

State of South Dakota

SEVENTY-SEVENTH SESSION
LEGISLATIVE ASSEMBLY, 2002

400H0350

SENATE ENGROSSED NO. **SB 41** - 01/22/2002

Introduced by: The Committee on State Affairs at the request of the Investment Council

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the higher education
2 savings plan and to declare an emergency.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 13-63-11 be amended to read as follows:

5 13-63-11. Account owners may withdraw all or part of the balance from an account ~~on sixty~~
6 ~~days' notice, or a shorter period~~ as may be authorized by the council, by policies, guidelines, or
7 procedures, or under rules promulgated by the council pursuant to chapter 1-26. ~~These rules~~
8 ~~shall include provisions that will generally enable the council or program manager to determine~~
9 ~~if a withdrawal is a nonqualified withdrawal. The rules may require one or more of the following:~~

10 ~~— (1) — Account owners seeking to make a withdrawal other than a nonqualified withdrawal~~
11 ~~shall provide certifications, copies of bills for qualified higher education expenses, or~~
12 ~~other supporting material;~~

13 ~~— (2) — Qualified withdrawals from an account shall be made only by a check payable jointly~~
14 ~~to the designated beneficiary and a higher education institution as designated by the~~
15 ~~account owner, except as expressly otherwise permitted by section 529 of the Internal~~



1 Revenue Code and related regulations;

2 ~~(3) Withdrawals not meeting requirements established by the council shall be treated as~~
3 ~~nonqualified withdrawals by the program manager, and if these withdrawals are not~~
4 ~~nonqualified withdrawals, the account owner must seek refunds of penalties directly~~
5 ~~from the council.~~

6 Section 2. That § 13-63-18 be amended to read as follows:

7 13-63-18. No contributor to, account owner of, or designated beneficiary of, any account
8 may, directly or indirectly, direct the investment of any contributions to an account or the
9 earnings from the account, except to the extent permitted under section 529 of the Internal
10 Revenue Code and related regulations.

11 The council, as trustee, may offer participants a choice of several investment options, some
12 of which may require investment counseling prior to participation. Any investment vehicle
13 offered by the council shall be in accordance with policies of the council adopted pursuant to this
14 chapter and shall be consistent with the investments of a prudent person with similar objectives
15 and shall further be separate from, and not commingled with, other investment programs of the
16 council.

17 Section 3. That § 13-63-21 be amended to read as follows:

18 13-63-21. The council shall adopt policies, guidelines, procedures, or rules pursuant to
19 chapter 1-26 to prevent contributions on behalf of a designated beneficiary in excess of ~~those~~
20 ~~necessary to pay the qualified higher education expenses of the designated beneficiaries and to~~
21 ~~satisfy the safe harbor requirements~~ the maximum amounts permitted under section 529 of the
22 Internal Revenue Code and related regulations.

23 Section 4. That § 4-5-26 be amended to read as follows:

24 4-5-26. Money made available for investment may be invested in the following classes of

1 securities and investments and, except as provided by § 3-12-117, chapter 3-13, the South
2 Dakota Cement Plant retirement fund, chapter 13-63, and the permanent trust fund containing
3 the net proceeds from the sale of state cement enterprises, not otherwise:

- 4 (1) Direct and indirect obligations of the United States government;
- 5 (2) Agencies and instrumentalities of the United States government;
- 6 (3) Direct obligations of the State of South Dakota and any of its political subdivisions;
- 7 (4) Obligations consisting of notes, bonds, debentures, and certificates which are direct
8 obligations of a solvent corporation or trust existing under the laws of the United
9 States or any state thereof, if such investments are rated in the four highest
10 classifications established by at least two standard rating services; or
- 11 (5) Savings accounts, share accounts, certificates of deposit of banks, savings and loan
12 associations, building and loan associations, and bankers' acceptances;
- 13 (6) In addition to the investments authorized by subdivisions (1) to (5) of this section,
14 inclusive, the investment council may also allocate a sum certain of state public funds
15 for investment in the accounts and certificates of South Dakota banks and
16 associations. This sum shall initially be offered to South Dakota banks and
17 associations, and if not initially fully subscribed, the investment officer shall
18 immediately reoffer the unsubscribed sum to other qualified public depositories
19 defined by subdivision 4-6A-1(7).

20 Section 5. That ARSD 6:01:06:01 be amended to read as follows:

21 6:01:06:01. Definitions. Words and phrases defined in SDCL chapter 13-63 have the same
22 meaning when used in this chapter. Terms used in this chapter mean:

- 23 (1) "Cash," currency, bills, and coin in circulation, or converting a negotiable instrument to
24 cash by endorsing and presenting to a financial institution for deposit. An automatic transfer,

1 cashier's check, certified check, money order, payroll deposit, traveler's check, personal check,
2 and wire transfer are cash;

3 (2) "Investment direction," specifying or attempting to specify the particular financial
4 instruments or ownership interests either individually, or within a fund family or other group of
5 financial instruments or ownership interests held as an investment group, into which the
6 contributions or earnings are invested. Investment direction does not mean selecting an initial
7 type of investment program if more than one program is offered;

8 (3) "IRC," section 529 of the Internal Revenue Code as amended on ~~August 1, 2001~~
9 January 16, 2002;

10 (4) "Program manager," any financial institution selected by the council to act as the
11 depository and manager for the higher education savings plan.

12 Section 6. That ARSD 6:01:06:04 be repealed.

13 ~~6:01:06:04. Withdrawals--Reporting of nonqualified withdrawals--Penalties. An account
14 owner may withdraw funds from an account on 30 days notice. The designated beneficiary of
15 an account does not have any authority to withdraw funds from an account unless the account
16 is structured to give the designated beneficiary such right of withdrawal upon matriculation or
17 upon incurring qualified higher education expenses.~~

18 ~~— (1) Withdrawals. Types of withdrawals include:~~

19 ~~— (a) Qualified withdrawals. In order to make a qualified withdrawal, the account holder
20 or the account holder's designee must complete a certification, on a form provided by the
21 program manager, declaring that the funds will be used for the purposes set forth in subdivision
22 SDCL 13-63-1(13). The form shall include a statement advising the designated beneficiary and
23 account owner to report, in accordance with IRC, refunds received from a higher education
24 institution. In addition to the certification, a withdrawal is deemed qualified only if:~~

1 ~~—————(i)————— The financial institution is provided with a copy of an invoice from the~~
2 ~~higher education institution or other supporting material; and~~

3 ~~—————(ii) The distribution is made only by check payable jointly to the designated~~
4 ~~beneficiary and a higher education institution as designated by the account owner, or the higher~~
5 ~~education institution only, or except as expressly permitted by IRC;~~

6 ~~—————(b) Withdrawal based on death, disability, or scholarship. A withdrawal may be made~~
7 ~~as a result of the designated beneficiary's death, disability, or scholarship, if written substantiation~~
8 ~~is provided. Written substantiation must be from a party other than the designated beneficiary~~
9 ~~or the account owner that can independently confirm the circumstances of the withdrawal. For~~
10 ~~a scholarship, the withdrawal may not exceed the amount of the scholarship;~~

11 ~~—————(c) Nonqualified or unsubstantiated withdrawals. Any penalty that exceeds zero percent~~
12 ~~would be considered more than de minimis based on IRC, therefore the council has determined~~
13 ~~that no penalty will be imposed pursuant to SDCL 13-63-15; and~~

14 ~~——(2) Substantiation procedures. Before treating any withdrawal as qualified, the program~~
15 ~~manager shall confirm that substantiation is provided for the amount of a withdrawal that the~~
16 ~~account owner or designated beneficiary asserts is qualified; that the substantiation complies with~~
17 ~~IRC, and, in the case of a withdrawal to pay qualified higher education expenses, that the~~
18 ~~substantiated expenditures are of a nature and in amounts that can be treated as qualified higher~~
19 ~~education expenses. If the program manager determines that substantiation is inadequate, it shall~~
20 ~~notify the account owner and defer making any distribution with respect to an inadequately~~
21 ~~substantiated request until proper substantiation is provided or the account owner instructs the~~
22 ~~financial institution to make the requested distribution.~~

23 Section 7. That § 13-63-1 be amended to read as follows:

24 13-63-1. Terms used in this chapter mean:

- 1 (1) "Account," an account established as prescribed in this chapter;
- 2 (2) "Account owner," the person who, under this chapter or rules promulgated by the
3 council pursuant to chapter 1-26, is entitled to select or change the designated
4 beneficiary of an account, to designate any person other than the designated
5 beneficiary to whom funds may be paid from the account, or to receive distributions
6 from the account if no such other person is designated;
- 7 (3) "Contribution," any payment directly allocated to an account for the benefit of a
8 designated beneficiary or used to pay late fees or administrative fees associated with
9 an account, and that portion of any rollover amount treated as a contribution under
10 section 529 of the Internal Revenue Code and related regulations;
- 11 (4) "Contributor," any person making a contribution to an account;
- 12 (5) "Council," the South Dakota Investment Council;
- 13 (6) "Designated beneficiary," except as provided in § 13-63-25, the individual designated
14 at the time the account is opened as the individual whose higher education expenses
15 are expected to be paid from the account or, if this designated beneficiary is replaced
16 in accordance with § 13-63-12, 13-63-13, or 13-63-14, the replacement beneficiary;
- 17 (7) "Eligible education institution," an institution that is eligible to participate in any
18 financial assistance program authorized by Title IV of the Higher Education Act of
19 1965, as amended through January 1, 2001, and that is any of the following as
20 permitted by section 529 of the Internal Revenue Code and related regulations:
 - 21 (a) An institution described in the Higher Education Act of 1965 (P.L. 89-329, 79
22 stat. 1219; 20 United States Code sections 1001 through 1150);
 - 23 (b) An area vocational educational school as defined in section 521(3),
24 subparagraph (C) or (D) of the Carl D. Perkins Vocational Education Act (P.L.

- 1 98-524; 98 stat. 2435; 20 United States Code sections 2301 through 2471);
- 2 (c) An institution accredited for private postsecondary education;
- 3 (8) "Financial institution," any bank, commercial bank, national bank, savings bank,
- 4 savings and loan association, credit union, an insurance company, brokerage firm, or
- 5 other similar entity that is authorized to do business in this state;
- 6 (9) "Member of the family," any of the following:
- 7 (a) A son or daughter of an individual or a descendant of the son or daughter of
- 8 the individual;
- 9 (b) A stepson or stepdaughter of an individual;
- 10 (c) A brother, sister, stepbrother, or stepsister of an individual. For purposes of
- 11 this subsection, the terms, brother and sister, include a brother or sister by the
- 12 half-blood;
- 13 (d) The father or mother of an individual or an ancestor of the father or mother of
- 14 an individual;
- 15 (e) A stepfather or stepmother of an individual;
- 16 (f) A son or daughter of an individual's brother or sister. For purposes of this
- 17 subsection, the terms, brother and sister, include a brother or sister by the
- 18 half-blood;
- 19 (g) A brother or sister of an individual's father or mother. For purposes of this
- 20 subsection, the terms, brother and sister, include a brother or sister by the
- 21 half-blood;
- 22 (h) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law,
- 23 or sister-in-law of an individual;
- 24 (i) The spouse of an individual or the spouse of an individual described in this

- 1 subdivision;
- 2 (j) Any individual who meets the criteria to be a member of the family as described
- 3 in this subdivision as a result of legal adoption;
- 4 (k) Any other individual who is considered a member of the family under section
- 5 529 of the Internal Revenue Code and related regulations;
- 6 (10) ~~"Nonqualified withdrawal," a withdrawal from an account other than one of the~~
- 7 ~~following:~~
- 8 ~~———— (a) A qualified withdrawal;~~
- 9 ~~———— (b) A withdrawal made as the result of the death or disability of the designated~~
- 10 ~~beneficiary of an account;~~
- 11 ~~———— (c) Withdrawal that is made on the account of a scholarship, or the allowance or~~
- 12 ~~payment described in section 135(d)(1)(B) or (C) of the Internal Revenue Code~~
- 13 ~~and related regulations, and that is received by the designated beneficiary, but~~
- 14 ~~only to the extent of the amount of this scholarship, allowance, or payment; or~~
- 15 ~~———— (d) A rollover or change of designated beneficiary;~~
- 16 (11) "Person," as defined in the regulations to section 529 of the Internal Revenue Code;
- 17 (12) "Program," the higher education savings program established under this chapter;
- 18 (13) "Qualified higher education expenses," tuition, fees, books, supplies, and equipment
- 19 required for enrollment or attendance and room and board of a designated beneficiary
- 20 at an eligible education institution, and any other expenses qualifying as qualified
- 21 higher education expenses under section 529 of the Internal Revenue Code and
- 22 related regulations; provided that room and board expenses qualify only if the
- 23 beneficiary enrolls at least half time and only if the expenses do not exceed the
- 24 minimum room and board allowance determined in calculating costs of attendance for

1 federal financial aid programs;

2 (14) ~~"Qualified withdrawal," a withdrawal from an account to pay the qualified higher~~
3 ~~education expenses of the designated beneficiary of the account, but only if the~~
4 ~~withdrawal is made in accordance with this chapter;~~

5 (15) "Rollover," a disbursement or transfer from an account of a designated beneficiary
6 that is transferred to or deposited within sixty days into an account of another
7 individual who is a member of the family of the designated beneficiary, if the
8 transferee account was created under this chapter or under a qualified state tuition
9 program maintained by another state in accordance with section 529 of the Internal
10 Revenue Code and related regulations.

11 Section 8. That § 13-63-15 be repealed.

12 ~~— 13-63-15. In the case of any nonqualified withdrawal from an account, an amount equal to~~
13 ~~ten percent of the portion of the proposed withdrawal that would constitute earnings as~~
14 ~~determined in accordance with section 529 of the Internal Revenue Code and related regulations~~
15 ~~shall be withheld as a penalty and paid to the council for use in operating and marketing the~~
16 ~~program and for state student financial aid.~~

17 ~~— The council, by rule promulgated pursuant to chapter 1-26, shall increase the percentage of~~
18 ~~the penalty or change the basis of this penalty if the council determines that the amount of the~~
19 ~~penalty must be increased to constitute a penalty that is more than a de minimis penalty for~~
20 ~~purposes of qualifying the program as a qualified state tuition program under section 529 of the~~
21 ~~Internal Revenue Code and related regulations.~~

22 ~~— The council may decrease the percentage of the penalty if it determines that the penalty is~~
23 ~~greater than is required to constitute a penalty that is more than a de minimis penalty for~~
24 ~~purposes of qualifying the program as a qualified state tuition program under section 529 of the~~

1 ~~Internal Revenue Code and related regulations.~~

2 Section 9. That § 13-63-16 be repealed.

3 ~~—13-63-16. If an account owner makes a nonqualified withdrawal and no penalty amount is~~
4 ~~withheld pursuant to § 13-63-15 or the amount withheld was less than the amount required to~~
5 ~~be withheld under § 13-63-15 for nonqualified withdrawals, the account owner shall pay the~~
6 ~~unpaid portion of the penalty to the council on or before April fifteenth of the following calendar~~
7 ~~year.~~

8 Section 10. Whereas, this Act is necessary for the support of the state government and its
9 existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full
10 force and effect from and after its passage and approval.