9276/9326

ALAN WILSON
ATTORNEY GENERAL

September 8, 2014

The Honorable Shane Martin
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

Thank you for your letter dated August 18, 2014 requesting this Office's interpretation of the Equal Access to Interscholastic Activities Act, S.C. Code Ann. § 59-63-100 (Supp. 2013), in the context of a home school student's eligibility to continue to participate in an interscholastic activity at a certain school after moving to a residence that falls within the same school district but a different attendance boundary. Specifically, you note that the home school student played for the Landrum High School basketball team last year and wishes to play for the same team in the upcoming season. Landrum is part of Spartanburg County School District One and within that District's northern attendance boundary. Currently, while the student's residence still falls within District One, it is located in the southern attendance boundary, zoned for the other high school in the District, Chapman High.[1]

Your correspondence includes a copy of a letter written to the chairman of the South Carolina High School League indicating that although the student in question is in good standing; meets all necessary requirements; and has approval from Landrum's principal, athletic director, head basketball coach, as well as the superintendent, to play on Landrum's basketball team during the upcoming season, the South Carolina High School League has denied, or is considering denying, the student's participation on the team. In addition, you indicate that for over forty (40) years, Spartanburg County School District One has been a "School Choice" District, meaning that parents and students are permitted to choose any school within the District for the student to attend, and that the primary purpose for the attendance boundaries within the District is to facilitate efficient bus routes.

## Law / Analysis

### I. The Equal Access to Interscholastic Activities Act

#### a. Our Nation's Evolution in Home School Student Participation in Extracurricular Activities

In the past several decades, home schooling has grown increasingly popular in our Nation to the extent that the once illegal practice prior to the 1980s, it is currently permitted in all fifty states. Charles J. Russo & Allan G. Osborne, Sports Participation and Home Schooling: A Game Changer?, 301 Ed. Law Rep. 8, 8 (2014). While home schooled students still represent a small number of the total student population, as the practice continues to grow, parents and advocates of home schooled students have

[1] See http://www.spartanburg1.k12.sc.us/do/ (follow "About Us" hyperlink; then follow "Attendance Map" hyperlink) (providing a map of Spartanburg County District One's attendance boundaries).

pushed for equal access to programming offered by public schools, and especially the ability of home schooled students to participate in extracurricular sporting activities. Id. In large part, law suits brought by parents of home schooled children alleging that participation in extracurricular activities is a constitutionally protected right under the principles of the Fourteenth Amendment's Equal Protection Clause and Due Process Clause, have been largely unsuccessful. See generally Kathryn Gardner & Allison J. McFarland, Legal Precedents and Strategies Shaping Home Schooled Student's Participation in Public School Sports, 11 J. of Legal Aspects of Sport 25, 35-36 (2001). Seeking legal redress, parents of home schooled students have pushed for state legislators to enact statutes specifically permitting home schooled students to participate in extracurricular activities, and a growing number of states, including South Carolina, have obliged. Eugene C. Ejorklun, Home Schooled Students: Access to Public School Extracurricular Activities, 109 Ed. Law Rep. 1, 5 (1996); see Michael Atkinson, Let Them Play: Why Kentucky Should Enact a "Tebow Bill" Allowing Homeschoolers to Participate in Public School Sports, 43 J.L. & Educ. 433, 435, n. 17 (2014) (noting that "[t]wenty-nine states now allow some form of access to homeschooled students via legislation or athletic regulations"[2]).

**b. Statutory Construction**

In June of 2012, South Carolina's General Assembly enacted Act No. 203, which is titled the Equal Access to Interscholastic Activities Act ("the Act") and is codified at S.C. Code Ann. § 59-63-100 (Supp. 2013). Act. No. 203, 2012 S.C. Acts 1809-11. Pursuant to the Act's opening provision, its purpose, "by adding section 59-63-100," is to "permit home school students and Governor's school students [the ability] 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 heart of the Act lies in S.C. Code Ann. § 59-63-100(B) (Supp. 2013), which states:

> [i]ndividual 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 the 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; or

[2] These states include: Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and Wyoming. Let Them Play: Why Kentucky Should Enact a "Tebow Bill" Allowing Homeschoolers to Participate in Public School Sports, 43 J.L. & Educ. 433, n. 17 (2014) (citing Home School Legal Defense Association, State Laws Concerning Participation of Homeschool Students in Public School Activities, Sept. 2013, available at http://www.hslda.org/docs/nche/issues/e/Equal_Access.pdf).

> (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.

Thus, to summarize the applicable provisions of the S.C. Code Ann. § 59-63-100(B) (Supp. 2013) to a home schooled student, he or she "may not be denied by a school district the opportunity to participate in interscholastic activities" if he or she "meets all school district eligibility requirements with the exception of the [ ] school district's school or class attendance requirements and [ ] class and enrollment requirements of the associations administering the interscholastic activities;" "resides within the attendance boundaries of the school for which the student participates;" and "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."

As a preliminary matter, your letter suggests that there is no question that certain requirements for eligibility under the Act have been satisfied. Specifically, it appears that there is no doubt that the student who is the subject of this opinion falls within the definition of a "home school student" as defined by S.C. Code Ann. § 59-63-100(A)(3) (Supp. 2013),[3] or that the activity he wishes to participate in classifies as an "interscholastic activity" as defined by S.C. Code Ann. § 59-63-100(A)(4) (Supp. 2013)[4]. Furthermore, your correspondence states that the student "is in good standing and meets all requirements." We assume this means the student meets all "district eligibility requirements" as required by S.C. Code Ann. § 59-63-100(B)(1) (Supp. 2013). Finally, pursuant to your mention of the superintendent's approval of the student's request to play on Landrum's basketball team during the upcoming season, it appears the student has satisfied the requirement set forth in S.C. Code Ann. § 59-63-100(B)(4) (Supp. 2013) of providing written notice to the superintendent of his desire to play on the team prior to the beginning date of the season. Thus, it appears it is only necessary to analyze the one remaining qualification for a home schooled student's eligibility to participate in an interscholastic activity, being the requirement that the "student participating in interscholastic activities [ ] reside [ ] within the attendance boundaries of the school for which the student participates." S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013).

As your question relates to statutory interpretation, we will note the applicable rules pertaining thereto. The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citing Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009)). In fact, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation omitted). In ascertaining legislative intent, "a court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (citation omitted). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) (citing

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[3] "'Home school student'" is defined 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 an interscholastic activity pursuant to this section."

[4] "'Interscholastic activities' includes, but is not limited to, athletics, music, speech, and other extracurricular activities."

Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 341, 47 S.E.2d 788, 789 (1948)).

When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction, and courts must apply the literal meaning of those terms. Sloan, 370 S.C. at 486-87, 636 S.E.2d at 616 (citing Carolina Power & Light Co. v. Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994)). If the statute is ambiguous, however, courts must construe the terms of the statute. Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). Rejection of the plain meaning of statutory terms should be done only to escape absurdity that could not have possibility been the intent of the Legislature. Sloan, 370 S.C. at 487, 636 S.E.2d at 616 (citing Kiriakides v. United Artists Commc'n, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

Furthermore, "a statute remedial in nature should be liberally construed in order to accomplish the objective sought." Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) (citation omitted). Finally we note that a court is required to construe a statute in a manner so as to avoid constitutional concerns. See State v. Pittman, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007) ("[W]here a statute is susceptible to more than one construction, the court should interpret the statute so as to avoid constitutional questions") (emphasis removed) (citation omitted); Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977) ("Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation") (citations omitted).

In three prior opinions of this Office, we addressed the construction of S.C. Code Ann. § 59-63-100, and in doing so, we have consistently noted the importance of the remedial nature of the Act in regards to its interpretation. See Op. S.C. Att'y Gen., 2013 WL 1931658 (April 24, 2013); Op. S.C. Att'y Gen., 2012 WL 4009949 (Sept. 5, 2012); Op. S.C. Att'y Gen., 2012 WL 4009948 (Sept. 5, 2012). In Op. S.C. Att'y Gen., 2012 WL 4009948 (Sept. 5, 2012) we addressed the eligibility of a home schooled student to participate in a Junior Officers Training Course at a public high school as well as the South Carolina High School League's refusal to allow two home school students to play football for a charter school. Concluding that the students in both instances should be permitted to participate in the aforementioned activities, we stated that: "[w]e deem the statute as remedial in nature, and that 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." Id. at *8. This same conclusion was reached in Op. S.C. Att'y Gen., 2010 WL 4009949 (Sept. 5, 2012) ("[G]iven the broad construction required of the statute, a court would likely conclude that a Junior ROTC program is included within the statutes mandate") as well as Op. S.C. Att'y Gen., 2013 WL 1931658 (April 24, 2013) (concluding that despite "home school student" being defined within the Act as "a child taught in accordance with §§ 59-65-40, -45, or -47 for a full academic year prior to participating in an interscholastic activity" "a court would likely find that a public school student does not automatically forfeit a year of eligibility with regards to interscholastic activities upon becoming home schooled under the Equal Access to Interscholastic Activities Act. . . . Such a construction would run contrary to the Act's mandate of liberal construction in favor of its express purpose of providing . . . home school students with *equal access* to participate in interscholastic activities").

As the subject of this opinion also involves the statutory construction of S.C. Code Ann. § 59-63-100 (Supp. 2013), we will advance the same analysis to the interpretation of subsection (B)(3)(a), requiring that a home school, charter school, or Governor's school student participating in interscholastic activities "reside[] within the attendance boundaries of the school for which the student participates." Although when considered in isolation the plain language of S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp.

2013) appears to require a home school, charter school, or Governor's school student participating in an interscholastic activity do so at the school within the attendance boundary where he or she resides, it is our opinion that strict construal of this section would contravene the Legislature's intent in passing the Act. As noted above, the Legislature's purpose in passing the Act is made clear in its opening provision and title, which 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." Act. No. 203, 2012 S.C. Acts 1809. Simply put, as the Act's title states, the Legislature intended to provide *equal access* for home school, charter school, and Governor's school students to participate in interscholastic activities. Id.

While S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013) states that a charter school, Governor's school, and home school student is permitted to participate in interscholastic activities at the school within their attendance boundary, the Act's opening provision permits participation in interscholastic activities in "the school district in which the students reside." Act. No. 203, 2012 S.C. Acts 1809. As these two provisions conflict, it is our opinion that construction is necessary. To briefly expand on Spartanburg County District One's School Choice Policy, the District Policies state that: "[a] child between the ages of 5 and 21 shall be entitled to attend school in District One if the child: 1. Resides with his/her parent or legal guardian and 2. The parent/legal guardian with whom the child resides is a resident of District One." District One Schools of Spartanburg County, District Policies 2014-2015 School Admissions, available at:
http://www.spart1.org/staff/collaborative/1495/district%20ONE%20SCHOOLS%20OF%20SPARTANBURG%20COUNTY.doc.

The District Policies also state that:

> [g]enerally a child must attend school in his/her designated attendance area within the district. However, District One Schools, for more than 35 years, has allowed a child to attend a school in another attendance area within the district provided the following conditions are met:
>
> 1. Space is available in the school and the appropriate grade level and
> 2. The parents provide transportation to and from school and
> 3. The student has not been guilty of infractions of the rules of conduct and
> 4. Has maintained a satisfactory academic record and
> 5. The principal approves the child's admission to the school.
>
> Requests to transfer schools within the district must be made prior to June 1 for the upcoming academic year.

Id.

Based upon Spartanburg County District One's policies, a child who is enrolled in Spartanburg County School District One is eligible to transfer to another school within the District and, as a result, participate in that school's interscholastic activities upon satisfaction of the aforementioned conditions. From the description in your letter, it appears the student at issue has met each of the factors that would apply to a home schooled student, making it likely that he would be eligible to transfer schools were he enrolled in the public school system. Yet, as you note in your letter, "[u]nfortunately, the current interpretation of the law treats a student enrolled differently than a home school student." In conjunction with the remedial nature of S.C. Code Ann. § 59-63-100(B)(3)(a), a court's requirement to interpret remedial statutory provisions broadly, as well as the Act's overall purpose of giving charter school, Governor's school, and home school students *equal access* to participate in interscholastic activities, it is

our opinion that a Court would interpret the Act to allow a home school, charter school, or Governor's school student to participate in an interscholastic activity at the public school where he or she would be assigned according to the district attendance boundaries *or* where the student could choose to attend pursuant to the district's open enrollment or school choice policy.

In addition to the rule that remedial statutes must be interpreted broadly, it is also necessary that statutory interpretation be done in a manner that avoids constitutional concern. See State v. Pittman, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007); Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977). The Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In addition, our State's Constitution states that "the privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws" S.C. Const. art. I, § 3. The Equal Protection Clause forbids legislative classifications that are "irrational and unjustified." South Carolina Public Service Auth. v. Citizens & Southern Nat'l Bank, 300 S. C. 142, 164, 386 S. E. 2d 775, 786 (1989). To determine whether a legislative classification is unjustified and, correspondingly, whether it violates state equal protection guarantees, courts focus on the basis of the classification involved and the governmental objective sought to be advanced by the classification. 19 S.C. Jur. Const. Law § 85 (2014). If a statutory provision "does not involve a suspect classification or a fundamental right, [ ] the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose." Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001) (citations omitted). Specifically, under the rational basis standard, "[e]qual protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis." Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996) (citation omitted). Because home schooled students do not fall within a suspect class,[5] and participation in interscholastic activities is not viewed as a fundamental right,[6] regulations governing participation in school athletics or other extracurricular events are therefore subject to the rational relationship test, as opposed to the strict scrutiny test, under equal protection analysis. See Bradstreet v. Sobol, 165 Misc.2d 931, 630 N.Y. S.2d 486 (N.Y. 1995).

Pursuant to S.C. Code Ann. § 59-19-90(9) (2004), trustees of a school board are permitted to "[t]ransfer any pupil from one school to another so as to promote the best interests of education, and determine the school within its district in which any pupil shall enroll." Through this provision, some school boards have chosen to implement "school choice," or "open enrollment." Construing S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013) as prohibiting home school, Governor's school, or charter school students residing within a school choice district from participating in extracurricular activities at any school within their district would classify them differently from other students residing in the school choice district. It is our opinion that such classification would run astray to the Legislative intent of "equal access," thereby leading to the conclusion that the classification would not bear a reasonable relation to the legislative purpose. In other words, through the passage of the Act, the Legislature intended to put home school, charter school, and Governor's school students on a level playing field with public school students in regards to participation in extracurricular activities. Prohibiting home school, charter school, and Governor's school students the right to apply for school choice in regards to participation in extracurricular activities would conflict with the intent of equal access. It is therefore our opinion that a Court would find broad construal of S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013) is necessary to avoid constitutional concerns.

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[5] See J.B. v. Washington County, 127 F.3d 919, 931 (10th Cir. 1997).

[6] See Florida High School Athletic Ass'n v. Melbourne Central Catholic High School, 867 So. 2d 1281, 1288-89 (Fla. Dist. Ct. App. 5th Dist. 2004).

In states without legislation advancing equal access to interscholastic activities for home school, charter school, and Governor's school students, challenges to rules prohibiting participation in extracurricular activities are often upheld despite equal protection challenges. See, e.g., Bradstreet v. Sobol, 165 Misc.2d 931, 630 N.Y. S.2d 486 (N.Y. 1995). Courts often find avoidance of administrative inefficiency as the "reasonable basis" for these rules. See, e.g., id. (noting and agreeing with an argument of the advocate of the rule preventing home schooled students' participation in extracurricular activities, which was that "havoc may be wreaked upon the public school system if home schoolers are permitted to opt out of the public school program generally and yet selectively participate in interschool athletics and then extend that ability to select courses of instruction as well"). While we assume a similar argument could be advanced in opposition to an equal protection challenge concerning S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013), it appears Spartanburg County School District One exercises flexibility among admission at any school within the district if space is available in the school and the appropriate grade level, parents provide transportation to and from school, the student has not been guilty of infractions of the rules of conduct, the student has maintained a satisfactory academic record, and the principal approves the child's admission to the school. In light of these admission qualifications for an enrolled public school student to participate in school choice, it seems there would be very little administrative burden in addition to what would already be necessary administratively for the home schooled student to participate in an extracurricular activity at any other school in the same district. Thus, the rational basis for strict construal of S.C. Code Ann. § 59-63-100(B)(3)(a) (Supp. 2013), at least in regards to the common argument of administration inefficiency applied to Spartanburg County School District One's policies, seems to be absent.

## II. South Carolina High School League

Concluding that a court would likely construe the Act to permit a charter school, Governor's school, or home school student residing in a school choice district and meeting the applicable eligibility requirements to participate in interscholastic activities at the public school where he or she would be assigned according to the district's attendance boundaries *or* where the student could choose to attend pursuant to district's open enrollment policy, we turn to second prong of your question. We will now address the authority of the South Carolina High School League ("the League") to deny a home schooled student's participation in an extracurricular activity at a school within his district but outside of his attendance boundary, despite approval from the school district for that student to participate in the extracurricular activity.

As a prior opinion of this Office has addressed this exact subject, we will reference the law contained in that opinion. See Op. S.C. Att'y Gen., 2012 WL 4009948 (Sept. 5, 2012); see also Op. S.C. Att'y Gen., 2009 WL 3208471 (Sept. 10, 2009) ("We will not reverse a prior opinion unless such opinion is clearly erroneous or the applicable law has been changed"). In Bruce v. South Carolina High School League, 258 S.C. 546, 552, 189 S.E.2d 817, 819 (1972), our Supreme Court noted that the League is a voluntary organization comprised of all public high schools and some private schools in South Carolina, and its rules regulate interscholastic athletic contests among its members, including the rules regarding a student's eligibility to participate. As the Court focused on in Bruce, the general rule and guiding legal principle with respect to high school athletic associations is judicial noninterference. Id. at 551, 198 S.E.2d at 819 (citing 6 Am. Jur. 2d Associations and Clubs § 27). However, while an athletic association has discretion in construing its rules and determining their applicability, such rules must be lawful. Id.; see also 78A C.J.S. Schools and School Districts § 1121 (2014) ("An athletic association . . . 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").

In Op. S.C. Att'y Gen., 1972 WL 26033 (Nov. 1, 1972), we commented on the freedom of an athletic association to implement its rules and policies, but distinguished that such rules and policies must coincide with the law. Specifically, we noted that:

> [t]he High School League rules are similar to a contract in that members of the League have mutually agreed to abide voluntarily by these rules insofar as participation in intercollegiate sporting contests are concerned. State League rules, however, have no legal effect relative to actual enrollment, attendance, and transfer of pupils, which are governed by State statue. . . .

Id. at *1. In other words, the rules of the League do not usurp state legislation.

With this distinction in mind, we turn to S.C. Code Ann. § 59-63-100(F) (Supp. 2013) which states that "[a] school district may not contract with a private entity that supervises interscholastic activities if the private entity prohibits the participation of charter schools, Governor's schools, or home school students in interscholastic activities." As the League is a private entity supervising interscholastic activities, this provision relates directly to it and clarifies that League policies and rules prohibiting eligible home school, charter school, or Governor's school students from participating in interscholastic activities are not permitted as they would directly conflict with S.C. Code Ann. § 59-63-100 (Supp. 2013).

Determination of whether refusal to permit the home schooled student in question from participating in an extracurricular activity at a school within his school choice district would constitute a breach of contract is a factual question beyond the scope of this opinion.[7] Nonetheless, it is clear that the Act prohibits the League from barring a home school, Governor's school, or charter school student from participation in interscholastic athletics if the student is otherwise eligible.

## Conclusion

Based on the analysis above, it is the opinion of this Office that a court would find a home school, Governor's school, or charter school student is eligible to participate in an extracurricular activity at the school within his or her attendance boundary *or* at a school where he or she would be permitted to attend within the district pursuant to open enrollment or school choice, contingent on the student meeting the district's eligibility requirements and obtaining the requisite approval, as outlined above. We reach this conclusion based on the Legislature's intent of equal access for home school, Governor's school, and charter school students to participate in interscholastic activities; the remedial nature of S.C. Code Ann. § 59-63-100 (Supp. 2013) which, in effect, requires a court to broadly construe the statute's provisions in line with the intent of the Legislature in passing the Act; and the duty of a Court to construe a statute possible of two interpretations in the manner that avoids constitutional concerns. It is also our opinion that a court would find that the South Carolina High School League, while generally permitted to make and construe rules free from judicial interference, is not permitted to make rules or policies that conflict with the law. Thus, it follows that the League cannot bar an otherwise eligible charter school, Governor's school, or home school student from participation in interscholastic activities.

In application of these conclusions, we believe the home school student in question, who meets district eligibility requirements and who has the required approval from Spartanburg County School District One, should be permitted to play on the Landrum High School basketball team. However, as

[7] See Op. S.C. Att'y Gen., 2005 WL 2250209 (Aug. 31, 2005) ("this Office has repeatedly indicated that an opinion of the Attorney General cannot investigate or determine facts. A conclusive determination as to exactly what activities are taking place would necessitate a factual inquiry, a matter beyond the scope of an opinion of this office") (citations omitted).

your questions are based on statutory construction, we caution that further clarity from the legislature or judiciary is recommended. This opinion should not be treated as anything other than advisory and is only an indication of how we anticipate a court would rule.

If we can answer any questions in regards to this opinion, please do not hesitate to contact our Office.

Sincerely yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General