



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

July 31, 2020

Superintendent Wayne Rodolfich
Pascagoula-Gautier School District
Post Office Box 250
Pascagoula, Mississippi 39568-0250

Re: ACT Incentives

Dear Mr. Rodolfich:

The Office of the Attorney General is in receipt of your request for the issuance of an official opinion.

Questions Presented

May the Pascagoula-Gautier School District (“the District”) offer monetary incentives to students based upon their performance on the ACT?

May the District award monetary incentives to its employees based upon improvements in overall ACT scores at a particular high school?

Brief Response

The District may not offer monetary incentives to students based upon their performance on the ACT as such incentives would constitute an unlawful donation in violation of Section 66 of the Mississippi Constitution.

A school district may provide monetary incentives to its employees based upon improvements in overall ACT Test scores at a particular high school if the incentives are contracted for prior to performance of the services, determined by objective standards, and earned by services performed by the employee.

Applicable Law and Discussion

Section 66 of the Mississippi Constitution provides:

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No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use.

Section 96 of the Mississippi Constitution provides:

The Legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrections.

The key distinction under Section 66 and Section 96 between permissible expenditures and impermissible expenditures rests on the presence or absence of a preexisting lawful contractual obligation.

In instances in which there is no preexisting contractual obligation, an expenditure of public funds to benefit a private party may result in a violation of Section 66 and Section 96. *See*, MS AG Op., *Marshall* (August 19, 2011)(while the adoption of a policy recognizing “athletic/instructional team achievement through the granting of reasonable awards for significant achievement” was within the statutory power of the board of trustees, the policy itself was not sufficient to create an enforceable contractual obligation and thus would not be sufficient to avoid a violation of Section 66 and Section 96 of the Mississippi Constitution).

In instances in which there is a lawful preexisting contractual obligation and payment is made for services performed after the contractual obligation becomes effective, there is no violation of Section 66 and Section 96. *See*, MS AG Ops., *Long* (November 3, 2000) and *Murdock* (August 7, 2009)(incentives are permissible for early completion of construction projects); MS AG Op., *Robinson* (January 31, 1997)(incentives are permissible for contractors who exceed specified standards of performance); MS AG Op., *Campbell* (April 12, 2010)(commissions in addition to salary are permissible to an employee when the agreement authorizing same is made prior to performance).

In this context, we must determine whether there is authority for the school district to create valid contractual obligations to expend the funds and whether the proposed actions will have that effect.

In MS AG Op., *Clark* (June 15, 2012), this office opined that community colleges were authorized to expend funds to provide awards for outstanding performance by students, employees and others based upon the community colleges’ broad authority granted pursuant to Miss. Code Ann. Section 37-29-67(1), which states, in relevant part:

Subject to the provisions of Sections 37-29-1 through 37-29-273, the board shall have full power ***to do all things necessary to the successful operation of the district and the college*** or colleges or attendance centers located therein to insure educational advantages and opportunities to all the enrollees within the district.

(Emphasis added).

By contrast to the broad authority granted community colleges pursuant to Section 37-29-67(1), Miss. Code Ann. Section 37-7-301(s) grants school districts the following authority to expend funds:

...Activity funds may only be expended for any necessary expenses or travel costs, including advances, incurred by students and their chaperons in attending any in-state or out-of-state school-related programs, conventions or seminars and/or any commodities, equipment, travel expenses, purchased services or school supplies which the local school governing board, in its discretion, shall deem beneficial to the official or extracurricular programs of the district, including items which may subsequently become the personal property of individuals, including yearbooks, athletic apparel, book covers and trophies...

It is the opinion of this office that monetary awards for prospective ACT Test performance do not constitute “commodities, equipment, travel expenses, purchased services or school supplies” as contemplated by Section 37-7-301(s). Nor is there any other statutory authority which would authorize a school district to offer monetary incentives to students based upon their prospective performance on the ACT¹. Thus, the proposed incentive program for students would constitute an unlawful donation in violation of Section 66 of the Mississippi Constitution.

Section 37-7-301(mm) grants school boards the authority:

[t]o expend federal No Child Left Behind Act funds, or any other available funds that are expressly designated and authorized for that use, to pay training, educational expenses, salary incentives and salary supplements to employees of local school districts; except that incentives shall not be considered part of the local supplement as defined in Section 37-151-5(o), nor shall incentives be considered part of the local supplement paid to an individual teacher for the purposes of Section 37-19-7(1). Mississippi Adequate Education Program funds or any other state funds may not be used for salary incentives or salary supplements as provided in this paragraph (mm);

Our office has consistently opined that “incentive payments are permissible when the incentive payment is contracted for by the employer and employee prior to the date when the services are performed, is determined in accordance with objective standards of measurement and is earned by personal services performed by the employee.” MS AG Op., *Williams* (February 17, 2017).

Pursuant to the above cited authority², the school district may provide monetary incentives to its

¹ Furthermore, the relationship between a public school and its students is not akin to the contractual student-university relationship found by the Mississippi Supreme Court in *UMMC v. Hughes*, 765 So. 2d 528 (Miss. 2000). Thus, there can be no underlying legal obligation to provide monetary incentives to public school students as described in your request.

² Miss. Code Ann. Section 37-19-10 may also be applicable as it provides a means by

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employees based upon improvements in overall ACT scores.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Beebe Garrard*

Beebe Garrard

Special Assistant Attorney General

OFFICIAL OPINION

which to award performance-based incentives to both licensed and non-licensed school district employees. *See, MS AG Op., Hill (October 27, 2017).*

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