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June 21, 1994

Mark R. Elam, Esquire
Senior Legal Counsel to the Governor
Office of the Governor
Post Office Box 11369
Columbia, South Carolina 29211

Dear Mr. Elam:

By facsimile transmission of June 9, 1994, you have inquired as to the constitutionality of H.5210, R-631, an act abolishing the Spartanburg County Board of Education, devolving that Board's powers and duties on the boards of trustees of the local school boards of Spartanburg County, establishing the Spartanburg County Education Oversight Committee, and so forth. For the reasons following, it is the opinion of this Office that the act is most probably constitutional.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

This act is clearly constitutional under S.C. Const. Art. VIII concerning Home Rule. "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." Moye v. Caughman, 165 S.C. 140, 217 S.E.2d 36, 37 (1975).

This act also appears to be constitutional under Art. III,

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§34(IX), which prohibits the enactment of a special law where a general law can be made applicable. Applying the above-cited presumptions of constitutionality to R-631 supports that conclusion despite the Supreme Court's recently finding an education law unconstitutional under Art. III, §34. Horry County v. Horry County Higher Education Commission, ___ S.C. ___, 412 S.E.2d 421 (1991).

In Horry County, the Supreme Court has recognized the broad legislative power of the General Assembly in dealing with education under Art. XI of the Constitution, but the court made clear that education is not exempt from special legislation restrictions of the Constitution. The court struck down legislation for the Horry County Higher Education Commission under Art. III, §34 because it found that a general law could be fashioned to provide ad valorem property tax funding for all colleges and universities and that the record was "...devoid of any peculiar local conditions which require special treatment for Coastal Carolina" as to those taxes; however, Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133, 138 (1946), recognized considerations that may allow R-631 to avoid unconstitutionality under Art. III, §34. The court stated that "[i]t is exceedingly doubtful whether a general law, uniform in operation throughout the state, regulating the measure of aid to be given by the counties to the districts or the extent of control which should be vested in the county boards of education, could be made applicable." Moreover, Moseley quoted the special referee in that case who held that the numerous special legislation provisions for the fiscal affairs of the schools and the counties of this State was "...at least indicative of a consistent legislative opinion that conditions in the various counties are such as to preclude uniformity of treatment in relation to the administration of school affairs." Id. According to the court, that conclusion of the General Assembly was "entitled to much respect and in doubtful cases should be followed." Id. We feel that a court might well uphold R-631 on the basis of the above presumption and language quoted from Moseley. See also Horry County; Art. III, §34; and Gillespie v. Pickens County, 197 S.C. 217, 14 S.E.2d 900 (1941).

Although the conclusion of this Office is that R.631 would most probably be found to be constitutional, the Horry County decision does indicate that R-631 carries some risk of being found unconstitutional if a court were to conclude that a

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general law could be fashioned on its subject and that no peculiar local conditions required special treatment for the district.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:kws

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions