STATE OF COLORADO

JOANNE HILL, CPA
State Auditor

OFFICE OF THE STATE AUDITOR
(303) 869-2800
FAX (303) 869-3060

Legislative Services Building
200 East 14th Avenue
Denver, Colorado 80203-2211

Memorandum

TO: Members of the Legislative Audit Committee

FROM: Joanne Hill, CPA
State Auditor

DATE: August 10, 2005

RE: Higher Education Enterprise Designations

The General Assembly enacted a statute in 2004 (Section 23-5-101.7, C.R.S.) enabling higher education governing boards to designate an institution or group of institutions as an enterprise for purposes of Section 20 of Article X of the Colorado Constitution (Taxpayer's Bill of Rights or TABOR). Once an institution is designated as an enterprise, the Office of the State Auditor and the Legislative Audit Committee are required to determine whether the designation conforms to the provisions of the statute. Last year, the Legislative Audit Committee approved the designation of the University of Colorado as a TABOR-exempt enterprise for Fiscal Year 2005 contingent on the University meeting all TABOR requirements at the end of the year and future years. Recently, a number of other higher education governing boards have designated their institutions as enterprises for Fiscal Year 2006.

My Office has completed a review of the additional enterprise designations identified below. The following discusses the results of the review and my recommendation for action to be taken by the Legislative Audit Committee.

Background

The General Assembly passed Senate Bill 04-189 during the 2004 Legislative Session. Among other things, the Bill:

- Changed the process for funding postsecondary education. The College Opportunity Fund was established to provide stipends to eligible undergraduate students who attend a state or private participating institution of higher education.

- Made the Colorado Commission on Higher Education responsible for acquiring specified educational services from state institutions of higher education. On behalf of the Commission, the Department of Higher Education was authorized to enter into fee-for-service contracts with higher education governing boards to purchase such services.

- Enabled governing boards to designate a higher education institution or group of institutions as a TABOR-exempt enterprise and established the requirements and process for enterprise designation.

In the past few months, various governing boards approved resolutions designating the following institutions as an enterprise for Fiscal Year 2006:

Adams State College
Colorado Community College System
Colorado School of Mines
Colorado State University
Colorado State University - Pueblo
Fort Lewis College
Mesa State College
Metropolitan State College of Denver
University of Northern Colorado
Western State College of Colorado

Results of Review

To qualify as an enterprise, a higher education institution needs to be a government-owned business authorized to issue its own revenue bonds and receiving under 10 percent of its annual revenue in grants from all Colorado state and local governments combined. We reviewed information submitted to us by the above 10 institutions concerning their enterprise designations in the form prescribed by the Legislative Audit Committee. We found these institutions meet the requirements of an enterprise for the reasons discussed below. However, as noted later in this memorandum, final determination of an institution's compliance with TABOR requirements will take place at the end of a fiscal year.

<u>Government-Owned Business</u>

Neither the Colorado Constitution nor state statute specify the characteristics of a government-owned business. However, a formal opinion issued by the Colorado Attorney General (No. 97-1, March 11, 1997) stated that:

> To satisfy the definition of an "enterprise" under TABOR, the enterprise must be an independent, self-supporting government-owned business that receives income, fees, and revenue in return for the provision of goods or services. The very concept of an enterprise under TABOR envisions an entity that is owned by a government institution, but is financially distinct from it. **Nicholl v. E-470 Public Highway Authority,** 896 P.2d 859, 868 (Colo. 1995).
>
> An enterprise must also engage in the kind of activity that is commonly carried on for profit outside the government. **Nicholl**, 896 P.2d at 868. The activities engaged in by the enterprise must bear the indicia of arms-length, market exchanges, and goods and services must be provided at a market rate sufficient for the independent operation of the enterprise.

In the legislative declaration for SB 04-189, the General Assembly stated that the provision of higher educational services is a business. We found the higher education institutions possess the characteristics of a government-owned business. As to being government owned, the Colorado Constitution (Section 5 of Article VIII) gives the State authority to establish, manage, and control institutions of higher education. As to being a business, the institutions receive fees and revenue from the provision of goods and services. They engage in activities that exist outside of state government in both profit and nonprofit forms. They also compete with similar business types outside of state government.

Authority to Issue Revenue Bonds

All of the institutions seeking enterprise status have the ability to issue revenue bonds. Section 23-5-102 (2), C.R.S., authorizes the governing board of any institution of higher education to issue revenue bonds on behalf of the institution. The governing boards of these institutions have issued revenue bonds on behalf of the institutions in the past.

Receive Under 10 Percent of Revenue from Governmental Support

TABOR limits the amount of governmental support an institution may receive to less than 10 percent of its annual revenue in grants from state and local governments. TABOR does not define what is meant by "grants." The General Assembly through enabling legislation (Section 23-5-101.5 (2) (b) (I), C.R.S.) has defined a grant to be any direct cash subsidy or other direct contribution of money from the State or any local government in Colorado which is not required to be repaid.

The institutions do not receive any direct cash subsidy or direct cash contribution from local governments. Prior to July 1, 2005, they received monies from the State of Colorado through General Fund appropriations. Beginning July 1, 2005, Senate Bill 04-189 changed the process of funding higher education institutions. General Fund monies are no longer directly appropriated to higher education governing boards for tuition and other educational services. Instead, stipends for tuition assistance are provided to eligible undergraduate students through the College Opportunity Fund (COF) which in turn issues payments to institutions, and the Commission on Higher Education purchases educational services from governing boards through fee-for-service contracts.

Senate Bill 04-189 stated that revenues received by higher education institutions from stipend payments and fee-for-service contracts are not a state grant. The table on the following page shows the calculation of state support for Fiscal Year 2006 excluding stipends and fee-for-service contracts as state support. As can be seen from this table, all of the institutions seeking enterprise status are projected to receive less than 10 percent of their revenue from the State.

ESTIMATED STATE SUPPORT
EXCLUDING FEE-FOR-SERVICE CONTRACTS AND COF STIPENDS
FISCAL YEAR 2006

	TOTAL REVENUE	STATE SUPPORT—GENERAL FUND	STATE SUPPORT—CAPITAL APPROPRIATIONS	TOTAL STATE SUPPORT	STATE SUPPORT AS A PERCENT OF TOTAL REVENUE
ADAMS STATE COLLEGE	$35,873,888	- -	- -	- -	0.0%
COLORADO COMMUNITY COLLEGE SYSTEM	$416,612,081	$23,621,070 Note 1	$5,578,836	$29,199,906	7.0%
COLORADO SCHOOL OF MINES	$113,223,481	- -	$5,077,735	$5,077,735	4.5%
COLORADO STATE UNIVERSITY	$643,256,628	- -	$1,983,468	$1,983,468	0.3%
COLORADO STATE UNIVERSITY - PUEBLO	$55,452,132	- -	$3,275,600	$3,275,600	5.9%
FORT LEWIS COLLEGE	$50,585,093	- -	- -	- -	0.0%
MESA STATE COLLEGE	$52,049,330	- -	$311,570	$311,570	0.6%
METROPOLITAN STATE COLLEGE OF DENVER	$116,412,100	- -	- -	- -	0.0%
UNIVERSITY OF NORTHERN COLORADO	$141,140,556	- -	$5,000,000	$5,000,000	3.5%
WESTERN STATE COLLEGE OF COLORADO	$29,123,712	- -	$496,125	$496,125	1.7%

Source: Information submitted by institutions for enterprise designation
Note 1: This includes appropriations for the Colorado Vocational Act and other programs. It excludes appropriations that are passed through the System to local district colleges and area vocational schools.

The following provides additional information about stipends and fee-for-service contracts.

College Opportunity Fund Stipends

The General Assembly created the College Opportunity Fund (COF) Program in 2004 (Section 23-18-101 *et seq.*, C.R.S.). The Program was established as a trust fund to provide financial assistance to eligible undergraduate students who attend college. To obtain the stipend, an eligible undergraduate student must apply for the stipend and be admitted to a state or private participating institution of higher education. Once this is done, an institution requests the Colorado Access Network to provide the stipend payment to the institution so it can be applied against the student's total in-state tuition cost.

For Fiscal Year 2006, the General Assembly appropriated $290,536,800 for the Colorado Opportunity Fund Program. Of this amount, $288,604,800 was designated for state institutions and $1,932,000 for participating private institutions. The two private institutions who have been approved for participation in the Program at this time are the University of Denver and Regis University. Eligible students may receive a total stipend of $2,400 a year for 30 credit hours at state institutions and $1,200 a year for 30 credit hours at participating private institutions. The stipend revenues estimated to be received by all state higher education institutions are shown in the table on page 7.

As noted above, enabling legislation for TABOR defines a grant to be a direct cash subsidy or other direct contribution of money from the State. As part of Senate Bill 04-189 which created the College Opportunity Fund Program, the General Assembly added Section 23-5-101.5 (2) (b) (II) (E), C.R.S., which specifically excludes revenues received by institutions from stipend payments as a grant.

During our review, we noted that the Colorado Attorney General recently issued a formal opinion about how the treatment of the College Opportunity Fund stipend for calculating the Cost of Attendance for federal financial aid programs impacts whether the stipend is treated as a state grant. Pages 4 and 5 of the Attorney General Opinion (copy of Opinion attached) includes a discussion of applicable case law relative to the stipend not being considered a grant under TABOR. Page 5 of the Opinion states that it appears that the stipend is not a grant for TABOR because the stipend results in an indirect government benefit to higher education institutions rather than a direct governmental grant. This is because the stipend provides financial assistance on behalf of the student and the student chooses the public or private institution in which to enroll.

Fee-For-Service Contracts

As part of the new funding system for higher education, the Commission on Higher Education is responsible for acquiring educational services from higher education institutions. Section 23-1-109.7, C.R.S., provides that the Department of Higher Education (Department), on behalf of the Commission, shall annually enter into fee-for-service contracts with governing boards for services that may include, but not be limited to:

- Educational services in rural areas or communities in which the cost of delivering the educational services is not sustained by the amount received in student tuition.

- Basic skills courses.

- Educational services associated with the "Postsecondary Enrollment Options Act."

- Educational services associated with the high school fast track program.

- Educational services required of the Commission to meet it obligations under reciprocal agreements (i.e., agreements for obtaining waivers of the nonresident differential in tuition rates for Colorado residents attending higher education institutions in other states in exchange for Colorado institutions waiving the nonresident differential in tuition rates for residents of the other states).

- Graduate school services.

- Educational services that may increase economic development opportunities in the State, including courses to assist students in career development and retraining.

- Specialized educational services and professional degrees including, but not limited to the areas of dentistry, medicine, veterinary medicine, nursing, law, forestry, and engineering.

As noted earlier, enabling legislation for TABOR defines a grant to be a direct cash subsidy or other direct contribution of money from the State. Senate Bill 04-189 added Section 23-5-101.5 (2) (b) (II) (D), C.R.S., which specifically excludes fees received by institutions from fee-for-service contracts as a grant.

For Fiscal Year 2006, the General Assembly appropriated $208,281,542 to the College Opportunity Fund Program for fee-for-service contracts. The services purchased from institutions by the Department of Higher Education for Fiscal Year 2006 are shown in the table on the following page.

SERVICES PURCHASED FOR HIGHER EDUCATION AND COF STIPENDS FISCAL YEAR 2006

	GRADUATE EDUCATION	POST-SECONDARY ENROLLMENT OPTIONS, FAST TRACK, BASIC SKILLS AND RECIPROCAL AGREEMENTS	ECONOMIC DEVELOPMENT AND PRESERVATION; CAREER DEVELOPMENT AND RETRAINING	SPECIALIZED SERVICES – ENGINEERING, MEDICINE, AND OTHER	FEE-FOR-SERVICE TOTAL	COLLEGE OPPORTUNITY FUND (COF) STIPENDS	TOTAL
ADAMS STATE COLLEGE	$3,627,652	$159,600	$3,820,579	- -	$7,607,831	$3,508,800	$11,116,631
COLORADO COMMUNITY COLLEGE SYSTEM	- -	$16,645,200	- -	- -	$16,645,200 Note 2	$89,296,800	$105,942,000
COLORADO SCHOOL OF MINES	$2,041,578	$8,538	- -	$9,188,264	$11,238,380	$5,949,600	$17,187,980
COLORADO STATE UNIVERSITY	$17,521,054	$16,000	- -	$40,794,106	$58,331,160	$38,958,166	$97,289,326
COLORADO STATE UNIVERSITY - PUEBLO	$1,163,790	$60,000	$1,286,121	$1,286,121	$3,796,032	$8,098,634	$11,894,666
FORT LEWIS COLLEGE	- -	$249,600	$969,561	- -	$1,219,161	$6,216,000	$7,435,161
MESA STATE COLLEGE	$179,820	$729,600	$6,227,275	- -	$7,136,695	$10,173,600	$17,310,295
METROPOLITAN STATE COLLEGE OF DENVER	- -	- -	- -	- -	- -	$36,184,800	$36,184,800
UNIVERSITY OF COLORADO Note 1	$30,501,188	$88,800	- -	$55,457,892	$86,047,880 Note 2	$64,624,800	$150,672,680
UNIVERSITY OF NORTHERN COLORADO	$11,707,709	$12,000	- -	- -	$11,719,709	$21,871,200	$33,590,909
WESTERN STATE COLLEGE OF COLORADO	- -	$21,600	$4,517,718	- -	$4,539,318	$3,722,400	$8,261,718
TOTAL	$66,742,791	$17,990,938	$16,821,254 Note 3	$106,726,383	$208,281,366 Note 2	$288,604,800	$496,886,166

Source: Fee-For-Service Contracts and Long Appropriation Bill

Note 1: The Legislative Audit Committee approved the University of Colorado's enterprise status in August 2004 subject to annual review. it is included here for informational purposes.

Note 2: The amounts for the Colorado Community College System and the University of Colorado are $15 and $161, respectively less than the amounts appropriated because of rounding differences in the number of credit hours purchased.

Note 3: Economic development and preservation services are $2,900,079 for Adams State College, $969,561 for Fort Lewis College, and $1,002,968 for Western State College. The remaining services included in this column are for career development and retraining.

The following is a summary of the services being acquired and the bases for the purchase prices of the services.

Graduate Education - The Department is purchasing a specified number of credit hours for Master and (if applicable) Doctorate level programs at the institution's average cost per credit hour for such programs.

Post Secondary Enrollment Options, High School Fast Track Program, Basic Skills Courses, and Reciprocal Agreements - The Department is purchasing a specified number of credit hours for applicable courses at the rate of $80 per credit hour. This rate is the same as the credit hour rate used for the College Opportunity Fund stipend (i.e., $2,400 divided by 30 credit hours). It should be noted that the General Assembly revised Section 23-18-202 (5) (d) (I), C.R.S., during the 2005 session as part of SB 05-132 to enable higher education institutions to receive payment of the College Opportunity Fund stipend on behalf of eligible undergraduate students for these courses. Because the monies for the payment of the courses were not appropriated to the College Opportunity Fund Stipend Program for Fiscal 2006, the payment is being handled through the fee-for-services contracts. For Fiscal Year 2007, the payment of the stipend for the courses is planned to be included as part of the College Opportunity Fund Stipend Program.

Economic Development and Preservation; Career Development and Retraining - For economic development and preservation services, the Department is paying a specified dollar amount for preservation of current economic conditions for the institution's region and the State, while increasing economic development opportunities where possible. Past economic impact studies have shown that colleges and universities provide benefits to local communities and to the State such as helping start new businesses, providing new jobs, increasing employment, and improving the tax base for local governments and the State.

For career development and retraining services, the Department is purchasing a specified number of credit hours for select programs including courses focused on educational training for students improving or changing careers. The Department is purchasing the services at the institution's average cost per credit hour for such programs.

Specialized Educational Services- Engineering, Medicine, and Other Programs - The Department is purchasing a specified number of credit hours for engineering, medical, and other related undergraduate programs at the institution's average cost per credit hour for such programs. In addition, the Department is purchasing specialized services provided to citizens by the State Forestry, Cooperative Extension, and Agriculture Experiment Station agencies within the Colorado State University System at the average cost of such services.

To ensure that the institutions provide the contracted number of credit hours, the fee-for-service contracts require institutions to periodically report on the number of student FTE served and credit hours provided. To ensure the provision of economic development and preservation services, the fee-for-service contracts require applicable institutions to provide an economic impact study by May 30, 2006 showing what the institutions' economic impact has been for their regions and the State.

As noted earlier, one of the characteristics of an enterprise is that it engages in market exchanges that provide goods and services at a market rate sufficient for the independent operation of the enterprise. Accounting literature defines a market exchange as a transaction in which one party provides goods or services to another party at fair market value. It appears the purchases of graduate education services, career development and retraining services, and specialized educational services exhibit the characteristics of a market exchange because essentially equal values are being exchanged for the services. That is, the Department of Higher Education is purchasing services from institutions at the cost of such services. However, the purchases of economic development and preservation services do not appear to possess the characteristics of a market exchange because the services are not specifically identified. Although colleges and universities provide direct economic benefits to local communities and secondary economic benefits to the State, the benefits are generally derived from the overall existence and operation of the institutions. Since there is not a specific identification or basis for measurement of the services, we cannot conclude that the value of services to be provided is essentially equal to the purchase price in the contract.

The Department of Higher Education is purchasing economic development and preservation services for $2,900,079 from Adams State College, $969,561 from Fort Lewis College, and $1,002,968 from Western State College. The fees received by the institutions for these services as a percentage of total estimated revenues for Fiscal Year 2006 are 8.1 percent for Adams State College, 1.9 percent for Fort Lewis College, and 3.4 percent for Western State College. Even if the economic development and preservation fees were to be considered a state grant, these institutions would be under the 10 percent TABOR limitation for state support.

We have discussed the lack of specific identification of economic development and preservation services with the Department of Higher Education. The Department has agreed to evaluate whether specific services can be identified and measured when it prepares fee-for-service contracts for Fiscal Year 2007. We will perform a follow up of this when the Department drafts the 2007 contracts in April 2006.

Conclusion

Our review found that the ten higher education institutions seeking enterprise status meet the TABOR requirements of being a government-owned business authorized to issue revenue bonds. With the statutory exclusion of revenues from College Opportunity Fund stipends and fee-for-service contracts, the institutions will receive less than 10 percent of their revenue from the State for Fiscal Year 2006. The purchases of economic development and preservation services do not appear to result in market exchange transactions and therefore do not qualify for exclusion from the 10 percent calculation. However, the institutions receiving fees from such services are under the 10 percent TABOR limitation even if such fees were to be considered state support.

Recommendation

I recommend that the Legislative Audit Committee approve the designation of the following institutions as TABOR-exempt enterprises for Fiscal Year 2006: Adams State College, Colorado Community College System, Colorado School of Mines, Colorado State University, Colorado State University - Pueblo, Fort Lewis College, Mesa State College, Metropolitan State College of Denver, University of Northern Colorado, and Western State College of Colorado.

The final determination of enterprise status is made at the end of each fiscal year. The determination of final TABOR status will be reviewed as part of the annual financial audits of the institutions as well as my Office's annual statewide audit of TABOR revenue.

Enclosure:
Colorado Attorney General Opinion: No. 05-03, July 29, 2005

JOHN W. SUTHERS
Attorney General

CYNTHIA S. HONSSINGER
Chief Deputy Attorney General

JOHN J. KRAUSE
Interim Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 5th Floor
Denver, Colorado 80203
Phone (303) 866-4500
FAX (303) 866-5691

FORMAL OPINION	)	
	)	No. No. 05-03
Of	)	AG Alpha No. HE HE AGBBL
	)	07/29/05
JOHN W. SUTHERS Attorney General	)	

This opinion, requested by the Colorado Commission on Higher Education ("CCHE"), concerns the The 2004 College Opportunity Fund Act, § 23-18-101 *et seq.* (the "Act"). The Act created the College Opportunity Fund; a trust fund consisting of stipends for each undergraduate student in Colorado. This Opinion is being issued to clarify how the College Opportunity Fund affects calculation of federal financial aid, and the effect, if any, that such calculations have on whether such stipend should be considered a state grant for purposes of Colo. Const. Art. X, § 20 ("TABOR").

QUESTION PRESENTED AND CONCLUSION

Question: Does the treatment of the College Opportunity Fund stipend for purposes of calculating federal student financial aid impact whether the stipend will be treated as a state grant to institutions of higher education under TABOR?

Answer: No. The treatment of the College Opportunity Fund stipend for purposes of federal financial aid will not impact whether the stipend will be treated as a state grant to institutions of higher education under TABOR.

BACKGROUND

1. The College Opportunity Fund

In 2004, the Colorado General Assembly enacted the College Opportunity Fund Act. The purpose of the Act was to improve higher education by changing the process by which post-secondary education is financed from that of funding institutions to funding individual students. Senate Bill 04-189, Section 1, (3)(f). To accomplish this, the Act created the

College Opportunity Fund, which is a trust fund for the benefit of eligible undergraduate students. The Fund consists of a stipend for each undergraduate student in Colorado who applies for the stipend and who is admitted and registers to attend a state or participating private institution of higher education. § 23-18-201(1), C.R.S. (2004). After the student has applied for the stipend and been admitted to the participating institution of his or her choice, the institution requests the Colorado Access Network to make a stipend payment to the institution on behalf of the eligible undergraduate student. The stipend payment is paid to the institution upon receipt of the student's authorization, and is then applied against the student's total in-state tuition. § 23-18-202(5)(a), C.R.S. (2004).

According to the Act, it is the intent of the General Assembly that the amount of the stipend received by a state institution of higher education on behalf of a student not constitute a grant from the State of Colorado for purposes of Colo. Const. Art. X, § 20(2)(d) ("TABOR"). § 23-18-202(7), C.R.S. (2004). The significance of this lies in the fact that, if stipend monies are not considered direct grants to the institutions, those institutions will be able to meet the requirements for becoming enterprises contained in Colo. Const. Art. X, § 20(2)(d).

Under the Act, "total in-state tuition" means the total amount of tuition that is paid to a state institution of higher education by or on behalf of a student, including the amount of the stipend. § 23-18-102(13), C.R.S. (2004). The "stipend" is the amount of money per credit hour held in trust for and paid on behalf of the student from the Fund, and the "student's share of in-state tuition" means the amount of total in-state tuition, less the amount of the stipend. § 23-18-102(11 – 12), C.R.S. (2004).

2. Eligibility for Federal Financial Aid

Those provisions of the Act outlined above affected a fundamental change in the method of funding higher education in Colorado. Whereas previously the state funded the institutions directly, now the state is funding the education of the individual student. One of the potential ramifications of this change is its effect on how federal financial aid is calculated for students receiving stipends from the College Opportunity Fund. This has prompted concern among some members of the higher education community regarding whether the treatment of the stipend for federal financial aid purposes will adversely affect whether the stipend is considered to be a state grant for purposes of TABOR. This concern centers on the fact that most third-party payments, such as private scholarships, are treated as resources in the federal financial aid process, and if the stipend is not also treated like a private scholarship, there will be an increased likelihood that at some future time a court may find that the stipends are actually grants to the institutions under TABOR, thus rendering it impossible for such institutions to satisfy the funding requirements for achieving enterprise status.

In general, a student's financial need for federal financial aid purposes is the difference between a student's "cost of attendance" (COA) and his or her expected family contribution. 34 CFR § 676.2(b). Thus, determining COA is the cornerstone of establishing a student's financial need. Basically, the COA is an estimate of the student's educational expenses for the period of enrollment. *Federal Financial Aid Handbook*, Cost of Attendance (Budget), chapter 2, p. 3-15. COA includes the tuition and fees charged to the student, allowances for books and supplies, room and board costs, etc. 20 U.S.C.A. § 1087ll. However, for the tuition and fees component, it is acceptable to have different standard costs for different categories of students; for instance, a lower COA for in-state students, who have lower tuition, than for out-of-state students, who have higher tuition. *Federal Financial Aid Handbook*, Cost of Attendance (Budget), chapter 2, p. 3-15.

COA is determined by the amount of tuition for which the student is actually responsible. When a portion of a student's tuition and fees are paid by another organization or are waived, the student's COA is based on what the school is actually charging the student. However, when the student is charged for the tuition and fees, even if the charge is eventually paid by someone besides the student (i.e., a scholarship agency or other source of aid), then the tuition and fee amount is included in the COA. In such a case, the tuition and fee payment would be counted as a resource and included in estimated financial assistance. *Federal Financial Aid Handbook*, Cost of Attendance (Budget), chapter 2, p. 3-18. For instance, for prepaid tuition plans and college savings plans, if the money from the plan is intended to reduce the amount of tuition and fees charged to the students, then the COA would not include a tuition and fees component. On the other hand, if the money from the plan is used to pay tuition and fees charged to the student, then the COA is not affected. *Id.*

The federal Department of Education has ruled that the College Opportunity Fund stipend should not count as part of the COA for in-state students in public institutions. Thus, for these students, the COA is based on the amount of in-state tuition actually charged to the student and not on total in-state tuition. The reason for this determination was practical – if the stipend was included as part of the financial aid calculation, it could adversely affect how much federal aid students would qualify for, and could raise issues regarding taxability of the stipend. Also, it could adversely affect students in some situations where a student drops out and aid must be refunded to the federal government. However, some members of the higher education community have raised the concern that if the stipend is not counted as COA, it will adversely affect whether the stipend is considered to be a state grant for purposes of TABOR.

DISCUSSION

Under the Act, the intent of the General Assembly is that the stipend not be considered a grant from the State of Colorado for purposes of Colo. Const. Art. X, § 20(2)(d), which defines an "enterprise" as "a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined". The importance of the stipend not being considered a grant under TABOR is that it allows state institutions of higher education to qualify for enterprise status.

In order to meet the enterprise requirement, the stipends from the College Opportunity Fund must be indirect government benefits to the institutions rather than direct state subsidies that would be government grants under TABOR. While Colorado case law provides no guidance for resolving this issue under TABOR, courts have examined the characteristics of direct and indirect government financial aid in other contexts. In *Zelman v. Simmon-Harrris*, 536 U.S. 639, 122 S. Ct. 2460 (2002), the United States Supreme Court, for purposes of Establishment Clause analysis, distinguished between government programs that provide aid directly to religious schools from government programs that provide aid to individuals who then direct the aid to institutions of their own choosing, which can include religious schools. The Court found that the latter could be sustained because these programs were the result of private choice:

> Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652. Likewise, in *Witter v. Washington Dept. of Serv. for Blind*, 474 U.S. 481, 106 S. Ct. 748 (1986), the U.S. Supreme Court used this reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution, finding that "[a]ny aid … that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

The Colorado Supreme Court adopted similar reasoning in *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo. 1982), where it held that a grant program designed to provide financial assistance to individual students was not a form of direct governmental aid to private and sectarian institutions:

> [a]s already noted, the statutory program is designed for the benefit of the student, not the educational institution. The program is non-restrictive in the sense that it is available to students at both public and private institutions of higher learning. Moreover, the financial assistance is distributed under

> statutory conditions calculated to significantly reduce any risk of fallout assistance to the participating institution.

Id. At p. 1082. Similarly, in *In re Interrogatory by the Governor*, 814 P.2d 875 (Colo. 1991), the Colorado Supreme Court held that a bill appropriating funds to intergovernmental agreements for a proposed United Airlines maintenance facility did not run afoul of the constitutional prohibition against state aid to private companies, because there was no "direct" donation, grant or aid from the state to the private company. *Id.* at 883.

Based on the criteria drawn from these cases, it appears that the stipend is not a grant for TABOR purposes because stipends drawn from the College Opportunity Fund result in an indirect government benefit to the educational institutions rather than a direct governmental grant. The College Opportunity Program does not provide a grant to any higher education institution. Rather, the stipend provides financial assistance on behalf of the student, and the direction of the stipend to any particular institution is left to the genuinely independent and private choices of the students, who choose which public or private institution in which to enroll. § 23-18-202(5)(a), C.R.S. (2004).

The fact that, for purposes of calculating eligibility for federal financial aid, the amount of the stipend is not included in the COA does not affect this analysis. In this respect, it is important to remember that COA is not a determination of the actual amount of tuition. Rather, it is part of the calculation of the actual need of the student for purposes of financial aid. 34 CFR § 676.2(b). For these purposes, it is entirely appropriate that the federal government would use the "student's share of in-state tuition" rather than "total in-state tuition", since it is the former amount that more closely reflects the student's actual out-of-pocket educational expenses for purposes of "need based" federal grants.

Under the *Zelman* and *Americans United* analysis outlined above, it is not necessary that the financial assistance become the property of the student in order to avoid direct government grants; indeed, this is not the situation in any of the cases cited above. Rather, the determining factor in rendering the monies an indirect government benefit to the educational institutions rather than a direct governmental grant is that the money is a) for the benefit of the student; and b) is directed to the educational institution as a result of the student's genuinely independent and private choice. These factors are present in the College Opportunity Fund Program whether or not the stipend is excluded from COA for federal financial aid purposes, or is included in the COA and considered to be a separate financial resource. Consequently, the federal government's calculation of COA has no effect on the TABOR grant analysis.

CONCLUSION

Our conclusion is that the treatment of the College Opportunity Fund stipend for purposes of calculation of the Cost of Attendance for federal financial aid programs does not impact whether or not the stipend will be treated as a state grant to institutions of higher education under TABOR.

Issued this 28th day of July, 2005.

JOHN W. SUTHERS
Colorado Attorney General

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