2015 WL 3476565 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 20, 2015

***1** The Honorable Larry Grooms
Senator, District No. 37
P.O. Box 142
Gressette Senate Office Building
Columbia, SC 29202

The Honorable Bruce W. Bannister
House of Representatives, Dist. No. 24
518-B Blatt Building
Columbia, SC 29211

Dear Senator Grooms and Representative Bannister:
By separate requests, you each have questioned a recent development concerning a proposed amendment to the Constitution of the South Carolina High School League ("SCHSL"). The request from Representative Bannister quotes the proposed amendment to Article V of SCHSL's Constitution, as follows:
[p]ublic high schools, including charter high schools, but excluding virtual schools, accredited by the South Carolina Department of Education whose principal or superintendent with the approval of the governing board, agrees to conform to the rules and regulations of the League shall be eligible to membership. Before being considered as a member of the League, the public charter high schools must clearly define its attendance area and enrollment count for athletic eligibility as the attendance area and enrollment count of the public school in which the school is located not to exceed on classification above its actual enrollment count, unless alternately approved by the Executive Committee. If the public charter school enrollment is larger than the public school in which the school is located or if the public charter school enrollment count is less than 200 students, the classification will be determined by its actual enrollment count.

South Carolina private high schools, excluding virtual schools, accredited by an organization recognized by the United States Department of Education or the South Carolina Department of Education whose principal or superintendent, with the approval of the governing board, agrees to conform to the rules and regulations of the League shall be eligible for membership. Before being considered as a member of the League, the private school must clearly define its attendance area and enrollment count for athletic eligibility as the attendance area and enrollment count of the public school in which the school is located not to exceed one classification above its actual enrollment count, unless alternately approved by the Executive Committee. If the private school enrollment is larger than the public school in which the school is located or if the private school enrollment count is less than 200 students, the classification will be determined by its actual enrollment count.

Senator Grooms notes in his letter that "[i]n March of 2015 the South Carolina High School League voted to require private and charter schools to compete with public schools in a higher division in athletics," citing to a March 18th, 2015 article in the Charleston Post and Courier. He quotes this article in pertinent part as follows:

> The SCHSL, gathering in Myrtle Beach earlier this week for the S.C. Athletic Administration Association meetings, approved the proposal to force private and charter schools to compete at a higher level than is mandated by the league's method of classification by enrollment. The poll of the State's 32 regions resulted in a 29-3 vote to make private schools such as Bishop England, Christ Church, St. Joseph's Catholic and Southside Christian to compete one classification higher than the individual school's enrollment figures would dictate.

***2** Senator Grooms further indicates that "w]hile this measure appears to apply to private schools equally, it has a disparate

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impact on Christian Schools. Additionally, it does not apply to private magnet schools."

Senator Grooms and Representative Bannister present two separate legal issues regarding this change in policy by SCHSL. Representative Bannister cites State Department of Education Proviso 1.81, which states:
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:

... (2)(a) guarantees that private or charter schools are afforded the same rights and privi9leges that are enjoyed by all other members of the association, body, or entity. A private or charter school may not be expelled from or have its membership unreasonably withheld by the association, body, or entity or restricted in its ability to participate in interscholastic athletics including, but not limited to state playoffs or championships based solely on its status as a private school or charter school.

Representative Bannister notes that "[t]hese proposed amendments appear to violate the language of the proviso." He further contends that:
[a]ll public schools are classified based on the enrollment count of that school. If the proposed amendments pass, however, private schools and charter schools will be classified not based on the enrollment count of the private or charter school, but instead based on enrollment count of another school. This appears to deprive private and charter schools of the same rights and privileges enjoyed by public schools in the SCHSL which is prohibited by the Proviso.

Representative Bannister further explains that "[t]here are fifteen schools negatively impacted by the proposed amendments to the Constitution."

Senator Grooms is more concerned with whether the SCHSL policy violates federal constitutional rights, although he also mentions possible violations of "state or federal law." He raises the following questions:
[d]oes this proposed proposal from the publicly funded South Carolina High School League violate the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution, the South Carolina Constitution's religious protections, or any other State or federal law.

Law/Analysis

At the outset, it is helpful to focus briefly upon the status of the SCHSL. Recently, in an opinion, dated September 8, 2014, 2014 WL 4659413, we stated the following:
[i]n 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.").

*3 In Op. S.C. Att'y. Gen., 1972 WL 26033 (Nov. 1, 1972), we commented on the freedom of an athletic association to implement its rules and policies, but distinguished that such rules and policies must coincide with the law. Specifically, we noted that:
[t]he High School League rules are similar to a contract in that members of the League have mutually agreed to abide voluntarily by these rules insofar as participation in intercollegiate sporting contests are concerned. State League rules, however, have no legal effect relative to actual enrollment, affordance, and transfer of pupils, which are governed by State statute....

Id. at * 1. In other words, the rules of the League do not usurp State legislation.

Thus, there can be no question, based upon the foregoing, that the SCHSL must comply with Proviso 1.81. Based upon the information submitted in your requests, we believe that it does not.

A number of rules of statutory construction are applicable here. It is well recognized that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). Courts will "give words their plain and ordinary meaning and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson Co. Sheriff's Office. 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). Further, "[a] statute remedial in nature should be liberally construed to accomplish the objective sought." Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008).

The purpose of the Proviso is clear and unambiguous. According to the Proviso, a private school or charter school must "be afforded the same rights and privileges that are enjoyed by all other members of the association, body, or entity." The "same" means "identical" or "alike in kind, quality, amount or degree." Websters New World Dictionary (2d ed.). Yet, the proposed amendment, on its face, treats private and charter schools differently. Public schools are classified for purposes of athletic contests based upon enrollment. However, private and charter schools are assigned a classification "not to exceed one classification above its actual enrollment count...." In short, enrollment count governs public schools; but not private and charter schools for purposes of athletic classification. These are classified based upon "enrollment plus one." We thus believe a court will likely conclude that private and charter schools do not receive the "same" rights and privileges as public schools from the League.

Such an assignment of classification one class higher across the board for only private and charter schools also, seems to us, arbitrary. Such arbitrary treatment of private and charter schools may well contravene the Equal Protection Clause of the Fourteenth Amendment. Assuming that the "state action" requirement imposed by the Fourteenth Amendment is met, a court could well conclude that the differing treatment of public schools and charter and private schools is irrational. The SCHSL League - would have to explain to a court the justification for treating these two classes of schools differently.

*4 Courts have concluded in various contexts, that differing treatment of public and private schools may violate the federal Constitution. In Immaculate Heart Central School v. N.Y. State Public High School Athletic Assn.. 797 F. Supp.2d 204, 215 (N.D.N.Y. 2011), the Court reviewed a challenge to a classification scheme, designed to "'place non-public school members in the appropriate class to ensure equitable competition regardless of enrollment.'" The Court noted that, "[t]o survive rational basis review, the classification must be rationally related to achieving that interest." id. In Immaculate Heart. the Court deemed that the Association "classifies non-public schools using factors in addition to enrollment figures." Id.

According to the Court, Immaculate Heart "alleged facts to overcome the presumption of rationality that applies to government classifications." Further, noted the Court,

[a]ccepting the allegations as true, they asserted facts to negate defendants' explanation that non-public schools have a competitive advantage because they can recruit without geographic boundaries.

Id. Thus, the Court summarized:

[t]he complaint and opposition provide a basis to conclude that there is a complete and utter lack of "rational relationship between the disparity of treatment and some legitimate governmental purpose."

Id. (citing Heller v. Doe. 509 U.S. 312, 320 (1993)). Accordingly, the Court found that the complaint could proceed on the Equal Protection claim. See also, Denis J. O'Donnell High School v. Virginia High School League. 581 F.2d 81, 84 (4th Cir. 1978) ["The right allegedly abridged, however, is not the right to education or the right to participate in interscholastic athletics; rather, the alleged abridgment is of the right of private school students to be treated similarly as public school students with regard to participation in interscholastic athletics where there is no rational basis for treating the two classes of students differently."].

Here, the SCHSL policy of automatically raising a private or charter school one classification higher for purposes of athletic

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competition appears to lack any rational basis. While only a court may apply the federal Constitution to the League's policy, at the very least, the League will have to justify a policy relating to athletic classification which applies only to private schools and charter schools, but which is not based upon enrollment. The statute demands that private and charter schools receive the "same" privileges and immunities from the League; however, we do not think the League's new policy does that.

Conclusion

While only a court may so conclude, it is our opinion that it would likely find that the proposed change in policy by the South Carolina High School League violates State law. Proviso 1.81 requires the League to afford "the same rights and privileges [to a private or charter school] that are enjoyed by all other members of the association, body or entity." As we understand it, the proposed SCHSL policy would "bump up" private and charter schools one classification beyond what they would ordinarily be classified by enrollment. Public schools receive no such treatment. Such a policy, in our view, does not afford private and charter schools the "same rights and privileges" as public schools.

*5 In addition, assuming there is the requisite state action, a court could also conclude that SCHSL is violating the Equal Protection Clause of the federal Constitution. At the very least, the League would have to justify this new policy as rationally related to a legitimate governmental purpose. Some courts have concluded that a policy designed to equalize competition through different treatment of public and private schools does not meet the constitutional standard. Because the policy automatically bumps up private and charter schools one classification, we believe that, at a minimum, the League's policy is constitutionally suspect.

Sincerely,

Robert D. Cook
Solicitor General

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