ALAN WILSON
ATTORNEY GENERAL

September 5, 2012

The Honorable Mick Zais
State Superintendent of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Mr. Zais:

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." By way of background, you state the following:

> The South Carolina General Assembly passed the Equal Access to Interscholastic Activities Act, 2012 S.C. Acts 203, on June 5, 2012. The law is "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." The General Assembly amended the charter school law to provide for charter school student participation in interscholastic activities as well.
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> The South Carolina Department of Education (SCDE) has received inquiries from a variety of sources regarding the interpretation of this law, including parents, legislators, school district staff, and school attorneys. The questions are focused around the determination of which types of activities fall within the purview of this law. Act 203 seems to broadly define those activities. It states that "Interscholastic activities includes, but is not limited to, athletics, music, speech, and other extracurricular activities." S.C. Code § 59-63-100(4) (To be codified at Supp. 2012). While it seems to be clear what "athletics" refers to, "music" may be defined as band, chorus, orchestra, jazz band, or any variation. Schools and districts offer a wide variety of extracurricular music opportunities, some with course requirements and other may not have course requirements. It is unclear as to what "speech" refers to. Speech therapy services are generally offered through the application of the Individuals with Disabilities Education Act and may already be available to these students without the application of this new law. However, in using the term "Speech" the General Assembly may have been referring to Drama Clubs, Debate Teams, and other types of theatrical productions. The catch-all language "other extracurricular"

activities seems to be intended to be read broadly. Those activities may include JROTC. We believe that the law should be read broadly, permitting home school, Governor's school, and charter school student participation in the widest extent.

The law provides conditions for participation:

> "(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:
> (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;" (Emphasis Added).

Many activities that are commonly considered "interscholastic" have course requirements or require that the students be enrolled in a class that goes along with the activity. Marching band, orchestra, chorus, and JROTC are examples of these types of activities. Often students are required to take a class to participate in these activities. The question raised is whether this law allows home school, Governor's school, and charter school students to participate in activities that may also have a course component, such as the ones described above. If the answer is yes, and I believe it is, are the students exempt from the course requirements or are the students permitted to attend those courses at the school?

My interpretation of the law is that students would be able to participate under (B)(1)(a) above. The law specifically addresses school district's "class attendance" requirements. It is my belief that the General Assembly specifically addressed activities that have class attendance requirements in drafting that language and that students may participate in these activities. Finally, with regard to (B)(1) above, does this section also apply to charter school students? Since the purpose of the Act as stated in the heading is to "to provide additional requirements for charter school students to participate in interscholastic activities," I would submit that it does.

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:

(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;

(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.

(3) student participating in interscholastic activities;

(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

(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 Sections 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 specific 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 Verononia 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.

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 if 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 specific 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.

Sincerely,

Robert D. Cook
Deputy Attorney General

RDC/an