



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Number: **200909064**
Release Date: 2/27/2009

Date: December 3, 2008

UIL 501.03-23

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:
1120

Tax Years Ending:

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). On October 16, 2008, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Date: December 3, 2008

UIL 501.03-23

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

School =
City =
County =
State 1 =
State 2 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Announcement 1 =
Announcement 2 =

Dear :

We have considered your application ("Application") for recognition of exemption from federal income tax under Internal Revenue Code section 501(a). Based on the information provided, we have concluded that you do not qualify for exemption under Code section 501(c)(3). The basis for our conclusion is set forth below.

FACTS:

FORMATION

You operate a private school for grades K4 through 12 located in City, County, State 1. You were formed as a non-profit corporation under the laws of State 1 on Date 1, and were formed or substantially expanded at the time of court-ordered desegregation of the public schools in County (per your Application). You were recognized as a tax-exempt organization under section 501(c)(3) of the Code by letter dated Date 2, but, according to your Form 1023, you "relinquished" your exempt status around 1971.

During more than 40 years of operation, you have not enrolled any black students, nor have you employed any black faculty or administrators. The population of County is 59% black and 39.2% white.

You filed an amendment to your articles of incorporation on Date 3, to provide that you were organized exclusively for section 501(c)(3) purposes, that your activities are limited to those that are exempt within the meaning of section 501(c)(3), and that in the event of dissolution your assets will be distributed to one or more section 501(c)(3) organizations.

APPLICATION

You reapplied for recognition of exemption from federal income taxes on June 30, 2004 and requested that you be recognized as exempt as of that date.

NONDISCRIMINATORY POLICY; PUBLICATION

On April 12, 20 , your Board of Directors adopted a racially nondiscriminatory policy as to students. The statement conforms to the language of section 3.01 of Rev. Proc. 75-50, 1975-2 C.B. 587. The statement "School admits students of any race, color, and national or ethnic origin" was stamped into the student handbook and the brochure until a reprinting of the handbook for the 20 -20 school year when the following policy was imprinted:

School admits students of any race, color, national and ethnic origin to all the rights, privileges, programs and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admission policies, scholarship or loan programs, and athletic and other school-administered programs."

You have also publicized your nondiscriminatory policy in newspapers during 20 , 20 and 20 . Some were in conformance with Rev. Proc. 75-50 and some were not. The last newspaper publications you have provided are from February 20 .

You have also publicized your nondiscriminatory policy in your brochure, student handbook, enrollment application and educational contract, and a brief version of the policy on the first page of your website. You have published on your website an updated version of your student handbook which includes your nondiscriminatory policy.

MINORITY SCHOLARSHIP PROGRAM

Your board adopted a minority scholarship program on April 12, 20 , effective August 1, 20 . The scholarship is to provide two half-tuition scholarships "100% to black applicants." Your minority scholarship program states that it requires applicants to pay a \$25 testing fee. However, when asked, you stated that you would waive the \$25 testing fee, and that you would also waive the \$600 per family membership fee for a student awarded a minority scholarship. You also stated that you have advertised the existence of your financial aid program in the local papers, and that to date you have not awarded any scholarships under this program. Two advertisements were published announcing the scholarship program. The first advertisement

for the scholarship program was published in the April , 20 weekend edition of a local paper. No black students have been enrolled yet. However, the advertisement did not specify that the scholarship was only available to black students until the advertisements published in the February , 20 editions of two local papers, which only stated that they were "minority" scholarships.

You have a minority representative on the minority scholarship program committee (the same representative that is on the minority outreach committee, discussed below). However, you have stated that "Because the committee has not received any scholarship applications, it has not met." With regard to offering full tuition scholarships, you state, "The school has not considered offering full-tuition scholarships. Financial aid is available to all enrolled students through the school, but is limited to ½ of the total tuition cost. Therefore, the school board believes it would not be equitable to offer full-tuition scholarships."

In your letter dated September 14, 20 , you stated that the "last advertisement of the minority scholarships was Feb. 17, 20 []. The school has not received any calls or requests in regard to the scholarships made available."

In your letter dated December 20, 20 , you state that you will include the availability of the scholarships on your website. However, in your letter dated September 14, 20 , you state, "The minority scholarships are not currently advertised on the school's website." The availability of the scholarships has not been advertised by any method other than the newspaper articles.

Part IV of the Scholarship Program states that, "If the goal for the black applicants is not achieved in any year, the Selection Committee shall file a written report to the Board of Directors setting forth the reasons for such and the Committee's recommendations for attracting more qualified black applicants." Since this program was adopted on April 12, 20 , no reports have been filed, despite this provision in the Program.

The application for scholarships sets out requirements, including, among other things, specific performance requirements on standardized tests and three letters of recommendation, for admission for persons awarded scholarships. When asked whether these standards are required of all new students admitted to the school, including those that are not offered scholarships, you responded in your letter dated September 14, 20 , "While the specific performance requirements still currently apply, a resolution has been made to eliminate the testing requirement from the Minority Scholarship program. Although it has not been passed at this time, there appears to be strong support for it and it may be adopted in the near future." No further information has been received.

MINORITY OUTREACH PROGRAM

You formed a minority outreach committee on April 12, 20 , which held its first meeting on April 11, 20 , after the initial development letter was received by you. The committee consists of not less than 3 members of your board, and the committee may then select one or more additional persons from the community to serve on the committee in an advisory capacity, and the board recommends that at least one of the advisory members be from the minority community. According to your Application, the initial committee included three board members

and one minority member. However, the meeting held in April 20 was only attended by the 3 board members and the headmaster, and your letter dated April 14, 20 stated that those were the members of the committee. There is now a minority representative on the minority outreach committee. However, despite your indication during our conference call on July 27, 20 , that you would hold a meeting of the minority outreach committee during the following couple weeks, according to your letter dated September 14, 20 , "The Minority Outreach Committee has not met since April 11, 20 ."

The minority outreach committee planned and held an open house on April 18, 20 . It invited interested persons in the community, provided a list, developed at the April 20 meeting, of 15 black persons to invite (although your letter dated June 10, 20 indicates that not all these persons were contacted), and advertised in the two nearest local papers the week before the open house. Three black persons from the community attended. It was also not specified whether any potential black students or their parents attended the open house. At the open house, "each school representative was instructed to promote attendance at the school, to express the school's interest in minority enrollment and to invite the attendees' comments regarding their view of the school and how it might be made more appealing to the minority community."

In response to our question to provide an update of the efforts and results of the minority outreach program since the open house in 20 , you stated "We have also had several open houses during [the last three years] that were open to the public." When asked for a more detailed response to this question, you stated, "The school has periodically conducted open houses in prior years. Although not targeted directly to the minority community, these events have been advertised to the public in local papers and held in public places." Specific dates, attendance, or any other details were not provided.

You had an open house in March 20 but did not provide any information about outreach to black leaders in the community to attend, or who attended, despite numerous requests in general to "provide details." You provided a letter addressed "Dear Parents," but don't say whether this was sent only to current parents, was sent home with students, was mailed out to members of the minority community, or was otherwise disseminated.

Since March 20 , you have had no open houses and there has been no additional activity of the minority outreach committee.

OTHER OUTREACH

You also stated that you participated in city and county events, such as a National Day of Prayer at a Baptist church, in an effort to show the community that you are a quality school and that you would like to attract more students. You are also a member of the State 2 Private School Association, which has for years required its member schools to adopt and maintain nondiscriminatory policies. You also participated in basketball tournaments with schools having black students and provided photos of basketball games and recruiters from local universities which include black persons.

In response to the question of what other methods of outreach to the black community you have taken, you responded "School has advertised in area newspapers, stating its nondiscriminatory policy. It also has distributed brochures about the school, which include the school's non-discriminatory policy. These brochures are made available to anyone upon request or who comes into the school expressing an interest in attending. These brochures are also available at the school's Open House. Representatives from the school have visited Kiwanis meetings in [neighboring counties]." No additional information, such as the racial composition of the Kiwanis meetings, was provided.

Finally, during our conference call on July 27, 20 , you indicated an intention to begin immediate outreach directed to the black community, such as to black pre-school or day care centers, and to have board members distribute brochures to their offices and places of business, such as dental offices, and to black churches. In response to a question regarding what actions had been taken since the conference call, on September 14, 20 you responded that "no other outreach to the minority community has been implemented."

LACK OF MINORITY ENROLLMENT OR EMPLOYMENT

You state that it is difficult to obtain minority students because there is a social resistance in the community for a black person to attend the school. In addition, there is the economic impediment of the cost of attendance. Additionally, you stated in a letter dated October 17, 20 that "it is difficult in our area to attract the minority student because there is a black private school also operating in City."

You sent letters asking to post teacher vacancies at two universities (one an historically black institution). However, you did not post your recent vacancies at these universities. You advertised teaching and coaching positions on the State 2 Private School Association website in Spring 20 , in response to which no minority applications were received. You stated that you are "generally unable to compete with public schools or schools in larger communities for teaching candidates, because of [your] relatively low pay scale." You further state, "Most of the school's teachers provide a secondary source of income to their households, and are able to work at a lower rate. Also, many of the current teachers and staff have children enrolled in the school (or have in the past), which increases the desirability of a position at the school."

LAW:

Section 501(c)(3) of the Code provides, in part, for the exemption from federal income tax of organizations organized and operated exclusively for educational purposes.

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations provides that in order to be exempt as an organization described in section 501(c)(3) of the Code, an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

Revenue Ruling 71-447, 1971-2 C.B. 230, provides that a private school which does not have a racially nondiscriminatory policy as to students does not qualify for exemption from federal

income tax under section 501(c)(3) of the Code. It defines a racially nondiscriminatory policy as meaning that "the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs."

Revenue Procedure 75-50, supra, sets for the guidelines and recordkeeping requirements for determining whether private schools that are applying for recognition of exemption from federal income tax under section 501(c)(3) of the Code or are presently recognized as exempt from tax have racially nondiscriminatory policies as to students. Section 2.02 provides that a school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy the school has operated in accordance therewith. Section 4.032(c) provides, in part, that whether a particular school follows a racially nondiscriminatory policy will be determined on the basis of the facts and circumstances of each case.

Announcement 1 withdrew advance assurance of deductibility to you of contributions made after Date 4 as you declined to adopt a racially nondiscriminatory admissions policy.

Announcement 2 stated that contributions under section 170 are no longer deductible to you as your exempt status had been revoked.

In Green v. Connally, 330 F. Supp. 1150 (D. D.C. 1971), aff'd sub nom., Coit v. Green, 404 U.S. 997 (1971), and in the revised injunction orders issued on May 5 and June 2, 1980, the Internal Revenue Service is prohibited from:

according...and from continuing the tax-exempt status now enjoyed by, all Mississippi private schools or the organizations that operate them, which: (1) have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.

(2) The existence of conditions set forth in paragraph (1) herein raises an inference of present discrimination against blacks. Such inference may be overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such is not proximately caused by such school's policies and practices. Such evidence might include, but is not limited to, proof of active and vigorous recruitment programs to secure black students or teachers, including students' grants in aid; or proof of continued meaningful public advertisements stressing the school's open admissions policy; or proof of meaningful communication between the school and black groups and black leaders within the community concerning the school's nondiscrimination policies, and any other similar evidence calculated to show that the doors of the private school and all facilities and programs therein are indeed open to students or teachers of both the black and white races upon the same standard of admission or employment.

In Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D. D.C. 1979), aff'd, D.C. Cir. June 30, 1980, cert. denied, 450 U.S. 944 (1981), the court held that private schools administering racially discriminatory admissions policies are excluded from tax-exempt status under section 501(c)(3) of the Code. The court further held that the foundation had failed to meet its burden of establishing its entitlement to exemption under section 501(c)(3) because the foundation's record was completely devoid of evidence that it was administering a nondiscriminatory admissions policy. The court also stated that the inference that the plaintiff administered a racially discriminatory policy may be drawn from the circumstances surrounding the school's establishment. Similar inferences as to the existence of a racially discriminatory policy based on facts surrounding a school's establishment and lack of minority enrollment have been drawn by other courts. See e.g. Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974) on remand from the Supreme Court, 413 U.S. 455 (1973) and Brumfield v. Dodd, 425 F. Supp. 528 (E.D. La. 1976).

In Norwood v. Harrison and in Brumfield v. Dodd, the courts analyzed whether private schools were racially discriminatory. The courts held that a prima facie case of racial discrimination arises from proof (a) that the schools' existence began close upon the heels of the massive desegregation of public schools within its locale, and (b) that no blacks are or have been in attendance as students and none is or has ever been employed as a teacher or administrator at the private school.

In Bob Jones University v. United States, 461 U.S. 574 (1983), the Supreme Court found that petitioner, a nonprofit private school that prescribes and enforces racially discriminatory admissions standards on the basis of religious doctrine, did not qualify as a tax-exempt organization under section 501(c)(3) of the Code. The court held that racially discriminatory private schools violate a fundamental public policy and cannot be viewed as conferring a public benefit within the meaning of common law standards of charity and congressional intent underlying section 501(c)(3).

In Calhoun Academy v. Commissioner, 94 T.C. 284 (1990), the Tax Court held that a private school failed to show that it operated in good faith in accordance with a nondiscriminatory policy toward black students. The school was formed at the time of desegregation of the public schools, and never enrolled a black student or employed a black teacher. The school and its students participate in some educational and vocational programs and other school-sponsored activities that directly involved blacks. The court noted:

In today's world, interaction with persons of another race in interscholastic and community activities is unavoidable by all but the most reclusive or isolated groups. Petitioner's burden is not met by showing that it interacts with outsiders. The relevant criteria deal with restrictions on those who may become insiders, i.e. students at the school.

The court concluded that the school did not qualify for exemption under section 501(c)(3) of the Code.

ANALYSIS:

All facts and circumstances must be considered in determining whether a private school has shown that it has overcome an inference of racial discrimination. Relevant factors include the following: actual enrollment of black students; active and vigorous recruitment of black students and teachers; financial assistance for black students; adoption of a policy of racial nondiscrimination; effective communication of such policy to members of the black community, including publication of the policy; meaningful contact with members of the black community; and public disavowal or repudiation of previous statements that are inconsistent with a policy of nondiscrimination.

The information submitted indicates that you were formed at the time of desegregation of the public school district in which you are located, and operated for a lengthy period of time and continue to operate without enrolling any black students or employing any black faculty or administrators. Furthermore, you operated for a substantial period of time without the adoption or publication of a facially nondiscriminatory policy. The foregoing information raises an inference of present discrimination against blacks as set forth in the above cited court decisions.

In order to be exempt from federal income tax, a private school subject to an inference of discrimination must provide clear and convincing evidence that it now operates in a good faith racially nondiscriminatory manner. Furthermore, such a school must provide persuasive evidence that the absence of black enrollment is not attributable to the continuation of the school's past policies.

Since you submitted your Application in 20 , you have taken the following actions toward demonstrating that you operate in a bona fide racially nondiscriminatory manner: adoption of a nondiscriminatory policy; publication of such policy in newspapers, your brochure, student handbook, enrollment application, educational contract, and your website; creation of a minority outreach committee and holding one meeting of such committee; adoption of a minority scholarship program and creation of a minority scholarship committee (which held no meetings); held one open house to which you invited a few members of the black community.

The facts indicate that you have failed to pursue and have in fact provided resistance to some suggestions made either by you or us, such as advertising the minority scholarship program on your website; outreach to black pre-school or day care centers; having board members distribute brochures to their offices and places of business and black churches; inviting black members of the community to serve on the minority outreach and scholarship committees or the board of directors; offering a full minority scholarship; and eliminating the testing requirement from the minority scholarship program. You state that you only make your brochures available to persons upon request or who come into the school expressing an interest in attending. Virtually no actions, including any meetings of the minority scholarship or outreach committee, have been taken since 20 .

You have been given ample opportunity and suggestions for actions you could take that would demonstrate that you are operating in a bona fide racially nondiscriminatory manner. However, the information submitted contains no evidence of actions such as active and vigorous

recruitment of black students and teachers; financial assistance for black students, or on-going communication with members of the black community. Although you have adopted a policy of nondiscrimination and made some preliminary efforts toward offering financial assistance and outreach to the black community, these efforts are minimal and have practically ceased. Mere adoption of a nondiscriminatory policy and publication of such a policy is insufficient for such a school to demonstrate that it is operating in a bona fide nondiscriminatory manner in accordance with Rev. Proc. 75-50, supra. And even publication in newspapers has appeared to cease since 20 .

The facts and circumstances do not show that you have made an intensive and comprehensive effort at outreach directed specifically to the black community which could possibly result in the enrollment of black students and current employment of black teachers and administrators. Like the school described in Calhoun Academy v. Commissioner, supra, your interaction with black persons in the community is insufficient to demonstrate that you operate in a bona fide racially nondiscriminatory manner with respect to the enrollment of students and hiring of faculty and administrators.

All of the pertinent facts and circumstances lead us to conclude that you have failed to demonstrate that you have taken sufficient steps to overcome the inference of discrimination set forth in the above mentioned court cases. Thus, you have failed to establish that you operate in a bona fide racially nondiscriminatory manner.

CONCLUSION:

Accordingly, you are not operated exclusively for exempt purposes under section 501(c)(3) of the Code, and thus you do not qualify for recognition of exemption as an organization described in section 501(c)(3). You must file federal income tax returns.

Contributions to you are not deductible under section 170 of the Code.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.

You also have a right to request a conference to discuss your protest. This request should be made when you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. For more information about representation, see Publication 947, *Practice before the IRS*

and Power of Attorney. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service

1111 Constitution Ave, N.W.
Washington, DC 20224

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements