ALAN WILSON
ATTORNEY GENERAL

March 21, 2018

John O. Williams, II, Esquire
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Berkeley County Legal Department
Post Office Box 6120
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Dear Mr. Williams:

You seek an opinion "regarding the ability of ready SC, a division of the South Carolina Technical College system, to implement residency requirements as outlined in the South Carolina Code of Laws § 59-112-20 for the purpose of prioritizing the availability of work force development training." By way of background, you stated that Berkeley County Council voted on February 12, 2018 to request an opinion on the issue as follow:

> 1. South Carolina Code of Laws [§59-112-20] restricts in-state tuition rates to "...persons who reside in and have been domiciled in South Carolina for a period of no less than twelve months...". May readySC, a division of the South Carolina Technical College System, implement this residency requirement for the purpose of making work force development training available to persons who reside in and have been domiciled in South Carolina for a period of less than twelve months on a priority basis as against persons who do not meet this residency requirement? Said differently, may readySC use the requirements of the statute defining which persons are eligible for in-state tuition rates to define which persons may be given priority placement in workforce development training?

Law / Analysis

We begin with the principle that a statute enacted by the General Assembly must be presumed constitutional. As we have previously recognized,

> "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits. . . ." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within . . . [its] constitutional power. . . ." State v. Soloman, 245 S.C. 550, 572, 141 S.E.2d 818 (1965). Moreover, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231,

> 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. A statute will not be considered void unless its constitutionality is clear beyond a reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only, a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon an apparent conflict with the Constitution, we may not declare the Act void. Put another way a statute "must continue to be followed until a court declares otherwise." Op. S.C. Att'y Gen., June 11, 1997.

Op. S.C. Att'y Gen., 2004 WL 2451472 (Oct. 7, 2004).

Section 59-112-20 establishes "domicile for tuition and fee purposes . . . in determinations of rates of tuition and fees to be paid by students entering or attending state institutions." Pursuant to § 59-112-20(A), "[i]ndependent persons who reside in and have been domiciled in South Carolina for a period of no less than twelve months with an intention of making a permanent home therein, and their dependents, may be considered eligible for in-state rates." Moreover, § 59-112-20(B) further provides that "[i]ndependent persons who reside in and have been domiciled in South Carolina for fewer than twelve months but who have full-time employment in the State, and their dependents, may be considered eligible for in-state rates for as long as such independent person is employed on a full-time basis in the State." Section 59-112-10 defines certain terms, including the term "state institution" as including TEC schools. The term "in-state rates" is defined as "charges for tuition and fees established by State Institutions for persons who are domiciled in South Carolina. . . ." There is no doubt that attendance by a resident student to a TEC school qualifies for in-state tuition. The word "student" is also defined as "any person enrolled for studies in any state institution." The word "tuition" is not defined. The question you pose is whether this statute may be used with respect to readySC's work-force training of persons?

Turning now to this question, we note that previously we addressed the issue of so-called "durational residency" requirements in a 1985 opinion. See 1985 WL 259175 (May 7, 1985). We referenced therein the decision, Memorial Hosp. v. Maricopa County, 415 U.S. 750 (1974) and subsequent decisions of the United States Supreme Court. There, we explained as follows:

> In the Maricopa County case, supra, the United States Supreme Court set forth the law governing durational residency provisions. There, the Court reviewed an Arizona statute which required an indigent to have been a resident of the County for twelve months in order to be eligible for free nonemergency medical care. The Court summarized as follows the governing constitutional analysis under the Equal Protection Clause:
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> > The Arizona durational residency requirement for eligibility for nonemergency free medical care creates an 'invidious classification' that

> infringes on the right of interstate travel by denying newcomers 'basic necessities of life.' Such a classification can only be sustained on a showing of a compelling state interest. Appellees have not met their heavy burden of justification, or demonstrated that the State, in pursuing legitimate objectives, has chosen means which do not unnecessarily infringe unconstitutionally protected interests.

415 U.S. at 269.

The Court rejected the several reasons offered to sustain the durational residency requirement. Among the rationales argued was that a durational residency period served as a 'necessary means to insure the fiscal integrity of its free medical care program by discouraging an influx of indigents. . . . ' Supra at 263. The Court found the argument unpersuasive. Moreover, it was contended that 'eliminating the durational residency requirement would dilute the quality of services provided to longtime residents by fostering an influx of newcomers and thus requiring the County's limited public health resources to serve an expanded pool of recipients. ' Supra at 266. To this, the Court responded that the Equal Protection Clause does not permit the State to apportion its benefits and services on the basis of past tax payments.

Likewise, the Court discounted the idea that the expected influx of indigents would discourage the development of modern medical facilities, noting that a 'State may not employ an invidious discrimination to sustain the political viability of its programs. ' Supra at 267. Neither could it be argued, said the Court, that a one year waiting period is a permissible 'rule of thumb to determine bona fide residence' because such a requirement was overbroad. Similarly, the Court concluded that such a requirement could not constitutionally be used as a tool for preventing fraud because there existed 'other mechanisms to serve that purpose ... which would have a less drastic impact on constitutionally protected interests. ' Supra at 268. Finally, the Court also rejected the idea that the one year waiting period could be employed for budget predictability.

Since the Maricopa County case was decided, the Court has reaffirmed its holding on several occasions. See, Sosna v. Iowa, 419 U.S. 393 (1975); Mathews v. Diaz, 426 U.S. 67 (1976); McCarthy v. Phil. Civil Service Commission, 424 U.S. 645 (1976); Zobel v. Williams, 457 U.S. 55 (1982); Martinez v. Bynum, 461 U.S. 321 (1983). Accordingly, Maricopa County still appears to be good law. Because virtually every reasonable rationale for upholding such a provision was presented to the Court in that case and rejected, we would thus advise that a durational residency provision, such as the one contained in the bill, would be constitutionally suspect. We do not believe this conclusion is altered by the fact that, there, the durational residency requirement is six months, rather than the one year prerequisite in Maricopa County. See, Martinez v. Bynum, 416 U.S. at 325 [requirement that conditions a benefit on a 'minimum period of residence' is suspect].

We would further note for your information that only recently in Martinez v. Bynum, supra, the Court emphasized that while a durational residency

requirement is constitutionally infirm, a bona fide residency requirement is permissible. There, the Court stated the governing law in this area:

> This Court frequently has considered constitutional challenges to residency requirements. On several occasions the Court has invalidated requirements that condition receipt of a benefit on a minimum period of residence within a jurisdiction, but it always has been careful to distinguish such durational residence requirements from bona fide residence requirements... A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial slate interest in assuring that services provided for its residents are enjoyed only by residents ... It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.

461 U.S. at 325-329. And as stated by a leading treatise writer on constitutional law:

> The Supreme Court has never held that a slate or local government is prohibited from requiring persons to be residents of that location in order to receive governmental benefits. The state may restrict some welfare benefits to bona fide residents. The Shapiro [v. Thompson, 394 U.S. 618 (1969)] rationale only requires close judicial scrutiny of durational residency requirements, a distinction between new and old residents. . . .

Nowak, Constitutional Law, p. 810 (2d ed. 1983). Since that Court in Maricopa County (which, as here, concerned medical assistance to the indigent) staled that its earlier decisions were not intended to "cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements", it is reasonable to conclude that a bona fide residency provision, if contained in H.2I18, would be upheld. See also, McCarthy v. Phil. Civil Service Comm., supra.

By contrast, our 1985 opinion noted that "[i]n Sosna, the Court did uphold a durational residency requirement for procuring a divorce." The Court reviewed previous durational residency cases, and distinguished the divorce situation as follows:

> What those cases [Shapiro, Maricopa County, etc.] had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals. But Iowa's divorce residency requirement is of a different stripe. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case of the welfare recipients in Shapiro. . ., or the indigent patient in Maricopa County. She

> would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement delayed her access to the courts, but, by fulfilling it, a petitioner could ultimately obtain the same opportunity for adjudication which she asserts ought to be hers at an earlier point in time.
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> 419 U.S. at 406.

We note also that the United States Supreme Court has treated durational residency requirements for in-state tuition differently from other durational residency requirements. Chief Justice Rehnquist observed in his dissenting opinion in Saenz v. Roe, 526 U.S. 489, 517-18 (1999) (Rehnquist and Thomas dissenting) as follows:

> . . . this Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities. Starns v. Malkerson, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), summarily aff'g 326 F.Supp. 234 (D. Minn. 1970) (upholding 1-year residence requirement for in-state tuition); Sturgis v. Washington, 414 U.S. 1057, 94 S.Ct. 563, 38 L.Ed.2d 464, summarily aff'g. 368 F.Supp. 38 (W.D. Wash. 1973) (same). The Court has declared: "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but have come there solely for educational purposes, cannot take advantage of the in-state rates." Vlandis v. Kline, 412 U.S. 441, 453-454, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts, see Sosna v. Iowa, 419 U.S. 393, 406-409, 95 S.Ct. 553, 42 l.Ed.2d 532 (1975), and in upholding political party registration restrictions that amounted to a durational residency requirement for voting in primary elections, see Rosario v. Rockefeller, 410 U.S. 752, 760-762, 93 S.Ct. 1245, 36 L.Ed. 760-762, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

It is our understanding that Berkeley County Council has conditioned its donation of $750,000 for a training facility upon readySC's giving priority to training to those meeting the criteria of § 59-112-20. It also is our understanding that readySC, which has provided job training for TEC since 1961, has never previously imposed a residency requirement of any kind for receipt of its job training.

Thus, the issue here is whether the readySC job training may be deemed to be "tuition" or "fees" to be "paid by students entering or attending State Institutions" because readySC is a division of State TEC? In Op. S.C. Att'y Gen., 1981 WL 157847 (July 2, 1981), we stated the following regarding a closely related provision of the Code:

> [b]ecause Section 59-111-10 does not define the term 'tuition' or 'fees' each term must be accorded its commonly understood meaning. Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 99 99, 82 C.J.S. Statutes § 329 at 639; 1971 Op. Att'y Gen. 3068 at 6-7. The word 'tuition' means a charge made for instruction; Linton v. Lucy

> Cobb Institute, 117 Ga. 678, 45 S.E.2d 53; 1970 Op. Att'y Gen. No. 2891 at 33. On the other hand, the word 'fee,' a broader and more general term means a payment for service done or to be done [Aiken v. U.S., 53 F.Supp. 524; see also WEBSTER'S THIRD INTERNATIONAL DICTIONARY, Fee at 833] or a charge imposed to defray a cost of a particular service. Nitkin v. Administrator of Health Services Administration, 67 Misc.2d 716, 399 N.Y.2d 162.

As we have previously recognized, a county council "as a legislative body . . . has the ability to place conditions on its appropriations as 'an integral element of the legislative prerogative to define social objectives through its exclusive appropriation power.'" Op. S.C. Att'y Gen., 2007 WL 655622 (February 16, 2007) (quoting Op. S.C. Att'y Gen. February 22, 1987). However, to be effective, the program involved would first have to qualify as "tuition" or "fees" for purposes of § 59-112-20's durational residency requirement in order to impose "in-state" rates.

It is our understanding, after speaking with readySC, that worker training appears to be paid for by the State as part of the incentives which Mercedes and Volvo received for locating in the Tri-County area. See also Charleston Post and Courier, March 12, 2018 ["State-paid worker training was among the incentives both vehicle makers received when they agreed to locate in the low country.']. Officials representing readySC inform us that the training involved does not cost the company or the trainees anything. It is our understanding, moreover, that it is the company who selects applicants for the training program. Accordingly, we do not see how § 59-112-20 may constitute either "tuition or fees to be paid by students entering or attending State Institutions" for purposes of § 59-112-20. It is logical that if one is not required to pay anything for the job training which readySC offers, such lack of a charge eliminates there being a "tuition" or a "fee" for purposes of § 59-112-20.

Further, in our view, even assuming arguendo admission to readySC's training does require "tuition" or a "fee," and that readySC or the State makes the selection of persons entering the training program, we question whether imposition of § 59-112-20's residency requirement could withstand constitutional scrutiny. It would appear that the job training programs is, for constitutional purposes, more akin to admission to a benefits program than it is one for tuition. See Nehring v. Ariyoshi, 443 F.Supp. 228 (D. Haw. 1977) [Hawaii's one year durational residency requirement for public employment was unconstitutional]; Mitchell v. Steffen, 504 N.W.2d 198 (1993) [durational residency requirement for full general assistance work readiness benefits was unconstitutional]. We have found no case which allows the imposition of a durational residency requirement to be allowed for this type of job training program. Thus, application of § 59-112-20 to this situation would pose numerous constitutional and other legal problems assuming there is no "tuition" or "fee" involved.

Conclusion

In response to your question, we doubt that the in-state tuition provision (§ 59-112-20) is applicable to the situation referenced in your letter. Section 59-112-20 is narrowly structured to charge in-state residents "tuition" or "fees" at a lower rate than nonresidents, based upon a 12

month durational residency in South Carolina or full-time employment in the State. The United States Supreme Court has deemed such a durational residency requirement for tuition or fees to be a valid exception to the general rule that a durational residency requirement – one where a person must reside in and be domiciled in a state for a specific period of time – is unconstitutional as infringing upon one's fundamental right to interstate travel. On the other hand, obtaining a state-subsidized secondary education is not a fundamental right. See San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Only recently, the District Court of South Carolina upheld § 59-112-20 as facially constitutional in the limited tuition or fees context. Herrera v. Finan, 176 F.Supp. 549 (D.S.C. 2016), aff'd., 709 Fed. Appx. 741 (4th Cir. 2017).

However, the scope of the statute providing residents with lower tuition or fees is quite narrow. In Herrera, the Court recognized that "the statutory and regulatory scheme pertaining to residency [for tuition] must be applied in a very specific manner. . . ." 176 F.Supp.2d at 565. The provision constitutionally allows the State to charge lower rates to those who have established a presence in the State for a fixed period of time.

Here, it is our understanding, after speaking to readySC, that the State plays no role in the selection of persons into the training program provided by readySC. Moreover, it is also our understanding from our conversations that the company or the trainee pays nothing for the training. That being the case, there is no "tuition" or "fee" involved. Thus, we cannot see that § 59-112-20 is applicable. If there is no "tuition" or "fee," and the State is not involved in the selection of persons admitted to the training program, the in-state residency provision for tuition is inapplicable.

Moreover, even assuming arguendo that the statute could conceivably be deemed applicable, a court would most probably not allow its use here. A court would likely not give the statute the same constitutional deference as when charging lower tuition or fees to residents. More likely, here, a court would apply the usual rule of unconstitutionality for durational residency requirements. We know of no case allowing the "tuition" exception to be validly applied to a durational residency requirement for entry into job training. See Hicklin v. Orbeck, 565 P.2d 159, 165 (Alaska 1977), revd. on other grounds, 437 U.S. 518 (1978) [Alaska Supreme Court struck down one year durational residency requirement of "Alaska Hire" law; Court distinguishes "reduced public college tuition cases" in that "Alaska Hire would resemble an absolute preference in enrollment for one year residents, not a reduced tuition rate."]. In this instance, the same analysis would control; in essence, any requirement that only one year South Carolinians could receive readySC job training, and thus be employed at the plants, would likely not pass constitutional muster. For all of these reasons, we would advise that this provision should not be used in this situation.

While readySC has apparently never employed residency as a criteria for admission to job training, and while in this instance, the State is apparently not involved in the selection process, such is not to say that some form of bona fide residency requirement to enter the

training program is unconstitutional and may not be used. As discussed above, courts have distinguished for constitutional purposes durational residency (residency for a fixed period of time) from bona fide residency requirements (demonstration of residency at a relevant time). As one court has stated, "[c]onditioning benefits on [bona fide] state residency is presumptively permissible." Nunez v. Autry, 884 S.W.2d 199, 204 (Tex. Ct. App. 1994), citing Califano v. Torres, 435 U.S. 1, 5 (1978). Furthermore, the Fourth Circuit has recognized, that "[t]he Supreme Court has never applied anything greater than a rational basis level of review in cases involving equal protection challenges to bona fide residence requirements." Sylvia Development Corp. v. Calvert Co. Md., 48 F.3d 810, 820 (4th Cir. 1995). Of course, we only address the legality of such bona fide residency criteria, not the policy considerations involving its use. We note only that, of course, if the company is making the selection, rather than the State, constitutional constraints do not apply.

In summary, while, of course, Berkeley County may condition its appropriations upon certain contingencies, we advise that § 59-112-20 is not a useful criteria for admission into the job training program. We are advised that no "tuition" or "fees" to enter the training program are involved and that the State does not make the selection. Such would eliminate § 59-112-20 as an option. However, assuming the State is involved in any selection to the training program (readySC advised that is here not the case), nothing precludes the use of a bona fide residency requirement, as opposed to a durational residency requirement, for admission into the job training program. See Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985) [bona fide residency requirement for selection of vendors is constitutional]. Any decision to use a bona fide residency requirement is, of course, a policy judgment, and one beyond the scope of an opinion of this Office.

Sincerely,

Robert D. Cook
Solicitor General