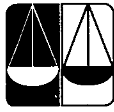
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April 27, 2010

Chris Herren
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
1800 G Street, NW
Room 7254 – NWB
Washington, DC 20006

RE: Comment under Section 5 of the Voting Rights Act, Submission Nos. 2010-0970 and 2010-0971, Fairfield County, South Carolina

Dear Mr. Herren:

The Lawyers Committee for Civil Rights Under Law submits this comment letter to urge the Attorney General not to grant preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the voting changes included in Submission Nos. 2010-0970 and 2010-0971 and, instead, to send a letter requesting additional information, pursuant to 28 C.F.R. § 51.37.

These submissions seek preclearance for related changes made by two pieces of local legislation enacted by the South Carolina General Assembly earlier this year with respect to the Fairfield County School District. Submission No. 2010-0970 concerns Act No. R135, which transfers authority for determining the budget and managing the finances of the school district from its elected board of trustees to a committee appointed by the Fairfield County Legislative Delegation, and transfers taxation authority from the school board to the Fairfield County Council. Submission No. 2010-0971 concerns Act No. R136, which increases the number of members on the school district's board of trustees and alters the method of selecting the trustees. With regard to these latter changes, the board currently has seven members elected from single-member districts. Act No. R136 would increase the size of the board from seven to nine, with seven members elected from the existing single-member districts and the two additional members appointed by the Fairfield County Legislative Delegation. The legislative delegation consists of two individuals, State Senator Creighton Coleman and State House member H. Boyd Brown (both of whom are white), and these are the individuals who are responsible for the enactment of the submitted local acts. Both pieces of legislation were and are opposed by the school district board of trustees, six of whose members are African-American.[1]

[1] The submitted acts sunset the changes regarding the appointment of two additional school board members and the transfer of budgetary and financial authority to an appointed finance committee. The transfer of the taxation authority is permanent. The sunset provisions in the two acts are identical: the changes are to remain in effect until July 1, 2022 or an earlier date if certain specified standards are met with regard to the

The Lawyers' Committee submits this comment letter to address two issues. First, we urge the Justice Department to conclude that the transfers of authority occasioned by Act No. R135 (as well the changes made by Act No. R136) are voting changes covered by Section 5. Under the Supreme Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491, 508 (1992), transfers of authority that do not concern the authority to adopt or administer voting practices are subject to Section 5 preclearance in those instances where the transfer of authority is so substantial that it constitutes a de facto replacement of an elected official. For the reasons set forth below, we believe that that standard has been met here, where the elected board has been stripped of its taxation, budgetary, and financial management authority.

Second, our analysis indicates that the submitted changes present substantial questions as to whether they would have a retrogressive effect and whether they were adopted, at least in part, with a discriminatory purpose. In order to resolve these questions, certain items of additional information should be requested by the Justice Department, as set forth below.

<u>Section 5 Coverage</u>

Both Act No. R135 and Act No. R136 contain changes affecting voting within the meaning of Section 5 for which preclearance is required.

1. Act No. R136

Act No. R136 alters the power of county voters to select the members of the school district's board of trustees by expanding the size of the school and requiring that two additional members be appointed by the county's local legislative delegation. This, in turn, creates the potential for dilution of African-American voting strength and clearly is a change for Section 5 coverage purposes.

2. Act No. R135

Preclearance also is required for Act No. R135, although the question of Section 5 coverage requires closer analysis. The Supreme Court's decision in *Presley v. Etowah County Commission, supra*, while holding that most transfers of powers between governmental branches do not require Section 5 preclearance because they are not changes affecting voting within the meaning of Section 5, nonetheless reserved the question of "whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a de facto replacement of an elective office with an appointive one, within the rule of Bunton v. Patterson." Id. at 508. In this regard, the Attorney General should continue to follow the general test set forth by the Solicitor General in *Texas v. United States*, 593 U.S. 296 (1998), that Section 5 coverage is required when the change divests an elected body of its "reason for being." *Brief for United States*, 1997 U.S. S. Ct. Briefs LEXIS 734, *48-49. For the following reasons, Act R135, acting in tandem with Act R136, clearly divests the elected Fairfield County School Board of its "reason for being" – to be the governing authority for the

Fairfield County public school system – and therefore results in a *de facto* replacement of the board for which Section 5 preclearance is required.

State law presently vests the Fairfield County school board with the primary responsibility for budgeting and tax assessment. Only in certain circumstances must the board have its budget approved by the county council.[2]

Act No. R135 removes the authority for budgeting and tax assessment from the school board by establishing a separate Finance Committee appointed by the legislative delegation, requiring the Finance Committee to hire a Finance Director, and transferring tax assessment powers to the Fairfield County Council. The Act provides:

> The finance committee, as created by Section 9A of this act, shall prepare an annual budget for general school purposes and shall submit the budget to the board for review. The finance committee has sole authority over the budget-making process and is the only entity that may make changes to the budget. The board shall submit the budget for approval by the Fairfield County Council by April first of each year. The Fairfield County Council is authorized and empowered, by resolution, to determine and fix the amount of the levy needed to operate schools in the district and shall notify the county auditor on or before June fifteenth of each year of the amount of the levy and file with him a certified copy of the resolution.

The school board is left with only the ministerial duty of serving as the conduit for the budget to be prepared exclusively by the finance committee and approved the county council.

Furthermore, Act No R135 is written so as make the power of the Finance Director and Finance Committee over the purse-strings as controlling as possible with regard to school district operations. The Finance Committee will approve all pay, all pay increases, all budget transfers, all district borrowing, and all unbudgeted expenditures and compensating cuts; it also can mandate spending cuts and furloughs, set the fund balance target, and hire its own counsel. The Finance Director will report only to the Finance Committee and is explicitly given "sole authority over the finances of the district."[3]

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[2] Current law provides that: "The board shall prepare an annual budget for general school purposes. The board is authorized and empowered, by resolution duly adopted, to determine and fix the amount of the levy needed to operate schools in the district and shall notify the county auditor on or before June fifteenth of each year of the amount of the levy and file with him a certified copy of the resolution. In the event the annual budget required an increase in millage in excess of three mills above that levied for the previous year or increases in excess of the consumer price index for the previous year, whichever is less, the budget must be submitted for approval to the Fairfield County Council."

[3] The school district is required to pay for all expenses of the Finance Committee and Finance Director, even though the avowed purpose of the legislation is to reduce non-classroom expenditures.

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On paper, Act No. R135 will allow the board of trustees to continue to establish policy for the school district.[4] However, this is meaningless authority since the board will not have the authority to fund its policy initiatives and choices, and any policy efforts that it does undertake may be defunded, and thus vetoed, by the Finance Committee.

In sum, the changes made by Act No. R135 constitute a *de facto* replacement of the elected Fairfield County School District board of trustees, and therefore are changes subject to Section 5 preclearance.[5]

Discriminatory Purpose and Effect

1. Discriminatory Effect

The consistent approach used by the Justice Department to analyze whether changes in the method of selecting government officials from elected to appointed, or from elected to a mixture of elected and appointed, are retrogressive is to compare the opportunity of minority voters to elect officials of their choice under the existing system to the opportunity they would have under the proposed system to select these officials using the new appointive, or mixed elective-appointive, method. In turn, the opportunity of minority voters to select the appointed officials is determined by analyzing their ability to elect candidates of choice to the position or positions that are to be responsible for making the appointments. See, *e.g.*, Jan. 8, 2007 Section 5 objection for Mobile County, Alabama (change in the method of filling vacancies from special elections to gubernatorial appointment) (withdrawn on other grounds, July 23, 2008, pursuant to the Supreme Court's determination, in *Riley v. Kennedy*, 553 U.S. 406 (2008), that no "change" requiring preclearance had occurred); Dec. 13, 1994 Section 5 objection for Spartanburg County, South Carolina (abolishment of the elected county board of education and its replacement by an appointed oversight committee).

It follows, therefore, that the retrogression analysis presented here, with respect to the addition of two appointed members to the school district board of trustees, boils down to a comparison of the opportunity Fairfield County's African-American voters have to elect school trustees using the single-member district system to their opportunity to elect the two members of the local legislative delegation, since the local legislative delegation will be responsible for the appointing the two new board members. If African-American voters have less opportunity to elect the state senator and state house member, then the change is retrogressive. *Beer v. United States*, 425 U.S. 130, 140-42 (1976); 28 C.F.R. § 51.54(a). Similarly, with regard to the proposed transfer of budgetary and financial authority from the board of trustees to a committee appointed by the local legislative delegation, that change also is retrogressive if African-

[4] The Act provides that, after establishment of the Finance Committee and the Finance Director position, "[t]he fundamental role of the Board of Trustees of the School District of Fairfield County is to establish policy for the school district, focusing on student achievement."

[5] Although, as noted above, Act No. R135 sunsets the transfers of authority to the Finance Committee and Finance Director, it appears that these changes would continue in effect for at least several years, and so cannot be viewed as somehow lasting so briefly that they will have a minimal impact on school district operations.

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American voters have less opportunity to elect the delegation than to elect the seven school trustees under the current single-member district system.[6]

Using this analysis, it appears that there is a substantial basis on which to conclude that the changes would be retrogressive. At the outset, it appears that elections in Fairfield County are racially polarized. As the Justice Department is aware, South Carolina has a long and continuing history of racially polarized voting. Since 2001, the Attorney General has interposed nine objections to redistricting plans, method of election changes, and annexations in South Carolina, all of which were premised on a determination that voting is racially polarized. With regard to Fairfield County, in 1988 the United States District Court ruled, in a challenge to at-large elections for the Fairfield County Council, that plaintiffs had established a prima facie violation of Section 2 of the Voting Rights Act, including a showing of polarized voting. Walker v. Fairfield County, South Carolina, County Council, Civ. No. 0-88-2927-6 (D. S.C.). There does not appear to be any basis on which to conclude that elections for the school district's board of trustees follow a different voting pattern.

Under the benchmark system, it appears that African-American voters currently have the opportunity to elect a majority of the members of the school board. Fairfield County is 59 percent black in population according to the 2000 Census, and 58% of its registered voters are nonwhite. In the last regular election for the board, five African-Americans and two whites were elected; the two white members then resigned and, in special elections held to fill the vacancies, one African-American and one white individual were elected. Prior to the 2008 election, the board also was composed of five African-American and two whites. It is our understanding that, at the time of the 2008 general election, five of the seven districts had nonwhite registration majorities, and a sixth district was 49 percent nonwhite in voter registration.[7]

On the other hand, it appears that African-Americans, at best, have a marginal opportunity to elect a candidate of choice to the local legislative seats and, accordingly, it appears that they effectively would not have anything more than a marginal opportunity to select the two new appointed members of the school board. The current state senate district (district 17) is composed of all of Fairfield County, all of Chester County, and parts of Union and York Counties. The current state house district (district 41) includes all of Fairfield County and part of Chester County. It is our understanding that African-Americans have never elected a candidate of choice in either district, although African-American candidates have run for both seats, including candidacies for seats in the past decade. The unsuccessful candidates include the current African-American chairperson of the school board, Annie McDaniel, who has been defeated in three efforts to win the state house seat (in 2004 and 2006 she was defeated by the current state senator, Creighton Coleman, who was elected to the state house in 2000, 2002,

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[6] With regard to the transfer of the taxation authority, since the transfer is being made to the county council this change (if it is analyzed separate and apart from the transfer of the budgetary and financial authority) is retrogressive only if African-Americans have less opportunity to elect members of the county council than the school board members. The council and the school board are elected from the same single-member districts.

[7] As noted, the Fairfield County Council has seven members elected from the same districts as the school board. The council currently has three African-Americans and four white members.

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2004, and 2006, and then was elected to the state senate in 2008; in 2008, McDaniel was defeated by the current house member, Boyd Brown).[8]

By obtaining additional information from the State, the Justice Department can further explore these factual issues and reach the appropriate determination. The items of additional information that should be requested include: election returns by precinct for the school district, county council, any at-large county positions, and the two legislative seats for elections in which African-Americans participated as candidates; registration data and turnout data by race and precinct for each such election; and any data by race (such as registration data) that describes the current demographics of the school board's seven single-member districts. In reviewing these data, the Justice Department not only should assess the extent of racially polarized voting in the county, but also should analyze whether voting patterns differ between school board elections and elections for the state legislative seats.[9]

2. Discriminatory Purpose

The Justice Department should closely examine the sequence of events leading up to the adoption of the proposed changes, as well as other relevant information, to determine whether the changes were adopted, at least in part, with a discriminatory purpose. We recognize that the Fairfield County schools are faced with a number of substantial problems, as outlined in the two submissions, and that stated purpose of the changes is to create new mechanisms for resolving the problems and improving the county's public schools. Nonetheless, it is clear that these problems have existed for many years, and it has been credibly alleged that these problems did not lead to the conclusion that the systems for selecting school board members and administering the schools should be substantially revamped until the African-American members of the school board gained control of the board following the 2008 election. Further, it has been alleged that the new board did not act to worsen the problems it inherited from the predecessor boards. Thus, it has been alleged that the changes, at least in part, were animated by who had gained control of the board of trustees in 2008, rather than any new or increased need to revamp the manner in which the school district is governed.[10]

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[8] We recognize that in both districts nonwhites now have a registration majority. However, it appears that as a result of racially polarized voting, and perhaps other voting patterns and factors (e.g., turnout and the power of incumbency), these registration majorities have not, functionally speaking, resulted in African-American voters having a realistic opportunity to elect their preferred candidates.

[9] For example, it may be that there is a larger drop-off in participation rates among white voters than African-American voters between state legislative elections and school board elections because whites have proportionally less interest in school board matters. In that regard, it is our understanding that students residing in an all-white area of the county adjacent to Chester County (the Mitford area) have historically attended Chester County schools, not Fairfield County schools, and the voters in this area therefore may have minimal interest in Fairfield County school district elections.

[10] Accordingly, the circumstances presented by the current submission may be analogous to the circumstances presented in the above-referenced Spartanburg County, South Carolina school board submission. There, as set forth in the December 13, 1994 objection letter, the Attorney General concluded that the abolishment of the elected school board, and its replacement with an appointed committee, was motivated by a discriminatory purpose based on the sequence of events leading up to the change. In particular, the Attorney General cited the fact that the change was

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As is indicated in the submissions, the problems with the administration of the county schools date back at least to 2002 and apparently go back as far as the 1980s or 1970s. Prior to the 2008 election, the school board apparently was controlled by a white chairperson, who was supported by one other white board member and two African-American board members. In the 2008 election, one of these African-American members was replaced by another African-American who joined with other African-Americans on the board to establish a new controlling majority. It was this change in power that allegedly precipitated the adoption of the submitted changes.

In considering the issue of discriminatory purpose, it is relevant to also take note of the views of the African-American community. As indicated in the submissions, there is very substantial opposition to these changes among African-Americans in Fairfield County and statewide. The school board has submitted a comment to the Justice Department opposing the changes. In the General Assembly, the African-American state house members unanimously voted in opposition to both acts (in the state senate, the only senator who voted was Senator Coleman).

Senator Coleman and Representative Brown have submitted statements, included in the submissions, in which they assert that the changes were precipitated by a 2009 report prepared by the Southern Association of Colleges and Schools, which criticized the manner in which the school district is being administered. However, it has been alleged that this review was undertaken at least in part to provide cover for the two legislators' interest in making the submitted changes based on the shift in who controls the school board, and it is unclear to what extent, if any, the report indicates that the nature and scope of the school district's problems have appreciably increased since 2008. Thus, the representations made by these two legislators do not, by themselves, establish that the changes were made without any discriminatory purpose.

Lastly, in analyzing the purpose issue, it is important to consider what alternatives approaches could have been taken to address the school district's problems. Apparently, state education authorities have the authority to assist problem districts, and it is unclear to what extent, if any, that approach was explored prior to instituting the submitted changes.

We therefore urge the Justice Department to request additional information to allow the Department to properly evaluate whether the State has met its burden of showing the absence of discriminatory purpose. We believe that the requested information should include the following: 1) a detailed description of all public and private meetings and other communications involving one or both members of the local legislative delegation (or their representatives) prior to and during the 2010 session of the South Carolina General Assembly in which changing the method of selecting school board members or administering the school district was discussed; 2) any

made shortly after a Section 2 suit against the school district was settled, resulting in the implementation of a method of election for the school board under which African-Americans, for the first time, would have an equal opportunity to elect board members of their choice.

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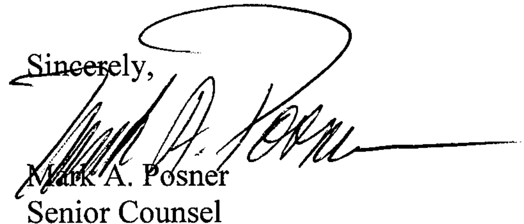
correspondence, emails, memoranda, notes, or other documents in which one or both members of the local legislative delegation (or their representatives) discussed changing the method of selecting school board members or administering the school district; 3) a description of any opportunities to provide public input regarding this issue prior to the adoption of the submitted acts, and any documents that set forth the public input provided: 4) newspaper articles that discuss this issue, the 2008 school board election, the decision by the two white board members to resign after the election, and the subsequent special elections to fill the vacancies; 5) a detailed timeline setting forth the history of relevant events regarding the administration of the school district (such as, since 2000, ratings by outside bodies, the racial composition of the board, and the points in time when new superintendents and acting superintendents have been appointed); 6) copies of all reports discussing the administration of the school district since 2000; and 7) a description of any alternative procedures under current state law for addressing the school district concerns, and a description of any efforts to make use of these procedures since 2000.

We appropriate the opportunity to submit our views on these pending Section 5 submissions, and look forward to receiving the Justice Department's response to the submitted changes.

Sincerely,



Mark A. Posner
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