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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

February 20, 2004

The Honorable Ben A. Hagood, Jr.
Member, House of Representatives
400 Hibben Street, Suite 200
Mount Pleasant, South Carolina 29464

Dear Representative Hagood:

You have requested an opinion of this Office "regarding proposed changes to the governance structure of the Charleston County School District ...." By way of background, you state in your letter:

> [t]he Charleston County School District is currently governed under Act # 340 of 1967 ("the Act of Consolidation"). The Act of Consolidation consolidated the taxing and expenditure authority, and other administrative responsibilities, of various school districts in Charleston County into the Charleston County School District under the direction of the Charleston County School Board, but retained 8 constituent school districts each with elected boards. This Act was challenged on equal protection grounds in federal court. See United States v. Charleston County School District, et al., 738 F.Supp. 1513 (D.S.C. 1990), affd, in part remanded in part 960 F.2d 1227 (4th Cir. 1992), on remand 856 F.Supp. 1060 (D.S.C. 1994). The federal court opinions were based, at least in part, upon the factual analysis that the Constituent Boards had sufficient authority over personnel and students so that Constituent Districts functioned as distinct school districts.
>
> Proposals are now being discussed with the Charleston County legislative delegation regarding the elimination of the constituent school boards, or the retention of the constituent boards with consolidation of many of its functions with the County Board or Superintendent. One bill, S.250, abolishes the Constituent Boards and devolves their powers upon the County Board. Another proposal, which I am introducing as a bill, transfers the Constituent Board's authority over teachers, staff and student attendance zones to the County Board and the County Superintendent. The purpose of the proposed legislative changes is to increase accountability within the governance structure of the Charleston County School district by providing for a strong executive, the Superintendent of the Charleston County School District, who is accountable to a single elected body, the County School Board.

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Your question, as you have presented it, is the following:

> [w]ould legislation that eliminates the Charleston Constituent School Boards, or reduces their authority over students and school personnel, jeopardize, in any way, the "unitary status" of the Charleston County School District and thereby lead to a reanalysis by the federal courts of whether the structure and actions of the Charleston County School District violates any equal protection rights, or any other constitutional or statutory rights?

You have forwarded to us for review a comprehensive legal memorandum prepared by Ms. Patricia A. Brannan, Partner in Hogan and Hartson, L.L.P., Washington, D.C., which addresses the question you have raised. Therein, Ms. Brannan concludes that legislation restructuring the Charleston County School District along the lines referenced in your letter would not jeopardize the District's current legal status, or "pose a significant risk that county-wide school desegregation would be required in Charleston, South Carolina." In Ms. Brannan's opinion, "the case law does not lead us to expect a change by the South Carolina General Assembly in the governance of the Charleston School District would lead to a school desegregation challenge by the United States Department of Justice." In addition, we have been provided a wealth of helpful materials by Neil C. Robinson, Jr., attorney, regarding recommendations for restructuring the governance of the Charleston School District. Subsequent to your request, Representative John Graham Altman notified this Office that he makes the same request for an opinion.

Law / Analysis

House Bill 4164

House Bill 4164 has been presented to us as one alternative for amending act No. 340 of 1967. Pursuant to House Bill 4164, the following changes in the governance of the Charleston County School District would result:

(1) the Superintendent of the Charleston County School District would now possess the responsibility for hiring all necessary personnel. Included would be principals and teachers. The School Board would select the Superintendent and determine the qualifications therefor;

(2) The Charleston County Board of Education would determine the policies and direction of the District and require accountability of the Superintendent;

(3) The constituent school districts would no longer determine student assignments, but this would be done by the Charleston County Board of Education;

(4) The trustees of the constituent boards would possess only limited responsibility, including student discipline, bus transportation and safety. The constituent boards would, in the future, act merely as advisory boards to the Charleston County Board of Education.

Other bills may also be introduced all of which give greater authority to the Superintendent and less power to the constituent districts.

U.S., et al. v. Charleston County School District, et al.

As you indicate in your letter, the case of U.S., et al. v. Charleston County School District, et al, 738 F.Supp. 1513 (D.S.C. 1990), affd. in part, remanded in part, 960 F.2d 1227 (4th Cir. 1992), on remand, 856 F.Supp. 1060 (D. S.C. 1994) is pivotal in answering your question. Thus, a brief review of Judge Blatt's comprehensive order and the background leading up to that order is necessary.

Litigation to desegregate Charleston schools was first filed in 1962 in Brown v. School Dist. No. 20, Charleston, 226 F.Supp. 819 (E.D.S.C. 1963), affd., 328 F.2d 618 (4th Cir. 1964), cert. den., 379 U.S. 825 (1964). In that case, the District Court determined that "the [Charleston] school system is completely segregated," and that "[a] dual set of attendance area lines exist ...." 226 F.Supp. at 825. The District Court thus ordered remedial action, and the Fourth Circuit affirmed the District Court's order.

While this desegregation case was pending, the General Assembly enacted Act No. 340 of 1967, known as the Act of Consolidation for Charleston School District. Act No. 340 consolidated the District and bestowed certain administrative and fiscal authority thereupon. The eight previously existing school districts in Charleston County were designated as "constituent districts." These so-called "constituent districts" maintained general authority over faculty and student assignments and student discipline within the particular constituent district.

In 1981, the United States sued the Charleston School District and a number of state officials alleging a failure to eliminate a racially segregated school system in Charleston County. The United States alleged that "[t]he public schools in Charleston County are substantially segregated by race and that such segregation was "... the result of intentionally discriminatory legislative and administrative actions ...." See, United States et al. v. Charleston County School District et al., supra, 738 F.Supp. at 1516. In 1983, the Court denied defendant's motions to dismiss and permitted certain other plaintiffs to intervene. The plaintiff-intervenors made "substantially the same allegations as were set forth in the United States' complaint." Id. Trial commenced October 6, 1987 and, allowing for a number of breaks in the trial schedule, finally ended on September 27, 1988.

The United States argued that Act No. 340 should be disregarded in desegregating the District. The defendants denied any intentional discrimination and argued that the de jure segregated

system had been fully removed. Defendants thus sought a declaration from the Court that Charleston School District had been completely desegregated, and that the District be declared a "unitary" school district.

On June 5, 1990, Judge Solomon Blatt issued his Order. Judge Blatt ruled that, while plaintiffs were entitled to a presumption that current racial disparities are causally related to segregation, plaintiffs also possessed the burden of showing that Act 340 violated the Constitution because every duly enacted state statute carries a presumption of constitutionality. Accordingly, in his Order dismissing Plaintiffs' action, Judge Blatt upheld Act No. 340 – which currently governs Charleston County School District – as constitutional against plaintiffs' Equal Protection attack. The Court concluded that, while the Act demonstrated a limited discriminatory effect in operating Charleston County schools, Act No. 340 of 1967 was enacted without any discriminatory intent. In the view of the District Court, the Charleston County School District and each of its constituent districts were fully desegregated, and thus the Court held that the School District had achieved unified status.

In effect, Judge Blatt concluded that the 1967 Act, with its system of eight constituent school districts had, on balance, benefitted the School District in the desegregation and educational process. The District Court found that

> [i]n this case, we do not start from a de jure segregated system. Despite plaintiffs' argument to the contrary, the eight constituent districts, with boundaries identical to what they are today, existed well before 1967 and, in fact, all of them had passed reviews by the Office of Civil Rights. In the eight school districts – (predecessors to the constituent districts) – segregation has been eliminated to the extent that it can be – therefore Brown [v. Bd. of Ed, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)] is not implicated.
>
> In conclusion, ... the court finds that to the extent Act 340 changed the educational organization of Charleston County, its changes were beneficial, especially to the rural, predominately black areas of the County. The primary complaint of plaintiffs is that Act 340 did not make more substantial changes. The General Assembly, however, was under no duty to change the existing school system to provide for more centralized teacher hiring and more centralized control over student assignments. Although they were under no affirmative duty to change the existing system, this court does find that if the Act had effected wholesale changes in attendance zones, a slightly more integrated school system could have resulted. Since the General Assembly was not required to further expand their changes in the CCSD under the constitutional mandate of Brown, this court finds that the defendants have fulfilled their duty to eliminate the dual system that existed in Charleston County prior to 1954. Based on the foregoing, it is

> Ordered, that within the Charleston County School District, there is, and has been, a unitary school system;
>
> Further Ordered that this action shall be dismissed and the Clerk shall enter final judgment for the defendants;

738 F.Supp. at 1542-1543.

While the District Court viewed Act No. 340 of 1967 as by no means ideal, Judge Blatt elaborated at some length as to the beneficial effects which the legislation provided. In the District Court's judgment, "... without the Act 'the rich would be richer' and 'the poor would be poorer'." The Court determined that this "... departure from normal practice [8 constituent school boards] has led to an improved school system which has led to further desegregation, not less." Id., at 1525. "To the extent that there was a departure from normal procedures in this case," wrote Judge Blatt, "it was to overcome possible racial bias, not to facilitate the enactment of racially discriminatory legislation." Id. Although not ideal, the enactment, by leaving teacher and student assignments in the hands of the eight constituent school districts was, in Judge Blatt's view, constitutionally valid, because "neither the State nor the CCSD [Charleston County School District] were under any duty in 1967 to consolidate or manage the eight school districts in Charleston County." Id., at 1527.

Judge Blatt rejected plaintiffs' argument that their establishment of "'current disparities'" in the racial composition of schools throughout the District violated the Equal Protection Clause. Plaintiffs contended that "there are a number of disproportionately black and white schools within the CCSD when the schools are evaluated with reference to the total percentage of black and white enrollment in the CCSD." 738 F.Supp. at 1533. Faculty assignments were similarly racially disproportionate, the plaintiffs argued. The District Court disagreed. The Court concluded that, while the makeup of student and faculty in certain schools might be racially disproportionate if measured against the District as a whole, such composition was to be evaluated not against the entire District, but against the particular Constituent District in which the school was located. Judge Blatt wrote:

> ... the court has determined that student assignments and faculty assignments at each school should not be compared to the racial makeup of the student enrollment and faculty in the entire County – (as plaintiff – intervenors and the United States contend) – but should be compared with the racial makeup of the student enrollment and faculty in each Constituent District in which the school is located – (as defendants contend). In more specific terms, the +- 20% standard enunciated in Adams v. Weinberger, 391 F.Supp. 269 (D.D.C. 1975), or the +- 15% guideline used by plaintiff-intervenors' expert witness, Dr. Gordon, should not be applied against the percentage of black students in the entire County in determining whether individual schools are substantially racially balanced but should be applied against

> the percentage of black students in the Constituent District from which student assignments to that particular school are made.

Id.

The Fourth Circuit Court of Appeals, in large part, affirmed Judge Blatt's order. In the view of the Court of Appeals, Judge Blatt was correct in evaluating whether each constituent district was properly desegregated rather than requiring each constituent district to reflect the racial makeup of the Charleston County School District as a whole. The Fourth Circuit found that

> [t]he district court rulings that the eight constituent districts are separate and distinct and that Act 340 was not enacted with discriminatory intent are AFFIRMED. Because all parties concede that each of the eight constituent districts is currently operating unitary schools, no further duty to desegregate exists.

960 F.2d 1227, at 1234. Nevertheless, the Fourth Circuit remanded the case to the District Court with respect to the question of interdistrict transfers. The Court's reasoning for the remand was the following:

> [w]e also think it would be wise for the district court to clarify precisely what constitutes, and has constituted, a valid reason for an interdistrict transfer between the eight districts in Charleston County. This clarification, along with our instruction that racial considerations are accorded no weight – either pro or con – in a transfer request, will help alleviate future controversies.
>
> We emphasize that our holding here is narrow. Where the sole motive behind a request to transfer between constituent districts is racial integration, that request may properly be denied as there is no foundation to grant it. Where a transfer request is premised upon a valid reason and, also, a desire to integrate racially, that part of the request premised upon racial integration is accorded no weight and consideration shall be accorded only to the valid reason. While a desire to integrate is not a sufficient reason to require a transfer approval, it may not be a reason to deny an otherwise valid transfer request. We leave to the district court to clarify what is a valid reason for an interdistrict transfer, and request precision in that definition.

960 F.2d at 1236.

In addition, the Fourth Circuit spoke to the validity of Judge Blatt's recognition of the importance of the eight constituent school districts in Charleston County. Noting that Judge Blatt's findings were factually supported, the Court stated:

> [t]hus appellant's claim is simply that there is only one school district in Charleston County – the CCSD – and that the eight constituent districts are merely shams. On this issue, the district court treated the constituent districts as separate political entities and the powers vested in them as important, separate and apart from the responsibilities of the CCSD. See Charleston County, 738 F.Supp. at 1525. This finding is not clearly erroneous. The local determination of school attendance zones and student discipline is a tradition as rich as the neighborhood school itself. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process." Milliken [v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974)] at 741-42, 94 S.Ct. at 3125-26; see Wright v. Council of Emporia, 407 U.S. 451, 469, 92 S.Ct. 2196, 2206, 33 L.Ed.2d 51 (1972); San Antonio Independent Sch. Dist. v. Rodriquez, 411 U.S. 1, 50, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973).

960 F.2d at 1233.

Governing Case Law Recognizing That a Judicial Declaration of Unitary Status Terminates Federal Supervision

Numerous authorities have consistently recognized that a judicial declaration of unitary status terminates federal judicial supervision of a school district. Ms. Brannan's memorandum, referenced above, cites many of these cases. Among these are Bd. of Ed. of Oklahoma City Public School District v. Dowell, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) and Riddick v. School Board of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986). In Dowell, the United States Supreme Court stated that

> [d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

498 U.S. at 248. The Court further commented that "[a] school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like ...." Id., at 250.

In Riddick, the Fourth Circuit explained that "the district court retains jurisdiction until it is clear that the unlawful segregation has been completely eliminated. But once the goal of a unitary school system is achieved, the district court's role ends." 784 F.2d at 535. Moreover, the Riddick

Court noted that "the right of the federal courts must end when the objective sought has been achieved." Id., at 536. In the view of the Fourth Circuit, once a finding of the achievement of unitary status has been made, "control of the system must be allowed to return to local officials." Id., at 539.

Courts have held that upon declaration of unitary status for a school district, that district "must begin making its own decisions, guided by the Constitution, applicable case law, and its best professional judgment, on whether changes should be made in school assignments ..." or other policies or procedures relating to the district. Little Rock Sch. Dist. v. Pulaski Co. Special School Dist., 237 F.Supp.2d 988, 1087 (E.D. Ark. 2002). See also, Belk v. Charlotte Mecklenburg Bd. Ed., 269 F.3d 305, 311 (4th Cir. 2001) (en banc). In Davis v. Sch. Dist. of Pontiac, 95 F.Supp.2d 688, 697, n. 10, the Court declined to exercise continuing jurisdiction over a district which had been declared to be unitary in order to monitor implementation over that District's newly adopted student and faculty assignment plan. There, the Court emphasized that "of course ... [the District is] ... free to implement this plan on its own without judicial supervision." And, in Stell v. Bd. of Pub. Ed. for Savannah, 860 F.Supp. 1563, 1583 (S.D. Ga. 1994), the Court noted that a "school system will always be in a state of transformation, as it responds to current circumstances and prepares for prospective growth and needs."

Federal courts have also recognized that once a school district has been declared to be unitary, the plaintiffs bear the burden of proving any alleged new constitutional violations. For example, in Dowell, supra, the Supreme Court of the United States stated the following:

> [a] school district which has been released from an injunction imposing a desegregation plan ... remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the [student reassignment plan] under appropriate equal protection principles.

498 U.S. at 250. And in Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 31-32, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), the Supreme Court noted that following a declaration of unitary status,

> federal courts are [not] without power to deal with future problems, but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Moreover, in Riddick, supra, the Fourth Circuit stated that "[o]nce a school system has achieved unitary status, a court may not order further relief to counter-act resegregation that does not result from the school system's intentionally discriminatory acts." 784 F.2d at 536. See also,

Arlington Heights v. Met. Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U. S. 229 (1976). In addition, the Riddick Court emphasized that "Swann and the cases that follow, both in the Supreme Court and in the courts of appeals, require a plaintiff to prove discriminatory intent on the part of the school board of a unitary school system." 784 F.2d at 537. The Court there held that "the burden of proving discriminatory intent attaches to a plaintiff once a de jure segregated school system has been found to be unitary." Id., at 538. Thus, as the Fourth Circuit emphasized in Vaughns v. Bd. of Ed. of Prince George's County, 758 F.2d 983, 988 (4th Cir. 1985), once a school system has "discharged its duty to liquidate the dual system and replace it with a unitary one," the district court's jurisdiction is at an end.

Your Question

Thus, the foregoing case law, which concludes that a judicial determination of a district's unitary status terminates a federal court's supervision over that district, is clear. The question here, however, is whether this body of law may be safely relied upon without caveat, considering the unique nature of the Charleston County School District and Judge Blatt's Order. This Order clearly recognized the importance of the School District's eight constituent districts in reaching the decision that the District had achieved unitary status.

Your specific question is whether legislation which eliminates the Charleston County Constituent School Boards' powers or reduces those Boards' authority over students and other school personnel would "jeopardize in any way, the 'unitary status'" and thereby "lead to a reanalysis by the federal courts of whether the structure and actions of the Charleston County School District violates any equal protection rights, or any other constitutional or statutory rights?"

Ms. Brannan's memorandum concludes that "the answer is 'no,' both on a technical legal and practical level." After reviewing the foregoing legal authorities, she correctly writes that "[o]nce a school district has been declared unitary, if the United States, parents or organizations wish to challenge in a school desegregation case a changed governance structure, policy or practice, they must carry the burden of showing that the change was adopted with a racially discriminatory intent in violation of the Equal Protection Clause." Ms. Brannan notes that "House Bill 4164 would not change any students' assignment ..." but would "identify the Charleston County School District, rather than the constituent districts, as the locus of student assignment authority." In her opinion, for the same reason that Judge Blatt found Act No. 340 constitutional – because it "did not create any further segregation" – House Bill 4164 "similarly would not create or enhance segregation [but] ... might create a potential for some reduction in racial isolation in same schools." Thus, she opines, "House Bill 4164 does not force the District to develop a county-wide desegregation plan ... and any plaintiffs would bear a heavy burden in convincing a court that the District should be required to do so."

In answering you question, it is important to consider the nature of a judicial determination that a school district is afforded unitary status. As federal courts have often stressed, a finding that

a school district is unitary is a factual determination by the District Court, usually based upon an extensive factual record. Coalition To Save Our Children v. State Bd. of Ed. of the State of Delaware, 90 F.3d 132 (3d Cir. 1996). Indeed, the Fourth Circuit, in reviewing Judge Blatt's decision in U.S., et al. v. Charleston County School District, et al., emphasized that

> [o]n review, we are bound to the district court's factual findings unless they are clearly erroneous. See Fed. R. Civ. Pro. 52(a); Vaughns v. Board of Educ., 758 F.2d 983 (4th Cir. 1985). Because the district court literally lived with this school desegregation case for a number of years, its factual determinations are accorded a high level of acceptance. See Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n. 6, 99 S.Ct. 2941, 2947 n. 6, 61 L.Ed.2d 666 (1979); Riddick v. School Bd., 784 F.2d 521 (4th Cir.), cert. denied 479 U.S. 938, 107 S.Ct. 420, 93 L.Ed.2d 370 (1986) (Factual findings by the district court in school desegregation case, especially where the presiding judge has lived with the case for many years, are entitled to great deference on review).

960 F.2d at 1231.

Moreover, in Riddick, supra, the Fourth Circuit recognized that "[t]he principles of collateral estoppel or issue preclusion are applicable to school desegregation cases." 784 F.2d at 531, citing Los Angeles Branch NAACP v. L.A. Unified School Dist., 750 F.2d 731 (9th Cir. 1985); Bronson v. Board of Education of City School Dist., 687 F.2d 836 (6th Cir. 1982). The Riddick Court quoted Montana v. United States, 440 U.S. 147, 153-4, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979) as follows:

> [a] fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....' Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 [18 S.Ct. 18, 27, 42 L.Ed. 355] (1987). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. (Citations omitted) Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on different cause of action involving a party to the prior litigation. (Citations omitted) Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within the jurisdictions. (Citations omitted) To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

784 F.2d at 531. The Court has further defined "collateral estoppel" as "mean[ing] simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In Riddick, the Fourth Circuit concluded that the earlier order by the District Court finding that the Norfolk school system had achieved "unitary status" was binding even upon the United States, as well as upon other parties to the original action.

On the other hand, the case law is abundant that the doctrine of collateral estoppel (issue preclusion) is inapplicable where the facts and law have materially changed. As the Court stressed in Montana v. United States, supra, principles of collateral estoppel are not appropriate when "controlling facts or legal principles have changed significantly since the [prior] judgment." 440 U.S. at 155. See also, Berwind Corp. v. Appel, et al., 94 F.Supp.2d 597, 611 (E.D.Pa. 2000) ["A material change in the law or development in the controlling principles may vitiate issue preclusion."] Moreover, the United States Supreme Court, in State Farm Mut. v. Automobile Ins. Co., 324 U. S. 154, 162 (1945), stated that it was "the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." The Fourth Circuit has recognized this "general rule" as well. See, Comm. Of Internal Revenue v. Arundel- Brooks Concrete Corp., 152 F.2d 225 (4th Cir. 1945). As the Court emphasized in Spradling v. City of Tulsa, 198 F.3d 1219, 1223 (10th Cir. 2000),

> [t]he doctrines of collateral estoppel and res judicata ... apply only in cases where controlling facts and law remain unchanged. Consequently, res judicata and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the or modification of significant facts create new legal conditions.

In other words, a substantive change in the statutes concerning the governance of the Charleston County School District could forfeit the virtually unassailable defenses of collateral estoppel and res judicata which the District currently enjoys. Currently, the District has a governance statute which has been upheld by the Fourth Circuit Court of Appeals as constitutional. Even though the Legislature is now free to substantively change the law if it so desires, it should also be recognized that by doing so, the District may well be giving up the defenses and protections which could be used in any future lawsuits raising desegregation issues.

Conclusion

(1) As you indicate, federal case law clearly supports the principle that a judicial finding of a unitary school district in Charleston County means that any future plaintiff must prove discriminatory intent in order to be successful in any subsequent suit alleging resegregation. Current law is to the effect that once a school district has been declared to be unitary, the burden of proving any new constitutional violation is quite

high and rests upon those bringing the new suit. Local control to implement policies and procedures is thus returned once the District is deemed to be fully desegregated. In order to re-establish judicial intervention concerning any alleged resegregation of schools in Charleston, a plaintiff must prove that such resegregation resulted "from the school system's intentionally discriminatory acts." Riddick, supra, 784 F.2d at 536. Moreover, the South Carolina General Assembly possesses plenary power to "enact any law not specifically or impliedly prohibited by the Constitution." Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976).

(2) However, this does not mean that substantive changes in the law governing Charleston County School District would not create substantial new legal problems for the District. Any substantial change in the law governing the Charleston County School District would carry with it a number of legal risks. First of all, a change in the District's law would most probably remove any defense of collateral estoppel and res judicata which the District currently enjoys. Judge Blatt's finding of a unitary school district was, as noted, based upon the facts and the law in existence when he issued his order. Any substantial change in those facts and that law necessarily means that the legal and factual foundation upon which his judicial declaration of a unitary school district was based, may no longer exist. Thus, the District could well lose the virtually absolute defenses of res judicata and collateral estoppel in any new litigation. Put another way, at present, the District possesses a governance law which has been upheld as constitutionally valid by the Fourth Circuit Court of Appeals. Any substantive change in that law could well remove that protection.

(3) Second, while the burden on any future plaintiffs in proving resegregation would be high, there is clearly a likelihood that litigation would, nonetheless, result. Its allegations, as well as its likelihood of success or failure, are impossible to predict at this point. Ours is a litigious society, and even unfounded or misguided lawsuits – as well as serious and meritorious ones – consume substantial time, talent and resources. Note, even though the Plaintiffs in Riddick did not ultimately prevail, it was only a change in the District's policy which resulted in new litigation. Moreover, while the Department of Justice certainly might be the party which would bring a new lawsuit against the District, such action could legally be brought by any plaintiff with the necessary standing. In a question like this, interested parties would likely abound.

(4) Third, we add that a legislative change, either abolishing the eight constituent school districts in the Charleston County School District or substantially changing the authority of those districts, would clearly alter the legally protected status quo which the District currently enjoys as a result of Judge Blatt's Order. That Order, finding that the Charleston County School District had achieved unitary status, was based upon the District Court's extensive fact-finding, and was founded upon the existence

of the eight constituent school districts. A change in the facts and law would undoubtedly remove the protection which the Order at present provides, and would thus require the compilation of an extensive new factual record when new litigation resulted.

(5) In short, even though the Legislature is now free legally to alter the governance of Charleston County School District, the District could, nevertheless, be subjected – rightly or wrongly – to lengthy and costly new litigation seeking to prove intentional discrimination. While it would be inappropriate for us to comment with respect to the policy considerations for changing the existing law, from a legal standpoint, we must urge caution and careful consideration. Any substantive amendment of the law governing the School District would carry with it a risk of new lawsuits and new expenditures in defending such litigation.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an

cc: The Honorable John Graham Altman