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The State of South Carolina

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September 15, 1994

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

Dear Mr. Elam:

By your letter of September 9, 1994, you have asked for the opinion of this Office as to the constitutionality of H.5146, R-628, an act relating to the Charleston County School District. For the reasons following, it is the opinion of this Office that the Act is entitled to the presumption of constitutionality, though there is some risk that the Act could be found to be unconstitutional.

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.

The act bearing ratification number 628 of 1994 would permit the trustees of the Charleston County School District to charge matriculation and other incidental fees, as permitted by S.C. Code Ann. § 59-19-90 (8) when authorized by special act of the General Assembly. The act would also revise the manner in which certain vacancies on the board of trustees are filled. 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

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of the counties, but of the General Assembly." Moye v. Caughman, 165 S.C. 140, 217 S.E.2d 36, 37 (1975). This law also appears to be constitutional under art. III, § 34 (IX), which prohibits the enactment of a special law where a general law can be made applicable.

This Office would uphold the presumption of constitutionality with respect to H.5146, R-628 despite the Supreme Court's fairly 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 H.5146, R-628 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. Although certain general laws do exist as to borrowing (see e.g. S.C. Const. art. X § 15, S.C. Code Ann. § 11-27-50 (1986) and § 59-71-10, et seq. (1990)), a court might uphold H.5146, R-628 on the basis of the above presumption and the language quoted from Moseley. See also Horry County, art. X § 34 and Gillespie v. Pickens County, 197 S.C. 217, 14 S.E.2d 900 (1941).

Although the conclusion of this Office is that H.5146, R-628 would most probably be found to be constitutional, the Horry County decision does indicate that H.5146, R-628 carries some risk of being found unconstitutional if a court were to conclude that a 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

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REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions