



ALAN WILSON
ATTORNEY GENERAL

April 16, 2020

Christina Gwozdz, MD
Chairperson
Beaufort County Board of Education
Post Office Drawer 309
Beaufort, SC 29901-0309

Dear Dr. Gwozdz:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

The Beaufort County Board of Education is requesting a formal opinion on the legality of the attached Emergency Resolution, which has not yet been approved by the Board. ...

The resolution states the following:

NOW, THEREFORE, the Board hereby adopts the following EMERGENCY
RESOLUTION:

For the duration of the State of Emergency in South Carolina, and unless otherwise directed by subsequent action of the Board, the Board waives and/or suspends all policies, administrative procedures, and other rules that conflict with the aforementioned Executive Orders of Governor McMaster and any future applicable Executive Orders, any state and federal emergency laws such as the Families First Coronavirus Response Act (FFCRA) that may have or may be passed during the pandemic, any guidance issued by federal or state agencies, including but not limited to FEMA, the Department of Labor, the IRS, and the South Carolina Department of Education, and further authorizes the Board Chair in consultation with the Superintendent to waive or suspend provisions of existing policies, administrative procedures, and other rules, if compliance with the provisions thereof would in any way prevent, hinder, or delay necessary action by

the Board or school district in coping with the emergency or otherwise in carrying out the applicable Executive Orders of the Governor, including making necessary and appropriate arrangements to account for the local needs and unique circumstances of the Board and school district.

Law/Analysis

It is this Office's opinion that the resolution does not present an apparent conflict with state law. However, in application, the waiver or suspension of policies, administrative procedures, and other rules by a single board member and superintendent raises potential issues regarding the non-delegation doctrine. See Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978) (discussing limitations on delegating legislative power).

The resolution can broadly be divided into two clauses. The first suspends any of the Board's policies, administrative procedures, and other rules that conflict with the Governor's executive orders, state and federal law, and guidance from state and federal agencies for the duration of the state of emergency in South Carolina. This clause does not raise apparent issues and seems to be an acknowledgment that the Board's rule making power must be consistent with state and federal law. See S.C. Code § 59-19-110. In regards to suspending the Board policies in response to agency guidance, the Board is authorized to "prescribe such rules and regulations" as they "may deem necessary or advisable to the proper disposition of matters" brought before them. Id. The Board has the authority to voluntarily alter its own policies, procedures, and rules to comply with lawfully issued state and federal agency guidance.

The second clause permits the Board Chair, in consultation with the superintendent, to waive or suspend provisions of existing policies, procedures, or rules that "would in any way prevent, hinder, or delay necessary action by the Board or school district in coping with the emergency" or carrying out applicable Governor's executive orders and accounting for local needs. This clause seems to apply where a policy, procedure, or rule does not directly conflict with an executive order, state or federal law or agency guidance, but instead makes the response to the emergency or compliance with an executive order more difficult. While this clause does not appear to conflict with state law on its face, it may be applied in a manner that would. One concern with this clause is that it may be used in a manner that violates quorum requirements. See In re Matthews, 345 S.C. 638, 646, 550 S.E.2d 311, 314-15 (2001) ("In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum."). Again, the Board may adopt rules and regulations that it deems proper to address the matters brought before them. This specifically includes "designat[ing] one or more of its members" to conduct hearings in connection with any responsibility of the board to one or more of its members. Id. However, this designee must still report to the Board for its determination. Id. Similarly, if this second clause is utilized, we suggest consulting with the Board's or school

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district's attorney to ensure that any policy or rule suspension is one that a designated member can make or that the superintendent can make on their own, or if it needs Board approval.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General