S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 06-004

Status of a Caucus Under Title VI, State and Federal Tax Law, and State Laws Governing Non-profit Corporations

QUESTIONS

1. The State of Tennessee receives federal funds. Is it a violation of Title VI of the Civil Rights Act of 1964 for the state to provide funding, support, or staff for a caucus which discriminates on the basis of race, color, or national origin? Same question in regards to an activity, such as an annual legislative retreat, which is not part of the state, a subdivision of the state, or one of its agencies or departments; which is not registered as a non-profit; which is an unchartered activity having no legal existence; and which over decades has been billed as that caucus's activity or an activity of that caucus and/or an activity sponsored or hosted by that caucus or for the legislative benefit of that caucus and/or its members? If a Title VI violation exists, what is the legal remedy? If the state learns it has been providing funds to a caucus that discriminates or to an activity so inextricably linked to, sponsored or hosted by, and/or operated by that caucus as to be inseparable because it has no separate legal existence, must the state require repayment of those funds?

2. State colleges and universities receive federal funds. Is it a violation of Title VI of the Civil Rights Act of 1964 for a state college or university to provide funding, support, or staff for a caucus which discriminates on the basis of race, color, or national origin? Same question in regards to an activity, such as an annual legislative retreat, which is not part of the state, a subdivision of the state, or one of its agencies or departments; which is not registered as a non-profit; which is an unchartered activity having no legal existence; and which over decades has been billed as that caucus's activity or an activity of that caucus and/or an activity sponsored or hosted by that caucus or for the legislative benefit of that caucus and/or its members: If a Title VI violation exists, what is the legal remedy? If a state college or university learns it has been providing funds to a caucus that discriminates or to an activity so inextricably linked to, sponsored or hosted by, and/or operated by that caucus as to be inseparable because it has no separate legal existence, must the state college or university require repayment of those funds?

3. Is it a violation of Title VI of the Civil Rights Act of 1964 for a state, or any agency, departments, state college or state university thereof, which receives federal funding or support directly or indirectly to provide funds, support, or staff directly or indirectly to provide funds, support, or staff directly or indirectly to a caucus and/or an activity which that caucus sponsors, if that caucus discriminates on the basis of race, color, or national origin?

4. Is it legal under federal and/or state law for the state's Office of Legislative Administration to pay dues for members of a caucus, political, legislative, or otherwise, if that caucus discriminates on the basis of race, color, or national origin?

5. Under federal and state law, can the state's Office of Legislative Administration provide funds, support, or staff for any activity conducted by that caucus or its closely related Annual Legislative Retreat, if that caucus discriminates on the basis of race, color, or national origin?

6. Can an Annual Legislative Retreat which is a nebulous entity or organization that no longer claims a direct tie to its supporting and supported caucus; which is not part of state government; which has no legal standing with the Secretary of State's Office nor is registered with its Division of Charitable Solicitations receive funds, support, and/or staff from the state, or an agency, department, state college or university thereof? If the answer is yes, could it do so, if that Legislative Retreat is sponsored or hosted by a caucus which discriminates on the basis of race, color, or national origin?

7. Can the state, or any agency or department thereof, including a state college or university, provide funds, support, or staff for the benefit of a caucus, or the members thereof, which purports to be a 501(c)(3)? Can it do so if that same caucus discriminates on the basis of race, color, or national origin? Can it do so if that caucus has failed for some three decades to register with the Internal Revenue Service, to apply for non-profit exemption status and receive a Determination of Exemption, to make required annual disclosures, to make available its Application for Exemption Under 501(c)(3) or IRS Form 1023 along with all supporting documents and a copy of its exemption ruling or exemption determination letter as issued by the IRS, to make any required filings and required disclosures to the IRS, such as IRS Form 990 disclosing certain information on expenditures and contributions, and to make available for public inspection certain filings and disclosures as required by federal law with the exception of material required to be withheld from public inspection, such as national defense material, unfavorable rulings or determination letters issued in response to applications for tax exemption, or rulings or determination letters revoking or modifying a favorable determination letter?

8. Can the state, or any department or agency thereof including a state college or university, provide funds, support, or staff for the benefit of a caucus, or members thereof in their capacity as caucus members, if that caucus purports to be a 501(c)(3) but which has not properly registered with the Division of Charitable Solicitations in the Office of Secretary of the State since 1983 and has not provided to that division the required information and financial disclosures which are public record under Tenn. Code Ann. § 48-101-511? Can it do so, if the caucus as described discriminates on the basis of race, color, or national origin?

9. Is a "non-profit" caucus or a closely related, or closely held, "non-profit" activity which sells "advertising" or sponsorships or display booth space in lieu of accepting direct donations or contributions required to register with the Division of Charitable Solicitations in the Secretary

of state's office as that division's official web site indicates? That web site at http://www.tennessee.gov/sos/charity/co-info.htm states "Soliciting may include asking for money or selling items such as sponsorships, advertisements, books, food or tickets to a show."

10. Is the Secretary of State's duty for enforcement of the Charitable Solicitations Act merely permissive because of the use of "may" and "may deem necessary" in TCA 48-101-503(1) and (3)? If the answer is yes, is there a legislative remedy to force "charitable organizations" as defined in TCA 48-101-501 to comply with the law? Is there any other constitutional or statutory law which would require such enforcement by the Secretary of State under TCA 48-101-514 other than "upon complaint of any person" which complaint may bring lead to harassment of the complainant?

11. Are contributions to a caucus which purports to be a 501(c)(3) but which has never applied nor been granted non-profit exemption status by the Internal Revenue Service deductible as a charitable contribution (under IRC Section 170 or elsewhere), as a trade or business expense (under IRC Section 26 or elsewhere), as a state expense, or as anything else whether for federal or state revenue purposes?

12. If an activity or caucus applies for 501(c)(3) status, is subsequently recognized under federal law, and is only granted non-profit status for the automatic 27-month retroactive exemption rule pursuant to Rev. Proc. 92-85, 1992-2 CB 490 which has been incorporated into the application for exemption (IRS Form 1023) and is not also granted a retroactive exemption to the date of the organization's formation (if applied for under Schedule E for organizations not filing within 27 months of the organization's date of formation), would that activity or caucus - which is presumably subject to federal income tax interest and penalties on net income as a regular corporation for all tax years previous to that 27 months' allowance which remain open because of failure to return income tax returns - also be subject to any state business taxes, including but not limited to franchise and excise taxes imposed on a corporation? Same question as above, only with an assumption that the IRS denies exemption status for part or all of the period because the activity or caucus operated under a charter/bylaws which contained discriminatory language on the basis of race, color, or national origin.

13. If an activity or caucus exceeds the federal annual limit of $25 on "gifts" to one individual under IRS Section 274(b)(1) or elsewhere which disallows Section 162 or Section 212 expense deductibility, is that gift income to the recipient as employee or as non-employee compensation or other form of income? If the answer is yes, does the activity or caucus have to withhold under the federal laws for Federal Income Tax Withholding (FITW) and Federal Insurance Contributions Act (FICA) and file appropriate information returns with the IRS? Are any "bonuses" paid by an activity or caucus income to the recipient? If the answer is yes, does the activity or caucus have to withhold under the laws FITW and FICA and file appropriate information returns with the IRS?

14. Would discriminatory language in the charter/bylaws of an activity or organization

with a stated educational function or which conducts Youth Mock Legislature Sessions violate the strictures placed on 501(c)(3) Educational Organizations and Private Schools, including but not limited to a violation of the ban on "Racially Discriminatory Policy" contained in IRS Publication 557, Chapter 3, and elsewhere based on the Internal Revenue Code (USC, Title 26) and IRS rules and regulations which require certain activities to comply with Title VI of the Civil Rights Act of 1964 in order to be granted a non-profit exemption status?

15. If a "non-profit" caucus or a closely related or closely held "non-profit" activity which contains bylaws which state "[n]o part of the activities of the caucus shall be the carrying on of propaganda, or otherwise attempting to influence legislation" but which intentionally and knowingly as a stated purpose of the caucus or activity directly or indirectly influences legislation, is it subject to the federal IRC 4911 Tax on excess expenditures to influence legislation or federal IRC Section 4912 Tax on disqualifying lobbying expenditures of certain organizations under IRC Chapter 41 or elsewhere regarding Public Charities?

16. Is there a statute of limitations on franchise and excise taxes for tax years for which an activity or caucus did not file either the required tax returns or other appropriate filings with the Registry of Election Finance as a political activity?

OPINIONS

1. Title VI only prohibits the denial of participation in a covered program or activity that receives federal funds on the basis of race, color, or national origin. Therefore, the State does not violate Title VI if it does not distribute any federal funds to such a program or activity. Further, it is doubtful that a caucus would even fall under the statutory definition of "program or activity."

2. It is not a violation of Title VI for a state university or college to provide funding, support, or staff to a discriminatory caucus or its retreat because Title VI only prohibits a state school from excluding participation in a program on the basis of race, color, or national origin.

3. This question is answered in questions 1 and 2.

4. This Office is aware of no state laws prohibiting the Office of Legislative Administration from paying dues for members of a caucus that discriminates on the basis of race, color, or national origin. If the Office of Legislative Administration does not pay the dues for members of some caucus based on the members' race, color, or national origin, it is likely in violation of federal regulations. However, merely paying to dues for members of a discriminatory caucus is not prohibited by federal law.

5. This question is answered in question 4.

6. a) Maybe. Under TCA 9-4-208 (a) it is permissible for the Tennessee General Assembly to appropriate funds to organizations that "in the interest of the state of Tennessee. . .

promote, encourage and foster the commercial and interests of the state by attraction of industries, educational and research facilities, and other facilities involving modern technologies." If an organization conforms to these criteria, funding may be authorized, if it does not: it would not be permissible. We need more information to make a more definitive pronouncement.

b) No. There is no statutory provision authorizing state personnel to conduct anything other than state business during the work time during which they are employed and paid by the state.

7. In accordance with longstanding policy, this Office is not able to opine on the federal tax status of an organization or the federal tax consequences of any transaction. This Office does not have the power to authoritatively interpret federal tax laws or regulations, for which the Internal Revenue Service has established its own procedures.

8. a) There is no statutory prohibition specifically addressing whether the state can indirectly support a charitable organization or group which may not be properly registered under the Charitable Solicitations Act. Consequently, after examining the limited information provided, it appears that such a charitable organization or group may conceivably be eligible for indirect state support under Tenn. Code Ann. § 9-4-208(a) or other applicable law. Without additional information, there can be no definitive answer to this question at this time.

b) With regard to whether a State agency can provide support for a caucus that (1) purports to be a 501(c)(3) organization but which has not properly registered, and (2) discriminates on the basis of race, color, or national origin, this question is answered in our response to Question 4, above.

9. Yes. The Division of Charitable Solicitations of the Secretary of State's office on its web site at http:www.Tennessee.gov/sos/charity/co-info.htm specifically states that so-called "non-profit" entities that solicit (through advertising sales or sponsorships, books, food or tickets to a show) funds are to register with the Division of Charitable Solicitations.

10. Yes. When the word "may" is used in a statute it means that the act it modifies is discretionary, not mandatory. *See Black's Law Dictionary*, 883 (5th ed. 1979). The legislature could change T.C.A. § 48-101-503(1) and (3) pertaining to enforcement from discretionary authority to mandatory obligation. There is no other constitutional or statutory law which would require such enforcement by the Secretary of State.

11-15. In accordance with longstanding policy, this Office is not able to opine on the federal tax status of an organization or the federal tax consequences of any transaction. This Office does not have the power to authoritatively interpret federal tax laws or regulations, for which the Internal Revenue Service has established its own procedures.

16. Because an "activity" or "caucus" is not an entity subject to franchise and excise taxes, this question is pretermitted.

ANALYSIS

1. Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d, provides that "no person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." A covered Title VI "program or activity" includes "all of the operations of a department, agency . . . or other instrumentality of a State department . . . of a State . . . or . . . each such department or agency (and each other State or local government entity) to which the assistance is extended." 42 U.S.C. § 2000d-4a. Title VI does not apply directly to prohibit a caucus' discriminatory membership criteria because the caucus does not receive federal funds.[1] *See Cuffley v. Mickes*, 208 F.3d 702, 710 (8th Cir. 2000) (citing *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999)). For the State to violate Title VI, it must receive federal funds, it must supply those funds to a "program or activity," and participation in the program or activity which receives the funding must be denied on the basis of race, color, or national origin.[2]

Nor does the State violate any federal regulations promulgated pursuant to Title VI by providing non-federal funding, support, or staffing to a discriminatory caucus. In *Cuffley*, the Eighth Circuit considered whether Missouri could exclude the Ku Klux Klan from its "Adopt-A-Highway" program. The State argued that allowing the Klan to participate would put the State in violation of both Title VI and the Department of Transportation's regulations that were promulgated pursuant to Title VI. *Cuffley*, 208 F.3d at 710-11.[3] The court concluded that Missouri did not violate Title VI or any federal regulations by allowing the Klan to participate because Missouri was not denying anyone the opportunity to participate in a program. *Id.* at 711. Though Missouri received federal funds, it did not pay for the "Adopt-A-Highway" program with any of these funds. *Id.* Likewise, here, the State is not in violation of Title VI or federal regulations by providing non-federal funding to a discriminatory caucus because in doing so, the State does not exclude anyone, deny participation in, or otherwise provide a service different from that afforded others.

Even if the State distributed federal funding to such a caucus, it is unlikely that a court would conclude the State was in violation of Title VI. According to Black's Law Dictionary, a "caucus"

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[1] The questions assume that the caucus does discriminate on the basis of race, color, or national origin. This opinion does not address whether any caucus does, in fact, so discriminate.

[2] According to the Legislature's Office of Legislative Administration, the State does not receive any federal funding which is distributed to a caucus.

[3] The regulation provided that a recipient of federal funds "may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin ... [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program." *Cuffley*, 208 F.3d at 710 (citing 49 C.F.R. § 21.5(b)(1)(vi)). Many other federal departments have regulations that are identical to this. *See, e.g.*, 28 C.F.R. § 42.104 (promulgated by the Department of Justice).

is a either group of "[r]epresentatives from a political party who assemble to nominate candidates and decide party policy"or "[a] meeting of a group, usually within a deliberative assembly, of people aligned by party or interest to formulate a policy or strategy." *Black's Law Dictionary* 232 (8th ed. 2004). This Office is aware of no court which has ever considered whether a caucus is included in the definition of "program or activity." Given the statutorily prescribed definition of "program or activity," however, it is unlikely that a court would conclude that a caucus fits within the definition.

Similarly, the State could only be in violation of Title VI for funding an activity such as a legislative retreat if it distributed federal funding for the activity. Even if it did, the State would not be in violation of Title VI because the question assumes that the activity is "not part of the state, a subdivision of the state, or one of its agencies or departments." Thus, the activity would not be included in the definition of a "program or activity."

Assuming that a violation of Title VI did exist, the ultimate legal remedy would be for the federal agency supplying the funding to suspend it. Section 602 of Title VI, codified at 42 U.S.C. § 2000d-1, authorizes executive agencies of the Federal government to promulgate administrative rules "to effectuate the provisions of § [601]." Section 602 grants federal agencies the power to remove funding through their own administrative processes and describes the process an agency must follow to enforce regulations promulgated under the section. First, it must: (1) "advise the appropriate person or persons of the failure to comply;" and (2) be convinced "that compliance cannot be secured by voluntary means." If informal means do not work, then the agency must: (1) establish "an express finding on the record" of a violation; and (2) give the recipient an opportunity for a hearing. If the agency finds against the recipient, then it may proceed to discontinue funding. But if it does discontinue funding, the agency must: (1) limit the termination to the particular program of the "political entity or part thereof" in which the violation occurred; (2) file a report with the respective House and Senate committees that have jurisdiction over the program or activity affected; and (3) stay the termination of funding until 30 days after the agency has filed the required report with the appropriate Congressional committees.[4] Title VI has no provision requiring a state to repay funds it has distributed to a discriminating program or activity.

2. As discussed above, Title VI prohibits exclusion on the basis of race, color, or national origin from a "program or activity" receiving federal funds. Colleges and universities are specifically included in the definition of "program or activity." 42 U.S.C. § 2000d-4a. Thus, receipt of federal financial assistance by any student or portion of a school subjects the entire school to Title VI coverage. *Radcliff v. Landau*, 883 F.2d 1481, 1483 (9th Cir. 1989). While Title VI applies to colleges and universities receiving federal funds, it only prohibits the actual schools from excluding people from a program based on the improper factors. Title VI does not prohibit a school from providing non-federal funding, support, or staff to a third party, i.e. a caucus or an annual legislative

[4] Even if an agency completed the process and the results were in its favor, §602 provides that the agency could only remove funding from the particular program of the "political entity or part thereof" in which the violation occurred.

retreat, that discriminates.

3. This question has been addressed in the answers to questions 1 and 2.

4. This Office is aware of no state or federal law which prohibits the Office of Legislative Administration (OLA) from paying the dues for members of a caucus which discriminates on the basis of race, color, or national origin.[5] Tennessee Code Annotated § 4-21-904 does provide that it "is a discriminatory practice for any state agency receiving federal funds making it subject to Title VI of the Civil Rights Act of 1964, or for any person receiving such federal funds from a state agency, to exclude a person from participation in, deny benefits to a person, or to subject a person to discrimination under any program or activity receiving such funds, on the basis of race, color, or national origin."[6] Nevertheless, paying for a member's caucus dues is not excluding a person from participating in, denying benefits to a person, or subjecting a person to discrimination under a program or activity receiving funds on the basis of an impermissible factor.

5. This question has been addressed in the answer to question 4.

6. a) Under TCA 9-4-208 (a) it is permissible for the Tennessee General Assembly to appropriate funds to organizations that "in the interest of the state of Tennessee. . . promote, encourage and foster the commercial and interests of the state by attraction of industries, educational and research facilities, and other facilities involving modern technologies." If an organization conforms to these criteria, funding may be authorized, if it does not: it would not be permissible. We need more information to make a more definitive pronouncement.

b) There is no statutory provision authorizing state personnel to conduct anything other than state business during the work time during which they are employed and paid by the state.

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[5] Federal departments and agencies have promulgated regulations for enforcing Title VI. These regulations prohibit a recipient of federal funds from not only excluding participation in a program or denying benefits, but also affording a person an opportunity or service which it does not afford others on the basis of their race, color, or national origin. *See, e.g.*, 49 C.F.R. § 21.5. Thus, though no court has addressed such an issue, the OLA would likely violate a regulation by paying the caucus dues for some members and not others if the decision not to pay was based on their race, color, or national origin. The question does not assume such facts, however, and it is the understanding of this Office that the OLA has not refused to pay caucus dues for any members based on their race, color, or national origin.

[6] There are numerous federal statutes with similar provisions which govern how a state may distribute federal funds in specific programs. *See, e.g.*, 42 U.S.C.A. § 8625 (providing that no person on the ground of race, color, national origin, or sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available to states for low-income energy assistance); 42 U.S.C.A. § 300w-7 (providing that no person on the ground of race, color, national origin, or sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available to states for preventative health and health block service grants).

7. In accordance with longstanding policy, this Office is not able to opine on the federal tax status of an organization or the federal tax consequences of any transaction. This Office does not have the power to authoritatively interpret federal tax laws or regulations, for which the Internal Revenue Service has established its own procedures.

8. a) There is no statutory prohibition specifically addressing whether the state can indirectly support a charitable organization or group which may not be properly registered under the Charitable Solicitations Act. Consequently, after examining the limited information provided, it appears that such a charitable organization or group may conceivably be eligible for indirect state support under Tenn. Code Ann. § 9-4-208(a) or other applicable law. Without additional information, there can be no definitive answer to this question at this time.

b) With regard to whether a State agency can provide support for a caucus that (1) purports to be a 501(c)(3) organization but which has not properly registered, and (2) discriminates on the basis of race, color, or national origin, this question is answered in our response to Question 4, above.

9. The Division of Charitable Solicitations of the Secretary of State's office on its web site at http://www.Tennessee.gov/sos/charity/co-info.htm specifically states that so-called "non-profit" entities that solicit (through advertising sales or sponsorships, books, food or tickets to a show) funds are to register with the Division of Charitable Solicitations.

10. Yes. When the word "may" is used in a statute it means that the act it modifies is discretionary, not mandatory. *See Black's Law Dictionary*, 883 (5th ed. 1979). The legislature could change T.C.A. § 48-101-503(1) and (3) pertaining to enforcement from discretionary authority to mandatory obligation. There is no other constitutional or statutory law which would require such enforcement by the Secretary of State.

11-15. In accordance with longstanding policy, this Office is not able to opine on the federal tax status of an organization or the federal tax consequences of any transaction. This Office does not have the power to authoritatively interpret federal tax laws or regulations, for which the Internal Revenue Service has established its own procedures.

16. The Tennessee franchise and excise taxes apply only to designated types of organizations engaged in business for profit. Tenn. Code Ann. §§ 67-4-2007 (excise tax); 67-4-2105 (franchise tax). These organizations, which are defined at Tenn. Code Ann. § 67-4-2004(20) as "persons" for purposes of these taxes, include "every corporation, subchapter S corporation, limited liability company, professional limited liability company, registered limited liability partnership, professional registered limited liability partnership, limited partnership, cooperative, joint-stock association, business trust, regulated investment company, real estate investment trust, state-chartered or national bank, or state-chartered or federally chartered savings and loan association." Unless an entity is organized as one of these sorts of businesses, and conducts its business for profit, it is not subject to Tennessee franchise or excise tax. Accordingly, an "activity"

or "caucus" is not subject to franchise or excise taxes, and is not required to file a state tax return, unless it qualifies as one of the types of entities to which those taxes apply. Thus, because an "activity" or "caucus" is not an entity subject to franchise and excise taxes, Question 16 is pretermitted.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

KEVIN STEILING
Deputy Attorney General

Requested by:

The Honorable Stacey Campfield
State Representative
113 War Memorial Building
Nashville, TN 37243