July 6, 2007

The Honorable B. R. Skelton
Member, House of Representatives
2962 Walhalla Highway
Six Mile, South Carolina 29682

Dear Representative Skelton:

We received your letter requesting an opinion on behalf of June Hay, a constituent of yours and a member of the Pickens County School Board. Attached to your letter, you included a letter from Ms. Hay to Attorney General Henry McMaster. In this letter, Ms. Hay presents four questions concerning House Bill 3782, in which she desires guidance from this Office. These four questions are as follows:

1. According to Article VIII, Section 7, of the Constitution of South Carolina, "No laws for a specific county shall be enacted." Our Pickens County School Board is an elected county board which represents the entire county. This bill H3782 pertains only to the specific county of Pickens. It should therefore be considered unconstitutional.

2. We cannot find anywhere in the SC Code of Laws or the SC Constitution an explanation for the use of a weighted vote in the legislature. Bill H3782 was passed on 2nd reading by a weighted vote in the Senate. There is no weighted vote in the House. This weighted vote tabled an amendment to let the people decide this issue by referendum. Pickens County has 2 senators and logic would lead the public to believe that each senator would have equal representation, 1 vote each. A weighted vote giving one senator 81.49 vs. the other senator 18.51, would mean that the senator with the higher weighting would always be able to do whatever he wanted to do. The area of the county that does not vote for the senator with the larger weighting would never be able to vote for or against that senator and effectively would have no voice, as the lower weighted senator would never be able to stop any legislation

proposed by the larger weighted senator. I would think that this would be unfair representation and unconstitutional . . . .

3. Bill H3782 was originally written to reduce the number of at-large members of the board from three to one. This was a reduction of 2 at-large members. There are 2 females on the school board, both at-large members. This discriminatory intent to remove the females was brought to the attention of the public at the one and only public meeting held, after which, the bill was changed to remove all 3 at-large seats. The result is the same, removal of the female board members. We find it very disturbing that legislation to remove females and/or other minorities from elected office could find its way through the legislative process so quickly. Because of this, we are asking you to investigate whether H3782 breeches discrimination laws in South Carolina.

4. We have laws in this state against bullying, but this legislation is clearly retaliation for the vote taken to approve the installment purchase plan to build new schools and make existing schools safe in Pickens County. At the same one and only public meeting on the legislation, it was admitted by a member of the legislature that the bill may have been caused a little by retaliation. The fact that a senator with more added weight is able to keep the bill out of the hands of the public by throwing his added weight around is nothing more than bullying. Is this really legal? Would you please verify the constitutionality of a weighted vote in terms of equal representation under the law? Those citizens of Pickens County who are not allowed to vote for Senator Martin, the senator with the higher weighting, deserve equal representation in the Senate, as they really have no voice, no representation.

Law/Analysis

Before considering the constitutionality of H3782, we must keep in mind that laws enacted by the Legislature are presumed constitutional. According to our Supreme Court: "A court will declare a statute unconstitutional if its repugnance to the Constitution is clear and beyond reasonable doubt." Se. Home Blgd. & Refurbishing, Inc. v. Platt, 283 S.C. 602, 603, 325 S.E.2d 328, 329

(1985). Moreover, only a court, not this Office, may declare a statute unconstitutional. Op. S.C. Atty. Gen., March 27, 2006. Thus, regardless of our opinion as to the constitutionality of H3782, unless and until a court declares this legislation unconstitutional, it remains valid and in effect.

The Legislature passed H3782 on June 1, 2007 and it was signed by the Governor on June 13, 2007. This legislation, among other things, amends Pickens County School Board of Trustees' (the "Board's") enabling legislation by eliminating the three positions on the Board held by at-large members. Prior to the enactment of this bill, the Board's enabling legislation called for the Board to be "comprised of nine members, six of whom shall be qualified electors from each of the districts for which members of the county governing body of Pickens County are elected and three shall be elected from the county at large." 1995 S.C. Acts 1551. H3782 states:

> The board must be comprised of six members, all of whom must be qualified electors from each of the districts for which members of the county governing body of Pickens County are elected. A current at-large member holding Seat 7, 8, or 9 shall continue to serve until his term is ended or he vacates the at-large seat for whatever reason, whichever occurs first. Upon the end of the term or the earlier vacation of the at-large seat, that at-large seat no longer exists. Only those electors residing in the particular district are eligible to vote for each of the six single-member trustees representing the district. The current trustees from the single-member districts shall continue to serve until their four-year terms expire and until their successors are elected and qualify.

In your first question, you inquire as to whether H3782 violates article VIII, section 7 of the South Carolina Constitution. Article VIII, section 7 of the South Carolina Constitution (1976) provides as follows:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. <u>No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.</u>

(emphasis added). Courts have interpreted the emphasized portion of this provision as prohibiting the passage of any law "concerning a specific county which related to those powers, duties,

functions, and responsibilities, which under the mandated systems of government, were set aside for counties." Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991) (citing Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975)).

In Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975), our Supreme Court addressed the constitutionality under article VIII, section 7 of a statute changing the method by which the members of a county school board of trustees are elected. In that case, the Court determined:

> Creation of different provisions for school districts does not impinge upon the 'home rule' amendment because public education is not the duty of the counties, but of the General Assembly. The General Assembly has not been mandated by any constitutional amendment to enact legislation to confer upon the counties the power to control the public school system. To the contrary, the command of new Article XI, Section 3, is 'The General Assembly shall provide for the maintenance and support of a system of free public schools.'
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> . . .
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> The contrast between Article XI and Article VIII should be obvious. In Article XI the General Assembly is charged with the duty to provide for a system of public education, whereas, in Article VIII the General Assembly is required to confer powers upon the counties so that they may carry out local functions. Moreover, a reading of Article XI, which deals specifically with public education, as a whole, in light of the historical background of public education in this State, and attempting to harmonize the entire Article and extract the impact of each section, it is clear that the provisions of Article VIII, which deal solely with local government, have no application to the matter currently before us.

Id. at 143-44; 217 S.E.2d at 37-38 (citations omitted). Accordingly, the Court found the statute did not violate article VIII, section 7.

H3782 appears similar to the legislation considered by the Court in Moye in that it involves a change to a school district's board of trustees. Furthermore, H3782 pertains to matters of public education. The Court in Moye clarified the Legislature has not conferred power to counties to control the public school system. Thus, we are of the opinion that H3782 does not constitute a law for a specific county and therefore, does not violate article VIII, section 7 of the South Carolina Constitution.

Next, you question the constitutionality H3782 based on the fact the Senate employed weighted voting in its adoption of the legislation. In 1999, the Fourth Circuit addressed a challenge to the legality of South Carolina's county legislative delegation system. Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999). The challengers of the system, consisting of voters in various South Carolina counties, argued the delegation system violated the "one person, one vote" rule mandated by the Equal Protection Clause because a member of a legislative delegation may represent few or no voters residing in the county but, each has a vote just as someone representing a larger portion of the population of the county. Id. The Court concluded "the legislative delegations are elected bodies that exercise governmental functions, and that therefore the one person, one vote requirement applies to them. Because there is no serious dispute that the delegation system fails to satisfy this requirement, we hold it to be unconstitutional." Id. at 281.

Based on the Fourth Circuit's ruling in Vander Linden, a South Carolina District Court issued an order imposing an interim remedy to rectify the equal protection problem with the legislative delegation system. The Court adopted a rule set forth in a Senate Bill calling for weighted voting when decisions are made by legislative delegations. As cited in a prior opinion of this Office, the Court set forth the following method for weighted voting:

> (4) to determine the weight of the vote for each member of the Senate and the House of Representatives, when voting as a legislative delegation, each calculation to the fourth decimal place in items (1) and (2) must be multiplied by one hundred;
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> (5) to determine the weight of the vote for each member of the Senate or the House of Representatives, when voting as a single branch delegation, each calculation

Op. S.C. Atty. Gen., February 23, 2001 (citing Judge Patrick Michael Duffy's order of June 22, 2000 at 4).

Based upon the information in your letter, it appears the Senate employed these rules required of legislative delegations in its consideration of H3782. However, the question then arises as to whether this treatment was appropriate. Certainly, it would be if the Pickens County Senatorial Delegation voted on the matter, but it is our belief that this matter is only proper before the Senate as a whole and thus, weighting voting is not applicable.

Article III, section 1 of the South Carolina Constitution states: "The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" Accordingly, "[t]he supreme legislative power of the State is vested in the General

Assembly . . . ." State v. Charron, 351 S.C. 319, 323, 569 S.E.2d 388, 390 (Ct. App. 2002). Our courts have held "the General Assembly cannot delegate this legislative power even if it so desired." State ex rel. Condon v. Hodges, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002). Furthermore, the courts have clarified that legislators may only exercise legislative power as members of the General Assembly. Gunter v. Blanton, 259 S.C. 436, 441, 192 S.E.2d 473, 475 (1972). Thus, based on these authorities, we believe the Legislature must act as a whole and it cannot delegate to certain members the ability to perform legislative functions. Therefore, we do not believe the Legislature has the authority to delegate the passage of legislation affecting a particular county to that county's legislative delegation. Accordingly, while it appears from your letter that only the senators who are members of the Pickens County Legislative Delegation participated in the vote on H3782[1], these senators can only act in their capacity as legislators. Therefore, weighting voting would not be applicable and if used in the enactment of H3782, would be improper.

Ms. Hay also inquires as to whether H3782 is discriminatory in practice because it effectively removed two females from the Board. The Equal Protection Clauses of the fourteenth amendment to the United States Constitution and article I, section 3 of the South Carolina Constitution prohibit discrimination based upon gender and provide that people must be treated alike under similar circumstances and conditions. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (1976). The United States Supreme Court held classifications based on gender are suspect classifications under the Equal Protection Clause. Thus, in reviewing these types of classifications, courts analyze them under heightened scrutiny.

According the United States Supreme Court "such classifications must bear a close and substantial relationship to important governmental objectives." Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

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[1] According to 67A C.J.S. Parliamentary Law § 7: "[W]here a quorum is present, a proposition is carried by a majority of the votes cast, although some of the members present refuse to vote." See Shaughnessy v. Metro. Dade County, 238 So.2d 466, 468 (Fla. Dist. Ct. App. 1970) (finding that "in order to take an affirmative action, it is necessary only that a majority of those Present and voting concur in the action" and "[m]embers of a board abstaining from voting are counted for purposes of a quorum." Laconia Water Co. v. City of Laconia, 112 A.2d 58, 60 (N.H. 1955) ("[W]hen the Legislature intends that a definite number of the qualified voters must cast their ballots, they say so expressly. In the absence of such an express provision, a majority of the qualified voters who vote determine whether an appropriation shall be made, a bond issue approved or a proposition accepted."). Thus, we believe the vote on H3782 by only a few senators is proper so long as a quorum was present at the time of the vote and the other senators abstained.

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Id. at 274 (citations and quotations omitted).

H3782 does not bar females from service on the Board. Further, this legislation makes no reference to gender in regard to who may serve on the Board. Thus, H3782 appears gender-neutral on its face. Therefore, the next inquiry is whether the legislation has the impact of discriminating against females. In other words, we must determine whether the Legislature was motivated by a discriminatory purpose when enacting this provision. Ms. Hay suggests in her letter that H3782 was enacted to remove females from the Board. However, to make such a determination we would be required to look to the circumstances under which this legislation was passed and consider justifications the Legislature may offer for the decision to eliminate the at-large positions on the Board. Moreover, we are unaware of the reason set forth by the Legislature for eliminating the Board's at-large members. In order to determine whether this legislation serves an important governmental objective, we must evaluate and determine factual issues, which is beyond the scope of an opinion of this Office. See Op. S.C. Atty. Gen., April 6, 2006 ("[T]he investigation and determination of facts are matters beyond the scope of an opinion of this office."). Thus, this question of whether H3782 is discriminatory based on gender must be left to a court to decide.

Lastly, Ms. Hay suggests the passage of the H3782 was in retaliation for a vote taken by the Board considering the decision to approve an installment purchase plan to build new schools and make improvements to existing schools. Again, whether this was the motivation of the Legislature in its passage of H3782 is purely a question of fact, and thus, it must be left to a court. However, in response to Ms. Hay's assertion that such actions are in violation of state laws against bullying, we are unaware of the existence of such laws.

Conclusion

Although article VIII, section 7 prohibits the Legislature from enacting laws for a specific county, because the Legislature is charged with the duty to provide a system of public education, our Supreme Court ruled article VIII, section 7 does not prevent the Legislature from enacting legislation effecting particular school districts. Moye, 265 at 140, 217 S.E.2d at 36. Thus, we do not believe

a court would find H3782 unconstitutional in violation of this provision. However, if the Senate used weighted voting in its consideration of H3782, we believe this action was in error as we do not find weighted voting applicable to matters before the Legislature as a whole. As for Ms. Hay's inquiry into whether the passage of H3782 was discriminatory based on gender, such a determination involves issues of fact and must be left to a court to decide. Furthermore, whether or not the Legislature passed this legislation in retaliation against a vote take by the Board is also a question of fact for a court to decide. Nonetheless, we do not find any statutory law addressing retaliatory legislation.

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
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