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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 27, 2002

The Honorable Scott H. Richardson
Senator, District No. 46
52 North Calibogue Cay
Hilton Head Island, South Carolina 29928

Dear Senator Richardson:

You are concerned that several sections of the South Carolina Charter Schools Act of 1996, as recently amended, which you authored, "are being seriously misinterpreted" in such a manner that "will drastically slow down the entire application process for new charter schools in our state, in complete contravention of the spirit and intent of our amendments."

By way of background, you state the following:

> As I understand it, the position of the staff of the State Department of Education is that the new law requires a lengthy process of regulation promulgation (section 59-40-180), with legislative approval, prior to any new applications being accepted by the Charter School Advisory Committee for review. The new timeline established by SDE staff shows that it would be the Spring of 2003 before a single new application would even be reviewed by the Advisory Committee, which means that it would be two years (Fall 2004) before any new charter schools could be open in South Carolina under our new law. Their reading of section 59-40-180 of the Act is apparently that the State Board of Education must first promulgate regulations, then submit them to the General Assembly for legislative approval next year, then allow the new Charter School Advisory Committee to begin reviewing applications in the Spring of 2003, which would allow for the first new schools to open in Fall of 2004, a full two years from now. It was not our intent to hold up the opening of new charter schools for such a protracted period of time. I would appreciate receiving your opinion as to feasibility of the State Board of Education issuing emergency regulations, guidelines, and standards under the reading of section 59-40-180 of the new statute.

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Request Letter

You present specific examples of how the law is being misconstrued. First, you indicate that Section 59-40-200 is "being used as a punitive measure, rather than as a 'grandfather type' clause as intended." Your understanding is that it "was the intent to allow those already in the process to go forward without being delayed by a review of the advisory board, if they chose to do so." However, in your mind, "[i]t was not intended to eliminate the review by the advisory board if a pending applicant preferred submitting for the review prior to going to the local school district for final approval."

Secondly, your concern is that

> [i]t also appears that section 59-40-100 (A), which outlines the process for charter school conversions, is also being badly misinterpreted. Although we did not specifically address the issue of what group would be in charge of handling the voting by the parents and by the faculty and instructional staff in charter school conversions, it was our intent, and logic would dictate such, that it would be the chartering committee group seeking a charter school conversion that would arrange for this vote. In Charleston County, specifically in James Island, the school district has informed the parents that it would be the school district that would handle and coordinate the voting process, not the chartering committee. I would ask for your opinion on this matter. These misinterpretations of the statute are further examples of clear attempts to stifle the charter school movement in South Carolina.

Representative Wallace Scarborough has expressed similar concerns regarding the James Island situation.

Law / Analysis

Act 341 of 2002 constitutes "An Act to Amend Chapter 40, Title 59, Code of Laws of South Carolina, 1976, Relating To Charter Schools, So As to Further Provide For the Organization, Operation, and Governance of Charter Schools." The Legislature, in enacting the new law, set forth its intent quite explicitly in Section 59-40-30 as follows:

> (A) 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 is 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 the State of South Carolina to the mission, goals, and diversity of public education.
>
> (B) It is the intent of the General Assembly that creation of this chapter encourages cultural diversity, educational improvement, and academic excellence. Further it is not the intent of the General Assembly to create a segregated school system but to continue to promote educational improvement and excellence in South Carolina. (emphasis added).

A brief review of the Act is as follows. Section 59-40-40 defines a "charter school" and other terms used in the Act. Subsection -50, with certain exceptions, exempts charter schools "from all provisions of law and regulations applicable to a public school ...." Sections 59-40-70 creates the Charter School Advisory Committee to be "established by the State Board of Education to review charter school applications for compliance with established standards that reflect the requirements and intent of this chapter."

The Advisory Committee consists of 11 members and "shall be convened by the State Superintendent of Education on or before July 1, 2002 ..." In addition, the Advisory Committee is to "establish by-laws for its operation ...." Within 60 days of receipt of the application, the Advisory Committee is to determine whether the application is in compliance. If the Advisory Committee determines an applicant is in compliance, the application is forwarded to the school district which must "rule on the application for a charter school in a public hearing, upon reasonable public notice, within thirty days after receiving the application." Pursuant to § 59-40-70 (C), a local school board of trustees "shall only deny an application if the application does not meet the requirements specified in Section 59-40-50 or 59-40-60, fails to meet the spirit and intent of this chapter, or adversely affects, as defined in regulation, the other students in the district."

Section 59-40-80 allows a local school board to 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."

The procedure for conversion of an existing public school into a charter school is set forth in § 59-40-100. Such provision in pertinent part states:

> (A) An existing public school may be converted into a charter school if two-thirds of the faculty and instructional staff employed at the school and two-thirds of all voting parents or legal guardians of students enrolled in the school agree to the filing of an application with the local school board of trustees for the conversion and formation of that school into a charter school. All parents or legal guardians of students enrolled in the school must be given the opportunity to vote on the

> conversion. Parents or guardians of a student shall have one vote for each student enrolled in the school seeking conversion. The application must be submitted pursuant to Section 59-40-70(A)(6) by the principal of that school or his designee who must be considered the applicant. The application must include all information required of other applications pursuant to this chapter. The local school board of trustees shall approve or disapprove this application in the same manner it approves or disapproves other applications.

Section 59-40-110 enumerates the process for renewal of the charter of a charter school and the grounds for revocation or non-renewal of a charter. Section 59-40-140(K) indicates that the Legislature contemplated that some charter schools would be established before July 1, 2003. Such subsection states that "[f]or those charter schools established on or 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 school in the district on the one hundred thirty-fifth day of the previous school year."

Section 59-40-180 requires the State Board of Education to "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 state board appeal, by December first of the year preceding the charter school's opening."

A review of the recent amendments indicates that the General Assembly intended to effectuate the Charter School Act immediately. The Advisory Committee is to be put in place "on or before July 1, 2002." Section 59-40-140(K) uses language which anticipates that some charter schools will be established before July 1, 2003. Section 59-40-80 allows a local school board to conditionally authorize a charter school even before space, equipment, etc. is secured if the applicant indicates "such authority is necessary for it to meet the requirements of this chapter." Strict deadlines are placed both on the Advisory Committee and the local school board as part of the approval process. Moreover, the Act requires that the law be "liberally construed" to "support the findings and goals of this chapter."

In addition, nothing in the statute suggests that implementation of the new law must await the promulgation of regulations by the Department of Education and the State Board of Education. Indeed, the charter school law, as amended, is unusually detailed and filled with specificity.

Unless the General Assembly has indicated its desire to make the effectuation of a statute dependent upon the promulgation of regulations, the administrative agency charged with such promulgation may not prevent the law from being implemented by failing to adopt regulations. See, In the Matter of Mintz v. Mintz, 378 P.2d 945 (Oregon, 1963). Of course, the Legislature may not vest unbridled, uncontrolled or arbitrary power in an administrative agency. All an administrative agency is constitutionally empowered to do by virtue of the promulgation of regulations is "fill up the details" of the law enacted by the General Assembly. As our Supreme Court indicated recently in Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002), only the General Assembly can make the law. It is the Legislature, by enactment of a statute, which declares a legislative policy, establishes primary standards for carrying it out, or lays down "an intelligible principle to which the administrative officer must conform, with a proper regard for the protection of the public interests ...." S.C. State Highway Dept. v. Harbin, 226 S.C. 585, 86 S.E.2d 466, 470 (1955); Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Cole v. Manning, 240 S.C. 160, 125 S.E.2d 621 (1962).

Accordingly, it is often held that, based upon the particular statute involved, "agencies are not required to adopt particular rules and regulations, especially where statutes set forth detailed requirements for administrative action." 73 C.J.S., Public Administrative Law and Procedure, § 91. Certain enactments are a "complete law, which envision[ ] no further implementation by administrative rules and regulations." See, Op. Atty. Gen., November 23, 1964. An administrative agency does not have to "set out statutory provisions in its rules and regulations" in order for that statute to be effective. Weiner v. State Real Estate Comm., 184 Neb. 752, 171 N.W.2d 783 (1969). When "it is clear that if the language of a provision of a statute which an agency is empowered to administer and enforce leaves no room for substantial debate over its meaning, ... such a clear statutory provision is enforceable by the agency in accordance with its plain meaning without the necessity imposed by the Administrative Procedure Act for a prior rule promulgation." Equitable Life Mortgage and Realty Investors v. N.J. Div. of Taxation, 151 N.J. Super. 232, 376 A.2d 966, 970-71 (1977).

The case of In the Matter of Mintz v. Mintz, supra is instructive. There the State Board of Medical Examiners of Oregon sought to revoke a physician's license for "unprofessional and dishonorable conduct." The lower court dismissed the Board's complaint on the basis that the Board had not yet promulgated regulations defining the particular conduct on the part of the physician as "unprofessional and dishonorable conduct."

The Supreme Court of Oregon reversed. The Court concluded that the relevant statute possessed ample specificity such that it could be enforced without implementing regulations. Concluded the Court,

> [w]e find nothing in the medical practice act ... or in the history of the legislation which formed it supporting the lower court's conclusion that the legislature intended [the law] ... to be inoperative until the board made rules and regulations further defining 'unprofessional or dishonorable conduct.' ... We agree with the view expressed by the court in the Bell case [Matter of Bell v. Bd. of Regents, 295 N.Y. 101, 65 N.E.2d 184, 163 A.L.R. 900 (1946)], first in regarding the prior promulgation of rules as unnecessary under the circumstances and secondly in treating 'unprofessional conduct' as an adequate standard. We have previously held that the failure to specify in a statute the standards circumscribing administrative actions is not necessarily fatal. It may be advisable for the legislature or the administrative agency to set out specific adjudicatory standards in some instances .... But this does not mean that a statute must always set out the precise instances under which it is to be operative. No matter how specific the standard or standards are stated, there is almost always a penumbra which requires the administrative agency to exercise judgment as to whether the facts before it fall within or outside the legislative design.

378 P.2d at 947-948.

Likewise, the Court in Mitchell v. Cavicchia, 101 A.2d 575 (N.J. 1955) rejected the argument that a statute governing liquor licensing was inoperative because the Director failed to promulgate regulations specifying what acts constituted the hindrance or delay of an investigation regarding the licensee's business. The defendant cited the Director's statutory authority to make such general rules and regulations "as may be necessary." Reasoned the Court, however,

> [i]t has been held that there is no rigid principle requiring an administrative agency to lay down rules and standards spelling out every wide grant of authority it receives. ... [Here] [w]e are dealing with the legislative command ... which is sufficiently precise so as not to require - so far as the present situation goes - to lay out its terms. Rules are designed to close up the interstices in the law, but they are not called for here.

101 A.2d at 576 - 577.

Nothing in the new Charter School Act indicates that the Legislature felt it was necessary to promulgate implementing regulations before the law could be put into effect. While § 59-40-180 requires the State Board of Education to "promulgate regulations and develop guidelines necessary to implement the provisions of this chapter," when viewed in its entirety, particularly in light of the fact that the law is so specific, we are of the opinion that a court would conclude that the Act was intended to be effective immediately.

Conclusion

It is our opinion that in enacting the new amendments to the Charter School law, the General Assembly intended that charter schools be made far more easier to create and much more readily available to the school children of South Carolina. As part of that intent, the Legislature desired that the law be put into effect immediately. As the statute is written, implementation of the Charter School law does not depend upon whether the State Board of Education promulgates implementing regulations therefor. Put differently, the Legislature did not favor implementation of the Charter School law to be delayed because implementing regulations are not in place.

This means also that the Legislature intended that the application and start up process for charter schools should begin without delay. As the Legislature stated in § 59-40-30, in its expression of intent, it desired 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." From an examination of the law in its entirety, 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.

Specifically, in an effort to address the James Island High School situation, as we understand it, a vote has been scheduled pursuant to § 59-40-100 for August 28 as to whether faculty and instructional staff employed at James Island High School and parents or guardians of students at James Island High School wish to convert the School to a charter school. The new law expressly requires that a vote of two-thirds of faculty and staff and two-thirds of parents and guardians is required to begin the conversion procedure. In other words, this process allows for conversion to a charter school to commence at the grass roots level. While there are a number of other steps in that process, the General Assembly intended to empower parents and school personnel to be able to get the process moving.

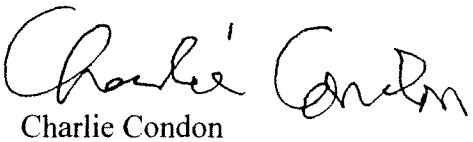
Yet, as we understand, the Board of Trustees for Charleston County School District has intervened and has directed that the vote be cancelled and that the Board will handle and coordinate the voting process. This action of the School Board is, in our opinion, contrary to both the letter and spirit of the Charter School law. Pursuant to the new act, the school board's role in the process is to receive, evaluate and rule upon applications within thirty days from receipt by the advisory committee. We glean no authority in the Charter School law for the school board to waylay or block a determination by parents, teachers and school staff to initiate the process for conversion to a charter school. The statute gives parents and school personnel the right to initiate an application for conversion and the school board possesses no authority to change the law.

As to your other question, we can find nothing in the new law which prevents a pending applicant from initiating a new application and ultimately submitting it to the Advisory Committee

for review pursuant to § 59-40-70(A)(6). As you suggest, the Legislature did not intend for a pending applicant to remain frozen in the process, but to be able to start anew.

The General Assembly has mandated that the Charter School law be interpreted liberally to support the findings and goals of the law as written and to "advance a renewed commitment by the State of South Carolina to the mission, goals and diversity of public education." Stopping the vote by parents and school officials seeking to determine whether James Island High School is converted to a charter school does not conform with this legislative mandate. Neither does insistence by the Department of Education and the State Board of Education that implementing regulations must be put in place prior to the law's taking effect. Given that the statute is so specific, it appears that emergency regulations would be unnecessary and that the statute could be immediately implemented as written. The Department of Education could fill in any details by establishing temporary guidelines until permanent regulations are put in place. But in any event, the Charter School law should be implemented immediately rather than await regulations to be promulgated years from now.

Sincerely,



Charlie Condon
Attorney General

cc: The Honorable Wallace B. Scarborough
Member, House of Representatives