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OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

February 1, 2005

The Honorable Ronald P. Townsend
Chairman, Education and Public Works Committee
Room 429, Blatt Building
Columbia, South Carolina 29211

Dear Representative Townsend:

In your letter, dated December 13, 2004, you questioned the extent of the State's responsibility to provide technical assistance to poorly performing charter schools. You expressed in your letter that you were particularly interested in the relevance of Sections 59-40-60, 59-40-140, 59-40-110 (C)(2), 59-18-920, and 59-18-1500 to your inquiry. We are of the opinion that a court would likely conclude that the language found within the relevant statutes places no duty upon the State to provide technical assistance to poorly performing charter schools.

Law/Analysis

In your letter, you questioned the relevance of various statutory provisions, focusing primarily upon whether such provisions require the State to provide technical assistance to charter schools receiving below average or unsatisfactory report cards. In analyzing your questions, it is necessary to apply well-recognized rules of statutory interpretation. The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct.App. 2002) (citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct.App. 1999) cert. denied as improvidently granted, State v. Hudson, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. Morgan, 352 S.C. at 366, 547 S.E.2d at 206. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Id. Undefined statutory terms must be interpreted in accordance with their usual and customary meaning. Id. Courts must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). A court should consider, not merely the language of the particular clause being construed, but the words and meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328

before first disbursement of funds. All state and local funding must be distributed by the local school district..." Section 59-40-140 (A). Furthermore, "a charter school shall report at least annually to its sponsor and the [Department of Education] all information required by the sponsor of the department including...the success of students in achieving specific educational goals for which the charter school was established..." Section 59-40-140 (G). Lastly, and most pertinent, the "sponsor shall provide technical assistance to persons and groups preparing or revising charter applications at no expense." Section 59-40-140 (H). Although the charter school possesses a duty to report to the State, the language does not address whether the State has a duty to provide technical assistance to schools which fail to meet their specific achievement goals. Furthermore, subsection (H) clearly requires that the duty of providing all technical assistance with respect to preparation and revision of charter applications is that of the sponsor. Accordingly, it is evident that Section 59-40-140 does not impose a duty upon the State to provide technical assistance to failing charter schools.

Next, you questioned what bearing Section 59-40-110 (C) might have upon the State's duties to provide technical assistance. As set forth in Section 59-40-110 (C)(2), "[a] charter must be revoked or not renewed by the sponsor if it determines that the charter school...failed to meet or make reasonable progress toward pupil achievement standards identified in the charter application..." The sponsor must notify the charter school of the grounds for termination within sixty days prior to termination. Section 59-40-110 (D). Within fourteen days of the termination notification, the charter school board must request a hearing and the school district must comply; failure to request a hearing will be treated as acquiescence to the proposed action. Section 59-40-110 (E). Following revocation, the charter school may appeal the school board's decision to the State Board of Education pursuant to 59-40-90. Section 59-40-110 (F).

In an opinion dated October 15, 2004, we expressed the view that it would be beyond our scope to analyze a charter school's failure to meet the twenty percent racial composition requirement and thus should be analyzed on a case-by-case basis. Furthermore, we determined that termination of a charter school was purely a discretionary matter held within the responsibility of the district. See, Op. S.C. Atty. Gen. dated October 15, 2004. In the present case, background information concerning any particular charter school has not been made available. We are unaware of any action which has been taken by a sponsoring school board against a poorly performing charter school. The language utilized in Section 59-40-110 (C)(2) is quite broad and grants the school district wide discretion in determining whether the charter school's academic shortcomings rise to a level worthy of charter revocation. Without the availability of more specific facts, which may not be determined in an opinion of the Attorney General, see Op. S.C. Atty. Gen., December 12, 1983, it would be speculative on our part to assume that a below average or unsatisfactory report card rating automatically constituted a failure to "meet or make reasonable progress" toward pupil achievement as expressed in Section 59-40-110 (C)(2). In other words, it would exceed the scope of an opinion of this Office to predict the actions which a school district may or may not take when dealing with a poorly performing charter school. We note, however, that pursuant to Section 59-40-110 (C)(2), a sponsoring school district is authorized to revoke a charter if it finds that a below average or unsatisfactory rating was equivalent to the charter school's failure to meet or make reasonable progress toward the pupil achievement standards identified in the charter application.

Answering your question more specifically, Section 59-40-110 is silent with respect to the State's duty to provide technical assistance to a charter school prior to or during a revocation proceeding. However, pursuant to subsection (F), the State provides an appellate function, but only in a case where a school district has revoked a charter school or denied its renewal and that charter school has appealed the district's decision to the State Board of Education. Given the facts as presented, none of the aforementioned actions have occurred. Therefore, pursuant to existing law, the State has no duty to act at this time.

You further expressed concern regarding the impact which Sections 59-18-920 and 59-18-1500 might have upon the State's duty, if any, to provide technical assistance to those charter schools possessing unsatisfactory reports. Section 59-18-920 requires charter schools to issue school report cards to parents and the public containing the school's performance rating and explaining the performance rating's significance. In part, Section 59-18-920 provides as follows:

> [c]harter schools established pursuant to Chapter 40, Title 59 will receive a performance rating and must issue a report card to parents and the public containing the rating and explaining its significance and providing other information similar to that required of other schools in this section. Alternative schools are included in the requirements of this chapter; however, the purpose of such schools must be taken into consideration in determining their performance rating ...

Section 59-18-1500 further outlines the necessary steps which schools receiving unsatisfactory ratings must take in order to inform the parents and the public at large of their rating. Upon receiving a below average or unsatisfactory rating, the pertinent portions of Section 59-18-1500(A) require that:

> (1) The faculty of the school with the leadership of the principal must review its improvement plan and revise it with the assistance of the school improvement council...
>
> (2) Once the revised plan is developed, the district superintendent and the local board of trustees shall review the school's strategic plan to determine if the plan focuses on strategies to increase student academic performance. Once the district board has approved the plan, it must delineate the strategies and support the district the will give the plan. ...
>
> (4) The school, in conjunction with the district board, must inform the parents of children attending the school of the ratings received from the State Board of Education and must outline the steps in the revised plan...This information must be provided by February first...This information must also be advertised in at least one South Carolina daily newspaper of general circulation...within ninety days of receipt of the report cards issued..."

> (5) Upon a review of the revised plan to ensure that it contains sufficiently high standards and expectations for improvement, the Department of Education is to delineate the activities, support, services, and technical assistance it will make available to support the school's plan and sustain improvement over time.

The question thus becomes whether the General Assembly intended the 1998 Education Accountability Act's requirement that the State provide technical assistance to "schools" to apply to charter schools. More specifically, the issue is whether § 59-18-1500(5) – which states that "[u]pon a review of the revised plan to ensure it contains sufficiently high standards and expectations for improvement, the Department of Education is to delineate the activities, support, services, and technical assistance it will make available to support the school's plan and sustain improvement over time" – encompasses charter schools. As explained below, we doubt that the Legislature intended this result based upon the language of the statutes and the purpose of charter schools.

Of course, we must construe the Charter Schools Act of 1996 (as reenacted and amended in 2000) together with the Education Accountability Act of 1998 and reconcile the two, if possible. As noted, § 59-40-110 requires revocation or non-renewal of a charter schools charter by the sponsor if the charter school has (2) "...failed to meet or make reasonable progress toward pupil achievement standards identified in the charter application ...." Thus, it is at least arguable that a charter school's below average or unsatisfactory rating could meet the express requirements of § 59-40-110(2) for revocation or non-renewal of the charter. However, such a determination must be made on a case-by-case basis by the sponsor, depending upon whether the "standards identified in the charter application" have or have not been met. In other words, an unsatisfactory rating under the process specified in the Education Accountability Act would not automatically translate into a revocation of the charter because such revocation must be made on the basis of the standards specified in the charter application.

On the other hand, § 59-18-920 of the Education Accountability Act expressly provides that charter schools established pursuant to Chapter 40 of Title 59 must receive a performance rating and must issue a report card to parents and the public containing the rating and explaining its significance and providing other information "similar to that provided of other schools in this section." Thus, there is no question that charter schools are included in at least some provisions of the Education Accountability Act and are treated as "other schools" for some purposes of that Act. One could thus speculate that the ultimate purpose of the report card process was to the end of the State providing technical assistance to the charter school.

Notwithstanding § 59-18-920, however, there is little or no evidence that the General Assembly intended to include charter schools within other provisions of the Education Accountability Act, including the receipt of technical assistance from the Department of Education for poor performance. We first note that the Legislature's purpose in authorizing charter schools is expressed in § 59-40-30(A), and is to

> (A) ...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 is actively pursued and where classroom teachers are given flexibility to innovate and the responsibility to be accountable.

Moreover, as we stated in an opinion, dated June 30, 2003, "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 ...." In that opinion, we pointed out the "significant differences between a predecessor school and the school in which it was converted ...." Thus, in our view, the particular charter school in question was not "required to accept" the School District's prior exclusive vending agreement. Therefore, there is no question that charter schools are unique entities.

Furthermore, the General Assembly, in enacting § 59-18-920, has expressly required that charter schools must receive a performance rating and must issue a report card. No mention of technical assistance for charter schools is made in this provision or any other, however. At the same time, § 59-18-920 specifically mandates that "[a]lternative schools are included in the requirements of this chapter," meaning that all requirements of the Accountability Act, including the provision of technical assistance for unsatisfactory performance, are applicable to alternative schools. It is striking that no similar language, relating to "the requirements of this chapter," is present for charter schools. Thus, it is reasonable to conclude that, had the General Assembly intended that all of Chapter 18 (Accountability Act) apply to charter schools, similar inclusive language as that provided for alternative schools would have been included in order to make such requirement patent. Such omission is a further indication that charter schools were not intended to be included in the provisions of Chapter 18 except as the General Assembly expressly provided. See, Hodges v. Rainey, supra ("expressio unius est exclusio alterius").

Section 59-18-1510 requires that

> (A) When a school receives a rating of unsatisfactory or upon the request of a school rated below average, an external review team must be assigned by the Department of Education to examine school and district educational programs, actions, and activities. The Education Oversight Committee, in consultation with the State Department of Education, shall develop the criteria for the identification of persons to serve as members of an external review team which shall include representatives from selected school districts, respected retired educators, State Department of Education staff, higher education representatives, parents from the district, and business representatives.
> (B) The activities of the external review committee may include:

> (1) examine all facets of school operations, focusing on strengths and weaknesses, determining the extent to which the instructional program is aligned with the content standards, and recommendations which draw upon strategies from those who have been successful in raising academic achievement in schools with similar student characteristics;
> (2) consult with parents, community members, and members of the School Improvement Council to gather additional information on the strengths and weaknesses of the school;
> (3) identify personnel changes, if any, that are needed at the school and/or district level and discuss such findings with the board;
> (4) work with school staff, central offices, and local boards of trustees in the design of the school's plan, implementation strategies, and professional development training that can reasonably be expected to improve student performance and increase the rate of student progress in that school;
> (5) identify needed support from the district, the State Department of Education, and other sources for targeted long-term technical assistance;
> (6) report its recommendations, no later than three months after the school receives the designation of unsatisfactory to the school, the district board of trustees, and the State Board of Education; and
> (7) report annually to the local board of trustees and state board over the next four years, or as deemed necessary by the state board, on the district's and school's progress in implementing the plans and recommendations and in improving student performance.
> (C) Within thirty days, the Department of Education must notify the principal, the superintendent, and the district board of trustees of the recommendations approved by the State Board of Education. After the approval of the recommendations, the department shall delineate the activities, support, services, and technical assistance it will provide to the school. With the approval of the state board, this assistance will continue for at least three years, or as determined to be needed by the review committee to sustain improvement.

As previously mentioned, the purpose of the Charter Schools Act is to 'create new, innovative and more flexible ways of educating." If § 59-18-1500 were deemed applicable, state technical assistance would, in effect, require poorly performing charter schools to be assigned an external review committee. Again, in our view, if such a significant requirement were to be mandated, we believe the General Assembly would have plainly said so.

Accordingly, without further legislative guidance, such a conclusion is inconsistent with the spirit and intent of the Charter Schools Act. Charter schools are given, pursuant to § 59-40-30(A) the "responsibility to be accountable." In this regard we noted that § 59-40-50(A) provides that

> (A) Except as otherwise provided in this chapter, a charter school is exempt from all provisions of law and regulations applicable to a public school, a school bond or a

> district, although a charter school may elect to comply with one or more of these provisions of law or regulations.

This provision clearly indicates that, absent express language otherwise, or absent specific language contained in the charter school's application, provisions relating to public schools are generally inapplicable to charter schools. Thus, we are of the opinion that a court would likely conclude that the General Assembly did not intend to impose a duty upon the State to provide technical assistance to charter schools.

Conclusion

Although § 59-18-120 requires that charter schools be issued a report card, it does not require that charter schools are subject to the same provisions as public schools in the event of a below average or unsatisfactory report card. None of the provisions cited by you, or any other of which we are aware, impose any requirement of a charter school's receipt of technical assistance in the event of a below average or unsatisfactory grade. The entire purpose and concept of charter schools is to free these schools from many of the requirements of state law and to give these schools the flexibility to operate more freely. Accordingly, in enacting the Charter Schools Act, the General Assembly has made it clear in § 59-40-50(A) that charter schools "are exempt from all provisions of law and regulations applicable to a public school, a school board, or a district" absent specific statutory provisions otherwise or absent a charter school's election to comply" with a specific statute or regulation.

Here, while the Legislature has expressly deemed all provisions of the School Accountability Act applicable to alternative schools, it has not done so with respect to charter schools. Based upon the unique status which charter schools hold as nonprofit corporations, and with the unique authority given charter schools to create innovative and flexible ways of educating children, we doubt that a court would conclude, without more, that the General Assembly intended a duty to be imposed upon the State to provide technical assistance to charter schools receiving below average and unsatisfactory report card ratings.

Very truly yours,

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