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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

February 28, 2000

The Honorable Ernest L. Passailaigue, Jr.
Senator, District No. 43
513 Gressette Building
Columbia, South Carolina 29202

Dear Senator Passailaigue:

You reference an opinion letter from legal counsel representing the Charleston County School District. You note that the opinion from Robert N. Rosen, Esquire "specifically questions the constitutionality of deconsolidation of the District." On behalf of the Senate Delegation, you have requested an opinion with respect to the constitutional questions raised by Mr. Rosen.

Law / Analysis

Mr. Rosen notes in his opinion two specific bills which have been introduced and are now pending in the General Assembly. He states that Bill No. 3095, introduced by Representative Altman, would create seven independent and autonomous school districts in Charleston County as of January 1, 2001. Bill No. 64, introduced by Senator Ford, would create three separate school districts. Further, Representative Altman has introduced Bill 3920 which would require a referendum to be placed on the ballot of Charleston County at the general election of 2000. The voters would then choose whether the Charleston County Public School System should be broken up into as many as seven independent community school districts or whether the constituent school districts should be eliminated with all school authority and administration centralized in one nine-member board.

Mr. Rosen concludes that "... any Act passed by the General Assembly which would have as its effect the breaking up of the Charleston County School District would be unconstitutional, and that only an amendment to the South Carolina Constitution could provide the General Assembly with the authority to enact such legislation." Mr. Rosen's

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opinion cites Kearse v. Lancaster County Supt. of Ed., 172 S.C. 59, 172 S.E. 767 (1934) and the June 8, 1981 opinion of the Attorney General as authority for this conclusion.

In Kearse, our Supreme Court found unconstitutional a statute which ordered an election as to whether or not three-mile school district, No. 4, as it existed prior to its consolidation with Olar School District No. 8 should be withdrawn from the consolidated district and reestablished as it formerly existed. The Court found that the Act violated Art. III, § 34, subs. 4 and 9 of the South Carolina Constitution. Subsection 4 forbids a special law which incorporates a school district and Subsection 9 prohibits a special law "where a general law can be made applicable." Our Supreme Court specifically referenced a general law which stated that no new school district shall be created by the county board of education, except upon the petition of at least one-third of the qualified electors of the proposed new district. The Court further noted that the challenged Act "proposes to change the general law as to the creation and incorporation of school districts by taking from the county board of education any authority whatever as to the incorporation of that one district." Therefore, concluded the Court,

> [w]e think the act clearly violates the inhibitory provisions of subsection 4 of section 34,, article 3, of the Constitution, forbidding the General Assembly from enacting local or special laws concerning the incorporation of school districts and subsection 9, of the same sections and article, declaring that the General Assembly shall not enact a special law, "where a general law can be made applicable." Special rights are given to the electors residing in the territory proposed to be incorporated as a school district here, when such rights are not given to electors of other school districts of the state. The General Assembly can make a general law, concerning the subject of incorporation of school district, and it has done so. See Gillespie v. Blackwell, 164 S.C. 115, 161 S.E. 869; Lancaster v. Town Council of Brookland, 160 S.C. 150, 158 S.E. 223; Sirrine v. State, 132 S.C. 241, 128 S.E. 172, and State v. Hammond, 66 S.C. 219, 44 S.E. 797, the decisions in which authorize and demand that the attacked act be declared unconstitutional.

172 S.E. at 769.

Mr. Rosen's opinion also relies heavily upon the June 8, 1981 opinion of the Attorney General. There, we addressed the question "as to the authority of the General Assembly to create a new school district in Pickens County." In the Pickens situation, the entire geographical area of the county constituted a single school district. We stated that there, a portion of the district "would like to break away from the existing district and establish a new one." Our opinion concluded that "the South Carolina General Assembly most probably does not possess the necessary authority to create a new school district in Pickens County pursuant to § 59-17-20(1).

In addition to reliance upon the Kearse case, the 1981 opinion cited Smith v. Lexington School District No. 1, 219 S.C. 191, 94 S.E.2d 534 (1981). That case found that where boundary lines of an existing school district were, for the most part, obliterated and new district lines formed, such constituted the "incorporation" of a school district for purposes of the constitutional prohibition contained in Art. III, § 34, subs. 4. However, Smith concluded that the Act in question was not unconstitutional in view of a specific constitutional provision exempting Lexington County.

The June 8, 1981 opinion noted also that § 59-17-20(1) provides as follows:

> [u]nless otherwise expressly provided, the school districts of the various counties shall not be altered or divided except: (1) by act of the General Assembly relating to one or more counties ....

Mr. Rosen's opinion acknowledges that this provision "on its face appears to authorize the General Assembly to 'alter or divide' school districts of the various counties (and which would have to be the legal basis for the deconsolidation of the CCSD) ...." However, as Mr. Rosen correctly states, the June 8, 1981 opinion of the Attorney General concluded that § 59-17-20(1) is likely unconstitutional pursuant to Art. III, § 34 subs. 4. The opinion went on to conclude that Art. XI, § 5 of the Constitution, which authorizes the General Assembly to provide for a free school system did not contemplate allowing the General Assembly to incorporate school districts by local laws. The opinion stated as follows:

> Article XI, § 5 provided that "The General Assembly shall provide for a liberal system of free schools for all children between the ages of six and twenty-one and for the division of counties into suitable school districts ...." That provision was repealed in 1954 and not replaced with any similar provisions until 1973, when it was finally replaced with the following:

> The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning, as may be desirable.

Thus, the opinion concluded:

> ... as can be readily seen, South Carolina's present constitution contains no provision similar to any in existence from 1895 to 1954, authorizing the General Assembly to divide counties into suitable school districts. Without any such provision in the constitution pertaining to the General Assembly's role in educational matters, nothing appears in the constitution to except action by the General Assembly from the prohibitions stated in Article III, Section 34, IV.

Our June 8, 1981 opinion distinguished other South Carolina cases such as Williams v. Marion County Bd. of Ed., 234 S.C. 273, 107 S.E.2d 604 (1959) and Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975). The opinion pointed out that while Williams considered § 59-17-20, "no issue was raised as to sub-section 1 of that statute, purporting to authorize the General Assembly to alter or divide established school districts." Without respect to the Moye case, while the opinion acknowledged that Moye stands as authority for the proposition that Art. XI (education matters) of the Constitution provides an exemption from Art. III, § 34, it was our conclusion at that time that "neither the Supreme Court in Moye nor the cases cited therein addressed the particular issue of the direct application of Art. III, Section 34, IV." Accordingly, we concluded that § 59-17-20(1) "is of suspect constitutionality.."

In light of the opinion of June 8, 1981, there are two decisions of the South Carolina Supreme Court which must be discussed in some detail. The case of Williams v. Marion County Bd. Ed., supra was reviewed at length in an opinion of this Office dated April 8, 1985. There, we concluded that the Williams case could be used as a counter-argument to any contention that S-305 was unconstitutional. S-305, a local law, mandated that there existed three school districts in Dorchester County and that the County Board of Education could not consolidate any of the three districts except upon petition and approval of a majority of the registered voters of the district. Our opinion recognized that S-305 was presumed constitutional in all respects and that the constitutionality of an act must be

demonstrated beyond all reasonable doubt. Furthermore, we noted that only a court could declare an Act of the General Assembly to be unconstitutional.

While the 1985 opinion clearly recognized that S-305 would be subject to a constitutional challenge under Art. III, § 34, subs. 4, as indicated, we stated that the Williams case presented "one possible counter-argument which a court could conceivably use to sustain S-305." We referenced § 59-17-20(1) and noted that no case "has ever directly considered the validity of § 59-17-20(1) or 2(a) in light of Article III, § 34 or other constitutional provisions ...." Our discussion of the Williams case follows:

> [i]n Williams, the Marion County Board of Education later divided one of the school districts it had created by consolidation pursuant to § 59-17-50. In accord with § 59-17-20, the Board's action was approved by the legislative delegation and then ratified by act of the General Assembly. The Court stated that the 'sole question' was whether the school district created pursuant to § 59-17-20 ' is a valid and lawfully established school district.' 234 S.C. at 274. Certain constitutional objections were raised in the Williams case (Equal Protection), but the Court expressly stated that 'from the record ... no constitutional question is involved.' Supra. See also, Op. Atty. Gen., November 24, 1969 [citing Williams in conjunction with § 59-17-20 as a possible method for dividing an existing school district].
>
> A court could therefore conceivably read the Williams case broadly and uphold S-305 or similar legislation (as in Williams), because that case also involved in part a legislative act altering school district lines after a consolidation by the County Board had been previously ordered. While the Court in Williams was concerned primarily with § 59-17-20(2)(a) (approval of County Board action by the delegation) it is clear that the court also reviewed a statute ratifying the action of the Marion County Board; such statute was, arguably, enacted pursuant to subsection (1) of § 59-17-20. Accordingly, action taken by the General Assembly pursuant to subsection (1) might conceivably be sustained by a court, particularly where the

> burden would be to show unconstitutionality beyond a reasonable doubt.

In addition, the case of Smythe v. Stroman, 251 S.C. 277, 162 S.E.2d 168 (1968) must be referenced. In that case, Act No. 340 of 1967 was attacked as unconstitutional special legislation. The Act consolidated the eight existing school districts in Charleston County into a single county wide school district known as the Charleston County School District.

The Court rejected these arguments on several grounds, noting that it was well recognized in South Carolina that consolidation of school districts is substantially different from incorporation. See, Walker v. Bennett, 125 S.C. 389, 118 S.E.779 (1923); Arnette v. Ford, 129 S.C. 526, 125 S.E. 138 (1924). In addition, however, the Court upheld the statute in question on the basis that it was enacted pursuant to §§ 59-17-20(1) and 59-17-40 [previously §§ 21-112(1) and 21-114]. Section 59-17-40 provides that "[a]ll of the school districts of any county may be consolidated into a single school district embracing the entire county in the manner provided by § 59-17-20 for the alteration or division of school districts." The Court clearly upheld § 59-17-20(1) as a constitutionally legitimate way to create new school districts through an Act of the General Assembly. The Court stated:

> [t]here is the further fact that the general law provides in Section 21-112(1) and Section 21-114 that all of the school districts of the County may be consolidated into a single school district embracing the entire county by an act of the General Assembly. Thus, the general law itself provides for the enactment of the legislation by which the consolidated district was created; and the legislation is valid as a special provision in a general law which is expressly authorized by the general law. Walker v. Bennett, supra; Arnette v. Ford, supra. (emphasis added).

Thus, it could be argued at least that any legislative Act enacted pursuant to § 59-17-20(1) might be upheld as a constitutionally valid special provision in a general law under the rationale of the Smythe case. Clearly, a special provision in a general law is a valid defense to a constitutional attack based upon Art. III, § 34, subs. 4. See Burris v. Brock, 95 S.C. 104, 79 S.E. 193 (1913). See also, Severance v. Murphy, 67 S.C. 409, 46 S.E. 35 (1902) [statute providing that the county board shall designate a locality for a dispensary, and that on petition of a majority of the voters, such location may be prevented, is not in violation of Art. 3, § 34, subd. 11 as special legislation in that it provides for the location of dispensaries in certain named counties].

In addition, our Supreme Court "has recognized the broad legislative power of the General Assembly in dealing with education under art. XI of the Constitution ...." Op. Atty. Gen., September 15, 1994. While the Court has "made clear that education is not exempt from special legislation restrictions of the Constitution ...," Horry County v. Horry County Higher Ed. Comm., 306 S.C. 416, 412 S.E.2d 421 (1991), nevertheless, great deference must be given to any Act of the General Assembly which deals with education. Quoting the Court in Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946), the opinion of the General Assembly is "entitled to much respect and in doubtful cases should be followed." As was emphasized in Moye v. Caughman, supra, the "... General Assembly is charged with the duty to provide for a system of public education." 217 S.E.2d at 38. Time and time again, applying this body of law, this Office has stated that local laws relating to education are most probably constitutional.

Conclusion

There is no question, as Mr. Rosen correctly finds, that the Attorney General's June 8, 1981 opinion concluded that § 59-17-20(1), which authorizes the General Assembly to enact legislation for one or more counties to alter or divide school districts, is subject to constitutional challenge pursuant to Art. III, § 34, subs. 4 and 9. The opinion concluded that § 59-17-20(1) may contradict the constitutional prohibition against special legislation which incorporates a school district.

However, it is important to remember that no South Carolina case has ever so concluded. To the contrary, the Smythe case upheld the statute creating the present Charleston School District against the very same constitutional attack which is urged here. Our Supreme Court in Smythe cited § 59-17-20(1), suggesting that it is a valid general law and the local statute creating the Charleston School District as being an equally valid "special provision in a general law which is expressly authorized by the general law." Moreover, an earlier opinion of the Attorney General likewise cited § 59-17-20(1) as a proper means to alter school districts in Anderson County. See, Op. No. 1074 (March 25, 1961).

Section 59-17-20(1), which expressly authorizes the General Assembly by local law to alter or divide a school district, has been on the books now for fifty years. This law has been reviewed and discussed by our Supreme Court on several occasions without any indication or suggestion of its unconstitutionality. The Supreme Court, in deciding the Kearse case, a decision relied upon heavily in the 1981 opinion as well as in Mr. Rosen's letter, did not have the benefit of § 59-17-20(1)'s enactment.

There exists a strong presumption of constitutionality which any Act of the General Assembly must possess - particularly one relating to education. Common sense also dictates the belief that if the Legislature lawfully consolidated the Charleston School District, it can also legally deconsolidate that very same District. Certainly, the Legislature has never thought it necessary to amend the Constitution every time it wishes to alter or divide a school district. To be required to amend the State Constitution at every turn would defeat the whole idea of local control of education. That is apparently why the generally applicable law found at § 59-17-20(1) was enacted in the first place.

It is thus our opinion that an Act deconsolidating the Charleston School District would not be an unconstitutional special law incorporating a school district, but instead a special provision within a general law and thus constitutional. Accordingly, if a local law deconsolidating the Charleston School is enacted by the Legislature pursuant to § 59-17-20(1), we cannot definitively conclude that such enactment would be unconstitutional special legislation. As we have previously advised, if a statute is enacted by the General Assembly, such enactment should continue to be followed until a court rules otherwise. Op. Atty. Gen., June 11, 1997. Therefore, if one or more of the bills in question deconsolidating the Charleston School District were to be enacted, we would advise that such Act or Acts be enforced and followed.

Sincerely,

Charlie Condon
Attorney General

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