1973 WL 27716 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 24, 1973

***1 Re: Emergency School Aid Act, Project #239**

Herman E. Cain
Chief School Administrator
Edgefield County Schools
P. O. Box 608
Edgefield, South Carolina 29824

Dear Mr. Cain:
This is in response to your letter of August 24, 1973 requesting the advise of this Office concerning the legalities of the position of the Office for Civil Rights regarding the district's obligations with respect to racially identifiable classes, and teacher employment and assignment practices. At the outset, it should be noted that the district's obligations under the law generally do not materially differ from the requirements for eligibility for assistance under the above referenced Act.

With regard to teacher assignments, the law clearly requires that the racial ratio of the faculty for each school in the system be approximately the same as the racial ratio of the faculty in the system as a whole. The system's racial ratio percentage may be viewed separately for elementary and secondary teachers. It may be that the necessary adjustment in the faculties of the Johnston and Douglas Elementary Schools could be satisfactorily effectuated through the hiring process. However, if this should prove impossible, the only alternative would be to racially re-align these two faculties by the reassignment of current faculty personnel.

The Office for Civil Rights' understanding #3 as noted in their letter to you of June 14, 1973, is that the district 'will hire black teachers on a one to one ratio until you have reached the racial percentage of black classroom teachers which was in effect at the beginning of the 1968-69 school year.' If this position is predicated on an understanding that the district is required by law to maintain any particular faculty ratio, the position is without legal foundation. Once a unitary system has been established and faculty desegregation accomplished by invoking system-wide ratio for each particular school in the system, the system-wide faculty racial ratio may thereafter change from time to time as a result of non-discriminatory application of objective merit standards in the selection and composition of faculty and staff. The faculty ratio present when desegregation takes place in not required to be frozen; however, a marked reduction in the percentage of black faculty personnel could give rise to an inference of racial discrimination in the selection of faculty personnel particularly in a system having a long history of racially dual schools. A recent federal appeals court decision, recently cited with approval by the United States Supreme Court in support of another point, required affirmative efforts toward the achievement, as a goal, of a ratio of minority teachers to total faculty that approaches the ratio of minority students to the total student population. The school board need not, of course, lower its employment standards. A showing of a good faith effort to find sufficient qualified minority teachers to achieve an equitable ratio will rebut any inference of discrimination.

***2** There is no legal prohibition of bona fided ability grouping as a standard pedagogical practice. However, federal authorities look with special suspicion on any ability grouping initially undertaken shortly after transition from a dual to a unitary system.

Bona fided ability grouping is no simple undertaking and the development of such a practice is an administratively cumbersome thing. A bona fided program of ability grouping would seem to require at least the following:

(1) The use of non-discriminatory objective standards of measurement-i.e. a testing instrument that reflects actual differences in innate abilities and not merely differences in culture or class values;

(2) Maintenance of such grouping assignments for only such portion of the school day as is necessary to achieve the purpose of such grouping; e.g. assignment of a child to an academically lower track in one subject may be proper while assignment of the same child to the lower track in another or all other subjects could possibly be improper; and in no event could such groupings be maintained for school day activities such as recess, lunch, and study hall;

(3) Specially developed curricula;

(4) Specially trained or certified instructional personnel;

(5) Periodic retesting to determine academic progress and eligibility for promotion to a higher track;

(6) Validation of test scores or other reliable objective evidence indicating the educational benefits of such grouping.

The administrative burden of such a program is made even heavier by recent federal court decisions in the direction of requiring Fourteenth Amendment Due Process hearings before any fundamental change in educational status to determine if a grouping label has been fairly applied by the school.

I trust that this will be some help in understanding a very complex matter.
Sincerely,

Bruce E. Davis
Assistant Attorney General

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