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April 25, 1988

Ms. Virgie Randolph
Medical, Military, Public and Municipal
Affairs Committee
House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Re: House Bill 2580
Duty To Notify Parents Of Juveniles
Violation Of Law When Not Arrested Or
Taken Into Custody

Dear Ms. Randolph:

You have requested an opinion from this Office involving House Bill 2580 which amends S.C. CODE ANN. § 20-7-600 to provide that "when a child is found violating any law or ordinance, even if he is not taken into custody, the officers shall notify the parent, guardian, or custodian of the child as soon as possible ...." You have further advised me that the bill was introduced to address the problem of juveniles attending house parties where alcohol is served. The purpose of the bill is to ensure that parents are notified of their children's use of alcohol, even though they are not arrested and to serve as a deterrent to attending these parties. During the testimony on the bill, you have stated that law enforcement personnel report that sometimes over 100 children will attend the

parties and it is likely that the officers will not be able to talk to all those attending. Law enforcement has expressed a concern that they will be liable in a civil action if a juvenile [habitually] attends such parties and his parents are not notified and the juvenile has an accident as a result of alcohol. The question upon which you pose an opinion, if this bill becomes law, is as follows:

> If House Bill 2580 is enacted into law and in the event that a large number of children attend a party where alcohol is served and law enforcement personnel fail to notify one or several of the parents, can law enforcement personnel be held liable?

At the outset, it must be addressed what duty of notification, if any, the bill creates. There is no duty created by the bill to notify parents when a child "attends" a house party where alcohol is served. The responsibility to notify occurs only "when a child is found violating any law or ordinance, even if he is not taken into custody ...." Therefore, we submit that only when an officer has sufficient probable cause to believe the individual is violating the law does this responsibility arise. The draftsmen must clearly understand that mere presence at a house where alcohol is distributed, without more, does not adequately set forth probable cause to arrest for a state law violation.

Assuming the officer had probable cause to believe that a particular child has violated the law and is not arrested, charged, or taken into custody, the question then becomes whether this statute raises a duty to notify the parents that is enforceable against the law enforcement officers in favor of the child, his family, or potential victims. In general, there is no constitutional right to be protected by the State against criminals. Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); Jensen v. Conrad, 747 F.2d 185, 193 (4th Cir. 1984). Nevertheless, the courts have held a law enforcement officer's failure to protect an individual may

give rise to a constitutional deprivation under two circumstances. First, under the Due Process Clause, a duty to protect an individual may arise out of special custodial or other relationships created by statute or assumed by the State in respect of certain persons. Fox v. Custis, supra; Jensen v. Conrad, supra. The factors to be considered in determining whether such a special relationship exists are (1) whether the victim or perpetrator was in legal custody at the time of or prior to the incident; (2) whether the State has expressly declared its desire to provide affirmative protection to a particular class of persons; and (3) whether the State knew of the victim's plight. Thus, if officials have notice of the possibility of violent attacks on certain individuals, the Due Process Clause may impose on those officials an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Thurman v. City of Torrington, 595 F.Supp. 1521, 1527 (D. Conn. 1984). Thus, if the officials fail to take reasonable actions to protect a person to whom they owe a special duty of protection, their failure constitutes a violation of the Due Process Clause. Therefore, under 42 U.S.C. § 1983, if they show that first, the defendants acted under color of State law, and second, that such action subjected an individual to a deprivation of the "rights, privileges, remunities secured by the Constitution and laws [of the United States] a claim has been stated.

Here, the question becomes, if the General Assembly passes the bill as proposed, whether the officers' failure to notify the parents as required by the proposed bill and the court's view of the officers' conduct (or lack of conduct) as a failure to take reasonable action to protect, notify, or warn a person to whom they owe a duty under the statute constitutes a violation of the Due Process Clause.

In Patel by Patel v. McIntyre, 667 F.Supp. 1131 (D. S.C. 1987), the federal district court determined that South Carolina would regard the law enforcement duty as a public duty from which no liability would flow to an individual for the failure to perform it unless the individual can show he is owed a special duty by statute or circumstances. South Carolina has consistently found no liability, in the absence of malice or corruption, when the public function performed

is discretionary. Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659 (1973); Mulligan v. S. C. Dept. of Highways, 283 S.C. 59, 320 S.E.2d 505 (Ct. App. 1984); McIntyre v. Portee, 784 F.2d 566 (4th Cir. 1986). In Patel, the Court held that:

> 1. A public entity's and employee's tort liability must be based on the existence of a duty owing from the public entity or employee to the individual plaintiff;
>
> 2. That under the Tort Claims Act a public entity is not liable for a failure to enforce the law and a public employee is not liable for a failure to enforce the law unless his conduct in failing to enforce the law involves actual malice or intent to harm or similar aggravating circumstances; and
>
> 3. The law enforcement duty is generally a public duty only, in part because it is a discretionary function.

667 F.Supp. at 1141.

While the duty to enforce the law generally is a duty for the breach or nonperformance of which a public entity or employee is liable only to the public, it must be resolved whether or not the General Assembly's proposed new duty to notify the parents of a violator of law (including under-age drinking) creates by statute or circumstances a special relationship exception to the public duty, thereby creating a private cause of action.

The proposed statute speaks in terms of mandatory language "the officers shall notify the parent ... as soon as possible." Clearly, there can be no dispute (and as reflected in your letter) that it was the authors' intent that this is a mandatory requirement when the officer finds a child violating the law and not discretionary. Here, the existence of the duty the officer would owe to a particular

person -- the parent, guardian, or custodian of the child -- is without question. Therefore, the statute would create a special relationship that might be sufficient to support a negligence claim by this statute. Patel, supra; Sharpe v. Dept. of Mental Health, 292 S.C. 11, 18, 354 S.E.2d 778, 783 (Ct. App. 1987) (Bell, J. concurring); cf. Carolina Chemicals, Inc. v. S.C. Dept. of Health and Envtl. Control, 290 S.C. 498, 503, 351 S.E.2d 575, 578 (Ct. App. 1986).

In addition to the special duty, a plaintiff would have to prove negligence -- the failure to do what a reasonable person would have done under the same or similar circumstances and proximate cause. Proximate cause would be the critical factual element in these cases because an act or omission by the officer may be deemed to be proximate cause only when, without such act or omission, the damage would not have occurred or could have been avoided. Further, foreseeability of some damage from an act or omission is a prerequisite to its being the proximate cause for such damage and the officer cannot be charged with that which is unpredictable or that which could not be expected. See Gibson v. Gross, 280 S.C. 194, 311 S.E.2d 736, 738 (Ct. App. 1983).

In conclusion, it is my opinion that if the General Assembly enacts it, the proposed statute may create a special duty that could lead to liability for an officer's nonperformance if the additional showing of negligence and proximate cause are shown. The trend in the law would favor liability if the newly created duty is a mandatory duty on the officers. Obviously, this opinion is not free from doubt because of the present state of law enforcement duties being owed only to the public. However, the reasoning behind the bill to create a mandatory special duty owed to parents by the officers to prevent juveniles who are drinking (but not arrested) from being injured on the roads and participating in the drinking parties in the future may be seen as creating a private cause of action for nonfeasance of the non-discretionary notification.

If you have any questions about this, please contact me.

Sincerely,

Donald J. Zelenka
Chief Deputy Attorney General

bbb

APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions