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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 27, 1995

The Honorable Patrick B. Harris
Member, House of Representatives
Box 655
Anderson, South Carolina 29622

Re: Informal Opinion

Dear Representative Harris:

You have requested an opinion "on the constitutionality of State money being spent on the program at Converse College." Your reference is obviously to the newly-established South Carolina Institute of Leadership for Women (SCIL), recently established at Converse College for the purpose of providing a single-gender education for women in a leadership setting.

As you are aware, litigation is currently pending in the United States District Court (District of South Carolina) regarding the legality of the State's admission policy at The Citadel. Faulkner v. Jones, Civ. Act. No. 2-93-0488-2. Thus, a formal opinion of the Office of Attorney General addressing your question is inappropriate as it would necessarily involve issues which could well arise in that litigation.

However, by way of comment, it would be my own opinion that the expenditure of state money on the program established at Converse would be valid under the South Carolina Constitution. The State of South Carolina has contracted with Converse College to provide the SCIL program. State funds are appropriated through the State Appropriation Act to The Citadel and then disbursed to Converse for performance of its obligations under the contract. See, 1995-96 Appropriations Act, Sec. 18A.26 [contract with Converse College authorized and funds appropriated therefor]; see also, Agreement between State of South Carolina and Converse College [Converse College shall use "its best efforts to develop, implement and operate" the program].

It is well-settled that the expenditure of state funds must be for a public, not a private purpose. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). In conformity with Article X, Sec. 11 of the South Carolina Constitution (1895 as amended), the State's credit may not be used for the benefit of any individual, company, association, corporation or any religious or other private education institution. See, Op. Atty. Gen., March 19, 1985 (citing cases regarding a "pledge" of credit for private entity). Our Supreme Court has consistently held the view that this Constitutional provision requires that the public purpose served must be primary and not incidental. Bauer v. S.C. Housing Auth., 271 S.C. 219, 228, 246 S.E.2d 869 (1979); Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975). Each case must be determined according to its own peculiar circumstances. Byrd v. Co. of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984).

Unquestionably, the support of education promotes a valid public purpose. Op. Atty. Gen. January 30, 1978. As our Supreme Court stated in Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202, in upholding the constitutionality of a statute which authorized a state agency to make, insure or guarantee loans to students to defray expenses at any institution of higher learning,

> [a]ll these objections are met when we recognize, as we must, that the Act rests upon a valid public purpose, i.e. the promotion of higher education in the State; and that all of its provisions are reasonably related to this purpose.

Here, the appropriation of public funds for SCIL serves the valid public purpose of providing a single-gender education program. See, Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995). Thus, the fact that public funds will be disbursed to a private corporation, Converse College, does not render the purpose private. The promotion of higher education clearly serves a public purpose in South Carolina.

Neither is our State Constitution violated because public funds are going to a private educational institution. Art. XI, Section 4 provides:

> [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. (emphasis added)

Our Supreme Court, as well as this Office have often concluded that the State may constitutionally utilize a private, nonprofit corporation to serve a valid public purpose. As

we noted in Op. Atty. Gen., December 18, 1979, the Supreme Court case of Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) "recognizes the validity of appropriation of public funds for the performance of a public function through the agency of a nonprofit, nonsectarian entity which provide health services, welfare services, and other public purposes for which appropriations may be made." See also, Op. Atty. Gen. No. 85-81 (August 8, 1985) [state contracting with a private entity to perform a state function, i.e. providing a correctional facility]. Here, Converse College is clearly a nonsectarian entity.

Furthermore, it is well established that constitutional provisions limiting or prohibiting public aid being extended to private institutions of higher learning

> ... do not prohibit the State from doing business or contracting with private universities in fulfilling a governmental duty and furthering a public purpose.

14A C.J.S. Colleges and Universities, § 7. For example, in State ex rel. Creighton University v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984), the Nebraska Supreme Court upheld a proposed contract between the State and a private university to conduct cancer research. The Attorney General of Nebraska had ruled that the contract could not be considered by the State because the Nebraska Constitution forbade the appropriation of public funds to any school or institution of learning not owned or controlled by the State or its political subdivisions, a constitutional provision similar in purpose to our own Art. XI, Sec. 4. The Supreme Court disagreed with the Attorney General that such a contract would be invalid. Holding that the Constitution was not contravened because this was not a "direct" appropriation of public funds to a private institution, but instead only an indirect benefit, the Court opined,

> [t]he Nebraska Constitution does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose ... We do not rule out the possibility that Creighton may derive an indirect benefit from a research contract with the state, but possible indirect benefit does not transform payments for contracted services into an appropriation of funds proscribed by Article VII, § 11, of the Nebraska Constitution.

353 N.W.2d at 272.

Likewise, it is my informal opinion that the expenditure of public funds as part of the State's contract with Converse College for the provision of SCIL is constitutionally valid. Any benefit to Converse is indirect only, rather than direct. The State Constitution does not forbid the State from contracting with a private college such as Converse to perform a clearly recognized public purpose.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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