ALAN WILSON
ATTORNEY GENERAL

March 24, 2021

Katherine H. Harrison, Director
S.C. Higher Education
Tuition Grants Commission
111 Executive Center Dr., STE 242
Columbia, South Carolina 29210

Dear Director Harrison:

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

> The purpose of this letter is to request an opinion from the State Attorney General's Office to clarify the definition of "independent institution of higher learning" for the purposes of administering the South Carolina Tuition Grant under Section 59-113-50 of the South Carolina Code of Laws.
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> According to the Statute referenced above, an independent institution of higher learning means an:
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> > (1) independent eleemosynary junior or senior college in South Carolina whose major campus and headquarters are located within South Carolina and which is accredited by the Southern Association of Colleges and Secondary Schools; or
> > (2) independent bachelor's level institution chartered before 1962 whose major campus and headquarters are located within South Carolina.
>
> ...
>
> The institution under consideration is not accredited by the Southern Association of Colleges and Secondary Schools and could therefore not meet the statutory definition under 59-113-50(1). While the institution was chartered prior to 1962, it was a junior college offering only two-year degrees until 2013, at which time the college's accrediting agency approved a substantive change to add Bachelor's degree programs.

> The question presented to you is: "Can an institution chartered before 1962 as a non-bachelor's level institution, whose major campus and headquarters are located within South Carolina, meet the definition of an independent institution of higher learning under Section 59-113-50(2) if the institution's change to bachelor's level occurred after 1962?"

Law/Analysis

It is this Office's opinion that the statutory definition of independent institution of higher learning ("IIHL") in S.C. Code § 59-113-50(2) is ambiguous regarding whether an institution must have offered bachelor's level education prior to 1962. Because we have been unable to locate a prior opinion issued by our state courts or this Office interpreting section 59-113-50(2), this opinion will analyze the statute according to the principles of statute construction. When interpreting a statute, the primary goal is to determine the General Assembly's intent. See Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. The construing court may additionally look to the legislative history when determining the legislative intent." Ex parte Cannon, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (citations omitted).

As stated in the request letter, section 59-113-50 includes two definitions that qualify an institution as an IIHL. The definition in subsection (1), which the request letter notes is inapplicable to the subject institution, was codified in 1970 and last amended in 1988. See 1988 Act No. 464, § 3. Subsection (2) was added in 2007 "so as to include in the definition an independent bachelor's level institution chartered before 1962 whose major campus and headquarters are located within South Carolina." 2007 Act No. 42. The plain language of the statute could fairly be interpreted to either require such an institution to have been chartered as a bachelor's level institution prior to 1962, or to only require that the institution have been charted prior to 1962 and later offer bachelor's level instruction. Because there is no comma between the term "bachelor's level institution" and the phrase "chartered before 1962," the lack of punctuation suggests the drafter intended that the words would be interpreted together. See The Chicago Manual of Style § 5.45 (13th ed. 1982) (providing that "two or more adjectives [should be separated] by commas if each modifies the noun alone."). Accordingly, an institution which was chartered before 1962 would also need to have offered bachelor's level instruction before 1962 to

qualify as an IIHL. However, it is not clear that the General Assembly intended this construction. The title of the 2007 act suggests that the amendment was intended to expand those institutions which qualify as IIHLs. Certainly, by requiring such institutions to have been chartered nearly a half century prior to its adoption, the General Assembly intended this expansion to be limited. It is less certain that the General Assembly intended this expansion to be so limited that an institution satisfying the requirement of being chartered before 1962 could not qualify as an IIHL if it began offering bachelors level instruction after 1962.

Because this Office believes that S.C. Code § 59-113-50(2) is ambiguous regarding whether an institution must have offered bachelor's level education prior to 1962, it is this Office's opinion that our state courts would defer to the Higher Education Tuition Grant Commission's (the "Commission") reasonable interpretation of the statute. See S.C. Code Ann. § 59-113-10 ("The commission shall administer the provisions of this chapter and shall make those regulations as may be necessary in order to carry out the intent of this chapter."). It is this Office's long-standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." The Court stated that the determination of whether deference is afforded to an agency's interpretation of the statutes and regulations it administers involves two separate steps. Id.

> First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi–Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. Again, because it this Office's opinion that a court may well find S.C. Code § 59-113-50(2) is ambiguous regarding whether an institution must have been a bachelor's level institution prior to 1962, the Commission's interpretation of section 59-113-50 would be afforded deference as it is authorized to administer the chapter and to make regulations "to carry out the intent of th[e] chapter." S.C. Code § 59-113-10. While this Office's understands that the Commission has not yet interpreted S.C. Code § 59-113-50(2), our state courts would likely defer to such an interpretation so long as it is consistent with the plain language of the statute.

Conclusion

It is this Office's opinion that the statutory definition of independent institution of higher learning ("IIHL") in S.C. Code § 59-113-50(2) is ambiguous regarding whether an institution must have offered bachelor's level education prior to 1962. Because of this ambiguity, our state courts would likely defer to the Higher Education Tuition Grant Commission's interpretation of the definition of an IIHL so long as it is consistent with the plain language of the statute. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014); S.C. Code § 59-113-10.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General