ALAN WILSON
ATTORNEY GENERAL

January 14, 2020

The Honorable Brad Hutto
Member
South Carolina Senate
P.O. Box 1084
Orangeburg 29116-1084

The Honorable G. Murrell Smith, Jr.
Member
South Carolina House of Representatives
P.O. Box 580
Sumter 29151

Dear Senator Hutto and Representative Smith:

We received your letter requesting an opinion of this Office concerning the ability of a non-profit, charitable organization to provide vision screenings and/or eye examinations to students in Title I schools in this State. In your letter, you specifically reference Vision to Learn, a non-profit charitable organization that currently partners with school districts in other states to diagnose and provide eyeglasses to children in need. You describe the services offered by Vision to Learn as follows:

> Vision to Learn works with local, state-licensed optometrists to provide Title I Students with vision screenings and eye evaluations. Vision to Learn also provides these children with eyeglasses as may be needed. These services and eyeglasses are provided to Title I Students free of charge and regardless of such patient's ability to pay. Through this program, Vision to Learn facilitates Title I Students' ability to read, thereby improving their learning abilities and assisting with their access to successful educational opportunities.
>
> In order to provide these needed services, Vision to Learn typically partners with school districts through a Memorandum of Understanding (MOU). With the agreement of the school district, Vision to Learn works with appropriate and qualified personnel (including, for example, school nurses, but this could include state-licensed optometrist) who provide Title I Students on-site vision screenings utilizing appropriate equipment ("Vision Screening"). Vision to Learn then returns to the school with a mobile vision clinic ("Mobile Vision Clinic"), where state-licensed optometrist provide eye evaluations to those Title

> I Students who failed the initial vision screening. These eye evaluations include an assessment of the visual status of the patient using full, non-automated refraction equipment, but do not include dilation of the eye ("Eye Evaluation"). Title I Students who are diagnosed as needing corrective glasses or contact lenses then are given a prescription and eyeglasses. These services and eyeglasses are provided free of charge regardless of the patients' ability to pay.

Although you indicate Vision to Learn operates in 13 other states, you state "some questions have arisen as to whether South Carolina-licensed optometrists can provide their services to Vision to Learn in light of certain provisions of South Carolina law, as well as certain policies, procedures, and guidelines issued by the South Carolina Board of Examiners to Optometrist ('Board')." Based on this information along with other information specific to Vision to Learn provided to us, you ask the following questions:

1. Would a Board-licensed optometrist violate the Eye Care Statute by providing services to a non-profit, charitable organization that provides needed eyeglasses to Title I Students and by conducting Vision Screenings and/or Eye Evaluations for such patients, which services and eyeglasses would be provided regardless of the patients' ability to pay?

2. Are the Policies and Procedures Regarding Sanctioning for Failure to Provide Minimum Eye Examination After Advertising, which were issued by the Board and became effective August 15, 2001 ("Eye Examination Policies"), binding upon a Board-licensed optometrist who provides services to a non-profit, charitable organization that provides needed eyeglasses to Title I Students and by conducting Vision Screenings and/or Eye Evaluations for such patients, which services and eyeglasses would be provided regardless of the patients' ability to pay?

3. By providing services to a non-profit, charitable organization that provides Vision Screenings, Eye Evaluations, and/or needed eyeglasses to Title I Students regardless of the patients' ability to pay, would a Board-licensed optometrist or school employee violate state law prohibiting advertising or referrals by referring such patients for further eye examinations after providing an initial Vision Screening on school grounds?

4. Would a non-profit, charitable organization that provides needed eyeglasses to Title I Students or Board-licensed optometrists who provide their services to provide Vision Screenings and Eye Evaluations to Title I Students through the use of a Mobile Vision Clinic violate state law relating to the prohibition against advertising on school grounds?

5. Does state law require Mobile Vision Clinics to be registered or licensed if such Mobile Vision Clinics are owned and operated by a non-profit, charitable organization that provides needed eyeglasses to Title I Students and by Board licensed optometrists to conduct Vision Screenings and Eye Evaluations?

Law/Analysis

I. Eye Care Statute

Initially, you ask us whether a state-licensed optometrist violates the Eye Care Statute by providing services to a non-profit, charitable organization that provides eye glasses to Title I students. Chapter 24 of title 40 of the South Carolina Code contains the "Eye Care Consumer Protection Law" passed by the Legislature in 2016. 2016 S.C. Acts 173. Section 40-24-20 of the South Carolina Code (Supp. 2019), found in this body of law, states:

> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.
>
> (C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.
>
> (D) Violation of this section constitutes misconduct as provided for in Sections 40-37-110 and 40-47-110. A provider who violates this section is subject to the penalties authorized in Chapter 37, Title 40 or Chapter 47, Title 40, as applicable.

Whether state-licensed optometrists providing services through Vision to Learn are in compliance with the Eye Care Statute is a question of statutory construction.

> The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute. Eagle Container Co. v. County of Newberry, 379 S.C. 564, 571, 666 S.E.2d 892, 895 (2008). These words must be construed in context and in light of the

> intended purpose of the statute in a manner "which harmonizes with its subject matter and accords with its general purpose." Id. at 570, 666 S.E.2d at 896. The meaning of certain words can be ascertained by reference to associated words in the statute. Id. However, if the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used. Id.

Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

According to the plain language used in the Eye Care Statute, Vision to Learn may not dispense eyeglasses to students without a valid prescription. Section 40-24-10(6) of the South Carolina Code (Supp. 2019) defines "prescription" as "a provider's handwritten or electronic order to correct refractive error that is based on an eye examination." Section 40-24-10(3) of the South Carolina Code (Supp. 2019) defines "eye examination" as "an assessment of all or a portion of the ocular health profile, which must include a complete written or electronic medical history, as well as an assessment of the visual status of a patient." (emphasis added).

Section 40-24-10(3) specifies an eye exam includes assessments of "portions" of eye health. Giving effect to the language used by the Legislature, we are of the opinion that a full evaluation of eye health is not required for a valid prescription. However, we note that pursuant to section 40-24-20(C) a prescription cannot be based solely on "refractive eye error of the human eye or be generated by a kiosk." Additionally, in accordance with section 40-24-20(B), the prescription must take into account medical findings and refraction error discovered during the examination.

You state the Eye Evaluations provided by Vision to Learn involve "an assessment of the visual status of the patient using full, non-automated refraction equipment" aimed at determining whether the student needs corrective glasses or contacts rather than an overall evaluation of ocular health. Given the broad definition of "eye examination" provided by the Legislature in section 40-24-10(3), we believe this type of assessment could qualify as an "eye examination" for purposes of the Eye Care Statute. Moreover, as long as this assessment is not based solely on the refractive eye error of the human eye or generated by a kiosk, we believe a court could find the Eye Evaluation sufficient to support a valid prescription. As long as the student holds as valid prescription, we do not believe Vision to Learn violates the Eye Care Statute by providing students with eyeglasses.

II. The Board's Eye Examination Guidelines

You informed us that the Board adopted an Eye Examination Policy, which includes enumerated "Minimum Eye Examination Guidelines." You indicate you are specifically concerned with the guideline (listed as number 4) requiring an eye exam include the performance of "internal ophthalmoscopic examination through a dilated pupil, including evaluation of optic nerve head, macular, and peripheral retina." South Carolina Board of Examiners in Optometry, Sanctioning for Failure to Provide Minimum Eye Examination After Advertising at https://llr.sc.gov/opto/PDF/minieyexam.pdf.

You informed us that the Eye Evaluations performed by state-licensed optometrists working with Vision to Learn assess "the visual status of the patient using full, non-automated refraction equipment, but do not include dilations of the eye . . . ." Because the Vision to Learn exam does not include dilation, it appears that it does not comply with the Board's Minimum Eye Examination Guidelines. However, you question whether the Board's policy is binding on a state-licensed optometrists providing services through a non-profit, charitable organization as described in your letter.

Initially, we note

> [a]s creatures of statute, regulatory bodies are possessed only of those powers which are specifically delineated. South Carolina Electric and Gas Co. v. South Carolina Public Service Commission, 275 S.C. 487, 272 S.E.2d 793 (1980). By necessity, however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged. Carolina Water Service, Inc. v. South Carolina Public Service Commission, 272 S.C. 81, 248 S.E.2d 924 (1978); Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948).

City of Columbia v. Bd. of Health & Envtl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987).

Through chapter 37 of title 40, the Legislature gave the Board the power and authority to regulate the licensing and practice of optometry. S.C. Code Ann. § 40-37-40 (2011). Moreover, the Legislature gave the Board the authority to oversee and enforce the Eye Care Statute. S.C. Code Ann. § 40-24-20(D). Our courts also give deference to an agency's interpretation of an applicable statute. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). However, where "the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation. Id.

As explained above, the Legislature's definition eye examination in the Eye Care Statutes includes assessments of portions of eye health. The Eye Care Statute does not specifically require dilation in order for an eye exam to be used for purposes producing a prescription. In addition, we did not discover a statutory provision requiring optometrists to dilate the eye or evaluate the optic nerve head, macular, or peripheral retina during an eye exam. As such, the Legislature does not require a prescription be based on a complete assessment of ocular health for the dispensing of eye glasses.

While a court would give deference to the Board's interpretation of eye examination, we do not believe the Board, through its Eye Examination Policy, sought to interpret this definition. First, the Board issued its Minimum Eye Examination Policy in 2001, prior to the enactment of the Eye Care Statute in 2006. Presumably, the Legislature was aware of the policy adopted by the Board,

but chose not to adopt it in its definition of "eye examination." Moreover, the text of the Board's policy does not proclaim to interpret "eye examination" for purposes of the Eye Care Statute, but rather refers to the provisions of the South Carolina Code pertaining to fraudulent advertising aimed specifically at optometrists and professionals in general. See S.C. Code Ann. §§ 40-37-390 & 40-1-110(d) & (e) (2011). Section 40-37-390 of the South Carolina Code prevents the dissemination of untruthful or deceptive advertisements concerning eye examinations. Section 40-1-110(d) & (e) of the South Carolina Code allows regulatory boards to take disciplinary action against professionals that use of fraudulent statements to obtain fees. Thus, we believe these provisions restrict advertising by optometrist rather than the practice of optometry. While the Board's policy would apply to advertising used by Vision to Learn, we do not believe a court would interpret these policies to restrict the practice of optometry and the ability of a state-licensed optometrist to prescribe eyeglasses for students.

III. Referrals from Eye Screenings

Next, you ask whether Vision to Learn would violate state law by referring students for further evaluation after the initial Vision Screening conducted on school grounds? We understand you are specifically concerned with section 40-37-330(B) of the South Carolina Code (2011).

Section 40-37-330(B) provides:

> All agencies of the State and its subdivisions and all commissions, clinics, and boards administering relief, public assistance, public welfare assistance, social security, or health services under the laws of this State shall accept the services of licensed optometrists for all services that they are licensed to perform relating to a person receiving benefits from such an agency or subdivision of the State. These agencies, or agents, officials, or employees of these agencies, including the public schools, may counsel with and advise the persons needing eye care as to the type of service needed and as to those qualified to render the service; however, no attempt may be made to guide an individual seeking vision or eye care to either an optometrist or a physician licensed under Chapter 47, Title 40, Physicians, Surgeons, and Osteopaths. The patient must be given free choice in selecting a specialist to serve the patient's vision or eye-care needs in examinations, vision screening, or other vision-related services. However, an exception must be made in emergency cases of obvious eye injury or disease where delay in obtaining the services of a physician licensed under Chapter 47, Title 40, Physicians, Surgeons, and Osteopaths, might endanger the patient's visual health. Additionally, in recognized instances of disease or anomalies disclosed in the original physical evaluation by an agency, these cases may be referred directly to specialists, ophthalmologists, or optometrists as considered appropriate by the evaluating agency.

(emphasis added).

As we stated previously, the cardinal rule of statutory construction is to "ascertain and effectuate the legislative intent whenever possible." State v. Hudson, 336 S.C. 237, 245, 519 S.E.2d 577, 581 (Ct. App. 1999). "The legislature's intent should be ascertained primarily from the plain language of the statute." Id. at 246, 519 S.E.2d at 581. From the text of section 40-37-330(B), we gather the Legislature contemplated optometrists providing services in public schools and school staff advising students and their families as to those qualified to render follow up care. However, the emphasized language above indicates the Legislature's intent to prohibit governmental agencies, including schools, from referring individuals to a specific optometrist and ensures individuals have a choice in who provides their eye-care.

We understand that in the scenario you present, a school representative or possibly an optometrist working through Vision to Learn will provide the initial vision screening to determine whether a student needs further eye care. If the screening indicates further care is needed, a notice will be sent home advising that the student failed the screening and may need follow up care, but would not require the student to receive care through Vision to Learn. According to your letter, "Vision to Learn then returns to the school with a mobile vision clinic ("Mobile Vision Clinic"), where state-licensed optometrists provide eye evaluations to those Title I Students who failed the initial vision screening."

Whether or not these activities violate section 40-37-330(B) depends on whether the notice sent home serves to guide the student to receive services particularly from Vision to Learn. This question involves a factual determination, which cannot be made in opinion of this Office. See Op. Att'y Gen., 1987 WL 342805 (S.C.A.G. Jan. 23, 1987) (finding only a court of competent jurisdiction can make factual determinations). However, presuming the notice does not serve to direct students to Vision to Learn in particular for follow up eye care and the students are given free choice in selecting a specialist, this statute would not be violated.

You also mention the Board maintains a Vision Screening Policy. Per the Board's website, we understand this policy states "Vision screenings may not be used as an inducement to cause members of the public to choose one practitioner over another. Those persons offering screenings shall not take appointments at the screening and shall not solicit in any manner during the screening." South Carolina Board of Examiners in Optometry, Vision Screenings at https://llr.sc.gov/opto/PDF/Vision_Screening_Policy.pdf. If the screenings are provided by personnel not employed or affiliated with Vision to Learn, we do not see how Vision to Learn would be in violation of this policy unless Vision to Learn arranged with school staff to steer students to Vision to Learn. However, if a Vision to Learn optometrist performs the screenings, we caution that this policy would prohibit them from inducing students to choose its services over another practitioner and Vision to Learn would not be able to schedule appointments or solicit patients during the screening.

IV. Advertising on School Grounds

You also asked whether Vision to Learn would violate the state law prohibiting advertising on school grounds. In our research, we did not find a provision specifically prohibiting advertising on school property. In a 1992 opinion, this Office address questions about whether a school district could sell advertising space on its property. This opinion did not indicate advertising on school property is prohibited. We cited to section 59-19-90(5) of the South Carolina Code (2020), which authorizes school district trustees to manage school property, and opined:

> The law in South Carolina is obviously that the school board may make any arrangements that it cares to in regard to the incidental use of school property by private or public parties. But this discretionary power can be abused if the activities permitted on school property are other than incidental and casual in nature and conflict with school purposes.

Op. Att'y Gen., 1992 WL 575675 (S.C.A.G. Nov. 9, 1992). Moreover, we stated

> [i]t is well settled, however, that a school board, if it allows the school facilities to be used at all, must permit all individuals and organizations to use them if the purpose for which the facilities will be used are lawful. In other words, the school board may not discriminate. If the school board elects to make school facilities available it is required by constitutional provision, ". . . to grant the use of such facilities in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all." 1970 Ops. Atty. No. 3014 (November 2, 1970).

Id.

You did not indicate Vision to Learn is purchasing advertising on school property. However, based on this opinion, if a school district allows Vision to Learn to advertise on school property, it must also give all potential eye care providers the same or similar opportunity to advertise services to students and their families.

In addition, we note section 59-19-120 of the South Carolina Code (2020) allows each school district to adopt its own rules and regulations regarding the use of school buildings. Therefore, we advise you to check with the district in which the school is located to determine the restrictions on advertising on school property.

V. Registration and Use of Mobile Units

In your letter, you explained Vison to Learn intends to provide services to Title I students via a Mobile Vision Clinic. You indicate state-licensed optometrists will come to the Title I schools and perform the Eye Evaluations in the Mobile Vision Clinic. You question whether use of the Mobile Vision Clinics you describe is allowed under section 40-37-320 of the South Carolina Code (2011) and if so, whether they must be registered pursuant to this provision.

Section 40-37-320 provides:

> (A) An optometrist shall post in a conspicuous place the office hours that he or she will maintain. Office hours are those hours in which a licensed optometrist is actually present on the premises; however, this section does not prevent the office from being open for the purpose of accepting appointments or payments or performing other duties that by law do not require the presence of a licensed optometrist. Advertisements or any other public announcement of office hours must specify those hours in which a licensed optometrist is present on the premises.
>
> (B) Mobile units may be used; however, the optometrist shall obtain a registration for the mobile unit from the board. A mobile unit must be limited to visiting and providing services to licensed health care facilities within this State.
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> (C) Notwithstanding the provisions of subsection (A), the board may promulgate regulations regarding optometrists' offices so as to provide for:
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> (1) adequate and appropriate office facilities for the practice of optometry;
>
> (2) the proper handling of patient records; and
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> (3) appropriate sanitation for office facilities.

Again, this Office, just as a court, follows the cardinal rule of statutory construction, which is to "ascertain and effectuate the intent of legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

> Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Id. at 85, 533 S.E.2d at 581.

Section 40-37-320 certainly contemplates the use of mobile units by optometrists. However, this provision requires mobile units to be registered and limits their use to "to visiting and providing services to licensed health care facilities within this State." According to the plain language used in section 40-37-320(B), we are of the opinion Vision to Learn must register its Mobile Vision Clinics. In addition, the statute clearly limits where these mobile units may be used to licensed health care facilities. Neither this statute, nor any provision contained within chapter 37, define "health care facility." Article 3 of chapter 7 of title 44 contains the "State Certificate of Need and Health Care Facility Act." S.C. Code Ann. §§ 44-7-110 et seq. (2018 & Supp. 2019). The Act, among other things, governs the licensure of facilities rendering medical, nursing, and other health care. S.C. Code Ann. § 44-7-120(4) (2018). Section 44-7-260 of the South Carolina Code (Supp. 2019), contained within this Act, provides a list of facilities that must obtain a license in order to operate. This list includes facilities such as hospitals, nursing homes, surgical centers, and birthing centers. However, this list does not include schools. In addition, to our knowledge, schools are not required to be licensed as health care facilities. Therefore, we initially would advise that section 40-37-320 prohibits the use of Mobile Vision Clinics as described in your letter because they will not provide services at licensed health care facilities.

However, in reviewing section 40-37-320 for purposes of your request, we are concerned as to the validity of this statute with respect to the limit it places on optometrists to practice in their chosen profession. In Joseph v. South Carolina Department of Labor, Licensing and Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016), our Supreme Court considered a position statement by the Board of Physical Therapy interpreting a statute prohibiting physical therapist from receiving fees for referrals as prohibiting physical therapists from employment by a physician or physicians group. Joseph, a licensed physical therapist, argued the Board's position infringed her ability to practice her chosen profession and required she and other physical therapist be treated differently than other health professionals who may be employed by doctors. Id. at 448, 790 S.E.2d at 770. The Court referred to the Equal Protection Clause contained in the United States Constitution prohibiting states from denying "any person within its jurisdiction the equal protection of the laws." Id. at 451, 790 S.E.2d at 771 (citing U.S. Const. amend. XIV, § 1). The Court applied a rational basis analysis and determined "we now find that the classification, which distinguishes PTs from other licensed health care professionals, has no rational relationship to the legislative purpose of the statute—to protect consumers and government-sponsored health care programs from conflicts of interest and potential misuse of medical services." Id. at 451-52, 790 S.E.2d at 771. Overruling its prior decision in Sloan v. Sanford, 357 S.C. 431, 433, 593 S.E.2d 470, 471 (2004), the Court explained:

> Although, under Sloan, physicians may employ other healthcare professionals such as occupational therapists, speech pathologists, and nurse practitioners, they may not employ PTs. Neither the Sloan opinion nor Appellants have articulated any plausible reason as to why PTs are so different from other health care professionals that they must be singled out and provided disparate

> treatment for self-referral purposes. Accordingly, the Court's interpretation in Sloan constitutes an equal protection violation. In addition, the interpretation violates the substantive due process rights of physical therapists by imposing an arbitrary restriction upon physical therapists while preserving those employment relationships for all other health care providers and allied health professionals.

Id. at 452, 790 S.E.2d at 771.

We are not aware of the purpose for which Legislature enacted section 40-37-320. However, reading the statute as a whole, subsection (C) indicates a need to have proper facilities for practice, storage of patient records, and sanitation. Because optometrist require specialized equipment and because proper sanitation and record keeping are essential to their practice, a court could find the Legislature has a distinct interest in where optometrists practice. Furthermore, we can appreciate that the Legislature may have required registration of the mobile units to ensure these requirements are satisfied and to protect public health. However, we are not sure a court would find these interests are served by limiting the location of a mobile unit to a licensed health care facility. Under the scenario you present, the Eye Evaluations are performed within the Mobile Vision Clinic and the location of that unit does not impact the equipment, record keeping, or sanitation of the Mobile Vision Clinic.

Furthermore, other health professionals are not restricted in where they practice. To our knowledge doctors and nurses are not restricted in where they can provide care. In fact, the Legislature specifically allows for the practice of telemedicine by physicians and nurses. S.C. Code Ann. §§ 40-47-37 & 40-33-34 (Supp. 2019). In addition, section 40-47-955 of the South Carolina Code (Supp. 2019) permits physician assistants to make house calls. We acknowledge optometrist require specialized equipment in order to provide care unlike most doctors and nurses. However, dentists, like optometrists, have similar requirements of specialized equipment, strict sanitation requirements, and the need to maintain ongoing records. Section 40-15-172 of the South Carolina Code (2011) allows dentists, similar to optometrists, to use mobile dental facilities. This provision, like section 40-37-320, requires registration of mobile units. However, section 40-15-172 does not restrict where mobile dental units can be used. Rather, this provision seeks to ensure that such facilities are operated by licensed dentist, licenses are displayed properly, proper patient records and records of where such units provide care are maintained, and patients are given information concerning treatment and follow up care. Id.

Based on our understanding of where other health professionals may practice, we are concerned that similar to the physical therapists in Joseph, optometrist are treated differently that other health professionals as they are restricted in where they can provide care. We are also concerned that a court could find this restriction is arbitrary. Along with your letter, you included a recent Resolution of the United States Congress recognizing Vision to Learn. S. 222, 116th Cong. (2019). This Resolution provides that

> according to the American Optometric Association, uncorrected vision conditions affect 1 in every 4 children, yet only 39 percent of students referred to an eye exam through a routine vision screening actually end up seeing an eye doctor, and this discrepancy is far worse in high-poverty communities . . .

Id. The Resolution states addressing the eye care needs of students "is an often overlooked but critical strategy to improve the educational attainment of those students." Id. The Resolution recognizes Vision to Learn's efforts in combating this problem by bypassing "common hurdles preventing children from seeing an eye doctor," and introducing "students and parents to the need for ongoing eye care, making it more likely that those students and parents will seek out regular eye exams for local optometrist or ophthalmologist." Id. Accordingly, we believe a court would recognize the need to provide greater access, rather than less access, to eye care to children in public school. As such, we are concerned that a court would find prohibiting mobile vision units from providing care by licensed optometrists is arbitrary and constitutes an equal protection violation.

However, as stated in a 2015 opinion, "any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its constitutionality is clear beyond any reasonable doubt." Op. Att'y Gen., 2015 WL 836507 (Feb. 18, 2015). Moreover, only a court, not this Office, can determine the constitutionality of a statute. Id. "While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute must continue to be followed until a court declares otherwise." Id. (citations omitted) (quotations omitted).

Conclusion

Considering the information you provided to us as to the operations of Vision to Learn, we do not believe a state-licensed optometrist would violate the Eye Care Statute by conducting the Vision Screenings and Eye Evaluations you described. We believe the Eye Evaluations performed by the optometrists could qualify under the definition of an eye examination as provided for in section 40-24-10(3) of the South Carolina Code. As such, Vision to Learn could dispense eyeglasses to students without violating the Eye Care Statute.

We understand the Board adopted Minimum Eye Examination Guidelines requiring the performance of an "internal ophthalmoscopic examination through a dilated pupil." However, we did not find a similar requirement imposed by the Legislature. While the Board has authority to interpret and implement provisions under the Eye Care Statute and the portion of the Code pertaining to the practice of optometry, we believe this requirement pertains to how optometrists advertise their services rather than the practice of optometry. Therefore, although this type of evaluation is not performed by optometrists working in conjunction with Vision to Learn, we do not believe this policy restricts the optometrists' ability to provide more limited eye evaluations, but rather restricts how Vision to Learn advertises its services.

We also addressed your concerns about referrals to Vision to Learn from school staff performing vision screenings. We found section 40-37-330(B) places restrictions on school employees working with state-licensed optometrists, like those working with Vision to Learn, and prohibits them from directing students in need of eye care as a result of a school screening solely to Vision to Learn. But, this provision does not prohibit school staff from advising students as to the type of eye care needed and those qualified to render those services, which could include Vision to Learn. However, if Vision to Learn performs the vision screenings, the Board's Vision Screening policy would prohibit it from taking appointments or soliciting business during the screening.

We are not aware of a statute prohibiting Vision to Learn from advertising on school grounds. However, we suggest you contact the district you wish to advertise in to determine whether district rules prohibit such activity. In accordance with prior opinion, we advise that any school allowing advertising of one eye care provider should allow the same adverting by other eye care providers.

Lastly, we believe Vision to Learn would be required to register its Mobile Vision Clinics pursuant to section 40-37-320(B). In addition, this statute currently restricts use of mobile units at licensed healthcare facilities. S.C. Code Ann. § 40-37-320(B). However, we are concerned enforcing this restriction will result in disparate treatment of optometrist in comparison with other healthcare professions and this requirement may not be rationally related to the purpose of section 40-37-320 in violation of the Equal Protection Clause in the United States Constitution. Nevertheless, only a court can make a determination on the constitutionality of a statute.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General