March 7, 2007

The Honorable Robert E. Walker
Member, House of Representatives
429 Blatt Building
Columbia, South Carolina 29211

Dear Representative Walker:

You have requested an opinion concerning the use of school buildings by political parties to hold precinct reorganization meetings. By way of background, you provide the following information:

> Political Parties in South Carolina are required by state mandate to hold precinct reorganization meetings within the same public location within a county or local precinct in which public elections and primaries are held.
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> Many of these public polling locations and public precinct reorganization meetings are on the campuses of public schools. It has come to my attention that several school boards are demanding political parties purchase insurance in order to hold their reorganization meetings on the school grounds. I am writing in question of the legality of this demand to provide a certificate of insurance and would appreciate an issuance of an official legal opinion from the office of the Attorney General of the State of South Carolina.

Law / Analysis

State law authorizes school boards to permit school buildings to be used for non-school purposes. Pursuant to S.C. Code Ann. Section 59-19-120,

> [e]ach district board of trustees may adopt rules and regulations which are not inconsistent with state law or the rules and regulations of the State Board of Education governing the use of school buildings for purposes other than normal school activity.

Traditionally, the public schools of South Carolina have been used for a wide variety of non-school purposes over the years. Our Supreme Court, in *Carter v. Lake City Baseball Club, Inc.*, 218 S.C. 255, 62 S.E.2d 470 (1950), commented upon such uses, including political activity, as follows:

> [i]t is a fact of common knowledge in this state that from our earliest days school property, especially school buildings, by general consent, have been used, outside of school session hours, for a variety of purposes other than the holding of public school, – *such as political meetings*, lectures and entertainments of various kinds. And this practice, especially in our smaller towns and rural sections, still prevails; but it has never been done so as to interfere in any way with the use of the schools and the school property generally. In other words, there has not been and should not be any conflict.

218 S.C. at ___, 62 S.E.2d at 474 (emphasis added).

Such usage for non-school purposes, so far as we are aware, has not previously required that the particular group using the school obtain its own insurance coverage. We know of no statute which requires a group, such as a political party, to obtain insurance prior to holding a meeting at a public school. However, Section 59-19-120, by its terms, does allow a school district to impose conditions upon such usage, but also states that such conditions may not conflict with state law or the rules and regulations of the State Board of Education. As noted, such groups have always used schools without penalty or condition. Moreover, schools have also long been used as polling places.

Section 10-7-40 requires that "[a]ll insurance of public school buildings and on the contents thereof, whether such buildings are held and operated under the general school laws or laws applicable to special school districts only, shall be carried by the State Budget and Control Board." You do not, however, indicate what the terms and conditions of such insurance policies might be or what activity or activities are covered under such policy. Moreover, your letter does not state what other conditions a particular school district might have imposed regarding use of the school facility by a political party or whether such conditions of coverage apply to all groups who request to use a school building for non-school purposes. Of course, this Office is unable to conduct a factual investigation regarding such factual questions or resolve factual conflicts. *Op. S.C. Atty. Gen.*, December 12, 1983.

We have previously recognized that a school district may not discriminate against particular outside groups in the use of a school district. As we stated in *Op. S.C. Atty. Gen.*, Op. No. 3014, November 2, 1970,

> [t]his office has held that it was in the discretionary powers of the school board of District No. 4 of Spartanburg County to lease school property for recreational purposes and thus recognized the broad power of the board to control the school district property.... [citations omitted].
>
> The law in South Carolina is obviously that the school board may make any arrangements that it cares to in regard to the incidental use of school property by private or public parties. But this discretionary power can be abused if the activities

> permitted on school property are other than incidental or casual in nature and conflict with school purposes. The extracurricular activities sponsored by the school are also completely within the control of the board. Therefore, the board may allow whomever they desire to participate in the activities.
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> It is well settled, however, that a school board, if it allows the school facilities to be [used] at all, must permit all individuals and organizations to use them if the purposes for which the facilities will be used are lawful. In other words, the school board may not discriminate. If the school board elects to make school facilities available, it is required by constitutional provision, '... to grant the use of such facilities 'in a reasonable and non-discriminatory manner, [equitably] applicable to all and administered with equality to all." *East Meadow Community Concert Association v. Board of Education,* 18 N.Y.2d 129, 219 N.E.2d 172, 174, quoting *Brown v. Louisiana,* 383 U.S. 131, 143, 86 S.Ct. 719, 724, 15 L.Ed.2d 637. This is equally true of participants in extracurricular activities sponsored by the school.

Thus, this previous Opinion makes clear that any requirement of insurance coverage must be imposed equally and across the board or not at all. *Compare*, *Seipp v. Wake Co. Bd. of Ed.*, 510 S.E.2d 193 (N.C. 1999) [school board rule requiring "any group" interested in using a school facility to submit written application in advance including "proof" of liability insurance].

A recent First Amendment case decided by the Fourth Circuit illustrates the non-discrimination requirement. In *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), the Fourth Circuit concluded that the School District's policy of charging a nonprofit religious organization for after-hours use of school facilities while allowing free use of the same facilities by other groups violated the First and Fourteenth Amendments. The District, by policy, imposed a fee schedule for personnel and operating expenses, but waived the fees for certain specified groups. Moreover, the District reserved the right to waive fees and charges if it determined that such waiver was in the District's "best interest."

Noting that the government may not regulate speech, based upon the "substantive content or the message it conveys," the Fourth Circuit stated that

> ... when the government opens its property to private speech, it may not discriminate based upon the viewpoint of the speaker, and it must also "respect the lawful boundaries it has itself set."

470 F.3d at 1067. The Court also emphasized that "administrators may not possess unfettered discretion to burden or ban speech, because 'without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or view-point of the speaker.'" *Id.* at 1068.

The Fourth Circuit determined that the "district's fee-waiver system is the relevant forum, because the forum is defined 'in terms of the access sought by the speaker.'" Thus, in the Court's view, a "limited public forum" analysis governed the case. This meant that "unfettered discretion" to deny or admit access to the forum could not be squared with the First Amendment. In the facts before the Court, the "best interest" language thus did not pass constitutional muster. Therefore, in the Fourth Circuit's opinion

> [i]n sum, speech is not to be selectively permitted or proscribed according to official preference. The "best interest" guidelines are "a virtual prescription for unconstitutional decision making" and permit officials to regulate speech "'guided only by their own ideas' of what constitutes the good of the community." [citations omitted] ... Since "[n]othing in the [policy] or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees," [citation omitted] ... Policy KG did not by its terms provide the standards that the First Amendment requires."

Id. at 1070.

As noted above, we do not have before us the specific policy or policies of any particular school district. We are not aware of whether the condition of insurance coverage is applied equally to all groups, or whether, as was the case in *Anderson School District Five*, there is a provision in a particular policy or regulation allowing for such requirement to be waived. Clearly, § 59-19-120 gives school boards broad authority to adopt rules and regulations, not inconsistent with state law or the rules and regulations of the State Board of Education, governing the use of school buildings for non-school activity. Such authority would include the requirement of proof of liability insurance. However, as we have previously advised, such district must treat equally all groups or organizations in terms of use of school facilities for non-school related activities. If the District imposes a requirement of insurance coverage upon political parties, it must treat other groups the same way. Moreover, if in fact a particular school board policy has created a limited public forum, such as was the case in *Anderson School District Five* the school district may not possess unfettered discretion to decide which groups have access to such forum and which do not. A policy of allowing waivers for certain groups if such waiver is deemed "in the best interest" of the District, for example, is suspect. Viewpoint discrimination on the basis of the particular speaker is not constitutionally permissible.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General