



ALAN WILSON
ATTORNEY GENERAL

March 25, 2022

The Honorable Ross Turner
Member
South Carolina Senate
District No. 8
P.O. Box 142
Columbia, SC 29202

Dear Senator Turner:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

I am writing you to ask for an opinion on a matter that was recently brought to my attention concerning a student's eligibility for sports participation as an exceptional needs child. The South Carolina High School League recently denied a student's request to play sports at River Bluff High School. In denying the request in a letter to River Bluff High School's principal (letter attached), the Commissioner of the High School League wrote that their denial was based on their interpretation of the legislative intent behind S.C. Code Section 12-6-3790 and Proviso 1.85 of the 2021-22 State Budget. He further opines that if Proviso 1.85 was read to permit eligibility the proviso would not be tied to state funding and there would be a constitutional violation. Since his denial is based on what appears to be a misreading of both the statute and the associated Proviso as well as a improper reliance on legislative intent, I am requesting an opinion from your office.

As you may be aware, the 2021-22 Appropriations Act contains Proviso 1.85 which provides that "A student who meets the definition of Exceptional needs child in Section 12-6-3790(A)(2) and the definition of Qualifying Student in Section 12-6-3790(A)(5) of the 1976 Code shall be eligible to participate in any sport offered at the public school for which the child is zoned to attend." The Proviso seems clear and unambiguous limiting eligibility to students who meet two statutory definitions referenced in the Proviso.

The first statutory reference in the Proviso is Section 12-6-3790(A)(2) which provides:

(2) "Exceptional needs child" means a child:

(a) who has been evaluated in accordance with this state's evaluation criteria, as set forth in S.C. Code Ann. Regs. 43-243.1, and determined eligible as a child with a disability who needs special education and related services, in accordance with the requirements of Section 300.8 of the federal Individuals with Disabilities Education Act; or

(b) who has been diagnosed within the last three years by a licensed speech-language pathologist, psychiatrist, or medical, mental health, psychoeducational, or other comparable licensed health care provider as having a neurodevelopmental disorder, a substantial sensory or physical impairment such as deaf, blind, or orthopedic disability, or some other disability or acute or chronic condition that significantly impedes the student's ability to learn and succeed in school without specialized instructional and associated supports and services tailored to the child's unique needs."

Section 12-6-3790(A)(5) is the other eligibility requirement referenced in the Proviso which provides:

(5) "Qualifying student" means a student who is an exceptional needs child, a South Carolina resident, and who is eligible to be enrolled in a South Carolina secondary or elementary public school at the kindergarten or later year level for the applicable school year.

The High School League, in denying the child's request to play sports at River Bluff High School, seems to have added another requirement in addition to the two statutory provisions listed in the Proviso. The Commissioner writes that "[i]t is the League's position that S.C. Code Section 12-6-3790 . . . and Proviso 1.85 . . . would only mandate athletic eligibility at a public school when an exceptional needs child receives tuition assistance to attend an eligible independent school." As you can see from the statutory provisions referenced in the Proviso and provided above that neither code section mentions the award of tuition assistance, but rather only the requirements to be eligible for tuition assistance.

The question now, I believe, is whether the Commissioner's ruling that the Proviso requires tuition assistance in order to be eligible and whether his assertion that such an extra requirement for eligibility was the legislature's intent despite the clear and unambiguous language contained in Proviso 1.85. It seems that if the legislature had wished to make the grant a requirement for athletic eligibility it could have done so simply by referencing Section 12-6-3790(C) in addition to those code sections in the Proviso. By not doing so when it could have, it seems the legislature did not wish to make receipt of tuition assistance a requirement for athletic eligibility especially when not all qualifying students might get tuition assistance since the amount available for assistance is capped and are awarded on a first come first served basis.

Based on the information above, I am asking whether a student who has been evaluated as an exceptional needs child and who is a qualifying student is eligible to participate in any sport offered at the public school the child is zoned to attend as provided in Proviso 1.85 despite the child not receiving tuition assistance.

Law/Analysis

It is this Office's opinion that Proviso 1.85 of the 2021-22 State Budget does not require a student, who is eligible for an Educational Credit for Exceptional Needs Children, to actually receive a grant thereunder to participate in sports offered at the public school for which the child is zoned to attend. To evaluate whether a student must be awarded a grant from the Educational Credit for Exceptional Needs Children's Fund before the student is eligible for the benefits of Proviso 1.85, this opinion will interpret the proviso according to the rules of statutory construction. Statutory construction primarily requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Further, "[a] statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015).

As describe above, Proviso 1.85 expressly lists two conditions: (1) meet the definition of "Exceptional needs child" in Section 12-6-3790(A)(2), and (2) meet the definition of "Qualifying Student" in Section 12-6-3790(A)(5). The plain language of the proviso states that when a student satisfies these conditions, the student is then "eligible to participate in any sport offered at the public school for which the child is zoned to attend." It seems then that a plain reading of Proviso 1.85 demonstrates the Legislature intended to avoid making students who are determined to need "special education and related services" to choose between attending independent schools that meet those educational needs and their opportunity to participate in athletics at the public school for which they would otherwise attend.

This Office finds no support in the text or structure of Proviso 1.85 to additionally require a student actually receive a grant. Because the proviso lists express conditions, a court is unlikely to find the General Assembly intended to impliedly include others. See Hodges, 341 S.C. at 86, 533 S.E.2d at 582 (The rule of statutory construction "'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' ... holds that 'to express or include one thing implies the exclusion of another or the alternative.'"). Interpreting the proviso as the S.C. High School League suggests is not reasonably consistent with the purpose of the legislation and would instead create an absurd result. Under this construction, students that receive grant assistance from the Educational Credit for Exceptional Needs Children's Fund could both attend an independent school with aid and participate in sports offered at the public schools they are zoned to attend, while students that are not grant recipients would be forced to choose between attending independent schools that can provide for their special educational needs without aid

and being able to participate in sports offered at the public schools they are zoned to attend. It is this Office's opinion that a court would not construe Proviso 1.85 to create such a punitive result for those children who otherwise qualify as an "exceptional needs child" and "qualifying student" but do not receive a grant.

Conclusion

As discussed more fully above, it is this Office's opinion that Proviso 1.85 of the 2021-22 State Budget does not require a student, who is eligible for an Educational Credit for Exceptional Needs Children, to actually receive a grant thereunder to participate in sports offered at the public school for which the child is zoned to attend. Proviso 1.85 expressly lists two conditions: (1) meet the definition of "Exceptional needs child" in Section 12-6-3790(A)(2), and (2) meet the definition of "Qualifying Student" in Section 12-6-3790(A)(5). Because the proviso lists express conditions, a court is unlikely to find the General Assembly intended to impliedly include a further requirement; specifically here that a student also receive a grant from the Educational Credit for Exceptional Needs Children's Fund.


This opinion does not address the High School League's interpretation of its own bylaws and criteria for hardship requests under the extraordinary circumstances, medical, and financial special conditions. This Office does not seek to replace the High School League's role in determining student eligibility for student athletics. However, this Office is certainly authorized to advise the members to the General Assembly on issues of state law as we have here.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General