

SENATE OF VIRGINIA

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AND PART OF THE CITY OF DANVILLE



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AGRICULTURE, CONSERVATION AND
NATURAL RESOURCES
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COURTS OF JUSTICE
RULES

September 6, 2018

Via U.S. Mail and E-Mail

The Honorable Mark Herring
Attorney General of Virginia
202 North 9th Street
Richmond, Virginia 23219

Dear Attorney General Herring:

As the Chair of the Senate Subcommittee on School Facility Modernization, I write today on matters of great importance, and to seek a legal opinion from the Attorney General's Office. At our recent hearing in Blacksburg, Virginia Tech Professor Carol Cash gave a most illuminating presentation to those assembled regarding the effect that outdated school structures have on our student's ability to learn and be productive and successful students. "Education is the great equalizer" declared Dr. Martin Luther King Jr, indeed Abraham Lincoln, Harriet Tubman and Eleanor Roosevelt did declare as well also. Let's be honest: I believe that we have not heeded their advice sufficiently.

The Senators attending the hearing along with myself were extremely impressed with the Professor's review of the existing research. As she pointed out, it statistically proves the average student forced to attend aged, obsolete, and/or not properly maintained nor modernized school facilities for his or her K-12 learning cannot get the required 21st century education. The cumulative negative effects are often staggering. This tragic consequence is not in doubt, and its negative effects on our ability to provide Virginia with a cutting edge workforce, both now and in the future cannot be overstated.

Mr. Attorney General, I know you are aware of the 2008 Democratic Party Platform provision saying Democrats believe "every American, whatever their background or station in life, should have the chance to get a good education." Moreover, the 2016 Republican Party Platform says "(m)aintaining American preeminence requires a world-class system of education in which all students can reach their potential." Thus, all of us in politics have been quick to embrace this lofty goal. At the same time, we have been far less quick to ensure that it becomes a reality. We have made some progress, but not nearly enough.

This prologue is necessary in order to put in context the reason for this letter. When Governor Northam, in his Inaugural Address, became the first chief executive to highlight the growing problem of "crumbling" – his word – school facilities across our Commonwealth, I knew it to be true. When I created the Subcommittee on School Facility Modernization to explore the depth of the situation, I

hoped to better learn the extent of this physical problem, and find real solutions to these problems, especially in our rural areas and inner cities throughout the Commonwealth.

But now I realize this isn't merely an infrastructure issue: it is a moral issue too. The family's role in education may be paramount - I can't fix that. But as Professor Cash explained, and Senator Glen Sturtevant asserted, infrastructure is one of the few objective factors we have the expertise to control entirely.

Sometimes our system already provides a useful judicial remedy. At other times, a remedy requires new legislative action. The latter area is for the Committee. But as to the former, I write today to seek the advice of the Office of Attorney General, long an advisor to the legislative branch.

In that regard, I believe you can understand how Ms. Cash, and other experts have thrown down a great challenge to my Subcommittee, one first posed by the U.S. Supreme Court in their famed *Brown v. Board of Education* decisions. *Brown II*, 349 U.S. 294 (1955), has the specific language most germane in that regard. This opinion gave states and localities guidance on how to comply with the *Brown I* mandate requiring equal educational opportunities for all. In judging whether those responsible had meeting their constitutional duty, the *Brown II* ruling ordered lower courts to consider several factors, including whether "problems...arising from the physical condition of the school plant" might be denying the equal opportunities mandated in *Brown I*. This aspect of school facilities law has been largely overlooked as best I can tell at this stage of the Subcommittee's inquiry. The U.S. Supreme Court's interest in the physical plant stemmed from the Delaware case of *Gebhart v. Belton*, 91 A. 2d 137 (1952), affirmed by *Brown v Board of Education I*, 347 U.S. 483 (1954).

More than five generations of school children later (using the K-12 cycle as one generation), the statistics in Virginia are painfully clear: the average school facility is obsolete, with upwards of half approaching 50 years of age, and very many decrepitly old enough to be considered historic buildings under federal and state law. Making matters worse, the 2013 gubernatorial review of state school buildings suggests many that would be deemed in violation of the U.S. Constitution in 1954-55, have never been fully modernized or maintained as seemingly required.

The people of Virginia had hoped to address this matter by voting to install the new Virginia Constitution effective in 1971. However, the politicians controlling the General Assembly at the time had other ideas. While the language in Section 1 of Article VIII would seem mandatory to the average citizen, the lawyers in the State Legislature knew the wording had been deliberately chosen to be aspirational only. Quite simply, it appears that Virginia's constitution only requires politicians to talk the talk, not walk the walk.

My colleague, Senator Jennifer McClellan, at last year's hearing on Senator Glen Sturtevant's school facility legislation for their hometown of Richmond, said it came about because the citizens were fed-up with intolerable physical plant school conditions. And, as the Roanoke Times recently observed, rural citizens have reached this same point. They want action. Accordingly, so as not to spend my committee's time "reinventing the wheel" as the saying goes, I respectfully ask you to respond to the following legal inquiries.

1. Assuming, *arguendo*, that the Virginia Tech professor is right and the physical condition of a particular school facility makes it impossible for a student to get a true 21st century education, does this violate the U.S. Constitution, the Virginia Constitution, or any state law?
2. Assuming, *arguendo*, that the Virginia Tech professor is right and the physical condition of all the K12 facilities, on average, makes it impossible for students to get a true 21st century education, does this violate the U.S. Constitution, the Virginia Constitution, or any state law?
3. Assuming, *arguendo*, that the Virginia Tech Professor is right and the physical condition of a particular school has so damaged student learning that it is a fundamental reason students are not achieving the learning needed to make that school achieve accreditation due to poor test scores, does this situation violate the Virginia Constitution or any state law?
4. Assuming, *arguendo*, that my Subcommittee has data showing that a school deemed constitutionally inadequate by the *Brown* decisions was never modernized. 63 years later, does the U.S. Constitution, or federal law provide a legal remedy for the failure to satisfy the 1955 *Brown II* mandate on school infrastructure?
5. Assuming, *arguendo*, that my Subcommittee has data showing that a particular school, deemed inadequate by the *Brown* decisions, had been subsequently properly brought up to constitutional muster but now, and due to a failure since then to properly modernize and maintain the facility, the physical plant denies equal educational opportunities. Do the *Brown* decisions the U.S. Constitution, or federal law impose upon Virginia a continuing duty to satisfy the strictures of *Brown II*?
6. *Brown II* clearly says the physical condition of a school plant can deny a student equal educational opportunities. This conclusion is not related to what the law calls suspect classifications. The research of Virginia Tech professors likewise say their conclusions are not related to such classifications but rather all students. Assuming, *arguendo*, that the social science research of the Virginia Tech professors as cited above is correct, does such social science evidence support a finding that such a situation violates the U.S. Constitution, federal law or the Virginia Constitution?
7. Assuming, *arguendo*, as the available data evidences, that in many aged schools, the K-12 facilities for women such as sports-related and bathroom facilities, are inferior to the those for male students, what are the legal implications, if any, for this situation, in terms of state and federal law?

I know the above inquiries will require serious research on the part of your office. But I believe the stakes for our children justify the effort. I sincerely appreciate your consideration in this regard.

With warmest regards, I remain;

Very truly yours,

A handwritten signature in blue ink, appearing to read "W. Stanley, Jr.", with a stylized flourish at the end.

Senator William M. Stanley, Jr.
Chair, Senate Subcommittee on
School Facility Modernization