

The State of South Carolina



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The Honorable Michael L. Fair
Member, House of Representatives
33 Villa Road
Greenville, South Carolina 29615

Dear Representative Fair:

By your letter of June 19, 1987, referencing Act No. 167 of 1987, you have asked for the interpretation of the act in light of the role of the school nurse or similar personnel in the distribution of contraceptive devices or medication. The act adds Section 59-1-405 to the South Carolina Code of Laws and provides:

No contraceptive device or contraceptive medication may be distributed in or on the school grounds of any public elementary or secondary school. No school district may contract with any contraceptive provider for their distribution in or on the school grounds.

You have asked whether the act prohibits school nurses from distributing contraceptive medication if the prescription has been filled by a third party and the school nurse retains the medication for the student to stop by and receive the medication. Further, you have asked, if a school district should contract for services off the school grounds, would the physician be prohibited under the act from writing prescriptions for contraceptive medication.

The primary objective in construing acts of the General Assembly is to determine and effectuate legislative intent if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Words of a statute are usually

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given their plain and ordinary meanings, Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980), and are construed literally in the absence of ambiguity. Anders v. South Carolina Parole and Community Corrections Board, 279 S.C. 206, 305 S.E.2d 229 (1983). However, where words have acquired a technical meaning, it is assumed that the legislature intended such a meaning. Coakley v. Tidewater Const. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940). These rules of statutory construction will be applied to the terms of Section 59-1-405 and then your questions will be responded to.

In terms of drug abuse prevention and control of drugs, the term "distribute" is generally distinguished from the term "dispense." Within the meaning of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841 (a) in particular, to "distribute" is understood to mean "the act of writing a prescription outside the usual course of professional practice and not for a legitimate medical purpose." United States v. Davis, 564 F.2d 840, 845 (9th Cir. 1977). To "dispense" is "to deliver a controlled substance to an ultimate user ... pursuant to the lawful order of a practitioner" United States v. Black, 512 F.2d 864, 866 (9th Cir. 1975). To "dispense" contemplates a lawful order or prescription; if the order or prescription is unlawful, the medical practitioner "distributes" or effects delivery by other than dispensing. Id. In some contexts, the notion of distribution has been interpreted as involving more than one recipient, instead being the public at large or a significant group of people. State v. Reisler, 194 N.W.2d 230 (N.D. 1972) (giving one person a political advertisement not distribution).

Applying the foregoing to your first question, it appears that the act probably would not prohibit a school nurse from disseminating properly prescribed and obtained contraceptive medication to an individual student who would stop by to receive the medication. Assuming that the school nurse did not prescribe and procure the contraceptive medication on public school grounds, the nurse would be dispensing the medication only to the individual who obtained the medication in a lawful manner away from the school grounds. The activity which appears to be prohibited by the act is instead the widespread availability or dissemination of contraceptive medications or devices to students on public school property. Use of the notion of distributing rather than dispensing medication also seems to imply an unlawful prescription or other unlawful means of obtaining such medication or devices, which is not the case in your scenario.

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The phrase "contraceptive provider" is not defined within Section 59-1-405. To "provide" is synonymous with supplying or furnishing, Strout v. Polakewich, 139 Me. 134, 27 A.2d 911 (1942), to supply for use, Weckerly v. Mona Shores Bd. of Education, 388 Mich. 731, 202 N.W.2d 777 (1972), or to supply what is needed. Clapps v. Waterbury Iron Works, Inc., 38 Conn. Supp. 644, 458 A.2d 1161 (1983). As you are aware, contraceptive devices and oral contraceptive medications are regarded as "legend" medications or devices and thus are available only upon the prescription of a physician.^{1/} In this context, the persons or entities most likely to be considered "contraceptive providers" would include physicians, pharmacists acting only upon a lawful prescription of a physician, or family planning clinics such as those provided by the South Carolina Department of Health and Environmental Control; this list is not meant to be all-inclusive, however.

The activity which is apparently sought to be prohibited by the second sentence of Section 59-1-405 of the Code is dissemination of contraceptive medications or devices on school grounds by "contraceptive providers" under contract with a school district. It appears to be critical that the dissemination or distribution take place on the public school grounds. Under the literal terms of the act, an activity taking place elsewhere would not appear to be covered by the act. It may well be that a "contraceptive provider" under contract with a school district but providing his services or goods outside the public school grounds would not be viewed as engaging in activity prohibited by Section 59-1-405.

Numerous questions may be raised about activities which might come within the purview of Section 59-1-405; many of these questions will undoubtedly require determinations of fact, which this Office is not empowered to do by an opinion. Op. Atty. Gen. dated December 9, 1983. For instance, whether a physician or similar health-care provider is actually a "contraceptive provider" merely because he or she writes a lawful prescription later filled by a pharmacist will probably require judicial determination unless the matter should be clarified by the General Assembly. The distinction often recognized between "dispensing" and "distributing" medications might also require judicial

^{1/} "Legend" drugs are those which must bear the legend "Caution: Federal law prohibits dispensing without a prescription." See Section 40-43-150 of the Code; R. 99-38; Op. Atty. Gen. dated October 14, 1986.

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or legislative clarification, as well. This Office is happy to comment insofar as is possible, given our constraints as noted above; the actual resolution of such questions will remain with the General Assembly or the courts of this State.

We hope that the foregoing will be sufficiently responsive to your inquiry. If you need additional information or clarification, please do not hesitate to ask.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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PDP/an

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