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The State of South Carolina

Opinion No. 85-136

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November 25, 1985

The Honorable John E. Courson
Member, South Carolina Senate
Box 11619
Columbia, South Carolina 29211

Dear Senator Courson:

You have asked our opinion as to the constitutionality of a proposed bill which provides in pertinent part as follows:

> Any person twenty-one years or younger who is committed to the Department [of Youth Services] for the crimes of murder, first or second degree criminal sexual conduct, or assault with intent to commit criminal sexual conduct in the first degree is ineligible to attend any primary or secondary school operated by any entity other than the Department.

The bill is intended to require those twenty-one years and younger who have been committed to the Board of Youth Services for the above-referenced offenses to attend school at a facility operated by the Department of Youth Services (DYS), regardless of their subsequent release or discharge. In other words, these individuals would be ineligible to attend all other primary or secondary schools. 1/ We are informed that the purpose of the

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1/ Apparently, the bill would modify current procedures in this area. As we understand it, DYS presently provides education only to those in its physical custody or incarcerated in its facilities. See, §§ 20-7-3240 and 20-7-2190 of the Code of Laws of South Carolina (1976 as amended). The bill, if enacted, would now require DYS to educate those twenty-one years and younger who have been committed to DYS for the foregoing offenses, regardless of whether the individual remains incarcerated at DYS.

legislation is to protect children attending primary or secondary schools (other than those operated by DYS) from those who have committed particularly violent offenses.

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 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon the constitutionality of proposed legislation, it is solely within the province of the courts of this State to declare an act unconstitutional.

The United States Supreme Court has addressed the appropriate federal constitutional standard with respect to the State's regulation of education. See, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In Rodriguez, the Court emphasized and reiterated "the importance of education to our democratic society" see, Brown v. Bd. of Ed., 347 U.S. 483, 98 L.Ed. 873 (1954), and further stated:

> A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. (emphasis added)

411 U.S. at 40. Only recently, the Court reaffirmed these basic constitutional principles. Plyler v. Doe, 457 U.S. 202, 221, 72 L.Ed.2d 786 (1982). See also, Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981); Sherer v. Waier, 457 F.Supp. 1039 (D. C. Md. 1979).

Similarly, our own Supreme Court has also recently commented upon the constitutional standard of review for legislation regulating public school attendance. In Washington By and Through Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983), the Court noted that Article XI, Section 3 of the State Constitution

provides as follows:

> The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State....

Interpreting this provision, the Court in Washington stated:

> The plain language of this constitutional provision places the responsibility for free public education with the General Assembly and requires that such free public schools shall be open to all the children in the State.

306 S.E.2d at 601. However, the Court indicated that the standard for review, pursuant to Article XI, Section 3, is whether the legislation reasonably or rationally furthers this goal. Id. The Court also broadly reiterated the similar process of review set forth in Rodriquez, as discussed above. Thus, the Washington case concludes that legislation which regulates school attendance must bear a rational relationship to a legitimate state purpose in order to be valid under both the federal and state constitutions.

In regard to a legitimate state purpose, it is generally recognized that the State has the right, pursuant to its police power, to determine who shall be entitled to enroll in its public schools. In order for a child to be eligible for attendance at a public school, he must meet the requirements imposed by the State. 79 C.J.S., Schools, § 447. More specifically, it has been stated:

> The power of school authorities to exclude children from school is very broad and is to be exercised for the best interests of pupils and of all the people. ... So the fact that attendance of a child would impair the efficiency of a school or endanger ... other pupils may furnish grounds for the exclusion of such child....

Id. Moreover, it has often been stated:

> On the grounds, that his presence would be harmful to the best interests of the school, admission may be refused ... to a

> child of immoral ... character, although such character is not manifested by any acts ... within the school.

Id. Federal courts have recently stated that "lack of moral character is certainly a reason for excluding a child from public education...." Perry v. Grenada Munic. Sep. School Dist. 300 F.Supp. 748, 753 (N. D. Miss. W. D. 1969). Numerous authorities support the proposition that the State may exclude from its schools those who pose a threat of harm to other students. Nutt v. Bd. of Ed., 278 P. 1065 (Kan. 1929); Kenney v. Gurley, 208 Ala. 623, 95 So. 34, 26 A.L.R. 813 (1923); Pacyna v. Bd. of Ed., Joint Sch. Dist. # 1, 204 N.W.2d 671 (Wis. 1973); State ex rel. Beattie v. Bd. of Ed. 169 Wis. 231, 172 N.W. 153 (1919); Stone v. Probst, 206 N.W. 642 (1925).

Of course, in carrying out a rational purpose, legislation may not sweep too broadly. The proposed bill uses as a standard for eligibility to attend primary or secondary schools (other than those operated by DYS), whether a person twenty-one years and younger has been committed to DYS for certain violent offenses. By analogy, the use of prior criminal convictions to determine eligibility for matters such as holding public office, licensure for professional occupations and voting has been consistently upheld as constitutionally valid. See, Upshaw v. McNamara, 435 F.2d 1180 (1st Cir. 1980); Carlyle v. Sitterson, 438 F.Supp. 956 (D. N. C. 1975) [discharge of firemen for previous conviction of arson]; McCarvey v. D. of Cola., 468 F.Supp. 687 (D. of Cola. 1979) [exclusion of convicted felons from public employment]; Olson v. Murphy, 428 F.Supp. 1057 (W. D. Pa. 1977); Beatham v. Manson, 369 F.Supp. 783 (D. Conn. 1973) [right to have job of ones choice not within constitutionally protected liberty interest of the convicted]; Coles v. Ryan, 414 N.E.2d 932, 936 (1980); Paev v. Rodrigue, 400 A.2d 51, 53 (1979); Bradford v. D. C. Hacker's License App. Bd., 396 A.2d 988 (1978); contra, Kindem v. Alameda, 502 F. Supp. 1108 (N. D. 1980).

Indeed, the United States Supreme Court has on a number of occasions upheld the use of convictions to impose certain disabilities. Lewis v. United States, 445 U.S. 55, 63 L.Ed.2d 198 (1980) [prior felony conviction may validly prohibit the privilege of possession of firearms]; DeVeau v. Braisted, 363 U.S. 144, 4 L.Ed.2d 1109 (1960) [prohibition against holding office in a waterfront labor organization]; Richardson v. Ramirez, 418 U.S. 24, 41 L.Ed.2d 551 (1974) [disenfranchisement]; Hawker v. New York, 170 U.S. 189, 42 L.Ed. 1002 (1898) [prohibition against the practice of medicine]. In each of the foregoing

cases, the court has looked to see whether there is

> "some 'rational basis' for the statutory distinction made ... or ... they 'have some relevance to the purpose for which the classification is made.'"

Lewis v. United States, 445 U.S. at 65.

We believe that the proposed legislation possesses a rational basis and is reasonably related to its purpose, which is, among other things, the protection and safety of children in the schools. The bill reasonably accomplishes this purpose by insuring that those who have been adjudicated as having committed the offenses of murder, criminal sexual conduct and assault with intent to commit criminal sexual conduct will not attend schools operated by any entity other than D. Y. S. 2/

It is well recognized that previous convictions are a rational means for determining dangerousness to the community. See, Young v. Hubbard, 673 F.2d 132 (5th Cir. 1982); U. S. v. Anderson, 670 F.2d 328, 330 (D. C. Cir. 1982) ["... a defendant's propensity to commit crime generally ... may constitute a sufficient risk of danger ..."]; U. S. v. ex rel. Rainwater v. Morris, 411 F.Supp. 1252 (N. D. Ill. E. D.). In DeVeau v. Braisted, supra, the United States Supreme Court concluded that legislation prohibiting waterfront employees from choosing as their representatives persons convicted of a felony, rationally accomplished the purpose of eliminating future offenses on the waterfront. And in Lewis v. United States, supra, the Court held that a statute which prohibited the possession of firearms

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2/ Of course, other valid purposes may be present as well. As mentioned earlier, courts have upheld a state's imposing ineligibility to attend schools upon those lacking in moral character. See, Perry v. Grenada Munic. Sep. Sch. Dist., supra. Adjudication of the enumerated offenses could well be deemed as a reasonable ground for ineligibility for that reason as well. Moreover, disruption of the students attending the school and the fear and anxiety upon students and parents alike which the presence of one who has committed the violent offenses enumerated could certainly be deemed as a valid state purpose.

by anyone convicted of a felony was constitutionally valid under the Equal Protection and Due Process clauses of the federal Constitution. There, the Court stated that

> Congress' judgment that a convicted felon ... is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational.

445 U.S. at 67. The Court further noted that considerable deference should be given by a reviewing court "to a legislative determination that, in essence, predicts a potential for future criminal behavior." Supra at n. 9.

It is significant that the proposed legislation does not deprive of an education those under twenty-one who have been committed to DYS for the referenced offenses. Instead, the bill simply mandates that those who are included in such classification must be educated in a program operated by DYS, rather than in other schools. It should be further noted that § 20-7-3240 of the Code designates the Board of Youth Services as a "special school district which shall operated a continuous progress education program on a twelve month basis." Moreover, Section 20-7-2190 imposes upon the Board the duty to educate children committed to its custody. In addition, we note that the proposed legislation does not impose ineligibility to attend other schools upon all children committed to DYS, but only upon those who have committed particularly violent crimes. In addition, we note that, unlike many of cases cited above where the disqualification may have been based upon a conviction occurring years previously, here, the disqualification will be contemporaneous with the referenced offenses; the requirement to attend DYS will simply continue for those individuals who may be paroled or released from the physical custody of DYS until the person reaches twenty-one years of age.

Accordingly, we believe the proposed bill is constitutional. It is constitutionally valid to educate only in DYS facilities or programs those committed to DYS and presently incarcerated at DYS. We view this bill as continuing that policy with respect to those having committed the violent offenses enumerated until that person reaches age twenty-one even if he is, prior to that

time, released from custody. 3/

We emphasize that our conclusions herein are based upon the premise that an adequate education will be provided at DYS facilities or in DYS operated programs to those affected by the proposed bill. As we interpret the bill, such education must be provided to those affected and we make no comment as to the validity of any legislation or proposals to the contrary. Nor do we comment upon the policy considerations underlying the bill as those are matters more appropriately for the General Assembly.

3/ For the same reasons, the bill does not interfere with the federal Education of the Handicapped Act, 20 U.S.C. § 1401 et seq. Thereunder, all handicapped children must receive a free appropriate public education. Certain of those affected by the bill may be handicapped, but the bill instead distinguishes upon the basis of the commission of certain violent offenses. The bill would not deprive handicapped children of an education, but would mandate that they be educated with other non-handicapped children at a DYS operated facility.

Here, the bill continues the education of certain violent offenders at DYS after having been committed there, and only prevents their subsequent admission to non-DYS schools. The basis for such restriction is a judicial adjudication of the commission of the enumerated offenses. The Handicapped Act does not restrict the imposition of criminal penalties upon handicapped children, but recognizes they must receive a free appropriate education in the environment commensurate with the safety of others. See, Green v. Johnson, 513 F.Supp. 965 (D. Mass. 1981).

Of course, those who administer the Act and the federal funds thereunder, the federal Department of Education, would be in a position to more appropriately resolve questions concerning the effect of the bill upon the Handicapped Act. Moreover, we assume that if the bill is enacted the requirements of the Act would be followed in the education of handicapped children attending DYS facilities or programs.

If we can be of further assistance, please let us know. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

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