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Opinion No. 06-111

Use of Lottery Proceeds for Test Preparation Computer Modules

QUESTIONS

The Contract Services Subcommittee of the Fiscal Review Committee has been asked to review a contract amendment. Under the proposed amendment, a private corporation will make available test preparation and career preparation modules for junior high and high school students. The programs will be made available to the students at no charge through the Internet.

1. Do current Tennessee statutes authorize the use of proceeds from the Tennessee Lottery for this purpose?

2. Does Article XI, Section 5, of the Tennessee Constitution authorize the use of proceeds from the Tennessee Lottery for this purpose?

OPINIONS

1. No.

2. Because of the answer to Question 1, Question 2 is moot.

ANALYSIS

This opinion concerns whether proceeds from the Tennessee Lottery may be used to fund services provided under a proposed contract amendment. Under a current contract with the Tennessee Department of Education, Xap Corporation operates the "College for Tennessee" website. Through this website, high school students can review various colleges within the state and submit their transcripts to the Tennessee Student Assistance Corporation. State organizations can use this information to determine the students' eligibility for admissions to different post-secondary institutions. The system also enables students to learn about and apply for state and federal financial aid for post-secondary institutions of their choice. It appears that the Tennessee Higher Education Commission pays the Department of Education to operate the contract from lottery proceeds.

Under the amendment, Xap Corporation would add two additional services to the "College for Tennessee" web site. First, the corporation would add web-based test preparation services for the ACT, SAT, and GRE tests. These are standardized tests that post-secondary institutions use in

evaluating student applications for admission. Second, the corporation would provide a "career planning module." These programs would be available to all Tennessee students in grades 8-12, and adults seeking to re-enter college via the GRE. The site has no user access fees and is available twenty-four hours a day. The test preparation program would provide tutorials for subject areas of the three standardized tests, along with practice sessions and other features aimed at improving performance on the tests. The career planning module will assist students in evaluating their interests and qualifications for careers. We will refer to the services to be provided under the proposed amendment as "Preparation Services."

1. Statutes Governing Distribution of Lottery Proceeds

The first question is whether statutes governing the distribution of Tennessee Lottery proceeds authorize the use of such proceeds for this purpose. Under Article XI, Section 5, of the Tennessee Constitution, the legislature may authorize a state lottery:

> if the net proceeds of the lottery's revenues are allocated to provide financial assistance to citizens of this state to attend post-secondary educational institutions located within the state. The excess after such allocations from such net proceeds from the lottery would be appropriated to:
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> (1) Capital outlay projects of K-12 educational facilities; and
> (2) Early learning programs and after school programs.
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> Such appropriation of funds to support improvements and enhancements for educational programs and purposes and such net proceeds shall be used to supplement, not supplant, non-lottery educational resources for educational programs and purposes.

The General Assembly has exercised this authority and created the Tennessee Education Lottery Corporation to operate a state lottery. Tenn. Code Ann. §§ 4-51-101, *et seq.* Under Tenn. Code Ann. § 4-51-111, the Lottery Corporation is required to transfer net lottery proceeds to the state treasury, to be credited to the lottery for education account. The statute requires two reserve subaccounts. The General Assembly is authorized to appropriate net lottery proceeds for educational programs and purposes only in accordance with Article XI, Section 5, of the Tennessee Constitution. Tenn. Code Ann. § 4-51-111(c)(5).

The General Assembly has authorized three different educational programs that may be funded with lottery proceeds. The HOPE Scholarship Program operates under Tenn. Code Ann. §§ 49-4-901, *et seq.* It is administered by the Tennessee Student Assistance Corporation ("TSAC"), and the Tennessee Higher Education Commission, ("THEC") is charged with evaluating it. The General Assembly has also authorized lottery funds to be used for preschool programs, Tenn. Code Ann. §§ 49-6-101, *et seq.,* and after-school programs, Tenn. Code Ann. §§ 49-6-701, *et seq.* Clearly, the Preparation Services would not qualify as a preschool program. Further, the Preparation Services do not appear to qualify as an after-school program. These statutes refer to programs in

which students are to be enrolled. Tenn. Code Ann. § 49-6-702(c). The programs must also target students who are at an educational disadvantage for particular, specified reasons. *Id.* The Preparation Services do not appear to meet these qualifications. Recent legislation does authorize the use of lottery proceeds to fund six pilot programs that will prepare students to take the ACT or the SAT exams. 2006 Tenn. Pub. Acts Ch. 685. These programs, however, must target "at risk" students in grades seven through nine, and each program may serve no more than sixty students. The Preparation Services, therefore, are not an after school program authorized under current Tennessee statutes.

The question then becomes whether payment for the Preparation Services is authorized as part of the Hope Scholarship Program. Under this program, individual students apply directly for financial aid to attend Tennessee post-secondary institutions. Since the Preparation Services would be provided to Tennessee students generally, they are not a form of scholarship explicitly authorized under the Hope Scholarship Program. It appears that the only statute that might authorize the use of lottery funds to provide the Preparation Services is Tenn. Code Ann. § 49-4-924(e). Under that statute:

> Costs incurred by TSAC and THEC *in administering the educational programs created under this part*, which provide *financial assistance* to enable citizens of this state to attend postsecondary educational institutions, shall be funded from the lottery for education account as part of such programs.

Tenn. Code Ann. § 49-4-924(e) (emphasis added). We think that the term "financial assistance" as used within this statutory scheme is limited to assistance that will help a citizen to pay the costs the citizen will incur to attend a post-secondary educational institution. Op. Tenn. Att'y Gen. 05-019 (March 4, 2005) (financial assistance may include payments to cover living expenses, including a housing allowance and an allowance for day care). The Preparation Services, while they might ultimately assist students in selecting and qualifying for admission to a post-secondary educational institution, are not "financial assistance" that will enable them to pay the costs they will incur to attend one. Nor do we think that providing the Preparation Services is an expense of administering the programs that provide such financial assistance. Unlike the services associated with the application process now provided under the contract, the Preparation Services are not a direct part of providing financial assistance to Tennessee students. For these reasons, Tennessee statutes do not authorize the use of net lottery proceeds to provide the Preparation Services.

The second question is whether Article XI, Section 5, of the Tennessee Constitution authorizes use of net lottery proceeds to provide the Preparation Services. Because of our answer to Question 1, this question is moot.

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