

Legal Opinion Regarding S.419 and the Voting Rights Act of 1965

January 27, 2020

SENATE BILL S.419 PROVIDES AN AGGRESSIVE, UNNECESSARY, AND ATYPICAL METHOD OF SCHOOL DISTRICT TAKEOVER MANDATING REMOVAL OF LOCALLY ELECTED SCHOOL BOARDS AND, IF IMPLEMENTED, WOULD LIKELY VIOLATE BOTH THE LETTER AND SPIRIT OF THE VOTING RIGHTS ACT OF 1965.

RECOMMENDATION AND SUMMARY:

The local school board removal process in South Carolina Senate Bill S.419 (S.419) should be removed to prevent a violation of the Voting Rights Act of 1965 (VRA). If implemented, the bill's elimination of locally elected school boards would amount to a change in voting procedures that would have a racially disparate impact—a result the VRA prohibits. Additionally, the removal process is unnecessary because state statutes currently include various mechanisms for school district takeovers that address the stated academic and/or fiscal goals of such takeovers, and these mechanisms are currently being utilized in Allendale County School District, Florence School District Four, and Williamsburg County Schools while their school boards continue to hold elective office. Finally, the proposed removal process constitutes an atypical and problematic divergence from common practice as to the role of elected school board members following state takeover of a school district. Specifically, whereas state takeover systems in many other states provide for the takeover of day-to-day management of districts without affecting the school board composition, S.419 mandates the elimination of locally elected officials before their terms of office have expired.

DISCUSSION:

I. Overview of S.419 School Board Removal

S.419 would grant the state superintendent the power to seek a state of emergency declaration in a school district that, upon approval by the State Board of Education, would dissolve the district's locally elected school board. Such removal is not discretionary, and the dissolution of the school board is triggered solely by the declaration of a state of emergency. Upon the dissolution of the locally elected school board, the state superintendent is required to assume the responsibilities of the district superintendent and school board for a minimum of three years, and the school board's fiscal authority related to taxing and levying millage is transferred to the county council. Once the district demonstrates improvement for a minimum of three consecutive years, the State Board of Education may approve the appointment of an interim local board of trustees, consisting of five members who would serve for a minimum of three years and until the State Board of Education votes to end the state of emergency declaration. The interim board members would be residents of the school district and appointed as follows: one member appointed by the governor; one member appointed by the local legislative delegation; and three members appointed by the state superintendent in consultation with the local legislative delegation.

II. S.419's proposal to vacate the choice of voters in school board elections and deprive them of the right to vote in future elections is a voting change that would disparately impact non-white voters in violation of the VRA.

The VRA prohibits racially discriminatory voting policies and practices. To sustain a claim under the VRA, a plaintiff must show that a change in voting policy or practice has occurred and that the change has a racially disparate impact. S.419 results in both.

III. Eliminating or vacating the results of an election constitutes a change in voting under the VRA.

Current South Carolina law provides for the election of local school boards. State statutes spearheaded by locally elected legislative delegations set district-specific term limits for school board members, as well as the precise voting districts from which those members are elected. Numerous cases demonstrate that changes in the length of school board member terms, changes to the district lines for school board member election districts, and changes in qualifications required to vote in those elections all amount to changes in voting that trigger scrutiny under the VRA.

Similarly, S.419, if implemented, would reverse the various voting policies and practices that school districts already have in place, including allowing the results of the most recent elections to be vacated in takeover districts by removing board members before their terms have expired. Further, the proposed bill would allow for the replacement of school board members elected by local voters with a virtually unlimited grant of authority to the state superintendent, explicitly delegating him or her with the authority and responsibility of both the district superintendent and the school board. Only after the district has met its annual targets for sustained improvement for a minimum of three consecutive years is the state superintendent required to submit documentation to the State Board of Education to initiate its appointment of an interim school board.

Further, S.419 requires that the appointed interim school board serve for a minimum of three years and until the State Board of Education votes to end the state of emergency. The plain language of the statute is not clear as to whether this vote is required to take place after three years or whether the declaration of emergency can continue indefinitely. Only once all these conditions are met can the State Department of Education, in consultation with the district and the interim

board, begin to develop a transition plan and timeline for determining when to return management of the district to a locally elected school board.

S.419 unequivocally amounts to a voting change as voters in school districts declared to be in a state of emergency will be deprived of electing school board members for a minimum of six years following a declaration of emergency and are only provided with contingent timelines for the return of local control, which could arguably result in the removal of locally elected school boards indefinitely.

B. S.419's voting changes would have a racially disparate impact on non-white voters, which the VRA prohibits.

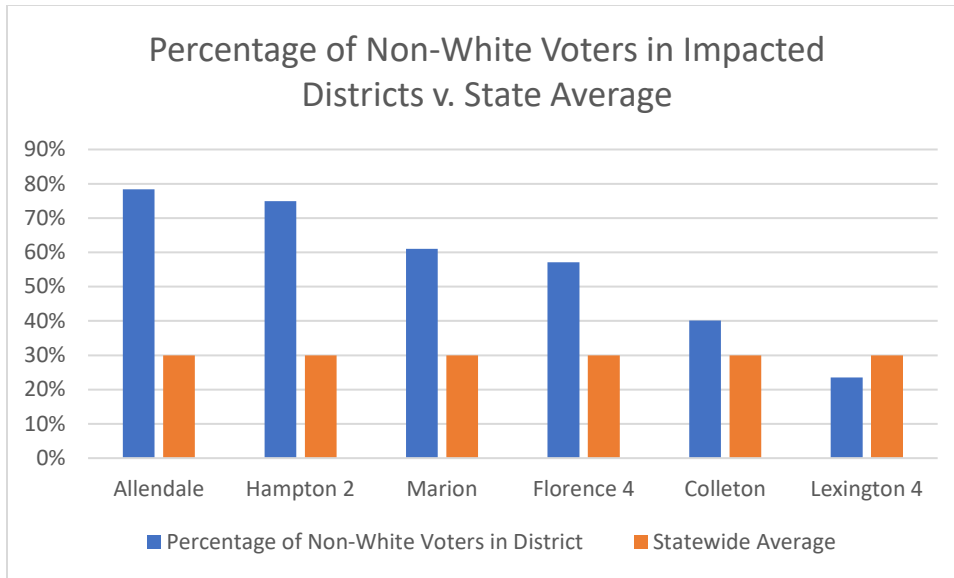
S.419 provides that districts will be subject to a declaration of emergency—resulting in school board removal—if the district is identified as underperforming for three consecutive years; the district's accreditation is denied; the state superintendent of education determines that a district's turnaround plan results are insufficient; or the district is classified as being in a fiscal emergency status pursuant to S.C. Code Ann. § 59-20-90 or if financial mismanagement resulting in a deficit has occurred. Analysis of currently available data shows overwhelmingly that the districts that would qualify for an emergency declaration based upon S.419's factors have large minority populations far in excess of the statewide average.

The primary factor leading to school district takeovers is the identification of a district as underperforming for three consecutive years, meaning that 65% or more of the schools in the district have maintained an overall rating of “unsatisfactory” or “below average” on the statewide report card during this period. A review of the 2018 and 2019 state school report cards reveal that, if current trends continue for a third year, Lexington County School District Four, Colleton County School District, Allendale County School District, Florence County School District Four,

Hampton School District 2, and Marion County School District would be subject to takeover under the provisions of S.419. The racial composition of registered voters in the aforementioned school districts is predominantly minority. Vacating the results of the school board elections in these districts would have a substantial racially disparate impact. As the following charts shows, the percentage of non-white voters in four of these districts is roughly twice the statewide average. In two of the districts, it is two and a half times the statewide average. This disparate impact, in conjunction with a change in voting, is strong evidence of a violation of the VRA.¹

Registered Voters by Race		
<i>School District</i>	<i>White Voters</i>	<i>Non-White Voters</i>
Hampton 2	25%	75%
Florence 4	43%	57%
Allendale	22%	78%
Colleton	60%	40%
Marion	39%	61%
Lexington 4	76%	24%
<i>Statewide Average</i>	70%	30%

¹ Totality of the Circumstances: The ultimate determination of whether a state statute violates the VRA (Section 2) rests on a totality of factors: the history of official voting-related discrimination in the state or political subdivision; the extent to which voting in the elections of the state or political subdivision is racially polarized; the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.



III. S.419’s board removal provision is unnecessary because South Carolina law provides multiple mechanisms to achieve the state’s stated academic and/or fiscal takeover goals.

South Carolina statutes already contain mechanisms sufficient to achieve the state’s academic and/or fiscal goals regarding school district takeover. One such process is found in S.C. Code Ann. § 59-18-1520 and is triggered when recommendations made by the State Board of Education and/or corresponding changes to the district’s strategic plan² developed by the district with the oversight and assistance of an external review team are found to be unsatisfactorily implemented or if student academic performance has not met expected progress. At that time, the district superintendent and members of the board of trustees must appear before the State Board of Education to outline the reasons why a state of emergency should not be declared in the district. The state superintendent, after consulting with the external review team and with the approval of

² These recommendations and strategic plan revisions are developed when a district receives a rating of at-risk. An external review team—including school district representatives, retired educators, State Department of Education staff, higher education representatives, parents from the district, and business representatives—engages in assistance and oversight during this process, providing recommendations to address any deficiencies. The State Board of Education approves the recommendations, and the Department of Education provides services, support, and other technical assistance to implement the plan during a minimum period of three years.

the State Board of Education, is then granted the authority to furnish continuing advice and technical assistance in implementing the recommendations of the State Board of Education or to declare a state of emergency in the district and assume management of the district. Throughout this process, the locally elected school board members continue to serve.

S.C. Code Ann. § 59-20-90 provides a second method for school district takeover if there are concerns regarding the district's fiscal practices. This statute, part of the Education Finance Act of 1977, as amended, allows the state superintendent to declare a fiscal watch, fiscal caution, or fiscal emergency in a school district. When a fiscal emergency is declared, if the state superintendent determines that the district has not made reasonable recovery plans or taken action to correct the practices or conditions that led to the declaration, he or she can recommend that the State Department of Education take control of the financial operations of a district and maintain control until the district is released from the fiscal emergency. Again, throughout this takeover process, the locally elected school board continues to serve.

In addition to these statutory methods of district takeover, yet another mechanism allowing state takeover is found in state budget provisos. This process, as outlined in South Carolina 2019-2020 Appropriation Act, Part 1B, Section 1A-H630, 1A.12 (SDE-EIA: Technical Assistance), provides for school district takeover initiated solely by the state superintendent. The state superintendent may declare a state of emergency in a district under this proviso if the district's accreditation status is probationary or denied; if a majority of the schools in the district fail to show improvement; if the district is classified as being in "high risk" status financially; or for financial mismanagement resulting in a deficit. Upon such declaration, the state superintendent will take over management of the district through direct management, consolidation with another district, charter management, public/private management, or contracting with an educational management

organization or another school district. While this proviso does not directly address the role that locally elected school boards play during this type of district takeover, historically, local school boards have remained intact.

In light of these varied and comprehensive methods for school district takeover that directly address district academic and fiscal performance, S.419 abridges the voting rights of South Carolina minorities by requiring the removal of locally elected school boards and inviting legal challenge.

IV. S.419 proposes an atypical and problematic divergence from common practice as to the role of elected school board members following state takeover of a school district.

School district takeover statutes throughout the country, including in South Carolina, have typically followed a general pattern and structure. S. 419 proposes a problematic divergence from common practice. Takeover statutes have, in recent years, resulted in high-profile fights over local educational control in places like New York City, Philadelphia, and Washington, DC. In some instances, these takeovers have resulted in the transfer of executive and policy control from the school board and its appointed superintendent to an executive officer.

In New York, for instance, power was transferred to the mayor's office, which then hired its own officials to run the district and supervised them out of the mayor's office. In Pennsylvania, power over Philadelphia schools was transferred to a newly constituted five-member commission, two of whom were appointed by the mayor and the other three by the governor. None of these takeovers, however, included removal of the locally elected school board.

To the extent state statutes have authorized the removal of school boards, they have not generally mandated it. Instead, states have made determinations related to school board removal on a case-by-case basis. Yet, such discretionary school board removal (as well as school district

takeover) has created another problem: negative racial impacts. A national study of district takeovers reveals that states have left local school boards in place 70% of the time in predominantly white districts but only 24% of the time in predominately black districts. Domingo Morel, *Takeover: Race, Education, and American Democracy*, 61-62 (Oxford University Press 2017). More specifically, in predominately black takeover districts, states have abolished the school board altogether 33% of the time and replaced it 43% of the time. *Id.*

S.419 differs in key respects from statutes found in other states. First, rather than substantially shrinking the school board's power and control, S.419 removes these locally elected officials from office and eliminates the voters' chosen leadership for its local schools. Second, rather than making removal optional, S.419 mandates removal upon a declaration of emergency. As discussed above, other states that authorize removal of a school board do not necessarily require such removal and, even if board member removal is permitted, the state has the option to remove only a portion of a school board's members when board governance issues are contributing to the district's deficiencies. See, e.g. Ark. Code 6-15-2916 (allows, as one of no less than six options, for removal of school board members on an individual basis and allows for a new election to occur to replace those removed); 105 Ill. Comp. Stat. 5/2-3.25f-5 (allows for removal of individual school board members and provides each member with full appellate rights).

Other states presumably stop short of mandated removal of full school boards in an attempt to prevent legal challenges under the VRA. This is not the case with S.419, and its provisions will invite legal challenges.