ALAN WILSON
ATTORNEY GENERAL

April 21, 2020

The Honorable Larry Grooms
Member
South Carolina Senate
District No. 37
203 Gressette Bldg.
Columbia, South Carolina 29201

The Honorable Garry R. Smith
Member
South Carolina House of Representatives
District No. 27
534 Blatt Bldg.
Columbia, SC 29201

Dear Senator Grooms and Representative Smith:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

> We have been closely following ongoing and recent activities at the South Carolina High School League (the "League"). We respectfully request the guidance of the South Carolina Attorney General's Office regarding whether certain provisions in the League's By-Laws, including recent Amendments to the By-Laws, are consistent with South Carolina law. ...
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> Specifically, we are concerned that certain provisions in the League's By-Laws are inconsistent with the right to school choice in South Carolina. These provisions include Article III (Student Eligibility), Section 9 (Original Eligibility) and Article III (Student Eligibility), Section 10 (Transfers). It appears the League's By-Laws place undue restrictions on the right of South Carolina parents to choose the most appropriate school(s) for their children by restricting the ability of children who attend public charter schools and private schools to participate in interscholastic athletics at the school of their choice. In particular, the new amendments to Section 10, 10(D), and 10(M) of the League's By-Laws appear to effectively place even greater limitations on parents' right to school choice by restricting their children's ability to participate in interscholastic athletics. We respectfully request that your office review the following legal authorities and any other legal authorities that may be applicable and provide an opinion on whether the League's By-Laws, including recent amendments, are consistent with South Carolina law.

## Law/Analysis

It is this Office's opinion that a court may well find the amendments to the League's By-Laws, specifically Article III, §§ 10, 10(D), 10(M), restrict private and charter school students' ability to participate in interscholastic athletics. While these amendments appear to apply equally to all schools, its impact is necessarily greater on students who transfer from public schools to charter schools and private schools than those that transfer within a public school district. Therefore, a court may well find that these amendments violate the Equal Access to Interscholastic Activities Act, S.C. Code Ann. § 59-63-100, and 2019-2020 Budget Proviso 1.59.

The League's March 12, 2020 Legislative Assembly results memorandum attached to the request letter shows both the language of the amended bylaws and original bylaws. First, Article III, § 10 read:

> A transfer student will be ineligible for a period of one calendar year at the new school unless he/she transfers under one of the circumstances set forth in subsections (A) through (N) below and only if he/she meets the following two criteria irrespective of whether he/she moves under one of the circumstances set forth in subsections (A) through (N). An ineligible transfer student meeting the two criteria, but not any of the circumstances of subsection (A) through (N) may compete with LIMITED ELIGIBILITY only and must have a letter of support from the principal of the school from which the athlete is eligible. The student cannot have participated in the sport in which he/she wishes to be certified during the current school year. This type of transfer of eligibility is only allowed once every (365 days) calendar year and only applicable to inter-district transfer.

(emphasis added). It has been amended to read:

> A transfer student will be ineligible for a period of one calendar year at the new school unless he/she transfers under one of the circumstances set forth in subsections (A) through (N) below and only if he/she meets the following two criteria irrespective of whether he/she moves under one of the circumstances set forth in subsections (A) through (N).

It is this Office's understanding that the emphasized language in this rule permitted otherwise ineligible transfer students to compete at the junior varsity level for the one year period that they would be ineligible to compete at varsity level. The amendment apparently removes this option for ineligible transfer students.

Second, Article III, § 10(D) read:

> A student transfers to a school in the same district where he/she is currently eligible; to a school in the district where he/she is currently ineligible (as it relates to residency), or to a school in the district where the student and his/her family lives. The transfer must occur at the beginning of the student's 9th-grade year.

(emphasis added). It has been amended to read:

> A student transfers to a school in the same district where he/she is currently eligible, or to a school in the district where the student and his/her family lives. The transfer must occur at the beginning of the student's 9th-grade year.

Third, Article III, § 10(M) read:

> A student transfers to another school in the same district, to include member charter and private schools located in the district; other than ninth grade, provided the affected superintendents and schools' principals approve the transfer. This type of transfer is allowed once every (365 days) calendar year and only applicable to member schools located within the district. The student cannot have participated in the sport in which he/she wishes to be certified during the current school year.

(emphasis added). It has been amended to read:

> A student transfers to another school in the same district other than ninth grade, provided the affected superintendents and schools' principals approve the transfer. This type of transfer is allowed once every (365 days) calendar year and only applicable to member schools located within the district. The student cannot have participated in the sport in which he/she wishes to be certified during the current school year.

This Office was provided an April 3, 2020 memorandum written by an attorney for the League which interprets the amendments to Sections 10(D) and 10(M).

> [I]n 2016, the membership approved changes to Section 10(D) to allow for entering 9th graders to have immediate eligibility when transferring to a school in the district where he/she is currently ineligible, which extended this transfer

> exception beyond traditional public schools. Likewise, in 2015, the membership approved changes to Section 10(M) to specifically allow charter schools and private schools, whose designated attendance zones fell in traditional public-school districts of choice, to get the option of intra-district transfers. This occurred despite the fact that public charter schools and private schools do not belong to the same local school district as traditional public schools.
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> Based on the proposals and discussions surrounding the recent amendments to these two sections, it is my understanding that these amendments were designed to give charter schools and private schools the same treatment as similar public schools, i.e. traditional public high schools that do not have another high school in their local school district. Therefore, the SCHSL would interpret these bylaws to only allow students to transfer to another school within the school district if both schools actually fall under the governance of the same school district.

When this construction of the amendments to Sections 10, 10(D), and 10(M) are read together, it is clear that student transfers between either a public charter school or a private school and a public school are discouraged. First, if a student does not meet one of the criteria in subsections (A) through (N) of Section 10, the amendments to Section 10(D) and 10(M) make all students that transfer between schools that are not governed by the same district ineligible for a year. While this change may be facially neutral in that it applies to all member schools, in application it disproportionately impacts transfers to and from private and charter member schools. Public school districts may have multiple middle and high schools that they govern and therefore provide avenues for these same-district transfers; particularly those in open enrollment districts. It is this Office's understanding that private schools and many charter schools do not have similar governance over multiple member schools. As a result, students who transfer to or from these schools would be ineligible for a year to participate in varsity athletics sanctioned by the League.

Additionally, for a student not to lose a year of eligibility, the student must have established original eligibility in the seventh grade at the private or charter school or a school that "feeds" into those schools. See SCHSL By-Laws Art. III, § 9. This Office understands that many private schools and charter schools do not offer courses beginning in the seventh grade or have feeder schools. Therefore, unlike traditional public schools, these schools depend on the transfer provisions in Section 10(D), and 10(M) in order for their students to be eligible. Further, the amendment to Section 10 removes the option for a transferring student to participate in athletics at the junior varsity level for the year he or she is ineligible. Many students entering private and charter schools after seventh grade will not be eligible for a full year of varsity or

junior varsity athletics. Taken together, these amendments present a dilemma for students and parents: whether to exercise their right to attend a private or charter school of their choice or to maintain their eligibility to participate in League athletics.

This Office has issued several opinions interpreting the Equal Access to Interscholastic Activities Act, S.C. Code Ann. § 59-63-100, and specifically subsection (F) which states, "A school district may not contract with a private entity that supervises interscholastic activities if the private entity prohibits the participation of charter school students, Governor's school students, or home school students in interscholastic activities." In 2012, this Office addressed the legislation that established the Act to find it applied to the League's policies. See Op. S.C. Att'y Gen., 2012 WL 4009948, at 8 (September 5, 2012) ("[The Equal Access to Interscholastic Activities Act] would control the League policy."). The opinion found that the Act is remedial and must be broadly construed to accomplish "the Legislature's purpose to provide 'equal access to interscholastic activities' to those being home schooled, in accordance with the definition provided in the Act." Id. at 5. In 2013, we rejected an interpretation of the Act that would require a student to forfeit a year of eligibility for interscholastic activities as a result of becoming home schooled.

> 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. ...

Op. S.C. Att'y Gen., 2013 WL 1931658, at 3 (April 24, 2013). Finally in 2014, we again found that the League's rules must be consistent with the Act.

> In Bruce v. South Carolina High School League, 258 S.C. 546, 552, 189 S.E.2d 817, 819 (1972), our Supreme Court noted that the League is a voluntary organization comprised of all public high schools and some private schools in South Carolina, and its rules regulate interscholastic athletic contests among its members, including the rules regarding a student's eligibility to participate. As the Court focused on in Bruce, the general rule and guiding legal principle with respect to high school athletic associations is judicial noninterference. Id. at 551, 198 S.E.2d at 819 (citing 6 Am. Jur. 2d Associations and Clubs § 27). However, while an athletic association has discretion in construing its rules and determining their applicability, such rules must be lawful. Id.; see also 78A C.J.S. Schools and School Districts § 1121 (2014) ("An athletic association ... is limited only by the requirement that its rules be reasonable, lawful, and in keeping with public policy,

> be interpreted fairly and reasonably, and be enforced uniformly and not arbitrarily").

Op. S.C. Att'y Gen., 2014 WL 4659413 (September 8, 2014). The opinion concluded:

> As the League is a private entity supervising interscholastic activities, this provision relates directly to it and clarifies that League policies and rules prohibiting eligible home school, charter school, or Governor's school students from participating in interscholastic activities are not permitted as they would directly conflict with S.C. Code Ann. § 59-63-100 (Supp.2013).

Id. at 8. This Office reaffirms our opinion that S.C. Code Ann. § 59-63-100(F) applies to the League and that its "rules ... do not usurp state legislation." Id.

While the amendments to Sections 10, 10(D), and 10(M) of the League's by-laws do not facially prohibit the participation of charter school students, a court would likely hold that they may in application. Because many charter schools do not have feeder schools, the transfer rules would be more widely applicable to charter school students than to public school students. As we stated in our 2013 opinion above, we do not find the Legislature intended to require an otherwise eligible student "to automatically forfeit a year of eligibility with regards to interscholastic activities upon becoming" a charter school, Governor's school, or home school student. Op. S.C. Att'y Gen., 2013 WL 1931658, at 3 (April 24, 2013). Because this rule would require many charter school students to forfeit a year of eligibility, it is this Office's opinion that a court may well hold that the given interpretation of these amendments violates Section 59-63-100(F).

Finally, the request letter asked this Office to consider whether these amendments comply with 2019-2020 Budget Proviso 1.59. In relevant part, Proviso 1.59 reads:

> (SDE: Interscholastic Athletic Association Dues) (A) A public school district supported by state funds shall not use any funds or permit any school within the district to use any funds to join, affiliate with, pay dues or fees to, or in any way financially support any interscholastic athletic association, body, or entity unless the constitution, rules, or policies of the association, body, or entity contain the following:
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> ...
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> (2)(a) guarantees that private or charter schools are afforded the same rights and privileges that are enjoyed by all other members of the association, body, or entity.

This Office has previously concluded that a nearly identical 2015 proviso was applicable to the League. See Op. S.C. Att'y Gen., 2015 WL 3476565 (April 20, 2015) ("[T]here can be no

question, based upon the foregoing, that the SCHSL must comply with Proviso 1.81."). This Office similarly concludes that 2019-2020 Budget Proviso 1.59 applies to the League and its governing documents.

For the same reasons that this opinion finds the construction of the amendments to Sections 10, 10(D), and 10(M) of the League's bylaws may violate Section 59-63-100(F), it is this Office's opinion that a court would likely hold they violate Proviso 1.59. Again, the rules disproportionately render many charter schools students ineligible to participate in varsity and junior varsity athletics for a full year. This same reasoning applies more pervasively to students that transfer to private schools as these schools often do not have another school under same governing body or district. Because private and charter school students are disproportionately rendered ineligible to participate in interscholastic athletic, a court would likely hold the amendments violate Proviso 1.59.

## Conclusion

As is discussed more fully above, it is this Office's opinion that a court may well find the amendments to the League's By-Laws, specifically Article III, §§ 10, 10(D), 10(M), restrict private and charter school students' ability to participate in interscholastic athletics. While these amendments appear to apply equally to all schools, its impact is necessarily greater on students who transfer from public schools to charter schools and private schools than those that transfer within a public school district. Therefore, a court may well find that these amendments violate the Equal Access to Interscholastic Activities Act, S.C. Code Ann. § 59-63-100, and 2019-2020 Budget Proviso 1.59.

This opinion's analysis utilized the construction of the League's amended by-laws contained in an April 3, 2020 memorandum written by an attorney for the League. Certainly, the League could interpret its rules in a manner that is less restrictive to students that seek to transfer to charter schools and private schools. A more permissive interpretation of these amendments that would not result in disproportionate ineligibility of charter school and private school students in interscholastic activities may well comply with South Carolina law.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General