



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

200520039

FEB 22 2005

SE.T:EP:RA:T3

Attention: *****

Legend:

Academy A	=	*****
State B	=	*****
Individual C	=	*****
Town D	=	***** *****
Town E	=	***** *****
Town F	=	***** *****
Trustees	=	*****
Year 1	=	****
Date 2	=	*****
Number N	=	*****
Plan P	=	*****
School Boards	=	*****

[REDACTED]

This is in response to a request for a ruling submitted on your behalf by your authorized representatives by letters dated July 22, 2004, and January 21, 2005, as to whether Plan P is a governmental plan as defined in section 414(d) of the Internal Revenue Code ("Code").

The following facts and representations have been submitted in support of the request:

Academy A was incorporated by the State B legislature in Year 1 using property donated by Individual C. Individual C expressly intended to support a public school or academy. Academy A was established for the purpose "... of promoting piety and virtue and for the Education of Youth in such of the liberal Arts and Sciences [and] Languages ...". The legislation incorporating Academy A also established the Trustees as a "body politic."

Academy A has been in operation since Date 2 and its campus was located in what is now Town D. At present, Academy A contains approximately ** separate buildings. Academy A functions solely as a secondary school, providing public education for all high school students from Towns D, E and F (hereinafter sometimes referred to as "districts"). Pursuant to its contracts with the sending towns and consistent with enabling legislation, Academy A is required to accept all students from sending towns with the minor exception for students requiring special services beyond those provided by Academy A. Thus, as is the case of a public school established directly by a town, Academy A has little control over the composition of its student body.

Today, Academy A has over Number N students, ** percent of which are from the sending towns. Although there is a private school in Town D that includes some school grade students, Academy A is the only public high school in Town D and clearly provides an education to most Town D high school age students.

Until recently Academy A, like most State B public schools, received the majority of its funding from the towns in which its students lived. Between ** percent and ** percent of school funding in State B was provided via local property tax. The remainder was provided through legislative appropriations from State B and payments from the federal government.

In ****, the State B legislature passed a statewide education property tax to be imposed on all persons and property subject to tax within State B. For most towns, the education funding provided by State B was not sufficient to operate the local schools, so the towns

supplemented State B funds with local property tax funds. The legislature provided that the education property tax could be collected by individual towns as a component of local property tax assessment. As a result, a town collects property tax and pays the appropriate amount to the school district, a portion of that funding is provided by State B and the town provides the remainder.

After ****, close to ***** of Academy A's funding received from the sending towns has been provided by the State tax. The remainder of its funding is provided by local property tax dollars and a small amount of federal funding. The statewide property tax is intended to help provide all of State B's public school students with an adequate education. It is represented that the only institutions eligible to receive statewide property tax revenues are State B public schools, like Academy A.

The balance of Academy A's funding comes directly from the municipalities it serves through normal town and school district appropriation power. Each year, Academy A estimates the costs for providing secondary education for each sending town's students. It then notifies each town of the expected cost for educating students from that town that do not require special educational services and the anticipated cost for those students that do need special services. These amounts are then included as line items in the town school district budget. Town school district budgets must be approved by a vote of the town residents at the annual school district meeting. After a district's residents have approved a school district budget, the budget is used to set the property tax rate necessary to raise the required funds. The appropriate portion of the school district budget is then provided to Academy A to fund its operations.

Academy A also receives some federal funding. This funding is generally paid to the Town D School District, which forwards the payments to Academy A.

Because Academy A was established by state statute, its charter and governance are subject to change by State B. When Academy A was established in Year 1, the State B legislature named nine individuals as Trustees empowered to operate the school. Each of the original Trustees was a resident of what is now Town D. Academy A's Trustees continue to be residents of the towns to which it provides educational services.

Throughout Academy A's history, its Board of Trustees has been responsible for approving all major operational decisions and for providing oversight of daily operations. At present, the Board of Trustees contains ***** members, two-thirds of whom are residents of the sending towns.

Academy A has contracted with the school district in each of the sending towns to provide secondary education to each town's eligible students. The tuition agreements typically specify, in part, that the district agrees to send and Academy A agrees to

accept all of the pupils who are qualified to attend grades * through ** to Academy A during the term of the contract, except for exceptional students requiring special schools or special facilities.

The tuition agreement also requires that Academy A maintain accreditation and that it qualify as "an approved high school" defined by State B law. The State B Board of Education routinely approves the contracts between Academy A and the sending towns. Upon approval of a tuition agreement Academy A is deemed to be a high school maintained by the sending district, and as a high school, Academy A is considered a public school or public academy.

State B Department of Education ("DOE") also considers Academy A to be a public school. The DOE has oversight responsibilities over all public and nonpublic education in State B. It evaluates and, when appropriate, approves educational institutions within State B. The DOE maintains a list of approved nonpublic schools and a list of approved public schools. A "public school" is defined to mean a school which is established and operated by a town, cooperative or municipal school district, maintained primarily by public funds and which is administered by a School Board whose members are elected at any annual school district meeting or in such other manner as provided under the laws of State B. Academy A is included on the DOE's list of State B public schools and public academies as a member of the Town D district.

The minimum standards for public school approval are published in State B administrative rule. This regulation includes requirements related to all aspects of a school's operation including length of school year, types of facilities, operational policies, curriculum and staff. Additionally, the regulation references multiple statutes with which a school is required to comply to be an approved public school. The DOE requires that teachers at public schools, such as Academy A, be certified.

As a public school, Academy A is required to, and does meet all of the minimum standards regulation and the related statutes. Academy A's status as a public high school is further shown by its ability to accept tuition students from non-contracting districts. In order to accept tuition students, a public high school must be approved by the state board of education as complying with State B law.

Academy A is also subject to the towns operational controls. The tuition agreements require that the Board of Trustees meet at least three times per year with the School Boards of the sending districts and more frequently if desired. These meetings are intended to allow School Board members to make suggestions and recommendations on curriculum and to address issues related to financial and policy matters. The tuition agreements specify that the Academy A Headmaster, or his designee, shall meet at least twice annually with the superintendent of schools or other administrators from

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each sending School District to discuss policy, curriculum and facilities, and that the principals of the middle schools whose students will progress to Academy A will meet twice yearly with the Academy A administration to discuss curriculum, programs and services.

The sending districts are required to participate in decisions by Academy A regarding large capital expenditures. A planning committee is created any time Academy A contemplates a large capital expenditure. The planning committee's members include a member of the School Board from each sending district and one of the superintendents from the sending districts. The planning committee studies the need for the proposed expenditure, is involved in the planning for the expenditure and makes recommendations to the Board of Trustees and the School Boards regarding the proposed capital expenditure.

A tuition agreement with a sending school district is not binding until after the State B board of education has approved it. The State B board of education approval of the contracts between Academy A and the sending towns is routinely obtained.

Finally, the tuition agreements require that any disputes regarding contract interpretation or performance be resolved via arbitration before the State B Commissioner of Education. The Commissioner's decision can be appealed to the Board of Education.

Plan P was established effective ***** , ****. Plan P is intended to be a Code section 403(b) plan. An "eligible employee" is defined to be any employee of the Institution. Under Plan P, all employees of Academy A are eligible to participate in Plan P, and they are the only persons eligible to participate. At present, Academy A has strong participation in the plan, including employees in all aspects of its operations. Plan P includes a salary reduction component, and Academy A employees who choose to participate elect a salary reduction percentage. Academy A provides a partial match for each participating employee, subject to a salary percentage maximum.

A ruling is requested that Plan P is a governmental plan as defined in section 414(d) of the Code.

Section 414(d) of the Code provides that, for purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Rev. Rul. 89-49, 1989-1 C.B. 117, provides that a plan will not be considered a governmental plan merely because the sponsoring organization has a relationship with

a governmental unit or some quasi-governmental power. One of the most important factors to be considered in determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision is the degree of control that a government exercises over the organization's everyday operations. Other factors include: (1) whether there is specific legislation creating the organization; (2) the source of funds for the organization; (3) the manner in which the organization's trustees or operating board are selected; and (4) whether the applicable governmental unit considers the employees of the organization to be employees of the applicable governmental unit. Although all of the above factors are considered in determining whether an organization is an agency of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

In this case, specific legislation by State B established Academy A in Year 1 for the purpose of promoting piety and virtue and for the education of youth in liberal arts, sciences and languages.

Academy A has little financial autonomy, and its primary sources of funds are from State B and the sending towns. Under the tuition agreements, the sending towns pay Academy A operating expenses for each pupil enrolled in Academy A. Tuition payments are made to Academy A through a combination of state property taxes collected by the districts on the State's behalf and local property tax revenues. Academy A also receives a small amount of federal funding.

The legislature of State B named original Trustees empowered to operate Academy A and the legislature established a means of replacing Trustees. While the original Trustees were residents of Town D, the Trustees continue to be residents of the towns which Academy A provides educational services. Through Academy A's history the Board of Trustees has been responsible for all major operational decisions and providing oversight of daily operations.

Academy A is subject to a variety of controls by the towns, the State B Department of Education ("DOE") as well as State B statutory and regulatory controls. The DOE regulation includes requirements relating to Academy A's operation including the length of the school year, types of facilities, policies, curriculum and staff. The DOE also certifies the teachers of Academy A. The State B Board of Education approves the tuition agreements between Academy A and its participating school districts. The tuition agreements require three meetings each year with the School Boards of the sending towns to discuss the curriculum and address issues on financial and policy matters. The Headmaster meets twice annually with the superintendent of each sending town to discuss the curriculum, programs and services. A member from each School Board serves on the planning committee of Academy A to oversee large capital expenditures.

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After ****, close to ***** of Academy A's funding received from the sending towns has been provided by State B tax. The remainder of its funding is provided by local property tax dollars and a small amount of federal funding. The balance of Academy A's funding comes directly from the towns it serves through normal town and school district appropriation power. Academy A furthers the government function of educating citizens of State B. State B Department of Education considers Academy A to be a public high school. For purposes of section 414(d) of the Code, Academy A is eligible to establish and maintain a governmental plan.

Accordingly, we conclude that Plan P is a governmental plan as defined in section 414(d) of the Code.

This ruling does not address whether Plan P satisfies the requirements of section 403(b) of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

In accordance with a power of attorney on file in this office, a copy of this ruling is being sent to your authorized representative.

If you have any questions, please contact ***** at
*****.

Sincerely yours,

for /s/ Ada Perry
Donzell Littlejohn, Manager
Employee Plans Technical Group 4

Enclosures:

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Notice of Intention to Disclose, Notice 437