1450 January

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

March 19, 1985

Mr. Edward M. Shannon, III, Agency Director
Higher Education Tuition Grants Agency
Post Office Box 11638
Columbia, South Carolina 29211

Dear Mr. Shannon:

You have asked our opinion as to the following: does Section 59-113-10 of the Code of Laws of South Carolina (1976 as amended), which provides for tuition assistance grants by the State to students attending "independent institutions of higher learning", authorize the disbursal of state funds to students attending schools which operate as "for profit" corporations? In view of the serious constitutional problems which may be raised by such disbursal, public funds probably should not be used in this manner, unless approved by the courts.

Section 59-113-10 of the Code establishes the State tuition assistance program. The program has been described by our Supreme Court as follows:

> The title of the act in question states that it is to provide tuition grants to students attending independent institutions of higher learning." The act creates a committee to administer the tuition grants; sets forth the eligibility requirements for students to receive aid; makes unavailable a tuition grant to any student "enrolled in a course of study leading to a degree in theology, divinity, or religious education"; and sets forth the standards to be met by any participating institution of higher learning....

Hartness v. Patterson, 255 S.C. 503, 505, 179 S.E.2d 907 (1971). An "independent institution of higher learning" is defined, pursuant to Section 59-113-50, as

> ... any independent senior college in South Carolina certified for teacher training by the State Department of Education, or accredited by the Southern Association of Colleges and Secondary Schools and any independent junior college accredited by the Southern Association of Colleges and Schools, or accredited by any other accrediting agency recognized and designated by the State Department of Education. (emphasis added).

It is our understanding that the institution in question, which operates as a for profit corporation, has been accredited by an "accrediting agency recognized and designated by the State Department of Education." Thus, at first glance, it would appear that the funds should be distributed to eligible applicants attending that institution.

On the other hand, those who administer the tuition grants program contend that they do not now have, nor have they ever had, the authority to disburse funds to those attending "for profit" institutions of higher learning. This contention is supported by the apparent fact that since the tuition grants program was enacted in 1970, no students attending for profit institutions have received financial assistance pursuant thereto, although such assistance has been sought. 1/ This longstanding interpretation by those charged with the administration of the program would undoubtedly be given weight by our courts. Etiwan Fertilizer Co. v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1982); Sutherland, Statutory Construction, § 49.05.

1/ We understand that in 1979 an attempt was made to enact an amendment to § 59-113-10 et seq. which would have the effect of allowing students to attend for profit institutions. Apparently, such amendment was defeated. See H.2520 of 1979.

Moreover, in seeking legislative intent, courts often consider cognate legislation. Subsequent legislation may be of great assistance to the courts in indicating the construction given to former legislation by the Legislature itself. Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956). In this regard, it is well recognized that

> ... [w]here two acts in pari materia are construed together, and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act containing such provisions where not inconsistent with the purposes of the act.

82 C.J.S., Statutes, § 366.

Close in time to the act providing for tuition assistance, the General Assembly enacted the Educational Facilities Authority Act for Private Non Profit Institutions of Higher Learning. See, § 59-109-10 et seq. This Act was designed to provide financial assistance for the construction of facilities to private institutions of higher learning in the State. Section 59-109-20 outlines the legislative purpose of that Act, a purpose which is virtually identical to that of the tuition assistance act:

> ... that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist youth in achieving the required levels of learning and development of their intellectual and mental capacities.

Compare, preamble to Act No. 1191 of 1970.

The Educational Facilities Authority Act defines an institution of higher learning as a nonprofit educational institution within the State. See, Section 59-109-30(e). Thus, in an act similar in purpose to the Tuition Assistance act, we have an indication that, as a matter of public policy, the Legislature intended to limit public assistance to such institutions to those corporations which are incorporated as not for profit. A court would likely not ignore this fact in construing Section 59-113-10 et seq. as to whether such act relates to for profit corporations.

Nor would a court overlook the various constitutional difficulties which could arise if Section 59-113-10 et seq. is not construed similarly. Both the federal and State Constitutions, by virtue of their Due Process Clauses, require that § 59-113-10 et seq. meet with the public purpose test. As our Supreme Court stated recently in Carll v. South Carolina Jobs-Economic Development Authority, Op. No. 22248 (February 26, 1985), quoting Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 227, 246 S.E.2d 869, 873 (1978):

> 'All legislative action must serve a public rather than a private purpose,' [Elliott v. McNair], 250 S.C. at 86, 156 S.E.2d at 427. 'In general, a public purpose has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division....' Caldwell v. McMillian, 224 S.C. 150, 172 S.E.2d 798, 801 (1953).... It is a fluid concept which changes with time, place, population, economy and countless other circumstances. Id. It is a reflection of the changing needs of society.

Moreover, Article X, § 11 of the State Constitution provides in pertinent part:

> The credit of neither the State nor any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation or any religious or other private educational institution except as permitted by Section 3, Article XI of this Constitution.

And Article XI, § 4 provides 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."

It is clear that, generally speaking, the framers of these latter two constitutional provisions were of the view that the State's providing tuition grants to students attending private institutions of higher education was consistent with those

constitutional provisions. See, Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895; Minutes of the Committee, pp. 216-225. However, there is no evidence that the framers anticipated that such a program would be extended to include use of the State's assistance to students attending for profit institutions. Instead, a fair review of the debates of the framers of the foregoing constitutional provisions clearly indicates that the concept of tuition assistance to students attending private institutions in South Carolina concerned those institutions such as Wofford, Furman, Newberry, etc. which operated as nonprofit corporations. Thus, we must now review whether our constitution can be read to extend so far as to permit State aid to be used to assist students attending for profit institutions. We believe that a court would not permit public funds to be used for this purpose.

As noted above, Article X, § 11 prohibits use of the State's credit for the benefit of any individual, company, association, corporation or any religious or other private educational institution except as permitted by Article XI. It is true that a number of courts in other jurisdictions have concluded that a grant or appropriation of public funds to a private entity is not a "pledge" of "credit" for purposes of such a constitutional provision. Johns Hopkins Univ. v. Williams, (Md., 1952), 86 A.2d 892; Bannock v. Citizens Bank and Trust Co., (Idaho 1933), 22 P.2d 674; McGuffey v. Hall, (Ky., 1977), 557 S.W.2d 401; In Re Interrogatories, (Colo., 1977), 566 P.2d 350. Other courts, however, conclude such expenditures do fall within the meaning of the constitutional provision. Wash. State Highway Comm. v. Pacific N.W. Bell Co., (Wash., 1961), 367 P.2d 605; O'Neill v. Burns, (Fla. 1967), 198 So.2d 1; State ex rel. Charleston v. Sims, (W.Va., 1949), 54 S.E.2d 729; State ex rel. Bldg. Comm. v. Casey, (W.Va., 1977), 232 S.E.2d 349; State ex rel. Dickner v. Defenbacher, (Ohio, 1955), 128 N.E.2d 59; Detroit Museum of Art v. Engel, 187 Mich. 432, 153 N.W. 700; Terrell v. Middleton, (Tex.Civ.App., 1916), 187 S.W. 367.

Our own Supreme Court has stated that the purpose of Article X, § 11 (formerly Article X, § 6) "was to prevent the State from entering into business hazards which might involve obligations of the public." Chapman v. Greenville Chamber of Commerce, 127 S.C. 173, 120 S.E. 584 (1923). The word credit has been construed to mean any "pecuniary liability" or "pecuniary involvement." Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Accordingly, this Office has over the years

consistently concluded that the provision was designed to "prohibit the use of ... funds to aid in the establishment of privately operated enterprises...." Op. Atty. Gen., May 8, 1964. As was said in Op. No. 1363 (July 19, 1962), this constitutional provision relates to "[t]he expenditure of public funds...." A long line of opinions of this Office is in accord. Op. Atty. Gen., No. 2726, (August 25, 1969); Op. Atty. Gen., August 7, 1963; Op. Atty. Gen., December 7, 1963; Op. Atty. Gen., March 5, 1964; Op. Atty. Gen., March 18, 1965; Op. Atty. Gen., July 25, 1969. Therefore, unless our Supreme Court rules otherwise, we assume this constitutional provision is invoked when public funds are appropriated, granted or donated to a private body. Op. Atty. Gen., July 12, 1984. 2/

Moreover, this Office has always concluded that Article X, § 11 is violated when public funds are appropriated to a private entity and such appropriation is not "for a public purpose." Op. Atty. Gen., December 18, 1979; Op. Atty. Gen., April 28, 1971; Op. Atty. Gen., No. 1822 (March 18, 1965). And only recently, this Office stated:

2/ It is true that our Supreme Court recently stated in Carll v. S.C. Jobs-Economic Dev. Authority, supra, that Article X, § 11 "relates soiely to general obligation bonds payable from the proceeds of ad valorem tax levies." Slip Op. at 5, quoting Elliott v. McNair, 250 S.C. at 85. Such language obviously could be construed as limiting Article X, § 11's applicability to this situation. However, the Court in Carll also reiterated the definition of "credit" in Elliott as including any "pecuniary liability". Slip Op. at 6. Moreover, the Court was satisfied that in Carll, the particular statute did not allow "assets of authority being transferred to private parties." Supra. Thus, we do not believe that Carll in any way changes this Office's prior interpretations of our Court's decisions construing Article X, § 11. Moreover, even if the situation at hand does not involve a "pledge of the State's credit, the general public purpose test must still be met. Carll, supra at 4-5. See below.

> This section (formerly Art. X, § 6) has been construed by the Court to prohibit the expenditure of public funds "for the primary benefit of private parties." State ex rel. McLeod v. Riley, 276 S.C. 323, 329-30, 278 S.E.2d 612, 615-16 (1981); Feldman Co. v. City Council of Charleston, 23 S.C. 57 (1886).

Op. Atty. Gen., November 16, 1983. Again, such is consistent with the general constitutional requirement that all legislation and taxes levied must be for a public purpose. Elliott v. McNair, supra; Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923).

Our Supreme Court has consistently held the view that the public purpose served must be primary and not merely incidental. As the Court stated in Bauer v. S.C. Housing Authority, 271 S.C. 219, 228, 246 S.E.2d 869 (1978),

> ... the Legislature cannot under the guise of public purpose enact a law that in its realistic operation benefits, not the enumerated public purpose, but essentially private interests.... Or, as stated in Anderson v. Baehr, [265 S.C. 153, 217 S.E.2d 43 (1975)] ... "It is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of 'public purpose'," 265 S.C. at 163, 217 S.E.(2d) at 48.

On the other hand, "the mere fact that benefits will accrue to private individuals or entities does not destroy public purpose." Bauer, supra, 271 S.C. at 229. Quoting the Wisconsin court, our Court in Bauer stated that where "whatever benefit is derived by private individuals and specific localities is necessary and incidental to the promotion of public health, safety, education, morals, welfare and comfort of the people of this state", public purpose is maintained. The Court has recognized that "merely because an individual or private corporation makes a profit as a result of legislation does not change the public purpose into a private purpose." South Carolina Farm Marketing Bureau v. S.C. Ports Authority, 293 S.E.2d 854, 857 (S.C. 1982).

In short, the test is whether the benefit is "primarily" to the public or instead primarily promotes private interests. Supra. As the Court stated in State ex rel. McLeod v. Riley, supra, quoting from earlier cases,

> However certain and great the resulting good to the general public, it does not by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprise or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary.

276 S.C. at 329. Each case must be determined according to its own peculiar circumstances. Byrd v. County of Florence, 315 S.E.2d 804 (S.C. 1984).

There is little quarrel with the fact that education, including higher education, generally serves an important public purpose. Indeed, as our Supreme Court stated in Hunt v. McNair, 255 S.C. 71, 78, 177 S.E.2d 362 (1970):

> It is too late to question whether or not the promotion of secular education is a public purpose as it is universally acceptable as a proper public purpose. Everson v. Board of Education, 330 U.S. 1, 7, 9 67 S.Ct. 504, 507, 508, 91 L.Ed. 711 at 719, 720; Cochrane v. Louisiana State Board of Education, 281 U.S. 370, 374, 50 S.Ct. 335, 74 L.Ed. 913. If the general public benefit is the dominant interest served, constitutional demands are not offended, even though the aid inures to the benefit of a private institution.

Courts including our own as well as the opinions of this Office have consistently distinguished between nonprofit and for profit corporations in evaluating whether the foregoing test has been met. We will now review these authorities. In Kentucky Bldg. Comm. v. Effron, 220 S.W.2d 836, 837 (Ky. 1949), the Court held that it was permissible to use public funds for the benefit of a nonprofit hospital. The Court stated:

> ... the construction of nonprofit hospital facilities is for a public purpose. [citations omitted] ... It is well settled that a private agency may be utilized as the pipeline through which a public expenditure is made, the test being not who receives the money, but the character of the use for which it is expended. . . [T]he construction of these nonprofit hospitals is for the common good of all people throughout the State.

In State v. City of Miami, 72 So.2d 655 (Fla. 1954), the Florida Supreme Court approved the issuance of revenue certificates to finance the construction of a warehouse on property owned by the city and payable from the revenues derived from leasing the warehouse to a nonprofit organization. Said the Court,

> In the instant case, there is no use by the city of its authority "for private gain by a private corporation." As noted above, the Committee is a non-profit organization whose members derive no pecuniary gain whatsoever from their activities although we have no doubt that the personal satisfactions and spiritual values which accrue from their unselfish devotion to this public service are far more rewarding to them than would be any monetary compensation.

72 So.2d at 656.

In Raney v. City of Lakeland, 88 So.2d 148 (Fla. 1956), the Florida Supreme Court upheld a lease of certain municipal property by the City of Lakeland to the Garden Club of Lakeland for a nominal rental. The lessee was required to establish and maintain as a public service a public library and an educational information service in the field of horticultural beautification. The Court explained its reasoning in approving the transaction:

> The lessee, Garden Club of Lakeland, Inc.. is not a private corporation for profit. If it were, this lease could not stand. On the other hand, it is quasi public in nature. By this lease it obligates itself to render a public service

> unlimited and unrestricted to its own membership. The lease is circumscribed by restrictions that preclude the exploitation of the land and contemplated improvements for private gain. There could be little question that by a substantial additional expenditure of public funds the city could carry on the program which the Garden Club undertakes to effectuate without additional demands on the public treasury.

88 So.2d at 151. The Court went on to say that its opinion

> ... is not to be construed as carte blanche authority to municipal corporations to exploit publicly owned land or extend the favor of the public funds and credit directly or indirectly to promotional schemes or devices aimed immediately or ultimately at lining the pockets of private business or individuals. (emphasis added).

Supra.

The Florida Supreme Court, in Overman v. State Board, 62 So.2d 696 (Fla. 1952) reviewed an act which authorized the payment of $3,000 per year for each Florida student enrolled in the first approved and accredited medical school established in the State. In that instance, the medical school was incorporated as a nonprofit corporation and thus the Court upheld the act. To the argument that the act unlawfully pledged or loaned the credit of the State, the Court responded:

> ... we do not think a nonprofit Educational Institution, such as the University of Miami, is any such "chartered company" "individual company" "corporation or association" as is contemplated by Sections 7 and 10, Article IX. 3/

3/ The Florida constitutional provisions in question in this case and those discussed above are virtually identical to our present Article X, § 11.

In other words, the State was utilizing and supporting the non-profit corporation to in order perform the valid State function "of medical education of Florida men and women." This the Court said was constitutionally permissible.

The opinions of this Office have consistently recognized that our Supreme Court has made the same distinction between non-profit and profit corporations as the above cases from other jurisdictions. For example in a 1979 opinion of Attorney General McLeod it was concluded that where funds were appropriated to a nonprofit corporation for a valid public purpose, Article X, § 11 was not infringed. There, Attorney General McLeod stated:

> Public funds may be appropriated to a private nonprofit, nonsectarian organization if the funds are to be expended in the promotion of a valid public purpose.

It was determined in that same opinion that the South Carolina Supreme Court case of Bolt v.Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) was controlling in such a situation. Attorney General McLeod wrote in that regard:

> In brief, this case recognizes the validity of appropriation of public funds for the performance of a public function through the agency of a nonprofit, nonsectarian entity, such as organizations which provide health services, welfare services, and other public purposes for which appropriations are made.

Op. Atty. Gen., December 18, 1979, at 1. The cases of Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) and Battle v. Wilcox, 128 S.C. 500, 122 S.E. 516 (1924) are in accord.

By contrast, in Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947), the Court upheld Charleston County's right to make a contribution to the State Medical College. Reaffirming its earlier holding in Battle v. Wilcox, supra, which had involved a nonprofit corporation, the Court distinguished the situation before it from public aid to a for profit corporation.

> ... [m]anifestly, if the proposed hospital here were a private enterprise for profit, the County would not be authorized under the Constitution to issue bonds in aid thereof,

> even if certain public benefits might be derived therefrom. But when as here, the project is a public enterprise owned by the State, the local benefits accruing to the county are determinative of whether its bonds may be issued to contribute to the establishment thereof.

210 S.C. at 117.

Other opinions of this Office are in accord. For example, in Op. No. 2726 (August 25, 1969), in reliance upon Bolt v. Cobb, supra, it was concluded that a county could subsidize a non-profit ambulance service. However, it was also noted that "if the ambulance service is private and is intended to make a profit, public funds could not be provided to aid its operation", because such would contravene Article X, § 11 [then § 6]. In Op. Atty. Gen., No. 2810 (January 6, 1970) it was again stated that a municipality may make a grant of money for the construction and maintenance of a juvenile home if the organization is nonprofit and nonsectorian. See also, Op. Atty. Gen., July 12, 1984 [state appropriation to a nonprofit rapid transit authority probably permissible].

Further, it is well established that a distinction made between nonprofit and profit corporations for purposes of public expenditures to students is a reasonable one. For example, in Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972), the Court stated:

> It is certainly rationale, and therefore compatible with the Equal Protection clause, for government to pursue a policy which does not funnel state loans into the hands of students who, attending institutions conducted for profit, necessarily repaying tuition fees set at a level which makes possible that profit.

191 S.E.2d at 272. The same conclusion was reached by our Supreme Court in Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362 (1970).

Applying the rationale of the above authorities to the situation at hand, it is clear that serious constitutional difficulties would arise if tuition assistance funds are disbursed to students attending for profit institutions. As noted above, the tuition assistance program was reviewed extensively by our Supreme Court in Hartness v. Patterson,

supra. Among other things, an attack was made in Hartness upon the use of public funds to provide tuition assistance to students attending sectarian colleges on the basis that such payments constituted aid to institutions which were "wholly or in part under the direction of" a church or religious organization, in contravention of then Article XI, § 9.4/

The Court in Hartness described the relationship between the grant and the participating institution, in response to the defendant's argument that the grants did not constitute aid to the schools because payments were made not to the institution but the student.

> We 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 the 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. (emphasis added).

255 S.C. at 505-508. Demonstrating the significance of the aid to the institution, the Court described the tuition assistance program:

4/ Article XI, § 9, which as the predecessor to Article XI, § 4 provided in pertinent part:

> The property or credit of the State of South Carolina ..., or any public money, from whatever source derived, shall not, by gift, 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.

> The Stipulation of Facts shows that there are private colleges have space available for approximately 5313 additional students without increasing existing facilities or additional capital outlays. It is apparent that one of the main purposes of the tuition grant is to reduce the cost to a student for attending the private colleges and thereby attract additional students to their campuses so as to fill the vacancies in their student body. Such would have the effect of adding additional funds to their treasuries and thereby improve their financial status. It is perhaps better stated in respondents' brief as follows: "The indirect benefit accruing to the private colleges will consist of their being able to attract sufficient students to their campuses to continue to function." Such constitutes aid to the religious schools. (emphasis added). 5/

265 S.C. at 508.

It is true that in Hartness, the predecessor to Article XI, § 4 (Article XI, § 9) proscribed all aid, "direct or indirect" to sectarian institutions. However, the Court's emphasis upon the importance of the tuition grant to the institution itself is clear throughout the decision. Rather than deeming such aid to

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5/ The fact that the Court characterized the aid a "indirect" by no means indicates such aid is any less substantial. The distinction between direct and indirect turns, not on the magnitude of either the cause or the effect but entirely on the manner in which the effect has been brought about. Carter v. Carter Coal Co., 298 U.S. 238 (1936). In this instance, the Court in Hartness characterized the aid as "indirect" to the school because it is not passed from the State immediately to the institution. Such is not to say that the tuition assistance is incidental or of minor importance to the school however, but is, in the words of the Court, of "material" benefit to it.

the private institution as incidental, the court characterized the public assistance as "material" to the school. Indeed, in a subsequent case, Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), the Court distinguished the situation of loans to all eligible students, whether or not they attended public or private colleges, from the situation addressed in Hartness:

> In Hartness v. Patterson ... we held that tuition grants to students attending independent institutions of higher learning amounted to aid to these institutions in violation of the section here relied upon. But the clear purpose of that Act was to aid "independent institutions of higher learning" as defined, of which sixteen out of a total of twenty-one which qualified were church supported. The direct tuition grants were, of course, of public money, and our conclusion that the Act violated Article XI, Section 9 was inevitable.
>
> In this case, the emphasis is an 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. (emphasis added).

259 S.C. at 412-413. Moreover, unlike the Hartness case, the situation in Durham involved no expenditure of public funds. Supra at 413.

Thus, our Supreme Court, in both Hartness and Durham has already found that the "clear purpose" of the State's tuition grant program is to provide "material" aid to private institutions of higher learning. The common and ordinary meaning of "material" is "essential", "important", "necessary" and "weighty." See, 26A Words and Phrases, p. 209 et seq.,"material"; Webster's New International Dictionary. In terms, then, of our Supreme Court's own characterization of the importance of the tuition grants program to the private institution itself, such

aid can hardly be characterized as incidental. See note 4 above.

Accordingly, we believe that it would cross the line between public purpose and private purpose if public funds in the form of tuition assistance grants are disbursed to students attending for profit institutions. Based upon the foregoing authorities, we conclude that extending the tuition assistance to students attending for profit institutions would, in essence, assist such institutions in making a profit. Since our Supreme Court has, in Hartness, recognized that the grants program has the effect of increasing the number of students at private institutions and thus "adding additional funds to their treasuries and thereby improv[ing] their financial status", it is our opinion such assistance to profit institutions is constitutionally prohibited. And, in our view, since the Court has characterized the assistance provided by this particular program as "material" aid to the institutions, the problem remains the same whether the assistance is deemed direct or indirect. To paraphrase the Florida Supreme Court's words in Raney v. City of Florida, supra, it crosses the line from public purpose to private purpose when the State "extends the favor of the public funds and credit directly or indirectly to [transactions] ... aimed immediately or ultimately" at allowing private businesses to make a profit. (emphasis added).

We recognize, of course, that on its face, § 59-113-10 et seq. does not distinguish between profit and nonprofit institutions in defining "independent institution of higher learning." Thus, it could be argued that the general public purpose served by the State's creation of an additional method for encouraging higher education in the form of tuition assistance to be paramount and could, therefore extend such purpose to include payments to students attending for profit institutions. Courts elsewhere have reasoned that statutes providing for tuition assistance to students are constitutionally valid. See, Vermont Educational Buildings Financing Agency v. Mann, 247 A.2d 68 (Vt. 1968); Americans United v. Rogers, 538 S.W.2d 711 (Mo. 1976); Americans United v. State, 648 P.2d 1072 (Col. 1982). But, in each of those cases, the State's statutory scheme went no further than nonprofit corporations. In our view therefore, the public purpose doctrine does not extend so far as including for profit schools, particularly in view of our Court's determination that the program constitutes "material aid" to the school itself.

In a recent opinion this Office addressed an analogous situation involving State aid to promote tourism. There, we recognized that recent decisions of our Supreme Court might prompt a court to approve, in certain circumstances, aid to for profit corporations, so long as it is clear that such is for a valid public purpose. See, Taylor v. Davenport, 316 S.E.2d 289; S.C. Public Service Authority v. Summers, 318 S.E.2d 113. Nevertheless, we cautioned that such use of public funds is still suspect and advised that such aid should be limited to nonprofit corporations until our Court definitively ruled otherwise. We think the same advice governs here.

CONCLUSION

Therefore, based upon the foregoing authorities, we would advise that in view of the apparent longstanding interpretation of § 59-113-10 et seq. by the Tuition Grants Committee, as well as the above mentioned possible constitutional problems, the Tuition Assistance Act should be interpreted as limited to students attending nonprofit institutions. Put another way, unless approved by the courts, public funds should not be disbursed to students attending for profit institutions. Such an interpretation would be in keeping with past practices. And it would be in accord with the well recognized rule that a statute should always be construed in a constitutional manner. Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723. The General Assembly may wish to clarify present § 59-113-10 et seq. along these lines.

If we may be of further assistance to you, please let us know. With kindest regards, I am

Sincerely yours,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg