ALAN WILSON
ATTORNEY GENERAL

April 24, 2013

The Honorable Wm. Weston J. Newton
Representative, District No. 120
83 Myrtle Island Road
Bluffton, South Carolina 29910

Dear Representative Newton,

You seek an opinion concerning this Office's interpretation of the Equal Access to Interscholastic Activities Act, S.C. Code § 59-63-100, as it applies to child who is taken out of a public school and home schooled. Specifically, you ask whether such a child must complete one year of home schooling under the Act before he or she may participate in interscholastic activities.

Law/Analysis

According to its caption, the Equal Access to Interscholastic Activities Act was enacted "so as 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 of 2012. The heart of the Act found in subsection (B) of § 59-63-100 provides that "home school students may not be denied by a school district the opportunity to participate in interscholastic activities[1]" if the student meets certain eligibility requirements further set forth in that section.[2] In addition, subsection (C) states:

> (C) **A public school student who has been unable to maintain academic eligibility is ineligible to participate in interscholastic activities as a** charter school student, Governor's school student, or **home school student for the following semester**. To establish eligibility for subsequent school years, the student's teacher shall certify by submitting an affidavit to the school district that the student meets the relevant policies of the school at which the student wishes to participate.

§ 59-63-100(C) (emphasis added). "Home school student" for purposes of the Act is defined under subsection (A)(3) 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**

[1] See § 59-63-100(A)(4) ("'Interscholastic activities' includes, but is not limited to, athletics, music, speech, and other extracurricular activities").

[2] The specific requirements a home school student must be meet under subsection (B) include: all of the school district's eligibility requirements other than the school, class attendance, or enrollment requirements of the school district or the associations administering the interscholastic activities; residency within the attendance boundaries of the school the student participates at; and written notification to the district's superintendent of the student's intent to participate before the date on which the season of the relevant activity begins. § 59-63-100(B)(1) to (3).

participating in an interscholastic activity pursuant to this section." § 59-63-100(A)(3) (emphasis added).

In responding to your question, a number of rules of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007). "[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). Courts will reject an interpretation that would lead to an absurd result that could not have been intended by the Legislature or would defeat plain legislative intention. Lancaster County Bar Ass'n v. S.C. Com'n on Indigent Defense, 380 S.C. 219, 222 670 S.E.2d 371, 373 (2008); State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011). Finally, "[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).

As previously mentioned, the Act's title and caption indicate its purpose is to provide home school students, Governor's school students, and charter school students "equal access" to participate in interscholastic activities.[3] Pursuant to subsection (B), a home school student "may not be denied the ... the opportunity to participate in interscholastic activities" if he or she meets certain eligibility requirements set forth in that subsection. § 59-63-100(B). As we stated in a recent opinion with regards to the construction of § 59-63-100:

> 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.

Op. S.C. Att'y Gen., 2012 WL 4009948 (Sept. 5, 2012).

The issue central to your request relates to the definition of "home school student" under the Act. As previously mentioned, § 59-63-100(A)(3) provides that a child must complete a "full academic year" of home schooling under one of the three programs referenced therein "*prior* to participating in an interscholastic activity" as a "home school student" under the Act. (Emphasis added). The provision clearly has no effect on the eligibility of a child to participate in interscholastic activities if he or she has been home schooled in accordance with one of the three qualified programs for one or more years. The question then, for purposes of this opinion, is whether § 59-63-100(A)(3) was intended to require a public school student to automatically forfeit a year of eligibility with regards to participation in interscholastic activities upon becoming home schooled. We note that the issue of whether any particular charter school, Governor's school, or home school student is eligible to participate in interscholastic activities at a certain public school under the Act is a factual question which must be determined on a case-by-case basis. See

[3] See Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) ("it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature") (citing Lindsay v. Southern Farm Bureau Casualty Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972)).

Op. S.C. Att'y Gen., 2010 WL 3896162 (Sept. 29, 2010) ("This Office is not a fact-finding entity; investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court"). Therefore, we can only advise as to how we believe a court faced with the issue presented would interpret the Act's provisions.

Although the plain language of § 59-63-100(A)(3), when considered in isolation, appears to require a public school student or any other child to automatically forfeit a year of eligibility with regards to interscholastic activities upon becoming home schooled, we do not believe such a result was intended by the Legislature. Such an interpretation is inconsistent with the broad construction required of § 59-63-100 in favor of granting charter school, Governor's school, and home school students *equal access* to participate in interscholastic activities. In addition, construing § 59-63-100(A)(3) in such a manner would render subsection (C) of the statute superfluous. As previously mentioned, that provision states that "[a] public school student who has been *unable to maintain academic eligibility* is ineligible to participate in interscholastic activities as a ... home school student for the following semester." § 59-63-100(C) (emphasis added). It would have been entirely unnecessary to specify that academically ineligible public school students are ineligible to participate in interscholastic activities the following semester as a home school student under subsection (C) if the Legislature otherwise intended for academically eligible public school students to automatically be deemed ineligible to participate for one year upon becoming home schooled under subsection (A)(3). Therefore, we believe the Act should be construed to permit an academically eligible public school student to maintain his or her eligibility to participate in interscholastic activities the following semester as a home school student.[4]

In addition, we would be remiss if we failed to note that construing § 59-63-100 as forcing an academically eligible public school student to forfeit a year of eligibility to participate in interscholastic activities on the sole basis that he or she was taken out and placed in home school raises constitutional concerns under the principles of equal protection. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. As stated by our State Supreme Court:

> The guiding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions .... The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated....

Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 471, 229 S.E.2d 718, 722 (1976) (citation omitted).

Where, as here, legislation does not affect a fundamental interest or suspect class,[5] the legislation is generally tested under the "rational basis" standard. Lee v. S.C. Dep't of Natural Res., 339 S.C. 463,

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[4] While it may be argued that the language in § 59-63-100(A)(3) requiring one year of home schooling prior to participation in interscholastic activities was intended to deter attempts to circumvent academic eligibility requirements – e.g., by withdrawing a child who is struggling academically from public school and home schooling him or her for the purpose of artificially inflating his or her grades – we believe such concerns are expressly and adequately addressed by subsection (C) of the statute.

[5] In cases involving government action or legislation which "employs a suspect classification or significantly burdens the exercise of a fundamental right," courts use a heightened level of scrutiny otherwise known as "strict scrutiny." 19 S.C. Jur. Constitutional Law § 85 (citing Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836 (1982)). Although the U.S. Supreme Court has repeatedly recognized that parents have a fundamental liberty interest in controlling and making decisions concerning the upbringing and education of their children, see Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925); Washington v.

466-67, 530 S.E.2d 112, 113-14 (2000) (citation omitted); see also Denis J. O'Connell High Sch. v. Virginia High Sch. League, 581 F.2d 81, 84 (4th Cir. 1978) ("Where ... there is no fundamental right or suspect classification involved, the test to determine the validity of the state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose"). 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. Cnty. of Newberry, 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996) (citation omitted).

Construing or applying § 59-63-100 in a manner which requires all children who begin home schooling to automatically forfeit a year of eligibility with regards to interscholastic activities creates several problematic classifications. For example, such a construction or application would treat first year home school students differently from those who have completed one year or more of home schooling, and home school students in general differently from charter school or Governor's school students who are not subject to any such one year requirement. Home school students who move here from another state would also be subject to disparate treatment since, presumably, no amount of home schooling in another state would be sufficient to satisfy one year of teaching under one of the three South Carolina home school programs referenced in § 59-63-100(A)(3), thus forcing such children to forfeit one year of eligibility as well. It is possible a court could find the above classifications are not reasonably related to the Act's express purpose of providing charter school, Governor's school, and home school students equal access to participate in interscholastic activities. However, 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) ("where a statute is susceptible to more than one construction, the court should interpret the statute so as to avoid constitutional questions") (emphasis removed); 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"). Therefore, we believe a court would construe the Act so as to permit academically eligible public school students to maintain their eligibility to participate in interscholastic activities upon becoming home schooled and not in a manner which requires them to forfeit a year of eligibility.

Conclusion

It is the opinion of this Office 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, S.C. Code § 59-63-100. The heart of the Act, § 59-63-100(B), provides that "home school students may not be denied ... the opportunity to

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Glucksberg, 521 U.S. 702, 117 S.C. 2258 (1997); Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000), § 59-63-100 merely affects the right of a child to participate in interscholastic activities. Our State Supreme Court has held that participation in interscholastic activities is not a fundamental right under the Constitution. See Bruce v. S.C. High School League, 258 S.C. 546, 189 S.E.2d 817 (1972) (holding high school students had no constitutionally protected right to participate in interscholastic athletics). Courts from various other jurisdictions addressing this issue appear to be in unanimous agreement. See, e.g., Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81 (4th Cir. 1978); Bradstreet v. Sobol, 225 A.D.2d 175, 650 N.Y.S. 402 (N.Y. App. Div. 1996). Furthermore, in Goulart v. Meadows, 345 F.3d 239 (4th Cir. 2003) the Fourth Circuit rejected the argument of the parents of home schooled children that a county policy prohibiting use of a county community center for private educational activities infringed upon their fundamental right to direct the upbringing of their children. Noting that such parents were still "free to homeschool their children in whichever manner they choose" in accordance with Maryland's homeschooling law, the Court found the county's policy "need only be rationally related to a legitimate government interest." Id. at 260-61. Accordingly, any equal protection challenge to § 59-63-100 would likely be analyzed under a rational basis standard.

participate in interscholastic activities" if the student meets certain eligibility requirements. A "home school student" is defined for purposes of 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." § 59-63-100(A)(3). Although the plain language of subsection (A)(3), when considered in isolation, appears to declare any child who has yet to complete one year of home schooling ineligible to participate in interscholastic activities, we do not believe such a result was intended by the Legislature. Such a construction would run contrary to the Act's mandate of liberal construction in favor of its express purpose of providing charter school, Governor's school, and home school students with *equal access* to participate in interscholastic activities. In addition, construing subsection (A)(3) as forcing any child who begins home schooling to automatically forfeit one year of eligibility would render superfluous subsection (C) which states that "[a] public school student who has been unable to maintain academic eligibility is ineligible to participate in interscholastic activities as a ... home school student the following semester." That is, it would have been entirely unnecessary to specify that an academically ineligible public school student is ineligible to participate in interscholastic activities the following semester as a home school student if the Legislature otherwise intended for a public school student to automatically forfeit one year of eligibility upon becoming home schooled under subsection (A)(3). Accordingly, we believe the Act should be construed as permitting an academically eligible public school student to continue to be eligible to participate in interscholastic activities upon becoming home schooled in accordance with one of the three programs referenced in § 59-63-100(A)(3).

Furthermore, we find it necessary to note that equal protection concerns may be implicated if the Act is construed or applied in a manner which requires academically eligible public school students to automatically forfeit one year of eligibility with regards to interscholastic activities upon becoming home schooled. Such a construction or application would result in the disparate treatment of first year home school students as compared to students who have completed one or more years of home schooling, charter school students, and Governor's school students. We must express doubt as to whether a court would find such classifications are reasonably related to the Act's express purpose of providing charter school, Governor's school, and home school students equal access to participate in interscholastic activities. Moreover, because a court must adopt an interpretation of a statute which avoid constitutional concerns, we believe a court would hold that the Act does not require an academically eligible public school student to forfeit a year of eligibility with regards to interscholastic activities upon becoming home schooled.

Sincerely,

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Assistant Attorney General

REVIEWED AND APPROVED BY:

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