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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 13, 1996

Geraldine H. Urbanic, Director of Legal Services
Charleston County School District
75 Calhoun Street
Charleston, South Carolina 29401

Re: Informal Opinion

Dear Ms. Urbanic:

You have been authorized by the Charleston County School District Board of Trustees to seek an opinion concerning the "use of public funds to support private educational institutions," prohibited by Article XI, § 4 of the South Carolina Constitution. Specifically, you state the following in that regard:

> [t]he Charleston County School District has historically helped support the Florence Crittendon Day Care Program in Charleston County. The Board of Trustees has requested your opinion regarding the legality of continued monetary support to the Florence Crittendon program. Florence Crittendon Programs of South Carolina are private programs operating for the benefit of pregnant young women who do not wish to continue their education in the public schools. The Florence Crittendon Day Care Program operating in Charleston County offers an alternative setting in which young pregnant women who are residents of Charleston County may attend the Florence Crittendon facility, receive pre-natal and post-partum care and counseling, and continue their academic education.
>
> The Charleston County School District has in the past given Florence Crittendon $20,000 per year for rent. In addition, the School District has supplied instructional personnel to the facility. While the School District has paid

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teachers for Florence Crittendon, the teachers are not School District employees in that we do not make the hiring decisions, the termination decisions, provide supervision, or evaluation. In effect, the providing for part-time to the Florence Crittendon facility is a form of a school district subsidy to the facility.

Attached you will find a copy of a memo dated February 19, 1996, addressed to Dr. Barbara Dillingham, Interim Superintendent of the Charleston County School District, concerning this issue. To the best of my knowledge, the case cited in that memo, Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) is the only time the South Carolina Supreme Court has interpreted this particular Constitutional provision since it was amended in 1973. In that instance, the court held that a state grant funding a proposed addition to a hospital did not violate this Constitutional section since the purpose of the hospital was to treat patients not provide an educational facility. In the fact situation under review, the purpose of the Florence Crittendon Day Care Center is to provide an educational setting for pregnant girls as an alternative to attending the public schools.

The decision whether to continue funding the Florence Crittendon Program must be made by the Board of Trustees before the budget is approved for the fiscal year beginning July 1, 1996. Decisions regarding the budgeting process are currently under way. If the Charleston County School District were to continue funding the Florence Crittendon Program at the current level, that is both rent and teacher subsidy, it would mean setting aside approximately 95,000.00 for Florence Crittendon in the next budget year. As you can see decisions must be made quickly and we would request that your opinion, be it a formal or informal opinion, be forward[ed] as soon as possible.

The Mission Statement of Florence Crittendon Programs of South Carolina is "[t]o provide and promote those comprehensive medical, educational and support services which will most effectively insure the well-being and self-sufficiency of single parents and their children in South Carolina." FCP offers a Day Program, Community Education as well as a Residential Program. The Day Program "offers a comprehensive year-round

alternative school and follow-up for pregnant Charleston County girls who can remain in their own homes." The Community Education program serves "both as a networking and prevention outreach effort," focusing "primarily on prevention in the public schools." The Residential Program "provides a full range of comprehensive educational medical and social services within a sheltered 24-hour maternity home setting."

Law/Analysis

The legal issue raised by your request is whether the Charleston County School District Board may provide funds to Florence Crittendon to pay for rent and for instructional personnel. Clearly, such expenditures would be for a public purpose, Op. Atty. Gen., December 18, 1979. As our Supreme Court stated in Hunt v. McNair, 255 S.C. 71, 78, 177 S.E.2d 362 (1970) "[i]t is too late to question whether or not the promotion of secular education is a public purpose as it is universally accepted as a proper public purpose." Thus, Art. X, § 11 of the South Carolina Constitution, which forbids the State or its political subdivisions pledging or loaning its credit for the benefit of any private corporation or other private educational institution would not be contravened in my view. We have consistently stated that a donation or contribution to a private non-profit corporation which serves a clear public purpose is valid pursuant to Article X, § 11. Nichols v. South Carolina Research Authority, 290 S.C. 415, 315 S.E.2d 155 (1986).

As you recognize in your letter, however, the more substantial question involves another State Constitutional provision. Art. XI, § 4 provides as follows:

> [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).

In Op. No. 3687 (January 4, 1974), we addressed at length the historical underpinning of this Constitutional mandate. We stated:

> [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 Article XI, Section 4. As the comments of the framers of the revised Constitution indicate:
>
> > "... 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 ..." Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 99 (1969).
>
> In an opinion already issued by this office, the practice of loaning money to students who are South Carolina residents but who attend out-of-state sectarian institutions was adjudged valid under the loosened Constitutional prohibiting only direct benefit to religious or other private educational institutions. See, Letter to Ms. Rebecca M. Connelly, June 5, 1973. The practice of loaning films to private educational institutions would be even less questionably of direct benefit to the recipient, institutions than is the already approved practice of loaning money to students to enable them to attend such institutions.

The opinion continued, concluding that the state could loan State Department of Education films to parochial schools, denominational colleges and private schools under Article XI, § 4:

> [t]he expressed intent of the framers for 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.

> 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.

We have also concluded that tuition grants to students attending Columbia Bible College are not invalid under Art. XI, § 4. Op. Atty. Gen., Op. No. 94-14 (February 2, 1994). There, we found 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, Sec. 4. Although Hartness has held that 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 [v. Washington Dept. of Services for the Blind, 474 U.S. 41, 106 S.Ct. 748, 88 L.Ed.2d (1986)].

Likewise, we have opined that public funds may be used for the purchase of textbooks for students enrolled in private colleges along with other public institutions. In that instance, we stated "[t]he benefit to the colleges in contrast to the students affected, would here appear to be merely indirect and the public benefit would greatly outweigh any incidental private gain."

In an opinion of June 5, 1973 (referenced in the January 4, 1974 opinion, discussed above) we again focused upon the underlying intent of Article XI, § 4. That opinion quoted at length from the Report made by the Committee to make a Study of the South Carolina Constitution of 1895 which recommended the change in the language of the Constitutional provision in its present form. The Committee noted that it had "evaluated this section in conjunction with interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution." The Committee further commented:

> [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 instate 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 ....

Based on the foregoing authorities, the line of demarcation between a violation and a non-violation of Art. XI, § 4 appears to be whether the particular aid primarily benefits the student or the institution itself. Tuition grants, transportation of students the loaning of textbooks etc. have been viewed by this Office as being primarily for the benefit of students because such is not deemed to be a "direct benefit" to a "private educational institution."

Likewise, in the case of Seegars v. Parker, 256 La. 1039, 241 So.2d 213 (1970), the Louisiana Supreme Court addressed the question of the validity of an Act which enabled the State to provide a salary supplement to teachers in private schools so long as the teacher taught only secular courses. The design of the statute was to insure that the State paid qualified teachers of approved non-public schools an amount equal to that paid public school teachers. The supplement was paid directly to the teacher rather than the school.

The Court, in a sharply divided opinion, held that the Act was invalid under Louisiana's Constitutional prohibition against an appropriation to a private corporation. The majority appears to have accepted the dissenting opinions' characterization of this form of aid as "indirect", but the majority noted that the Louisiana provision under review did not distinguish between "direct" and "indirect" appropriation or aid. The Court thus rejected the dissent's reasoning and observed:

> [t]he dissent previously filed has concluded that an amendment to this provision, which, among other things, changed the

> language from "used for the support of" to "made to", effected a vital change which would allow indirect public funding of private and sectarian schools through the payment of teacher's salaries. We cannot accept this conclusion, for such a construction would disregard the purpose of Article 12 and other constitutional provisions. The prohibition is against any appropriation -- direct or indirect -- to any non-public school.

The various dissenting opinions were of the view that while the referenced provision prohibited "direct" aid, "indirect" assistance was not prohibited even though the provision did not explicitly distinguish between the two. Said one dissenting justice,

> [o]bvioulsy, the constitutional restriction was relaxed when the language was changed from "shall be used for the support" to "shall be made". The meaning to be derived from this revision is that so long as the appropriation is not "made to" the private or sectarian school it incidentally support such a school.

241 So.2d at 231. Another dissenting justice concluded that the Act in question "does not provide for an appropriation of public funds to any private or sectarian school. It merely provides for a contract to purchase educational services, such contract to be entered into with the teacher individually." Id. at 235 (emphasis added). A third dissent reasoned that "[t]he present funds are not appropriated to any school; nor, ... can it reasonably be said that, by interpretation, the scope of this prohibition can be expanded to include the furnishing of supplemental pay directly to teachers of children attending nonpublic schools." Id. at 237.

Recently, in an Informal Opinion, dated September 27, 1995, we concluded that Art. XI, § 9 "'does not prohibit the State [nor its political subdivisions] from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.'" [Quoting State ex rel Creighton University v. Smith, 217 Neb. 682, 353 N.W.2d 267, 272 (1984)]. We found that such a contract with a private educational institution was not a "direct" appropriation of public funds.

And in Adams v. County Commrs. of St. Mary's Co., 26 A.2d 377 (Md. 1942), the Court upheld a statute which made a donation of public funds to certain private schools for the transportation of the school children. The public funds were being distributed under a contract with the schools in the proportion of mileage traveled by the buses. Relying upon Bd. of Ed. v. Wheat, 174 Md. 314, 199 A. 628, the Court upheld the expenditure as not being the donation of public funds for a private purpose. The Court

noted that "[u]nder the statute considered in the Wheat case transportation was to be given in buses provided for public school children, and only those entering and leaving along the regular routes of those buses; the provision now sought to be enjoined is a contribution to the parochial schools for transportation in their own buses." While observing that the Wheat case was "not in agreement with" other decisions elsewhere, the Court stood by its decision in Wheat, saying that

> ... the view taken in the Wheat case was that it could have been the design of the General Assembly in the statute considered to give aid and protection to the children on the highways, or to facilitate the compulsory attendance at some school and that the possibility of this design prevented holding the enactment unconstitutional. ... This court still considers the reasoning sound and adheres to the decision on that statute.

Continuing, the Court concluded that the "decision in the Wheat case that the public funds may be expended to aid the children appears to validate the action questioned in this one. 26 A.2d at 380.

As you indicate, Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) is the only South Carolina case which has construed Art. XI, § 9 since it was revised in 1973. In Gilbert, a provision in a lease arrangement between a hospital district and a private non-profit hospital (McLeod in Florence) was attacked as violative of Article XI, § 4. The questioned lease clause enabled McLeod "to operate such medical ancillary facilities as may be desirable for a full service regional hospital and referral center and carry out medical research and education." (emphasis added). Our Supreme Court rejected the argument, concluding that the

> ... obvious basic intent of this provision is to permit the training of nurses and interns, a universally accepted function of a hospital of the size here contemplated. These educational functions are positive factors in treating the sick, and it is illogical to conclude that such functions would convert the facility into a private educational institution within the language of the Constitution.

267 S.C. at 183 (emphasis added). Thus, while Gilbert is not really a close case with respect to McLeod Hospital's being a "private educational institution", the Court's analysis -- whether certain educational functions convert a facility which would not otherwise be a "private educational institution" into such -- is particularly helpful here.

In light of the Supreme Court's reasoning in Gilbert, I doubt that Florence Crittendon would be deemed a "private educational institution" for purposes of Article XI, § 4, even though the organization clearly performs important educational functions. The material you have provided indicates that Florence Crittendon is referred to either as "Florence Crittendon Program" or the "Florence Crittendon Home". Moreover, I have earlier referenced the fact that the mission of Florence Crittendon is to provide and promote comprehensive medical, educational and support services for single parents and their children.

Further, authorities elsewhere have not characterized Florence Crittendon as either a "school" or an "educational facility". See, Palisades Citizens Assoc. v. Weakly, 166 F.Supp. 591, 599 (D.D.C. 1958) [Florence Crittendon is a "home for unwed mothers and rehabilitation center for young girls ...".] Crittendon has also been characterized as "'an organization that houses unwed mothers and teaches them parenting skills.'" Stamm, 9-Oct. W. Va. Lawyer 14 (1995). Of course, the issue of whether or not a particular entity is a "private educational institution" is ultimately a question of fact. Cf., Shea v. State Dept. of Mental Retardation, 279 S.C. 604, 310 S.E.2d 819 (Ct. App. 1983) [whether or not Midlands Center was a "hospital or other medical facility" was a fact question. However, based upon the information presented to me, it is my opinion that Gilbert's analysis would in all likelihood compel the conclusion that Florence Crittendon Program is not a "private educational institution" within the meaning of Art. XI, § 4.

Assuming, however, that the Court were to characterize Florence Crittendon as within the scope of Art. XI, § 4, I would agree with your conclusion that the payment of the rent as you have outlined would cross the constitutional line. I cannot see how rent payments could be argued to be benefitting primarily those young women participating in Florence Crittendon if Art. XI, § 4 is to have any meaning at all. The use of the building could be put to purposes other than the education of students. Payment for teachers' salaries would, on the other hand, be constitutionally defensible since, as I have indicated, there is authority which concludes that such payments "indirectly" benefit the institution. Seegars, supra. Moreover, it is my understanding that just as in Seegars, payment is made directly to the teacher rather than the institution. A court could view this arrangement as a contract with the teacher to purchase educational services for Florence Crittendon students and, thus, an "indirect" benefit to the institution (assuming even that a court would deem Florence Crittendon an "educational institution for purposes of Art. XI, § 4). Cf. Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981) (scholarship program to needy students paid directly to the student to be used at public or private institution, constitutionally valid as only "indirect" benefit to private institution).

Even under the worst-case scenario -- i.e. a court were to conclude that both of these specific expenditures you have referenced are constitutionally invalid -- such would,

of course, not mean that the District could not still assist the Florence Crittendon program financially through "indirect" expenditures. As I have pointed out, where expenditures primarily benefit the student, rather than the institution, -- such as is the case with tuition payments, purchases and loans of textbooks and other supplies, as well as payment of student transportation, such is not deemed to be a "direct" benefit to the institution for purposes of Art. XI, § 4. Thus, the District would be free if it so chose to provide Florence Crittendon with any "indirect" benefit primarily benefitting participants in the program which meets the requirement of constituting a public purpose and which is within the corporate purpose of the District of educating the children of the District.

We addressed this issue of determining whether the benefit is "direct" in Op. Atty. Gen., November 10, 1988. There, the question was whether a county could loan or donate money to a private, post-secondary educational institution. We stressed the primarily factual nature of the question of whether a particular expenditure provides a "direct benefit" to a private educational institution, wherein we stated:

> [w]hether a particular grant would constitute a "direct benefit" to invoke this provision [Art. XI, 4] would be a question of fact, but no information has been provided as to the details of this grant and addressing questions of fact does not fall within the scope of opinions of this Office. (Op. Atty. Gen., December 12, 1983.) Therefore, the Cherokee County Council will need to determine whether the donation or loan would constitute a "direct benefit" under Art. XI, Sec. 4. ... Therefore, you may wish to consider a declaratory judgment action here if the application of these constitutional provisions to this matter remains in question.

Conclusions

1. Of course, any decision by the District to assist Florence Crittendon financially is a policy question for the District to determine. From the standpoint of the legalities of such assistance, however, and in light of the Court's analysis in Gilbert v. Bath, it is my opinion, based upon the information provided to me, that the Florence Crittendon Program is not a "private educational institution" within the meaning of Art. XI § 4.

2. Assuming, however, that a court nevertheless concludes that the Florence Crittendon Program is a "private educational institution" for purposes of Art. XI, § 4, I agree with your conclusion that the payment of Florence Crittendon's rent would cross the constitutional line of that provision. Rent payments, in my

judgment, would be deemed primarily for the benefit of Florence Crittendon, rather than those involved in the program, and thus a court could conclude such payments were a "direct" benefit to Florence Crittendon. On the other hand, while the payment of teachers' salaries would also be subject to question, I feel that such payments are constitutionally defensible. As opposed to rent payments, teachers' salaries could be upheld as primarily benefitting those involved in the FCP rather than Florence Crittendon itself. Such payments could be viewed as having "no purpose beyond that of aiding the State itself in its duty to educate its citizenry." Op. No. 3687, supra.

3. Even assuming that a court held that the District could not constitutionally appropriate funds for rent and teachers' salaries, however, such does not mean that the District could not provide other financial support to FCP through "indirect" benefits if it chose to do so. Such "indirect benefits" are entirely constitutional pursuant to Art. XI, § 4 so long as the assistance serves a valid public purpose and is within the District's corporate authority. The District itself would determine whether a particular benefit -- if it chose to grant it -- would be "indirect" for purposes of Article XI, § 4.

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

RDC/an