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April 8, 1985

The Honorable George H. Bailey
Member, House of Representatives
308-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Bailey:

You have asked our advice as to the constitutionality of S-305. The proposed bill provides in pertinent part as follows:

> SECTION 1. There are three school districts in Dorchester County: the St. George District or District One, the Summerville District or District Two, and the Harleyville-Ridgeville District or District Three, with each district serving the same areas of the county served by it on January 1, 1984.
>
> SECTION 2. The Dorchester County Board of Education may not consolidate any of the three school districts of the county except upon petition of the boards of the district to be consolidated and approval of a majority of the registered voters of the districts to be consolidated voting in the consolidation referendum which must be conducted by the Dorchester County Election Commission at the discretion of the Board of Education.

In addressing your question as to the constitutionality of the bill, particular reference is made to our letter written to you on February 7, 1985. Referring therein to an exhaustive opinion of this Office, dated June 18, 1981, the February 7 letter commented generally upon the constitutionality of special legislation halting or suspending the consolidation of school

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districts once such consolidation had been ordered pursuant to the procedures set forth in § 59-17-50 of the Code. While at that time we did not have the occasion to examine particular legislation, we pointed out that there would exist potential constitutional problems under Article III, § 34(40) of the State Constitution, with respect to any such special legislation.

Our February 7 letter emphasized, however that any act of the General Assembly is presumed constitutional in all respects and that the constitutionality of an act must be shown beyond a reasonable doubt. We further stated that "while this office may comment upon potential constitutional problems, it is solely with the province of the courts of this State to declare an act unconstitutional."

Therefore, specifically as to the constitutionality of S-305, the February 7 letter and the opinion of June 28, 1981 and the potential constitutional problems mentioned therein would be applicable. 1/

Our research does reveal one possible counter-argument which a court could conceivably use to sustain the constitutionality of S-305. Section 59-17-20 of the Code provides in pertinent part:

> Unless 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; or
>
> (2) By authorization of the county board of education under the following conditions:
>
> (a) With the written approval of the Senator and the entire house legislative delegation from the county involved...

1/ See particularly, Smith v. Lexington School District, 219 S.C. 191, 64 S.E.2d 534 (1951); Kearse v. Lancaster Co. Supt. of Ed., 172 S.C. 59, 172 S.E.767 (1934).

It is not clear whether S-305 is being proposed pursuant to § 59-17-20 or the Legislature's general power.

As pointed out in the opinion of this Office dated June 8, 1981, 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 such as Article I, § 8 (separation of powers). See, Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972); Aiken Co. Bd. of Ed. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980). See also, Op. Atty. Gen., November 24, 1969. However, one decision, Williams v. Marion Co. Bd. of Ed., 234 S.C. 273, 107 S.E.2d 640 (1959) construing subsection 2(a) is at least worthy of mention.

In 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.

We must advise, however, that the foregoing discussion of § 59-17-20 and the Williams case are presented as a possible counter-argument to sustain the constitutionality of S-305. It is clear that the Court in Williams did not directly address the

constitutional problems discussed in the June 8, 1981 opinion or opinion the February 7 letter to you. Thus, until a court comments beyond what was said in Williams, S-305 would be subject to the potential constitutional problems mentioned earlier. Cf., Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, Spartanburg, ___ S.C. ___, 321 S.E.2d 258 (1984).

One further comment is in order. This Office is cognizant of the interest and concern of many individuals in the organization of the Dorchester County school districts. We have previously advised you and the Dorchester County Attorney concerning this matter (Op. Atty. Gen., February 7, 1985 and March 25, 1985) and have held numerous telephone conversations with concerned individuals and officials. This letter and the previous advice given appear to exhaust these issues. Should questions remain as to the proper course of action to take, we would suggest a declaratory judgment action to resolve this matter with certainty.

CONCLUSION

1. Based upon Supreme Court decisions referenced in the opinion of this Office, dated June 8, 1981 and in our letter to you, dated February 7, 1985, the constitutionality of S-305 is subject to some question under Article III, § 34(4).

2. One possible argument can be made to sustain the constitutionality of S-305, pursuant to § 59-17-20(1) and Williams v. Marion Co. Bd. of Education, supra; however as stated above, this case did not specifically address the constitutional problems noted.

3. S-305, if enacted, would be presumed constitutional and would remain valid until a court declares otherwise.

If we may be of further assistance to you, please let us know.

Sincerely yours,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg