# The State of South Carolina

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March 24, 1989

The Honorable Joyce C. Hearn
Member, House of Representatives
503-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Hearn:

Your letter dated March 2, 1989, to Attorney General Medlock has been referred to me for response. You ask for an opinion on the following four (4) questions:

(1) Does the term "handicapped person" as defined in Section 2-7-35, S.C. Code of Laws (1976) include persons who suffer from diseases, either contagious or non-contagious?

(2) Does the term "handicapped person" as defined in Section 2-7-35, S.C. Code of Laws (1976) include persons who are infected with Human Immunodeficiency Virus, the virus which causes Acquired Immunodeficiency Syndrome (Aids), as determined by a positive HIV antibody test result?

(3) Does the term "handicapped person" as used in Section 43-33-560 S.C. Code of Laws (1976) include persons who are infected with Human Immunodeficiency Syndrome (AIDS), as determined by a positive HIV antibody test result?

(4) What effect, if any, does Section 2-7-35, S.C. Code of Laws (1976) have upon Section 43-33-560 S.C. Code of Laws (1976) which specifically refers to disease?

Of course, statutory construction is, ultimately, the province of the courts. Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942).

In interpreting a statute, the primary purpose is to ascertain the intent of the legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987); Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, 292 S.C. 411, 357 S.E.2d 6 (1987). When interpreting a statute, the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983).

Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Co. v. South Carolina Tax Comm'n, 292 S.C. 64, 354 S.E.2d 902 (1987). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Multi-Cinema, Ltd. v. South Carolina Tax Comm'n, supra. In determining the meaning of a statute, it is the duty of the court to give force and effect to all parts of the statute. State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Where the same word is used more than once in a statute, it is presumed to have the same meaning throughout unless a different meaning is necessary to avoid an absurd result. Smalls v. Weed, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987). The legislature is presumed to have fully understood the import of words used in a statute and intended to use them in their ordinary and common meaning, unless that meaning is vague and indefinite, or in their well-defined legal sense, if any. Powers v. Fidelity & Deposit Co. of Maryland, 180 S.C. 501, 186 S.E. 523 (1936).

"As a part of its legislative function a legislature may, beside enacting the original text of a law, also prescribe that words used elsewhere in the same statute or in other statutes are to carry specified meanings. . . ." Sutherland Stat. Constr. §27.01 (4th ed. 1985).

> Statutory definitions of words used elsewhere in the same statute furnish official and authoritative evidence of legislative intent and meaning, and are

> usually given controlling effect. Such internal legislative construction is of the highest value and prevails over executive or administrative construction and other extrinsic aids. . . . [Footnotes omitted.]

Sutherland Stat. Constr. §27.02 (4th ed. 1985).

Statutes in pari materia have to be construed together and reconciled, if possible, so as to render both operative. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). In construing a statute, it is proper to consider legislation dealing with the same subject matter. Fidelity and Casualty Ins. Co. of New York v. Nationwide Ins. Co., 278 S.C. 332, 295 S.E.2d 783 (1982).

S.C. Code Ann. §2-7-35 (1976) provides:

> Wherever the term "handicapped person" appears in the laws of this State, unless it is stated to the contrary, it shall mean a person who:
>
> (1) Has a physical or mental impairment which substantially limits one or more major life activities including, but not limited to caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
>
> (2) Meets any other definition prescribed by federal law or regulation for use by agencies of state government which serve handicapped persons.

S.C. Code Ann. §43-33-560 (1976) provides:

> Notwithstanding the provisions of §2-7-35 of the 1976 Code, the terms "handicap" and "handicapped" as used in this article mean a substantial physical or mental impairment, whether congenital or acquired by accident, injury, or disease, where the impairment is verified by medical findings and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement, but, with respect to

> employment, which is unrelated to the individual's ability to engage in a particular job or occupation. This does not include any individual who is an alcohol, drug, narcotic, or other substance abuser, or who is only regarded as being handicapped. The term "mental impairment" shall not include mental illness.

Applying the above rules of statutory construction to these statutes, I will address your questions seriatim.

1. Does the term "handicapped person" as defined in §2-7-35 include persons who suffer from diseases, either contagious or noncontagious?

Section 2-7-35 does not expressly use the term "disease" in its definition of "handicapped person." Similarly, §504 of the 1973 Vocational Rehabilitation Act[1] did not expressly use the term "disease." Nevertheless, in School Board of Nassau County,

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[1] Section 504 of the 1973 Vocational Rehabilitation Act provides, in relevant part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. §794 (1988 Supp.). The definition of "individual with handicaps" for use in §504 reads as follows:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such impairment.

(Footnote 1 continues on next page.)

Florida v. Arline, ___ U.S. ___, 107 S.Ct. 1123 (1987), the United States Supreme Court, considering §504 of the 1973 Vocational Rehabilitation Act, held that a person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of §504. Accord S.C. Att'y Gen. Op., #87-85 (Oct. 15, 1987)(analyzing the constitutionality of mandatory AIDS testing). The definitions of "handicapped person" in §2-7-35 and "individual with handicaps" in §504 of the 1973 Vocational Rehabilitation Act and regulations of the Department of Health and Human Services (which were used by the United States Supreme Court to reach its holding in Arline, supra) are remarkably similar. Although I am unaware of any judicial decision concerning §2-7-35, the analysis in Arline, supra, would almost certainly impact on a judicial construction of §2-7-35.

(continuation of footnote 1)

29 U.S.C. §706(7)(B) (1988 Supp.). The regulations promulgated by the Department of Health and Human Services define two critical terms used in the statutory definition of handicapped individual. School Board of Nassau County, Florida v. Arline, ___ U.S. ___, 107 S.Ct. 1123, 1127 (1987). "Physical or mental impairment" is defined as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary, hemic and lymphatic; skin; and endocrine; or (B) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 CFR §84.3(j)(2)(i)(1987). "Major life activities" is defined as:

> functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

45 CFR §84.3(j)(2)(ii)(1987). Accord Arline, supra at ___, 107 S.Ct. at 1127.

2. Does the term "handicapped person" as defined in §2-7-35 include persons who are infected with Human Immunodeficiency Virus, the virus which causes Acquired Immunodeficiency Syndrome (AIDS), as determined by a positive HIV antibody test result?

Similarly, §2-7-35 does not expressly use the term "Human Immunodeficiency Virus" or "Acquired Immunodeficiency Syndrome [AIDS]" in its definition of "handicapped person." Analyzing the impact of the United States Supreme Court's decision in Arline, supra, upon the issue of the constitutionality of mandatory AIDS testing, this Office has previously opined:

> The United States Supreme Court has not yet decided whether AIDS as a contagious disease constitutes a handicap within the provisions of the vocational Rehabilitation Act of 1973. But cf. School Board of Nassau County Florida v. Arline, ___ U.S. ___, 107 S. Ct. 1123 (1987)(A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of §504.) with Memorandum of the U.S. Dep't of Justice (Jun. 20, 1986)(The disabling effects of AIDS qualify as a handicap under §504 of the Vocational Rehabilitation Act of 1973, by the ability-real or perceived - to transmit the illness is not protected as a handicap under the law.)

S.C. Att'y Gen. Op. #87-85 (Oct. 15, 1987).

Subsequently, the United States Department of Justice, considering the subject in light of the decision in Arline, supra, concluded:

> "[W]ith respect to the non-employment context, [ ] section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity - - so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in Arline. We have further concluded that section 504 is similarly applicable in the

> employment context, except for the fact that the Civil Rights Restoration Act replaced the Arline "otherwise qualified" standard with a slightly different statutory formulation. We believe this formulation leads to a result substantively identical to that reached in the non-employment context: namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others. [Footnotes omitted.]

Memorandum of the U.S. Dep't of Justice (Sep. 27, 1988)(responding to a request for an opinion on the application of §504 of the 1973 Vocational Rehabilitation Act, 29 U.S.C. 794, to individuals who are infected with the Human Immunodeficiency Virus). Cf. Chalk v. U.S. District Court Central District of California, 840 F.2d 701 (9th Cir. 1988)(analyzing a challenge under the 1973 Vocational Rehabilitation Act by a teacher diagnosed as having AIDS whom the district court ruled was handicapped within the meaning of the Act and that ruling was not contested on appeal); Local 1812, American Federation of Gov't Employees v. U.S. Dep't of State, 662 F. Supp. 50, 54 (D.D.C. 1987)("In the present period of speculation and concern over the the incurable and fatal nature of AIDS there is no doubt that a known carrier of the virus which causes it is perceived to be handicapped."); Judd v. Packard, 669 F. Supp. 741 (D. Md. 1987)(Inmate who was placed in State prison hospital isolation units while being tested for AIDS had no claim under the 1973 Vocational Rehabilitation Act, in the absence of a nexus between the allegedly discriminatory conduct of the prison officials and the specific program receiving federal funding.). This interpretation of Arline, supra, by the United States Department of Justice, as well as the progeny of Arline, supra, will likely have a significant impact upon a judicial construction of whether §2-7-35 includes persons infected with the AIDS virus.

3. Does the term "handicapped person" as used in §43-33-560 include persons who are infected with the Human Immunodeficiency Syndrome (AIDS), as determined by a positive HIV antibody test result?

Again, §43-33-560 does not expressly use the term "Human Immunodeficiency Syndrome" or "AIDS"[2] in its definition of "handicap" or "handicapped." Analyzing the impact of S.C. Code Ann. §43-33-10 through §43-33-580 (1976) upon the issue of the constitutionality of mandatory AIDS testing, this Office has previously opined:

> Apparently, no South Carolina Courts have addressed whether AIDS is a handicap within the meaning of this statute. Thus, the success of a challenge by an AIDS victim pursuant to the South Carolina statute is unclear. . . .

S.C. Att'y Gen. Op. #87-85 (Oct. 15, 1987). I am unaware of any judicial decisions, since October 15, 1987, which address that issue.

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[2] "Persons who are infected with Human Immunodificiency Virus" and "persons with AIDS" may not be synonymous concepts. This Office has previously observed:

> For the nonepidemiologist, it is helpful to think of AIDS as a spectrum of HTLV-III disease ranging from HTLV-III infection in a healthy person, to recurrent nonopportunistic infections, to full blown AIDS as it is currently defined. Any disease associated with HTLV-III infection that does not fall far enough into the spectrum to be classified as AIDS is called AIDS-related complex (ARC). . . .

S.C. Att'y Gen. Op. #87-85 (Oct. 15, 1987)(quoting Sicklick & Rubinstein, A Medical Review of AIDS, 14 Hofstra L. Rev. 5, 5-6 (1985) and noting the Centers for Disease Control's recently altered definition of AIDS by citing the Atlanta Constitution, September 1, 1987, §1, at 25-A; The State (South Carolina), September 1, 1987, §1, at 2-A).

The definition of "handicap" or "handicapped" in §43-33-560 is not as similar to the definition of "individual with handicaps" in §504 of the 1973 Vocational Rehabilitation Act and regulations of the Department of Health and Human Services as is the definition of "handicapped person" in §2-7-35. For example, §43-33-560 provides that "handicap" or "handicapped" does not include any individual who is only regarded as being handicapped whereas 29 U.S.C. §706(7)(B) (1988 Supp.) includes within the definition of "individual with handicaps" for use in §504 to include any person who is regarded as having a physical or mental impairment which substantially limits one or more of such person's major life activities. Consequently, the United States Supreme Court's decision in Arline, supra, may have more limited impact upon a judicial construction of §43-33-560 than upon a judicial construction of §2-7-35.

4. What effect, if any, does §2-7-35 have upon §43-33-560 which specifically refers to disease?

Section 2-7-35 specifically defines the term "handicapped person" wherever it appears in the laws of this State, "unless it is stated to the contrary [Emphasis added.]" S.C. Code Ann. §2-7-35 (1976). Section 43-33-560 specifically defines "handicap" and "handicapped" as used in that article, "[n]otwithstanding the provisions of §2-7-35. [Emphasis added.]" Based upon the clear and unambiguous language of §§2-7-35 and 43-33-560 concerning their application, §43-33-560 (not §2-7-35) controls the use of the terms "handicap" and "handicapped" in article Seven (7) of Chapter Thirty-three (33) of the Code of Laws of South Carolina. See Duke Power Co. v. South Carolina Tax Comm'n, Supra; Walton v. Walton, supra; Sutherland Stat. Constr. §27.02 (4th ed. 1985).

I hope the above is of assistance to you. Analyzing the constitutionality of mandatory AIDS testing, this Office has previously observed:

> In addition to the complex and indeterminate legal issues, your inquiry also raises various policy considerations. As part of its responsibility for guiding the development of state agency policies in health-related matters, the South Carolina Department of Health and Environmental Control ["SCDHEC"] arranged a meeting for all Department/Agency heads on September 22, 1987, to discuss coordinated AIDS policies within South Carolina state government. The

State (South Carolina), September 10, 1987, §3, at 1-C. To insure uniformity and consistency among state agencies in their approach to the policy considerations raised by AIDS, SCDHEC is an available resource to assist you in this area of analysis. Also, the South Carolina General Assembly has established an Ad Hoc Legislative Panel on AIDS, chaired by Senator Nell Smith, to study the legislative, legal, and health-related issues raised by the disease. Although this Panel has not yet completed its study, I understand this Panel is a potential resource to assist in analyzing various AIDS issues. I also understand that the Governor's Office has a staff member in the Office of Executive Policy and Programs who is responsible for considering various AIDS issues. Obviously, the best approach to the plethora of issues raised by AIDS is an informed, uniform and consistent approach.

In summary, concerning the issue posed, ultimate state policy will be inextricably bound to the law on the subject, and the law has not yet developed sufficiently to permit this Office to render a definitive legal opinion as is requested. We recommend that you consult your attorneys and that you communicate with DHEC and/or other agencies specified in this opinion for needed assistance and coordination. Ultimately, it will be necessary that our courts decide the complex issues that you and other agencies are raising by way of opinion requests.

S.C. Att'y Gen. Op. #87-85 (Oct. 15, 1987). Since October, 1987, the South Carolina General Assembly has enacted 1988 S.C. Acts 336 (amending S.C. Code Ann. §44-1-110(1976)) to assure the South Carolina Department of Health and Environmental Control access to certain records when investigating epidemic and endemic diseases and 1988 S.C. Acts 490 (amending S.C. Code Ann. §§44-29-60 through -110, 44-29-130 through -140, & 44-29-190 through -210 (1976)), making, inter alia, it unlawful for anyone knowingly to expose another person to AIDS through the exchange of blood products or body fluids. Also since that date, the South Carolina Supreme Court has issued its opinions in Samson v. Greenville Hospital System, 295 S.C. 359, 368 S.E.2d 665 (1988)

(Considering a transfusion recipient's action against a blood center and hospital to recover for damages caused by the transfusion of blood allegedly tainted with the AIDS virus, the South Carolina Supreme Court held that the blood shield statute exempting providers of blood and blood products from implied warranty-based liability did not violate South Carolina's equal protection clause.) and Samson v. Greenville Hospital System, No. 22970, slip op. Davis's Advance Sheets (S.C. Sup. Ct. filed Feb. 21, 1989)(Considering, in part, the fact that plaintiffs allege that Helen Samson contracted the AIDS-related virus from a blood transfusion given to her while she was a patient at a hospital operated by the defendant, the South Carolina Supreme Court held that blood is not a product for purposes of strict liability in tort.). Of course, this statutory and decisional law constitute only an embryo in the development of South Carolina law addressing the myriad of issues raised by AIDS.

The General Assembly may wish to clarify §2-7-35 and §43-33-560 by an amendment which would either expressly include or exclude persons within the spectrum of HTLV-III disease as the term "handicapped person" would then be defined. Such clarification would obviously best indicate the intent of this legislation.

If I can answer any further questions concerning this matter, please advise me.

Sincerely,

Samuel L. Wilkins

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SLW/fg

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