



ALAN WILSON
ATTORNEY GENERAL

March 18, 2019

Herbert M. Berg, Ed.D.
Interim Superintendent
Beaufort County School District
Post Office Drawer 309
Beaufort, SC 29901-0309

Dear Dr. Berg:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

The Beaufort County Board of Education (the "Board") requests that I, on its behalf, seek an opinion from the Attorney General regarding whether the Superintendent had the authority to close Islands Academy, an alternative school in the Beaufort County School District (BCSD). The Board's motion states that "the Board obtain the State's Attorney General's opinion on whether the Board and/or District violated state statute with the closing of Islands Academy and, if so, what is needed to correct it." S. C. Code Ann. Section 59-10-90 (7) states that the board of trustees shall "Control the educational interest of district. Manage and control local educational interests of its district, with the exclusive authority to operate or not to operate any public school or schools."

On December 7, 2018, after consultation with the Instructional Services Department staff, I made the decision, in the educational interest of the students, to close Islands Academy, effective January 8, 2019. This letter explains my understanding that I had the authority to close the school and my rationale for closing the school.

As the Interim Superintendent, the Board has delegated authority to me to be responsible for all matters related to the day-to-day operation of the BCSD within the parameters of Board Policies. No Board policy or Administrative Regulation exists with respect to opening or closing schools.

Performance Expectation 2.2 (B), Governance Commitment, states that the Board will focus on strategic leadership rather than administrative details. Performance Expectation 1: Instructional Program, states that the Superintendent will gather, analyze, and use data and research in making curricular and instructional choices. The Superintendent is also responsible for allocating and protecting instructional time to support student learning.

Pursuant to Performance Expectation PE 1: Instructional Program, the Superintendent is expected to provide equitable and challenging learning experiences that ensure all students have sufficient opportunities to develop learning, thinking and life skills that lead to success at the next level and to allocate and protect instructional time to support student learning. After reviewing several academic metrics, district staff and I were very concerned about the lack of instruction time provided to students and the extremely poor student performance at Islands Academy. Unfortunately, the former Superintendent, Dr. Jeffrey Moss, did not address these deficiencies. I made the decision to close Islands Academy, effective January 8, 2019, at the end of the first semester and to transition its students back to their home schools. Each student was assigned a personal mentor who meets weekly with the student.

Dr. Moss announced the creation of the Right Choice (later renamed Islands Academy) School during a Board meeting in public session on January 6, 2015. Islands Academy was a "school of choice" that attracted about 70 students from other schools across the district. The Board did not approve the opening of Islands Academy and did not question the authority of the Superintendent to open the school. I have closed several schools in previous school districts where I have served as Superintendent. In addition, I also believed that because Dr. Moss had opened the school without Board approval, I had the authority to close it.

Prior to my decision to close Islands Academy, district staff had several conversations with staff at the South Carolina Department of Education (SCDE). When asked about the process for closing a school, our staff was informed that the SCDE had a form that required only the Superintendent's signature. Staff inquired as to whether any other information was needed from the Board, and the response was that only the Superintendent's signature was required.

On December 18, 2018, the Board held a Special Called Meeting. One of the agenda items included a Discussion of Closing Islands Academy. I presented Islands Academy Report Card Data, State Rankings and Comparisons, as well as SC Ready Data on Student Progress and Trends. These data supported the

rationale for closing Islands Academy in the best interest of the students. During this meeting, a motion was for the Board to ask the Superintendent to reconsider closing Islands Academy. On December 21, 2018, I reaffirmed my decision to close Islands Academy. The Board did not question my authority to close the school.

Discussions and public comments at a subsequent Board meeting raised questions about the closing of Islands Academy. I have instructed staff to develop procedures for the opening and closing of schools and will present this information to the Board for review and approval. As Interim Superintendent, I made a decision in the best educational interests of our students. If I exceeded my authority, I respectfully request that the Attorney General's opinion advise the Board and me of any appropriate procedure to remedy the situation, including whether the Board needs to ratify my decision to close Islands Academy.

Law/Analysis

It is this Office's opinion that a court would likely find a superintendent of a school district does not have the authority to determine whether to operate or not operate a public school because that authority is vested in a school district's board of trustees. This Office has previously opined:

The closing of a school, or the nonoperation of a school, is a matter which is vested in the exclusive authority of the board of trustees. Section 21-230(7), Code of Laws, 1962. A decision of a board of trustees to operate or not to operate a school or schools must be appealed directly to the Court of Common Pleas of the county and is subject to review by that Court only upon questions of law. Section 21-247.7, Code of Laws, 1962.

1970 S.C. Op. Att'y Gen. 14 (1969). This Office interpreted the phrase "exclusive authority" in Section 21-230(7) of the 1952 Code to grant the board of trustees "sole authority to determine whether or not schools within the district shall, or shall not, be operated." Op. S.C. Att'y Gen., 1961 WL 11386 (April 21, 1961). While this section was re-codified in the 1976 South Carolina Code of Laws at S.C. Code Ann. § 59-19-90 and was also amended since the opinions discussed above were published, these amendments were unrelated to the authority to operate or not operate a public school. As there has been no change in the law and this Office finds no clear error in our interpretation of the plain language of the statute, this Office reaffirms our opinion that a school board of trustees has the sole authority to determine whether or not to operate a public school within its jurisdiction. Op. S.C. Att'y Gen., 2018 WL 7501573 (March 6, 2018) ("Traditionally, this Office does not overrule a prior opinion unless there has been a change in

the law or where there is clear error.”). This opinion will address the additional issues raised in the request letter regarding the exercise of a school district board of trustees’ authority to not operate a public school.

- I. A school district board of trustees may affirm a recommendation to not operate a public school by majority vote in a public session with the presence of a quorum.

The request letter asks for this Office’s opinion regarding “whether the Board and/or District violated state statute with the closing of Islands Academy and, if so, what is needed to correct it.” As stated above, it is this Office’s opinion that S.C. Code Ann. § 59-19-90(7) solely authorizes a school district board of trustees to determine whether to operate or not operate a public school within its district. As described in the request letter, the decision to close Islands Academy was made by the interim superintendent, rather than the Board. It is this Office’s opinion that a court would likely find a school district board of trustees exceeds its authority by delegating the determination to cease operating a public school.

The South Carolina Code of Laws defines a “school district” as “any area or territory comprising a legal entity, whose sole purpose is that of providing free school education, whose boundary lines are a matter of public record, and the area of which constitutes a complete tax unit.” S.C. Code Ann. § 59-1-160. Each school district is “under the management and control of the board of trustees ..., subject to the supervision and orders of the county board of education.” S.C. Code Ann. § 59-19-10. By Act No. 977 of 1970, the General Assembly consolidated Beaufort County School District No. 1 and Beaufort County School District No. 2 into the School District of Beaufort County and assigned the Board of Education of Beaufort County to constitute its board of trustees.¹ The South Carolina Code of State Regulations directs each

¹ Act No. 977 of 1970 is set forth in its entirety below.

An Act To Confirm The Creation Of The School District Of Beaufort County And The County Board Of Education As Its Governing Body

Section 1. Findings. --- The General Assembly finds that Beaufort County School District No. 1 and Beaufort County School District No. 2 have been consolidated into the School District of Beaufort County, which is co-terminous in area with Beaufort County, by action taken by the Board of Education of Beaufort County pursuant to Sections 21-114.1, 21-144-2 and 21-114.3 of the 1962 Code.

Section 2. School District of Beaufort County. --- The School District of Beaufort County consisting of all the former school districts in Beaufort County is hereby recognized and confirmed as a body politic an corporate coterminous in area with Beaufort County; and all of the property and assets of the former school district is the property of the School District of Beaufort County and all obligations of the former school districts are the obligations of the School District of Beaufort County which is vested with all rights, powers, privileges and duties prescribed by law for school districts.

school district to hire a superintendent. S.C. Code Ann. Regs. 43-161. The superintendent is the “chief administrative officer who serves as the executive officer of the board of trustees and the professional leader of the school district.” Id. A school district board of trustees is responsible for “[m]anag[ing] and control[ling] local educational interests of its district, with the exclusive authority to operate or not to operate any public school or schools.” S.C. Code Ann. § 59-19-90(7). A school district board of trustees’ decision to operate or not operate a public school is “appeal[able] directly to the court of common pleas of the county in which any school to be operated or not to be operated is located.” S.C. Code Ann. § 59-19-580. In Gamble v. Williamsburg Cnty. School Dist., 305 S.C. 288, 408 S.E.2d 217 (1991), the South Carolina Supreme Court explained that such a determination will not be overturned absent an abuse of discretion as follows:

In determining whether the Board properly exercised its discretion under [S.C. Code Ann. § 59-19-90 to close a public school], the inquiry is whether the action under consideration measures up to any fair test of reason. Sarratt v. Cash, 103 S.C. 531, 88 S.E. 256 (1916). If the facts and circumstances are such that reasonable men may differ as to the wisdom and expediency of the decision, the decision must be upheld. Id. A clear abuse of discretion is required to warrant judicial interference. Id.

305 S.C. at 290, 408 S.E.2d at 218.

With this framework in mind, this opinion will suggest how the BCSD board of trustees may evaluate whether to operate or not operate a public school within its district. In Sarratt v. Cash, 103 S.C. 531, 88 S.E. 256 (1916), the South Carolina Supreme Court was asked to enjoin the board of trustees of school district No. 10 of Cherokee County from locating a public school building on a lot in the business center of Gaffney rather than in the western end of the city as a committee report had previously suggested. The Court explained that a board of trustees has a “continuing and inalienable” duty to best promote the educational interests of its district and could not be bound by earlier representations, as follows:

Section 3. School Trustees. --- The Board of Education of Beaufort County shall ex-officio be and constitute the Board of School Trustees of the School District and is confirmed as the governing body of the School District of Beaufort County with all the powers vested by law in school district board of trustees.

Section 4. Time effective. --- This act shall take effect upon approval by the Governor.

Approved the 31st day of March, 1970.

1970 Act. No. 977 (emphasis added).

They are bound, under the statute and their oath of office, to exercise their discretion and judgment, in the language of the statute (Civ. Code, § 1761) “so as best to promote the educational interests of their district.” This power and duty is continuing and inalienable. They could not, therefore, bind themselves by promises or representation, so as to divest themselves of the right to a free and untrammelled exercise of their judgment and discretion for the best interests of their district at the time they were required to act as a body. They may have thought, when the representations were made, that it would be best to locate the building in the west end; but, upon further consideration of the matter, in the light of new reasons suggested by some of their body or others, they may have changed their minds; if so, they not only had the power, but it was their duty to themselves and to the district to do so. It would be contrary to public policy to allow public officers who are charged with the duty of exercising their judgment and discretion for the benefit of the whole district to bind or fetter themselves by promise or representation to individuals or to electors of a section of the district so that they could not, at all times, act freely and impartially for the benefit of the whole district. ...

103 S.C. 531, 88 S.E. at 258. In the same manner as the committee report and public representations in Sarratt could not bind the board of trustees prior to “the time they were required to act as a body,” a superintendent’s determination that a public school should no longer be operated could not bind a board of trustees. The members of the board of trustees are the public officers who are charged with the duty of exercising their judgment and discretion for the benefit of the whole district. Id.; S.C. Code Ann. § 59-19-90(7). Therefore, the members of the board of trustees may not be bound by representations regarding whether to operate or not operate Islands Academy until the time that the board of trustees acts as a body. Sarratt, supra.

If the BCSD board of trustees makes a determination regarding the operation of a public school under S.C. Code Ann. § 59-19-90(7), it is this Office’s opinion that it should do so by voting in a public session with the presence of a quorum. This Office’s September 6, 1984 opinion to Representative Derwood L. Aydlette, Jr. explained that public bodies act collectively in public meetings as follows:

In Gaskin v. Jones, 198 S.C. 509, 18 S.E.2d 454 (1942), for example, the Court stated:

In the absence of any statutory or other controlling provision, the commonlaw rule to the effect that a majority of a whole body is necessary to constitute a quorum applies, and no valid act can be done in the absence of a quorum. A majority of such a body must

be present to constitute a Board competent to transact business.
(Emphasis added.).

198 S.C. at 513.

Section 30-4-60 of the [Freedom of Information Act] mandates that '[e]very meeting of all public bodies [as defined] shall be open to the public unless closed pursuant to § 30-4-70 of this chapter.' Section 30-4-20(d) of the Act defines a 'meeting' to be

. . . the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

The statute defines a 'public body' in Section 30-4-20(a) as

. . . any department of the State, any state board, commission, agency and authority, any state board, commission, agency and authority, any public or governmental body or political subdivision of the State including counties, municipalities, townships, school districts and special purpose districts, or any organization, corporation or agency supported in whole or in part by public funds or expending public funds . . .

It is evident that the South Carolina Act, like the federal FOIA, does not expressly require a public body to hold a meeting in order to conduct its business. See, Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967); Common Cause v. Nuc. Reg. Comm., 674 F.2d 921 (D.C. Cir. 1982); Pac. Legal Found. v. Council on Env. Qual., 636 F.2d 1259 (D.C. Cir. 1980). Certainly however, the entire tenor of the Act, as best expressed in Section 2, anticipates that public bodies will conduct their business in 'meetings' as defined. Indeed, the conduct of the public's business in a 'meeting' of a public body is the basic starting point of the Act. Clearly then, we cannot say that the Freedom of Information Act derogates the general law, cited above, requiring a public body to act collectively in a meeting; if anything, it reinforces that requirement. Accordingly, the general law mandates that a public body act collectively in a formally convened meeting when acting upon matters within its authority; and if the body constitutes a 'public body' as defined by the FOIA, the Freedom of Information Act then requires the meeting of that public body to be open to the public unless a specific statutory exemption is applicable.

1984 S.C. Op. Att'y Gen. 256 (1984). This Office has further opined that BCSD must follow the procedures required by the Freedom of Information Act as school districts are expressly included within the statutory definition of a "public body" at S.C. Code Ann. § 30-4-20(a). Op. S.C. Att'y Gen., 2015 WL 992702, at *3 (February 19, 2015); Op. S.C. Att'y Gen., 2017 WL 4707544, at *2 (October 11, 2017) (opining that a school district board of trustees' action to approve hiring a teacher otherwise barred from employment with the district by S.C. Code Ann. §59-25-10 must be accomplished in public session by at least a majority vote and with the presence of a quorum). Accordingly, if the BCSD board of trustees desires to act upon a superintendent's recommendation that the district no longer operate a public school, it is this Office's opinion that a court would likely find the board of trustees may do so by taking collective action with a majority vote in a public session with the presence of a quorum.

- II. A local school district board of trustees may create of a school of choice with exemptions from certain statutes and regulations only after a two-thirds affirmative vote and State Board of Education approval for each exemption.

The request letter states that the interim superintendent believed he had authority to close Islands Academy because it was opened by the prior BCSD superintendent without Board approval. This Office cannot make factual determinations in an opinion and will generally assume facts as provided in a request letter for purposes of providing legal analysis. Op. S.C. Att'y Gen., 2012 WL 1371025, at *2 (April 11, 2012) ("[F]actual determinations ... are beyond the scope of an opinion of the Attorney General."). As discussed above, a court would likely find that the BCSD board of trustees has the sole authority to determine whether to operate Islands Academy. S.C. Code Ann. § 59-19-90(7). Further, the decision to create a school of choice requires a two-thirds affirmative vote from a school district board of trustees at a public meeting and approval from the State Board of Education for each exemption from specific statutes and regulations. See S.C. Code Ann. § 59-19-350(A).² If the BCSD board of trustees did

² The statute authorizing the creation a school of choice reads as follows:

(A) A local school district board of trustees of this State desirous of creating an avenue for new, innovative, and more flexible ways of educating children within their district, may create a school of choice within the district that is exempt from state statutes which govern other schools in the district and regulations promulgated by the State Board of Education. To achieve the status of exemption from specific statutes and regulations, the local board of trustees, at a public meeting, shall identify specific statutes and regulations which will be considered for exemption. The exemption may be granted by the governing board of the district only if there is a two-thirds affirmative vote of the board for each exemption and the proposed exemption is approved by the State Board of Education.

(B) In seeking exemptions, the local board of trustees may not exempt:

not take this additional action of authorizing each exemption by a two-thirds affirmative vote or receive approval from the State Board of Education, a court would likely find that the exemptions for Islands Academy are without the force of law. Id. However, regardless of whether any exemptions were effective or whether the initial decision to open a public school followed all procedures required by law, the decision to operate or not operate a public school is not granted to a school district superintendent; it is reserved to the school district board of trustees. Op. S.C. Att’y Gen., 1961 WL 11386 (April 21, 1961). If a decision to operate or not operate a public school is based on an error of law, S.C. Code Ann. § 59-19-580 directs that an appeal of the decision may be brought in “the court of common pleas of the county in which [the] school to be operated or not to be operated is located.”

- III. Transmitting an administrative report regarding the decision not to operate a public school to the State Board of Education does not, by itself, ensure a school district board of trustees has complied with all legal requirements.

The request letter describes efforts made by BCSD staff to discuss the process of closing a public school with the South Carolina Department of Education (“SCDE”). In relevant part, the request letter states the following:

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- (1) federal and state laws and constitutional provisions prohibiting discrimination on the basis of disability, race, creed, color, national origin, religion, ancestry, or need for special education services;
 - (2) health, safety, civil rights, and disability rights requirements as are applied to other public schools operating in the district;
 - (3) minimum student attendance requirements;
 - (4) state assessment requirements; and
 - (5) certification requirements for teachers in the core academic areas as defined by the federal No Child Left Behind Act, Public Law 107-110; however, up to twenty-five percent of the teaching staff of the school may be employed if the individual possesses a baccalaureate or graduate degree in the subject he is hired to teach.
- (C) Any school created pursuant to this section shall admit all children eligible to attend the school subject to space limitations and may not limit or deny admission or show preference in admission decisions to any individual or group of individuals.
- (D) A local school district that provides exemptions pursuant to subsection (A) shall provide the State Department of Education with documentation of the approved exemptions and shall submit evaluation documentation to be reviewed by the State Board of Education after three years of the exemption to ensure that the district continues to meet the needs of its students. Upon review, if the State Board of Education determines the continuation of the exemption does not meet the needs of the students attending the district school of choice, the board may suspend exemptions granted by the local board of trustees with a two-thirds vote. Before suspending the exemptions, the State Board of Education shall notify the district and provide the district with any opportunity to defend the continuation of approved exemptions.

Prior to my decision to close Islands Academy, district staff had several conversations with staff at the South Carolina Department of Education (SCDE). When asked about the process for closing a school, our staff was informed that the SCDE had a form that required only the Superintendent's signature. Staff inquired as to whether any other information was needed from the Board, and the response was that only the Superintendent's signature was required.

As described above, this Office's opinions cannot make factual determinations and will generally assume facts as provided in a request letter for purposes of providing legal analysis. See Op. S.C. Att'y Gen., 2012 WL 1371025, at *2 (April 11, 2012). However, this Office has consulted with the SCDE regarding its administrative reporting procedures for school closures in an effort to deliver consistent guidance. This Office was provided a copy of the SCDE's "public school closings" form which requires the names of the public schools that are being closed, the School Identification Numbers, the closure dates, and the school district superintendent's signature. The SCDE also forwarded to this Office a December 21, 2018 email between Cathy L. Hazelwood, Deputy Superintendent of Education, and BCSD staff which states, "The South Carolina Department of Education simply requires a letter from the district that the school has been closed. The SCDE does not vet the closing, but rather assumes that the decision has been made in the proper manner." While other exchanges with BCSD staff may have given reason to believe that completing the SCDE's public school closings form met all legal procedures necessary to close a public school, the email makes clear that the SCDE does not view the public school closings form as the only step required to close a public school. It is this Office's understanding that this administrative reporting form requires the school district superintendent's signature as he is the "chief administrative officer" for the school district board of trustees. S.C. Code Ann. Regs. 43-161. This Office observes that the public school closings form's requirement of a superintendent's signature apparently is intended to represent to the SCDE, on the behalf of the board of trustees, that the decision to not operate the public school was made in the proper manner, rather than an endorsement of the superintendent's authority to close a public school. As described above, it is this Office's opinion that the decision to cease operating a public school is vested exclusively in a school district board of trustees. S.C. Code Ann. § 59-19-90(7); Op. S.C. Att'y Gen., 1961 WL 11386 (April 21, 1961).

Conclusion

It is this Office's opinion that a court would likely find a superintendent of a school district is without discretionary authority to determine whether to operate or not operate a public school because that authority is vested in a school district's board of trustees. See S.C. Code Ann. § 59-19-90(7); Op. S.C. Att'y Gen., 1961 WL 11386 (April 21, 1961) (opining the phrase "exclusive authority" grants the board of trustees "sole authority to determine whether or not schools within the district shall, or shall not, be operated."). In Sarratt v. Cash, 103 S.C. 531, 88

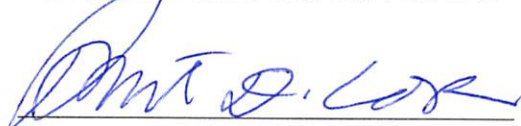
S.E. 256 (1916), the South Carolina Supreme Court explained that a school district board of trustees has a “continuing and inalienable” duty to best promote the educational interests of its district. Therefore, the members of the board of trustees cannot be bound by representations regarding whether to operate or not operate Islands Academy until the time that the board of trustees acts as a body. Id. If the BCSD board of trustees desires to act upon a superintendent’s recommendation that the district no longer operate a public school, it is this Office’s opinion that a court would likely find the board of trustees must do so by taking collective action with a majority vote in a public session with the presence of a quorum.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General