



2011-041

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Young Boozer
Office of State Treasurer
State Capitol
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Montgomery, Alabama 36104-2510

Prepaid College Tuition Trust Fund –
Tuition – Colleges and Universities –
Treasurer

Discussion of issues concerning the fees
and tuition charged PACT plan students.

Dear Mr. Boozer:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Does the definition of “tuition” and “mandatory fees,” as used in Attorney General’s Opinion No. 2010-107, apply to every Alabama public college and university?

(2) Is the definition consistent with Rule 1.10 of the *2010 PACT Rules* of the Board of Directors of the PACT Trust Fund?

(3) Since the current actuarial funded status of the PACT Trust Fund is below 90 percent, should the 2.5 percent increase of fees and tuition per credit hour that was allowed for the 2010 Fall Term be disallowed immediately beginning the next school term, the 2011 Spring Term?

(4) In future years, if 2.5 percent increases are allowed for consecutive years, and then the funding status falls below 90 percent, do the fees and tuition

paid by the PACT Program revert to the baseline rate of September 30, 2009?

(5) Is the list of fees certified by each educational institution to the PACT Program as of September 30, 2009, exclusive of any additional fees that might be added by an institution in future years?

FACTS AND ANALYSIS

The Wallace-Folsom College Savings Investment Plan ("Plan") is provided for in section 16-33C-1, *et seq.*, of the Code of Alabama. ALA. CODE § 16-33C-1 to § 16-33C-22 (2001 & Supp. 2010). The Plan consists of two programs, the PACT and ACES Programs. ALA. CODE § 16-33C-2.1 (2001). The programs are college savings alternatives in which payments are made to respective trust funds. ALA. CODE §§ 16-33C-6, 16-33C-10 (Supp. 2010). Under the PACT Program, "purchasers enter into PACT contracts for the future payment of tuition and mandatory fees at eligible educational institutions." ALA. CODE § 16-33C-6(a) (Supp. 2010). The programs are administered by the State Treasurer pursuant to regulations established by the Board of Directors of the PACT Trust Fund ("Board"). ALA. CODE §§ 16-33C-2.1 (2001), 16-33C-3(14) (Supp. 2010). The State Treasurer also chairs the Board. ALA. CODE § 16-33C-4.1(e) (Supp. 2010).

Your first two questions seek clarification of our opinion to Honorable Jack Hawkins, Jr., Chancellor, Troy University, dated September 28, 2010, A.G. No. 2010-107. That opinion addressed the amount that colleges or universities may charge PACT plan students under section 16-33C-17(a). The *Hawkins* opinion concluded that the authorized tuition/fees was "the standard, non-discounted, published tuition per credit hour as of September 30, 2009, . . . and mandatory fees." *Id.* at 3.

You first question the state public colleges and universities to which the opinion applies. Section 16-33C-17(b) specifically exempts "institutions of higher education under the oversight of the boards of trustees . . . [in] Sections 264 and 266 of the Official Recompilation of the Constitution of Alabama of 1901, as amended," [ALA. CODE § 16-33C-17(b) (Supp. 2010)] from the operation of section 16-33C-17(a). Those provisions refer to the Boards of Trustees of the University of Alabama and Auburn University. Accordingly, the fees and tuition authorized by section 16-33C-17(a) apply to all state public colleges and universities except the University of Alabama and Auburn University Systems.

Your second question concerns application of the *Hawkins* opinion to Rule 1.10 of the Board's rules adopted pursuant to 16-33C-17(a). Rule 1.10 requires colleges and universities to annually "certify" their fee and tuition rate for the

upcoming academic school year to the PACT Program so that the Program can calculate the current rate for PACT plan students. Rule 1.10, *2010 PACT Rules*. Consistent with the *Hawkins* opinion, the fee and tuition rate that is published for all students must be certified or submitted to the PACT Program by an educational institution.

Your remaining questions are new questions not addressed by the *Hawkins* opinion. Your third and fourth questions concern annual increases to fees and tuition. The *Hawkins* opinion also stated that section 16-33C-17(a) established a baseline fee and tuition rate as of September 30, 2009, with a formula for annual increases. As the opinion explained, “[a]n annual increase of the *lesser* of the *actual* annual tuition or mandatory fee increase, *or* an annual tuition or mandatory fee increase of *two and one-half percent* for each year thereafter, is permitted.” *Hawkins*, at 2-3 (emphasis added). Section 16-33C-17(a), however, prohibits annual increases if their payment “would cause the PACT Trust Fund’s funding status to fall below 90 percent, as determined by the actuarial professional retained by the PACT board.” ALA. CODE § 16-33C-17(a) (Supp. 2010).

Your third question specifically addresses whether this prohibition would operate to bar increases in the current year. This Office understands that the academic school year is September through August, consisting of Fall, Spring, and Summer Terms, and that colleges and universities release their fee and tuition rates at the end of the Spring Term for the following school year. Therefore, any increase would be allowed once per year beginning with the Fall Term. Section 16-33C-17(a) was enacted on April 30, 2010. This Office understands that, following the release of the fee and tuition rates after the 2010 Spring Term, the PACT Program applied the annual increase formula to increases in those rates to allow increases for PACT plan students for the 2010-2011 school year. This Office further understands that the PACT Program has paid fees and tuition for the 2010 Fall Term at the increased rates. Your request states that the most recent actuarial valuation was presented to the Board on December 1, 2010, and it showed a 77.5 percent funding level. You further state that to disallow the increase for the 2011 Spring Term would cause the mandatory fee and tuition to revert to the September 30, 2009, baseline.

Section 16-33C-17(a) contemplates that the Board will conduct an actuarial valuation of the PACT Trust Fund (“Fund”) at the end of each school year, after the issuance of the schools’ actual rates, but before the start of the next school year, to determine if the allowance of an annual increase to the PACT rate would cause the Fund to fall under 90 percent funding. The section provides no authority to “disallow” an annual increase once it has been allowed.

Under the well-established rules of statutory construction, where a statute enumerates certain things on which it is to operate, the statute must be construed to exclude all things not expressly mentioned. *Ex parte Holladay*, 466 So. 2d 956, 960 (Ala. 1985). Where, as here, the Legislature has chosen not to

give the Board the authority to change an allowed increase, it is the opinion of this Office that the Board may not do so.

Your fourth question specifically addresses the proper fee and tuition rate when the Fund falls beneath minimal funding after years of increases. The prohibition on annual increases states that it applies to “the *increase* in mandatory fees or tuition per credit hour *referenced in this subsection.*” ALA. CODE § 16-33C-17(a) (Supp. 2010) (emphasis added). Section 16-33C-17(a) provides, singularly, for “*an* annual increase” to be “allowed” or not and does not address multiple increases. *Id.* (emphasis added). Nor does it contain language “disallowing” increases allowed in prior years or stating that the fee and tuition rate “reverts” to a prior year’s rate. Therefore, when the annual increase prohibition is triggered, the rate merely remains the same as the previous year’s rate.

Regarding your last question, section 16-33C-17(a) is silent on the later addition of new fees not included in the initial baseline fee rate or later removal of fees in the initial rate. The Board has defined the fees that may be charged in Rule 1.06 of its rules as the “Building Fee, Facility Fee, Technology Fee, Learning Resource Fee, Administrative Fee, Registration Fee, Instructional Fee, Library Fee, Reserve Fund Fee, and General University Fee.” Rule 1.06, 2010 *PACT Rules*. This Office understands that colleges or universities charge various combinations of these fees.

The baseline fee and tuition rate established in section 16-33C-17(a) is directed at the amount of the fees and tuition, not the number of fees themselves. Section 16-33C-17(a) specifically provides that colleges or universities shall not charge “*mandatory fees* or tuition per credit hour in an *amount exceeding the cost* of mandatory fees or tuition per credit hour as of September 30, 2009.” ALA. CODE § 16-33C-17(a) (Supp. 2010) (emphasis added). The Legislature could have stated “mandatory fees or tuition per credit hour *different from the* mandatory fees or tuition per credit hour as of September 30, 2009.” It did not. Therefore, educational institutions are free to drop or add the fees listed in Rule 1.06 on an annual basis.

The following example is offered as guidance in calculating an annual fee and tuition increase for an institution that removes all fees. The 2009 rate for all students established as the baseline rate for PACT Plan students was as follows:

Tuition = \$162/hour

Fees:

Fee A = \$100

Fee B = \$ 50

Total = \$150

The 2010-2011 school year rate for all students increased tuition and removed all fees as follows:

Tuition = \$227/hour
No Fees

Because the institution no longer charges fees to all students, it may not charge them to PACT plan students. Because there are no longer any fees to be increased, the formula for annual increases only needs to be considered with respect to tuition. The formula permits an institution that increases a fee or tuition for all students to increase the fee or tuition for PACT plan students to the extent of the "*lesser* of the *actual* annual tuition or mandatory fee increase *or* an annual tuition or mandatory fee increase of *two and one-half percent. . .*" *Id.* The actual increase in tuition is \$65 (2010-2011, \$227/hour less 2009-2010, \$162/hour). Two and one-half percent (2.5 percent) of \$162 is \$4.05. Because \$4.05 is less than \$65, the institution's 2010-2011 fee and tuition rate for PACT Plan students is as follows:

Tuition = \$166.05/hour (2009-2010, \$162/hour plus \$4.05)
No Fees

The following example is offered as guidance in calculating an annual fee increase for an institution that removes and adds fees. The 2009 fee rate for all students established as the baseline rate for PACT Plan students was as follows:

Fee A = \$ 50
Fee B = \$ 50
Fee C = \$100

Total = \$200

The 2010-2011 school year rate for all students removed Fee C and added Fee D as follows:

Fee A = \$ 50
Fee B = \$ 50
Fee D = \$150

Total = \$250

The effect of the formula on a new fee is that an institution may not charge the PACT plan the new fee in the first year of the fee's existence. The only increase in the rate occurred with Fee D. The actual increase for Fee D is \$150 (2010-2011, Fee D, \$150 less 2009-2010, Fee D, \$0). Two and one-half

percent (2.5 percent) of \$0 (2009-2010, Fee D) is \$0. Because \$0 is less than \$150, the institution's 2010-2011 fee rate for PACT Plan students is as follows:

Fee A = \$ 50
Fee B = \$ 50
Fee D = \$ 0 (2009-2010, Fee D, \$0 plus \$0)

Total = \$100

The institution may start charging PACT plan students the new fee in the second year of the fee's existence. The institution's 2010-2011 school year rate for all students that added Fee D is restated as follows:

Fee A = \$ 50
Fee B = \$ 50
Fee D = \$150

Total = \$250

The 2011-2012 school year rate for all students remained the same except that Fee D increased as follows:

Fee A = \$ 50
Fee B = \$ 50
Fee D = \$200

Total = \$300

The actual increase for Fee D is \$50 (2011-2012, Fee D, \$200 less 2010-2011, Fee D, \$150). Two and one-half percent (2.5 percent) of \$150 (2010-2011, Fee D) is \$3.75. Because \$3.75 is less than \$50, the institution's 2011-2012 fee rate for PACT Plan students is as follows:

Fee A = \$ 50.00
Fee B = \$ 50.00
Fee D = \$153.75 (2010-2011, Fee D, \$150 plus \$3.75)

Total = \$253.75

CONCLUSION

The mandatory fees and tuition for PACT plan students authorized by section 16-33C-17(a) of the Code of Alabama, stated in Attorney General's Opinion No. 2007-103 as "the standard, non-discounted, published tuition per credit hour as of September 30, 2009, . . . and mandatory fees," applies to all state public

colleges and universities except the University of Alabama and Auburn University Systems.

Educational institutions must annually certify the fee and tuition rate that is published for all students for the upcoming academic school year to the PACT Program so that the Program can calculate the current rate for PACT plan students.

Annual increases to fees and tuition allowed for PACT plan students for the 2010-2011 school year may not be disallowed for the 2011 Spring and Summer Terms.

When, after years of increases, the prohibition on annual increases is triggered because the PACT Trust Fund has fallen below 90 percent funding, the fee and tuition rate remains the same as the previous year's rate.

Educational institutions may annually add or remove the fees listed in Rule 1.06 of the *2010 PACT Rules* of the Board of Directors of the PACT Trust Fund. A mandatory fee that has been removed from the fee rate that is published for all students may not be charged to PACT plan students. A mandatory fee that has been added to the published rate may not be charged to PACT plan students until the second year of the fee's existence.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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