ALAN WILSON
ATTORNEY GENERAL

June 30, 2022

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Office of the State Treasurer
P.O. Box 11778
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Dear Mr. Condon:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter contains extensive analysis of the South Carolina Charter Schools Act of 1996 (the "Charter Schools Act") with a chief focus on whether the nature of a charter school's sponsor impacts the school's status as a political subdivision of the state as well as the investment limitations in S.C. Const. art. X, § 11 and S.C. Code §§ 6-5-10(a), 6-6-10, 11-1-60, or 11-1-70. The letter describes the statutes as follows:

> Section 6-5-10(a) is commonly used as the statute that generally defines the authorized investments available to a local government in South Carolina. Under this statute, "[t]he governing body of any municipality, county, school district, or other local government or political subdivision and county treasurers may invest money subject to their control and jurisdiction in" eight listed types of investments. S.C. Code § 6-5-10(a) (emphasis added).
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> Section 6-6-10 is limited to investment matters concerning LGIP. This statute allows the State Treasurer to establish and maintain a common trust fund, which is referred to as LGIP, and "any county treasurer or the governing body of any municipality, county, school district, regional council of government, or any other political subdivision of the State" to invest public monies under their custody in the LGIP. S.C. Code § 6-6-10 (emphasis added).
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> Section 11-1-60 allows "[t]he State or any department, institution agency, district, county, municipality or other political subdivision of the State or any political or public corporation of the State or of the United States" to invest in "bonds or debentures issued by any Federal home loan bank or in the consolidated bonds or debentures issued by the Federal Home Loan Bank Board." S.C. Code § 11-1-60 (emphasis added).

> Section 11-1-70 allows "public agencies" to "invest pension funds in obligations issued or constitutionally guaranteed by the International Bank." S.C. Code § 11-1-70(2). A "public agency" includes any public officer acting in an official capacity for "any division or political subdivision of the State." Id. (emphasis added).
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> The letter concludes:
>
> Based on the above, it appears that there is no distinction between a "political subdivision" and a "political subdivision of the State"; that all charter schools in South Carolina are political subdivisions of the state whose exhaustive list of authorized investments includes the investments included only in sections 6-5-10(a), 6-6-10, 11-1-60, and 11-1-70; and that these investment limitations are not affected by the charter schools being organized as nonprofit corporations, by the exemption from laws and regulations in section 59-40-50(A), or by the nature of a charter school's sponsor.

The letter requests this Office's opinion on whether these investment statutes apply to a charter school if its sponsor is an independent, rather than a public, institution of higher learning.

Law/Analysis

It is this Office's opinion that a court would likely hold charter schools in South Carolina are political subdivisions of the state and are, therefore, subject to the same limitations as other political subdivisions regarding the investment of public funds. The Charter Schools Act, S.C. Code § 59-40-10 *et seq.*, established that all charter schools created thereunder are public schools. The General Assembly expressly stated its intent for establishing charter schools was to promote innovation "within the public school system." S.C. Code Ann. § 59-40-30. The Act defines "charter school" to mean "a public, nonreligious, nonhome-based, nonprofit corporation forming a school that operates by sponsorship." S.C. Code § 59-40-40(1). In McNaughton v. Charleston Charter School for Math & Science, Inc., 411 S.C. 249, 768 S.E.2d 389 (2015), the South Carolina Supreme Court explained that charter schools are considered state actors:

> Section 59–40–40(2)(a) of the South Carolina Code provides that a charter school "is, for purposes of state law and the state constitution, considered a public school and part of the South Carolina Public Charter School District, the local school district in which it is located, or is sponsored by a public or independent institution of higher learning." S.C. Code Ann. § 59–40–40(2)(a) (Supp.2013). Section 59–17–10 of the South Carolina Code provides, in part, that "[e]very school district is and shall be a body politic and corporate ... of ... the State of South Carolina." S.C. Code Ann. 59–17–10 (Supp.2013); Camp v. Sarratt, 291 S.C. 480, 481, 354 S.E.2d 390, 391 (1987).
> ...

> Appellant is a state actor because it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state's duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution. See S.C. Const. art. XI, § 3; S.C. Code Ann. § 59–40–40(1). Charter schools such as Appellant would cease to exist but for the public funding which they receive.

Id. at 265-66, 768 S.E.2d at 398-99. As the McNaughton Court explained, section 59-40-40(2) explicitly states charter schools are considered public schools and part of their sponsor district "for purposes of state law and the state constitution." The Act defines "sponsor" to mean:

> the South Carolina Public Charter School District Board of Trustees, the local school board of trustees in which the charter school is to be located, as provided by law, a public institution of higher learning as defined in Section 59-103-5, or an independent institution of higher learning as defined in Section 59-113-50, from which the charter school applicant requested its charter and which granted approval for the charter school's existence. Only those public or independent institutions of higher learning, as defined in this subsection, who register with the South Carolina Department of Education may serve as charter school sponsors, and the department shall maintain a directory of those institutions. The sponsor of a charter school is the charter school's Local Education Agency (LEA) and a charter school is a school within that LEA. The sponsor retains responsibility for special education and shall ensure that students enrolled in its charter schools are served in a manner consistent with LEA obligations under applicable federal, state, and local law.

S.C. Code Ann. § 59-40-40(4). The Court made no distinction, nor does the Act, in regard to whether a charter school's sponsor is an independent institution of higher learning as opposed to any of the other listed public bodies. Certainly, the Court's observation that every charter school is a public school, funded by state money, and created in furtherance of the state's duty to provide public education holds true irrespective of its sponsor.

Your letter also addresses the issue of whether a charter school's status as a nonprofit precludes finding a charter school is a political subdivision of the state. Ultimately, the letter concludes that it does not. This Office agrees with your assessment. Again, the McNaughton court found that charter schools are state actors notwithstanding that under the Act all charter schools are nonprofit corporations. See McNaughton, supra; S.C. Code § 59-40-40(1). Moreover, this Office has previously opined that nonprofit corporations can be political subdivisions of the state.

> The fact that the Emerald Center Board is created pursuant to legislative act, its members are appointed by the Governor and it performs public functions, including the expending of public money to accomplish its duties dictates that

> Emerald Center be considered a political subdivision. Emerald Center's incorporation as a nonprofit corporation does not alter this Office's opinion in this regard.

Op. S.C. Att'y Gen., 2002 WL 31958827, at 2-3 (December 11, 2002). Charter schools are similarly created by legislative act, perform the public function of providing public education, and expend public funds. The fact that charter schools are formed as nonprofit corporations does not change this Office's opinion that they are political subdivisions of the state.

Because charter schools are state actors whose operations are supported with public funds, there are restrictions on how those funds may be invested. In O'Brien v. S.C. ORBIT, 380 S.C. 38, 668 S.E.2d 396 (2008), the South Carolina Supreme Court discussed why the South Carolina Constitution Article X, § 11 prohibits "risky" investment of government funds.

> [C]onstitutional provisions such as Article X were adopted by many states in the late 1800s in response to the loss of public funds invested in risky railroads. A modern comparison would be the current debacle with sub-prime lending. Thus, the intent of the section is to protect public funds from fraudulent and speculative investments.

Id. at 43 n.4, 668 S.E.2d at 398 n.4. The opinion then listed the same statutes as your letter, S.C. Code §§ 6-5-10(a), 6-6-30[1], 11-1-60, and 11-1-70, and declared they are "an exhaustive list of authorized investments" for political subdivisions. Id. at 44, 668 S.E.2d at 399.[2] A court would

[1] The Court cited to S.C. Code § 6-6-30, rather than 6-6-10. However, both statutes relate to participation in the South Carolina Pooled Investment Fund.

[2] See also Ops. S.C. Att'y Gen., 2021 WL 6104711, at 3 (December 13, 2021) ("In prior opinions, we interpreted these provisions as limiting the investment authority of political subdivisions and county treasurers to those investments for which the Legislature specifically provided for.");

> Political subdivisions may not vary from the provisions of general law unless such variance is specifically authorized. See Op. Atty. Gen. Dated February 27, 1990. The legislature has authorized the governing body of political subdivisions to invest money subject to their control and jurisdiction according to the terms of Section 6-5-10. It is the opinion of this Office that Emerald Center does not have the authority to invest funds in its control and jurisdiction in a manner not provided for in Section 6-5-10. Additionally, Art. X, § 11 of the South Carolina Constitution provides in part that "[n]either the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

2002 WL 31958827, at 3 (December 11, 2002);

> The General Assembly has authorized several permissible investments by political subdivisions, none of which include the investment in futures contracts. A cardinal rule of statutory construction is "*expressio unius est exclusio alterius*" or "the enumeration of particular things excludes the idea of something else not mentioned." ... Therefore, as the

likely hold that the statutes authorizing investments by political subdivisions serve as an exhaustive list of the types of investments in which charter schools may invest public funds.

Finally, your letter finds that while charter schools are exempt from "provisions of law and regulations applicable to a public school, a school board, or a district," this authorization does not permit charter schools an exemption from the investment provisions which are applicable to all political subdivisions of the state. S.C. Code § 59-40-50(A). This Office agrees with your assessment that the exemptions in S.C. Code § 59-40-50(A) do not permit a charter school to investment public funds except as specifically authorized by the General Assembly. First, a statute that permits exemptions from laws and regulations applicable to public schools and school districts does not provide an exemption from constitutional restrictions on the investment of public funds. In McNaughton, supra, the Court explained that section 59-40-50(A) was intended to grant charter schools "more flexibility in their operations," rather than permitting blanket exemptions from laws and regulations applicable to all political subdivisions.

> The purpose of 59–40–50(A) is to distinguish between charter schools and other public schools, school boards, or school districts by providing charter schools with more flexibility in their operations. While section 15–77–300 is generally applicable to public schools, school boards, or districts, the provision also covers other state actors and "political subdivisions of the State." In other words, the provision was not enacted especially for public schools, school boards, or school districts, and is not a provision that a charter school may opt out of merely because of its charter school status as opposed to a traditional public school.

Id. at 268–69, 768 S.E.2d at 400. Here, the investment limitations on public funds, such as Art. X, § 11, are applicable to all state actors and political subdivisions instead of merely applying to public schools and school districts. These limitations are not the kind from which a charter school could elect to exempt itself. Second, the specific statutes cited in your letter that permit the investment of public funds are just that, permissive. Exemption from these statutes would not expand a charter school's investment options. If a charter school sought to exempt itself from these statutes, it would essentially be choosing not to invest its public funds.

> statute does not currently authorize political subdivisions to invest in futures contracts, the Authority would not be permitted to invest its funds in futures contract for natural gas.

1998 WL 746079, at 2 (June 25, 1998) (internal citations omitted).

Conclusion

As is discussed more fully above, it is this Office's opinion that a court would likely hold charter schools in South Carolina are political subdivisions of the state and are, therefore, subject to the same limitations as other political subdivisions regarding the investment of public funds. In McNaughton v. Charleston Charter School for Math & Science, Inc., 411 S.C. 249, 768 S.E.2d 389 (2015), the South Carolina Supreme Court made no distinction, nor does the Charter Schools Act, S.C. Code § 59-40-10 *et seq.*, in regard to whether a charter school's sponsor is an independent institution of higher learning as opposed to any of the other listed public bodies. See S.C. Code Ann. § 59-40-40(4) (defining "Sponsor" under the Charter Schools Act). As a result, a court would likely hold these investment limitations are equally applicable to charter schools sponsored by an independent institution of higher learning as those that are sponsored by the South Carolina Public Charter School District, a local school district, or a public institution of higher learning.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General