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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 30, 2003

The Honorable Wallace Scarborough
House of Representatives District 115
Post Office Box 12557
Charleston, SC 29422

Dear Representative Scarborough:

You have requested an advisory opinion from this Office on behalf of David L. Savage, Esq., legal counsel for the James Island Charter High School (JICHS). Mr. Savage notes that the application to convert James Island High School into a charter school was approved by the Charleston County School District (CCSD) on January 27, 2003, and takes effect on July 1, 2003. He further indicates that presently, there is a dispute concerning a term which was recently added to a pending agreement for the lease of the James Island High School property. The added term is one requiring the JICHS to honor a pre-existing contract between the Pepsi Bottling Company and the CCSD. Mr. Savage also indicates that the CCSD has taken the position that until the lease agreement issue is resolved satisfactorily to the District, the CCSD will not recognize the JICHS as a charter school and it will continue to operate as a public high school.

Based upon these facts, Mr. Savage has specifically asked our opinion with respect to the following issues:

1. Under the South Carolina Charter School Act of 1996, can the CCSD impose, as a term of the lease, the provisions of the exclusive vending contract between Pepsi and the CCSD?

2. Under existing law, specifically Section 59-40-70, the CCSD had ninety (90) days within which to act upon the charter application submitted November 1, 2002. As all material terms of the lease had been negotiated and agreed upon by January 27, at the same time that the charter application was actually approved by the Board, can the Board, after the 90 day period, now insert without JICHS's approval, Paragraph 4.d., dealing with the exclusive vending contract between CCSD and Pepsi?

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3. Can the contract between the CCSD and Pepsi be imposed upon JICHS making compliance with the contract a term of the lease?

4. Despite having approved the charter application, the CCSD has indicated that if the JICHS does not sign the lease containing Paragraph 4.d., the CCSD will continue to operate James Island High School starting July 1, 2003. Is this position consistent with the Charter School Act?

Law/Analysis

Our analysis notes one important caveat at the outset. The questions raised ultimately involve contractual differences between the James Island Charter High School and the Charleston County School District. Accordingly, final resolution of these questions may well turn upon issues of fact which cannot be determined by an opinion of this Office, but only adjudicated by a court. In a previous opinion of this Office, we expressed the following reservation concerning the difficulties in attempting to resolve contractual disputes through the issuance of an opinion of the Attorney General:

> [a] legal opinion cannot resolve such obviously critical questions as precisely what expectations the parties may have had or what reliance was placed upon any representations made ....Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body ... we do not possess the necessary fact-finding authority and resources to adequately determine the difficult factual questions present here. Op. S.C. Atty. Gen., Op. No. 85-132 (November 15, 1985).

Those same reservations and limitations are present here as well, particularly in view of the novelty of the legal issues surrounding "converted" charter schools. Only a court can resolve the issues of fact which may be highly relevant to any final resolution of the question raised by your letter. Nevertheless, with that caveat in mind, and based solely upon the information provided, we will attempt to set forth the applicable law which a court would likely consider.

CAN THE EXCLUSIVE VENDING AGREEMENT BETWEEN PEPSI AND THE SCHOOL DISTRICT BE IMPOSED ON JAMES ISLAND CHARTER HIGH SCHOOL?

In order to address the first and third questions of Mr. Savage's request, we must examine the purpose, nature, and powers of a legally created charter school in the state of South Carolina as well as the relationship between a charter school and the local school district. South Carolina's Charter School Act is established by S.C. Code Ann. Section 59-40-10 et seq. The Legislature's purpose is "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 children within the public school system." S.C. Code Ann. § 59-40-30.

Section 59-40-40(1) defines a "charter school" as a "public, nonsectarian, nonreligious, non-home based, nonprofit corporation forming a school which operates within a public school district, but is accountable to the local board of trustees of that district, which grants its charter." Subsection (2) of Section 49-40-40(2) expressly provides that a charter school "is considered a public school and part of the school district in which it is located for the purposes of state law and the state constitution." Pursuant to § 59-40-50(B)(4) a charter school is "considered a school district for purposes of tort liability under South Carolina law ..." except in certain specified instances.

The governing body of a charter school is its board of directors. The Charter School Act enumerates specific powers of the governing body of a charter school (board) and these powers are broad in scope. For example, the board may accept gifts, donations or grants in accordance with the conditions prescribed. § 59-40- 140(F). Charter schools may acquire by gift, devise, purchase, lease, sublease, installment purchase agreement, land contract, option or other means and hold and own in its own name buildings for schools purposes. § 59-40-140(I). The board may sue and be sued, but may not levy taxes or issue bonds. § 59-40- 190(A). In addition, the board may obtain insurance for activities performed in the course of official duties. § 59-40-190(C). Most importantly, the board is responsible for and has the general power to decide matters related to the operation of the charter school. § 59-40-60(C).

The Act defines the charter school application which is submitted to the local school board for approval as a "proposed contract." § 59-40-60(F). The approved application constitutes the charter[1], or an "agreement, and the terms must be the terms of a contract between the charter school and the sponsor." § 59-40-60(A); § 59-40-70(F). Courts elsewhere have described such language as "plain regarding the status of a contract ... ." See, Board of Education v. Booth, et al., 984 P. 2d 639, 653 (Colo. 1999). Furthermore, any material revision of the terms of the charter would clearly have to be approved by both parties. § 59-40-60(C).

No provision of the Charter School Act, however, indicates that the General Assembly specifically contemplated the issue of whether a school which is converted to a charter school must honor the pre-existing service contracts to which the "sponsor" school district is a party. However, the Act does provide in Section 59-40-140(D) that "all services centrally or otherwise provided by the school district . . . are subject to negotiation between a charter school and the school district." This provision seems to suggest that the General Assembly intended to give a charter school leeway in the negotiation and the making of service contracts. Certainly, it can be said that the Legislature intended a charter school to possess considerable independence in entering these contracts. See, Delbon v. Brazil, 285 P 2d 710 (Cal. 1955) [there is an obvious difference between "negotiation" and a binding contract.]

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[1] It appears to be undisputed that the CCSD approved the application of JICHS on January 27, 2003. Therefore, a charter for the James Island Charter High School was created by the approval of that application, and the terms of it are currently binding on both parties.

We recently issued an opinion concerning the James Island Charter High School in the context of dual office holding which has relevance here. Op. S.C. Atty. Gen., February 26, 2003. In that opinion, we advised that even though a charter school could be considered an "alter ego" of the State for dual office holding purposes, the Act defines a charter school as a "nonprofit corporation." Furthermore, it is an established principle of law that a corporation, through its individual agents, possesses the independent power to contract:

> All corporations must, from necessity, act and contract through the aid and by means of individuals. Such individuals may be those holding corporate offices or agents properly appointed by such officers; and as a general rule, corporations have the power to appoint agents with full authority to do acts or enter into contracts within the powers of the corporation.

18B Am. Jur. 2d Corporations §1341.

Thus, while a charter school may be considered for certain purposes a public entity which retains some affiliation with the school district in which it is located, it is also a separate nonprofit corporation which possesses contractual powers. Furthermore, having such authority to enter into contracts generally means that those contracts to which the charter school is not a party are not be binding upon the charter school.

As this Office stated in Op. S.C. Atty. Gen., Feb. 22, 1982, a "basic tenant of contract law is that one who is not a party to a contract simply is not bound by the terms thereof." There, we stated that "'the obligation of contracts is limited to the parties making them ... .'" Accordingly, parties to a contract cannot "'impose any liability on one who under its terms is a stranger to the contract.'" Id., citing 17 Am. Jur. 2d, Contracts, § 294.

Other principles of corporate law provide a useful analogy as well. As a general rule, a new corporation is not liable for the contractual obligations of its predecessor. Kuempel Service, Inc. v. Zofko, 109 Ohio App. 3d 591, 672 N.E.2d 1026 (1996). An exception to this rule is applicable if the successor corporation is a "mere continuation" of the earlier entity. Id. See also, Wing Wong, et al. v. East River Chinese Restaurant, 884 F. Supp. 663 (E.D.N.Y 1995); Glynwed, Inc. v. Plastimatic, Inc., 869 F. supp. 265 (D.N.J. 1994) [exceptions are (1) an express or implied agreement to assume obligations; (2) successor corporation is a mere continuation of earlier corporation; (3) there was a de facto consolidation or merger of corporations; (4) transaction was fraudulent.]

Our own Supreme Court recognized these principles in Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). There, in the context of the question of whether the purchase of a company transfers the debts of the selling corporation, the Court noted that

> [i]n the absence of statutes, in order to render a purchasing company

> liable for the debts of the selling corporation, it must appear: a) that there was an agreement to assume such debts; b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; c) or that the purchasing corporation was a mere continuation of the selling corporation; or d) that the transfer was pretensive of the transaction fraudulent in fact.

123 S.E.2d at 98.

Unquestionably, the Charter School Act creates a significantly different entity when a school is "converted" to a charter school. A charter school could not be reasonably characterized as a "mere continuation" of its previous form. Based upon these general principles of law and the Act of the General Assembly which defines a charter school as a "corporation," it is our opinion that the James Island Charter High School possesses the general power to contract independently for beverage services. Accordingly, it is our opinion that a court would conclude that the JICHS would not be bound by a prior exclusive vending agreement to which it was not a party.

CAN THE SCHOOL BOARD REVOKE THE CHARTER IF THE SCHOOL DOES NOT AGREE TO THE "PEPSI" PROVISION IN THE LEASE?

We believe the likely answer to this question is "no." The charter was granted by the CCSD on January 27, 2003, and the approved application constitutes the contract between JICHS and CCSD. Thus, any material revision of the terms of this contract would have to be approved by both the CCSD and the JICHS, pursuant to Section 59-40-60(C). We are informed that the Pepsi provision added in Paragraph 4.d. of the lease agreement was not a part of the original contract[2], and was not proposed by the CCSD until April 28, 2003, the day that the lease agreement was to be submitted to the CCSD board for approval. This being the case, a court likely would conclude that if the CCSD required as a condition to maintaining its charter school status that the JICHS must agree to a pre-existing service agreement with Pepsi, such a condition could well be deemed a material change in the January 27, 2003 contract. Thus, it is our opinion that a court could conclude that for the JICHS to add a provision relating to Pepsi would contravene the statutory requirement in Section 59-40-60(C) that both parties approve any material changes to the contract.

The Act does give a school board the authority to revoke or refuse to renew an existing charter. § 59-40-110(A). However, the General Assembly provided that the grounds upon which a charter may be revoked are limited and listed those grounds specifically. Section 59-40-110(C) says that:

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[2] Of course, a determination on whether the original contract was conditioned on the subsequent approval of the lease agreement, or if there were any oral agreements regarding the exclusive vending agreement with Pepsi, are questions of fact that can only be determined by the court and not this Office.

> A charter must be revoked or not renewed by the sponsor if it determines that the charter school:
>
> (1) committed a material violation of the conditions, standards, or procedures provided for in the charter application;
>
> (2) failed to meet or make reasonable progress toward pupil achievement standards identified in the charter application;
>
> (3) failed to meet generally accepted standards of fiscal management; or
>
> (4) violated any provision of law from which the charter school was not specifically exempted.

It is a general principle of statutory construction that when such express provisions are enumerated others, not so listed, were not intended. See, Pa. Natl. Mut. Cas. Ins. V. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App. 1984)["the enumeration of particular things excludes the idea of something else not mentioned."]. Based upon the foregoing statute, it would appear that any unwillingness by the JICHS to agree to the Pepsi provision in paragraph 4.d of the proposed lease agreement in and of itself would not be a valid reason for the CCSD to revoke the charter. In our view, only a determination that the charter school's compliance with the pre-existing Pepsi contract was a condition upon which the original contract depended would constitute grounds to revoke the charter under Section 59-40-110(C)(1). Moreover, for the CCDS not to recognize the JICHS charter, thereby continuing to operate the school as the James Island High School, would be unauthorized and in conflict with the January 27, 2003 contract as well as the Charter Schools Act.

NINETY DAY DEFAULT RULE IN THE OLD VERSION OF SECTION 59-40-70(B)

It is the opinion of this Office that the second question in Mr. Savage's request is now moot. Under the existing law at the time the charter school application was submitted on November 1, 2002, the allowed time period given a school district to review a charter school application before it became a contract by default was ninety days.[3] S.C. Code Ann. § 59-40-70(B) (1996). Since the charter was apparently approved by the CCSD on January 27, 2003, which is within the ninety day window, the charter as approved on that date is the controlling contract between the parties. As noted above, any material revision that is proposed subsequent to the original contract must be approved by both parties under Section 59-40-60(C). Accordingly, we are of the opinion that once the contract was created by the approval of the charter school application on January 27, 2003, there can be no material revisions made to the original contract without the approval of both parties, regardless of whether such changes are proposed within the ninety day time limitation.

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[3] Section 59-40-70(B) was amended by the General Assembly, pursuant to Act No. 341 (2002), to "thirty days" instead of "ninety days."

Conclusion

It is our opinion that a court would conclude that the James Island Charter High School is not bound by a prior exclusive vending agreement between the Charleston County School District and Pepsi-an agreement to which the charter school was not a party. While the Charter Schools Act does not expressly address this unique situation, the law makes clear that the James Island Charter High School will be constituted as a separate, non-profit corporation and thus able to enter into contracts upon assuming full charter status on July 1. Moreover, Section 59-40-50(A) expressly states that a charter school is "exempt from all provisions of law and regulations applicable to a public school, a school board, or a district ... ," with certain exceptions not relevant here. Further, Section 59-40-140(D) affords a charter school considerable flexibility concerning service contracts. Thus, while the question is not free from doubt, it would appear that the James Island Charter High School is not bound by the Charleston County School District's pre-existing contract with Pepsi. Such a conclusion is consistent with principles of general corporate law that a successor corporate entity is not bound by the contractual obligations of its predecessor unless the status of the successor is a "mere continuation" of that of the predecessor. As discussed herein, where a charter school is converted from a public school, such is not the case. A charter school is a significantly different entity upon conversion.

Moreover, in our opinion, the School District would not be authorized pursuant to the Charter Schools Act to condition the District's continued recognition of the charter school contract upon the James Island Charter High School's acceptance of the pre-existing vending agreement. Such could well be deemed by a court to be a unilateral change in the charter school contract-one not authorized by law.

Accordingly, in light of these significant differences between a predecessor school and the charter school into which it was converted, it is our opinion that a court would conclude that the James Island Charter High School is not required to accept the Pepsi provision. We would caution, however, that the question is a novel one in view of the fact that the Charter Schools Act is so recent in origin. As noted above, only a court could find that a contract is, in this instance, non-binding. Accordingly, absent a resolution acceptable to all parties, you may wish to resolve this matter with finality through a declaratory judgment.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General