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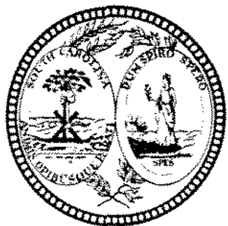

The State of South Carolina
# OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 21, 1996

The Honorable Scott H. Richardson
Member, South Carolina House of
Representatives
52 North Calibogue Cay
Hilton Head Island, SC 29928

Dear Representative Richardson:

You have requested legal advice regarding provisions of South Carolina's new charter schools law regarding the racial composition of those schools. S.C. Code Ann. §59-40-50(B)(6) as added by Act 447, 1996 S.C. Acts ______.

This law provides in part, as follows:

> However, under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than 10 percent.

Your first question is whether this provision refers to racial composition of attendance zones of schools in the district or whether it refers to the composition of the entire district. The following rule of construction is applicable here:

> The ... primary function in interpreting a statute is to ascertain the intention of the legislature.... Where the terms of a statute are clear and unambiguous, there is no room for interpretation and [a court] must apply them according to their literal meaning. South Carolina Department of Highways and Public Transportation v. Dickinson, 281 S.C. 134, 341 S.E. 2d 134 (1986).

Under this rule, the above provision's references to "under no circumstances", indicates that the provision is mandatory. Further, the term "school district" must be interpreted with reference to definitions of that term elsewhere in the Code. Lewis v. Gaddy, 254 S.C. 66 173 S.E. 2d 376 (1970). The term "school district" is defined, in part, in §59-1-160 (1990) as "a legal entity" and §59-17-10 states that it is it is "a body politic and

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corporate." School districts have also been recognized by the courts as political subdivisions of the State. Patrick v. Maybank, 198 S.C. 262, 17 S.E. 2d 530 (1941). No alternative definition is suggested by §59-40-50(B)(6) which would be limited to an attendance area rather than an entire political subdivision. Accordingly, a school district, as defined by the above authority is the entire political subdivision rather than an attendance area.

Your next question is whether the racial composition requirement is constitutional. Its purpose appears to be indicated by the introduction to Act 447 which states in part that "...the General Assembly will not allow greater flexibility and deregulation to result in segregation of students by race...." [1] In reviewing this provision, a Court may not declare it unconstitutional "unless its repugnance to the Constitution is clear and beyond a reasonable doubt." Robinson v. Richland County Council, 293 S.C. 27 358 S.E. 2d 392 (1987).

Recently, the case Hopwood v. State of Texas, 78 F.3d (5th Cir. 1996) held as follows as to racial preferences in a law school admissions program:

> Foremost, the [Supreme] Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs. 78 F. 3d at 944.
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> * * *
>
> In contrast to its approach to the diversity rationale, a majority of the Supreme Court has held that a state actor may racially classify where it has a "strong basis in the evidence for its conclusion that remedial action was necessary." 78 F 3d at 948.

At issue in Hopwood was a policy regarding diversity in enrollment, but the Court noted that "[n]o case since Regents of University of California v. Bakke, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57, L.Ed.2d 750 (1978) (opinion of Powell, J.) has accepted diversity as a compelling state interest under a strict scrutiny analysis." 78 F.3d at 944. Although Hopwood questioned reliance upon Judge Powell's opinion in Bakke that race could be used for the purposes of obtaining a heterogenous student body, even Bakke stated that, while race could be a factor, it could not be the only factor. 78 F.3d at 943.

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[1] "... [T]he meaning of particular terms in this statute may be ascertained by reference to words associated with them in this statute." Southern Mutual Church Insurance Company v. Windstorm and Hail Underwriting Assoc., ___S.C.___, 412 S.E.2d 377 (1991).

Although the above authority was in the context of higher education, it appears to be of guidance here. The only express reference in Act 447 to its purposes is the above statement regarding not allowing segregation, but under the above authority, the Act's fixed enrollment percentage may not be constitutional unless strong evidence exists that it is necessary to remedy any present effects of past discrimination.[2] Cf. Missouri v. Jenkins, ___U.S. ___, ___L.Ed. 2d ___, 115 S.Ct. 2038, 2049-2050 (1995)[3]. We cannot make a determination of whether such evidence exists in that factual investigations do not fall within the scope of opinions of this Office. Ops. Atty. Gen. (December 12, 1983).

In conclusion, the racial provisions of § 59-40-50(B)(6) apply to entire school districts rather than to attendance areas. Moreover, the Act's fixed enrollment percentage may not be constitutional as applied to a particular district unless strong evidence exists that it is necessary to remedy any present effects of past discrimination. Therefore, the constitutionality may be dependent upon factual findings which cannot be undertaken within the scope of an opinion. As to the constitutionality as applied to a particular district, the District may want to review this matter with its lawyer. You also may wish to consider clarifying legislation.

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

Yours very truly,

J. Emory Smith, Jr. /an

J. Emory Smith, Jr.
Assistant Deputy Attorney General

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[2] In the application of R517 to an individual school district, consideration should also be given to whether any desegregation plan exists that the district may required to follow under Court order or under agreement with the federal government, and the effect of that plan, if any, on the charter school.

[3] "[T]he Court has consistently held that the Constitution is not violated by racial imbalance in the schools without more." 115 S.Ct. at 2050. Missouri makes clear that federal courts cannot order a remedy as to school desegregation that goes beyond scope of any identified violation of the law. 115 S. Ct. at 2049 - 2053.