



ALAN WILSON
ATTORNEY GENERAL

August 21, 2012

Michael A. Letts, Chairman
Hope Academy Charter School
2 Stagbriar Court
Columbia, South Carolina 29229

Dear Mr. Letts,

We received your letter requesting an opinion of this Office regarding certain regulations and procedures implemented or enforced by the South Carolina Department of Education (the "SCDOE") against charter school applicants and the manner in which the SCDOE disburses federal planning and implementation subgrant funds to new charter schools.

By way of background, you explain that the planning committee for the Hope Academy Charter School ("Hope Academy") forwarded a charter school application to the staff of the SCDOE in September of 2011 with the intent of opening the school for 2012-2013 school year. Upon review, a member of the SCDOE's staff informed Hope Academy that it missed the May 1, 2011 application deadline for the 2012-2013 school year and asked Hope Academy to change its projected opening date to the 2013-2014 school year. After this change was made, the SCDOE's staff eventually approved the application and forwarded it to the Charter School Advisory Committee (the "Advisory Committee"). Hope Academy's charter application was ultimately approved by the South Carolina Public Charter School District ("SCPCSD") on March 8, 2012 for the 2013-2014 school year. Although it now had an approved charter, the SCDOE informed Hope Academy that it was ineligible at that time to begin receiving federal planning and implementation subgrant funds because it missed the September 2, 2011 deadline to apply for the 2011-2012 cycle for such funds. However, Hope Academy was informed that it was eligible to apply for such funds in the fall of 2012 for the 2013-2014 cycle.

In light of the above background information, you ask the following questions:

- 1) Does the May first deadline for the submission of charter school applications conflict with the language of S.C. Code section 59-40-70 providing that "[a]n applicant may submit a charter application to the advisory committee at any time during the fiscal year," and that "[o]nce an application is approved by the school board of trustees, the charter school may open at the beginning of the following year?"
- 2) Does the SCDOE have the authority to implement and administer a policy by which members of its staff review charter school applications for "completeness" before forwarding such applications to the Advisory Committee for a compliance determination where section 59-40-70(A)(5) simply provides that "[a]n applicant may submit an application to the advisory committee at any time during the fiscal year and the advisory

committee, within sixty days, shall determine whether the application is in compliance?" You indicate you are concerned such a policy permits the SCDOE to delay, without statutory authority, the tolling of the sixty day period the Advisory Committee has to determine whether the application is in compliance.

- 3) Does the SCDOE have the authority to withhold or delay the disbursement of federal planning and implementation dollars to a charter school planning committee whose charter has been approved? You also express concern with the SCDOE's policy of disbursing such funds on a reimbursement basis only as you believe such a policy limits the ability of charter school planning committees to adequately use such funds for the planning of charter schools.

With your permission, we also spoke with members of the SCDOE's staff regarding the above issues. The SCDOE informed us that on October 20, 2011, Hope Academy forwarded its charter application to the SCDOE's chief of staff. As is the SCDOE's practice, the application was subsequently reviewed for "completeness" by a staff member from its Charter School Program Office. On November 3, 2011, the Charter School Program Office staff sent correspondence notifying Hope Academy that because its application was submitted after the May first deadline for the 2012-2013 school year, the school's projected opening date needed to be changed to the 2013-2014 school year. Hope Academy submitted a completed application reflecting such changes on December 14, 2011. The SCDOE then forwarded the application to the Advisory Committee as well as the SCPCSD. On January 24, 2012, the Advisory Committee found the application to be in compliance pending minor revisions. Hope Academy submitted a revised application to the Advisory Committee on February 15, 2012, which was also forwarded to the SCPCSD. On March 8, 2012, the Board of Trustees of the SCPCSD approved Hope Academy for a charter for the 2013-2014 school year.

With regards to the federal funds you reference, it is our understanding that in 2010 the SCDOE applied for and received a five-year grant under the federal Charter Schools Program, Catalog of Federal Domestic Assistance (CFDA) No. 84.282A. Using these funds, the SCDOE makes subgrant awards to eligible applicants for the planning and implementation of new charter schools. The SCDOE has informed us that the time period in which it accepts subgrant applications for this program typically opens each year in late July or early August and closes sometime in September. The SCDOE maintains its position that Hope Academy was not eligible to apply for planning and implementation subgrant funds for the 2011-2012 year because it did not yet have an approved charter application at the time of the September 2, 2011 deadline for such applications. Furthermore, the SCDOE has informed us that it has adopted a reimbursement only policy for the disbursement of all federal subgrant funds under any program. The reason for such a policy, the SCDOE asserts, is compliance with the federal Cash Management Improvement Act.

We have also obtained copies of the South Carolina Public Charter School Application Guide¹ [2012 Charter Application Guide] issued by the SCDOE for schools planning to open fall 2013, the 2011-12 Public Charter Schools Program Request for Proposals Application Package for the Planning-Implementation Competitive Subgrant² [2011-12 RFP] issued by the SCDOE, and the Application for

¹ Available at <http://ed.sc.gov/agency/se/School-Transformation/Charter-Special-Focus/documents/CharterSchool-Application2012.pdf>.

² Available at <http://ed.sc.gov/agency/se/school-transformation/charter-special-focus/documents/2012finalrfp.pdf>.

Grants Under the Charter Schools Program State Educational Agency (“CSP Grant Application”) that was submitted by the SCDOE to the U.S. Department of Education (the “USDOE”) and approved in 2010.

Law/Analysis

Question 1

The formation of charter schools is generally governed by the provisions of the South Carolina Charter Schools Act of 1996 (the “Charter Schools Act”), S.C. Code Ann. sections 59-40-10 to -240. An applicant desiring to form a charter school follows the procedures set forth in section 59-40-70.³ Pursuant to subsection (A)(5):

An applicant shall submit the application to the advisory committee and one copy to the school board of trustees of the district from which it is seeking sponsorship. In the case of the South Carolina Public Charter School District, the applicant shall provide notice of the application to the local school board of trustees in which the charter school will be located for informational purposes only. The advisory committee shall receive input from the school district in which the applicant is seeking sponsorship and shall request clarifying information from the applicant. **An applicant may submit an application to the advisory committee at any time during the fiscal year and the advisory committee, within sixty days, shall determine whether the application is in compliance.** An application that is in compliance must be forwarded to the school district from which the applicant is seeking sponsorship with a letter stating the application is in compliance. The letter also shall include a recommendation from the Charter School Advisory Committee to approve or deny the charter. The letter must specify the reasons for its recommendation. This recommendation is nonbinding on the school board of trustees. If the application is in noncompliance, it must be returned to the applicant with deficiencies noted. The applicant may appeal the decision to the Administrative Law Court.

§ 59-40-70(A)(5) (Supp. 2006) (emphasis added).⁴

In addition, subsection B of 59-40-70 provides:

The school board of trustees from which the applicant is seeking sponsorship shall rule on the application for a charter school in a public hearing, upon reasonable public notice, within thirty days after receiving the

³ This statutory section, along with many other sections of the Charter Schools Act, was recently amended by Act No. 164 of 2012 (effective May 14, 2012). Any relevant changes will be noted herein for reference purposes only.

⁴ As amended, this section now provides, in relevant part, that “[a]n applicant may submit an application to the advisory committee *pursuant to State Board of Education regulations* and the advisory committee, within *ninety days*, shall determine whether the application is in compliance....” § 59-40-70(A)(5) (Supp. 2012) (emphasis added).

application. If there is no ruling within thirty days, the application is considered approved. **Once the application has been approved by the school board of trustees, the charter school may open at the beginning of the following year.** However, before a charter school may open, the State Department of Education shall verify the accuracy of the financial data for the school within forty-five days after approval.

§ 59-40-70(B) (Supp. 2006) (emphasis added).⁵

S.C. Code Ann. Reg. 43-601 provides the procedures and standards adopted by the State Board of Education (the "State Board") for the review of charter school applications. The May first deadline for the submission of charter applications is found in subsection (II)(B) which provides, in part:

Applications must be submitted to the Advisory Committee on or before May 1 to ensure completion of the review process by December 1 of the year preceding the opening of the charter school. If a charter, to include a conditional charter, is not issued by December 1, the opening will be delayed one scholastic year....

S.C. Reg. 43-601(II)(B).

Your first question essentially asks whether the May first deadline for the submission of charter school applications set forth in the above State Board regulation conflicts with the provisions of section 59-40-70 previously mentioned. Our Supreme Court has described a state agency's rulemaking power as "its authority to 'fill up the details' of the laws promulgated by the General Assembly." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011) (citations omitted). "An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." Hunter & Walden Co., Inc. v. S.C. State Licensing Bd. for Contractors, 272 S.C. 211, 213, 251 S.E.2d 186 (1978). "While the Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority ... to make rules and regulations, an agency may not make rules that conflict with, or ... change in any way the statute conferring such authority." Ahrens, 392 S.C. at 348-49, 709 S.E.2d at 58 (quotations omitted). Furthermore, although a regulation has the force of law, it may only implement the law and "must fall when it alters or adds to a statute." McNickel's Inc. v. S.C. Dept. of Revenue, 331 S.C. 629, 634, 503 S.E.2d 723, 725 (1998) (citations omitted).

Here, the Legislature has statutorily conferred upon the State Board the power to adopt regulations governing certain aspects of the charter school application process:

The State Board of Education shall promulgate regulations and develop guidelines necessary to implement the provisions of this chapter, including standards which the Charter School Advisory Committee shall use to determine compliance with this chapter and an application process to include a timeline for submission of applications that will allow for final decisions, including Administrative Law Court appeal, by December first of the year preceding the charter school's opening.

⁵ As amended, this section now provides, in part, that "[t]he board of trustees or area commission from which the applicant is seeking sponsorship shall rule on the application for a charter school in a public hearing, upon reasonable public notice, within *forty-five days* after receiving the application. If there is no ruling within *forty-five days*, the application is considered approved...." § 59-40-70(B) (Supp. 2012) (emphasis added).

§ 59-40-180 (emphasis added).⁶

It is clear from the language of section 59-40-180 that the Legislature intended for a charter school application to receive final approval by December first in order for the charter school to open the following school year. Thus, the question becomes whether the State Board's adoption of a May first deadline for the submission of charter applications is reasonably related to the purpose of establishing a timeline that will allow for the entire application process to run its course before the December first deadline for final approval established by section 59-40-180.

In responding to this question, we find it necessary to examine the potential length of time the charter application process could span under the relevant statutory provisions. Upon the submission of an application, the Advisory Committee has sixty days to make a compliance determination. § 59-40-70(A)(5). If the application found not to be not in compliance, the applicant may appeal this decision to the Administrative Law Court (the "ALC"). *Id.* Pursuant to section 1-23-380, the applicant has thirty days after the decision is made to file the appeal. After some indefinite period of time, the ALC issues an order either affirming or reversing the Advisory Committee's findings. If reversed, the application is sent to the school board of trustees that is the potential sponsor to approve or deny the application. § 59-40-70(A)(5), (B). The sponsor has thirty days from receipt of the application to issue its ruling. § 59-40-70(B). If the application is denied, the sponsor has ten days to provide a written explanation of the reasons for denial. § 59-40-70(C). The applicant may then appeal the sponsor's decision to the ALC. § 59-40-90. Again, the applicant has thirty days to file the appeal. § 1-23-380. After some indefinite period of time, the ALC issues an order either affirming or reversing the school board's decision.

Assuming an application for a charter school followed the above process, approximately one hundred days could pass solely as a result of the time allotted to the Advisory Committee and the sponsor to issue their respective determinations. Another sixty days could pass from the time it could take the applicant to file appeals from such determinations. Thus, without even considering the indefinite amount of time it would take the ALC to hear both appeals and issue orders on such matters, an application submitted on May first could still be pending well into the month of October.

In light of the above, we find no basis to conclude that the State Board's May first deadline for the submission of charter school applications is unreasonably related to the purpose of establishing a timeline which ensures that such applications receive final approval by December first of the year prior to that in which the charter school intends to open. Accordingly, we conclude the May first deadline for the submission of charter applications established by S.C. Reg. 43-601(II)(B) does not conflict with subsections (A)(5) and (B) of section 59-40-70.

Question 2

There is no express requirement in the Charter Schools Act or in S.C. Reg. 43-601 that an application must be deemed "complete" by a member of the SCDOE's staff before it may be submitted or forwarded to the Advisory Committee for a compliance determination.⁷ As previously mentioned, section

⁶ As the administrative officer to the State Board, the State Superintendent of Education, through the SCDOE, is responsible for administering all policies and procedures adopted by the State Board. § 59-3-30(1), (6).

⁷ The only mention of such a policy we were able to find is in the charter school application guide the DOE issued this year, which states:

59-40-70(A)(5) simply provides that “[a]n applicant may submit an application to the advisory committee at any time during the fiscal year and the advisory committee, within sixty days, shall determine whether the application is in compliance.”

However, we believe section 59-40-70(A)(5) is reasonably interpreted as requiring that charter applications be “complete” before they may be submitted to the Advisory Committee for a compliance determination. To conclude otherwise would read the statute as allowing the sixty-day period⁸ the Advisory Committee has to review the application for compliance to begin running upon the submission of an incomplete application. Such a result could not have been intended by the Legislature. Lancaster County Bar Ass’n v. S.C. Com’n on Indigent Defense, 380 S.C. 219, 222 670 S.E.2d 371, 373 (2008) (“In construing a statute, [courts] will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature”).

Furthermore, we believe the SCDOE has the implied power to administer a procedure by which it ensures that charter applications are “complete” before submission to the Advisory Committee. In describing the powers of administrative bodies, our Supreme Court has observed:

As creatures of statute, regulatory bodies ... possess only those powers which are specifically delineated. By necessity however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged.

City of Rock Hill v. S. Carolina Dept. of Health & Envtl. Control, 302 S.C. 161, 165, 394 S.E.2d 327, 330 (1990) (citation omitted); see also 73 C.J.S. Public Administrative Law and Procedure § 109 (“While the powers of administrative officers and agencies cannot be conferred by implication, administrative agencies generally have such implied powers, and only such, as are necessarily inferred or implied from, or incident to, the powers and duties expressly granted and imposed on them”).

Here, section 59-3-30(6) provides that the Superintendent of Education (the “Superintendent”) is responsible for administering, through the SCDOE, “all policies and procedures adopted by the State Board of Education.” Thus, the Superintendent, through the SCDOE, has the authority to administer the policies and procedures adopted by the State Board in S.C. Reg. 43-601(II)(A) and (B) concerning the Advisory Committee’s review of charter applications and the timeline for the submission of applications. We believe this authority necessarily includes the power to determine whether charter school applications are “complete” before submission to the Advisory Committee for a compliance determination.

Only applications that are complete and follow these guidelines will be considered. Applications must present information in the order specified in these guidelines to be deemed complete; applications that do not will not be reviewed....

....

After receiving a completed application, the [Advisory Committee] will review the application, within 60 days, to determine compliance or noncompliance....

2012 Charter Application Guide, 3-4 (emphasis in original).

⁸ As previously noted, under recent legislation the Advisory Committee’s review period has been changed from sixty to ninety days.

We caution, however, that in reviewing charter applications for “completeness” the SCDOE must administer such a policy and exercise discretion in a manner consistent with the intent and goals of the Charter Schools Act. As stated in 73 C.J.S. Public Administrative Law and Procedure § 124:

Administrative officers and agencies may be, and, where not expressly or impliedly restrained by law, generally are, vested with discretion in the exercise of their powers and the performance of their duties....

....

Generally, the discretion vested in administrative officers and agencies is not absolute or unlimited. Administrative discretion must be exercised in accordance with the law, including applicable constitutional provisions, and those of statutes and regulations....

Here, the Legislature has declared that the purpose of the Charter Schools Act is to:

- (1) improve student learning;
- (2) increase learning opportunities for students;
- (3) encourage the use of a variety of productive teaching methods;
- (4) establish new forms of accountability for schools;
- (5) create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site; and
- (6) assist South Carolina in reaching academic excellence.

§ 59-40-20.⁹ Furthermore, the Legislature has expressly stated its intent in enacting the Charter Schools Act as follows:

In authorizing charter schools, it is the intent of the General Assembly to **create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system.** The General Assembly seeks to create an atmosphere in South Carolina’s public school systems where research and development in producing different learning opportunities are actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. **As such, the provisions of this chapter should be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by**

⁹ This section was recently amended to include a seventh purpose of “creat[ing] new, innovative, and more flexible ways of educating children within the public school system, with the goal of closing achievement gaps between low performing student groups and high performing student groups.”

the State of South Carolina to the mission, goals, and diversity of public education.

§ 59-40-30(A) (emphasis added).

In our examination of the above provisions as well as the timelines established by the Charter Schools Act for the submission and review of charter school applications, we have previously stated that “it is clear the Legislature did not envision that the process for the creation of charter schools would be delayed, postponed or decelerated for want of action by agency administrators.” Op. S.C. Att’y Gen., 2002 WL 31341820, at *6 (Aug. 27, 2002).

Consistent with the above, we advise that the process by which members of the SCDOE’s staff review charter school applications for completeness before submission to the Advisory Committee may not be used in a manner so as to unreasonably delay the process for the creation of charter schools. We note, however, that a determination as to whether the Department has improperly used such a practice in any particular case is a question of fact beyond the scope of an opinion of this Office. See Op. S.C. Att’y Gen., 2010 WL 3896162 (Sept. 29, 2010) (“This Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court”).

Question 3

As we understand your third question, you are essentially asking whether, under federal law, a charter school planning committee is entitled to receive planning and implementation subgrant funds from the SCDOE immediately upon receiving approval of its charter application. The answer to this question requires us to examine and construe applicable federal statutes and regulations. As we have repeatedly advised, it is the general policy of this Office not to opine on issues involving federal law. See Ops. S.C. Att’y Gen., 2010 WL 3048330 (July 9, 2010) (stating “this Office generally does not construe federal law” and “issue[s] involving federal law ... are best addressed before a federal court”); 2009 WL 2406409 (July 24, 2009) (stating that “as a matter of policy, this Office does not opine on questions of federal law” and “defers [such matters] to the federal agency charged with the interpretation of the federal statute or regulation in question”). However, as the interpretation of these federal statutes and regulations directly affects the administration of a statewide grant program by a state agency, we will attempt to provide some guidance on the matter.

The federal Charter Schools Program (the “CSP”) is authorized by 20 U.S.C.A. sections 7221 to 7221(j) (Supp. 2002). The purpose of the CSP is “to increase national understanding of the charter schools model by-- (1) providing financial assistance for the planning, program design, and initial implementation of charter schools ... [and] (3) expanding the number of high-quality charter schools available to students across the Nation ...” 20 U.S.C.A. § 7221. Section 7221a(a) states that the U.S. Secretary of Education “may award grants to State educational agencies¹⁰ having applications approved ... to enable such agencies to conduct a charter school grant program ...” 20 U.S.C.A. § 7221a(a). A “State educational agency” (“SEA”) desiring a CSP grant from the U.S. Secretary of Education is required to

¹⁰ In this case, the “State educational agency” is the SCDOE. See 20 U.S.C.A. § 7801(41) (“The term ‘State educational agency’ means the agency primarily responsible for the State supervision of public elementary schools and secondary schools”).

submit an application that, *inter alia*, “describes the objectives of the [SEA’s] charter school grant program and ... how such objectives will be fulfilled” 20 U.S.C.A. § 7221b(b)(1).

SEAs receiving CSP grants use such funds to make subgrants to “eligible applicants ... to plan and implement a charter school” 20 U.S.C.A. § 7221c(f)(1), (2). In reviewing applications for subgrants, an SEA is simply required to use a “peer review process.” 20 U.S.C.A. § 7221c(c). However, “to the extent possible,” an SEA must award subgrant funds in a manner that will distribute such funds “through different areas of the ... State, including urban and rural areas,” and “will assist charter schools representing a variety of educational approaches” 20 U.S.C.A. § 7221c(d). Subgrants are awarded for a period of up to three years, of which up to eighteen months may be used “for planning and program design” and up to two years “for the initial implementation of the charter school.” 20 U.S.C.A. § 7221a(c)(2).¹¹

While there are no federal regulations directly implementing the CSP, the program is still generally subject to the USDOE’s General Administrative Regulations found in Title 34 of the Code of Federal Regulations, Parts 74 to 86 and 97 to 99. 34 C.F.R. Part 76 generally sets forth the manner in which state agencies administering certain USDOE grant programs distribute subgrants and review subgrant applications for approval. A program statute that authorizes a state agency to make subgrants does one of three things:

- (a) **Requires** the State¹² to use a **formula** to distribute funds;
- (b) **Gives** the State **discretion to select subgrantees through a competition** among the applicants or through some other procedure; or
- (c) **Allows some combination of the procedures.**

34 C.F.R. § 76.51 (emphasis added).

Furthermore, the procedures a state agency uses in reviewing subgrant applications for approval differ based on whether the agency is administering an “entitlement program” or a “discretionary program.” 34 C.F.R. § 76.400. Under an entitlement program, a state agency “*shall* approve an application if ... submitted by an applicant that is *entitled* to receive a subgrant under the program” and the applicant qualifies under the federal statutes and regulations applicable to the program. 34 C.F.R. § 76.400(b) (emphasis added). On the other hand, a state agency “*may* approve an application” under a discretionary program if:

- (1) The application is submitted by an eligible applicant under a program in which the State has the *discretion to select* subgrantees;

¹¹ We note that although this provision also provides that an eligible applicant may use up to two years “to carry out dissemination activities,” it is our understanding that the SCDOE no longer awards dissemination grants.

¹² While these regulations in Part 76 make repeated reference to a “State,” 34 C.F.R. § 76.50(a) provides that “[u]nder a program covered by this part, the Secretary makes a grant: (1) To the *State agency* designated by the authorizing statute for the program; or (2) to the *State agency* designated by the State in accordance with the authorizing statute.” (emphasis added).

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State *determines* that the project should be funded under the authorizing statute and implementing regulations for the program.

34 C.F.R. § 76.400(c) (emphasis added). An SEA must comply with, and use federal funds in accordance with, “the State plan and applicable statutes, regulations and approved applications.” 34 C.F.R. § 76.700.

Nothing in the statutes governing the CSP provides that an SEA is required to use a formula to make subgrants, or that any subgrant applicants are entitled to receive an award under the program. To the contrary, the provisions of the CSP previously discussed indicate SEAs are afforded considerable flexibility and discretion in establishing their own individual charter school grant programs, including the establishment of the program’s objectives, the manner in which subgrants are awarded, and the procedures for reviewing subgrant applications for approval. Furthermore, the USDOE’s 2010 notice to SEAs inviting applications for new awards under the CSP pursuant to CFDA No. 84.282 encouraged SEAs to exercise such discretion in establishing certain aspects of their individual subgrant programs:

In addition to describing the proposed objectives of the SEA charter school grant program and how these objectives will be fulfilled, the Secretary encourages applicants to provide descriptions of the steps to be taken by the SEA to award sub-grant funds to eligible applicants desiring to receive these funds, including descriptions of the peer review process the SEA will use to review applications for assistance, the timelines for awarding such funds, and how the SEA will assess the quality of the applications.

75 FR 13735-02 (March 23, 2010).

The USDOE has also expressed in several publications its position that the CSP allows SEAs to establish their own procedures and guidelines for distributing subgrant funds and determining the eligibility of subgrantees. A 2002 reference guide states that SEAs receiving CSP grants “must ... [e]stablish procedures and guidelines for administering a competitive subgrant program” and “[d]etermine eligible subgrantees and funding guidelines.” U.S. Dep’t of Education, Office of Elementary and Secondary Education, No Child Left Behind: A Desktop Reference 110 (2002).¹³ Likewise, a report issued in 2004 provides that “[e]ach state with a CSP grant creates its own process and selection criteria for distributing [start-up and dissemination] funds as subgrants to charter schools or planning groups.” U.S. Dep’t of Education, Office of the Deputy Secretary, Evaluation of the Public Charter Schools Program: Final Report xii (2004) [USDOE Final Report].¹⁴

In light of the above authorities, it seems clear that the eligibility of a charter school developer to apply for or receive planning and implementation subgrant funds from an SEA depends, to the extent consistent with the objectives and guidelines of the CSP, upon the procedures and guidelines of the individual state’s charter school subgrant program.

¹³ This reference guide is available at <http://www2.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

¹⁴ This report is available at <http://www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf>.

For example, many state CSP programs establish different criteria for what constitutes an “eligible applicant” that may receive planning and implementation subgrant funds. See 20 U.S.C.A. § 7221c(f)(1) (SEAs use CSP funds “to award subgrants to one or more *eligible applicants* in the State to enable such applicant to plan and implement a charter school”) (emphasis added). For purposes of the CSP, an “eligible applicant” is defined as “a developer¹⁵ that has-- (A) applied to an authorized public chartering authority¹⁶ to operate a charter school; and (B) provided adequate and timely notice to that authority” of its grant application. 20 U.S.C.A. § 7221i(3). Thus, the CSP allows for SEAs to make planning subgrants to charter school developers before a charter has been issued as long as the above conditions have been met. See USDOE Final Report, supra (“each state with a CSP grant creates its own process and selection criteria for distributing [start-up and dissemination] funds as subgrants to *charter schools or planning groups*”) (emphasis added).

Under South Carolina’s charter school grant program, a charter developer becomes eligible to *apply* for planning and implementation funds once its charter application has been submitted to the Advisory Committee and the board of trustees of the school district that is the proposed sponsor. See 2011-12 RFP, 3 (“upon submitting a charter application to the Charter School Advisory Committee and the proposed authorizer, the charter developer group becomes eligible to apply for funding”). However, an applicant does not become eligible to *receive* planning funds until after its charter application has been recommended for approval by the Advisory Committee and approved by the sponsor.¹⁷ See Id., 6 (“To *receive planning funds* ... an applicant must be recommended for approval by the CSAC, be officially approved by an authorizer, and submit requested benchmark documentation”) (emphasis in original). Furthermore, the SCDOE has informed us that an eligible applicant may only apply during the open call for subgrant applications, which typically opens in late July or early August and closes sometime in September. See Id., 8 (indicating September 2, 2011 was the deadline for applications for the most recent funding period).

For those applicants that are eligible to receive planning subgrants under the program, the SCDOE has established procedures for reviewing applications and awarding subgrant funds on a competitive basis:

CSP subgrants are competitive and follow the federally mandated peer review process, with external review by at least two reviewers....

....

¹⁵ A “developer” is defined as “an individual or group of individuals (including a public or private nonprofit organization), which may include teachers, administrators and other school staff, parents, or other members of the local community in which a charter school project will be carried out.” 20 U.S.C.A. § 7221i(2).

¹⁶ An “authorized public chartering agency” is defined as “a State educational agency, local educational agency, or other public entity that has the authority pursuant to State law and approved by the Secretary to authorize or approve a charter school.” 20 U.S.C.A. § 7221i(4).

¹⁷ Consistent with the discretion afforded to CSP grant recipients in administering state charter subgrant programs, the eligibility requirements for receiving planning subgrants vary by state. As is the case in South Carolina, a charter developer must first have an approved charter to be eligible to receive planning subgrant funds in Tennessee, Georgia, and New York. In Wisconsin and Michigan, a charter developer is eligible to receive planning subgrant funds before their charter is approved. In Washington, D.C., a charter developer must receive conditional approval from an authorizer before they are eligible to receive subgrant funds.

A panel of two readers will score the quality of each application using the Scoring Rubric included in the RFP. If initial scores vary by more than 20 points, a third reader will score the application. The panel then discusses the application together and may adjust their individual scores based on the discussion. The final score will be the average of the two or three scores. The maximum number of points available for each application is 115. Applications that do not score at least 80 points will not be funded. Applications will be rank-ordered by final scores.

“Project Narrative,” 2010 CSP Grant Application, 50-51; see also 2011-12 RFP, 8 (providing same competitive process). The awarding of planning subgrant funds is also contingent upon the availability of funds. 2011-12 RFP, 4. For those applicants receiving a subgrant award, the funding period typically begins in September and the funds are first released in November. See 2011-12 RFP, 8 (indicating last year’s funding period began in September of 2011); “Project Narrative,” 2010 CSP Grant Application, 43-48 (indicating funds are released to new grantees in November of each year).

In light of the above, a charter developer becomes eligible to receive planning and implementation subgrant funds from the SCDOE if they have been recommended for approval by the Advisory Committee, their charter has been approved by an authorizer, and they have submitted benchmark documentation. An applicant then becomes *entitled* to receive a planning and implementation subgrant award if their application qualifies for funding under the competitive review process set forth above and such funds are available.

You also question the SCDOE’s policy of distributing planning and implementation subgrant funds on a reimbursement basis as opposed to distributing such funds in advance. You express the belief that this policy impedes the ability of subgrant recipients to adequately use such funds for their intended purpose of planning a charter school.

As previously mentioned, the SCDOE has adopted a reimbursement policy for the disbursement of all federal funds under any program. The reason given for the adoption of such a policy is compliance with the federal Cash Management Improvement Act (CMIA) of 1990, Pub. L. No. 101-453, 104 Stat. 1058 (codified as amended at 31 U.S.C.A. §§ 6501, 6503). Section 1 of the CMIA states that its purpose “is to ensure greater efficiency, effectiveness, and equity in the exchange of funds between the Federal Government and the States.” 31 U.S.C.A. section 6503(a)(2) provides that “the State shall minimize the time elapsing between transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payments by other means for program purposes.” The Secretary of the U.S. Treasury is authorized to “issue regulations that shall require a State, when not inconsistent with program purposes, to pay interest to the United States on funds from the time funds are deposited ... until the time that funds are paid out by the State” 31 U.S.C.A. § 6503(c)(1).

The regulations for the implementation of the CMIA are found in 31 C.F.R. Part 205 which “prescribes rules for transferring funds between the Federal government and States for Federal assistance programs....” 31 C.F.R. § 205.1(a). Part 205 is divided into two subparts. Subpart A, 31 C.F.R. sections 205.3 to 205.31, generally applies to federal assistance programs which are listed in the CFDA, qualify as a “major Federal assistance program,”¹⁸ and are included in a “Treasury-State agreement.”¹⁹ 31 C.F.R. §

¹⁸ A “major Federal assistance program” is a program with federal funding that exceeds certain threshold levels set forth in Table A of section 205.5. 31 C.F.R. § 205.2.

205.3(a). All other programs listed in the CFDA that are not subject to subpart A are subject to subpart B, 31 C.F.R. sections 205.32 to 205.35.

South Carolina's charter school grant program is subject to subpart B of 31 C.F.R. Part 205 because it is not a "major Federal assistance program"²⁰ and is not included in South Carolina's Treasury-State agreement. See 31 C.F.R. § 205.3, *supra*. The provisions of subpart B provide that "[a] State must minimize the time between the drawdown of Federal funds ... and their disbursement for Federal program purposes.... [and] should exercise sound cash management in funds transfers to subgrantees in accordance with OMB Circular A-102." 31 C.F.R. § 205.33(a).

Likewise, the USDOE's General Administrative Regulations provide that "[m]ethods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205." 34 C.F.R. § 80.21(b). Subsection (c) of 80.21 states that "[g]rantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of funds and their disbursement" 34 C.F.R. § 80.21(c). The reimbursement method is preferred when the requirements of subsection (c) are not met. 34 C.F.R. § 80.21(d).

We note that 34 C.F.R. section 80.21 seems to suggest that, in general, a state receiving a grant from the U.S. Secretary of Education should award funds to subgrantees in advance as long as they are willing and able to meet the requirements of subsection (c). However, we have been informed by the USDOE that it in no manner discourages states receiving CSP grants from adopting a reimbursement only policy for the distribution of funds to subgrantees and, in some cases, encourages such a policy. Although there are certainly circumstances in which it would be beneficial for a charter school to receive planning and implementation funds in advance, it is the USDOE's position that, consistent with the considerable degree of discretion states are afforded in using CSP funds to develop their individual charter school grant programs, states are generally free to determine the method of disbursement they deem appropriate. Furthermore, the USDOE considers such a reimbursement only policy to be a suitable method of disbursement in light of increasing problems states are apparently experiencing in monitoring the use of such funds by subgrantees. Consistent with the policy of this Office previously expressed in this opinion, we defer to the USDOE's opinion on the matter.

Conclusion

It is the opinion of this Office that the May first deadline for the submission of charter school applications established by the State Board in S.C. Reg. 43-601(II)(B) does not conflict with the language of S.C. Code section 59-40-70 providing that "[a]n applicant may submit a charter application to the advisory committee at any time during the fiscal year," and that "[o]nce an application is approved by the school board of trustees, the charter school may open at the beginning of the following year." The Legislature has expressly granted the State Board the power to promulgate regulations developing "an application process to include a timeline for submission of applications that will allow for final decisions,

¹⁹ A "Treasury-State agreement" is "a document describing the accepted funding techniques and methods for calculating interest and identifying the Federal assistance programs governed by this subpart A. 31 C.F.R. § 205.2.

²⁰ The 2011 South Carolina Treasury-State agreement indicates the State's threshold for "major Federal assistance programs" is \$ 45,179,481.

including Administrative Law Court appeal, by December first of the year preceding the charter school's opening." § 59-40-180. The language of the preceding section manifests a clear legislative intent that a charter school application receive final approval by December first in order for the charter school to open the following year. Based upon our examination of the process for the review and approval for charter school applications set forth in the Charter Schools Act, we conclude the State Board's establishment of a May first deadline for the submission of such applications is reasonably related to the purpose of establishing a timeline which ensures such applications receive final approval by December first of the year prior to that in which a charter school plans to open.

We are also of the opinion that the SCDOE has the authority to administer a policy by which members of its staff review charter school applications for "completeness" before forwarding such applications to the Advisory Committee for a compliance determination. Although no such procedure is expressly required by statute or regulation, we believe the language of section 59-40-70(A)(5) – "[a]n applicant may submit an application to the advisory committee at any time during the fiscal year and the advisory committee, within sixty days, shall determine whether the application is in compliance" – is reasonably interpreted as requiring that an application be "complete" before it is forwarded to the Advisory Committee and the tolling of the sixty-day period for a compliance determination begins. Furthermore, pursuant to subsections (II)(A) and (B) of S.C. Reg. 43-601, the State Board has adopted procedures and standards concerning the Advisory Committee's review of charter applications the timeline for the submission of such applications. As the entity statutorily responsible for administering the policies and procedures of the State Board, we believe the SCDOE has the implied authority to ensure that charter applications are complete before submission to the Advisory Committee for a compliance determination. We caution, however, that the SCDOE should not utilize such a policy or procedure in a manner that would cause unreasonable delay in the process for the creation of charter schools.

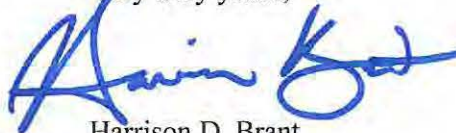
The issue of whether or when an applicant becomes entitled to receive charter school planning and implementation subgrant funds from an SEA depends, to the extent consistent with the objectives and guidelines of the CSP, upon the procedures and guidelines of the individual state's charter school grant program. The provisions of the federal CSP, the administrative regulations applicable to the program, and several publications issued by the USDOE indicate states receiving CSP funds are afforded considerable discretion and flexibility in establishing their individual charter school grant programs, thus allowing such states to develop their own procedures and guidelines for the distribution of subgrant funds and determine the eligibility of subgrantees. Under South Carolina's charter school grant program established by the SCDOE, an applicant becomes eligible to receive planning and implementation subgrant funds if they have been recommended for approval by the Advisory Committee, their charter has been approved by an authorizer, and they have submitted benchmark documentation. An eligible applicant then becomes entitled to receive a subgrant award only if their application qualifies for funding under the competitive review process *and* such funds are available.

As for the SCDOE's policy of only distributing planning and implementation subgrant funds to charter schools on a reimbursement basis, the USDOE does not in any manner discourage states from adopting such a policy and has further expressed the opinion that such policies are not improper. Since the USDOE is the entity responsible for interpreting and administering the relevant statutes and regulations applicable to the federal CSP, we defer to their judgment on the matter.

Mr. Letts
Page 15
August 21, 2012

Notwithstanding the above conclusions, we find it necessary to emphasize that the General Assembly, through the enactment of the Charter Schools Act, clearly intended to promote the creation, availability, use, and development of charter schools. As stated in section 59-40-30(A), the legislative intent of the Charter Schools Act was "to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system." Furthermore, the General Assembly mandated that the provisions of the Charter Schools Act "be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education." Id. While we reiterate that the SCDOE's performance of its administrative duties and responsibilities must conform to the law, we also advise the SCDOE to ensure that it carries out such duties and responsibilities in a manner consistent with the intent of the General Assembly as described above. To this end, the SCDOE should do everything administratively possible, to the extent consistent with the law, to promote the creation, availability, use, and development of charter schools to ensure that schools such as Hope Academy are given the opportunity to open their doors and operate successfully.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General