HENRY MCMASTER
ATTORNEY GENERAL

April 6, 2010

The Honorable John M. Knotts, Jr.
Senator, District No. 23
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:

In a letter to this office you questioned the constitutionality of the requirement that a driver who refuses to submit to a breath test must complete the Alcohol Drug Safety Action Program (ADSAP) pursuant to S.C. Code Ann. § 56-5-2951 when the driving under the influence charge has been dismissed and the driver pled guilty to a non-alcohol related offense. You indicated that the driver did not contest the suspension required by Section 56-5-2951 but has been informed that he must complete ADSAP before his license will be reinstated. He was not convicted of driving under the influence or any alcohol-related offense. You acknowledged that state law requires ADSAP because he did refuse the breath test. However, you stated that the driver "feels that he served his suspension for refusing the test and that it would be unconstitutional for him to attend a program that will not benefit him now that his suspension has been served." You indicated that the driver is diabetic and does not consume alcohol due to his medical condition and, as such, any alcohol treatment or counseling would be unnecesssary.

S.C. Code Ann. § 56-5-2951 states that

> (A) The Department of Motor Vehicles must suspend the driver's license, permit, or nonresident operating privilege of or deny the issuance of a license or permit to a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950 or has an alcohol concentration of fifteen one-hundredths of one percent or more. The arresting officer must issue a notice of suspension which is effective beginning on the date of the alleged violation of Section 56-5-2930, 56-5-2933, or 56-5-2945.
>
> (B) Within thirty days of the issuance of the notice of suspension, the person may:...

(2) request an administrative hearing.

At the administrative hearing if:

(a) the suspension is upheld, the person's driver's license, permit, or nonresident operating privilege must be suspended or the person must be denied the issuance of a license or permit for the remainder of the suspension period provided for in subsection (I). Within thirty days of the issuance of the notice that the suspension has been upheld, the person must enroll in an Alcohol and Drug Safety Action Program pursuant to Section 56-5-2990;...

(D) If a person does not request an administrative hearing, he waives his right to the hearing, and his suspension must not be stayed but continues for the period provided for in subsection (I).

(E) The notice of suspension must advise the person of his right to obtain a temporary alcohol driver's license and to request an administrative hearing. The notice of suspension also must advise the person that, if he does not request an administrative hearing within thirty days of the issuance of the notice of suspension, he waives his right to the administrative hearing, and the suspension continues for the period provided for in subsection (I). The notice of suspension must also advise the person that if the suspension is upheld at the administrative hearing or if he does not request an administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program...

(P) If a person does not request an administrative hearing within the thirty-day period as authorized pursuant to this section, the person may file with the department a form after enrolling in a certified Alcohol and Drug Safety Action Program to apply for a restricted license. The restricted license permits him to drive only to and from work and his place of education and in the course of his employment or education during the period of suspension. The restricted license also permits him to drive to and from Alcohol and Drug Safety Action Program classes or a court-ordered drug program. The department may issue the restricted license at any time following the suspension upon a showing by the individual that he is employed or enrolled in a college or university, that he lives further than one mile from his place of employment, place of education, the location of his Alcohol and Drug Safety Action Program classes, or the location of his court-ordered drug program, and that there is no adequate public transportation between his residence and his place of employment, his place of education, the location of his Alcohol and Drug Safety Action Program classes, or

> the location of his court-ordered drug program. The department must designate reasonable restrictions on the times during which and routes on which the individual may drive a motor vehicle. A change in the employment hours, place of employment, status as a student, status of attendance of Alcohol and Drug Safety Action Program classes, status of his court-ordered drug program, or residence must be reported immediately to the department by the licensee. The route restrictions, requirements, and fees imposed by the department for the issuance of the restricted license issued pursuant to this item are the same as those provided in this section had the person requested an administrative hearing. A restricted license is valid until the person successfully completes a certified Alcohol and Drug Safety Action Program, unless the person fails to complete or make satisfactory progress to complete the program. (emphasis added).

As stated, pursuant to subsection (E), if a driver does not request an administrative hearing following his refusal to submit to a breathalyzer test, "...he must enroll in an Alcohol and Drug Safety Action Program."

As set forth in a prior opinion of this office dated January 11, 2010, in construing a statute, "...we begin with the presumption that all statutes are constitutional and we, just as a court, must if possible construe them to render them valid. State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). 'A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A possible constitutional construction must prevail over an unconstitutional interpretation.'" Id. (quotations omitted). Another opinion of this office dated June 12, 2009 stated that "...every statute is presumed constitutional, and will not be declared unconstitutional unless its invalidity is clear beyond reasonable doubt...." An opinion of this office dated November 27, 2007 indicated that

> ...legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("All statutes are presumed constitutional and will, if possible, be construed so as to render them valid."). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." Joytime Distrib. & Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Atty. Gen., August 19, 1997.

Therefore, with respect to the provisions of Section 56-5-2951 requiring a driver to enroll in an Alcohol and Drug Safety Action Program if he does not request an administrative hearing, such provision is presumed constitutional.

Regardless, in the opinion of this office, such requirement of enrollment in an Alcohol and Drug Safety Action Program is constitutional. As stated in a prior opinions of this office dated April 1, 2009 and January 3, 1971, the right to drive a motor vehicle on the public roads of this State is a privilege and not a fundamental right. See also: State v. Sullivan, 966 A.2d 919, 923 (Ct.App. Md. 2009) ("'The courts have unanimously agreed that an individual does not have a fundamental right to operate a motor vehicle.'"); State v. Wells, 965 So.2d 834, 839 (D.Ct.App. Fla.4th District, 2007) ("...courts have held that the right to travel does not encompass a fundamental right to drive...and that driving is a privilege rather than a right....").

As indicated in an opinion of this office dated September 24, 1997, a statute will be construed as constitutional if it is rationally related to a legitimate purpose. See also: Ops. Atty. Gen. dated September 27, 1996 and February 26, 1996. An opinion of this office dated March 3, 1994 similarly declared that "[f]inding no fundamental constitutional right, the proper legal test is simply whether...(the statute)...is rationally related to a legitimate purpose...." In an opinion of this office dated June 20, 1989, this office referenced the decision in Mitchell v. Board of Trustees of Oxford, 625 F.2d 660 (5th Cir. 1980) which upheld a school rule requiring expulsion of students for bringing weapons to school against a constitutional attack finding that "...the punishment for violating the rule clearly...(is)...rationally related to the goal of providing a safe environment in which children can learn...(and as such)...it comports with substantive due process." 625 F.2d at 664-665. See also: Op. Atty. Gen. dated September 26, 1984 (upheld the constitutionality of a statute where the purpose was to preserve public order at the State Fair finding the statute's provisions were rationally related to the implementation of that purpose).

An opinion of this office dated December 31, 2004 stated that as to a requirement regarding continuing professional education requirements for certified public accountants, "...(the)...right to licensure is not a 'fundamental right' and establishment of mandatory advanced educational requirements is rationally related to...(the)...legitimate state interest of protecting public health and safety." An opinion of this office dated June 27, 2001 stated that the provisions of S.C. Code Ann. § 56-5-2990 relating to ADSAP are "clearly remedial in purpose and nature." An opinion of the Nebraska Supreme Court in State v.Muggins, 222 N.W.2d 289 (Neb. 1974) indicated that their state's Alcohol Safety Action Program "...represents an effort by the state and the national government to reduce drunken driving offenses through the medium of education."

As stated, there is no fundamental right to drive. Referencing such, in the opinion of this office, the statutory requirement to enroll in an Alcohol and Drug Safety Action Program is rationally related to the goal of protecting public safety and reducing drunken driving offenses in this

State. As stated, the statute authorizes an administrative hearing following a notice of suspension for refusing to submit to a breathalyzer test and upon refusal to request an administrative hearing, the driver "must enroll in an Alcohol and Drug Safety Action Program." Such requirement is applicable even if the driving under the influence case has been dismissed and the driver pled guilty to a non-alcohol related offense. In the opinion of this office, such a requirement is constitutional.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General