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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 15, 2004

The Honorable Larry K. Grooms
Senator, District No. 37
131 Indian Field Drive
Bonneau, South Carolina 29431

Dear Senator Grooms:

In a letter to this office you raised several questions regarding charter schools. The statutory provisions relating to charter schools are set forth in S.C. Code Ann. Sections 50-40-10 et seq. (2004). This office will attempt to respond to your questions as best we can. However, it must be acknowledged that these responses are first impressions as to how the various applicable statutes may be construed. Also, it must be acknowledged that as to many of the questions, the statutes applicable do not speak directly to the questions raised. As a result, only a court could interpret such provisions with finality. Furthermore, it appears that as to some of the questions raised, legislative clarification would be advantageous in order to resolve such issues.

In your first question you referred to Section 59-40-70(D) which states:

> In the event that the racial composition of an applicant's or charter school's enrollment differs from the enrollment of the local school district or the targeted student population by more than twenty percent, despite its best efforts, the local school district board shall consider the applicant's or the charter school's recruitment efforts and racial composition of the applicant pool in determining whether the applicant or charter school is operating in a nondiscriminatory manner. A finding by the local school district board that the applicant or charter school is operating in a racially discriminatory manner may justify the denial of a charter school application or the revocation of a charter as provided herein or in Section 59-40-110, as may be applicable. A finding by the local school district board that the applicant is not operating in a racially discriminatory manner shall justify approval of the charter without regard to the racial percentage requirement if the application is acceptable in all other aspects.

Section 59-40-50(B)(7) states:

> However, it is required that the racial composition of the charter school enrollment reflect that of the school district or that of the targeted student population which the charter school proposes to serve, to be defined for the purposes of this chapter as differing by no more than twenty percent from that population. This requirement is also subject to the provisions of Section 59-40-70(D).

One other provision of interest not cited by you that comments on racial composition of charter schools is Section 59-40-60(F) which states

> The charter school application shall be a proposed contract and must include:
> (8) a description of how the charter school plans to ensure that the enrollment of the school is similar to the racial composition of the school district or the targeted student population the charter school proposes to serve and provide assurance that the school does not conflict with any school district desegregation plan or order in effect.

As to your question as to whether this office has issued an opinion commenting that the "twenty percent" requirements are invalid, we have not issued an opinion as to that specific point. However, this office did issue an opinion dated May 29, 1997 regarding a similar statutory provision affecting charter schools that reflected a ten percent racial composition. In that opinion, it was concluded that

> 1. We reiterate that the racial quota provision contained in the Charter School statute is unconstitutional. While this quota may reflect the intent of the Legislature in enacting the law, in no way or in any sense does it square with Equal Protection of the Law. Simply put, the quota is a present-day form of systematic student segregation. Rather than mandating black and white schools, the statute creates within charter schools, black and white seats. Each side of this racial coin is completely at odds with the ideal of a "colorblind" Constitution.
> 2. As we emphasized earlier, the case law teaches that there must clearly be documented past discrimination by the specific entity in question, not just society generally. Thus, we again stress the point that "[w]ithout waiting to see whether any discrimination [in the charter school program] even occurs, or without any effort to rely on existing individual remedies or other race-neutral measures, the Legislature has required that every charter school possess the same racial balance as is present in the school district. Such amounts to nothing more than a legislative edict to achieve a particular racial composition." Here, the General Assembly's fear or speculation that a particular charter school program may consist predominantly of students of one race or another is not constitutionally sufficient to support the kind of quota present in the Charter School law. The Legislature is not free to violate the Constitution simply because it anticipates that people may not choose to attend a charter school in perfect proportion to their racial composition in the community.

3. This racial quota is particularly pernicious and more malignant than many. Instead of creating a floor in favor of a certain race, it places a ceiling upon all races. The quota, for example, cuts to the quick innovative efforts to attack the crisis in black families. The statute places an impossible roadblock in front of innovative efforts like Thaddeus Lott's charter schools in Houston, Texas -- a nationally recognized minority charter school program. In short, the Legislature has sacrificed substance for statistics.

4. Where there are more applications to a charter school than places available, a method which prefers racial quotas over random selection is also constitutionally untenable. A random drawing cannot coexist alongside a race-based selection process and be anything other than a pretense. The statute is ambiguous and contradictory on its face; while providing for some form of random drawing to fill available places, it also states that "under no circumstances" may a charter school enrollment differ from the racial composition of the school district by more than ten percent (10%). Such statutory inconsistency is a thinly disguised "grab bag" designed to satisfy everyone but, in reality, it placates no one. It is illusory to pretend that separate drawings for black and white applicants or a single drawing with one eye on the statute's quota is anything other than an unconstitutional quota. Thus, the statute as written gives conflicting and unconstitutional directives to a charter school and cannot be fully adhered to in its present form.

5. The courts have repeatedly upheld as constitutional a random drawing of a jury in a criminal trial which has as its pool a cross-section of the community. See, e.g. Carwise v. State, 454 So.2d 707 (Fla. 1984)[every jury need not actually contain representatives of all economic, social, religious, racial, political and geographical groups; so long as random selection process is complied with, constitution is satisfied]. Such a jury selection process does not use one drawing for blacks and another for whites; there is only one random draw, usually computerized. If a random jury selection system is good enough constitutionally to send a defendant to jail or his death without reliance on a racial quota, it is certainly a sufficient method to choose applicants to a charter school. We suggest that the jury selection method without the racial quota be used as the controlling analogy here.

Therefore, this office has construed the racial quota provision of the charter school law prior to its most recent amendment to be unconstitutional. I would note that the State Supreme Court in its decision in Beaufort County Board of Education v. Lighthouse Charter School Committee, 353 S.C. 74, 576 S.E.2d 180 (2003) determined that the question of whether the racial composition requirement of the original Charter Schools act violated equal protection was moot and declined to issue an opinion regarding the constitutionality of such provision. However, the Court further noted as to the provisions of Sections 59-40-50 (B) and 59-40-70 (D):

> ...the provision found in Section 59-40-70(D) excuses the new twenty percent racial composition requirement entirely if the charter school is not operating in a racially

> discriminatory manner. These new provisions have changed the character of the racial composition requirement by injecting a fact-based determination regarding discrimination rather than mandating a straightforward racial quota.

353 S.C. at 28.

You have asked what is the legal consequence of a deviation from the required racial composition, no matter how small, for a charter school. You noted that the population of a school can vary and asked how this variance affects the requirements. You asked:

> Assume that a charter school sponsor has failed to find lack of discrimination by the charter school and may refuse to make a finding regarding the issue. If for even one day the racial composition of a charter school exceeds the twenty percent limit...by just one student, does that require the charter school be shut down automatically by operation of law or entitle or require the sponsoring district to shut down the charter school. Is there a requirement that the amount by which this twenty percent is exceeded be material or significant to cause a charter school to be terminated, or is there a per se rule whereby any exceeding of this limit can require or justify termination of a charter school. Can any deviation from this twenty percent limit be cured by the charter school's dropping one or more of its enrolled students, and thereby enable a charter school to continue in existence even though it had exceeded this twenty per cent limit before dropping these students.

With regard to your questions, as noted previously, Section 59-40-70(D) states in part:

> In the event that the racial composition of an applicant's or charter school's enrollment differs from the enrollment of the local school district or the targeted student population by more than twenty percent, despite its best efforts, the local school district board shall consider the applicant's or the charter school's recruitment efforts and racial composition of the applicant pool in determining whether the applicant or charter school is operating in a nondiscriminatory manner.

Beyond such, the statute is silent as to any flexibility regarding the twenty percent limit. As a result, legislative clarification would be in order to precisely outline the consequences of failing to meet such absolute requirement. In the absence of such clarification, only a court could apply the statutes to the factual scenarios posed by you. However, until such clarification either by legislative amendment or court action is accomplished, it is our opinion that one workable solution would be that racial composition should be based upon the first day of enrollment. It is obvious that an enrollment varies throughout a school year and the racial composition may vary during that school year. Construing the requirement of Section 59-40-50(B)(7) that the racial composition of the charter school enrollment reflect that of the school district or that of the targeted student population which the charter school proposes to serve to be defined as differing by no more than twenty percent from

that population so as not to allow for variances to be considered throughout a school year would appear to be unworkable for the most part. I would note that Section 59-40-140(G) provides that "...a charter school shall report at least annually to its sponsor and the department all information required by the sponsor or the department and including, at a minimum, the number of students enrolled in the charter school."

However, it could also be asserted that if a material variance with regard to the twenty percent limit would occur such might be considered. As noted, Section 59-40-70(D) states that "(a) finding by the local school district board that the applicant or charter school is operating in a racially discriminatory manner may justify the...the revocation of a charter as provided herein or in Section 59-40-110, as may be applicable." Additionally, Section 59-40-110 (C) provides that "a charter must be revoked...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.". Such provision also allows revocation for violations of "any provision of law from which the charter school was not specifically exempted." An analysis of the failure to meet the twenty percent requirement would therefore have to be made on a case by case basis and would be beyond the scope of an opinion of this office.

You next asked is the school board of the sponsoring district the only authority entitled to terminate the sponsorship of a charter school and does the school board have to give a fair hearing to the charter school before terminating its sponsorship of the charter school. As set forth by Section 59-40-110 a charter may be revoked by the sponsor district if a determination is made 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.

As set forth by subsection (D) and (E) of such provision,

> (D) At least sixty days before not renewing or terminating a charter school, the sponsor shall notify in writing the charter school's governing body of the proposed action. The notification shall state the grounds for the proposed action in reasonable detail. Termination must follow the procedure provided for in this section.
>
> (E) The charter school's governing body may request in writing a hearing before the sponsor within fourteen days of receiving notice of nonrenewal or termination of the charter. Failure by the school's governing body to make a written request for a

> hearing within fourteen days must be treated as acquiescence to the proposed action. Upon receiving a timely written request for a hearing, the sponsor shall give reasonable notice to the school's governing body of the hearing date. The sponsor shall conduct a hearing before taking final action. The sponsor shall take final action to renew or not renew a charter by the last day of classes in the last school year for which the charter school is authorized.

Pursuant to subsection (F) any decision to revoke or not to renew a charter school may be appealed to the State Board of Education pursuant to the provisions of Section 59-40-90.
As to your question regarding whether the local school board is required to provide a fair hearing, implicit in the mandate for a hearing is the requirement that the hearing be fair. See: Op. Atty. Gen. dated August 25, 1983.

Review of any decision by a sponsor district is provided. Section 59-40-90 states that "The State Board of Education, upon receipt of a notice of appeal or upon its own motion, shall review a decision of any local school board of trustees concerning charter schools in accordance with the provisions of this section." Subsection (C) of such provision states:

> (C) If the notice of appeal or the motion to review by the State Board of Education relates to a local board's decision to deny, refuse to renew, or revoke a charter, the appeal and review process must be as contained in this section. Within thirty days after receipt of the notice of appeal or the making of a motion to review by the State Board of Education and after reasonable public notice, the State Board of Education, at a public hearing which may be held in the district where the proposed charter school is located, shall review the decision of the local school board of trustees and make its findings known. The state board may affirm or reverse the application for action by the local board in accordance with an order of the state board.

Section 59-40-145 authorizes students to attend charter schools outside the district of their residence. You referenced that portion of the statute which states:

> However, the out-of-district enrollment shall not exceed twenty percent of the total enrollment of the charter school without the approval of the sponsoring district board of trustees...If the twenty percent out-of-district enrollment is from one school district, then the sending district must concur with any additional students transferring from that district to attend the charter school.

You have questioned whether the sponsoring district board of trustees may refuse to approve out of district enrollment exceeding twenty percent arbitrarily or without good cause. You also asked whether the sponsoring district may revoke or terminate a charter school contract due to the charter school having an out of district enrollment in excess of twenty percent, no matter how minor in number and no matter what minor length of time. You asked whether there is a requirement that the

amount by which the twenty percent may be exceeded be material or significant to cause a charter school to be terminated or is there a per se rule whereby any exceeding of the limit can require termination of the charter school. You also asked whether the sending district that is not a sponsor may refuse arbitrarily and without good cause to approve a charter school's enrollment of more than twenty percent of its students from the sending district. You next asked whether a sponsoring district may revoke or terminate a charter school contract having an out of district enrollment from one school district in excess of twenty percent, no matter how minor the number and no matter for what minor length of time. You asked whether there is a requirement that the amount by which this twenty percent is exceeded be material or significant to cause a charter school to be terminated, or is there a per se rule whereby any exceeding of this limit can require or justify termination of a charter school. You also asked what is the legal consequence of a deviation, no matter how minor, from the twenty percent requirement by a charter school. You referenced the situation where on a given day the composition of a charter school exceeds the twenty percent out of district limit. In such circumstances you asked whether the charter school is required to be shut down in such circumstances. You asked whether any deviation from the twenty percent limit can be cured by the charter school's dropping one or more of its enrolled students.

As to all of the questions referenced above, as in the situation addressed previously regarding race, the statute is silent as to the ramifications of not meeting the absolute twenty percent limit. The statute simply does not speak to the various scenarios covered by your questions. As a result, again, legislative clarification would be in order to precisely outline the consequences of failing to meet such requirements. As stated previously, in the absence of such clarification, only a court could apply the statute to the factual scenarios posed. As a result, this office cannot in an opinion provide substantive responses to these situations. I can only refer to the provisions of Section 59-40-110 that states that a charter may be revoked by the sponsoring school district if the charter school "...committed a material violation of the conditions, standards, or procedures provided for in the charter application." Such provision also allows revocation for violations of "any provision of law from which the charter school was not specifically exempted." As stated in the response dealing with the situation regarding racial limits, an analysis as to whether revocation would be in order would therefore have to be made on a case by case basis and would be beyond the scope of an opinion of this office.

You next referenced that the racial mix of students from a sponsoring district versus nonsponsoring districts may change at a charter school from week to week or even from day to day. You asked whether a charter school is obligated to keep within the twenty percent racial mix deviation limits established by Section 59-40-70(D) and Section 59-40-50(B)(7) and within the twenty percent permission requirements stated in Section 59-40-145 continuously.

The statutes cited are silent as to when they are to be construed as to a particular charter school. I can only refer you to the responses to the preceding questions regarding a charter school's flexibility as to the requirements of the referenced provisions. Again, legislative clarification would be in order to fully address such issues.

You next referenced the provisions of Section 59-40-80 which state:

> A local school board may conditionally authorize a charter school before the applicant has secured its space, equipment, facilities, and personnel if the applicant indicates such authority is necessary for it to meet the requirements of this chapter. Conditional authorization does not give rise to any equitable or other claims based on reliance, notwithstanding any promise, parole, written, or otherwise, contained in the authorization or acceptance of it, whether preceding or following the conditional authorization.

Referencing such, you asked whether a sponsoring school district may terminate its conditional sponsorship of a charter school because of a technical violation of its charter school contract or the charter school law, no matter how minor. You asked whether termination must be by official action of the sponsoring district school board and after a fair hearing. You also asked whether board action to declare approval of a charter school contract to be invalid or terminated must be for reasons substantial and material or for reasons insubstantial and immaterial. You also asked whether a school district sponsoring a charter school can terminate a charter school because the charter school failed to report one item of information, especially where that information may change.

As set forth previously, Section 59-40-110 provides that

> (C) 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.

The statutes regarding charter schools are silent as to the questions you have posed regarding the seriousness of allegations against a school. Again, this is a situation where legislative clarification would be advantageous. Pending such clarification, in my opinion, termination is a purely discretionary matter within the responsibility of the district. I would note that Section 59-40-110 provides that a charter may be revoked if it is determined that the charter school committed a "material violation". Whether termination is proper would depend on the specific facts presented to the board and its judgment as to the seriousness of the facts and would be beyond the scope of an opinion of this office. Again, the right of appeal to the State Board of Education is provided pursuant to Section 59-40-90.

You next referenced that Sections 59-40-140 and 59-40-145 appear to govern the timing and amounts of payments required to be paid by sponsoring school districts and nonsponsoring school districts to charter schools. Referencing such you have asked when a school district sponsoring a charter school, whether by approval or conditional approval, begins payments to a charter school on July 1st in accordance with Section 59-40-140(A) and the sponsoring school district has accepted the charter school's application stating that the charter school will begin holding classes during the month of August, what is the number of students on which those payments must be based on July 1st and for each month thereafter. You asked if the number of students actually attending a charter school is less on or after the beginning day of classes than the number projected in the charter school application, may the sponsoring school district recoup any monies paid in excess due to the actual number of students being less than the projected number. If so, how must recoupment of excess payments be accomplished. You also asked what is the proper process and formula for payments of monies to a new charter school by a sponsoring school district. You next asked what is the proper process, timing and formula for payments of monies to a new charter school by a school district that is not the sponsor of the charter school but which has one or more residents of its school district who attend the charter school out of its school district.

Sections 59-40-140 and 59-40-145 appear to set forth a formula to be followed in determining the payments to be made. In particular, Section 59-40-140 states in part as follows:

> (A) A sponsor shall distribute state, county, and school district funds to a charter school as determined by the following formula: The previous year's audited total general fund expenditures, including capital outlay and maintenance, but not including expenditures from bonded indebtedness or debt repayment must be divided by the previous year's weighted students, then increased by the Education Finance Act inflation factor, pursuant to Section 59-20-40, for the years following the audited expenditures, then multiplied by the weighted students enrolled in the charter school, which will be subject to adjustment for student attendance and state budget allocations based on the same criteria as the local school district. These amounts must be verified by the State Department of Education before the first disbursement of funds. All state and local funding must be distributed by the local school district to the charter school monthly beginning July first following approval of the charter school application. (emphasis added)
>
> (B) During the year of the charter school's operation, as received, and to the extent allowed by federal law, a sponsor shall distribute to the charter school federal funds which are allocated to the local school district on the basis of the number of special characteristics of the students attending the charter school. These amounts must be verified by the State Department of Education before the first disbursement of funds.

> (C) Notwithstanding subsection (B), the proportionate share of state and federal resources generated by students with disabilities or staff serving them must be directed to charter schools. The proportionate share of funds generated under other federal or state categorical aid programs must be directed to charter schools serving students eligible for the aid.
>
> (K) For those charter schools established on and after July 1, 2003, during the first year of its operation and upon verification by the State Department of Education that the charter school is receiving funding consistent with this chapter, the local school district shall receive through a state reserve fund established by the General Assembly beginning with fiscal year 2003-2004 an amount equivalent to the base student cost times a 1.0 weighted pupil unit for each student enrolled in the charter school who was enrolled in another noncharter public school in the district on the one hundred thirty-fifth day of the previous school year. The reserve fund shall be available only when the charter school is not initiated or operated by the district. Upon the filing of a charter school application, the State Department of Education must verify to the Charter School Advisory Committee and the affected school district that adequate funds are in the state reserve fund to meet this requirement. (emphasis added).

Section 59-40-145 provides in part:

> A child who resides in a school district other than the one where a charter school is located may attend a charter school outside his district of residence...The charter school to which the child is transferring shall be eligible for state and federal funding according to the formula defined in Section 59-40-140(A), (B), and (C), as applicable.

Again, aside from the provisions of Sections 59-40-140 and 59-40-145 set forth above, the statutes particular to charter schools are silent as to the questions raised. Again, legislative clarification would be in order to fully address these questions. This office cannot arbitrarily set forth criteria regarding payments to charter schools that is not spelled out by the relevant statutes affecting charter schools.

In your last question you asked whether a sponsoring school district or another school district may stop paying a new charter school because the sponsoring school district declares that the "conditional" charter school contract is void under each of the following circumstances:

> (a) no official action has been taken by the school board of the school district to declare that the charter school contract is void, terminated or nonexistent;

> (b) no hearing of any kind has been given by anybody to the charter school regarding this declaration that the conditional school contract is void, terminated, or nonexistent;
> (c) the charter school has not had an opportunity to make or complete any appeal or review of this action by the sponsor school district to the State Board of Education.

You asked whether in circumstances where the answer to any of these questions is in the negative, would wrongful termination of payments to the charter school by the sponsor district violate the contract between the charter school and the sponsor district, and what is the liability, due to breach of contract or otherwise of the sponsor district and of nonsponsor districts to the charter school and to creditors damaged by the charter school for wrongful termination of payments to the charter school by the sponsor district or a nonsponsor district.

As noted previously, with regard to conditional authorization of a charter school, Section 59-40-80 states

> A local school board may conditionally authorize a charter school before the applicant has secured its space, equipment, facilities, and personnel if the applicant indicates such authority is necessary for it to meet the requirements of this chapter. Conditional authorization does not give rise to any equitable or other claims based on reliance, notwithstanding any promise, parole, written, or otherwise, contained in the authorization or acceptance of it, whether preceding or following the conditional authorization.

However, again, as set forth by Section 59-40-110, a charter may be revoked only by the sponsor district and only if a determination is made 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.

As set forth by subsection (D) and (E) of such provision,

> (D) At least sixty days before not renewing or terminating a charter school, the sponsor shall notify in writing the charter school's governing body of the proposed

action. The notification shall state the grounds for the proposed action in reasonable detail. Termination must follow the procedure provided for in this section.

(E) The charter school's governing body may request in writing a hearing before the sponsor within fourteen days of receiving notice of nonrenewal or termination of the charter. Failure by the school's governing body to make a written request for a hearing within fourteen days must be treated as acquiescence to the proposed action. Upon receiving a timely written request for a hearing, the sponsor shall give reasonable notice to the school's governing body of the hearing date. The sponsor shall conduct a hearing before taking final action. The sponsor shall take final action to renew or not renew a charter by the last day of classes in the last school year for which the charter school is authorized.

Pursuant to subsection (F) any decision to revoke or not to renew a charter school may be appealed to the State Board of Education pursuant to the provisions of Section 59-40-90.

Therefore, pursuant to such provisions, in my opinion, no official action may be taken by the school board of the school district to declare that the charter school contract is void, terminated or nonexistent unless notice of pending action has been made, and a hearing held in compliance with such provision if one is timely requested. Furthermore, by statute, the right of appeal to review of the action by the sponsor school district may be made to the State Board of Education. Termination of payments to the charter school by the sponsor district without the benefit of these referenced provisions would appear to be improper. In such situations, arguably there could be potential liability to the school districts for this wrongful termination of payments. Of course, such would have to be determined on a case by case basis and would be dependent on the facts of each situation.

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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