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# STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

*Office of the Attorney General*
*Columbia 29211*

May 29, 1997

James P. Scheider, Jr., Esquire
P. O. Drawer 7049
Hilton Head Island, South Carolina 29938

Dear Mr. Scheider:

You are writing on behalf of the Board of Directors of the Lighthouse Charter School, Inc. for "the purpose of seeking both clarification and guidance incident to the Charter School's diligent efforts to achieve both the racial composition for the student body and to conduct a lottery as required by statute." In your letter, you reference S.C. Code Ann. Sec. 59-40-50(B)(6) which requires a Charter School to

> ... (6) admit all children eligible to attend public school in a school district who are eligible to apply for admission to a charter school operating in that school district, subject to space limitations. However, under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent (10%). If the number of applications exceed the capacity of a program, class, grade level or building, students shall be accepted by lot, and there is no appeal to the sponsor.

Your letter also notes that to date the Charter School "has received approximately 150 applications from individual families with the expectation that the level of applications will continue to increase until the deadline for receiving such applications at 6:00 p.m. on May 31, 1997". Thus, there is "every expectation that applications will far exceed the maximum number of students in one or more grades in the Charter School, thus requiring a lottery to determine which children will be admitted." You further state

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Request Letter

that the plan is to conduct such lottery "immediately following the 6:00 p.m. deadline. A number will be assigned for every child for whom an application was submitted with numbers "to be drawn on a random basis with no preferential treatment given, except that the sibling(s) of a child for whom a member is drawn will be granted admission concurrently with their brother or sister." You state that the question presented is as follows:

> in the event that a lottery is necessary, with numbers drawn at random from a common pool, with no guarantee of any racial composition or quota, is such lottery process valid under the statute, particularly that portion of §59-40-50(6) which provides that, ... "under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten (10%) percent, or should some other lottery format be utilized to achieve the racial composition required by the State Board of Education Order and the statute?

## LAW / ANALYSIS

In an Opinion of this Office, dated April 7, 1997, we addressed the question of the facial constitutionality of the provision contained in Section 59-40-50(B)(6) which mandates that the racial makeup of a charter school may not vary by more than 10% "from the racial composition of the school district." We referenced the decisions of recent years emanating from the United States Supreme Court, particularly that of City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), and found the racial quota requirement of Section 59-40-50(B)(6) to be unconstitutional under Croson. Our analysis was summarized by the following statement:

> [b]ased upon the foregoing wealth of authorities, it is [our] ... opinion that Section 59-40-50(B)(6) is unconstitutional under Croson. Clearly, there has been no demonstration of, or even a specific allegation of, any past discrimination with respect to the charter school program. Nor could there be. In view of the fact that charter schools are just now beginning to be organized in this State, there is little or no history at all. This law is thus written on a clean slate ... and even if there had been past discrimination in the particular school district where a charter school is organized, such is irrelevant for the purpose

of any constitutional need for mandating a rigid quota in the charter school law. Hopwood [v. Texas, 78 F.3d 932 (5th Cir. 1996)] and other cases teach that there must have been a documentation of past discrimination by the particular entity or agency where the quota is being applied. See also, Croson, supra ... . Again, by definition, no discrimination in admissions could have occurred in a program just barely off the ground.

Moreover, even assuring for the sake of argument, a documented history of past discrimination, the General Assembly has presented no need for the kind of unforgiving quota present in this statute. Such a quota clearly is not "narrowly tailored" as is required by Croson. There may be any number of non-race-related reasons why persons would decide not to seek application at a charter school. In the words of the Court in Brooks [v. State Board of Elections, 848 F.Supp. 1548 (S.D.Ga. Brunswick Div. 1994)] it is "purely a speculative notion" that persons would desire to attend the charter school in the same numbers and the same [racial] proportions as other schools in the District.

To impose ... a rigid racial quota upon the charter school program is legally suspect. Without waiting to see whether any discrimination even occurs or without any effort to rely on existing individual remedies or other race-neutral measures, the Legislature has required that every charter school possess the same racial balance as is present in the school district. Such amounts to nothing more than a legislative edict to achieve a purely racial composition. Thus, an educational program quickened by creativity and flexibility is then paralyzed by the rigor mortis of racial quotas. A statute which professes to be on the cutting edge of educational progress, at the same time, adheres to the repudiated idea of admitting students by their race. The courts have ruled that such racial set-asides are presumptively illegal and constitutionally infirm. See Op.Atty.Gen., March 27, 1997. Accordingly, since the quota in question has in no sense been adopted in a "remedial setting" or as a remedy for demonstrated past discrimination, it is, in my opinion, violative of the Equal

Protection Clause. Cf. Missouri v. Jenkins, 115 S.Ct. 2038 (1995).

Thus, it is my Opinion of this Office that the quota provision contained in "Section 59-40-50(B)(6) would be declared unconstitutional by the courts, but that this provision would be severable from the rest of the Act." Id.

Your question now is what to do with respect to the conflicting provisions contained in Section 59-40-50(B)(6). On the one hand, this Section requires the enrollment of a charter school "under no circumstances" to "differ from the racial composition of the school district by more than ten percent (10%)." On the other hand, however the statute mandates that "[i]f the number of applications exceed the capacity of a program, class, grade level or building, students shall be accepted by lot, and there is no appeal to the sponsor." Thus, in the same breath, the statute requires a method of selection of applications which is racially neutral and another which is nothing short of a racial quota. How, then, can this statutory conflict be resolved?

Of course, where there are conflicts within a statute, we must make every effort to reconcile them consistently with legislative intent. Adams v. Clarendon County School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). But it is equally obvious that where there is a conflict between Constitution and statute, the statute must give way. State v. Wilson, 162 S.C. 413, 161 S.E. 104 (1931). A statute will be construed to avoid a conflict with the Constitution where possible. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956).

In essence, your question presented here is whether separate lotteries could be used in order to conform to the conflicting requirements of Section 59-40-50(B)(6). Presumably, in such a hypothetical scenario, there would be a lottery among white applicants to determine which white applicants would be admitted and a separate lottery would be held to determine which black applicants are admitted. The number chosen from each pool would, I assume, correspond (within 10%) to that racial group's percentage of students in the school district. For example, a charter school with an enrollment capacity of 100 students and where the racial composition of the district is 60% white, 40% black, would allot 60 seats to white students and 40 seats to black students. Separate lotteries would be used to reach this 60 - 40 ratio at the charter school.

While such an approach may well conform to the intent of the Legislature in drafting the law, in no way or in any sense does it square with the mandate of Equal Protection of the law. Simply put, this is a systematic form of student segregation. Rather than mandating black and white schools, the statute creates within charter schools

black and white seats. Each side of this racial coin is thus completely at odds with the ideal of a "colorblind" Constitution.

Courts have recognized that this modern-day form of racial discrimination is little different from its ancestor. In Equal Enrollment Association v. Bd. Ed. Akron City School Dist., 937 F.Supp. 700 (N.D.Ohio East Div.1996), an Ohio law permitted students native to a school district to transfer to an adjacent district unless the school district objected. One basis for such objection under the statute was to "maintain an appropriate racial balance. The Akron School Board promulgated a policy prohibiting transfers of white students out of the District in order to maintain an appropriate racial balance.

White students sued contending that the Board's policy deprived them of their right to transfer to an adjacent district on the basis of their race. The Board argued that its policy promoted a compelling governmental interest -- the prevention of de jure segregation of its schools. In essence, the Defendant school board feared "a segregated school system in which Akron's 'white' students are educated in the suburbs and its 'nonwhite' students are relegated to the Akron Public Schools." 937 F.Supp. at 704. Thus,

> [i]n order to avoid such interdistrict racial segregation, the Akron Public Schools took advantage of the "racial balance" exception provided in the Ohio Open Enrollment statute by adopting a policy of objecting to the transfer out of any white student. Avoiding racial segregation, Defendant argues, is the compelling reason behind its race-conscious prohibitory policy.

Id. The Court, however, rejected the school board's argument. Said the Court,

> [w]hatever else can be said here, the Board's compelling interest can only be seen as a preventative measure directed to an anticipated problem, rather than as a remedial measure to right an already recognized discriminatory practice or condition. In espousing its rather novel argument, the Board implicitly acknowledges that which Plaintiff explicitly states: absent a finding of past discrimination, no race-based regulation has been upheld. See, e.g., Croson, 488 U.S. at 499-501, 506, 109 S.Ct. at 724-26, 728; Middleton v. City of Flint, 92 F.3d 396, 401-03, 406 (6th Cir.1996); see also, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288, 106 S.Ct. 1842,

> 1854, 90 L.Ed.2d 260 (1986) (O'Connor, J. concurring) ("remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny"); Associated General Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.3d 922, 930 (9th Cir.1987) (state and local governments may only use racial classifications to correct our past wrongdoing) ... .

Id. at 705 -706.

In the Flint case, referenced in the Akron decision, the city of Flint, Michigan adopted a plan requiring that 50% of all police officers promoted to the rank of sergeant must be members of specified minority groups. The Sixth Circuit Court of Appeals overturned the decision of the District Court which had upheld the quota. Relying upon the Croson analysis, the Court found that the quota did not meet the strict scrutiny test, nor was it "narrowly tailored" to achieve a compelling state interest. Whatever past discrimination which had infected the Flint Police Department had been remedied and the Court noted that "... evidence of past discrimination that is remote in time will not support a claim of compelling governmental interest when other evidence is adduced to show that the governmental body has taken serious steps in subsequent years to reverse the effects of past discrimination and to implement appropriate new standards." 92 F.3d at 408. Rather than promoting to the rank of Sergeant from a race-neutral pool of applicants, the Flint pool was tainted, concluded the Court:

> [i]n order for the city to procure the necessary number of Black sergeants to meet the quota, the record shows that the degree of preference had to be very great. Based on the 1987 exam, twenty-one white officers were passed over to reach the first of the "preferred" Black officers, and an additional twenty-nine had to be passed over before the process was complete. The differences in scores was considerable.

Id. at 412. Thus, rather than a pool based upon the highest scores, the quota required a process of "passing over" higher scores until the quota was fulfilled.

The District of Columbia Circuit Court struck down a somewhat similar plan in Hannon v. Barry, 813 F.2d 412 (D.C. Cir. 1987). There a District of Columbia law required "full representation" of all groups in accordance with their representation in the available work force. The D.C. Fire Department thus adopted an affirmative action plan

with the express intent of compliance with this quota requirement. The Court acknowledged that "at least for the past five years, the District has assiduously sought to achieve racial representation in the Fire Department work force proportional to that in the District population at large." 813 F.2d at 430. Thus, concluded the Court:

> [t]his is an impermissible goal under our law. To draw lines based on race, our Constitution demands that government have the most weighty reason for doing so, one that is compelling or at least important. A government-inspired or -mandated effort to attain racial balance not only fails to satisfy that daunting standard, but is itself suspect. As Justice Powell stated in Bakke, "[a governmental] purpose ... to assure [the representation of] ... some specified percentage of a particular group merely because of its race ... must be rejected not as insubstantial but as facially invalid." Bakke, 438 U.S. at 307, 98 S.Ct. at 2757. And that position, as we read the cases, represents the law of the land.

Id. at 430.

Other decisions are in complete accord. In McLaughlin v. Boston School Committee, 938 F.Supp. 1001 (D.Mass. 1996), Judge Garrity issued a preliminary injunction against the Boston School Committee to restrain its voluntary set-aside for black and Hispanic students 35% of the seats available at three Boston public schools to which admission was based on a combination of entrance examination scores and sixth grade marks. Plaintiff claimed that as a result of the quota, she was denied admission to the Boston Latin School, a nationally know prep school (but also a part of the public school system) in violation of the Equal Protection Clause. The Court, in granting the preliminary injunction concluded that the quota was not "narrowly tailored" to the degree necessary to sustain it. Moreover, the Court found that a lottery without a racial quota would be constitutionally sustainable. The Opinion observed that

> ... admission to the examination schools could be conducted by lottery after examination results (perhaps in combination with sixth grade marks) establish the pool of students qualified for admissions to BLS. Cf. Wygant, 476 U.S. at 310, 106 S.Ct. at 1865, a case in which Marshall, J., dissenting suggested the use of a lottery so as to preserve desegregation gains without placing any one non-minority teacher more at risk than a minority teacher would be. In the past several years,

> approximately 65-70% of qualified applicants have been white or Asian-American; 20 or 25% have been black; and 7-10% have been Hispanic. Thus, a lottery could be expected to at least approximate BLS's current racial and ethnic mix.

938 F.Supp. at 1016.

And in Taxman v. Bd. of Ed., 91 F.3d 1547 (3d Cir. 1996), the Court held that an affirmative action plan which preferred minority teachers over non-minority ones where the teachers were equally qualified violated Title VII of the Civil Rights Act. There, two teachers were or equal seniority. In prior decisions involving equal seniority, the School Board had broken the tie through a lottery. However, in no previous case were the employees considered for layoff or different races. This time, however, the random drawing was not used and the minority teacher was given the preference consistent with the affirmative action plan.

While the case was brought under Title VII, the Court, nevertheless, found that an Equal Protection analysis would not uphold the Board's approach either. Reasoned the majority,

> [w]ere we to accept that equal protection standards may be imported into Title VII analysis, we are still unpersuaded that the Equal Protection case law validates the Board's asserted goal of racial diversity. We cannot agree with the Board that the racial diversity purpose is supported by the Supreme Court's holding and the dissenting opinions in Wygant. The Court in Wygant, although divided, agreed that under the Equal Protection Clause, racial classifications in the context of affirmative action must be justified by a compelling state purpose and the means chosen to effectuate that purpose must be narrowly tailored; that societal discrimination alone will not justify a racial classification; that evidence of prior discrimination by an employer must be presented before remedial racial classification can be employed; and that the "role model" theory proposed by the employer as a basis for race-conscious state action was unacceptable because it would have allowed discriminatory hiring and layoff well beyond the point necessary for any remedial purpose and did not bear any relationship to the harm caused by prior discrimination.

91 F.3d at 1560.

Thus, the courts have uniformly held that the kind of quota contained in Section 59-40-50(B)(6) unlawfully discriminates on the basis of race. We reiterate our conclusion in the Opinion of April 7, 1997, that the requirement that a charter school must have an enrollment within 10% of the racial composition of the school district is unconstitutional. Absent a showing that such a quota is essential to remedy past discrimination in the charter school program, which was certainly not the Legislature's intent, the quota cannot stand. Here, we can only speculate that such provision is the kind of "preventative measure" present in the Equal Enrollment case, which was "directed to an anticipated problem [to avoid racial imbalance], rather than as a remedial measure to right an already recognized discriminatory practice or condition." Equal Enrollment, supra. As such, it is unconstitutional.

Nor is this a case like Kromnick v. Sch. Dist of Phil., 739 F.2d 894 (3d Cir. 1984). There, the Court upheld a quota requiring the assignment of teachers partly on the basis of past discrimination and partially because "it is questionable whether the policy is one effecting a discrimination of constitutional dimensions." The Court reasoned that the policy "only affects assignments of teachers to schools" and does not hire, fire or pay along racial lines. While we agree with the District Court in Kromnick which found that the policy was an illegal racial quota, the Court of Appeals decision in Kromnick case is far different from this situation involving admission to a brand-new and innovative charter school program. There is indeed a "discrimination of constitutional dimension" present with respect to Section 59-40-50(B)(6) -- the denial of a student's admission to the program based upon his or her race. This discrimination works to impose a ceiling upon group's admission to a school based upon the group's racial composition in the school district. This has the pernicious effect of "locking" in all racial groups to a fixed percentage of admissions to a charter school but no more.. It is thus our Opinion that, where there are more applications than seats available at a charter school, the random drawing provision of the charter school law should be relied upon, rather than the racial quota required therein.

Thus, we advise that the dilemma in which the Charter School finds itself -- conflicting statutory obligations, as well as a conflict between statute and Constitution -- are such that the random drawing provision should control where the charter school has more applications than spaces available. Moreover, this Office is intervening in Bft. Co. Bd. Ed. v. Lighthouse Charter School Committee and will support its position that the quota provision is unconstitutional and severable.

## CONCLUSION

1. We reiterate that the racial quota provision contained in the Charter School statute is unconstitutional. While this quota may reflect the intent of the Legislature in enacting the law, in no way or in any sense does it square with Equal Protection of the Law. Simply put, the quota is a present-day form of systematic student segregation. Rather than mandating black and white schools, the statute creates within charter schools, black and white seats. Each side of this racial coin is completely at odds with the ideal of a "colorblind" Constitution.

2. As we emphasized earlier, the case law teaches that there must clearly be documented past discrimination by the specific entity in question, not just society generally. Thus, we again stress the point that "[w]ithout waiting to see whether any discrimination [in the charter school program] even occurs, or without any effort to rely on existing individual remedies or other race-neutral measures, the Legislature has required that every charter school possess the same racial balance as is present in the school district. Such amounts to nothing more than a legislative edict to achieve a particular racial composition." Here, the General Assembly's fear or speculation that a particular charter school program may consist predominantly of students of one race or another is not constitutionally sufficient to support the kind of quota present in the Charter School law. The Legislature is not free to violate the Constitution simply because it anticipates that people may not choose to attend a charter school in perfect proportion to their racial composition in the community.

3. This racial quota is particularly pernicious and more malignant than many. Instead of creating a floor in favor of a certain race, it places a ceiling upon all races. The quota, for example, cuts to the quick innovative efforts to attack the crisis in black families. The statute places an impossible roadblock in front of innovative efforts like Thaddeus Lott's charter schools in Houston, Texas -- a nationally recognized minority charter school program. In short, the Legislature has sacrificed substance for statistics.

4. Where there are more applications to a charter school than places available, a method which prefers racial quotas over random selection is also constitutionally untenable. A random drawing cannot coexist alongside a race-based selection process and be anything other than a pretense. The statute is ambiguous and contradictory on its face; while providing for some

form of random drawing to fill available places, it also states that "under no circumstances" may a charter school enrollment differ from the racial composition of the school district by more than ten percent (10%). Such statutory inconsistency is a thinly disguised "grab bag" designed to satisfy everyone but, in reality, it placates no one. It is illusory to pretend that separate drawings for black and white applicants or a single drawing with one eye on the statute's quota is anything other than an unconstitutional quota. Thus, the statute as written gives conflicting and unconstitutional directives to a charter school and cannot be fully adhered to in its present form.

5. The courts have repeatedly upheld as constitutional a random drawing of a jury in a criminal trial which has as its pool a cross-section of the community. See, e.g. Carwise v. State, 454 So.2d 707 (Fla.1984)[every jury need not actually contain representatives of all economic, social, religious, racial, political and geographical groups; so long as random selection process is complied with, constitution is satisfied]. Such a jury selection process does not use one drawing for blacks and another for whites; there is only one random draw, usually computerized. If a random jury selection system is good enough constitutionally to send a defendant to jail or his death without reliance on a racial quota, it is certainly a sufficient method to choose applicants to a charter school. We suggest that the jury selection method without the racial quota be used as the controlling analogy here.

6. This Office is intervening in the pending appeal from the administrative proceeding in Beaufort County Board of Education v. Lighthouse Charter School Committee and will support its position therein that the quota provision is unconstitutional and severable.

With kindest regards, I am

Sincerely,

Charles Molony Condon
Attorney General

CMC/ph