ALAN WILSON
ATTORNEY GENERAL

February 15, 2024

Danielle Fields
Board Chair
Greenwood County School District 50 Board of Trustees
P.O. Box 248
Greenwood, SC 29648

Dear Ms. Fields:

We received your letter requesting an Attorney General's opinion on behalf of Greenwood School District 50's (the District's) Board of Trustees (the Board). You seek an opinion on "whether the concept of double jeopardy is invoked when a student who was previously expelled from the District may be readmitted and placed in the District's alternative school or another alternative placement rather than the student's previously assigned school." By way of background, you explain:

> During its regular meeting in October 2023, the Board took up the issue of double jeopardy as it may relate to expelled students seeking petition for readmission under Board Policy JKE – Expulsion of Students,[1] with its accompanying administrative rule. . . . During our discussion, the Board weighed various options of allowing readmission of an expelled student contingent upon placement in the District's alternative program.

As way of example, you state:

> [P]ursuant to [section 59-63-210 of the South Carolina Code (2020)], as long as the nature of the offense for which a student was expelled does not pertain to firearms, "[e]ach expelled pupil has the right to petition for readmission for the succeeding school year." Based upon a plain reading of this statute, the word "readmission" seems to indicate the legislative intent that the student be allowed to return to the school that he or she was last expelled from as opposed to being reassigned to an alternative placement.

[1] Board Policy JKE provides: "A student may be expelled for the reasons listed in the [D]istrict's discipline policy, for the commission of any crime, gross immorality, gross misbehavior or the violation of any other written rules and regulations established by the [B]oard, the school or the state board of education. A student may also be expelled when the presence of the student is deemed to be detrimental to the best interest of the school."

> Further and as a result, the principle of double jeopardy may be implicated by such a requirement. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits anyone from being prosecuted or sentenced twice for substantially the same offense. The relevant part of the Fifth Amendment states, "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." To that end, if a District student is expelled for the remainder of the year, the expulsion is exacted for the purpose of punishing the student for a Student Code of Conduct violation in accordance with Board Policy JICDA – Code of Conduct and its accompanying administrative rule. The issue that arises under that scenario is whether, upon a student's petition for readmission after expulsion, the Board's decision to allow the student's readmission contingent upon placement in the District's alternative school constitutes a second punishment stemming from the same transaction or occurrence, which may be seen as violating the student's Fifth Amendment rights.

Law/Analysis

Both the Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, and our State Constitution protect against double jeopardy. U.S. Const. Amend. V (providing no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"); S.C. Const. Art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."); State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App. 2003) (noting the Double Jeopardy Clause of the Fifth Amendment is applicable to South Carolina through the Fourteenth Amendment to the United States Constitution). In State v. Cuccia, the South Carolina Court of Appeals recognized "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment." 353 S.C. at 435, 578 S.E.2d at 48 (quoting Hudson v. United States, 522 U.S. 93, 98-99 (1997). In Hudson v. United States, the United States Supreme Court reaffirmed that the "[Double Jeopardy] Clause protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." 522 U.S. at 99 (citations omitted). "Nevertheless, the [Double Jeopardy] Clause may prevent the government from subjecting a defendant to both a criminal punishment and a civil sanction." Cuccia, 353 S.C. at 435, 578 S.E.2d at 48.

In determining whether a penalty implicates the Double Jeopardy Clause, a court must first determine whether it is criminal or civil in nature. Initially, a court should look to the language of the statute to determine the nature of the punishment. Id. at 435, 578 S.E.2d at 48 ("Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" (quoting Hudson, 522 U.S. at 99)); id. at 436, 578 S.E.2d at 48 ("To determine whether a penalty is criminal or civil, a court must look to the face of the statute and then determine if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty.").

However, "Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty." Id. at 435-36, 578 S.E.2d at 48 (quoting Hudson, 522 U.S. at 99) (alteration in original). In making this determination, our Supreme Court has adopted the factors enumerated by the United States Supreme Court in Hudson:

> (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

State v. Price, 333 S.C. 267, 270-72 n.5, 510 S.E.2d 215, 217-18 n.5 (1998).

We believe a court would likely determine the penalties resulting from school disciplinary proceedings do not constitute criminal penalties under the Double Jeopardy Clause. Section 59-63-210(A) of the South Carolina Code (2020) grants a district board of trustees the authority to expel, suspend, or transfer any student for cause or when a student's presence is detrimental to the best interest of the school. Looking first to the statutory language, while the statute does not expressly provide the penalties are civil or criminal in nature, we believe a court would find the language implies a civil penalty.

> *Any district board of trustees* may authorize or order the expulsion, suspension, or transfer of any pupil for the commission of any crime, gross immorality, gross misbehavior, persistent disobedience, or for violation of written rules and promulgated regulations established by the district board, county board, or the State Board of Education, or when the presence of the pupil is detrimental to the best interest of the school. Each expelled pupil has the right to petition for readmission for the succeeding school year. Expulsion or suspension must be construed to prohibit a pupil from entering the school or school grounds, except for a prearranged conference with an administrator, attending any day or night school functions, or riding a school bus. The provisions of this section do not preclude enrollment and attendance in any adult or night school.

S.C. Code Ann. § 59-63-210(A) (emphasis added). Of significance, the General Assembly granted district boards of trustees discretionary authority to order or authorize the penalties listed in section 59-63-210(A). *See* Hudson, 522 U.S. at 103 ("That [the] authority [to issue debarment orders] was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction."); *see also* Price, 333 S.C. at 272, 510 S.E.2d at 218 (finding it significant that the authority to suspend a driver's license was vested with the South Carolina Department of Motor

Vehicles when the statute was silent as to whether the sanctions were civil or criminal in nature). South Carolina appellate courts have treated local school boards as administrative agencies. *See e.g.* Lee Cnty. Sch. Dist. Bd. of Trustees v. MLD Charter Sch. Acad. Plan. Comm., 371 S.C. 561, 567-68 n.1, 641 S.E.2d 24, 28 n.1 (2007) (finding the requirements for administrative agencies when presenting their findings apply to "all administrative agencies, including local school boards"); Brown v. James, 389 S.C. 41, 50, 697 S.E.2d 604, 609 (Ct. App. 2010) (determining the doctrine of exhaustion of administrative remedies under the Administrative Procedures Act[2] applied to a local school board in an action for violation of the Employment and Dismissal Act[3]). Accordingly, we believe a court would likely find the language of section 59-63-210(A) implies the penalties are civil in nature.

Turning to whether the statutory scheme is nevertheless "so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty," we believe a court would likely find the disciplinary penalties under section 59-63-210(A) are civil penalties. Price, 333 S.C. at 271, 510 S.E.2d at 218. First, the penalties under this section do not involve an affirmative disability or restraint. *See* Hudson, 522 U.S. at 104 (finding a prohibition from further participating in the banking industry was "certainly nothing approaching the 'infamous punishment' of imprisonment" (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960))). Second, penalties resulting from school disciplinary proceedings have not traditionally been regarded as criminal punishment. Recently, in Starbuck v. Williamsburg James City County School Board, the United States Court of Appeals for the Fourth Circuit affirmed the United States District Court for the Eastern District of Virginia's holding that the Fifth Amendment's Double Jeopardy Clause did not apply to school disciplinary proceedings. 28 F.4th 529, 537 (4th Cir. 2022). In Starbuck, a student brought a 42 U.S.C. § 1983 action against a local school board following his suspension from a public high school. Id. at 531-32. In holding the Double Jeopardy Clause was inapplicable to the student's case, the District Court relied on Hudson, 522 U.S. at 98-99 and Doe v. University of South Carolina, No. 3:18-161, 2018 WL 1215045, at *8 n.10 (D.S.C. Feb. 12, 2018). Starbuck v. Williamsburg James City Cnty. Sch. Bd., No. 4:18CV63, 2020 WL 7330182, at *9 (E.D. Va. Nov. 20, 2020), *aff'd in part, rev'd in part*, 28 F.4th 529 (4th Cir. 2022). In Doe v. University of South Carolina, a University of South Carolina graduate student was suspended from the university, jeopardizing his visa status. 2018 WL 1215045, at *1-2. The District Court noted "it is well settled that the Double Jeopardy Clause does not apply to academic disciplinary proceedings." Id. at *6 n.10.

Third, section 59-63-210(A) is silent as to whether it requires a finding of scienter. Fourth, penalties resulting from school disciplinary proceedings do promote the aim of deterrence; however, no civil remedy is solely remedial. Hudson, 522 U.S. at 102 ("If a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause."). Fifth, assuming for the purpose of our analysis the conduct precipitating a school disciplinary penalty is already a crime, this is

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[2] S.C. Code Ann. §§ 1–23–310 to –400 (2005 & Supp. 2023).
[3] S.C. Code Ann. §§ 59–25–410 to –530 (2004).

insufficient to transform a civil penalty into a criminal penalty. Price, 333 S.C. at 273-74, 510 S.E.2d at 219 ("[T]he mere fact that the conduct for which the sanction is imposed is also criminal is insufficient to render the sanction criminally punitive.").

Lastly, although there is a deterrent element to school disciplinary penalties, section 59-19-90(3) of the South Carolina Code (2020), indicates that the General Assembly intended codes of conduct promulgated by school district boards of trustees to be for the benefit of all students. The board of trustees shall:

> Promulgate rules prescribing scholastic standards of achievement and standards of conduct and behavior that must be met by all pupils as a condition to the right of such pupils to attend the public schools of such district. The rules shall take into account the necessity of proper conduct on the part of all pupils and the necessity for scholastic progress *in order that the welfare of the greatest possible number of pupils shall be promoted notwithstanding that such rules may result in the ineligibility of pupils who fail to observe the required standards, and require the suspension or permanent dismissal of such pupils*; . . .

§ 59-19-90(3) (emphasis added). This goal is also reflected in the language of the District's policies. Board Policy JK – Student Discipline states in pertinent part: "The school is a community. It is responsible for educating those children who attend, and therefore, it must establish and enforce guidelines and procedures that provide for reasonable order and an atmosphere where learning can take place." In addition, Board Policy JIC – Student Conduct states: "The [B]oard directs the administration to establish rules and regulations necessary to create and preserve conditions essential to the orderly operation of the schools." Further, we believe a court would determine the penalties are not excessive in relation to the goal of promoting a positive learning environment for all students. Even under the most severe form of punishment—expulsion—the student has the right to petition for readmission the following school year.

Taken together, we believe a court would find that under an analysis of the Hudson factors, section 59-63-210(A) is not so punitive in either purpose or effect to transform it into a criminal penalty. *See* Price, 333 S.C. at 271, 510 S.E.2d at 218 ("Only the clearest proof will suffice to override legislative intent and transform what has been denominated as a civil remedy into a criminal penalty."); Hudson, 522 U.S. at 101 ("[N]o one factor should be considered controlling as they 'may often point in differing directions.'" (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963))).

As to requiring a formerly expelled student to attend the District's alternative school or a school other than the school the student previously attended, we believe a court would likely determine section 59-19-90(9) of the South Carolina Code (2020), grants the school board of trustees the discretionary authority to assign and transfer students as it deems appropriate. S.C. Code Ann. § 59-19-90(9) ("The board of trustees shall . . . Transfer any pupil from one school to another so as to promote the best interests of education, and determine the school within its district in which any

pupil shall enroll; . . ."); *see* Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees, 400 S.C. 478, 489, 735 S.E.2d 492, 498 (2012) ("In construing the language of [section 59-19-90(9) & (10)(d)], we agree . . . that the General Assembly conferred discretionary authority on a board of trustees . . . to determine which school in its district a student may attend."). Moreover, with respect to a formerly expelled student's placement in the District's alternative school, we believe this would align with the General Assembly's intent in establishing alternative schools. S.C. Code Ann. § 59-63-1300 (2020) ("The General Assembly finds that a child who does not complete his education is greatly limited in obtaining employment, achieving his full potential, and becoming a productive member of society. It is, therefore, the intent of this article to encourage district school boards throughout the State to establish alternative school programs. These programs shall be designed to provide appropriate services to students who for behavioral or academic reasons are not benefiting from the regular school program or may be interfering with the learning of others.").

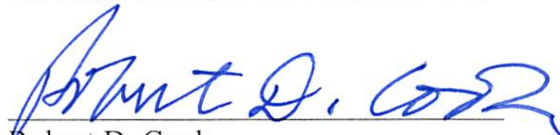
Conclusion

Accordingly, we believe a court would likely determine penalties arising out of school disciplinary proceedings under section 59-63-210(A) do not constitute criminal punishments under the Double Jeopardy Clause. Further, the General Assembly vested the Board with the discretion to transfer and assign students as deemed appropriate "so as to promote the best interests of education." S.C. Code Ann. § 59-19-90. Therefore, we believe a court would find that neither a student's expulsion nor the Board's assignment of a previously expelled student to a placement other than the student's previously assigned school implicates the Double Jeopardy Clause.

Sincerely,

Elizabeth McCann
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General