HENRY MCMASTER
ATTORNEY GENERAL

January 9, 2007

Mr. Dan Wuori
South Carolina School Readiness Officer
South Carolina First Steps
1300 Sumter Street, Suite 100
Columbia, South Carolina 29201

Dear Mr. Wuori:

We received your letter requesting an opinion of this Office on recently enacted legislation establishing the South Carolina Child Development Education Pilot Program (the "Program"), which you state

> charges South Carolina First Steps with overseeing the state's first large-scale expansion of publicly-funded pre-kindergarten in non-school district settings (to include private for profit, and faith-based settings). Participation is voluntary for both providers and families. Under the terms of the proviso, parents of eligible children may enroll in their choice of approved programs (public or private).

Thus, you request an opinion on the following issues:

> 1) Because the pilot program constitutes the state's first potential expansion into faith-based preschool settings, we are seeking your guidance as to whether any state or federal law serve to limit religious content and/or expression with classrooms receiving state funding?
>
> For example, would First Steps' approval of an explicitly religious curriculum model be permissible, assuming it meets the criteria defined by the enabling proviso (research-based, aligned with the SC Content Standards)?
>
> 2) Proviso 1.75 establishes a triple eligibility definition that limits the expenditure of 4K expansion dollars to children who are:
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> a. Age eligible (4 by September 1, 2006);

b. Income eligible (Medicaid or free/reduced lunch eligibility; and
c. Geographically eligible (children must reside in a trial or plaintiff county in Abbeville County School District te al vs. South Carolina).

What responsibility does the agency have to provide 4K (or other programmatic services) to children whose legal residency in SC (or the USA) cannot be established? Do state and federal law require the agency to deny service to families unable to document their residency status, in light of the residency requirements set forth in the proviso?

Law/Analysis

Funding of faith-based preschools by the Program

Although we were unable to locate a federal or State law expressing a limitation upon religious content expressed by faith-based schools receiving federal or State funds, we did discover aspects of both federal and State law limiting State and federal funding of religious schools. Initially, with regard to federal law, the First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion . . . . " U.S. Const. amend I. "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002). Over the years, the United States Supreme Court developed a three-part analysis for assuring a particular statute does not offend the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations & quotations omitted).

In Mitchell v. Helms, 530 U.S. 793, (2000), the Supreme Court recognized a modification of the three-part test established in Lemon as set forth in Agostini v. Felton, 521 U.S. 203 (1997). Particularly, Agostini recasts the third prong of the Lemon analysis as part of the second prong. "We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast Lemon's entanglement inquiry as simply one criterion relevant to determining a statute's effect." Id. at 807-08. Furthermore, the Mitchell Court recognized Agostini set forth three factors in determining the primary effect of the statute: "It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." Id. at 808 (quoting Agostini, 521 U.S. at 234).

With regard to indoctrination, the Court discussed the principle of neutrality, which it described as "upholding aid that is offered to a broad range of groups or persons without regard to

their religion." Id. at 809. Moreover, the Court stated: "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." Id. The Court emphasized one way of assuring neutrality is if the religious institution receives the governmental aid as a result of private choices by individuals. Id. at 810.

> For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program.

Id. (citations omitted). The Court also addressed the concept of an aid program defining its recipients by reference to religion. Id. at 813. The Court noted the question concerns whether the aid creates a financial incentive to undertake religious indoctrination. Id. Quoting Agostini, the Court stated:

> "This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion."

Id. (quoting Agostini, 521 U.S. at 231).

Before we analyze the constitutionality of the Program, we must keep in mind that "the general assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982). "Statutes are presumed to be constitutional and will not be found to violate the constitution unless their invalidity is proven beyond a reasonable doubt." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Furthermore, when considering a question of federal law, an opinion of this Office is only advisory and questions of federal law ultimately may only be resolved by the United States Supreme Court. Op. S.C. Atty. Gen., March 24, 1989. With these principles in mind, we consider the constitutionality of the Program employing the Lemon test, as modified by Mitchell.

Although the proviso establishing the Program does not explicitly state the purpose of the Program, we find its purpose of this legislation is in response to the circuit court's decision in the Abbeville County School District, et. al v. The State of South Carolina. In this case, the circuit court found a lack of adequate funding for early childhood educational programs in the plaintiff districts.

Thus, subsection (A) of the proviso provides for the appropriation of funds to establish 4-year-old kindergarten in the eight plaintiff school districts. Furthermore, this provision restricts funding appropriations under this legislation by stating "no funds appropriated by the General Assembly for this purpose shall be used to fund services to at-risk four-year-old children residing outside the trial or plaintiff districts." Accordingly, we believe this legislation serves a secular purpose of providing early childhood educational opportunities for children in the plaintiff counties.

With regard to the principal or primary effect of the Program, we consider the three factors set forth by the United States Supreme Court in Agostini and reiterated in Mitchell. First, we do not believe the Program results in governmental indoctrination. Subsection (B) of the proviso states as follows:

> Each child residing in the pilot districts, who will have attained the age of four years on or before September 1, of the school year, and meets the at-risk criteria is eligible for enrollment in the South Carolina Child Development Education Pilot Program for one year.
>
> The parent of each eligible child may enroll the child in one of the following programs:
>
> > (1) a school-year four-year-old kindergarten program delivered by an approved public provider; or
> >
> > (2) a school-year four-year-old kindergarten program delivered by an approved private provider.
>
> The parent enrolling a child must complete and submit an application to the approved provider of choice . . . .

Subsection (K) sets forth the amount of funding the Legislature will provide for the Program.

> The General Assembly shall provide funding for the South Carolina Child Development Education Pilot Program. For the 2006-07 school year, the funded cost per child shall be $3,077. Additionally, a reimbursement rate of $185 per child will be appropriated to the providers if the provider transports children to and from school. Providers who are reimbursed are required to retain records as required by their fiscal agent. For the 2007-2008 school year the funded cost per child shall be the same but shall be increased by the same projected rate of inflation as determine by the Division of Research and Statistics of the Budget and Control Board for the Education Finance Act.

> With funds appropriated by the General Assembly, the Department of Education shall approve grants for public providers and the Office of First Steps to School Readiness shall approve grants for private providers, of up to $10,000 per class for equipping new classrooms.

Subsection(K) indicates funding is provided directly to the 4-year-old kindergarten provider, including private providers. However, such aid is offered to any child meeting the age, residency, and at-risk criteria. It is not offered only to children of a particular religion. Furthermore, subsection (B) places the choice of whether a child will attend a public or private provider in the hands of the child's parent, not in the hands of the government. Thus, we opine that the Program is neutral in its application and not resulting in governmental indoctrination. Further, we find the Program does not define its recipients in reference to religion. The proviso makes no reference any particular religion and based on our review, does not provide any financial incentive to undertake religious indoctrination. To the contrary, the Program allows the same funding to both public and private providers and does not provide any additional benefit to those parents choosing one private provider over another or over a public provider. Lastly, for the same reasons we do not find the Program creates excessive government entanglement with religion. Accordingly, we do not believe the primary effect of the Program is to advance or inhibit religion. Thus, we believe the legislation under which the Legislature established the Program does not violate the Establishment Clause of the United States Constitution.

As for the Program's legality under State law, we find article XI, section 4 of the South Carolina Constitution (1976) relevant. This constitutional provision states: "No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." S.C. Const. art. XI, § 4. An amendment to the South Carolina Constitution significantly revised this provision in 1973. Since that time, our courts have yet to interpret the revised provision. However, we note several opinions of this Office considering this provision since its amendment.

In 1974, we issued an opinion considering both whether the South Carolina Department of Education violated article XI, section 4 of the South Carolina Constitution and the Establishment Clause of the federal constitution by loaning films to parochial schools. Op. S.C. Atty. Gen., January 4, 1974. After determining that the Department of Education did not violate the Establishment Clause, we turned to its actions with regard to article XI, section 4. We examined article XI, section 4, noting unlike the prior version, the current verison did not include the word "indirectly" when referring to the use of State property. Id. Based in part on this omission, we concluded:

> The expressed intent of the framers of the revised constitutional provision which was approved by the people and ratified by the General Assembly was to prohibit aid to religious and other private educational institutions only if it directly benefitted such an institution. The educational films, albeit paid for by public funds, are purchased not for the benefit of private institutions but rather for the

> use of the State educational system. Furthermore, the loan of these films to private institutions would not directly benefit the institution itself, but the student who attends such an institution and learns from the loaned films.

Id.

Subsequently in 1983, we discussed the impact of article XI, section 4 of the South Carolina Constitution on the utilization of State funds to purchase textbooks for use at private colleges as part of a program to encourage enrollment of African Americans in health care programs. Op. S.C. Atty. Gen., July 12, 1983. We determined: "The benefit to the colleges in contrast to the students affected, would here appear to be merely indirect and the public benefit would greatly outweigh any incidental private gain." Id. Thus, we found no violation of article XI, section 4.

Again, in 1994, we considered whether receipt of tuition assistance grants by students attending Columbia Bible College violates article XI, section 4. Op. S.C. Atty. Gen., February 2, 1994. We noted, the students decided where to use the tuition grant, not the government and that the program is available regardless of whether the school was public, private, sectarian, or non-sectarian. Id. We also did not find the grant program was skewed toward religion. Id. Finding the aid would be for the direct benefit of the students, not the institution, we concluded the program did not violate article XI, section 4. Id.

Most recently we considered whether the Legislature's appropriations to the South Carolina Education Equalization Program violate article XI, section 4. Op. S.C. Atty. Gen., April 29, 2003. Under such a program, the Commission on Higher Education enters into contracts with eligible institutions in order to provide enhanced educational opportunities to low-income and educationally disadvantaged students. Id. As part of this program, funds from the Education Lottery Account are appropriated to fund the program and the Commission on Higher Education has the authority to contract with eligible institutions to implement the program, which include both public and private schools.

> [T]his legislation is neutral on its face. The proposed Bill neither expressly singles out private or sectarian institutions of higher learning, but focuses more specifically upon the makeup of an institution's student population. As noted above, an "eligible institution" is defined simply as "a four year institution of higher learning at which sixty percent or more of the enrolled undergraduate students are low-income and educationally disadvantaged students." In precise terms, this would mean any institution in which sixty percent of the student population received a Pell Grant would be eligible for the South Carolina Higher Education Excellence Enhancement Program. Therefore, while the term "eligible institution" may, at present, only be applicable to certain colleges and

> universities in South Carolina, the Bill could conceivably apply to any institution of higher learning - public or private, secular or sectarian, depending upon the economic circumstances then governing. This fact is significant in determining the legislation's constitutionality. See, Timmons v. S.C. Tricentennial Comm., 254 S.C. 378, 175 S.E.2d 805 (1970). [fact that legislation might apply only to certain cases is not determinative of constitutionality where neutral on its face].

Id. Furthermore, we stated:

> In essence, the Legislature's purpose and emphasis here "is on aid to the student rather than to any institution or class of institutions." Durham v. McLeod, supra, 192 S.E.2d at 203-204. The General Assembly's avowed and express intent in the enactment of S.203 is to improve the quality of higher education for all "low-income and educationally disadvantaged students" in South Carolina.

Id. Accordingly, we concluded:

> [T]he Legislature's findings incorporated as a part of S.203 make it clear that the General Assembly's intent is to benefit primarily low-income educationally disadvantaged students in South Carolina as well as the public at large by improving higher education in the State. While, undoubtedly, the colleges themselves will benefit, low-income students will be the ultimate and principal beneficiary. As our Supreme Court stressed in Hunt v. McNair, 255 S.C. 71, 177 S..E.2d 362, 366 (1970), the ability of a college "to provide education to its students is inseparable from its fiscal welfare." In our opinion, the Legislature's findings, being entitled to great weight, are - and likely would be held to be - reasonable in this instance.

Id. In summary, we found because the program was not aimed at the direct benefit to the private schools, it did not violate article XI, section 4 of the South Carolina Constitution.

Although these opinions illustrate instances in which we found the appropriation of state funds ultimately received by private educational institutions were not unconstitutional, we note several opinions to the contrary. In 1996, we issued an opinion considering whether the Charleston County School District's support of the Florence Crittendon Day Care Program, located in Charleston County, violated article XI, section 4. Op. S.C. Atty. Gen., May 13, 1996. The support provided included the payment of the day care's rent and teacher salaries. Id. After an examination of prior opinions addressing article XI, section 4, we noted: "Based on the foregoing authorities, the line of demarcation between a violation and a non-violation of Art. XI, § 4 appears to be whether

the particular aid primarily benefits the student or the institution itself." Id. Turning to the aid provided to the day care, we concluded the rent payments were direct benefits to the day care. Id. On the other hand, we found the argument that payments for teacher salaries were indirect benefits to the day care defensible. Id. Nonetheless, we ultimately concluded whether the School District's aid to the day care was a direct benefit, invoking article XI, section 4, is a question of fact, which we could not answer. Id.

In an opinion issued in 2003, we considered a bill providing for the appropriation of $3,000,000 to historically back colleges for maintenance and repairs. We discovered the colleges receiving the money were all private institutions. In analyzing this bill in accordance with article XI, section 4, we surmised:

> Applying the foregoing constitutional history, as well as the plain language of Art. XI, § 4, it is evident that an appropriation to South Carolina's historically black colleges contravenes the State Constitution as a "direct benefit" to "private educational institutions." If this constitutional prohibition is to retain any meaning, it must be deemed to prohibit a direct appropriation to certain private colleges and institutions of higher learning. As was stated in the West Committee Report, the provision was designed to insure "that public funds should not be granted outrightly to [private institutions of higher education]."

Id. (citations omitted).

Before, we consider the Program with respect to article XI, section 4, we again bear in mind that "[a]ll statutes are presumed constitutional." Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 358 S.C. 647, 652, 595 S.E.2d 890, 892 (Ct. App. 2004). As we mentioned in our Establishment Clause analysis, the legislation governing the Program provides for the payment of appropriations to the providers, which includes private providers such as faith-based preschools. This fact may serve as an indication that the Program provides a direct benefit to a religious or private educational institution in contravention of article XI, section 4. However, based on our reading of this legislation, we believe the General Assembly's purpose with respect to the Program is to provide four-year-old kindergarten to qualifying students, not to assist the private providers participating in the Program. While certainly, private providers receive the benefit of the funding provided under the Program, including the cost per child and grants for equipping new classrooms, we believe a court would find such benefits secondary to the Legislature's primary intention of providing four-year-old kindergarten to selected children. Furthermore, the proviso gives parents of eligible children the choice of whether to send their child to a private, as opposed to a public, provider. Additionally, it allows the parent to choose which private provider to send their child to by submitting an application to that particular provider. Based on these factors, we do not believe the Program violates article XI, section 4 of the South Carolina Constitution.

Having found the Program does not run afoul of either the Establishment Clause or article XI, section 4 of the South Carolina Constitution, we also consider your specific question of whether First Steps may approve explicitly religious curriculums if it meets the criteria in the proviso. Subsection (E) of the proviso requires providers to

> offer a complete educational program in accordance with age-appropriate instructional practice and a research based preschool curriculum aligned with school success. The program must focus on the developmental and learning support children must have in order to be ready for school. The provider must also incorporate parenting education that promotes the school readiness of preschool children by strengthening parent involvement in the learning process with an emphasis on interactive literacy.

Furthermore, subsection (D) requires First Steps, along with the Department of Education to "develop a list of approved curricula for use in the program based upon the South Carolina Content Standards . . . ." First Steps also has the authority to review and approve eligible providers under subsection (I). Therefore, we presume as part of the provider approval process, First Steps verifies the providers curriculum in accordance with the requirement of subsection (E) and the guidelines it and the Department of Education established.

Other than the Establishment Clause and article XI, section 4 of the South Carolina Constitution, we find no further limitation on government aid to private institutions incorporating religious doctrine in their curriculum. Thus, we presume that should a private provider meet the requirements as set forth in the various sections of proviso regarding curriculums, First Steps would not be prohibited from approving the provider.

Implication of the Program's Residency Requirement

Next, you ask whether State law requires First Steps to deny service to families unable to document their residency status due to the residency requirements in the proviso. In our reading of the proviso, we did not find a provision specifically requiring First Steps to deny service to families unable to prove residency status. However, in subsection (B) of the proviso, describing the eligibility criteria for enrollment in the Program, provides "[e]ach child residing in the pilot districts . . . ." is eligible for enrollment.

In analyzing this provision, we employ the rules of statutory interpretation as follows:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and

> the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Dreher v. Dreher, 370 S.C. 75, __, 634 S.E.2d 646, 648-49 (2006).

From the plain and ordinary meaning of the language used in subsection (B), a child must reside in one of the pilot districts in order to participate in the Program. In addition, we believe this understanding of the provision coincides with the General Assembly's intent. As explained above, the purpose of this legislation is to respond to the court's determinations in Abbeville County School District et. al. v. South Carolina, which involved particular school districts as plaintiffs. Subsection (A) states the Program "shall first be made available to eligible children from the following eight trail districts in Abbeville County School District et. al. vs. South Carolina." Subsection (A) also states: "During the implementation of the pilot program, no funds appropriated by the General Assembly for this purpose shall be used to fund services to at-risk four-year-old children residing outside of the trial or plaintiff's districts." Therefore, we gather the General Assembly's clear intention for the Program to serve only those children residing in the specified districts. Additionally, subsection (I) of the proviso, stating the responsibilities of First Steps with regard to all private providers, requires First Steps to "verify student enrollment eligibility in consultation with the Department of Social Services . . . ." Thus, because First Steps, in conjunction with the Department of Social Services, must verify a child's enrollment eligibility, we believe the proviso requires First Steps to prohibit admission of children to the Program who do not meet the residency requirement.

Conclusion

While we found no South Carolina law limiting religious content and/or expression within classrooms receiving State funding, we found is pertinent to analyze the Program under the Establishment Clause and under article XI, section 4 of the South Carolina Constitution. Keeping in mind that legislation passed by the General Assembly is presumed to be within its authority and is constitutional, we conclude that the Program does not run afoul of either the Establishment Clause contained in the United States Constitution or article XI, section 4 of the South Carolina Constitution. In light of this conclusion and finding no other applicable state or federal law to the contrary, we believe First Steps is not prohibited from accepting a private provider offering religious curriculum, presuming such curriculum meets the requirements under the proviso. Concerning First Steps' responsibility with regard to the residency requirements under the proviso, we find the proviso clearly states a child must reside in one of the pilot districts in order to be eligible for the Program. Furthermore, the proviso charges First Steps, along with the Department of Social Service, with the responsibility of verifying the enrollment eligibility of children applying for enrollment with a

private provider. Thus, we believe First Steps may not admit a child to the Program who does not meet the eligibility requirements, including the residency requirement.

Very truly yours,

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REVIEWED AND APPROVED BY:

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