HENRY MCMASTER
ATTORNEY GENERAL

May 14, 2009

The Honorable Phil P. Leventis
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Leventis:

We received your letter requesting an opinion of this Office concerning Senate Bill 319. Specifically, you are concerned with the bill's consistency with South Carolina law "regarding parental custody/legal guardianship as it applies to placing children of military families in public schools."

Law/Analysis

Senate Bill 319 ("Bill 319"), currently under consideration by the South Carolina Senate, seeks to enact the Interstate Compact on Educational Opportunity for Military Children. S. 319, 118th Legs. (S.C. 2009). Bill 319 allows the Governor to enter into a compact on behalf of the State of South Carolina with other states ratifying the compact. In addition to establishing the Council on Educational Opportunity for Military Children, Bill 319 includes the specific terms of the compact. We understand that the compact is intended to address problems faced by military families whose children frequently transfer to different schools. The compact is broken down into different sections and addresses the applicability of its provisions, the handling of educational records and enrollment, placement and attendance, eligibility for enrollment, graduation, State coordination, and various provisions discussing the interstate commission on educational opportunities for military children. We understand you are particularly concerned with article VI of the compact, discussing a child's eligibility for enrollment. This provision provides as follows:

ARTICLE VI
ELIGIBILITY

A. Eligibility for enrollment

1. Special power of attorney, relative to the guardianship of a child of a military family and executed under applicable law shall be sufficient for the purposes of enrollment and all other actions requiring parental participation and consent.

2. A local education agency shall be prohibited from charging local tuition to a transitioning military child placed in the care of a noncustodial parent or other person standing in loco parentis who lives in a jurisdiction other than that of the custodial parent.

3. A transitioning military child, placed in the care of a noncustodial parent or other person standing in loco parentis who lives in a jurisdiction other than that of the custodial parent, may continue to attend the school in which he/she was enrolled while residing with the custodial parent.

B. Eligibility for extracurricular participation - State and local education agencies shall facilitate the opportunity for transitioning military children's inclusion in extracurricular activities, regardless of application deadlines, to the extent they are otherwise qualified.

By your letter, you have asked us to determine whether this provision is consistent with South Carolina law regarding parental custody/legal guardianship as it applies to placing children of military families in public schools. Chapter 63 of title 59 of the South Carolina Code governs children attending public schools in South Carolina. Section 59-63-30 of the South Carolina Code (2004) and section 59-63-31 of the South Carolina Code (Supp. 2008) present the qualifications for a child to attend a public school in a particular school district. Section 59-63-30 states as follows:

> Children within the ages prescribed by § 59-63-20 shall be entitled to attend the public schools of any school district, without charge, only if qualified under the following provisions of this section:
>
> (a) Such child resides with its parent or legal guardian;

> (b) The parent or legal guardian, with whom the child resides, is a resident of such school district; or
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> (c) The child owns real estate in the district having an assessed value of three hundred dollars or more; and
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> (d) The child has maintained a satisfactory scholastic record in accordance with scholastic standards of achievement prescribed by the trustees pursuant to § 59-19-90; and
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> (e) The child has not been guilty of infraction of the rules of conduct promulgated by the trustees of such school district pursuant to § 59-19-90.

Initially, we address whether the provision in Article VI of the compact allowing a child of a miliary family to attend a school in a noncustodial parent's school district is consistent with State law. Section 59-63-30 allows a child to attend a school in the school district assigned to his or her parent, but does not define the term parent or clarify whether this term includes a noncustodial parent. Moreover, we know of no case law discussing whether a noncustodial parent is considered to be a parent for purposes of this provision. However, in a prior opinion, this Office considered this very question and determined "section 59-63-30 allows a child to attend public school in the district in which either parent resides, assuming the child resides with the parent located in the district." Op. S.C. Atty. Gen., February 9, 2006. Therefore, we do not believe that the provision in Bill 319 allowing the child to attend a school in the noncustodial parent's school district is inconsistent with State law.

Article VI of the compact also allows a military child to attend a school in the school district of an"other person standing in loco parentis" when residing with that person. Section 59-63-30 indicates that the individual must be a legal guardian in order for a child to attend school in that individual's district. Section 59-63-30 does not define "legal guardian." In addition, our courts have yet to interpret the term legal guardian with regard to this provision. However, in a 2008 opinion, this Office considered whether a power of attorney signed by the parent of a child appointing an individual and her husband as temporary guardians is sufficient to allow the child to attend school in the school district in which the individual and her husband resided. Op. S.C. Atty. Gen., May 15, 2008. In our interpretation of the term legal guardian, we concluded that one must be made a guardian by will or court order. Id. Because the individual and her husband were not made guardians by court order, they would not meet the requirements of section 59-63-30. We are of the opinion that a will or court order is required for an individual to become a guardian over a child for purposes of section 59-63-30. Accordingly, if the person standing in loco parentis does not

have legal guardianship, as evidenced by a will or court order, allowing the child to attend a school in that person's district would be contrary to section 59-63-30.

However, in addition to section 59-63-30, section 59-63-31 provides additional ways in which a child can qualify to attend a particular public school. Included among the types of situations in which a child may attend a particular public school is a provision that states as follows:

> (1) the child resides with one of the following who is a resident of the school district:
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> . . .
>
> (c) the child resides with an adult resident of the school district as a result of the:
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> (i) death, serious illness, or incarceration of a parent or legal guardian;
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> (ii) relinquishment by a parent or legal guardian of the complete control of the child as evidenced by the failure to provide substantial financial support and parental guidance;
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> (iii) abuse or neglect by a parent or legal guardian;
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> (iv) physical or mental condition of a parent or legal guardian is such that he cannot provide adequate care and supervision of the child;
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> (v) parent's or legal guardian's homelessness, as that term is defined by Public Law 100-77; or
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> (vi) parent's or legal guardian's military deployment or call to active duty more than seventy miles from his residence for a period greater than sixty days; provided, however, that if the child's parent or legal guardian returns from such military deployment or active duty prior to the end of the school year, the child may finish that school year in the school he

> attends without charge even if the child resides in another school district for the remainder of the school year due to his parent or legal guardian returning home;
>
> . . . .

S.C. Code Ann. §§ 59-63-31(A)(emphasis added).

Section 59-63-31(1)(c)(iv) does not require that the adult the child is living with be the child's guardian in order for the child to attend school in the adult's school district. Thus, like the provision in Bill 319, this provision appears to allow a child to attend schools in the school district assigned to the adult with whom he is or she resides. However, section 59-63-31(1)(c)(iv) places some restrictions on who may qualify under this provision by requiring that the parent or legal guardian's call to active duty or deployment be at least seventy miles away and for more than sixty days. Accordingly, if the Legislature passes Bill 319, it could be viewed as removing these requirements from section 59-63-31(1)(c)(iv).

Neither section 59-63-30 nor section 59-63-31 specifically address the other situation described in Article VI of the compact in which a child is placed in the care of a person who lives in another school district, but wishes to continue attending the school he or she attended while residing with the custodial parent. According to section 59-63-30, in order for a child to attend a school in the parent's school district, the child must reside with the parent. Under the scenario presented in Article VI, the child would not be residing with their parent and therefore, would be ineligible to attend a school in the parent's school district. Section 59-63-31(B) allows children to continue attending a particular public school in three specific circumstances involving the Department of Social Services. However, this provision does not allow a child to continue attending a particular school district because of a parent's military service. Therefore, we are of the opinion that section 3 of Article VI of the compact allows military children to attend schools in a particular district that is not otherwise allowed under existing State law.

Lastly, we address the first provision under Article VI of the compact, which states that a special power of attorney can be used to transfer guardianship of a child of a military family for purposes of enrolling that child in school and "all other actions requiring parental participation and consent." S. 319, 118th Legs. (S.C. 2009). We are unaware of any provision of South Carolina law specifically allowing military families to use a special power of attorney to transfer guardianship of their children to another person. In addition, we found no South Carolina case law discussing the use of a special power of attorney to transfer guardianship. As we previously mentioned, in an opinion of this Office issued in 2008, we took the position that the only way to appoint a guardian

for a child is by will or court order. Op. S.C. Atty. Gen., May 15, 2008. Thus, we do not believe that South Carolina currently allows for a person to be appointed as a guardian of a child by a special power of attorney.

Nonetheless, if a child is enrolled in a public school pursuant to section 59-63-31(1)(c), section 59-63-32 of the South Carolina Code (2004) places specific requirements on the adult seeking to enroll the child. This provision states, in pertinent part:

> (A) The school district may require an adult seeking to enroll a child who resides with the adult pursuant to Section 59-63-31(1)(c) to accept responsibility for making educational decisions concerning the child. These educational decisions may include, but not be limited to, receiving notices of discipline pursuant to Sections 59-63-230 and 59-63-240, attending conferences with school staff, and granting permission for athletic activities, field trips, and other activities as required.

S.C. Code Ann. § 59-63-32. According to this provision, if a child of a military family is living with an adult who is not the child's parent or legal guardian while the child's parent is on active duty or has been deployed within the parameters of section 59-63-31(A)(1)(c)(vi), then that adult is required to accept responsibility for educational decisions regarding the child. Thus, the adult does have some legal authority with regard to the child. However, this authority does not appear to require court action or any legal documentation including a special power of attorney.

Conclusion

Although a court has yet to interpret the term parent as used in section 59-63-30, we believe this term includes noncustodial parents. Therefore, we are of the opinion that the provision in Article VI of the compact allowing a child of a military family to attend a school in the noncustodial parent's school district is consistent with State law. In addition, like Article VI of the compact, section 59-63-31(A)(1)(c)(iv) of the South Carolina Code allows children residing with an adult resident of a school district to attend schools in that district due to a parent's call to active duty or military deployment . However, this provision is limited in its applicability to situations in which the parent's active duty or deployment is more than seventy miles from his residence and is for a period of greater than sixty days. Thus, Article VI of the compact could be read to remove the distance and time restrictions from section 59-63-31(A)(1)(c)(iv).

We found no State law allowing a child of military parents to remain in the school he or she attended when residing with their parent when the child is living with someone other than the child's

parent. Thus, the provision in Article VI of the compact allowing children in these circumstances to continue to attend such a school would create a new provision under South Carolina law. Furthermore, we found no South Carolina law allowing guardianship of a child to be transferred via a special power of attorney. Thus, the first section of Article VI of the compact, allowing the use a special power of attorney for children of military families, also would create a new provision of law.

Very truly yours,

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REVIEWED AND APPROVED BY:

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