ALAN WILSON
ATTORNEY GENERAL

July 1, 2020

George E. Frierson III
Chairman
Clarendon School District 3 Board of Trustees
Turbeville, South Carolina 29162

Dear Mr. Frierson:

We received your letter requesting an opinion of this Office concerning recent legislation combining Clarendon School District Number One with Clarendon School District Number Three to create Clarendon School District Four. You informed us:

> In passing this legislation, the process allowed for the Clarendon County Legislative Delegation to appoint board members to the newly created board and to replace elected board members to both Clarendon District One (1) and Clarendon School District Three (3) Boards of Trustees. Under South Carolina laws, only the Governor has the authority to appoint a replacement to elected positions. Such appointments continue only until the next scheduled election.

As such, you pose the following questions to this Office:

a) Does a county legislative delegation possess the authority to make appointments of a regularly popularly elected official?

b) If such an appointment is allowed, must it follow the original composition, such as at-large or single membership?

c) Would such an appointment be in violation of the South Carolina Constitution or the United States Constitution?

d) Would such an action be in violation of the 1965 voting rights act?

Law/Analysis

Section 59-17-20 of the South Carolina Code (2020) prohibits school districts from being altered except in two specified situations, one of which is "[b]y act of the General Assembly relating to one or more counties . . . ." As you mentioned in your letter, in 2020, the General Assembly passed legislation[1] (the "2020 Act") combining Clarendon County School District One ("District 1") and Clarendon County School District Three ("District 3") and creating Clarendon County School District Four ("District 4"). S. 123-R115 (S.C. 2020). Section 2(A) of the 2020 Act provides:

> Clarendon County School District No. 4 must be governed by a board of trustees of seven members to be appointed initially by a majority of the Clarendon County Legislative Delegation. The seven members initially appointed by the legislative delegation after the effective date of this act must be qualified electors of either Clarendon County School District No. 1 or Clarendon County School District No. 3, and these appointed members shall serve on the Clarendon County School District No. 4 Board of Trustees until their successors are elected in school district elections conducted at the same time as the 2022 General Election and qualify.

Id. Thus, at least initially, the Clarendon County Legislative Delegation appoints members to the District 4 Board. We understand prior to the 2020 Act, the board members for both District 1 and District 3 were popularly elected. See 1986 S.C. Acts 593 and 1989 S.C. Acts 277, respectively.

First, you ask whether a county legislative delegation has the authority appoint members to the District 4 Board. The answer to this question depends on the authority given to the county legislative delegation by the General Assembly. As we stated in prior opinions, "[a] county legislative delegation possesses no inherent powers and cannot exercise sovereign authority, absent a delegation of authority to it by the General Assembly. Op. Att'y Gen., 2005 WL 1609294 (S.C.A.G. June 3, 2005) (citing State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972)). We believe the express language in the 2020 Act provides the Clarendon County Delegation (the "Delegation") with the authority to appoint members to the District 4 Board.

You mentioned in your letter that only the Governor has the authority to appoint a replacement to an elected position. Section 1-3-220 of the South Carolina Code (2005) allows the Governor to appoint certain officers, including county officers, when a vacancy occurs. While we have not opined on the application of this statute to District 1 or District 3, we determined it may apply to vacancies in countywide boards of education in the absence of authority to the contrary. See Op.

[1] On January 29, 2020 the South Carolina Senate ratified this legislation, which the Governor signed into law on February 3, 2020. The legislation took effect thirty days after the approval by the Governor, but is currently in its temporary form awaiting final approval from the Legislative Council and has not been assigned an act number as of the publication of this opinion.

Att'y Gen., 1983 WL 181798 (S.C.A.G. Mar. 16, 1983) ("Because of the absence of other authority for the filling of the vacancies in question, any vacancy on the Lee County Board of Education should be filled by the Governor pursuant to § 1-3-220.").

First, we do not believe a vacancy occurred in this situation. The 2020 Act makes clear that the District 1 and District 3 Boards are abolished. Section 1(A)(2) states:

> [E]ffective July 1, 2021, Clarendon County School District No. 1 and Clarendon County School District No. 3 must be abolished. The powers and duties of the two present school districts' respective boards of trustees must be devolved on the board of trustees of the consolidated school district to be known as Clarendon County School District No. 4 . . . .

S. 123-R115 (S.C. 2020). Additionally, section 7(A) provides:

> Clarendon County School District No. 1 and Clarendon County School District No. 3 are abolished on July 1, 2021, at which time Clarendon County School District No. 4 must be established by this act. The terms of all members of the boards of trustees of the two present school districts of the county will expire on this date . . . .

Id. We do not believe a court would treat a legislative abolishment of the District 1 or District 3 Boards as creating a vacancy on either these boards.

Second, District 1 and District 3 Boards, like most school boards, were established through the enactment of local legislation. Prior to the 2020 Act, local law provided as follows in regard to vacancies on the District 1 Board: "Vacancies occurring on the board of trustees must be filled for the remainder of the unexpired term by appointment by the county board of education." 1986 S.C. Acts 593. Likewise, local legislation for District 3 provides as follows in regard to vacancies: "In case of a vacancy in the board of trustees, the county board of education shall call a special election to fill the unexpired term." 1959 S.C. Acts 40. Therefore, a court is likely to find that prior to the 2020 Act, a vacancy on either the District 1 or District 3 Boards is controlled by local law rather than section 1-3-220.

Next, you inquire as to whether the Delegation must follow the original composition, referring to at-large and single member seats, of the two original boards. As we explained in a 1988 opinion,

> [i]n adopting an act, ordinance, or rule, a legislative body acts in a legislative capacity. However, such act, ordinance, or rule, once adopted, is not necessarily binding upon future legislative bodies, which bodies are free to amend or modify previous actions taken. See Manigault v. Springs, 199 U.S. 473, 50 L.Ed. 274 (1905); 67 C.J.S. Parliamentary Law §§ 2, 4, 8; 73 Am.Jur.2d Statutes § 34; Ops.Atty.Gen. dated April 14, 1986; May 18, 1981;

> June 13, 1985; March 1, 1979; and October 9, 1985; and resources cited therein. The only constraints would be those imposed by the statutes or Constitution of the State of South Carolina . . . .

Op. Att'y Gen., 1988 WL 485220 (Mar. 31, 1988).

School district boards of trustees are legislatively created positions rather than constitutionally created offices. As we previously mentioned, these positions are largely created through the enactment of local law, which prescribe the method of selections of board members, whether appointed or elected and what geographic areas they represent, whether at large or specific geographic districts. We understand the General Assembly established District 1 and District 3 through local legislation designating both single member and at large districts and what areas board members represent. 1986 S.C. Acts 593 and 1989 S.C. Acts 277, respectively. However, the 2020 Act abolishes the District 1 and District 3 Boards and creates a new District 4 Board. The 2020 Act does not make such designations for the initially appointed board members, but does designate beginning in 2022, its members shall be elected and comprised of six single-members representing individual districts and one at large member. S. 123-R115 (S.C. 2020). We believe any of the composition requirements, including at-large or single-member designations, designated prior to the 2020 Act are abolished along with the District 1 and District 3 Boards. The General Assembly is not bound by its prior legislation pertaining to the method of selection and composition of the District 1 and District 3 Boards and chose to select new criteria for the District 4 Board's composition and representation by enacting the 2020 Act.

Next, you inquire as to whether the appointments violate the South Carolina Constitution or the United States Constitution. This Office often states, "[A] legislative act is presumed valid as enacted unless and until a court declares it invalid. Our Supreme Court has repeatedly recognized that the powers of the General Assembly are plenary, unless in conflict with the Constitution." Op. Att'y Gen., 2007 WL 3317614 (S.C.A.G. Oct. 19, 2007). Section 3 of article XI of the South Carolina Constitution (2009) specifically gives the General Assembly plenary power to create and regulate public schools in the State, stating: "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."

In Miller v. Farr, 243 S.C. 342, 349, 133 S.E.2d 838, 842 (1963), our Supreme Court described the General Assembly's authority in regard to school districts as follows: "It is clear that under our Constitution school districts have no permanent existence inasmuch as the General Assembly has plenary power to create new school districts or to consolidate existing school districts with other school districts." In addition, citing section 3 of article XI, our Supreme Court in Crow v. McAlpine, 277 S.C. 240, 245, 285 S.E.2d 355, 358 (1981) , held "there is nothing to prevent the General Assembly from making all school boards appointive." Therefore, it is our opinion that the General Assembly has the authority to establish school boards, including the makeup of their membership as well as how members obtain their positions. Furthermore, we do not find any

constitutional provision prohibiting the General Assembly from establishing membership on a school district board by appointment rather than by an election.

Lastly, you inquire as to whether appointing board members violates of the 1965 Voting Rights Act. We presume you are referring to the regulations set forth under Section 5 of the Voting Rights Act, which require preclearance from the United States Department of Justice if an elected office is changed to an appointed office. 28 C.F.R. § 51.13(i). The United States Supreme Court in Allen v. State Bd. of Elections, 393 U.S. 544, 569-70 (1969) and in Presley v. Etowah County Comm'n, 502 U.S. 491, 502 (1992) specified section 5 is applicable to legislative enactments changing elected offices to appointed offices. However, it is our opinion that the District 4 Board is a newly created board. Therefore, we do not believe by abolishing the District 1 and District 3 Boards and creating the District 4 Board, the General Assembly changed an elected position to an appointed position.

Nonetheless, in 2013, the United States Supreme Court decided Shelby County, Alabama v. Holder, 570 U.S. 529 (2013). In Shelby County, the Supreme Court did not declare section 5 unconstitutional, but held the provision setting forth the coverage formula of the Voting Rights Act was unconstitutional and could no longer be used as a basis for subjecting certain jurisdictions, including South Carolina, to preclearance by the Federal Government. Id. As we stated in a 2013 opinion, "in light of Shelby County, there is no further requirement to obtain preclearance of applicable legislation pursuant to Section 5 of the Voting Rights Act." Op. Att'y Gen., 2013 WL 3479874 (S.C.A.G. July 2, 2013). Therefore, even if a court were to find 2020 Act effectively changed the District 1 and District 3 Boards from elected to appointed, we do not believe preclearance was required.

Conclusion

We understand prior to the 2020 Act, membership on the District 1 and District 3 Boards was determined by popular election. In the 2020 Act, the General Assembly used its plenary authority, as well as its specific authority under section 59-17-20, to consolidate these districts and to abolish these Boards along with the districts they represented. In doing so, the General Assembly gave the Clarendon County Delegation the authority to initially appoint members to the newly created District 4 Board. Therefore, we are of the opinion that the Clarendon County Delegation has the authority to appoint members to the District 4 Board.

We also do not believe the General Assembly must follow the composition of the District 1 and District 3 Boards as it is not bound by its prior legislation. We find the General Assembly's decision to provide for the appointment of members to the newly created District 4 Board is within its plenary authority under section 3 of article XI of the South Carolina Constitution. Additionally, we do not believe allowing a county delegations to appoint members to a local school board violates the South Carolina or United States Constitutions.

We recognize section 5 of the 1965 Voting Rights Act requires preclearance in order to change an elected position to an appointed position. However, based on our analysis above, we do not believe such a change occurred because the 2020 Act abolished both the District 1 and District 3 Boards and created a new District 4 Board. Nonetheless, in light of the United States Supreme Court's decision in Shelby County, even if a court were to find such a change occurred, South Carolina is no longer subject to the section 5 preclearance requirements.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General