



ALAN WILSON
ATTORNEY GENERAL

January 24, 2012

The Honorable Lewis E. Pinson
Representative, District No. 13
306 Plantation Drive
Greenwood, South Carolina 29649

Dear Representative Pinson,

We received your letter requesting an opinion as to whether pre-kindergarten programs exceeding four hours per day are required to be licensed by the Department of Social Services (DSS) pursuant to the South Carolina statutes and regulations governing the operation of "childcare facilities." Specifically, you indicate an interest in the law as it applies to such programs conducted by public schools.

In your letter, you also express your personal belief and concern that the law as written does not apply. You are "concerned that the current state of ambiguity may be engendering lapses in enforcement" by DSS which "may be allowing programs to operate that do not comply with health and safety requirements." You also express the opinion that "the legislature surely intended for the legislation to establish equitable business conditions for childcare providers." Noting that compliance with the statutory sections regulating childcare facilities is costly, you believe that "reading an exception...into the law for a narrow subset of childcare providers that is not expressly provided" would be "tantamount to endorsing unfair trade conditions."

It is our understanding the public schools where such programs exist are generally, if not entirely, limited to elementary schools which otherwise provide education at the kindergarten or first grade levels and higher. For purposes of this analysis, we will thus presume your question pertains more specifically to public elementary schools rather than public schools in general.

Law/Analysis

The statutory sections you reference are part of the South Carolina Children's Code found in Title 63 of the South Carolina Code. Specifically, Chapter 13 of the Children's Code governs the operation of childcare facilities. See § 63-13-10 et seq. The legislative purpose behind these statutory provisions is described as follows:

(A) The intent of this chapter is to define the regulatory duties of government necessary to safeguard children in care in places other than their homes, ensuring for them minimum levels of protection and supervision. Toward that end, it is the purpose of this chapter to establish statewide minimum regulations for the care and protection of children

in childcare facilities, to ensure maintenance of these regulations and to approve administration and enforcement to regulation conditions in such facilities. It is the policy of this State to ensure protection of children under care in childcare facilities, and to encourage the improvement of childcare programs.

(B) It is the further intent of this chapter that the freedom of religion of all citizens is inviolate. Nothing in this chapter shall give any governmental agency jurisdiction or authority to regulate, supervise, or in any way be involved in any Sunday school, Sabbath school, religious services or any nursery service or other program conducted during religious or church services primarily for the convenience of those attending the services.

(C) Nothing in this chapter shall create authority for the Department of Social Services to influence or regulate the curriculum of childcare facilities.

§ 63-13-10.

The responsibility of administering the regulation of childcare facilities is assigned to DSS. See § 63-13-20(11). DSS is also responsible for developing and promulgating regulations for the operation and maintenance of childcare facilities. See § 63-13-180(A). The relevant regulations promulgated pursuant to this statutory authority are found at S.C. Code of Regulations 114-501 *et seq.* (Supp. 2005).

With regards to public childcare facilities, S.C. Code section 63-13-610 provides that “[e]very operator or potential operator...must apply to [DSS] for an investigation and a statement of standard conformity or approval, *except those facilities designated in Section 63-13-10.*” (emphasis added). A private childcare center may not be operated by any “person, corporation, partnership, voluntary association, or other organization...unless licensed to do so by [DSS].” § 63-13-410. DSS has the authority to investigate applicants, licensees, and operators or potential operators for the purposes of granting, renewing, or revoking statements of approval or licenses for the operation of public facilities, or licenses for the operation of private facilities. See generally §§ 63-13-80, -420, -430, -620, -630.

Section 63-13-20 provides several definitions relevant to the question of whether the provisions of Chapter 13 of Title 63 apply to pre-kindergarten childcare programs exceeding four hours per day in public elementary schools or other locations. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* Courts “give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute’s operation.” *Harris v. Anderson County Sheriff’s Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 426 (2009).

“Childcare” is defined as “the care, supervision, or guidance of a child or children, unaccompanied by the parent, guardian, or custodian, on a regular basis,¹ for periods of less than twenty-

¹ “Regular basis” means “childcare services are available and provided” more than two days a week. § 63-13-20(24).

four hours per day, *but more than four hours*, in a place other than the child's or the children's own home or homes." § 63-13-20(2) (emphasis added). A "childcare center" is defined as "any *facility* which regularly receives thirteen or more children for childcare." § 63-13-20(3) (emphasis added). Thus, the question becomes whether public elementary schools or any other facilities conducting pre-kindergarten programs for more than four hours a day are "childcare facilities" subject to the provisions of Chapter 13 of Title 63.

"Childcare facilities" are broadly defined, in part, as follows:

[A] facility which provides care, supervision, or guidance for a minor child who is not related by blood, marriage, or adoption to the owner or operator of the facility whether or not the facility is operated for profit and whether or not the facility makes a charge for services offered by it. This definition includes, but is not limited to, day nurseries, nursery schools, childcare centers, group childcare homes, and family childcare homes.

§ 63-13-20(4). The section goes on to provide examples of facilities that fit within the definition: "This definition includes, but it is not limited to, day nurseries, nursery schools, childcare centers, group childcare homes, and family childcare homes...." *Id.* Without resorting to forced construction, it is doubtful that a public elementary school could be considered a "day nursery" or "nursery school" simply because such facilities also conduct a pre-kindergarten program. Due to the language of section 63-13-20(4) indicating the definition is not limited to these examples, however, any such determination would be premature.

Looking further, section 63-13-20(4) also provides examples of programs and facilities which are expressly excluded from the definition of "childcare facilities." Relevant to this analysis, these exclusions include, among other things:

- (a) *an educational facility*, whether private or public, which *operates solely for educational purposes in grade one or above*;
- (b) five-year-old kindergarten programs;
- (c) kindergartens or nursery schools or other daytime programs, with or without stated educational purposes, *operating no more than four hours a day* and receiving children younger than lawful school age....

§ 63-13-20(4)(c) (emphasis added). The programs you describe are at the pre-kindergarten level and exceed four hours a day, and thus clearly do not qualify for exclusion under (b) or (c). We think this irrelevant, however, as we are of the opinion that public elementary schools are excluded under the plain language of (a). This exclusion applies to educational *facilities* operating at the first grade level or above; it cannot be read as applying only to *programs* taught at these individual grade levels. If the Legislature intended to limit the exemption in this manner, it could have included language similar to that used in (b) excluding "five-year-old kindergarten *programs*." Accordingly, we believe public elementary schools are facilities that operate "solely for educational purposes in grade one or above," and are thus excluded from the definition of "childcare facilities" for purposes of Chapter 13 of Title 63.

However, distinct rules apply to public schools participating in four-year-old kindergarten programs established under the South Carolina Child Development Education Pilot Program (CDEPP). Budget Proviso 1A.45 of the 2011-2012 General Appropriations Bill allows for public or private schools to voluntarily participate in four-year-old kindergarten programs as part of the CDEPP and provides funding for these programs. Public schools choosing to participate apply through the Department of Education while private providers apply through the Office of South Carolina First Steps to School Readiness. Proviso 1A.45(C). The relevant section of the proviso states: "Providers shall...(8) be approved, registered, or licensed by the Department of Social Services." Proviso 1A.45(C). No distinction is made as to which "providers" which must be approved or licensed, nor is any exception to this rule set forth. Thus, all providers of these programs under the CDEPP must be approved or licensed by DSS.

We note that the Proviso's requirements appear to conflict with those of the general law previously discussed in this analysis. In prior opinions, this Office has recognized that "in case of conflict between a Proviso in the state Appropriations Act and a permanent provision of law, the proviso is generally controlling for that fiscal year." *Ops. S.C. Atty. Gen.*, December 2, 2008; November 10, 2004; June 24, 2003; March 19, 2003. "[T]he provisions of the appropriations act would have the effect of suspending the provisions of the conflicting general law." *Ops. S.C. Atty. Gen.*, December 2, 2008; March 19, 2003. Accordingly, we are of the opinion that public schools providing four-year-old kindergarten programs as part of the CDEPP are required to be approved or licensed by DSS for the 2011-2012 fiscal year.

It is our understanding that many public elementary schools offer pre-kindergarten programs separate and apart from the CDEPP and thus remain unaffected by the Proviso. Consistent with our previous conclusion, we believe such schools are not required to be approved or licensed by DSS as a childcare facility.

Conclusion

In consideration of Proviso 1A.45 of the 2011-2012 General Appropriations Bill, it is the opinion of this Office that any public school currently providing a four-year-old kindergarten program as part of the CDEPP is required to be approved or licensed by DSS. The Proviso, however, does not apply to pre-kindergarten programs established independent of the CDEPP. Such programs remain subject to the permanent law provisions of Chapter 13 of the Children's Code regulating "childcare facilities." Although the provisions of that chapter generally require that all such facilities be licensed or approved by DSS, the statutory definition of "childcare facilities" excludes public and private educational institutions that operate "solely for educational purposes in grade one or above." We believe public elementary schools fall within the plain language of this exclusion. Accordingly, it is the opinion of this Office that a public elementary school providing a pre-kindergarten program independent of the CDEPP is not required to be approved or licensed by DSS.

If the Legislature desires that all public elementary schools conducting pre-kindergarten programs be licensed or approved by DSS as a "childcare facility," we would advise that legislation be enacted or amended to include language expressly evincing such intent. Likewise, if the Legislature intended the

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statutory provisions of Chapter 13 of Title 63 to serve a public policy or purpose other than that stated in section 63-13-10, it should include language indicating such.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General