ALAN WILSON
ATTORNEY GENERAL

September 8, 2015

The Honorable Tom Davis
Senator, District 46
P.O. Box 142
Columbia, SC 29202

Dear Senator Davis:

You seek an opinion regarding the proper interpretation of Section 9 of the Supplemental Appropriations Bill for 2015 (H 4230). By way of background, you state the following:

> The above-referenced Proviso provides a nonrefundable tax credit for taxpayers who contribute to a certified Scholarship Funding Organization ("SFO") and a refundable credit for parents/guardians who pay directly to a certified school an amount for tuition of an exceptional needs child. A copy of the Proviso is enclosed for your reference.
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> This is the second year for this Proviso. In the first year, it allowed only a nonrefundable tax credit for taxpayers who contribute to a SFO and expressly set an $8,000,000 cap. This year, it allowed a new refundable credit for individuals who pay tuition to a school for an exceptional needs child and expressly set a $4,000,000 cap. This year's version of the Proviso also expressly set an overall cap of $12,000,000 for both credits, but it did ***not*** expressly set (as it did in the first year) an $8,000,000 cap on the contributions to SFO's.
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> I served on the Senate Finance Subcommittee that drafted the Senate version of the Proviso and it was my understanding the reconciled version of the Senate and House versions passed by the budget conferees had kept the $8,000,000 cap for SFO contributions and created a new refundable credit, capped at $4,000,000, for parents who paid tuition directly to certified schools. Again, however, the $8,000,000 cap for SFO contributions is ***not*** expressly slated; it can only be inferred through the Proviso's references to an overall cap of $12,000,000 for both credits and a stated $4,000,000 cap for the new "direct payment to schools by parent" credit, and also through knowledge of the $8,000,000 cap that had been provided in the prior year's version.

For the current year, donations to SFO's were permitted by the state Department of Revenue beginning July 1, 2015, and have reached $8,000,000. Applications for the new refundable credit by parents/guardians began in late July and the $4,000,000 cap has not yet been reached. The question now is: Should the state Department of Revenue continue to accept donations to the SFO's until the stated $12,000,000 cap on both credits is reached, or should it refuse further donations to SFO's in order to "protect" the $4,000,000 in refundable credits allocated to parents/guardians who make tuition payments to schools? Stated differently, is it proper for the SCDOT to infer an $8,000,000 cap on contributions to SFO's (for the reasons stated above)?

One SFO has argued that an $8,000,000 cap on contributions to SFO's cannot be inferred, and that the only cap applicable to SFO contributions is the one in subparagraph (D)(1)(a) pertaining to tax credits not cumulatively exceeding a total of $12,000,000. Alternatively, it has argued that the second sentence of that subparagraph ("If the department determines that the total of such credits claimed by all taxpayers exceeds either limit amount, it shall allow credits only up to those amounts on a first come, first served basis") means that, even if an $8,000,000 cap is inferred, that SFO contributions should nevertheless be allowed, first come, first served, up to $12,000,000.

Law/Analysis

Subsection (B) of Section 9 of the Supplemental Appropriations Bill provides in pertinent part as follows:

> (B)(1) A person is entitled to a tax credit against income taxes imposed pursuant to Chapter 6, Title 12, or bank taxes imposed pursuant to Chapter 11, Title 12 for the amount of cash and the monetary value of any publicly traded securities the person contributes to a nonprofit scholarship funding organization up to the limits of this proviso if:
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> > (a) the contribution is used to provide grants for tuition to exceptional needs children enrolled in eligible schools who qualify for these grants under the provisions of this proviso; and
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> > (b) the person does not designate a specific child or school as the beneficiary of the contribution.
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> (2) An individual is entitled to a refundable tax credit against income taxes imposed pursuant to Chapter 6, Title 12, or bank taxes imposed pursuant to Chapter 11, Title 12 for the amount of cash and the monetary value of any publicly traded securities, not exceeding ten thousand dollars per

child, the individual contributes as tuition for exceptional needs children within their custody or care and enrolled in eligible schools who qualify for these grants under the provisions of this proviso. The cumulative maximum total for credits authorized by this subitem may not exceed four million dollars. However, if a child within the care and custody of an individual receives a tuition scholarship from a nonprofit scholarship funding organization, then the individual only may claim a credit equal to the difference of ten thousand dollars or the cost of tuition, whichever is lower, and the amount of the scholarship.

(C) Grants may be awarded by a scholarship funding organization in an amount not exceeding ten thousand dollars or the total cost of tuition, whichever is less, for qualifying students with exceptional needs to attend an independent school. Before awarding any grant, a scholarship funding organization must receive written documentation from the parent documenting that the qualifying student is an exceptional needs child. Upon approving the application, the scholarship funding organization must issue a check to the eligible school in the name of the qualifying student. In the event that the qualifying student leaves or withdraws from the school for any reason before the end of the semester or school year and does not reenroll within thirty days, then the eligible school must return a prorated amount of the grant to the scholarship funding organization based on the number of days the qualifying student was enrolled in the school during the semester or school year within sixty days of the qualifying student's departure.

(D)(1)(a) the tax credits authorized by subsection (B) may not exceed cumulatively a total of twelve million dollars for contributions made on behalf of exceptional needs students. If the department determines that the total of such credits claimed by all taxpayers exceeds either limit amount, it shall allow credits only up to those amounts on a first come, first served basis.

(b) The department shall establish an application process to determine the amount of credit available to be claimed. The receipt of the application by the department shall determine priority for the credit. Subject to the provisions of item (5), contributions must be made on or before June 30, 2016, in order to claim the credit. The credit must be claimed on the return for the tax year that the contribution is made.

(2) A taxpayer may not claim more than sixty percent of the total tax liability for the year in contribution toward the tax credit authorized by subsection (B)(1). This credit is not refundable.

> (3) If a taxpayer deducts the amount of the contribution on the taxpayer's federal return and claims the credit allowed by this proviso, then the taxpayer must add back the amount of the deduction for the purposes of South Carolina income taxes.
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> (4) The department shall prescribe the form and manner of proof required to obtain the credit authorized by subsection (B). Also, the department shall develop a method of informing taxpayers if the credit limit is met at any time during Fiscal Year 2015-2016.
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> (5) A person only may claims a credit pursuant to subsection (B) for contributions made between July 1, 2015, and June 30, 2016.
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> (E) A corporation or entity entitled to a credit under subsection (B) may not convey, assign, or transfer the credit authorized by this proviso to another entity unless all of the assets of the entity are conveyed, assigned, or transferred in the same transaction.
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> (F) Except as otherwise provided, neither the Department of Education, the Department of Revenue, nor any other state agency may regulate the educational program of an independent school that accepts students receiving scholarship grants pursuant to this proviso.

In construing Section 9, we note that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). As our Supreme Court emphasized in Hodges, the purpose of an enactment will prevail over the literal import of the statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942). Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). In other words, the dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

Moreover, our Supreme Court has emphasized that it is the "General Assembly's prerogative to modify or repeal legislation and to make policy decisions." Amisub of South Carolina, Inc. v. S.C. Dept. of Health and Environmental Control, 407 S.C. 583, 597, 757 S.E.2d 408, 415 (2014). However, the Court has also observed that "[l]egislative intent, once determined, is 'permanently settled' absent subsequent action by the General Assembly to effect a statutory law." Wehle v. S.C. Retirement System, 363 S.C. 394, 403, 611 S.E.2d 240, 244 (2005), quoting Powers v. Powers, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962).

Further, it is presumed that the General Assembly is familiar with existing legislation. Amisub, supra. Thus, the following rule of construction is decreed to be governing:

> "It is a rule of construction that changes made by a revision of the statutes will not be construed as altering the law, unless it is clear that such was the intention, and if the revised statute is ambiguous or susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the legislature."

Town of Forest Acres v. Seigler, 224 S.C. 166, 179-180, 77 S.E.2d 900, 906 (1953), quoting Dennis v. Ind. School Dist., 166 Iowa 744, 148 N.W. 1007 (1914).

We turn now to an interpretation of Section 9. As your letter points out, Section 9 "did not expressly set (as it did in the first year) an 8,000,000 cap on the contributions to SFO's." The previous year's Proviso was clear that "[t]he tax credits authorized by subsection (B) may not exceed cumulatively a total of eight million dollars for contributions made on behalf of 'exceptional needs' students." Moreover, as you correctly state, no tax credit was given last year, as is the case this year, which provides that "[t]he cumulative maximum total for credits authorized by this subitem [for the "custody or care" of exceptional needs children] authorized by this subitem may not exceed four million dollars."

It is true enough that Section 9 contains no express provision capping the tax credit at eight million dollars with respect to contributions to an SFO as the previous year's Proviso had done. Instead, on its face, Section 9 appears to set a cap at twelve million dollars. Based upon a literal reading, one could infer that the General Assembly had raised the SFO credit cap by 4 million dollars from one year to the next.

On the other hand, for the first time, Section 9 also contains a four million dollar tax credit cap for the custody and care of Special Needs students. This insertion creates a statutory ambiguity. Is the twelve million dollar cap for SFO contributions only, or did the General Assembly really intend that the twelve million encompasses the eight million SFO cap from last year plus the new four million dollar cap for Special Needs students' custody and care?

We believe the latter interpretation is the more logical and the better construction of the statute. As noted above, the court will not read a statute as altering the law unless it is "clear" that the General Assembly intended to do so. Where a revised statute is "ambiguous or susceptible to two constructions, reference may be had to prior statutes for the purpose of ascertaining the intent of the Legislature." Town of Forest Acres v. Seigler, supra.

Reading Section 9 together with last year's Proviso, as we must, we thus believe it is evident the General Assembly simply intended to add the four million dollar credit for Special Needs children's custody and care to the preexisting eight million dollar credit for contributions

to a SFO, thereby equaling a total cap of twelve million dollars. There is no evidence that the General Assembly intended to increase the SFO cap to twelve million dollars, while at the same time, adding a cap of another four million dollars for children's custody and care (for a total of sixteen million altogether). If the Legislature had so intended, it is our belief that it would have had to state such intentions clearly and expressly. Town of Forest Acres, id.

Conclusion

While Section 9 of the Supplemental Appropriations Bill does not expressly contain a provision capping the tax credits for contributions to an SFO at 8 million dollars, as was the case last year, we believe that such an eight million dollar cap is consistent with the intent of the General Assembly. There is no evidence the Legislature intended to cap the SFO tax credits at 12 million dollars while, at the same time, capping tax credits for contributions for the custody and care of Special Needs children at 4 million dollars. Admittedly, Section 9 is ambiguous as to precisely its meaning. Therefore, the previous year's Proviso may be consulted in an effort to resolve that ambiguity. Town of Forest Acres v. Seigel, supra. In our view, reference to the previous year's Proviso, in which an 8 million dollar cap for SFO contributions was expressly provided, affords sufficient guidance as to this issue, such that we believe a court would likely imply an eight million dollar cap for SFO contributions, similar to last year.

Accordingly, it is our opinion that the better interpretation of Section 9 is to imply an 8 million dollar cap for SFO contributions and a 4 million dollar cap for contributions for the care and custody of Special Needs students.

Sincerely,

Robert D. Cook
Solicitor General