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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 27, 2000

John E. Smalls, Director of Finance, Facilities
and Statistical Services
South Carolina Commission on Higher Education
1333 Main Street, Suite 200
Columbia, South Carolina 29201

RE: Informal Opinion

Dear Mr. Smalls:

By your letter of October 13, 2000, you have requested an opinion of this Office concerning the fees charged by various public institutions of higher learning for their courses. By way of background, you provide the following information:

Through surveys completed by the Institutions we have learned that the school districts contract with various Colleges/Universities to provide teachers with credit hours for completing a course. The costs of the contract courses are paid either by the district or the teachers. The cost per credit hour, per teacher/student, normally results in significantly less than the institutions' published credit hourly rate. ... Certain institutions have a practice of allowing high school students to attend college courses and also contracting with industries around the State at a rate less than the institution's published credit hourly rate.

Specifically you ask whether the institutions can offer discounted tuition rates to certain groups of students.

In South Carolina, the tuition rates of public institutions of higher learning are set by the colleges' and universities' governing boards of trustees. For example, the General Assembly expressly authorizes the board of trustees for the University of South Carolina to "fix tuition fees and other charges for students attending the University." S.C. CODE ANN. §59-117-40. The trustees are vested with similar power at the College of Charleston under §59-130-30. Other institutions have more generalized authority to make all rules and regulations necessary for the government of the school. See S.C. CODE ANN. §59-119-50 (Clemson University); §59-125-80 (Winthrop University). The General Assembly does not mandate a specific tuition rate for each school, but instead allows the governing bodies of the schools some autonomy in determining the appropriate charge for their offered courses.

Although generally the boards have some discretion in setting fees for students, other provisions of law do have an impact on the amounts the institutions can charge to certain groups of students. For example, regardless of a public school's customary tuition rate for most students, persons

Respectfully,

older than sixty years who are not working full time may attend classes without paying any tuition. See S.C. CODE ANN. § 59-111-320. Similarly, children of firemen and law enforcement who become totally disabled or killed in the line of duty are not required to pay tuition. See S.C. CODE ANN. § 59-111-110. Furthermore, the determination of who pays in-state residency rates and who pays out-of-state residency rates is governed by § 59-112-10 et seq. Thus, an institution is mandated by the General Assembly to waive tuition for certain groups and to classify residents and nonresidents by certain standards. But nothing in the code of laws expressly prohibits an institution from charging different rates to different groups while abiding by these mandates.

The lack of any express prohibition does not definitively answer your question, however. The waiver of a fee for a particular group of students should be further examined in the context of the expenditure of public funds. In other words, the public colleges and universities forfeit the difference between the discounted rate for these students and the regularly applicable tuition rate that any other student would pay. The voluntary loss of the income expends public funds because the institutions of higher learning absorb the extra cost of educating these enrolled students.

It is well settled that the expenditure of government funds must be for a public, not a private purpose. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43, 47(1975): “[a]s a general rule, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all inhabitants or residents, or at least a substantial part thereof.” Noting the trend in recent case law to broaden the concept of a public purpose, the South Carolina Supreme Court recognized that although benefits may accrue to private individuals, that alone did not destroy the public purpose when incidental to the promotion of the public welfare. See Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). The court adopted a four prong analysis for determining a public purpose:

... [F]irst determine the ultimate goal or benefit to the public intended by the project. Second, ... analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth ... analyze and balance the probability that the public interest will be ultimately served and to what degree.

Nichols, at 429, 351 S.E.2d at 163.

Accordingly, the public institutions of higher learning must demonstrate a sufficient public purpose under the Nichols test to justify the discounted tuition rates certain student groups. In the case of teachers enrolling as students, the public purpose seems more obvious. In theory, although particular students appear to be the primary beneficiaries of the discounted rates, arguably the community at large benefits by providing easier access for its teachers to higher education. Most would probably agree that better educated teachers are a valuable resource to the State's schools. Indeed, other provisions of law appear to contemplate special treatment of teacher/student groups. Section 59-103-140 states:

The Commission on Higher Education, in consultation with the State Board of Education, may contract with selected public or private colleges and universities, or groupings of such institutions, to provide centers of excellence in programs designed to train teachers. The

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Commission shall devise guidelines and procedures by which institutions, or groups of institutions, may apply for such contracts by the Commission. Such guidelines and procedures shall include participation by local schools or school districts in such programs as may be appropriate. Funds for implementing this activity shall be appropriated annually to the Commission on Higher Education which, in consultation with the State Board of Education, shall monitor the performance of participating institutions and may or may not elect to renew such contracts to any original college or university.

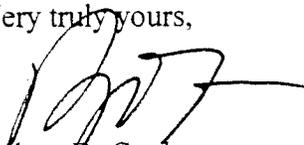
This provision appears to allow institutions of higher learning to develop a relationship with the State Board of Education and Commission on Higher Education for the purpose of encouraging teacher training by the institutions. Although not defined in the statute, the use of the term "contract" could be construed to include a financial agreement among the agencies that would ultimately favor teacher/students but would not be available to the general public. Arguably this statute serves as an example of the General Assembly's approval of differential treatment for teachers.

Ultimately, however, the determination of whether the discounted rate for teacher/student groups serves a legitimate public purpose involves numerous questions of fact which are beyond the scope of an opinion of this Office to resolve. The legitimate public purpose served by offering discounted rates to other groups from certain industries or high schools is even more questionable and fact sensitive. We certainly would not opine with any high degree of confidence that institutions of higher learning have unfettered discretion in charging varying rates of tuition to different groups of students. The circumstances of each course offered for a discounted rate must be examined on a case by case basis. Only then could a court make the determination that the offer of discounted rates to individual teacher/student groups, high school students, or student groups from certain industries by a public institution of higher learning serves a legitimate public purpose.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General