1981 WL 157810 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 8, 1981

***1 RE: Requested Opinion Concerning Pickens County Schools**

The Honorable Larry A. Martin
Member—House of Representatives
418-C Blatt Building
Columbia, South Carolina 29211

Dear Mr. Martin:
You have requested an opinion as to the authority of the General Assembly to create a new school district in Pickens County. Presently, the entire geographical area of the county constitutes a single school district, and apparently, a portion of the county would like to break away from the existing district and establish a new one. Based upon the discussion hereinafter, the opinion of this office is that the South Carolina General Assembly most probably does not possess the necessary authority to create a new school district in Pickens County pursuant to § 59-17-20(1), Code of Laws of South Carolina, 1976.

Section 59-17-20 states 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 one or more counties . . ..

That statute goes on to provide an alternate method for altering and dividing school districts that does not require legislative action by the General Assembly. The specific question here is whether action by the General Assembly in creating the new school district in Pickens County would contravene any portion of Article III, § 34, Constitution of South Carolina of 1895, as revised. The pertinent constitutional provision states:
The General Assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to-wit:

***

IV. To incorporate school districts.

***

Consideration must first be given to whether the proposed action by the General Assembly in Pickens County would constitute the incorporation of a school district. While the term ‘incorporate’ has not been precisely defined in the constitution, the state statutes, or South Carolina case law, the term has apparently been given application based upon the usual and ordinary meaning of the term. In Smith v. Lexington County School District No. 1, 219 S.C. 191, 64 S.E.2d 534 (1951), the Court considered a legislative enactment, applicable only to Lexington County and stated as follows:

While a few of the new school districts were created by merely combining several old districts, most of them, according to the allegations of the complaint, were formed by completely obliterating the boundary lines of the old districts and cutting off only portions thereof. Where the latter procedure was followed, we think it clear that the effect was to 'incorporate school districts.'

The Court, in Smith, cited as direct authority the case of Kearse v. Lancaster, County Superintendent of Education, 172 S.C. 59, 172 S.E. 767 (1934), wherein the Court considered the constitutionality of an act applicable only to Bamberg County in which the county board was required to order an election concerning the re-establishment of a school district as it had formerly existed. The Court held that the act required the incorporation of a school district, stating:

***2** The act in question, to our mind, clearly proposes the incorporation of a new school district, for it is obvious that, when that territory was consolidated with Olar School District No. 8, the existence of the former corporate body, Three Mile School District No. 4, as a corporation, was abolished. 172 S.E. 767 at 68.

Hewes v. Lengford, 105 Miss. 375, 62 So. 358 (1913) provides that the term 'incorporate' must be given broad application. In Hewes, the Mississippi Supreme Court, considering a state constitutional provision quite similar to the one in South Carolina, refused to give the term 'incorporate' too narrow a scope, as noted in the following excerpt:

It is urged that the act under review does not incorporate the special district, nor does it undertake to provide for the management or support of same, nor does it grant 'such school any privileges.' The definition given to the word 'incorporating' is, to our mind, entirely too technical and narrow. In a technical sense, schools are not incorporated, this word being usually employed in speaking of the creation of private corporations; but if used in the constitution it is used to apply to common schools and to private schools alike, and this we think is obvious from the context.

The exact thing that Chapter 288 seeks to and does accomplish is simply this: a certain people residing in a circumscribed area, by the action of the board of supervisors of Harrison County, are afforded the 'privileges' of a special school district. The order of the board of supervisors incorporates the school, and the school thus incorporated is thereby granted privileges not enjoyed by any similar area within the borders of the state.

Thus, the Mississippi Court construed the term 'incorporate' to mean generally the denomination of a particular geographical area as a school district, thereby entitling said district to the further privileges granted in state law.

Under the above authority, the enactment of a special or local law, applicable only to Pickens County or a portion thereof, to create a new school district would, in fact, be tantamount to the incorporation of such new school district. This point appears to be obvious even though a general statute, § 59-17-10, declares that all school districts in South Carolina are bodies politic and corporate. Provisions almost identical to the present § 59-17-10 have been included in the South Carolina Code of Laws at least since 1902, and such a provision was on the South Carolina law books when Smith v. Lexington County School District No. I, supra, and Kearse v. Lancaster, supra, were decided.

Having established that the proposed legislation for Pickens County would incorporate a school district, attention must be turned to the question of whether any overriding authority exists in the state constitution, authorizing the General Assembly to enact such legislation. The answer to this question is to be found in the evolution of Article XI in the Constitution of South Carolina, 1895, as revised. In Spencer v. McCaw, 77 S.C. 351, 58 S.E. 145, the Court considered whether a special law contravened the prohibition against incorporating school districts. In that case, the Supreme Court found that the legislature had merely amended a previous valid statute of incorporation; however, the Court went further and cited Article XI Section 5, of the state constitution then in effect, quoting in pertinent part, 'The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the counties into suitable school districts . . ..' As will be readily seen, in 1907 when Spencer was rendered, the General Assembly had specific constitutional authority with regard to creating school districts. In Smith v. Lexington County School District No. I, supra, the Court found that the General Assembly had passed an act incorporating a school district; however, that act was upheld for the simple reason

that Article XI Section 5 of the Constitution in effect in 1951 provided Lexington County a special exemption from restrictions as to the area of school districts. Thus, since the Constitution of South Carolina, 1895, was first adopted, until the early 1950's, the Constitution contained the provision prohibiting the legislature from incorporating school districts, but at the same time, the constitution contained provisions in Article XI dealing specifically with education that allowed the General Assembly great latitude in establishing and determining the size of local school districts.

***3** The 1895 Constitution, until 1954, contained the following provision, 'The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the counties into suitable school districts.' The Constitution of South Carolina, 1895, as amended. Once that provision was repealed, it, apparently, was not replaced with any similar provision until 1973. The provisions, contained in the Constitution of South Carolina, 1895, as revised, as of 1973 states, 'The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning, as may be desirable.' Thus, as can readily be seen, South Carolina's present constitution contains no provision similar to any in existence from 1895 to 1954, authorizing the General Assembly to divide counties into suitable school districts. Without any such provision in the constitution pertaining to the General Assembly's role in educational matters, nothing appears in the constitution to except action by the General Assembly from the prohibitions stated in Article III, Section 34, IV.

In an effort to determine the intention of the General Assembly at the time it proposed revision of the constitution of 1895, reference has been made to the Final Report of the Committee To Make a Study of the South Carolina Constitution of 1895. The committee proposed the current provision concerning the state system of free public schools. In explaining that provision, the committee stated that it had been deleted from the constitution in 1954; however, as has been noted earlier herein, the two provisions differ somewhat In any event, the committee went on to state in its report, 'The committee feels that the regulation of school district size should be left to the General Assembly.' In considering Article III of the Constitution, the committee gutted nearly all of § 34 of Article III, leaving only the following suggested provision, 'The General Assembly shall enact no special or local act when a general act is or can be made applicable; provided, that special laws may be enacted to provide for forestry and game zones and to provide for the necessary regulations within each zone.' Thus, the committee recommended that the provision barring special or local legislation for the incorporation of a school district be deleted from the revised constitution. For reasons unknown to this writer, the General Assembly did not accept the recommendation, of the committee, and the provision barring special or local legislation as to incorporation of school districts remains in the state constitution to this day. Even though the study committee had expressed its intention that the General Assembly be allowed to determine the size of school districts, this provision was effectively overruled by the ratification of the revised constitution containing the prohibition against incorporation of school districts by special or local enactment of the General Assembly.

***4** Section 59-17-20 was considered in Williams v. Marion County Board of Education, 234 S.C. 273, 107 S.E.2d 604 (1959); however, no issue was raised as to sub-section 1 of that statute, purporting to authorize the General Assembly to alter or divide established school districts. Thus, the holding in Williams is of no aid here. Another case of apparent interest here is that of Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975), wherein the South Carolina Supreme Court held that public education is the responsibility of the General Assembly and is not a burden of county government. Moye considered a special act that altered the manner of electing boards of trustees of school boards in Lexington County, and the plaintiffs attacked the act on the basis that it contravened Article VIII, Section 7, Constitution of South Carolina, 1895, as revised, providing for home rule to counties. The Court restricted its holding to that issue; however, the Court, by way of dicta, noted that whether a violation of Article III, Section 34 existed was not raised. The Court, stating specifically that it would not decide the issue, called the appellants' attention in that case to several cases. The Court concluded stating, 'They indicate that § 34 does not deal with matters specifically covered by Article XI.' While the cases cited by the Supreme Court in Moye do suggest that Article XI provides an exemption from Article III, § 34, neither the Supreme Court in Moye nor the cases cited therein addressed the particular issue of the direct application of Article III, Section 34, IV. Certainly, in Moye, no consideration appears to have been given to the evolution of the South Carolina Constitution as discussed hereinabove. Therefore, the opinion herein submits that the holding in Moye v. Caughman, supra, does not prevent reaching the conclusion that the General Assembly is prohibited from enacting a special or local act to incorporate a school district.

Therefore, based upon the foregoing discussion, the opinion of this office is that § 59-17-20(1) is of suspect constitutionality. Of course, only the Courts of this state in a proper proceeding possess the necessary authority to declare an act of the General Assembly to be in violation of either the state or federal constitutions. Even in a proper circumstance, the Court will refrain from declaring an act unconstitutional unless the subject act is clearly so, as noted in Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946).

Also, you have raised a question concerning the validity of § 59-17-20(2)(a), which provides for the alteration or division of school districts upon the authorization of a county board of education with the written approval of the senator and house legislative delegation from the county involved. To briefly address this question, let it be said that even the General Assembly may not do indirectly what it could not do directly. Thus, the discussion hereinabove is most likely applicable here. There is, however, a further consideration which strongly points in the direction of the county delegation not having authority to approve the alteration or division of a school district upon the authorization of a county board of education. In Aiken County Board of Education v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980), the Court declared a portion of a statute requiring approval of a local county delegation prior to a county school board receiving an increase in the millage rate to fund the school district budget. The Court declared that portion of the statute invalid upon the grounds that it violated the separation of powers provision of the constitution. Article I, Section 8, Constitution of South Carolina, 1895, as revised. That provision states, 'In the government of this state, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duty of any other.' The Court in Knotts, stated very succinctly, as follows, 'As a general rule, the legislature may not, consistently with the constitutional requirement here involved, undertake to both pass laws and execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators.' Section 59-17-20(2)(a) fits into the mold of the type of statute declared invalid by the Court in Knotts. In the statute under consideration here, the General Assembly by general law has authorized county boards of education to alter and divide school districts but only upon the completion of certain prerequisites. One alternative prerequisite is the written approval of the local county legislative delegation. Thus, the General Assembly has assigned an administrative function to an executive agency, a county board of education, but has prohibited the executive agency from fulfilling its authority in the administration of local school affairs without certain action by members of the legislature. Therefore, § 59-17-20(2)(a) might be held to be unconstitutional based upon the principles enunciated in Aiken County Board of Education v. Knotts, supra; however, this law possibly could be sustained by comparing it with the provisions for legislative delegation's making appointments and exercising other powers such as activating a housing authority which have been upheld by the South Carolina Supreme Court under separation of powers challenges. See, Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971); Benjamin v. Housing Authority of Darlington Co., 198 S.C. 79, 15 S.E.2d 737 (1941); see also, Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938). Again, the language stated above as to only a court of this state possessing the necessary authority to declare an act unconstitutional and the hesitancy of a court to declare an act of the legislature unconstitutional is applicable to this portion of this opinion.

***5** With kindest regards,
Sincerely,

Paul S. League
Assistant Attorney General

1981 WL 157810 (S.C.A.G.)

End of Document