ALAN WILSON
ATTORNEY GENERAL

January 18, 2018

The Honorable Tom Davis, Member
South Carolina Senate
P.O. Box 142
Columbia, SC 29202

Dear Senator Davis:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> I ask that your office provide an opinion on whether the referenced Educational Credit for Exceptional Needs Children proviso (the "ECENC" proviso) violates Article XI, § 4 of the South Carolina Constitution (the "Blaine Amendment"). ...
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> On March 21, 2011, your office opined that Senate Bill 414, which contemplated scholarships being granted by private 501(c)(3) charitable organizations (and funded by donations from individuals and corporations subsequently claimed by the donors as credits against state income tax) did not violate the Blaine Amendment....
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> The ECENC proviso differs from Senate Bill 414 in that donations are not made to private 503(c)(3) entities, but to a public charity formed under IRC Section 509(a)(1) through 509(a)(4), with the charity governed jointly by five directors and the state Department of Revenue. Does this increased degree of state involvement in the scholarship make it unconstitutional?

Law/Analysis

I. March 21, 2011 Attorney General Opinion regarding Senate Bill 414.

As your letter notes, this Office's March 21, 2011 opinion concluded that Senate Bill 414, the Education Opportunity Act, complied with both the Article I, § 2 and Article XI, § 4 of the South Carolina Constitution. Op. S.C. Atty. Gen., 2011 WL 1444725 (March 21, 2011). The request letter described Senate Bill 414's relevant features as providing:

> (1) the receipt of scholarships by students to attend independent primary or secondary schools of their choice; (2) the receipt of a tax credit for tuition paid for

> a student to attend an independent primary or secondary school of his choice; and (3) the receipt of a tax credit for contributions made to student scholarship organizations. Under S. 414, the students and their parents or guardians are the direct beneficiaries of the scholarship funds and they decide where to use such funds, not the government. Similarly, where tax credits are received for tuition paid or for contributions made to student scholarship organizations, the persons or entities paying tuition or making such contributions are the direct beneficiaries of the tax credits under the legislation. Moreover, the parents or guardians who received tax credits decide where the tuition is paid, not the government.

Id. at 1. The opinion provided a further summary of the bill as follows:

> 1) a qualifying student is eligible to receive a scholarship to attend an independent school if he or she meets certain conditions, and the value of those scholarships may not exceed the greater of 50% of the state's projected allocation to the resident public school district of the student or the statewide base student cost according to Section 59-20-20;
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> 2) one may be allowed to take a tax credit if the person files state income tax for tuition paid for a qualifying student to attend an independent school upon certain conditions. A tax credit may not be taken if same student's enrollment in independent school is terminated;
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> 3) South Carolina Budget and Control Board must calculate savings to the state derived from the provisions of this article;
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> 4) To provide for a tax credit for a person who teaches a qualifying student at home;
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> 5) To allow a corporation or person to claim a credit against state income tax or franchise fees for a contribution made to a student scholarship organization;
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> 6) An "independent school" is defined as a school "other than a public school," requiring compulsory attendance, and one which does not discriminate on grounds of race, color or national origin.
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> S.414, Session 119 (2011-2012). The express purpose of the Act, as stated therein, is to "... allow maximum freedom to parents and independent schools to respond to and provide for the educational needs of children without governmental control ... ."

Id. at 3.

This Office opined that Senate Bill 414 would likely be upheld with respect to an Establishment Clause challenge under Article I, § 2 of the South Carolina Constitution. Id. at 4-6. In relevant part, Article I, § 2 requires that "[t]he General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." In Hunt v. McNair, 258 S.C. 97, 187 S.E.2d 645 (1972), aff'd, 413 U.S. 734 (1973), the South Carolina Supreme Court found Article I, § 2 to be coextensive with the Establishment Clause of the federal Constitution.

> The language of the first amendment to the Constitution of the United States and the language of Article 1, Section 4, of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions. The establishment clauses are intended to afford protection against sponsorship, financial support and active involvement of the government in religious activity. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

258 S.C. at 103, 187 S.E.2d at 648. The opinion, therefore, examined the United States Supreme Court's reasoning in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), which upheld Ohio's Pilot Scholarship Program against an Establishment Clause challenge. The Court explained its prior cases demonstrate that

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Id. at 652. Under the Ohio program, the decision of "[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school." Id. at 646. The Court found that because the program "permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice," and did not offend the Establishment Clause. Id. at 662-63. This Office opined that our state courts would likely follow the analysis in Zelman to uphold Senate Bill 414 against an Establishment Clause challenge. Op. S.C. Atty. Gen., 2011 WL 1444725, 6 (March 21, 2011).

Next, the opinion found that that Senate Bill 414 would likely be upheld with respect to a challenge under Article XI, § 4. Id. at 13. Article XI, § 4 states, "No 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." S.C. Const. art. XI, § 4

(emphasis added).[1] This Office's April 29, 2003 opinion provided a detailed description on the history of the adoption of Article XI, § 4. Op. S.C. Atty. Gen., 2003 WL 21043491 (April 29, 2003). The opinion discussed prior Article XI, § 9 and the development of constitutional the amendment which became Article XI, § 4 as follows:

> 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:
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> > [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.
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> 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

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[1] This Office's prior opinions addressing S.C. Const. art. XI, § 4 have noted that this section is often referred to as "the Blaine Amendment." Op. S.C. Atty. Gen., 2011 WL 1444725 (March 21, 2011). In Mitchell v. Helms, 530 U.S. 793 (2000), Justice Thomas described the history of the proposed Blaine Amendment to the federal Constitution as follows:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

530 U.S. 793, 828. See also Frank R. Kemerer, State Constitutions and School Vouchers, 120 Ed. Law Rep. 1, 6 n.21 (1997) ("While the Blaine Amendment failed, similar efforts at the state level were successful as alarm grew over efforts by religious interests to secure state funding for their schools. By 1890, twenty-nine states had constitutional provisions limiting the transfer of public funds for sectarian purposes.").

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 [lending] of textbooks to students, and the [lending] 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 ([lending] 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) [[lending] of department of Education films to parochial schools denominational colleges and private schools]; Op. Atty. Gen., Op. No. 83-40 (July 12, 1983) [[lending] of textbooks to six predominantly black colleges].

If the primary beneficiaries of the public funds are the students themselves rather than the institutions, then the State Constitution would not be violated.

Id. at 7–8; see also Op. S.C. Atty. Gen., 2003 WL 164474 (January 7, 2003) (The West Committee Report also stated that our courts' interpretation of Art. XI, § 4 should be made "in conjunction with interpretations being given by the federal judiciary to the 'establishment of religion' clause in the federal constitution."). The March 21, 2011 opinion concluded a court

would likely uphold Senate Bill 414 against a constitutional challenge under Article XI, § 4 as follows:

> Our courts would analyze the constitutionality of any such scholarship or tax credit program - whether use of the scholarships or tax credits involve public or private, sectarian or secular schools - as the United States Supreme Court did in upholding the Ohio Pilot Scholarship Program in the Zelman case. Similarly, the South Carolina case of Durham v. McLeod, which validated the student loan program at issue there, would serve as a guiding precedent for concluding that S.414 would, on its face, pass constitutional muster under Article XI, § 4 of the State Constitution.
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> ... As the United States Supreme Court recognized in Locke v. Davey, supra - there, in the context of the federal Establishment Clause - use of the scholarships and tax credits are, in S.414, the "independent and private choice of recipients."
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> Accordingly, it is our opinion that S.414, if enacted would be upheld as constitutional.

Op. S.C. Atty. Gen., 2011 WL 1444725, 13 (March 21, 2011).

II. Educational Credit for Exceptional Needs Children Proviso Compliance with S.C. Const. art. XI, § 4.

This opinion will next address distinctions between the ECENC proviso and Senate Bill 414 to determine whether a court would likely find it to comply with Article XI, § 4 as well. As discussed in the request letter above, the ECENC proviso is structured in similar fashion to Senate Bill 414 in that it authorizes the creation of a program which awards grants to qualifying students to attend "an independent school including those religious in nature, other than a public school." Section 109.11(A)(1). Section 109.11(B)(1) directs that the creation of the Educational Needs Children Fund (the "Fund") "shall be organized by the [Department of Revenue] as a public charity as defined by the Internal Revenue Code under sections 509(a)(1) through 509(a)(4) and consist solely of contributions made to the fund. Further, the Fund is

> governed by five directors, two appointed by the Chairman of the House Ways and Means Committee, one of which is based upon the recommendation of the South Carolina Association of Christian Schools and one which is based upon the recommendation of the Diocese of Charleston, two appointed by the Chairman of the Senate Finance Committee based upon the recommendations of the South Carolina Independent Schools Association and one appointed by the Governor based upon the recommendation of the Palmetto Association of Independent Schools. The directors of the public charity, along with the Director of the

> Department of Revenue, shall designate an executive director of the public charity.

Section 109.11(B)(3). Moreover, the Department of Revenue administers the Fund "[i]n concert with the ... directors." Section 109.11(B)(4). Section 109.11(C)(1) states that grants may be made to a qualifying student "awarded in an amount not exceeding eleven thousand dollars or the total annual cost of tuition, whichever is less." The Fund "must receive written documentation from the qualifying students' parent or guardian documenting that the qualifying student is an exceptional needs child." Section 109.11(C)(2). After approving the student's status, the Fund "must issue a check to the eligible school in the name of the qualifying student." Id. (emphasis added). Finally, Section 109.11(H) details how a taxpayer may claim a tax credit against income taxes for contributions made to the Fund or for tuition payments made on behalf of qualifying students.

The request letter essentially asks whether the distinctions regarding the level of State involvement in administering the Fund would amount to the use of public funds "for the direct benefit of any religious or other private educational institution" in violation of Article XI, § 4. When asked to opine on the constitutionality of a statute, this Office has consistently stated that

> any statute enacted by the General Assembly carries with it a heavy presumption of constitutionality. As we have often stated, any act of the General Assembly is presumed valid unless and until a court declares it invalid. 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. State ex. rel. Thompson v. Seieler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townshend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
>
> Moreover, only a court and not this Office, may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute "must continue to be followed until a court declares otherwise."

Op. S.C. Atty. Gen., 2017 WL 2601032 (June 2, 2017) (citing Ops. S.C. Atty Gen., 2015 WL 836507 (February 18, 2015); 2006 WL 269605 (January 12, 2006); 2005 WL 1383357 (May 2, 2005); 1997 WL 419880 (June 11, 1997)). Therefore, this Office's analysis of the ECENC proviso begins with the presumption of its constitutional validity.

It is this Office's opinion that a court would likely find that the increased level of the State involvement in creating and managing the Fund in the ECENC proviso, as compared Senate Bill 414, does not violate Article XI, § 4. This Office's March 21, 2011 opinion considered the "scholarship or tax credit program" to constitute public funds. Op. S.C. Atty. Gen., 2011 WL 1444725, 13 (March 21, 2011) ("Use of public funds in such case where, as here, the student, rather than the institution, is the primary beneficiary, constitutes only an 'indirect' benefit to the particular school or educational institution."). With the increased level of State involvement, including how the directors of the Fund are appointed and that these directors administer the Fund in concert with the Department of Revenue, it is this Office's opinion that a court would likely find the grant and tax credits authorized by the ECENC proviso likewise constitute "public funds." See Elliott v. McNair, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967) ("It does not matter whether the money is derived by ad valorem taxes, by gift or Otherwise."); State v. Mecham, 173 Ariz. 474, 481, 844 P.2d 641, 648 (Ct. App. 1992) ("We conclude that the term 'public money' includes not only state-owned funds but also private money held by State officials in their official capacity."); S.C. Code Ann. § 13-1-25 (defining "public moneys" to be a fund of any kind used by the Department of Commerce "notwithstanding their public or private source, and must be treated like public monies for all purposes."); 63C Am. Jur. 2d Public Funds § 1 ("It is sometimes held that the term public money includes not only state-owned funds, but also private money held by state officials in their official capacity."). As a result, the Fund must not be used "for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4.

As in our prior opinions regarding state aid programs, we are guided by the interpretation of "the federal judiciary to the 'establishment of religion' clause in the federal Constitution," to determine whether the ECENC proviso violates Article XI, § 4 by providing a direct benefit to any religious or other private educational institution. Op. S.C. Atty. Gen., 2011 WL 1444725, 10 (March 21, 2011).

As discussed above, the Zelman Court noted its prior precedent distinguished between "government programs that provide aid directly to religious schools ... and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." 536 U.S. at 646 (internal citations omitted). The aid program at issue in Zelman was held to be neutral with respect to religion, in part, because the tuition aid that ultimately reached private schools did so only after parents received a check, "exercise[d] genuine choice among options public and private, secular and religious," and then endorsed the checks over to the chosen school. Id. at 662. Senate Bill 414 followed this model in that it required the student scholarship organizations to "provide scholarships... to qualifying students to defray the cost of tuition and fees" and to "not restrict or reserve scholarships for use at a single independent school." Id. at § 3.

The ECENC proviso likewise awards grants to a qualifying student at an eligible school. Section 109.11(C)(1). However, unlike in Zelman, Section 109.11(C)(2) states that the award is issued in the form of "a check to the eligible school in the name of the qualifying student."

While this payment may be delivered more directly to an independent school than under Senate Bill 414, it is this Office's opinion that the student's parent or guardian nevertheless exercises genuine choice in selecting which eligible school's tuition he or she seeks to apply such a grant check. In Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530 (2000), Justice Thomas wrote

> If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion," Witters, supra, at 489, 106 S.Ct. 748. See supra, at 10–11. Although the presence of private choice is easier to see when aid literally passes through the hands of individuals—which is why we have mentioned directness in the same breath with private choice, see, e.g., Agostini, 521 U.S., at 226, 117 S.Ct. 1997; Witters, supra, at 487, 106 S.Ct. 748; Mueller, supra, at 399, 103 S.Ct. 3062—there is no reason why the Establishment Clause requires such a form.
> ...
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> To the extent that respondents intend their direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given directly to the school for teaching those same children, the very cases on which respondents most rely, Meek and Wolman, demonstrate the irrelevance of such formalism.

530 U.S. at 816-18. Yet, Justice Thomas cautioned that the Establishment Clause concerns are greater where funds are provided directly to a religious entity.

> Of course, we have seen "special Establishment Clause dangers," Rosenberger, 515 U.S., at 842, 115 S.Ct. 2510, when money is given to religious schools or entities directly rather than, as in Witters and Mueller, indirectly.

530 U.S. at 818-19.

> The reason for such concern is not that the form per se is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so). An indirect form of payment reduces these risks. See Mueller, 463 U.S., at 399, 103 S.Ct. 3062 (neutral tax deduction, because of its indirect form, allowed economic benefit to religious schools only as result of private choice and thus did not suggest state sanction of schools' religious messages). It is arguable, however, at least after Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), that the principles of neutrality and private choice would be adequate to address those special risks ...

530 U.S. at 819, n.8; see also Op. S.C. Atty. Gen., 2003 WL 21043491 (April 29, 2003) ("[I]f the aid is directly to the student rather than the school itself, there would likely be no constitutional problem. Here, the Legislature is authorizing contracts with eligible institutions, many of which would be private, rather than direct grants to those schools. Thus, a much closer constitutional question is raised."); Frank R. Kemerer, State Constitutions and School Vouchers, 120 Ed. Law Rep. 1, 13 (1997) ("[T]he channeling of funding to the family or to the student who then has a wide selection of public and private institutions from which to choose is an important design feature in school voucher programs because it tends to attenuate the relationship between the state and sectarian private schools.").

As discussed above, this Office's opinions have consistently recognized that the distribution of public funds to independent institutions is indirect where it results from the true private choice of individuals. Two opinions which highlight this distinction are Op. S.C. Atty. Gen., 2003 WL 164474 (January 7, 2003) and Op. S.C. Atty. Gen., 2003 WL 21043491 (April 29, 2003). In this Office's January 7, 2003 opinion, we opined that a proviso in House Bill 4879 which allowed for the appropriation of $ 3 million dollars to South Carolina's Historically Black Colleges was prohibited by Article XI, § 4 as a "direct benefit" to certain private educational institutions. The opinion found that the aid was an "obvious" direct benefit because "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." Id. In contrast, this Office's April 29, 2003 opinion regarding the South Carolina Higher Education Equalization Program found that the aid program was designed primarily to benefit students and thus was only an indirect benefit to a private educational institution as follows:

> In short, the Bill finds that improvement in the facilities and available resources of institutions which primarily serve low-income and educationally disadvantaged students will improve the "overall quality of their educational experiences." In essence, the Legislature's purpose and emphasis here "is on aid to the student rather than to any institution or class of institutions." Durham v. McLeod, supra, 192 S.E.2d at 203-204. The General Assembly's avowed an[] express intent in the enactment of S.203 is to improve the quality of higher education for all "low-income and educationally disadvantaged students" in South Carolina. This contrasts with the legislation we reviewed in the January, 2003 opinion. There, the General Assembly simply appropriated funds directly to South Carolina's historically black colleges.

Op. S.C. Atty. Gen., 2003 WL 21043491, at *11-12 (April 29, 2003). It is this Office's opinion that a court would likely find the ECENC proviso is designed primarily to benefit exceptional needs children and the funds which flow to private educational institutions are indirect as the grant award funds are only received by the institutions as a result of the private choices of the individual students to seek a grant. Therefore, it is this Office's opinion that a court would like uphold the ECENC proviso against a constitutional challenge under Article XI, § 4.

Conclusion

It is this Office's opinion that a court likely would find that the ECENC proviso, H. 3720, General Appropriations Bill for Fiscal Year 2017-2018, (Ratified Version) Part IB, Section 109.11 (DOR: Educational Credit for Exceptional Needs Children), does not violate Article XI, § 4 of the South Carolina Constitution. While this Office may comment upon the constitutionality of a particular law, we may not declare duly enacted legislation to be void. Only a court may rule with finality that an act of the General Assembly is or is not constitutional. However, as discussed more fully above, this Office believes a court likely would find the ECENC proviso to comply with Article XI, § 4. The ECENC proviso is designed primarily to benefit exceptional needs children. Private educational institutions are only indirectly benefited because the grant award funds they receive are the result of the private choices of the individual students who seek a grant. Therefore, it is this Office's opinion that a court would likely uphold the ECENC proviso against a constitutional challenge under Article XI, § 4 because the public funds provided as grant awards thereunder are not "used for the direct benefit of any religious or other private educational institution."

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General