U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 16 2010

C. Havird Jones, Jr., Esq.
Senior Assistant Attorney General
Rembert Dennis Building, Room 519
1000 Assembly Street
Columbia, South Carolina 29201

Dear Mr. Jones:

This refers to Act R135 (H 4431) (2010), which provides for the temporary transfer of financial authority from the Board of Trustees to a five-member committee appointed by the Fairfield County Legislative Delegation, and Act R136 (H 4432) (2010), which provides for the temporary appointment of two seats on the Board of Trustees by the legislative delegation, for the Fairfield County School District in Fairfield County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our May 10, 2010 request for additional information on June 15, 2010; additional information was received through August 12, 2010.

Act R135

With respect to the changes contained in Act R135, the Attorney General does not interpose an objection. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. 42 U.S.C. 1973c(a); 28 C.F.R. 51.41.

Act R136

We reach a different determination, however, with respect to Act R136. Under Section 5, the submitting authority has the burden of establishing that a proposed change is not motivated by a discriminatory purpose and will not have a retrogressive effect on the ability of minority voters to participate in the political process and elect candidates of choice. *Georgia v. United States,* 411 U.S. 526 (1973); 28 C.F.R 51.52. We have carefully considered the information you have provided, as well as information from other interested parties. As discussed further below, I cannot conclude that the state has sustained its burden of showing that Act R136 will not have a discriminatory effect. Therefore, on behalf of the Attorney General, I object to Act R136.

We are keenly aware that the financial and administrative management of the Fairfield County School Board of Trustees, and the low academic performance of the Fairfield County schools, are matters of serious concern to residents and parents in the district. We appreciate that there must be wide local latitude to implement reforms that promote greater educational opportunity for all of our children.

As the experience of other states demonstrates, there are tools available to address these serious educational challenges without causing a discriminatory effect that violates the Voting Rights Act. A state may adopt legislation incorporating such tools so long as that adoption and implementation complies with the Act, as the Attorney General has previously determined. For example, Chapter 39 of the Texas Education Code provides a graduated series of interventions that the state may take regarding individual school districts to ensure the educational needs of their students. The State of Texas submitted this legislation to the Attorney General for review under Section 5 in the mid-1990s. On December 11, 1995, we informed the state that no objection would be interposed under Section 5 to that enabling legislation and likewise that any intervention taken pursuant to it that affects voting in a local school district also would be subject to review under Section 5. Since that time, the state has relied on those procedures to assist local school districts that are in some form of distress. In each instance that the state has submitted its proposed action, up to and including the dissolution of a school district, the Attorney General has determined that no objection was warranted.

The State of Mississippi has adopted a similar statutory approach to intervention in under-performing local school districts through Miss. Code Section 37-17-13(l) and 37-17-6(11)(b). This structure provides an objective basis for the state's actions, which can include removing all the powers previously held by elected board members. As has been our experience with submissions from Texas, we have reviewed several such state interventions and in none have we interposed an objection under Section 5.

By contrast, Act R136 was adopted through an *ad hoc* local legislation process rather than a uniform statewide approach. This process is neither subject to the traditional legislative scrutiny nor accompanied by legislative hearings or reports. We share the concern expressed by Governor Mark Sanford, who originally vetoed both bills and indicated that the more appropriate approach would be for the electorate in Fairfield County to express its will through the ballot.

In the absence of a state statute similar to those in either Mississippi or Texas, it appears that state education officials in South Carolina have taken action with regard to only one such school district in recent years. The county legislative delegation advises that it is for this reason that it turned to local legislation to effectuate the changes it desired in the school district. The county's legislative delegation has represented that they have been aware for several years of the district's poor academic record, accusations of financial impropriety against the school board, the perceived ineffective leadership of the school board, the legislators' inability to obtain any assistance from state education officials, and the repeated requests from constituents, both African American and white, for assistance in improving the district's schools, and that these factors prompted the delegation to take the action under review.

In addition, Act R136 operates solely by reducing the proportion of positions for which minority voters can elect candidates of choice on a local elected body. Changes related to voting may not be implemented unless and until the submitting authority establishes that, when compared to that jurisdiction's benchmark standard, practice, or procedure, the proposed change does not diminish the ability of minority voters to participate in the political process. *Beer v. United States*, 425 U.S. 130 (1976). The analysis must measure whether the opportunities of minority voters to participate in the political process and elect candidates of their choice will be "augmented, diminished, or not affected by the change affecting voting." *Id.* at 141.

The Fairfield County School District and Fairfield County have coterminous boundaries. According to the 2000 Census, African Americans comprise 59.0 percent of Fairfield County's total population and 55.6 percent of the county's voting age population. The benchmark method of election consists of seven trustees elected to four-year, staggered terms, with elections held in even-numbered years from seven single-member districts that are coterminous with the districts used to elect the county council.

Act R136 provides for a proposed method of selection that results in the board of trustees being increased in size to nine members, with two new members being appointed, and the remaining seven members being elected from the existing seven single-member districts. Under the proposed plan, the number of districts in which African-Americans voters can elect candidates of choice remains unchanged from the benchmark plan. What has changed is the context in which those members operate. The act adds two board members who will be appointed by the two-member county legislative delegation, and available information indicates that neither member of the legislative delegation is a candidate of choice of minority voters. As a result, the act expands the board's membership by more than a quarter, without a concomitant expansion of the electoral franchise. Act R136 provides that the new appointed members will remain part of the board of trustees for an exceptionally long term of twelve years, until 2022, unless certain performance criteria are met earlier.

As support for its actions here, the state has advised that the addition of two members was the least intrusive of various options that were considered, including replacing the elected board with an all-appointed board or continuing to elect all members of the board, but on a countywide at-large basis, rather than from single-member districts. While those options might indeed be more drastic than the proposed plan, that fact does not obviate the conclusion that the act reduces the proportion of positions on the board to which African Americans can elect representatives of choice, a retrogressive effect prohibited by Section 5. The fact of the matter is that the sole impact of the decision is to reduce the level of electoral influence that African-American voters have on the board.

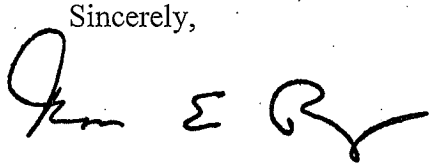
In sum, the state has not met its burden under Section 5 of proving that the changes affecting voting contained in Act R136 do not have a discriminatory effect. This conclusion is informed by the fact that the action undertaken here is *ad hoc* in nature and, unlike those actions we have reviewed in other circumstances, proceeded in the first instance to employ a drastic intervention of likely very long duration with a specific impact on the electoral influence of African-American voters, rather than starting with alternatives that would have a lesser

retrogressive effect on African-American voting strength. We encourage the state to examine the example of other states, like Texas and Mississippi, that have enacted statewide legislation to address educational deficiencies in local school districts in a uniform and transparent manner.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, Act R136 will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Because the Section 5 status of these two state acts are at issue before the Court in *Murphy v. Harrell* (D.S.C.), we are providing a copy of this letter to the Court and counsel of record.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of South Carolina plans to take concerning this matter. If you have any questions, you should call Robert S. Berman (202-514-8690), a Deputy Chief in the Voting Section.

Sincerely,



Thomas E. Perez
Assistant Attorney General

cc: Court and counsel of record in *Murphy v. Harrell* (D.S.C.)