October 27, 2009

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

Dear Ms. DeVenny:

We received your letter requesting a follow-up opinion to the opinion we issued to you on February 2, 2009 addressing whether First Steps is considered an agency for purposes of the Illegal Immigration Reform Act (the "Act") passed by the Legislature in 2008. In that opinion, we determine that First Steps is an agency for purposes of section 8-29-10 of the South Carolina Code (Supp. 2008), contained within the Act. Now, we understand you wish us to address whether or not the services First Steps provides constitute a public benefit pursuant to section 8-29-10.

Law/Analysis

Section 8-29-10 of the South Carolina Code provides, 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.

(emphasis added). Section 1621(c) of title 8 of the United States Code provides the following definition of "state or local public benefit":

> (1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means–
>
> > (A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local

> government or by appropriated funds of a State or local government; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

In your letter, you argue that "First Steps' services are not covered by the federal definition of state benefits, and that, therefore, the Act would not apply." You assert that First Steps' purpose is educational in nature and that aside from postsecondary education, the definition of state or local public benefit does not include educational services.

The Legislature established First Steps by enacting chapter 152 of title 59. By section 59-152-20 of the South Carolina Code (2004), the Legislature states the purpose of First Steps 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." Section 59-152-30 of the South Carolina Code (2004) states First Steps' goals are to:

> (1) provide parents with access to the support they might seek and want to strengthen their families and to promote the optimal development of their preschool children;
>
> (2) increase comprehensive services so children have reduced risk for major physical, developmental, and learning problems;
>
> (3) promote high quality preschool programs that provide a healthy environment that will promote normal growth and development;
>
> (4) provide services so all children receive the protection, nutrition, and health care needed to thrive in the early years of life so they arrive at school ready to learn; and
>
> (5) mobilize communities to focus efforts on providing enhanced services to support families and their young children so as to enable every child to reach school healthy and ready to learn.

As you mentioned in your letter, these goals are primarily implemented at the local level through First Steps' county partnerships, which the Legislature authorized in section 59-152-60 of

the South Carolina Code (2004). Section 59-152-100 of the South Carolina Code (2004) states the focus of the activities and services provided by these county partnerships should focus on the following:

(1) lifelong learning:

(a) school readiness;

(b) parenting skills;

(c) family literacy; and

(d) adult and continuing education.

(2) health care:

(a) nutrition;

(b) affordable access to quality age-appropriate health care;

(c) early and periodic screenings;

(d) required immunizations;

(e) initiatives to reduce injuries to infants and toddlers; and

(f) technical assistance and consultation for parents and child care providers on health and safety issues.

(3) quality child care:

(a) staff training and professional development incentives;

(b) quality cognitive learning programs;

(c) voluntary accreditation standards;

(d) accessibility to quality child care and development resources; and

(e) affordability.

(4) transportation:

(a) coordinated service;

(b) accessibility;

(c) increased utilization efficiency; and

(d) affordability.

From these provisions, we agree with your assessment that the services First Steps provides are aimed at "ensuring children arrive at school ready to learn." Thus, it appears the benefits provided by First Steps are educational in nature. However, we cannot ignore the fact that First Steps' enabling legislation contemplates that First Steps may provide some health benefits as well. Section 1621(c) specifically includes health benefits in the definition of state or local public benefits. Both section 59-152-30 and 59-152-100 mention healthcare for children as part of First Steps' initiatives. However, in your letter you state these health services are provided through partner entities and that while a First Steps' staff member may be involved in the coordination of health services, they are not directly involved in providing health services to participants in First Steps' programs. Based on your assertions, we believe a court would likely find that First Steps provides educational benefits rather than health benefits to its participants.

Although a court would likely find the benefits provided by First Steps to be educational in nature, in order to find that First Steps is not required to verify the lawful presence in the United States of those receiving its services pursuant to section 8-29-10, a court would also need to find the type of educational benefits offered by First Steps are excluded from the state or local public benefits referenced in section 8-29-10. Because the Legislature in section 8-29-10 defers to the federal definition of this term in section 1621 of title 8 of the United States Code, we must consider federal cases interpreting this definition. Unfortunately, in our research, we were unable to uncover any federal cases determining whether, as you assert, by specifically including postsecondary education in its definition of state or local public benefit, Congress intended to exclude all other types of educational benefits.

However, we found a California District court decision indicating that public elementary and secondary education are excluded from the definition of state or local public benefit under section 1621. In League of United Latin American Citizens v. Wilson, 997 F.Supp. 1244 (C.D. Cal. 1997) the District Court for the Central District of California addressed whether a portion of a state initiative denying public elementary and secondary education to certain aliens was invalid due the provisions in the Personal Responsibility and Work Opportunity Reconciliation Act (the "PRA"), the federal legislation containing section 1621. With regard to section 1621, the Court found that its provisions must be read in conjunction with the Supreme Court's determination in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), finding "a state cannot deny public education to children based on their immigration status." Id. at 1255. The District Court stated as follows with regard to the PRA and the Court's decision in Plyer:

> The PRA provides strong support for this finding. As stated, the PRA is a comprehensive statutory scheme regulating alien eligibility for government benefits. It does not deny public elementary and

> secondary education to aliens, but it does specifically deal with the subject of basic public education. Section 1643 provides, "Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under Plyler v. Doe (457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786) (1982)." 8 U.S.C. § 1643. Thus, although basic public education clearly must be classified as a government benefit, just as health care is, the PRA does not purport to deny it to non-qualified aliens.

Id. at 1255. Thus, at least one federal court has determined that the definition of state or local public benefit does not include primary and secondary education.

The programs offered by First Steps are not primary and secondary education. Thus, a court likely would not find Plyler applicable to the benefits provided by First Steps. However, a court could nonetheless employ the rules of statutory construction to determine that the benefits provided by First Steps do not fall under the definition of state or local public benefits provided in section 1621(c).

"When interpreting a statute, the goal is always to ascertain and implement the intent of Congress." Scott v. U.S., 328 F.3d 132, 139 (4th Cir. 2003). As recognized by the Fourth Circuit Court of Appeals, "the doctrine of expressio unis est exclusio alterius instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded." Reyes-Gaona v. North Carolina Growers Ass'n, 250 F.3d 861, 865 (4th Cir. 2001). "When interpreting statutes we start with the plain language. It is well established that when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms. In interpreting the plain language of a statute, we give the terms their ordinary, contemporary, common meaning, absent an indication Congress intended it to bear some different import." Stephens ex rel. R.E. v. Astrue, 565 F.3d 131, 137 (4th Cir. 2009) (quotations omitted).

Interpretations of federal law are generally beyond the scope of an opinion of this Office. See Ops. S.C. Atty. Gen., August 25, 2009; March 6, 2008. However, as the interpretation of this provision directly impacts State law, we will attempt to provide some guidance on this issue until a federal court specially addresses the issue. Section 1621(c) appears to broadly define those items included in the definition of state or local public benefit. However, the only mention of educational benefits in this definition is postsecondary education. Given the rules of statutory construction followed by federal courts, the fact that Congress specifically included postsecondary education in the definition of state or local public benefit under section 1621(c) could indicate Congress's intent to exclude other types of educational benefits. The District Court's finding in League of United Latin American Citizens, certainly signifies that Congress intended for certain types of education to be excluded. Therefore, a court could find the educational benefits provided by First Steps are also excluded. However, we cannot make this assertion with certainty as the federal courts have yet to provide clear guidance on this issue.

As we previously concluded, the benefits provided by First Steps appear to be educational in nature. Thus, if a court were to find all educational benefits with the exception of postsecondary education are excluded from the definition of state or local public benefit pursuant to section 1621(c), we believe that the courts of this State would likely find the educational services provided by First Steps are not state or local public benefits for purposes of section 1621. Accordingly, if the educational services provided by First Steps are excluded from the definition of state or local public benefit pursuant to section 1621(c), in accordance with section 8-29-10, First Steps would not be required to verify the lawful presence of the applicants for those benefits.

Conclusion

Based on our understanding of the services provided by First Steps, we agree with your interpretation these services appear to be educational in nature. Moreover, while neither our courts, nor the federal courts, have yet to interpret whether state or local public benefits as defined in section 1621(c) of title 8 of the United State Code include educational benefits other than postsecondary education, we believe a court could find that these types of benefits are excluded given the fact that Congress specifically included postsecondary education and made no mention of other types of educational benefits. Furthermore, we believe that the California District Court's finding in League of United Latin American Citizens that certain educational benefits are clearly excluded from the definition under section 1621(c) supports this interpretation. Thus, presuming the services provided by First Steps are education related and that other than postsecondary education, all other educational benefits are excluded from the definition of state or local public benefit under section 1621(c), we believe a court would find First Steps is not required pursuant to section 8-29-10 to verify the lawful presence of the applicants for its services due to the fact that these services do not constitute state or local public benefits.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Deputy Attorney General