto, your questions will be examined.

Briefly stated, §59-111-20 provides free tuition benefits to the children of certain war veterans, who must qualify under the provisions of that law. The tuition is allowed at State supported colleges, universities and technical schools. Under the statute, prior to June 14, 1993, a student could attend both undergraduate and graduate work. The new amendment contains a new subparagraph limiting the type of degree, and inserting for the first time the age requirement:

> B. The provisions of this section apply to a child of a veteran who . . . is twenty-six years of age or younger, and is pursuing any type of undergraduate degree.

The first question presented is whether or not students who were approved by the State Department of Veterans Affairs (hereafter, Department) prior to the amendment of the law should be "grandfathered," and be allowed to continue in programs other than undergraduate degrees.

The second question you presented was whether or not students who, if "grandfathered," could continue in programs beyond age twenty-six. Apparently the Department has determined as a matter of policy that eligible students could receive tuition through age twenty-six, or through such age as they would be entitled to receive certain benefits under other, related, federal law. Under those other circumstances, a student approved for benefits at, for example, age twenty, would have eight years of eligibility for free tuition. Apparently, some students previously approved by the Department, who are in the middle of, or beginning graduate

programs, are now being billed by certain universities for tuition, and they are over twenty-six.

In addition, you had supplied to this Office a Proposed Policy Decision, dated July 23, 1993, providing, in pertinent part, as follows:

> For the purposes of free tuition for the children of certain war veterans, under §59-111-20, . . ., the [Department] hereby has determined that all approvals issued prior to June 14, 1993 are valid and binding, regardless of the age or type of program being pursued by the student.
>
> This decision is effective from June 14, 1993, and those children who have been granted benefits beyond their twenty sixth birthday, and those who are pursuing graduate work will continue to be eligible until the matriculation date as previously established. Approvals issued subsequent to June 14, 1993 will be based upon the new provisions of law.

You had also provided us a prior Opinion of this Office, dated June 30, 1980, by Senior Assistant Attorney General Richard B. Kale, Jr., and we have located other Opinions relative to that one, dated April 29, 1970 (Op. Atty. Gen. #2892) and December 29, 1978 (Op. Atty. Gen. 78-213).

The statute was enacted in its earliest form around 1930. The most recent version, prior to this last legislative session, provided for free tuition to eligible children of certain wartime veterans. The criteria were as follows: A child had to be born to a veteran who was (1) a resident of South Carolina at the time the veteran entered service and during service, or where the veteran had been a resident of South Carolina for at least eighteen years and, (2) if he was disabled, still resided in South Carolina, and (3) served honorably in the military during a war period as defined by federal law.

Further, for the child to be eligible for free tuition, the parent veteran had to have been (1) killed in action, (2) died from other causes while in service, (3) died of disease or disability resulting from service, (4) a POW, (5) permanently and totally disabled by the federal Veterans Administration, (6) awarded the Medal of Honor, (7) missing in action, or (8) the child of a deceased veteran who was either a POW or declared permanently and totally disabled by the VA.

As we understand the procedure, referring to discussions between your office staff and our attorneys and prior Opinions of this Office, such an eligible child could apply to the Department, and upon approval by your agency, be allowed the free tuition so long as his or her work and conduct was satisfactory at the institution attended.

The old statute did not contain a termination date; information from the June 30, 1980 Opinion of the Attorney General appears to indicate that eligibility would generally terminate when a child reached twenty-six years of age. The eligibility tracked that awarded by certain federal statutes, related to educational benefits and dependency status. For example, a child requesting free tuition for the first time, who was over eighteen years of age, would have to qualify as a dependent of his or her parent. However, the approval period administratively set by the Department was for eight years and not limited to undergraduate work.

No procedures for tuition approval were specified in the previous statute, nor do there appear to be regulations promulgated by the Department. There does not appear to be a specific requirement that approvals by the Department be periodically reviewed, or that new approval be made when an eligible child transfers from undergraduate to graduate education or transfers from one State institution to another. Any such procedure would be an internal policy of the Department.

Effective June 14, 1993 the Governor approved the General Assembly's revision of the law. The new statute requires an eligible child to be of a "wartime" veteran, and specifically states that the application must be made to and approved by the Department. It codifies the age limit of twenty-six years. The list of criteria the veteran must meet are the same in the new statute. However, §59-111-20(B) limits, for the first time, the free tuition to an undergraduate degree.

Generally speaking, the principles of statutory construction state that an amended act is ordinarily construed as if the original statute had been repealed, and a new and independent law in the amended form had been adopted. An amendment becomes part of the original statute, as if it had always been contained therein. 82 C.J.S. "Statutes," §384; see also, Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1939).

In addition, the provisions of an earlier act which are in irreconcilable conflict with the provisions of an amended act are impliedly repealed. See, Sutherland, Statutes and Statutory Construction, (4th Ed. 1985), §23.12. However, that rule may be waived if the legislative intent is to the contrary, and it must be understood that legislative grants, such as of property, rights, or privileges, are required to be construed strictly in favor of the

public. 82 C.J.S. "Statutes," §392; see also, Cain v. South Carolina Public Service Authority, 72 S.E.2d 177 (S.C. 1952).

Our examination of House and Senate Journals, and discussions with at least one State Representative, and the Director of Research at the House Education and Public Works Committee, indicate a lack of evidence of legislative intent regarding the issue of grandfathering. The Bill which became the new law began as H-3455, and was reported favorably from the House Education and Public Works Committee, with Amendments, on April 7, 1993. On April 15 an Amendment was proposed that would include what is now subsection (B), but limiting the pursuit of a degree of education to "a Baccalaureate Degree."

On April 23 Representative Molly Spearman introduced and explained an Amendment to subsection (B), that replaced the word "Baccalaureate" with "any type of undergraduate" when referring to the degree that could be pursued. Representative Spearman's amendment was adopted by the House, read the second time on April 23, read the third time the next day, and referred to the Senate.

Passage in the Senate was swift. The statute was read for the first time on April 27, and referred to the Education Committee. At the request of Senator Giese it was recalled from that Committee on June 1, and read for the second and third times by the following day, and enrolled for ratification in its present form.

At first glance, therefore, we are faced with an issue of "grandfathering," which the legislature apparently did not address in its debate on the subject. The primary concern, according to the information we received, was the old eighteen year residency requirement for the parent veteran, which was reduced to one year; further concerns were the codifying of the twenty-six year age limit, and the limiting of education to be pursued to an undergraduate degree. There are no minutes of any conferences by subcommittees with representatives of the various universities and other schools, and apparently nothing else can be gleaned from the legislative record. It might therefore be safe to presume that the legislature did not intend to affect students already approved by the Department, and its amendment was intended to be prospective in nature.

Ordinarily it could be concluded that absent a specific provision providing for students already approved by the Department, no provisions for grandfathering such students could be inferred, absent a specific legislative intent, and a provision in the new statute so stating. Further, legislative clarification would be required.

However, the history of this statute, and its construction by Opinions of this Office, must be considered. For example, there

appears to be nothing in the statute's prior version, nor the Opinions of this Office, limiting attendance to undergraduate degrees. In fact, it may be presumed that the legislature, by its actions during the 1993 session, specifically intended to eliminate graduate work for those students who would otherwise qualify under the law. The inference is that students have attended graduate classes in the past, without tuition, if properly approved by the Department.

Grandfathering has been considered before. For example, Attorney General Opinion No. 78-213 required that the determination of total and permanent disability be made by the federal Veterans Administration. Section 59-111-20(5) allowed for free tuition to children of a wartime veteran who was permanently and totally disabled as determined by the Veterans Administration from any cause. The question presented in 1978 was whether to grant free tuition to children of veterans who had been determined to be disabled by other agencies, under other standards, and other laws. Examples included federal statutes defining disability for Social Security benefits, disability as defined under the South Carolina Retirement System, Army Regulations relating to separation from the Armed Forces for physical disability, and the provisions of the South Carolina Workers Compensation Act.

The 1978 Opinion included that the statute had clearly identified the federal Veterans Administration as the sole agency to determine whether or not a veteran was totally and permanently disabled. The Opinion concluded that if the legislature had intended for disability to be determined by an agency other than the federal VA, that it would not have amended an earlier version of the law so as to provide for such a determination.

Subsequent to that Opinion, the question arose as to what to do with students who were attending school, had already been approved by the Department, but whose approval was based upon a determination of total and permanent disability of their parent veteran by an agency other than the federal Veterans Administration. The Department determined, as a policy matter, that such prior approvals would not be terminated, but would be grandfathered under the 1978 Attorney General Opinion.

This policy decision was made by the Department, without Opinion from the Attorney General's Office or legislative action. Those students enrolled in programs whose parents had been determined to be disabled by agencies other than the federal VA were allowed to continue, without objection from any state agency, including the particular colleges or universities involved.

And it is a settled rule in this State that deference is given to a state agency charged with the responsibility of interpreting and applying the laws under which it operates.

The June 30, 1980 Opinion of this Office determined that a child receiving free tuition under §59-111-20 would not lose that benefit merely by transferring to another state supported college, university or technical school. The Opinion noted, as observed above, that once approved for free tuition, there was no periodic review, or re-approval where a student transferred from one institution to another. It observed that any such requirement for periodic review or re-approval would be an internal policy of the Department.

Most importantly, the 1980 Opinion set the tone for review of this statute, quoting from an earlier, April 20, 1970 Opinion:

> Obviously, the foregoing statute is grounded upon principles of a humane public policy, and it unquestionably has a benevolent purpose, i.e., to assist in obtaining a college education for the children of South Carolinians who, for example, were killed in action while in the military service of this country during a time when it was at war.
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> > "A liberal construction is generally accorded statutes which are regarded . . . as humanitarian and beneficial, . . . or which have a benevolent . . . purpose . . . . Such a statute should be given a favorable construction to the end that its manifest humanitarian and benevolent purpose may be effectuated to the fullest extent compatible with its terms [citations omitted].

1969-1970 Op. Atty. Gen. No. 2892, Page 132.

The 1980 Opinion concluded that a fair, reasonable, equitable and liberal interpretation of the free tuition "policy," taking into consideration the Department's decision to grandfather approvals made prior to the 1978 Opinion, was that, under the circumstances of the 1978 Opinion, an eligible student could retain free tuition status even though she transferred from one state institution to another.

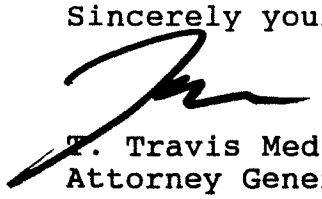
Citing the foregoing "humane public policy" language, a 1970 Opinion had ruled that persons eligible to the benefits of the statute, but who were residents of other states, could attend a state supported college or university in South Carolina without having to pay out-of-state tuition. See, 50 Am. Jur. "Statutes" §396 at pp. 420-421; 1970 Op. Atty. Gen. No. 2892.

CONCLUSION

Even though we find no evidence of legislative intent regarding "grandfathering", we conclude that fairness and equity requires that students approved prior to the new law's effect be grandfathered. For decades our State has supported the children of our veterans through tuition in State supported schools and colleges. If students approved prior to the new law's effective date had a right to expect they would be attending college or technical school this fall by virtue of being approved for tuition under the old law, it is only fair that that expectation should now be honored. Accordingly, we conclude that students approved prior to June 14, 1993 be allowed to continue receiving free tuition as they had before, in graduate or undergraduate work, subject, of course, to such criteria established by the Department prior to the amendment.

With kindest regards, I am

Sincerely yours,



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