

1984 WL 249922 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 9, 1984

*1 The Honorable Richard W. Riley
Governor of the State of South Carolina
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:

You have asked this Office to examine Act No. 497 (S.440, R 598), to determine whether the Act contains any inconsistencies concerning rule-making authority with respect to the Children's Foster Care Review Board system, and how any such inconsistencies may be resolved. The Act, in general, revises several of the statutes pertaining to the review of children in foster care, creating a new Board of Directors and restructuring the previously-existing Advisory Board. Two sections do appear to conflict with regard to rule-making, though the conflict is reconcilable. Legislative clarification would be necessary, however, to be assured that the legislature's intent is carried out.

Section 2 of the Act amends [Section 20-7-2420 of the Code of Laws of South Carolina \(1976\)](#) to provide in part:

Pursuant to the Administrative Procedures Act, the Advisory Board shall promulgate regulations to establish policies, including policies for summary review of children . . . , and to carry out the provisions of this chapter. These regulations shall include but not be limited to provisions for reports and other information required from state, county, and private agencies and institutions, provisions for scheduling and conducting reviews and appropriate notification of interested parties, regulations governing the proceedings of the local review boards and the Advisory Board including the establishment of quorums and dissemination of decisions, and the process modifying or appealing a board decision.

All public and private agencies and institutions which provide for or arrange foster care for children shall cooperate with the Advisory Board and local review boards by furnishing such records to the boards as may from time to time be required, as set forth by regulations of the Advisory Board.

Section 3 of the Act requires the Advisory Board to submit its regulations to the General Assembly for review by January 1, 1985. That section also provides that '[t]he present policies, procedures, and regulations of the board shall remain in effect until appropriately changed.' These amendments to [Section 20-7-2420](#) were passed by the Senate and sent to the House of Representatives and remained virtually unchanged until the House reconsidered S.440 on June 18, 1984. Until that date, the Advisory Board was the only governing body of the Children's Foster Care Review Board system.

[Section 20-7-2420](#) is also amended by Section 7 of the Act and reads substantially the same as [Section 20-7-2420](#) read prior to this Act:

All public and private agencies and institutions which provide for or arrange foster care for children shall cooperate with the Board of Directors and local review boards by furnishing records to the boards as may from time to time be required. The Board of Directors shall promulgate regulations pursuant to the provisions of Chapter 23 of Title 1 to implement the provisions of this section including regulations to provide for necessary reports and other information required from state, county, and private agencies and institutions. [Emphasis added.]

*2 The Board of Directors was created by Section 4 of the Act, amending [Section 20-7-2390 of the Code](#), which also provides that '[t]he board is authorized to promulgate regulations pursuant to the provisions of Chapter 23 of Title 1 relating to the function and procedures of the state office and local review boards.' The State Advisory Board was reconstituted by Section 5 of the Act, amending [Section 20-7-2400 of the Code](#). In addition to the amendment of [Section 20-7-2420](#), other Code sections previously referring to the Advisory Board were amended to refer to the Board of Directors; *See*, for example, Section 6 of the Act, amending Section 20-7-2410. These amendments, as well as the initial amendment to [Section 20-7-2420](#), were passed by the House and subsequently adopted by the Senate.

In construing a statute, the chief function is to ascertain and give effect to the legislature's intent. [McGlohon v. Harlan](#), 254 S.C. 207, 174 S.E.2d 753 (1970). Further, it must be presumed that the legislature did not intend to do a futile act, [State ex rel. McLeod v. Montgomery](#), 244 S.C. 308, 136 S.E.2d 778 (1964), and that the legislature was aware that it was amending the same Code section twice within the same Act. *Cf.*, [Prudential Insurance Company v. Benjamin](#), 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed.2d 1342 (1946). Thus, if it is at all possible, these Code sections must be read in harmony, to give effect to and reconcile all of the provisions. [Bradford v. Byrnes](#), 221 S.C. 255, 70 S.E.2d 228 (1952).

The resolution to the apparent conflict would be to have the Advisory Board promulgate those regulations pertaining especially to procedural matters and also those regulations pertaining to the communication and flow of information between the various agencies and institutions and local boards, unless the Board of Directors should elect to pre-empt the Advisory Board and promulgate those regulations. By Section 5 of the Act, amending [Section 20-7-2400 of the Code](#), '[t]he Advisory Board shall meet at least once a year to make recommendations to the Board of Directors with regard to coordination of responsibilities among the local review boards and between the local boards and the Board of Directors.' (Emphasis added.) For the Advisory Board to be able to make such recommendations, that Board would necessarily require access to the relevant information; it might be necessary for that Board to promulgate regulations to get that information.

If the Board of Directors should elect to promulgate regulations on the same matters as the Advisory Board or should adopt conflicting regulations, it is the opinion of this Office that the regulations of the Board of Directors would most probably supersede those of the Advisory Board.¹ Authority to promulgate regulations was granted to the Board of Directors by Sections 4 and 7 of the Act, whereas the Advisory Board was granted its regulation-promulgating authority in Section 2. Because Sections 4 and 7 were both later in time (being a result of reconsideration by the House on June 18, 1984) and later in placement within the Act itself, those sections would be the later or more recent expressions of the legislature's will and thus would be considered controlling. [Jolly v. Atlantic Greyhound Corporation](#), 207, S.C. 1, 35 S.E.2d 42 (1945); [Feldman v. South Carolina Tax Commission](#), 203 S.C. 49, 26 S.E.2d 22 (1943); 73 Am.Jur.2d, *Statutes*, §§ 255, 256; 82 C.J.S., *Statutes*, § 347. This interpretation would also be consistent with the notion that the Board of Directors would, by Section 4 of the Act, regulate the functions and procedures of the state office and local review boards; thus, the action by the Board of Directors would be controlling in case of a conflict.

*3 Legislative clarification of this Act would be advisable. The Act, as stated above, twice amends a single Code section. The title of the Act relative to that Code section is ambiguous and could refer to the Board of Directors or the Advisory Board, though it would appear from placement of the relevant portion of the title that reference should be had to Section 7.² Arguably, Section 7 impliedly repeals Section 4 to the extent inconsistent, though such implied repeal is disfavored and the presumption is against such repeal, [Strickland v. State](#), 276 S.C. 17, 274 S.E.2d 430 (1958), and will be resorted to only where two statutes are irreconcilable and both cannot stand. *In Interest of Shaw*, 274 S.C. 534, 265 S.E.2d 522 (1980). While this Office can offer possible interpretations to give effect to the entire Act, clarification by the legislature would be advisable to resolve the seeming conflicts and ensure that the legislative intent is put into effect.

We hope that we have satisfactorily responded to your inquiry. Please advise if additional information or clarification is needed. Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 For purposes of this opinion, it will be assumed that any regulations will have been promulgated and approved pursuant to Chapter 23 of Title 1 of the Code and any other relevant Code section.
- 2 The title of an act may be used to ascertain legislative intent. [University of South Carolina v. Elliott](#), 248 S.C. 218, 149 S.E.2d 433 (1966). The relevant portion of the title reads:
AN ACT . . . TO AMEND [SECTION 20-7-2420](#), RELATING TO MANDATED COOPERATION BETWEEN AGENCIES PROVIDING FOSTER CARE AND THE ADVISORY BOARD AND LOCAL BOARDS, SO AS TO CHANGE CERTAIN REFERENCES AND REVISE PROVISIONS PERTAINING TO REGULATIONS THE BOARD MUST PROMULGATE; . . .
[Emphasis added.]
Exactly which board is intended, is unclear.

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