



HENRY McMASTER
ATTORNEY GENERAL

February 2, 2009

Susan DeVenny, Executive Director
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1300 Sumter Street
Columbia, South Carolina 29201

Dear Ms. DeVenny:

We understand you desire an opinion of this Office regarding the South Carolina Illegal Immigration Reform Act and its impact on First Steps to School Readiness ("First Steps") and its local partnerships. In your letter, you pose the following three questions:

First, I would like to know if the requirements of Chapter 29 apply if all programs are intended to benefit children 0-5 (under 18), and benefits to adults and businesses are a secondary result of our efforts? For example, a First Steps funded scholarship is awarded to an eligible child but does provide benefit to the entire family, as well as the child care center. Or, a family enrolled in a Parents as Teachers program, will be an active part of the services, although the goal of the services is to improve school readiness of the child.

Second, would the Office of First Steps be considered an agency or political subdivision under the chapter for any services provided directly? We appropriate money through the Department of Education, voluntarily comply with certain state rules and regulations, and our employees are paid through state payroll.

However, we are also recognized as a 501(c)(3) by the I.R.S., and our business is directed by a Board of Trustees rather than the Department. We provide minimal direct service from this office, but a notable example would be our involvement in the state legislated CDEPP (4 year old kindergarten) program created through a Department of Education budget proviso, where our employees provide technical assistance to child care providers with CDEPP classrooms, and the office provides tuition to qualified children to attend.

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The final question is, that even if you opine for some reason that my office must comply with chapter 29, I would ask your opinion about whether we must require the same of the local partnerships through our grant agreements. These offices are separate legal entities, and I would suggest should be treated like any other non-profit organization receiving public funds.

Law/Analysis

As you explained in your letter, in 2008, the Legislature passed the South Carolina Illegal Immigration Reform Act (the "Act"). 2008 S.C. Acts 2325. Among the provisions of this Act is the enactment of section 8-29-10 of the South Carolina Code. This provision states, in pertinent part:

(A) Except as provided in subsection (C) of this section or where exempted by federal law, on or after July 1, 2008, every agency or political subdivision of this State shall verify the lawful presence in the United States of any alien eighteen years of age or older who has applied for state or local public benefits, as defined in 8 USC Section 1621, or for federal public benefits, as defined in 8 USC Section 1611, that are administered by an agency or a political subdivision of this State.

S.C. Code Ann. § 8-29-10.

Your first question deals with whether this provision applies to First Steps given the fact that First Steps' programs are aimed at benefitting children ages zero to five. In order to answer your question, we must employ the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intention of the Legislature in enacting the statute. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). "Whenever possible, legislative intent should be found in the plain language of the statute itself." Id.

Section 8-29-10 provides that the immigration status of any alien over the age of eighteen who has applied for state or local public benefits must be verified. The plain language of this provision appears to require the agency or political subdivision to verify the status of the person applying for the benefit. This provision does not distinguish between those applying for the benefit and the person receiving the benefit. Accordingly, even if the person receiving the benefit is under the age of eighteen and the person actually submitting the application or requesting the benefit is over the age of eighteen, this provision appears to require the agency or political subdivision to verify the applicant's immigration status.

In your second question, you ask whether or not First Steps is considered an agency or political subdivision for purposes of section 8-29-10. We will first address whether First Steps is a political subdivision. Chapter 29 of title 8 does not define the term “political subdivision.” However, section 41-8-10 of the South Carolina Code, enacted as part of the Act, states this term “includes counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law.” Section 41-8-10, placing certain responsibilities on private employers to verify the status of aliens under the Act, appears to limit the use of this definition to chapter 8 of title 41, as the first sentence of this provision states: “As used in this chapter . . .” *Id.* Nonetheless, if this definition applied to section 8-29-10, First Steps would not be a political subdivision.

Moreover, several opinions of this Office discussed the meaning of the term political subdivision when use in statutes that do not define this term. Some of our opinions look to the definition of this term provided in article X, section 14 of the South Carolina Constitution (Supp. 2007). *Op. S.C. Atty. Gen.*, February 15, 1995; August 14, 1989. This provision gives political subdivisions the authority to issue bonded indebtedness and states that the term political subdivision means “the counties of the State, the incorporated municipalities of the State, and special purpose districts, including special purpose districts which are located in more than one county or which are comprised of one or more counties.” S.C. Const. art. X, § 14(1). Because First Steps is not a county, municipality, or a special purpose district, employing this definition, we do not believe First Steps is a political subdivision.

Other opinions recite certain attributes of political subdivisions and compare those attributes to the entity to determine whether it is a political subdivision. In a 1985 opinion, this Office discussed whether or not the Loris Community Hospital District is a political subdivision. *Op. S.C. Atty. Gen.*, May 9, 1985. We stated: “Attributes of a political subdivision generally include existence to discharge a governmental purpose; prescribed area; authority for subordinate self-government; existence for the benefit of residents of the area; and organized for public, rather than private advantage.” *Id.* See also, *Ops. S.C. Atty. Gen.*, March 12, 2003 (stating the attributes of a political subdivision include that it “exists for the discharging of some function of local government, that it has a prescribed area and that it possesses authority for subordinate self-government by the officers selected by it.”); April 21, 1982 (stating “[t]he words ‘political subdivision’ are a generic term which means any constitutionally or statutory established area within the State which has been given authority to exercise limited sovereignty within a defined area. In this State the principal political subdivisions are: counties[,] municipalities [,] school districts[,] special purpose districts: water[,] sewer[,] drainage[,] fire.”); November 19, 1968.

The Legislature established the First Steps initiative through its enactment of chapter 152 of title 59 of the South Carolina Code. In section 59-152-20 of the South Carolina Code (2004), the Legislature states the purpose of this initiative is “to develop, promote, and assist efforts of agencies, private providers, and public and private organizations and entities, at the state level and the community level, to collaborate and cooperate in order to focus and intensify services, assure the

most efficient use of all available resources, and eliminate duplication of efforts to serve the needs of young children and their families.” According to its stated purpose and in reading First Steps’ enabling legislation as a whole, we understand that this initiative is statewide. Although First Steps’ initiative is served through the use of local county partnerships, it operates on a statewide basis and not within a statutorily defined area. Therefore, we are of the opinion that First Steps lacks at least two of the attributes generally associated with political subdivisions. Thus, based on the various statutory definitions of political subdivision and the various attributes associated with political subdivisions, we do not believe First Steps is a political subdivision.

Whether First Steps is an agency is a more complex question than its status as a political subdivision. In a 2007 opinion, this Office considered whether First Steps is an agency for purposes of the Federal Privacy Act. Op. S.C. Atty. Gen., March 28, 2007. Because the Federal Privacy Act is federal law, not state, law, we looked to federal court decisions addressing whether an entity is an agency for purposes of the Federal Privacy Act. Id. The determination as to whether an entity is an agency appeared to rest on whether or not the entity was controlled by the federal government. Id. We determined, in light of federal court decisions, simply receiving funding from the federal or state government did not create an agency, but we must look at the day to day supervision of the entity by the State. We concluded as follows:

The fact that the Legislature established First Steps by statute and the fact that the Board of Trustees consists of public officials and those appointed by public officials may support an argument that First Steps is indirectly supervised and controlled by the State. But, in our review of First Steps’ enabling legislation, the only evidence of the State’s direct supervision over and involvement in First Steps’ operations is a provision requiring the Board of Trustees to annually submit a report to the Legislature on its activities and progress. S.C. Code Ann. § 20-7-9720(10) (Supp. 2006). In our opinion, this would not amount to the extensive day to day supervision contemplated by the federal courts in their determination of whether an entity is an agency for purposes of the federal Privacy Act.

Id. Nonetheless, we cautioned that

we acknowledge that the determination of whether the State exerts sufficient involvement in and control over First Steps’ daily activities would require an extensive investigation into First Steps’ operations. “The investigation and determination of factual issues must be left to a court.” Op. S.C. Atty. Gen., January 29, 2007. Thus, while we believe First Steps does not meet the requirements of a state agency under the federal Privacy Act, such a determination must be left to a federal court to decide.

Id.

Your question as to whether First Steps is an agency for purposes of the Act is a question of State, not federal law. While our 2007 opinion addressed whether First Steps is an agency, it did so pursuant to federal law. Thus, we must analyze whether our conclusion holds true under a State law analysis. Just as political subdivision is not defined in chapter 29 of title 8, agency is not defined under chapter 29 of title 8. The only definition of this term found anywhere in the Act is in section 41-8-10(A) of the South Carolina Code. As we mentioned, from the language in section 41-8-10, it appears that this definition's use is limited to chapter 8 of title 41. Moreover this provision states that the term means "any agency, department, board, or commission of this State or any political subdivision of this State that issues a license for the purposes of operating a business in this State." S.C. Code Ann. § 41-8-10(A) (emphasis added). First Steps does not issue licenses for operating businesses. Therefore, this definition would not include First Steps.

Black's Law Dictionary defines the term agency as "[a] governmental body with the authority to implement and administer particular legislation." Black's Law Dictionary 67 (8th ed. 2004). As a related term, Black's defines the term "state agency" as "An executive or regulatory body of a state. • State agencies include state offices, departments, divisions, bureaus, boards, and commissions." Id. at 68. Moreover, we found numerous definitions of the term agency in addition to that contained in section 41-8-10 within various parts of the South Carolina Code. See, e.g., S.C. Code Ann. §§ 1-23-310 (2005) (South Carolina Administrative Procedures Act); 1-25-30 (2005) (the Human Services Development Project); 2-15-50 (2005) (Legislative Audit Council); 2-65-15 (2005) (the South Carolina Federal and other Funds Oversight Act); 8-11-220 (1986) (dealing with State officers and employees); 8-17-320 (Supp. 2007) (State Employee Grievance Procedure), 15-78-30 (2005) (South Carolina Tort Claims Act). These definitions generally describe an agency to include state boards, institutions, commissions, departments, and officers. Accordingly, we presume the Legislature intended for the term agency in section 8-29-10 to include these types of entities as well.

While this Office has not addressed generally whether or not a body is an agency when no definition is provided, on several occasions, this Office employed the definitions listed above to determine whether a particular entity falls within the definition provided. In 1992, we considered whether the State Housing Authority is a state agency for purposes of the Administrative Procedures Act. Op. S.C. Atty. Gen., May 7, 1992. We noted that the Legislature created the Housing Authority by statute as a "public body corporate and politic, "" and that the Legislature gave the Housing Authority the authority to make regulations. Id. We also noted that the Housing Authority's employees are subject to State law governing personnel classification and compensation like other State agencies. Id. Accordingly, we concluded that the Housing Authority is a state agency for purposes of the Administrative Procedures Act. Id.

In 1994, we considered whether the South Carolina Public Service Authority is a state agency for purposes of audits conducted by the Legislative Audit Council. Op. S.C. Atty. Gen., March 10, 1994. We looked to the definition of an agency found in the statutes governing the Legislative Audit Council. Id. In addition, we took into account the fact that the Legislature created the Public Service Authority and gave it “expansive governmental powers and duties.” Id. We also noted that the Public Services Authority’s enabling legislation provides that it “‘is a corporation, completely owned by and to be operated for the benefit of the people of this State.’” Id. (quoting S.C. Code Ann. § 58-31-110 (1976)). Based on these findings, we concluded that “[t]he Authority is most clearly an agency of the State as that term is most often understood.” Id.

Our Court of Appeals addressed whether the Sumter Airport Commission is an agency for purposes of the South Carolina Tort Claims Act in Willis Const. Co., Inc. v. Sumter Airport Comm’n, 308 S.C. 505, 419 S.E.2d 240 (Ct. App. 1992). The Court acknowledged that the definition of the term agency under the Tort Claims Act includes commissions. Id. at 510, 419 S.E.2d at 242. However, the Court recognized that the Airport Authority “is neither a private corporation nor a political territorial subdivision.” The Court described the Airport Commission as follows: “It is a quasi-municipal corporation of a type commonly used to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care.” Id. Thus, the Court concluded that the Airport Commission is not a state agency for purposes of the Tort Claims Act. Id. at 511, 419 S.E.2d at 243.

However, just because an entity is created as a private nonprofit entity, we cannot ignore the fact that it may operate as an “alter ego” of the State. Prior opinions of this Office addressed this concept and found that regardless of an entity’s creation as a nonprofit corporation is may be viewed as a state actor. In a 2003 opinion, we stated:

Of course, in certain rare instances, a nonprofit corporation has been held to constitute a state, local or other governmental agency. In Op. S.C. Atty. Gen., September 6, 1996, this Office, citing a number of authorities, recognized that “courts sometimes look beyond a non-profit corporation’s status as such to determine whether, in reality, the corporation is an ‘alter ego’ of the State.” We referenced the case Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3d Cir. 1981) which held that Temple University, a nonprofit corporation, is not a “political subdivision” of the State. The Court observed that Temple did not possess the three principal attributes of sovereignty - the power to tax, the power of eminent domain or the police power. Therefore, the Court looked to whether there was any “identity of interest, control, or intent” such that Temple might be seen as the “alter ego of the State.” 666 F.2d at 841.

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As you point out, although the Legislature established First Steps' Board by statute, the Legislature established it as an eleemosynary corporation, rather than as governmental entity. S.C. Code Ann. § 63-11-1710. However, the Legislature provided for the appointment of several of the Boards' members by the Governor, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives, who serve along with the ex officio appointment of various governmental officials provided for by statute. S.C. Code Ann. § 63-11-1720. Section 63-11-1720 of the South Carolina Code specifies that these members shall serve a four-year term of office. In addition, section 63-11-1750(B) calls for the creation of a fund within the State general fund to account for funding received by First Steps from Legislative appropriations, which indicates that First Steps will be funded, at least in part, by state appropriations.

According to section 63-11-1730 of the South Carolina Code, while the Board's authority consists of many ministerial duties related to planning and development of programs, it also holds the authority to promulgate regulations and establish criteria and procedures for awarding grants funded by State appropriations. In addition, you also mention in your letter that through a Department of Education proviso, First Steps is involved in providing technical assistance to child care providers as part of the South Carolina Child Development Education Pilot Program (the "CDEPP"). According to the 2007-2008 appropriations act, First Steps is responsible for recruiting, and reviewing and making decisions on what private entities may provide four-year-old kindergarten programs, for which they will receive compensation from the State. 2007 S.C. Acts 751. First Steps is also charged with determining which students are eligible for this program. Accordingly, First Steps has significant decision making authority with regard to the State's four-year-old kindergarten program. Moreover, as you mentioned, its First Steps' employees are considered state employees. Thus, although not free from doubt, we believe many of these attributes could lead a court to find that First Steps is an agency.

Furthermore, First Steps' Board is a board created under state law. Thus, pursuant to the plain and ordinary definition of the term agency and many of the definitions of agency found in our statutes, a court could recognize First Steps's Board as an agency. However, like the Airport Commission in Willis Construction, First Steps is not purely a governmental entity. Nonetheless, given the authority given to First Steps by the Legislature, the fact that its employees are treated as state employees, and the composition and method of appointment of its board, we are of the opinion that a court would likely find First Steps is an agency for purposes of section 8-29-10. Given this possibility, we would advise First Steps to comply with section 8-29-10's provisions in order to ensure compliance with the Act.

Finally, you ask us to address whether First Steps' partnerships must comply with section 8-29-10. In other words, you ask whether or not these partnerships are political subdivisions or agencies for purposes of this provision. Several provisions under chapter 152 of title 59 address the creation of county First Steps partnerships. Section 59-152-60 of the South Carolina Code (2004) specifies the composition of such partnership boards. But, with the exception of up to four

appointments that may be made by the county delegations, the participants involved in the formation of the partnership are charged with the appointment of its board members. S.C. Code Ann. § 59-152-60. Section 59-152-70 of the South Carolina Code (2004) states the powers and duties of First Steps' partnerships, which for the most part charge the partnerships with planning for and the implementation of initiatives to carry out First Steps' goals.

Although First Steps' partnerships are called for under state law, they do not fall under the normal categories of entities classified as political subdivisions previously referenced in this opinion. These partnerships appear to maintain some of the attributes generally associated with political subdivisions. They serve a proscribed area, they are self governed by their boards, likely benefit the residents within the area they operate, and serve what we believe to be a public purpose. However, we do not believe they serve a purely local purpose in that they are to carry out the goals and purposes of First Steps, a statewide program. In addition, pursuant to section 59-152-70(E), the Legislature requires that these organizations must be "private nonprofit corporation[s] organized under Section 501(c)(3) of the Internal Revenue Code." S.C. Code Ann. § 59-152-70(E). Accordingly, we do not believe these partnerships are political subdivisions for purposes of section 8-29-10.

With regard to whether First Steps' partnerships are considered agencies, we first note that they are not state offices, departments, divisions, boards, or commissions, which are typically found to be agencies under various state laws. Like First Steps, the enabling legislation pertaining to these partnerships requires they be established as private, nonprofit corporations. However, unlike First Steps, the partnerships' boards are not, for the most part, comprised of public officials or selected by public officials. Rather, their boards consist of participants selected by its participants. Moreover, their boards do not have the authority to make regulations. You informed us that employees of the partnerships are not considered First Steps' employees. However, according to section 1-11-720 of the South Carolina Code (Supp. 2007), partnerships employees are entitled to state health and dental insurance.

While First Steps partnerships do have some of the characteristics of an agency, as they are created by statute and their employees are considered state employees for purposes of health and dental insurance, we believe they lack some of the characteristics cited in our prior opinions. In addition, while these partnerships receive state funding through grants provided by First Steps and are subject to some oversight by First Steps, they appear to be independent entities. Accordingly, we believe a court would be less likely to find that First Steps partnerships are agencies for purposes of section 8-29-10. Thus, we do not believe these partnerships are required to comply with this provision of the Act. However, this determination is not free from doubt. As such, it may be prudent for these partnerships to comply with the provisions of the Act.

Conclusion

Based on our interpretation of section 8-29-10 of the South Carolina Code, we read this provision as requiring agencies and political subdivisions to verify the status of a person applying for benefits if the person applying is over the age of eighteen. Thus, whether or not an agency or political subdivision must check the immigration status of an individual depends on the age of the person applying and not the age of the person receiving the benefit.

While we do not believe that First Steps is a political subdivision for purposes of section 8-29-10, a court could find that First Steps is an agency for purposes of section 8-29-10. Therefore, we advise First Steps to comply with this provision. However, we are of the opinion that county partnerships formed in association with First Steps are likely neither political subdivisions nor agencies for purposes of section 8-29-10. As such, pursuant to section 8-29-10, these partnerships would not be mandated to follow the requirements in this provision. However, in an abundance of caution, these partnerships may want to consider following the verification requirement in section 8-29-10.

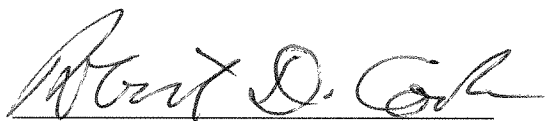
Very truly yours,

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