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OPINION	:	No. 79-1101
of	:	December 14,1979
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SUBJECT: ACQUISITION OF STUDENT LOAN NOTES—The Governor of California does not possess the authority to request a qualified nonprofit corporation to devote income to the acquisition of student loan notes insured under the federal Higher Education Act of 1965. A county, however, is authorized to make such a request.

The Honorable Bill Greene, Senator, Twenty-Ninth District, requests an opinion on the following questions:

1. Does the Governor of California possess the authority to request a qualified nonprofit corporation to devote income to the acquisition of student loan notes insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103 (e) of the Internal Revenue Code?

2. Does a county possess the authority to request a qualified nonprofit corporation to devote income to the acquisition of student loan notes insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103(e) of the Internal Revenue Code?

CONCLUSIONS

1. The Governor of California does not possess the authority to request a qualified nonprofit corporation to devote income to the acquisition of student loan notes insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103 (e) of the federal Internal Revenue Code, title 26, United States Code.

2. A county is authorized by the provisions of Government Code section 53703 to request a qualified nonprofit corporation operating in the county to devote income to the acquisition of student loan notes of students who are residents of the county, which notes are insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103 (e) of the federal Internal Revenue Code, title 26, United States Code.

ANALYSIS

We are requested to resolve two issues that arise in the following context. It is contemplated that two private nonprofit corporations, incorporated under California laws and established and operated exclusively for the purpose of acquiring student loan notes incurred under the federal Higher Education Act of 1965, as amended, will issue bonds to finance this corporate purpose. One corporation proposes to operate in more than one county; one corporation proposes to operate only in one county.

We are advised that such bonds are feasible only if the interest earned by the bondholders is tax exempt under federal law. A specific provision of the federal Internal Revenue Code provides for the exclusion from a taxpayer's gross income of interest on "qualified scholarship funding bonds," 26 U.S.C.A., section 103 (a) (2), thus making such income tax exempt.

The phrase "qualified scholarship funding bonds" is defined by 26 U.S.C.A., section 103(e) as bonds issued by a corporation which:

> "(1) [I]s a corporation not for profit established and operated exclusively for the purpose of acquiring student loan notes incurred under the Higher Education Act of 1965; and
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> "(2) is organized at the request of a state or one or more political subdivisions thereof or is requested to exercise such power by one or more political subdivisions and required by its corporate charter and by-laws, or required by state law, to devote any income (after payment of expenses, debt service, and the creation of reserves for the same) to the purchase of additional student loan notes or to pay over any income to the state or a

political subdivision thereof."

Thus, if a private nonprofit corporation is, among other requirements, "requested" to exercise its corporate power to acquire student loan notes by "one or more political subdivisions" of the state or is organized at the request of a state or one or more political subdivisions thereof, then income from its bonds, assuming all other conditions are satisfied, is tax exempt.

We are asked to determine whether the Governor is authorized to make the "request" specified in 26 U.S.C.A., section 103 (e) as to the corporation operating in more than one county and whether a board of supervisors is authorized to make the 'request" as to the corporation operating only in its county.

No provision of the federal Internal Revenue Code purports to grant authority to a state public official or public body to exercise such authority. The provisions of 26 U.S.C.A., section 103 were enacted to implement the provisions of the federal Higher Education Act of 1965, as amended. (26 U.S.C.A. § 1071 *et seq*.; see tit. 45, C.F.R., pt. 177.1 *et seq*.) The congressional purpose implemented through the enactment of the amendments to 26 U.S.C.A., section 103, *supra*, is set forth in the report of the House Ways and Means Committee, contained in the 1976 United States Code Congressional and Administrative News, volume 4, pages 3834–3836, wherein it is stated, in part, that:

> "The committee is aware that groups in at least one State are attempting to develop a student loan program for students desiring a college education. . . These corporations, however, face considerable obstacles because the interest on bonds they wish to issue to finance student loans will be taxable under present law. The corporations are not political subdivisions of the State and cannot be treated under the Treasury regulations as acting 'on behalf of' the State or its political subdivisions. Even if they were described in section 103(a), these obligations might not be exempt because they would be arbitrage bonds in the sense of section 103(d).
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> ". . . . .
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> "The committee believes it is appropriate to treat the obligations of these corporations providing student loans in the same manner as if the State had issued the bonds directly.
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> ". . . . .

> "The committee amendment adds to the list of exempt obligations described in section 103 (a) those obligations of nonprofit corporations organized by, or requested to act by, a State or a political subdivision of a State (or of a possession of the United States), solely to acquire student loan notes. The entire income of these corporations (after payment of expenses and provision for debt service requirements) must accrue to the political subdivision, or be required to be used to purchase additional student loan notes. The obligations are to be called 'Qualified Scholarship Funding Bonds.'
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> "As a result of this provision, organizations which wish to maintain student loan programs will have statutory authority to issue tax exempt bonds to finance their operations. . . ."

Thus, the "request" by the state or one or more of its political subdivisions serves this purpose: it supplies a nexus between the state and the nonprofit private corporation so as to permit *treating* the bonds of these corporations *for federal tax purposes* in the same manner as if the state had issued the bonds directly. (See House Ways and Means Committee report, op. cit.)

We have examined the provisions of the federal Higher Education Act of 1965, as amended. (20 U.S.C.A. § 1071 *et seq*; tit. 45 C.F.R., pt. 177.1 *et seq*.) While its provisions authorize the United States Commissioner of Education to enter into agreements with private nonprofit corporations in order to implement the provisions of that Act, no provision of which we are aware purports to grant authority to a state public official or to a political subdivision of the State to make the "request" specified in 26 U.S.C.A., section 103. Thus, the issue of the Governor's authority or that of a board of supervisors to make the request must be determined in the light of California law—with reference to both statutory and constitutional provisions—by which public officials and public entitles are authorized to exercise the power of the state, as it may be vested in their respective public offices.

We turn first to the issue concerning the authority of the Governor to make the "request" specified in 26 U.S.C.A., section 103. The Governor has powers derived both from the state Constitution and from statutes enacted by the Legislature. Article V, section 1 of the state Constitution vests in the Governor "supreme executive power," and it directs him to see that the "law is faithfully executed." In contrast, article IV, section 1 provides that "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Further, article III, section 3, California Constitution provides that "[t]he powers of state government are legislative, executive and Judicial. Persons

charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Under this separation of powers concept, as embodied in the state Constitution, the decision of the State of California to participate in a federal program is basically a legislative act and the Legislature has the exclusive power to determine whether and the manner in which the state shall participate. Thus, under this analysis it is the state that makes the request of the private nonprofit corporation, and the decision whether the state shall make the request, as a policy matter, is a legislative decision. Thus, the Governor may execute such a policy decision by making a request of any particular corporation only if and as authorized by the Legislature. (See generally, *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal. 2d 545, 549.) We find no statute authorizing the Governor to exercise that power. (*Cf*. 40 Ops. Cal. Atty. Gen. 145 (1962); 1 Ops. Cal. Atty. Gen. 231 (1943).)

The only relevant statute with respect to the Governor of which we are aware is Government Code section 12018 which provides as follows:

> "Except as otherwise provided by statute, the Governor may designate which single state agency shall be responsible for each federal program in which federal money is given to the state with the requirement that it be handled by a single state agency.
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> "Whenever the Governor designates an agency pursuant to this section, he shall notify the Joint Legislative Budget Committee of the agency designated and the federal program for which such agency was designated."

In this instance, the federal money is to be provided, if at all, to a private nonprofit corporation rather than to the state, thus making Government Code section 12018 inapplicable to our facts.

We note that the Legislature has enacted provisions enabling the state to participate in the federal student loan program. (See Ed. Code, §§ 69760–69779.) Education Code section 69760 establishes a state Guaranteed Loan Program which is "to be consistent with Title IV of the act of Congress entitled the Higher Education Act of 1965' (P.L. 89–329) and extensions thereof, the Education Amendments of 1976 (P.L. 94–482), or any similar act of Congress and the rules and regulations adopted thereunder." Further, Education Code section 69761.5 establishes the commission as a "state student loan guarantee agency" within the meaning of P.L. 94–482 (20 USCA. § 1005.) Education Code section 69760.5 provides as follows:

"In authorizing commission participation in the federal Guaranteed Student Loan program, pursuant to the 1976 Higher Education Act Amendments (P.L. 94–482), 120 U.S.C.A. § 1071 *et seq*.) the legislature finds and declares:

"(a) Direct federal administration of the Guaranteed Student Loan program has resulted in bureaucratic problems, high default rates and rapidly decreasing participation of private lenders.

"(b) The Congress has moved positively to diminish student abuse of the program and encourage state participation through creation of state student loan guarantee agencies.

"(c) Twenty-six states now operate student loan guarantee agencies; student loan volume in these states increased seventy-million dollars ($70,000,000) last year compared to a ninety-three million dollar (93,000,000) drop in student loans in states without guarantee agencies, including California.

"(d) Commission participation as a student loan guarantee agency, at no cost to the General Fund, will increase available student loans for needy students, especially for middle-income students and families."

Education Code section 69761 provides that:

"The purpose of the guaranteed loan program shall be as follows:

"(a) To provide a source of credit to students who are residents of California to assist them in meeting educational costs at a community college, college, or university of their choice which is accredited by an accreditation association recognized by the United States Commissioner of Education for this purpose.

"(b) To accept, receive and administer the funds provided under Title IV of the 'Higher Education Act of 1965,' and extensions thereof, or any similar act of Congress."

Education Code section 69763 provides that:

"The commission shall administer the guaranteed loan program established pursuant to this chapter. The commission is hereby vested with

authority to enter into any contract with the United States Commissioner of Education or any other federal officer or agency under Title IV of the Higher Education Act of 1965, any extension thereof, or any similar act of Congress, and is hereby vested with all other necessary power and authority to cooperate with the government of the United States, or any agency or agencies thereof, in administration of the act of Congress and the rules and regulations adopted thereunder. The commission shall adopt any rules and regulations it deems necessary for the proper administration of this chapter."

These provisions establish that the Legislature is cognizant of the provisions of the federal Higher Education Act of 1965. The Legislature has acted so as to authorize the state to participate to the extent specified in these provisions. We believe that these provisions reinforce the conclusion that the Legislature has not authorized the Governor to act on behalf of the state with respect to the issue presented in this opinion.

In response to the first question, we conclude that the Governor of California does not possess the authority to request a qualified nonprofit corporation to devote income to the acquisition of student loan notes insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103 (e) of the Internal Revenue Code, title 26, United States Code.

We reach a contrary conclusion with respect to a county board of supervisors on the basis that it has been authorized by the provisions of Government Code section 53703 to take many different actions, which broad authorization includes an act of the type at issue in this opinion.

Government Code section 53703 provides that:

"53703. A *county or city may do all acts necessary to participate in* all programs authorized by a federal housing act, including the Demonstration Cities and Metropolitan Development Act of 1966 or any other federal program whereby *federal funds are granted to the county or city or any of its residents for purposes of health, education*, welfare, public safety, law enforcement activities which have not been preempted by state law, prevention or reduction of crime, rehabilitation of persons convicted of crime or juvenile offenders, public works or community improvement, *including, without limitation thereto*, contracting and cooperating with the federal government, the state and its agencies, other local public agencies and *private persons and corporations*, and may make any expenditure of county or city funds required for such participation.

". . . . .

'This section shall not be construed to operate as a grant of authority in compliance with any federal act or program requiring the adoption of specific enabling legislation nor shall it be construed to supersede any such legislation." (Emphasis added.)

Section 53703 authorizes a county to do all acts necessary to participate in any federal program whereby federal funds are granted to the county or to any of its residents for purposes of, among other things, education. Such authorized acts include cooperating with private persons and private corporations. (See generally, 57 Ops. Cal. Atty. Gen. 36, 40 (1974).)

Assuming that the private nonprofit corporation were to enter into an agreement with the federal Commissioner of Education pursuant to the provisions of the federal Higher Education Act of 1965, *supra*, the federal government would then subsidize a portion of the interest otherwise payable by student borrowers. (See 20 U.S.C.A. § 1078.) Thus, funds would be made available to students that would not otherwise be made available. Thus, it is reasonable to conclude that a county's participation in the program—by its act of making the request specified in 26 U.S.C.A., section 103, *supra*,— would make federal funds available for the benefit of residents of the county. Government Code section 53703 was enacted to provide general authority to the counties so that they may take advantage of federal programs offering benefits to counties and their residents.

We conclude that the extremely broad grant of authority to counties by the Legislature contained in Government Code section 53703 constitutes authorization for a county to request a qualified nonprofit corporation operating in the county to devote income to the acquisition of student loan notes of students who are residents of the county, which notes are insured under the federal Higher Education Act of 1965, as amended, as provided for in section 103(e) of the Internal Revenue Code, 26 United States Code.

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