ALAN WILSON
ATTORNEY GENERAL

September 5, 2012

The Honorable George E. Campsen, III
Senator, District No. 43
360 Concord Street, Suite 201
Charleston, South Carolina 29401

The Honorable A. Shane Massey
Senator, District No. 25
P. O. Box 551
Edgefield, South Carolina 29824

The Honorable Phillip D. Owens
Member, House of Representatives
House District 5
P. O. Box 723
Easley, South Carolina 29641

Dear Senator Campsen, Senator Massey and Representative Owens:

You seek an opinion regarding our interpretation of the recently enacted Act 203 of 2012. According to the Act's title, this legislation, the "Equal Access to Interscholastic Activities Act," was enacted "to permit home school students and Governor's School students to participate in interscholastic activities of the school district in which the students reside, subject to certain conditions, and to provide additional requirements for charter school students to participate in interscholastic activities." You note that your inquiry involves "two separate instances relating to the application of the act to home school students." By way of background, you state the following:

> [t]he first question involves the application of the act to a school district prohibiting a student from participating in a Junior Officers Training Course (JROTC) offered at a local high school. The second question involves the application of the act to the refusal by the High School League to allow two home school students to play football for a charter school chartered by the statewide school district.
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> In the first instance, it is our understanding that recently a home school student, who lives in Lexington Richland School District 5, requested access to a JROTC program offered at Irmo High School entitled "Aerospace Science I" under the provisions of the Equal Access to Interscholastic Activities Act, in order to help facilitate his application to the U.S. Naval Academy. The district, through a letter by Superintended Dr. Stephen Hefner (attached), refused to allow access to the program. The reason stated was that program attendees receive academic credit and therefore the program does not fall within the definition of an "extracurricular activity" as defined by the district.

We believe the application of the district's own definition of "extracurricular activity" rather than the term "interscholastic activities", as defined in the act, is in error and therefore the student should be allowed to participate in the JROTC program. The application clearly violates the intent of the legislature to allow access to home school, charter school, and Governor's School attendees to all extracurricular educational opportunities available to other students of the district.

Section 59-63-100(A)(4) defines "interscholastic activity" and includes, "but is not limited to, athletics, music, speech, and other extracurricular activities." The law clearly intends that any extracurricular program, with no limitation on those that offer or do not offer school credit, must allow access to home school, charter school, and Governor's school students. An application of the definition prescribed by the district would greatly undermine the act because the school district ties numerous extracurricular programs to courses offered for credit. These include band, orchestra, chorus, theater, dance, and speech.

Further, the district has included in their reasoning the argument that interscholastic competition is an essential element in the definition. We would argue that competition is not a term found in the definition and should not be used as a standard to restrict access to these programs. The fact that music is listed as an example underscores that, while there may be music competitions, competition is not an element of the defined term. Many music programs give performances with no competitive element or involvement from other schools whatsoever. In addition, a statement made by a member of the school district on the local news described the policy that the school will be opening up access to after school clubs and organizations to home schooled children. Many, if not most, of these after school clubs also have no competition requirement or element.

We believe the broadest application of the definition of the term is essential to facilitate the goal of the legislature. The legislature included the phrase "but is not limited to" to highlight the expansive nature of the definition. Also, guidance can be found in the "Interstate Compact on Educational Opportunities for Military Children Act" which in Section 59-46-50(F), defines "extracurricular activities" as to, "include but are not limited to, preparation for an involvement in public performances, contests, athletic competitions, demonstrations, displays, and club activities." It is clear the legislature intended the term to be broadly interpreted to allow for, rather than restrict, participation by students.

In addition, the school district limits access to the JROTC drill team by requiring Aerospace Science 1 as a prerequisite to participation. The drill team is clearly an interscholastic competitive organization; therefore, any restriction to Aerospace Science 1 would be a *de facto* restriction against participation on the drill team. Undoubtedly, the drill team is a competitive interscholastic activity that would fall within the definition of any interscholastic activity under any interpretation. We are concerned that the use of credit bearing prerequisites to participate in this and other interscholastic activities could greatly undermine the effectiveness of the act in providing participation opportunities to

home school, charter school, and Governor's school students, unless the student is also allowed access to the credit bearing prerequisite.

Lastly, the benefits of the educational opportunities for the children must be weighed against the minimal financial impact to the school from students who would otherwise have the right to attend the school on a full time basis. Also, given that the honor of the admission to a United States military service academy may be affected by whether this student will be allowed to participate in JROTC, we respectfully ask for a formal opinion on this issue.

In the second instance, a charter high school chartered by the statewide school district has indicated that it will allow two home school students to play football on the school's team during the upcoming season. However, the High School League, a private organization contracted with by school districts to supervise interscholastic activities, has indicated that the team would be required to forfeit any game in which these students participate because under its interpretation Act 203 sets out eligibility requirements that the students do not meet. We believe that this ruling, if maintained by the league, would nullify any contract between the High School League and any state school district.

The High School League may not prohibit home school students from participating in interscholastic activities. Section 59-63-100(B) states: "home school students may not be denied by a school district the opportunity to participate in interscholastic activities if the: (1) student meets all school district eligibility requirements with the exception of the: (a) school district's school or class attendance requirements; and (b) class and enrollment requirements of the associations administering the interscholastic activities." This subsection does not set out eligibility requirements that the High School League has any role in judging, but rather prohibits a school from refusing to allow a home school student to participate in a particular activity.

Once a school or district has determined that a student may not be refused participation, the High School League may not discriminate against that school or student based on the student's participation. Section 59-63-100(F) of the statute provides: "A school district may not contract with a private entity that supervises interscholastic activities if the private entity prohibits the participation of charter school students, Governor's school students, or home school students in interscholastic activities." Therefore, the enforcement of the league's prohibition would place the High School League in the category of a private entity with which school districts are prohibited from contracting, potentially nullifying every contact between the High School League and any school district in the State.

Given the potential impact on not only these particular students' ability to play football this year, but also the validity of any agreement providing for the High School League's supervision of high school football for the upcoming season, we would request a formal opinion on this issue as well.

As primary sponsors and proponents of this legislation, we have a particular interest in ensuring that this legislation is interpreted in the manner consistent with the legislative intent to provide broad access to participation in interscholastic and extracurricular activities by charter school, home school, and Governor's school students. As a result, we would ask that you render an opinion on this matter as expeditiously as possible in hopes that it will aid the students affected in resolving these matters in ample time to participate to the fullest extent possible in the respective interscholastic and extracurricular activities involved.

Law / Analysis

The "Equal Access to Interscholastic Activities Act" (Act 203) provides, pursuant to Section 2(B), that

> (B) Individual Governor's school students and home school students may not be denied by a school district the opportunity to participate in interscholastic activities if the:
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> (1) student meets all school district eligibility requirements with the exception of the:
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> (a) school district's school or class attendance requirements and
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> (b) class and enrollment requirements of the associations administering the interscholastic activities;
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> (2) student's teacher, in the case of a Governor's school student, certifies by submitting an affidavit to the school district that the student fully complies with the law and any attendance, class, or enrollment requirements for a Governor's school. In addition, a charter school student's teacher, in the same manner required by this subsection for a Governor's school student, also must certify by affidavit to the student's school district that the student fully complies with the law and any attendance, class, or enrollment requirements for a charter school in order for the student to participate in interscholastic activities in the manner permitted by Chapter 40 of this title.
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> (3) student participating in interscholastic activities;
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> (a) resides within the attendance boundaries of the school for which the student participates; and

> (b) in the case of a Governor's school student, resides or attends a Governor's school within the attendance boundaries of the school for which the student participates; and
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> (4) student notifies the superintendent of the school district in writing of his intent to participate in the interscholastic activity as a representative of the school before the beginning date of the season for the activity in which he wishes to participate.

"Interscholastic activities "are defined by the Act in Section 2(A)(4) as follows: "Interscholastic activities includes, but is not limited to, athletics, music, speech, and other extracurricular activities." The Act also defines "Home School student" in Section 2(A)(3) as "a child taught in accordance with Section 59-65-40, 59-65-45, or 59-65-47 and has been taught in accordance with one of these sections for a full academic year prior to participating in interscholastic activity pursuant to this section."

In construing Act No. 203 of 2012, a number of rules of construction are applicable. The cardinal rule of interpretation is to determine the intent of the Legislature. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369, 377 (Ct. App. 2005). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be interpreted in light of the intended purpose of the statute. *McClanahan v. Richland Co. Council*, 350 S.C. 433, 567 S.E.2d 240, 242 (2002); *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203, 206 (Ct. App. 2002). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *S.C. Farm Bureau Mutual Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11, 14 (Ct. App. 1989).

The Legislature's intent should be ascertained from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 505 (Ct. App. 2004). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. Comp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843, 846 (1992). What the Legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 581 (2000). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual or ordinary significance. *Martin v. Nationwide Mutual Insurance Co..*, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clean and unambiguous terms of a statute according to their literal meaning and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991); *Jones v. S.C. Highway Dept.*, 247 S.C. 132, 146 S.E.2d 166 (1966). Finally, "[a] statute remedial in nature should be liberally construed in order to accomplish the object sought." *Auto Owners Ins. v. Rollinson*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) (quoting *Inabinet v. Royal Exchange Assur. of London,* 165 S.C. 33, 36, 162 S.E.2d 599, 600 (1932)).

We deem the purpose of Act 203 to be remedial in nature, and thus the statute must be broadly construed. As noted above, the Legislature's purpose is to provide "equal access to interscholastic

activities" to those being home schooled, in accordance with the definition provided in the Act, see, Section 2(A)(3), or students attending a Governor's school or a charter school as those terms are defined. Home school students, according to Subsection (B) "may not be denied by a school district the opportunity to interscholastic activities" provided the conditions set forth in the Act are met. Expressly exempted from the conditions which a home school student must meet are the school district's school and class attendance requirements, as well as class and enrollment requirements of the associations administering the scholastic activities. With respect to charter school students, "a charter school student's teacher ... must certify by affidavit to the student's school district that the student fully complies with the law, and any attendance, class, or enrollment requirements for a charter school in order for the student to participate in interscholastic activities in the manner permitted by Chapter 40 of this title ...." Moreover, Subsection (F) of Section 2 states that "[a] school district may not contract with a private entity that supervises interscholastic athletics if the private entity prohibits the participation of charter school students, Governor's school students, or home school students in interscholastic activities."

The central issue in your request concerns the definition of "interscholastic activities," contained in the Act. As noted above, Section 2(A)(4) of the Act states that "'Interscholastic activities' *includes but is not limited* to, athletics, music, speech and *other extracurricular activities*." (emphasis added). Thus, the Legislature, by using the language "includes, but is not limited to," intended that the term "interscholastic activities," as used in the Act, is broader than the term "extracurricular activities, " The word "interscholastic" typically means "between or among schools," while the term "extracurricular activities" usually means "not part of the required curriculum; outside the regular course of study but under the supervision of the school." *Webster's New World Dictionary of the American Language* (2d College ed.).

Courts have recognized that "[t]he term 'extracurricular activities' is itself extremely broad." *Pratt v. Ferber*, 335 S.W.2d 90-97 (Mo. 2011). Moreover, the Supreme Court of California has stated:

> [i]t can no longer be denied that extracurricular activities constitute an integral component of public education. Such activities are "'generally recognized as a fundamental ingredient of the educational process.'" (*Moran v. School District # 7, Yellowstone County*, ... 350 F.Supp. 1180, 1184; *Kelley v. Metropolitan County Bd. of Ed. of Nashville, etc.* (M.D. Tenn., 1968) 293 F.Supp. 485, 493 ... . They are "[no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin ...." (*Alexander v. Phillips* (1927) 31 Ariz. 503, 254 P. 1056, 1059).

Hartzell v. Connell, 35 Cal.3d 899, 909, 609 P.2d 35, 42 (Ca. 1984).

We turn now to your first question involving a student desiring to participate in the Junior ROTC program. Title 10, Section 2031 of the United States Code states that the purpose of JROTC is "to instill in students in [United States] secondary educational institutions the values of citizenship, service to the United States, and personal responsibility and a sense of accomplishment." 10 U.S.C. § 2031. Pursuant to § 59-29-110 of the South Carolina Code, "[a]ny ... high school may, under such rules and regulations as the State Board of Education may prescribe, install and maintain United States junior reserve officers training corps unity." Pursuant to the Regulations of the State Board of Education, a student must have

one unit of Physical Education, or JROTC in order to graduate. S.C. Code of Regulations, R. 43-259. The Program of JROTC "is a leadership program" and is designed "[t]hrough a series of classes and after-school activities [for] ... students [to] acquire an understanding of military science and citizenship, increase leadership skills and physical fitness, and learn an appreciation for national security and the value of the United States Armed Forces." *Esquivel v. San Francisco Unified School Dist.*, 630 F.Supp.2d 1055, 1056 (N.D. Cal. 2008).

While there is some disagreement as to whether JROTC is truly "extracurricular," courts have generally recognized that the program is an extracurricular activity, or, at the very least, extracurricular activities are a part of the Junior ROTC program. For example, in *Koopman v. Fremont School District No. 1*, 911 P.2d 1049, 1053 (Wyo. 1996), the Supreme Court of Wyoming stated:

> [a]t the heart of Koopman's complaint is his contention that, when the appellees refused to allow him to join in the Training Corps (Naval JROTC) activities because of his medical condition, they deprived him of the educational benefits that he could have derived from participating in the field trips on the rifle team. The courts have recognized that extracurricular activities may be considered as being a part of the free appropriate public education which is guaranteed by the IDEA [cases omitted] .... The Training Corps rifle team and the field trips were examples of such extracurricular activities.

And, in *Kelly v. U.S.*, 809 F.Supp.2d 429 (E.D.N.C. 2011), it was concluded by the District Court that a liability waiver signed by the mother of a minor to participate in the Navy Junior Reserve Officer Training Corps program was binding. The injuries occurred at Camp Lejeune Marine Corps base. The Court explained that

> [h]ere, it is undisputed that the liability waiver was executed on behalf of a fifteen-year-old student by her mother in conjunction with the student's participation in a school-sponsored activity ... . Here, the liability waiver was executed so that Morgan Kelly could participate in a school-sponsored enrichment program that was *extracurricular* and voluntary.

809 F.Supp.2d at 437 (emphasis added). See also, Busbee, "Who Will Speak For the Teachers: Precedent Prevails in Veronia School District 47J v. Acton," 33 *Hous. L. Rev.* 1229, 1258 (Winter, 1996) ["Upon closer inspection it becomes apparent that there are many other students in the school system who have chosen to subject themselves to a higher degree of regulation. Those students involved in extracurricular activities - the glee club, cheerleading, scholastic competition, marching band, drill-team, Junior Reserve Officers Training Corps (JROTC), or the school play - have clearly volunteered for participation."]

We readily acknowledge that participation in Junior ROTC affords academic credit pursuant to the foregoing State Board of Education Regulation and that one definition of "extracurricular activity" is that the term "usually carr[ies] no academic credit." See, *Merriam-Webster Online Dictionary* at m-w.com. However, we do not deem this criteria dispositive, particularly in light of the fact that, as noted above, "extracurricular," in its broadest sense, means the activity is "not part of the required curriculum." *Webster's New World Dictionary, supra.* This analysis was adopted by the Georgia Supreme Court in

Smith v. Crim, 240 S.E.2d 884, 885 (Ga. 1977) where in a suit to compel officials to allow a student to play high school football, the Court deemed interscholastic sports to be "extracurricular and not essential to the prescribed curriculum which must be made available to all of Georgia's children." And, there is no doubt that Junior ROTC is not part of the *required* curriculum in South Carolina Schools. We believe that, given the broad, remedial purpose of Act 203, a court would likely conclude that Junior ROTC participants would fall within the definition of "interscholastic activity" found in the Act. Thus, assuming all other requirements are met, home school students would be eligible to participate in the activities of Junior ROTC.

With respect to your second question regarding the two students who desire to play football, and have been declared ineligible to play by the High School League, Act 203 would control the League policy. In *Bruce v. South Carolina High School League*, 258 S.C. 546, 189 S.E.2d 817 (1972), the Supreme Court recognized that the League is a voluntary organization comprised of public high schools, and some private schools, and its rules regulate interscholastic athletic contests among its members, including student eligibility. While the Court, in *Bruce,* refused to interfere in the League's internal operations in that case, it is clear that the League's Rules must be consistent with state law. As we stated in an opinion, dated November 1, 1972, "such League rules ... have no legal effect relative to actual enrollment, attendance, and transfer of pupils, which are governed by State statute." Moreover, as is generally recognized,

> [a]n athletic association need not construe its constitution, rules, or handbooks in a technical manner in order to avoid judicial interference; rather the association has discretion in construing its rules and determining their applicability, and is limited only by the requirement that its rules be reasonable, *lawful, and in keeping with public policy*, be interpreted fairly and reasonably, and be enforced uniformly and not arbitrarily.

78 C.J.S. *Schools and School Districts* § 1121. (emphasis added). Section 2(F) recognizes this rule - that the High School League is governed by Act 203 - in providing that "[a] school district may not contract with a private entity that supervises interscholastic activities if the private entity prohibits the participation of charter school students, Governor's school students, or home school students in interscholastic activities." Whether refusal by the High School League to allow the students to participate on the football team constitutes a breach of contract is, of course, beyond the scope of an opinion of this Office because it involves factual questions which we are unable to determine in an opinion. *Op. S.C. Attorney General*, December 12, 1983. However, we note that Act 203 clearly prohibits the High School League from barring any of the three categories of students [home school, Governor's school or charter school] from participation in interscholastic athletics if they are otherwise eligible.

Conclusion

Act 203 of 2012 expressly provides that "... Governor's school students and home school students may not be denied by a school district the opportunity to participate in interscholastic activities" if the student otherwise meets requirements for such participation. Governor's school and home school students are exempt under the Act from having to meet the school district's school or class attendance requirements and class and enrollment requirements of the associations administering the interscholastic

activities. Subsection 2(B)(2) further expressly addresses charter school students and requires charter school students' participation of such students fully comply with the law and any attendance, class or enrollment requirements. We deem the statute as remedial in nature, and thus it must be broadly interpreted to fulfill the Legislature's purpose of providing equal access to interscholastic activities for Governor's school, home school and charter school students. The statute requires that these students be allowed to participate in interscholastic activities.

With respect to your first question, it is our opinion that, given the broad construction required of the statute, a court would likely conclude that a Junior ROTC program is included within the statute's mandate. Courts have concluded that Junior ROTC programs and their out-of-school activities, such as a drill team, are extracurricular activity. Moreover, in light of the fact that Junior ROTC programs compete against other institutions or schools, we believe the Junior ROTC program is an interscholastic activity within the common and ordinary meaning of that term. While we recognize that academic credit is given for participation in a Junior ROTC program, we do not believe this factor is controlling, given the statute's broad remedial purpose. Moreover, the fact that the statute exempts home school students from the requirements of a school district's school or class attendance, further indicates that academic credit is not a controlling factor in the Act's application. Most often, a student may not receive academic credit for any course unless attendance requirements are met. The fact that the Legislature exempted home school students from this requirement for participation in interscholastic activity, strongly suggests that academic credit is not a controlling factor here. Thus, we believe that Act 203 requires a home school student's admission to the Junior ROTC program.

With respect to your second question, a Governor's school, home school and charter school student is, pursuant to the statute, given equal access to participate in interscholastic athletic programs if otherwise eligible. While a court typically defers to the High School League in the application of its internal rules, by the same token, the League is bound by state law. The statute expressly provides that a "school district may *not* contract with a private entity that supervises interscholastic activities if the private entity prohibits the participation of charter school students, Governor's school students or home school students in interscholastic activities." (emphasis added). While we cannot determine facts, failure by the League to follow the statute could jeopardize such contracts with school districts.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an