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ATTORNEY GENERAL

May 29, 2015

Susan DeVenny, Director
S.C. First Steps to School Readiness
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Dear Ms. DeVenny,

We are in receipt of your opinion request concerning the interpretation of Section 63-11-1730 of the South Carolina Code which, as you are well aware, discusses the applicability of the Administrative Procedures Act ("APA") to First Steps' Board of Trustees ("the Board"). In your opinion request you note the following:

> Act 287 of 2014 (House Bill 3428, which reauthorizes and updates the First Steps to School Readiness Act of 1999), calls on the Board to perform a number of duties, including the development and promulgation of certain items "*in accordance with the South Carolina Administrative Procedures Act [APA].*"
>
> The list of duties the board is called on to oversee is extensive and includes items which may fall outside of the APA's stated domain (ex: receiving gifts and bequests, providing technical assistance and consultation, and the development and implementation of the Director's annual performance review, for example).

In light of this dilemma you have requested us to examine "how the [the Board] might appropriately exercise its responsibilities as delineated in Section 63-11-1730 of Act 287." Our response follows.

I. Background

According to Section 59-152-10 of the South Carolina Code, First Steps is "a comprehensive, results-oriented initiative for improving early childhood development and education services[.]" The initiative seeks to improve these services by providing both public and private funds to such an end, as well as increasing their accessibility to parents of young children. S.C. Code Ann. § 59-152-10 (2014 Supp.). As detailed in Section 59-152-20 of the Code and noted in our prior opinions:

> The purpose of the First Steps 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.

Op. S.C. Att'y Gen., 2013 WL 2121457 (May 6, 2013).

As you are well aware, the Board is established pursuant to Section 63-11-1720 of the Code. See S.C. Code Ann. § 63-11-1720(A) (2014 Supp.) ("There is created the South Carolina First Steps to School Readiness Board of Trustees . . ."). The role of the Board, along with the Office of First Steps to School Readiness and local First Steps partnerships, is to "ensure that collaborations, the existence and continued development of partnerships, and the sharing and maximizing of resources occur so that the funding of grants and services, as provided in this chapter, may continue." S.C. Code Ann. § 59-152-20.

Despite the distinct roles each of these entities play in carrying out the First Steps initiative, the Board is solely responsible for the oversight and accountability aspect of the initiative. See S.C. Code Ann. § S.C. Code Ann. § 59-152-40 (2014 Supp.). ("[The Board] . . . shall oversee and be accountable for the South Carolina First Steps to School Readiness initiative."). For example, the Board, in conjunction with the State Board of Education, is tasked with crafting a comprehensive long-range initiative regarding the implementation of First Steps' goals. See S.C. Code Ann. § 59-152-30 (2014 Supp.) (listing statutory goals); S.C. Code Ann. § 59-152-32 (2014 Supp.) (entrusting the Board to craft a comprehensive long range initiative in consultation with the State Board of Education). This includes adopting "a description of school readiness" S.C. Code Ann. § 59-152-32(A)(1); establishing "specific benchmarks and objectives" for administering programs benefitting preschool children, S.C. Code Ann. § 59-152-32(A)(2); determining the efficacy of state and local programs and activities, S.C. Code Ann. § 59-152-32(A)(3); publishing and distributing a "list of approved evidence-based and evidence-informed programs," S.C. Code Ann. § 59-152-32(A)(4), and implementing a statewide "school readiness assessment" in order to establish "standards and practices to support all early childhood providers served by First Steps." S.C. Code Ann. § 59-152-33(D) (2014 Supp.). Moreover, the Board, again consistent with its oversight and accountability duties, has been tasked with reviewing reports and data collected by the Office of First Steps for the purpose of better targeting "at risk children" and evaluating the success of its current programs. See S.C. Code Ann. § 59-152-50(6) (2014 Supp.) (requiring the Board to review reports and data regarding at risk children); S.C. Code Ann. § 59-152-50(7) (2014 Supp.). (mandating that the Board review reports and data related to success of current programs).

These specific oversight and accountability duties are largely in addition to the Board's general duties as described in Sections 63-11-1730 of the Code, as well as the more specific roles

as established in Sections 59-152-90 and 59-152-160 regarding grant funding to local partnerships and internal evaluation of local policies and procedures related to grant funding. See S.C. Code Ann. § 63-11-1730(1)-(14) (listing the Board's general oversight and accountability duties); S.C. Code Ann. § 59-152-90 (2014 Supp.) (detailing the Board's specific oversight and accountability role with respect to local partnership grant funding); S.C. Code Ann. § 59-152-160 (2014 Supp.) (explaining the Board's role in establishing internal evaluation policies and procedures for local partnerships). Thus to summarize, the Board's role, pursuant to the above-cited statutes in Chapter 152 of Title 59 and Section 63-11-1730, is primarily to oversee local partnerships and hold them accountable through the application of state law, and where applicable, the promulgation of administrative regulations.

II. Law/Analysis

Understanding the Board and its role within the South Carolina First Steps to School Readiness initiative, we now return to your question regarding Section 63-11-1730 and the meaning of the phrase "in accordance with the APA" as contained within the statute's introductory language. Specifically, we will address whether the phrase, "in accordance with the APA," and its' location within the statue was intended to apply to each of the statute's fourteen subsections. Stated simply, we believe it was not.

In order to answer your question we must first look to the intent of the legislature in enacting the statutory provisions at issue. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court looks to the "plain meaning" of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Indeed, courts will only reject the plain and ordinary meaning of the words used in a statute when doing so would defeat the intent of the legislature. Greenville Baseball v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815 (1942).

Section 63-11-1730, entitled "Board of trustees; promulgation of comprehensive long-term initiative; regulations; policies" states as follows:

> To oversee and be accountable for the South Carolina First Steps to School Readiness Initiative, *in accordance with the APA*, the board shall:
>
> > (1) develop and promulgate a comprehensive long-range initiative for improving early childhood development and increasing school

readiness and literacy, which shall include the specific requirements of Chapter 152, Title 59;

(2) in accordance with the APA, promulgate regulations and establish guidelines, policies, and procedures for the continued implementation of the South Carolina First Steps to School Readiness initiative;

(3) provide oversight on the continued implementation and evaluation of the South Carolina First Steps to School Readiness initiative at the state and local levels;

(4) establish and promulgate grant qualification requirements and a formula by which allocations for qualifying partnership grants shall be calculated;

(5) ensure the provision of technical assistance, consultation services and support to First Steps Partnerships including: the creation and annual revision of county needs assessments; the prioritization, implementation, and evaluation of each First Steps Partnership's strategic plans based on needs assessments; and the identification of assets from other funding sources;

(6) assess and develop recommendations: for ensuring coordination and collaboration among service providers at both the state and county level, for increasing the efficiency and effectiveness of state programs and funding and other programs and funding sources, as allowable, as necessary to carry out the First Steps to School Readiness initiative, including additional fiscal strategies, redeployment of state resources, and development of new programs;

(7) establish and promulgate results-oriented measures and objectives and assess whether services provided by First Steps Partnerships to children and families are meeting the goals and achieving the results established for the First Steps initiative pursuant to Chapter 152, Title 59;

(8) receive gifts, bequests, and devises for deposit for awarding grants to First Steps Partnerships;

(9) report annually to the General Assembly by January first on activities and progress to include recommendations for changes and legislative initiatives and results of program evaluations;

> (10) establish and promulgate internal policies and procedures to allow the board to operate optimally, which shall include, but not be limited to, an established and consistent process for decision making;
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> (11) develop, implement, and document an annual performance process for the Director of the Office of South Carolina First Steps;
>
> (12) establish and promulgate bylaws for adoption by local First Steps Partnerships;
>
> (13) establish and promulgate internal evaluation policies and procedures for local partnerships for annual review pursuant to Chapter 152, Title 59; and
>
> (14) arrange for the conduction of an independent external program evaluation pursuant to Chapter 152, Title 59

S.C. Code Ann. § 63-11-1730 (emphasis added).

Analyzing the phrase "in accordance with the APA" within the statute's introductory language, language ending with a colon followed by sequentially numbered subsections ending with semi-colons, it would appear, from a grammatical standpoint, that the phrase "in accordance with the APA" should apply to each subsection of the statute. See 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction, § 47:1, at 274-75 (7th ed. 2007) ("The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.")). For example, in Meridian Oil, Inc. v. New Mexico Taxation and Rev. Dep't., 122 N.M. 131, 134, 921 P.2d 327, 330 (N.M. Ct. App. 1996) the New Mexico Court of Appeals, interpreting a statute with the same grammatical structure—an introductory phrase ending with a colon followed by subsections individually ending with semi-colons—relied on the canons of statutory construction and held such a structure evidenced an intent to create a list with each subsection being independent of the others within the list. Thus, by simply relying on the statutory canons of construction along with the statute's grammatical composition and structure here, one could conclude the APA was intended to apply to each of Section 63-11-1730's subsections.

However, and as noted in your letter, construing Section 63-11-1730's "in accordance with the APA" language in this instance is problematic. For instance, and as noted in your request letter, were we to interpret Section 63-11-1730's APA language as applying to each subsection within Section 63-11-1730, doing so would actually extend the APA's procedural requirements to contexts outside of its' originally defined parameters. Specifically, such an interpretation would take APA requirements such as publication, notice and comment, and

legislative ratification, all of which are limited to regulations as defined by Section 1-23-10(4), and apply them in situations that are entirely outside of the APA's intended scope. See S.C. Code Ann. § 1-23-40(1) (2005) (requiring the publication of "[a]ll *regulations* promulgated or proposed to be promulgated by state agencies which have general public applicability and legal effect") (emphasis added); S.C. Code Ann. § 1-23-110 (2005) (delineating notification procedures to be followed for the promulgation, amendment and repeal of *regulations*) (emphasis added); S.C. Code Ann. § 1-23-120 (2005) (requiring the Legislature ratify proposed *regulations*) (emphasis added); see also, Sloan v. S.C. Bd. of Phys. Therapy Examiners, 370 S.C. 452, 474, 636 S.E.2d 598, 609 (2006), ("[T]he APA generally requires a state agency to give notice of a drafting period during which public comments are accepted on a proposed *regulation*; conduct a public hearing on the proposed *regulation* overseen by an administrative law judge or an agency's governing board; possibly prepare reports about the *regulation's* impact on the economy, environment, and public health; and submit the *regulation* to the Legislature for review, modification, and approval or rejection.") (emphasis added).

To demonstrate, the definitions section of the APA, Section 1-23-10(4), defines a "regulation" as a statement of "general public applicability that implements or prescribes law or policy or practice requirements of any agency." See S.C. Code Ann. § 1-23-10(4) (2005) ("'Regulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency."). Further, Section 1-23-10(4) specifically excludes the following from the definition of regulation:

> *descriptions of agency procedures applicable only to agency personnel*; opinions of the Attorney General; decisions or orders in rate making, price fixing, or licensing matters; awards of money to individuals; policy statements or rules of local school boards; regulations of the National Guard; decisions, orders, or rules of the Board of Probation, Parole, and Pardon Services; orders of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients; decisions of the governing board of a university, college, technical college, school, or other educational institution with regard to curriculum, qualifications for admission, dismissal and readmission, fees and charges for students, conferring degrees and diplomas, employment tenure and promotion of faculty and disciplinary proceedings; decisions of the Human Affairs Commission relating to firms or individuals; advisory opinions of agencies; and other agency actions relating only to specified individuals.

S.C. Code Ann. § 1-23-10(4) (emphasis added). Nevertheless, if we were to interpret Section 63-11-1730's "in accordance with the APA," language as applying to each subsection, then certain subsections of Section 63-11-1730, such as Section 63-11-1730(10), which requires the Board to "establish and promulgate *internal policies and procedures*," would be subject to APA procedural requirements despite the fact the APA has expressly exempted its requirements from

applying in this exact situation.[1] See S.C. Code Ann. § 1-23-10(4) ("The term regulation . . . does not mean descriptions of agency procedures applicable only to agency personnel). Indeed, our prior opinions reinforce that the APA does not apply in such a context as internal policies and procedures do not meet the APA's definition of a regulation. See Op. S.C. Att'y Gen., 1977 WL 24669 (October 24, 1977) (concluding the APA does not apply to a draft policy manual regarding State Personnel Rules and Regulations as they do not constitute a "regulation" for purposes of the APA); Op. S.C. Att'y Gen., 1978 WL 34770 (March 16, 1978) (stating the APA does apply to policy statements or directives of the Budget Control Board where such statements and directives are internal policies only applicable to state employees and therefore do not meet the APA's definition of a regulation); Op. S.C. Att'y Gen., 1979 WL 43494 (July 31, 1979) (finding the Department of Highways and Public Transportation's internal list of investigatory procedures to be employed in determining whether a vehicle is properly insured is not subject to APA requirements as the document is not a "regulation" under the APA).

A similar problem occurs with respect to Section 63-11-1730(3). Section 63-11-1730(3) requires the Board to "provide oversight on the continued implementation and evaluation of the South Carolina First Steps to School Readiness initiative at the state and local levels." Yet applying the APA's procedural requirements in this context would mean the Board, when performing its statutory duties of oversight, implementation and evaluation, would need to provide notice and comment as well as legislative ratification whenever the Board engages in oversight, implementation and evaluation despite the fact the APA clearly has no applicability in such a situation. This construction of Section 63-11-1730's introductory "in accordance with the APA" language, as well as Section 63-11-1730(3) in particular, would be plainly absurd, as it is both inconsistent with the APA's intended reach and significantly burdens the Board's ability to carry out its most basic statutory functions.

The same is true with respect to other subsections of Section 63-11-1730. Notably, the subsection mentioned in your letter, Section 63-11-1730(8), if read in conjunction with 63-11-1730's introductory "in accordance with the APA" phrase, would require the Board to "receive gifts, bequests, and devises for deposit for awarding grants to First Steps Partnerships" in accordance with the APA. S.C. Code Ann. § 63-11-1730(8). In other words, under the expansive interpretation of the phrase "in accordance with the APA" the Board, when receiving private funds earmarked for awarding grants to First Steps Local Partnerships, would be required to go through APA procedural requirements like notice and comment as well as legislative ratification in order to receive private donations intended for First Steps Local Partnerships. Such a construction would not only offend the general rule of trust and estate law—that the intent of the testator be honored[2]—but would also allow the Legislature, by declining to ratify a

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[1] This same line of reasoning would appear to apply to S.C. Code Ann. § 63-11-1730(12) as we believe the establishment and promulgation of bylaws for local First Steps Partnerships constitute "agency descriptions of agency procedures applicable only to agency personnel" as described in Section 1-23-10(4).

[2] See Wilson v. Dallas, 403 S.C. 411, 453, 743 S.E.2d 746, 769 (2013) (Toal, C.J. concurring) (acknowledging "the cardinal rule of trusts and estates law" is "that the intent of the testator must prevail wherever possible" and further

particular private donation, to effectively veto an individual's decision to direct funds to a private group. Again, this is plainly an absurd and unreasonable interpretation of Section 63-11-1730. As a result, we believe Section 63-11-1730's introductory "in accordance with the APA" language must be subject to a different interpretation. See Palmetto Co v. McMahon, 395 S.C. 1, 5, 716 S.E.2d 329, 331 (Ct. App. 2011) ("An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended."); Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) ("[When] the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself."); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.");

Acknowledging Section 63-11-1730's introductory "in accordance with the APA" language cannot be applied to each subsection of the statute since doing so would lead to unreasonable and absurd results, we must now select from alternative interpretations of the statute. However, in doing so we remain bound by the canons of statutory construction and, as a result, must continue to give effect to all phrases contained within the statute while staying faithful to the statute's legislative intent. See S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase."). Indeed, the "words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words." State v. Bodden, 877 So.2d 680, 686 (Fla. 2004). This is so because, under a basic rule of statutory construction, the Legislature is not presumed to "enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." Bodden, 877 So.2d at 686 (quoting State v. Goode, 830 So.2d 817, 824 Fla. 2002)).

Keeping these concepts in mind, we believe the better interpretation of Section 63-11-1730's "in accordance with the APA" language is to interpret the phrase consistent with the APA's regulatory power rather than independent of such power. In other words, the phrase "in accordance with the APA" should be understood as meaning "in accordance with the APA where applicable" or "consistent with the powers of the APA." By doing so, the statute can be read as giving maximum effect to Section 63-11-1730's "in accordance with the APA" language, while simultaneously avoiding the absurd results of applying the APA to contexts outside of the normal regulatory process.

Moreover, interpreting the phrase "in accordance with the APA" in conjunction with the APA's statutorily defined limits also appears to be consistent with the legislative history of Act

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suggesting governmental intervention without regard for any legal deficiency in a testamentary document may constitute overreach).

287 of 2014. See Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964) (stating the Legislature intended to change existing law by amending a statute); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (holding Courts must presume the Legislature intended to do something by amending a statute as the Legislature's action is to accomplish something rather than doing a futile thing). Indeed, prior to the enactment of Act 287, Section 63-11-1730 was simply a non-exclusive list of the Board's powers and contained no mention of oversight, accountability, or the APA.[3] See S.C. Code Ann. § 63-11-1730 (2008)

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[3] The previous version of Section 63-11-1730 stated as follows:

> To carry out its assigned functions, the board is authorized, but not limited to:
>
> > (1) develop a comprehensive long-range initiative for improving early childhood development and increasing school readiness;
> >
> > (2) promulgate regulations, establish guidelines, policies and procedures for implementation of the South Carolina First Steps to School Readiness initiative;
> >
> > (3) provide oversight on the implementation of the South Carolina First Steps to School Readiness initiative at the state and county levels;
> >
> > (4) facilitate and direct the establishment of developing County First Steps Partnerships and establish the criteria for designation of County First Steps Partnerships;
> >
> > (5) establish criteria and procedures for awarding state First Steps grants to County First Steps Partnerships;
> >
> > (6) provide technical assistance, consultation services and support to County First Steps Partnerships including: the creation and annual revision of county needs assessments; the prioritization, implementation, and evaluation of each First Steps Partnership's strategic plans based on needs assessments; and the identification of assets from other funding sources;
> >
> > (7) assess and develop recommendations: for ensuring coordination and collaboration among service providers at both the state and county level, for increasing the efficiency and effectiveness of state programs and funding and other programs and funding sources, as allowable, as necessary to carry out the First Steps to School Readiness initiative, including additional fiscal strategies, redeployment of state resources, and development of new programs;
> >
> > (8) establish results oriented measures and objectives and assess whether services provided by County First Steps Partnerships to children and families are meeting the goals and achieving the results established for the First Steps initiative pursuant to Chapter 152, Title 59;
> >
> > (9) receive gifts, bequests, and devises for deposit for awarding grants to First Steps Partnerships; and

("To carry out its assigned functions, the board is authorized, but not limited to . . . ."); 2014, S.C. Acts No. 287 ("to amend 63-11-1730, relating to powers of the board of trustees . . ."); see also, Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 30 (June 2013) (relying on the prior version of Section 63-11-1730's subsections as responsibilities of the Board). However, Act 287 changed this; amending Section 63-11-1730's introductory language to incorporate the Board's oversight and accountability role as well as including the statute's initial, "in accordance with the APA" language—both recommendations which were first proposed in a 2013 Legislative Audit Council ("LAC") report to enhance the Board's accountability with respect to the First Steps initiative. See Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 32-34 (June 2013) (discussing shortcomings in the Board and recommending both additional oversight by the Board as well as oversight of the Board); Id. at 49 (suggesting the Board promulgate regulations in accordance with the APA). This is consistent with other portions of Act 287 where the Legislature adopted LAC recommendations and incorporated them as amendments to the First Steps' reauthorization.[4] As a result, we believe that in addition to the canons of statutory construction, the legislative history of Act 287 supports an interpretation of 63-11-1730 that not only gives maximum effect to the use of the phrase "in accordance with the APA" but also enhances the Board's accountability role by subjecting the Board's regulations to the APA's procedural requirements as suggested in the LAC's 2013 report. See Palmetto Co., 395 S.C. at 5, 716 S.E.2d at 331 ("[L]egislative history may be probative in determining the legislature's intent); 2A Norman Singer & Shambie

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> (10) report annually to the General Assembly by January first on activities and progress to include recommendations for changes and legislative initiatives and results of program evaluations.

S.C. Code Ann. § 63-11-1730 (2008).

[4] Compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 16 (recommending the Legislature amend state law to define "school readiness") with 2014, S.C. Acts No. 287 (amending S.C. Code Ann. § 59-152-32 to include a "description of school readiness"); compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 17 (suggesting the Legislature amend state law to authorize the adoption of a statewide readiness assessment) with 2014, S.C. Acts No. 287 (adding a statewide assessment of school readiness in S.C. Code Ann. § 59-152-33); compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 33 (recommending the amendment of S.C. Code Ann. § 63-11-1720 to permit the Governor and Superintendent of Education to assign designees on the Board) with 2014, S.C. Acts No. 287 (amending S.C. Code Ann. § 63-11-1720 to permit the Governor and Superintendent of Education to assign designees on the Board); compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 33 (suggesting the amendment of S.C. Code Ann. § 1-5-40 to add the Board to the list of boards and commissions monitored by the Secretary of State); with 2014, S.C. Acts No. 287 (amending S.C. Code Ann. § 1-5-40 to add the Board to the list of boards and commissions monitored by the Secretary of State); compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 34 (recommending a more orderly decisions making process with distribution of meeting minutes in accordance with the Board's internal bylaws) with 2014, S.C. Acts No. 287 (amending S.C. Code Ann. § 63-11-1730 to require the Board to "establish and promulgate internal policies and procedures to allow the board to operate optimally" including an established consistent decision making process); compare e.g., Legis. Audit Council, "A Review of S.C. First Steps to School Readiness," p. 34 (suggesting the development and implementation of an annual performance evaluation process for the First Steps director) with 2014, S.C. Acts No. 287 (amending S.C. Code Ann. § 63-11-1730 to require the development, implementation and documentation of an annual performance process for the director of First Steps).

Singer, Sutherland's Statutory Construction, § 45:5 (7th ed.) ("[In ascertaining legislative intent,] [c]ourts may consider the history of the subject matter involved, the end to be attained, the mischief to be remedied, and the purpose to be accomplished.").

With this in mind, we end by answering your question as to "how the [the Board] might appropriately exercise its responsibilities as delineated in Section 63-11-1730." In response, we advise that the Board need only apply our present interpretation of Section 63-11-1730's, "in accordance with the APA" language; meaning the phrase should be construed as "in accordance with the APA where applicable" and apply it to the statutory responsibility at issue. Thereafter, the only additional analysis the Board must perform when determining how to appropriately discharge its responsibilities is whether the statutory duty mentioned in the applicable subsection of Section 63-11-1730 requires the Board to "promulgate" what is defined as a "regulation" according to the terms of the APA—if it does, the APA's procedural requirements apply, and if it does not, they do not apply. Other than that, the only additional advice we would add is to err on the side of caution when performing this statutory analysis and defer to the application of the APA procedural requirements since a failure to subject an APA-defined regulation to APA procedural requirements would render the regulation invalid. See Home Health Service, Inc. v. South Carolina Tax Com'n, 312 S.C. 324, 329, 440 S.E.2d 375, 378 (1994) (cautioning the South Carolina Tax Commission that "when there is a close question whether a pronouncement is a policy statement of regulation, the commission should promulgate the ruling as a regulation in compliance with the APA."); Avant v. Willowglen Academy, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) ("Under the Administrative Procedures Act, policy or guidance issued by an agency other than in a regulation does not have the force of law.") (internal quotations omitted).

III. Conclusion

In conclusion, it is the opinion of this Office that the phrase "in accordance with the APA" as contained within Section 63-11-1730's introductory language does not apply to each of the statute's fourteen subsections. While it is true mere reliance on the statutory canons of construction along with the statute's grammatical composition and structure would typically suggest otherwise, and should at a minimum merit legislative clarification, such an interpretation here would lead to an absurd and unreasonable result by extending the application of the APA outside of a regulatory context. Accordingly, we believe the better reading of Section 63-11-1730's introductory, "in accordance with the APA" language, is to read it in a way that harmonizes the language with the proper application of the APA's regulatory boundaries and is consistent with the statute's legislative history. Here, this means the phrase should be interpreted to mean "in accordance with the APA where applicable," an interpretation that not only gives maximum effect to the use of the phrase, but also eliminates the absurd result of applying the APA outside of a regulatory context. Therefore, we advise you that when the Board seeks to discharge its statutory responsibilities as delineated in Section 63-11-1730, the Board must look at the particular subsection in issue and determine whether the statutory duty mentioned in the subsection of Section 63-11-1730 requires the Board to "promulgate" what is defined as a

"regulation" according to the terms of the APA. However, because a regulation that is not promulgated in accordance with the APA's procedural requirements will render the regulation invalid as detailed in Avant, we suggest the Board err on the side of APA applicability when performing this analysis.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General