COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

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The Honorable William M. Stanley
Member, Senate of Virginia
13508 Booker T. Washington Highway
Moneta, Virginia 24121

Dear Senator Stanley:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

Following a scholarly presentation, you ask several questions regarding whether the poor physical condition of public schools—in particular or "on average"—violates the U.S. Constitution, the Virginia Constitution, or any state law when such condition prevents students from "getting a true 21st century education;"[1] whether the *Brown* decisions, the U.S. Constitution, or federal law provide a remedy for students attending schools deemed inadequate by the *Brown* decisions; and whether there are legal implications in terms of state and federal law regarding inferior facilities for female students as compared with facilities for male students.

Applicable Law and Discussion

I. School Physical Plant Conditions so Poor as to Adversely Affect Students' Ability to Learn May Implicate the Federal Constitutional Right to Equal Protection under the Law if the Conditions are Tied to a Suspect Classification.

A. *As Established in Brown II, the Physical Condition of the School Plant may be an Obstacle to the Desegregation of Schools as Required by the Equal Protection Clause of the U.S. Constitution.*

You ask whether the physical condition of a school plant that is so dire as to deprive students of educational opportunities violates the U.S. Constitution, and you reference the *Brown*

[1] For purposes of this opinion, the phrase "getting a true 21st century education," as used in your request, is presumed to mean an education that meets the standards of quality required by Article VIII, § 2 of the Virginia Constitution.

decisions, in particular *Brown II*, as providing a potential remedy for schools in such poor physical condition as to deny student "equal educational opportunities."

All school divisions in Virginia are subject to the mandates of the Equal Protection Clause of the Fourteenth Amendment.[2] In the 1954 decision *Brown v. Board of Education*, the U.S. Supreme Court found that racially separate educational facilities are "inherently unequal," even where the facilities' physical conditions are equal, and held that racial segregation in public schools was a denial of "the equal protection of the laws guaranteed by the Fourteenth Amendment."[3] In so doing, the Court rejected the "separate but equal" doctrine articulated earlier in *Plessy v. Ferguson*[4] and concluded that it has no place in public education.[5]

A year later, in 1955, the Court issued a second ruling—often referred to as *Brown II*—in which it ordered school districts to desegregate "with all deliberate speed" and tasked federal district courts with crafting appropriate remedies and overseeing implementation of the ruling in *Brown*.[6] The Court reasoned that federal district courts could best perform this duty "[b]ecause of their proximity to local conditions and the possible need for further hearings."[7] The Court stated that full implementation of its earlier decision "may require [the] solution of varied local school problems" and that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems."[8]

Among the potential obstacles to local implementation noted by the Court were "problems related to administration, *arising from the physical condition of the school plant,* the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."[9]

Thirteen years later, in *Green v. County School Board of New Kent County*, the Supreme Court followed *Brown II* in ruling that integration must occur in the school district's pupil assignment, "faculty, staff, transportation, extracurricular activities, and *facilities*."[10]

Race, a "suspect classification" triggering strict constitutional scrutiny under U.S. Supreme Court jurisprudence, is the defining factor in *Green* and both *Brown* decisions. Although you state in your request that *Brown II* "clearly says that the physical condition of a school plant can deny a student equal educational opportunities" unrelated to suspect classifications, in fact, *Brown II* is premised on the finding of racial segregation in public

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[2] U.S. CONST. amend. XIV, § 1.

[3] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." *Id.* at 493).

[4] 163 U.S. 537 (1896).

[5] *Brown*, 347 U.S. at 495.

[6] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299, 301 (1955).

[7] *Id.* at 299.

[8] *Id.*

[9] *Id.* at 300-301 (emphasis added).

[10] Green v. Cty. Sch. Bd. of New Kent Cty., 391 U.S. 430, 435 (1968) (emphasis added).

schools. In your letter, however, you do not assert the poor physical conditions of some schools results from racial discrimination.

B. *Desegregation Orders Issued under Brown II are Enforced by the Court and Complaints under Civil Rights Statutes are Investigated by the U.S. Department of Education and the Department of Justice.*

You ask whether there are legal remedies if desegregation orders issued by the courts have not been satisfied, or if desegregation is accomplished but is subsequently undermined by failure to maintain the school's physical plant.

Pro Publica conducted a national survey of school desegregation orders in 2014.[11] The survey identified 15 school districts subject to open desegregation orders that were generally issued between 1957 and 1970 in Virginia.[12] In addition, the survey identified two voluntary desegregation plans in Virginia—for Norfolk Public Schools and Waynesboro Public Schools—that were entered into in 2012. The U.S. Department of Education also maintains a list of school districts nationally that have reported being under open desegregation orders or voluntary desegregation plans.[13]

In the 1990s, the U.S. Supreme Court decided two noteworthy cases that addressed the criteria required for release from a desegregation order. In *Board of Education v. Dowell*,[14] the Supreme Court held that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination" and that desegregation decrees are "not intended to operate in perpetuity."[15] In remanding the case, the Supreme Court directed the district court to determine whether the school board "had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[16] In *Freeman v. Pitts*,[17] the Supreme Court held that "in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations."[18]

Thus, desegregation orders are subject to enforcement by the courts that issued them. A school division in Virginia that is subject to an open desegregation order continues to be subject to the court's oversight until released.

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[11] Yue Qiu and Nikole Hannah-Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA (Dec. 23, 2014), http://projects.propublica.org/graphics/desegregation-orders.

[12] Alexandria City (n/d); Arlington County (1957); Augusta County (1966); Brunswick County (1969); Buckingham County (1961); Charlottesville City (1957); Danville City (n/d); Fairfax County (1964); Hanover County (1966); Lynchburg City (1962); Newport News City (1957); Powhatan County (1963); Roanoke City (1962); Roanoke County (1970); and Suffolk City (n/d). The survey did not include data on school districts that have been released from court oversight.

[13] *See* U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, *Civil Rights Data Collection*, https://ocrdata.ed.gov/ (last visited Dec. 20, 2018).

[14] 498 U.S. 237 (1991).

[15] *Id.* at 247-248.

[16] *Id.* at 249-50.

[17] 503 U.S. 467 (1992).

[18] *Id.* at 490.

School divisions that have been released from desegregation orders and are subsequently found to have reverted to a system of racially segregated school facilities may be the subject of a complaint to the Office for Civil Rights of the U.S. Department of Education (OCR), or legal action brought by the U.S. Department of Justice (DOJ) under relevant provisions of the Civil Rights Act of 1964 (the "Civil Rights Act")[19] or the Equal Educational Opportunities Act of 1974.[20] Legal action may also be brought by private parties, to include actions brought under § 601 of Title VI of the Civil Rights Act or the Equal Educational Opportunities Act of 1974.

II. The Supreme Court of Virginia has Ruled that Education is a Fundamental Right under the Virginia Constitution and the State Constitution Requires the General Assembly to Determine the Manner of Funding to Provide for an Education Program that Meets Prescribed Standards of Quality.

A. *The Virginia Supreme Court Held that Education is a Fundamental Right under the Virginia Constitution But Has Not Addressed the Question of Whether School Physical Plant Conditions so Poor as to Adversely Affect Students' Ability to Learn Violate the Virginia Constitution.*

You ask whether the poor condition of a school's physical plant that deprives students of adequate educational opportunities violates the Virginia Constitution.

Article VIII, § 1 of the Virginia Constitution states that "[t]he General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained."[21] Article VIII, § 2 of the Virginia Constitution provides:

> Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly. *The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions.* Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.[22]

The Virginia Constitution thus empowers the General Assembly to decide the level of funding for schools in order to meet required standards of quality and to allocate such funding between the state and its localities.

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[19] In particular, Title IV of the Civil Rights Act of 1964 protects students attending public schools from discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000(c). Title VI prohibits discrimination on the basis of race, color or national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000(d).

[20] The Equal Education Opportunities Act of 1974 prohibits discrimination on the basis of race, color, sex, and national origin. 20 U.S.C. § 1701.

[21] VA. CONST. art. VIII, § 1.

[22] VA. CONST. art. VIII, § 2 (emphasis added).

In my view, this funding responsibility is critical to your inquiry as there may often be a direct relationship between the level of school funding available and the physical condition of the school buildings in which an education is obtained, and you state that you have been advised that there is an equally direct relationship between the physical condition of school buildings and the quality of that education. The Supreme Court of Virginia has addressed only the funding factor, and only with respect to disparity in funding levels among school divisions.

Specifically, in 1994, the Supreme Court of Virginia decided *Scott v. Commonwealth*,[23] in which eleven public school students and seven local school boards sought a declaratory judgment that the current system of funding public elementary and secondary schools violates the Virginia Constitution by denying students "an educational opportunity substantially equal to that of children who attend public school in wealthier divisions."[24] The Supreme Court did not find that equal funding of school districts is expressly required by the Virginia Constitution, but made clear that education is a fundamental right and that the General Assembly has ultimate authority for determining the standards of quality and funding an educational program that meets these prescribed standards, including the apportionment of costs between the Commonwealth and localities.[25] Significantly, the plaintiffs in *Scott* did not allege that the manner or level of funding prevented their schools from meeting the constitutionally-mandated standards of quality determined and prescribed by the General Assembly.[26] Accordingly, the Court did not address the question of any relationship between the adequacy of funding and the quality of education, whether related to school physical plant issues or other conditions.

B. *The General Assembly has Enacted State Laws that Make Local School Boards Primarily Responsible for Constructing and Renovating School Buildings in Virginia.*

You ask whether the condition of a school's physical plant that makes it impossible for students to "get a true 21st century education" violates any state law. Under Article VIII, § 2 of the Virginia Constitution, the General Assembly has chosen to enact laws placing primary responsibility for operating, maintaining, constructing, and renovating public school buildings on localities and local school boards.

While the state provides some funding through the standards of quality funding formula for the operation and maintenance of school facilities, the General Assembly has imposed a duty upon local school boards to directly "care for" school buildings and to "provide for the erecting, furnishing, equipping, and noninstructional operating of necessary school buildings and appurtenances and the maintenance thereof."[27] Local responsibility for a school's physical plant is further evidenced by § 22.1-135, which provides that "[n]o public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard for decency and health,"[28] and by § 22.1-136 which establishes the duty of the division superintendent to close a public school building when it "appears to the division superintendent to be unfit for occupancy."[29]

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[23] 247 Va. 379, 443 S.E.2d 138 (1994).

[24] *Id.* at 381, 443 S.E.2d at 139.

[25] *Id.* at 386-87, 443 S.E.2d at 142-43 (internal citations omitted).

[26] *Id.*

[27] VA. CODE ANN. § 22.1-79(3) (2016).

[28] VA. CODE ANN. § 22.1-135 (2016).

[29] VA. CODE ANN. § 22.1-136 (2016).

Additionally, the General Assembly has made the construction and improvement of school buildings a local responsibility. The principal approaches for funding school capital projects are local revenues, bonds, and bank loans. Local revenues are generally derived from various taxes levied by local governing bodies, which are under specific statutory mandate to levy property tax to provide funds for maintaining an education program that meets the prescribed standards of quality.[30] Revenue amounts appropriated by local governing bodies "shall be not less than the cost apportioned to the governing body for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law."[31] Financing options for capital projects include direct local government borrowing, borrowing indirectly through the pooled bond or subsidy programs offered by the Virginia Public School Authority, and direct loans through the Literary Fund.

While state funding for improvement of a school's physical plant is available via direct loans from the Virginia Literary Fund, the General Assembly has for many years allocated the use of these funds for purposes other than loans for capital improvements. Article VIII, § 8 of the Virginia Constitution requires the General Assembly to set apart the Literary Fund "as a permanent and perpetual school fund" and further provides that "so long as the principal of the Fund totals as much as eighty million dollars, the General Assembly may set aside all or any part of additional moneys received into its principal for public school purposes, including the teachers retirement fund."[32] Section 22.1-146 sets out the purposes for which Literary Fund loans may be used, including the construction, altering, or enlarging of school buildings,[33] while § 22.1-142 provides that the Literary Fund "shall be invested and managed by the Board of Education."[34]

The General Assembly did not transfer any monies from the Literary Fund to school construction from Fiscal Years 2003–2013.[35] Consequently, any state funding for the capital projects previously approved by the Board has been deferred for many years. It was not until the 2018–2020 Biennial Budget, as introduced by the Governor and approved by the General Assembly, that the Board was finally able to release the Literary Fund loans for two projects that were placed on the First Priority Waiting List by the Board nearly ten years ago in October 2008.[36]

Increased state funding would provide localities with the opportunity to invest greater amounts of capital into constructing, maintaining, and improving public school buildings. Because the standards of quality consist of minimum instructional program and staffing requirements and are not directly tied to the quality of the physical plant, the standards of quality funding formula does not take into account the costs of constructing or renovating school buildings, although it does provide some funding for the operation and maintenance of public schools. Accordingly, the General Assembly has elected to place primary responsibility for correcting less than adequate school conditions that may affect the quality of students' education—through renovation or new construction—on the localities and local school boards.

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[30] VA. CODE ANN. § 22.1-95 (2016).

[31] VA. CODE ANN. § 22.1-94 (2016).

[32] VA. CONST. art. VIII, § 8.

[33] VA. CODE ANN. § 22.1-146 (2016).

[34] VA. CODE ANN. § 22.1-142 (2016).

[35] *Uses of the Literary Fund for Public Education*, presented to the Senate Finance Committee Education Subcommittee on January 23, 2014 by Kent C. Dickey, Deputy Superintendent for Finance and Operations, Virginia Department of Education, at Pages 8-9.

[36] Virginia Board of Education Business Meeting Minutes, March 22, 2018, Volume 89, pages 23-24.

III. Gender Inequities Related to the Quality of Facilities Provided by Public Schools May Constitute Sex Discrimination Prohibited under Title IX of the Education Amendments of 1972, which is Enforced by the Department of Justice and Department of Education's Office for Civil Rights.

You state that in many aged schools, the facilities for women, such as sports–related and bathroom facilities, are inferior to those for male students. You ask whether this disparity violates any state or federal law.

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on sex in all education programs and activities in federally funded schools at all levels.[37] The DOJ and OCR share enforcement authority over Title IX.[38] Specific to your inquiry, bathroom and athletic facilities must be provided on a comparable basis for males and females.[39]

In determining whether an institution is providing equal opportunity in athletics, including athletic facilities, the U.S. Department of Education's Title IX regulations require the Department to consider, among others, the following factors: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice, and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; and (10) publicity.[40] Thus, significant disparities in the quality of the athletic facilities and other facilities, such as bathrooms, that a public school provides for male students as compared to that which it provides for female students may result in a legal challenge for sex discrimination under Title IX, which may be resolved through the OCR complaint and investigation process or litigation.

Conclusion

Remedies for inequality in public education, whether arising from poor school physical plant conditions or otherwise, are available under the mandates of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; the Civil Rights Act of 1964; the Equal Educational Opportunities Act of 1974; and Title IX of the Education Amendments of 1972, which collectively prohibit discrimination on the basis of race and sex and provide recourse for violations through the U.S. Department of Justice and the Office for Civil Rights of the Department of Education, in addition to certain private causes of action that may be available to aggrieved individuals under those laws. Relief under each of these laws, however, requires proof of unequal conditions arising from discrimination on the basis of the aggrieved party's status as a member of a protected or suspect class, such as race or sex.

While the Virginia Constitution does establish education as a fundamental right, it places the responsibility for determining the funding for maintaining the required educational program

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[37] 20 U.S.C. §§ 1681–1688.

[38] *See* U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, at 1 n.1 (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf .

[39] 34 C.F.R. § 106.33; 34 C.F.R. § 106.41.

[40] 34 C.F.R. § 106.41(c).

on the General Assembly. The General Assembly has elected to require localities to provide the majority of funding for the construction and improvement of the school physical plant.

With kindest regards, I am,

Very truly yours,

Mark R. Herring

Mark R. Herring
Attorney General