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March 7, 2002

OFFICIAL OPINION 2002-02

Dr. Suellen Reed
State Superintendent of Public Instruction
Room 229 State House
Indianapolis, IN

RE: Funding for Charter Schools

Dear Dr. Reed:

During its 2001 session, the Indiana General Assembly passed the Charter School Act, now codified at IND. CODE § 20-5.5, *et. seq.* (the "Act"). The Act provides for the creation of charter schools, which are defined as "*public elementary school[s] or secondary school[s] established under this chapter.*" IND. CODE § 20-5.5-1-4 (emphasis added). In the Act the Legislature provided an alternative to traditional public schools, and authorized charter schools to provide:

innovative and autonomous programs that do the following:

- (1) Serve the different learning styles and needs of *public school students*.
- (2) Offer *public school students* appropriate and innovative choices.
- (3) Afford varied opportunities for professional educators.
- (4) Allow *public schools* freedom and flexibility in exchange for exceptional levels of accountability.
- (5) Provide parents, students, community members, and local entities with an expanded opportunity for involvement *in the public school system*.

IND. CODE § 20-5.5-2-1.

The Department of Education (the "Department") will be required by IND. CODE § 20-5.5-7-3 to distribute state tuition support for charter schools. An issue has arisen as to

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when the initial distribution of these funds¹ to charter schools must be made by the Department.

In your letter dated February 14, 2002, requesting a legal opinion, you provided us with the Department's interpretation based on its reading of the Act and the Budget Bill, P.L. 291-2001 § 4. The Department believes that (i) it is prohibited by statute from making any distribution of state tuition support to charter schools earlier than January 2003, and (ii) it has no authority to reduce payments to which traditional public school corporations are entitled to receive (during the first semester of a school year) for the purpose of providing tuition support to charter schools.

Brief Answer

It is my legal opinion that the General Assembly has created dual obligations that the Department must fulfill. It cannot be assumed that the General Assembly intended to have the new public schools operate without state tuition funds absent clear language to that effect in the Charter School Act. Therefore, the Department of Education is required both to distribute tuition support and other state funding upon verification of the required information from the charter school organizer and to make full state tuition payments to public school corporations.

Analysis

The importance of the issue presented is one that is set within our Indiana Constitution, which states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools², wherein tuition shall be without charge, and equally open to all.

¹ The Act also provides that charter schools shall receive a proportionate share of "local support" (general fund property tax levy, auto excise and financial institution taxes) available to any other public school. IND. CODE § 20-5.5-7-3(c). The Department is not responsible for distribution of these funds, and any issue surrounding distribution of these funds is beyond the scope of this opinion.

² The phrase "Common Schools" is synonymous with "public schools" and includes high schools. *State v. O'Dell*, 118 N.E. 529, 530 (Ind. 1918).

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IND. CONST. art. 8, § 1. Any analysis of charter school funding requirements must begin with the basic and irrefutable fact that charter schools are *public* schools, “wherein tuition shall be without charge.”

Titles 20 and 21 of the Indiana Code are replete with statutory provisions evidencing the General Assembly’s ongoing concern with the quality of education in this state and the importance of minimizing disparities of funding available to educate each student in a *public* school.

The establishment of charter schools is in direct response to public interest in providing innovation and flexibility in education. The fact that these schools may operate independently of already-established school corporations does not negate the fact that they are, nonetheless, by definition *public* schools. Each charter school student is to be counted for the purpose of state tuition support “in the same manner as a student of the school corporation in which the charter school student resides.” IND. CODE § 20-5.5-7-2.

In the absence of a specific legislative directive which indicates that charter schools must operate without state tuition support during the first semester of operation, one may only conclude that charter schools, like all other public schools, are required to be funded with public funds during the first semester of a school year. Indeed, any other reading would require the inference that the General Assembly intended charter schools with inadequate private start-up monies to never open. *See, e.g., Wilson v. Stanton*, 424 N.E.2d 1042, 1045 (Ind. App. 1981) (“It is not to be presumed that the legislature intends its enactments to have no effect.”)

Although the Act provides that the organizer of a charter school “*may* apply for and accept for a charter school (1) independent financial grants; or (2) funds from public or private sources other than the department,” IND. CODE § 20-5.5-7-5 (emphasis added), a traditional school corporation has similar authorization. (A “school corporation . . . shall have . . . the power . . . [t]o make all applications, to enter into all contracts, and to sign all documents necessary for the receipt of aid, money, or property from the state government, the federal government, *or from any other source.*” IND. CODE § 20-5-2-2-(15) (emphasis added).

In addition, the General Assembly has explicitly provided that charter schools are entitled to a proportionate share of the public funds available to all other public schools. *See generally*, IND. CODE § 20-5.5-7-3. Of equal importance is the fact that the General Assembly did *not* provide that charter schools specifically be required to operate without state tuition funding during the first semester they are in operation.

Any other statutory provisions that possibly conflict must be construed to give effect to the Act. “[T]his is particularly true where the hardships and evils of a different construction could readily affect adversely the educational opportunities of children.”

Fort Wayne Public Schools v. State ex rel New Haven Public Schools, 159 N.E.2d 708, 712 (Ind. App. 1959). The Indiana Court of Appeals provided this guidance for statutory construction:

... when two statutes on the same subject must be construed together, the court should attempt to give effect to both; however, where the two are repugnant in any of their provisions, then the later statute will control and operate to repeal the former to the extent of the repugnancy. Similarly, where one statute deals with a subject in general terms and another statute deals with a part of the same subject in a more detailed or specific manner, then the two should be harmonized, if possible; but if they are in irreconcilable conflict, then the more detailed will prevail as to the subject matter it covers.

Indiana Alcoholic Beverage Commission v. Osco Drugs, 431 N.E.2d 823, 833 (Ind. App. 1982) (citations omitted).

In the funding formulas set forth in IND. CODE § 21-3-1.7, the General Assembly has sought to reduce the disparity in resources available to educate students residing in “property-poor” taxing districts and those in “property-rich” taxing districts. The funding formulas require each school corporation to make an Average Daily Membership (“ADM”) count “within the first thirty (30) days of the school term.” IND. CODE § 21-3-1.6-1.1(d). The school corporation’s ADM is then used in a formula weighted to take into account, among other things, the amount of local revenues available and significant changes in both the number of students and the amount of local revenues over previous years. IND. CODE § 21-3-1.7. A school corporation’s state tuition entitlement is adjusted in January to reflect changes in the September ADM.

The fact that an already-existing school corporation must wait until January for funding adjustments based on September’s ADM does not support the argument by correlation that a charter school must wait until January for any state tuition support.

In regard to state tuition support for charter schools, the Act provides:

- (a) Not later than the date established by the department for determining average daily membership under IC 21-3-1.6-1.1(d), the organizer shall submit to the department [of education] the following information:
 - (1) The number of students enrolled in the charter school.
 - (2) The name of each student and the school corporation in which the student resides.

(b) After verifying the accuracy of the information reported under subsection (a), the department shall distribute the following to the organizer³:

(1) Tuition support and other state funding for any purpose for students in the charter school.

(2) A proportionate share of state and federal funds received for students with disabilities or staff services for students with disabilities or staff services for students with disabilities for the students with disabilities enrolled in the charter school.

(3) A proportionate share of funds received under federal or state categorical aid programs for students who are eligible for the federal or state aid enrolled in the charter school.

. . . .

(d) The distribution under subsection (b) shall be made on the same schedule as the schedule on which the school corporation receives funds.

IND. CODE § 20-5.5-7-3. It is important to note that the count mentioned in subsection (a) is *not* referred to as the “ADM” count. Likewise, the Department is *not* directed by subsection (a) to use the student count number to determine the calendar year tuition support for a charter school. Rather, it is directed simply to “distribute tuition support” to the charter school.

In its interpretation of the statute, the Department does not distinguish between the difference in: (i) the requirement that public schools (including charter schools) be funded during the first semester of a school year; and (ii) the availability of such funds to make such distributions. The Department appears to interpret IND. CODE § 20-5.5-7-3(d) (“the distribution under subsection (b) shall be made on the same schedule as the schedule on which the school corporation receives funds”) to preclude distribution to a charter school during the first semester based on the fact that available funds are already committed to pre-existing public school corporations.

P.L. 291-2001 § 4 makes the biennial appropriation for tuition support to public schools. It makes no specific reference to charter schools, providing simply that

[t]he above appropriations for tuition support shall be made each calendar year under a schedule set by the budget agency and approved by the governor. However, the schedule shall provide for at least twelve (12) payments, that one (1) payment shall be made at least every forty (40) days, and the aggregate of the payments in each calendar year shall equal

³ This opinion focuses exclusively on the distribution of state tuition support as that term is used in IND. CODE § 21-2-1.7. It does not address other sources of state or federal funding.

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the amount required under the statute enacted for the purpose referred to above.

Although public schools operate on the basis of a school year (defined in IND. CODE § 21-3-1.6-1(b) as “a year beginning July 1 and ending the next succeeding June 30”), state tuition support is distributed during the following calendar year. IND. CODE § 21-3-1.6-1.1(c) defines “state distribution” to mean “the amount of state funds to be distributed to a school corporation in any *calendar* year under this chapter,” with the amount of funds calculated on the basis of a school’s ADM of “the school year ending in the calendar year.” IND. CODE § 21-3-1.6-1.1(d).

Subject to the amount appropriated by the General Assembly, “the amount a school corporation is *entitled* to receive in tuition support for a year is the amount determined by section 8 of this chapter,” IND. CODE § 21-3-1.7-9. This amount is distributed on a monthly schedule established by the Budget Agency and approved by the Governor. P.L. 291-2001 § 4.

Thus, the statutory framework established by the General Assembly has an inherent time lag of roughly one semester between the time a public school starts a school year and the time it receives a distribution of state tuition support based on September ADM.

However, during the first semester of a school year each public school corporation is assured under IND. CODE § 21-3-1.7-9 that it will receive at least the monthly distributions based on the previous September ADM count, and the school may budget accordingly. The Charter School Act in no way alters the state's obligation to the traditional public school corporations. It is therefore my legal opinion that the Department has no authority to reduce payments which traditional public school corporations are entitled to receive during the first semester for the purpose of providing tuition support to charter schools.

I am fully aware that the General Assembly has created what may be termed an “unfunded legislative mandate”. It has created a new variety of public school without either (1) addressing the fiscal impact these schools may have on entitlements to existing school corporations, or (2) expressing an intent that charter schools will not receive state tuition support during the first semester of operations.

It is possible, given current budget projections, that the appropriations cap set by the General Assembly in 2001 may be inadequate. This is an issue that the General Assembly created, and one that may require its action to remedy.

The Department may find in the performance of its ministerial duties that it is impossible to satisfy the State’s financial obligations to all public schools as required by the General Assembly. In such an event, the General Assembly must supply the Department with the

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necessary funds to satisfy these obligations. The Department must carry out all of its ministerial duties as required by statute and may not allow the potential lack of funding to cause it to choose one duty over another.

Therefore, in answer to your request for guidance as to your statutory obligations as Superintendent of Public Instruction under the new Charter School Act, it is my legal opinion that the Charter School Act obligates the Indiana Department of Education to distribute tuition support and other state funding upon verification of the required information from the charter school organizer, and to make full state tuition payments to public school corporations.

Sincerely,

Stephen Carter
Attorney General