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Hand Delivered

Representative Michael A. Balboni  
Chairman of the House Education Committee  
NH State Representative  
Hillsborough County District 21

Dear Chairman Balboni:

In light of the State Board of Education's (the "State Board") decision at the September 19, 2012 State Board meeting denying all pending applications for charter schools, you have asked our office to provide a written statement surrounding communications our office had with the Board. We are pleased to provide an overview of the legal issues surrounding this decision. Ethical rules prohibit us from discussing attorney-client privileged communications.

You also asked our office for a written explanation of the State Board's authority to deny all applications and to "impose a blanket moratorium." As a preliminary matter, the State Board was never advised to, nor has it, issued a "blanket moratorium" on all charter school applications. The State Board does not have the authority to issue a moratorium on charter schools. Instead, for the reasons stated below, under current law, the State Board denied the current applications as it lacks the legal authority to grant applications and bind the State to expend funds that have not yet been appropriated.

When analyzing statutes, our office must consider the plain language of the statute as well as the overall statutory system that the statute is a part of. The provisions of RSA 194-B and RSA 198 are a part of the State's overall budgetary system.

Under RSA 194-B:3-a:

I. The state board of education may grant charter status to applicants that meet the requirements of this chapter.

...

IV. The state board of education shall either approve or deny an application using reasonable discretion in the assessment of the elements set forth in RSA 194-B:3, II, (a)-(bb) and (dd).

RSA 194-B:3a, I and IV.

One of the elements considered by the State Board when reviewing a charter school application is the “[a]nnual budget, including all *sources of funding*, and a projected budget for the next 2 years.” RSA 194-B:3, I(r). Given the current status of appropriations for charter schools, this factor is the current focus of the State Board’s review.

RSA 198:42, IV (as amended through House Bill 2 (2011)) provides that for “the fiscal year-beginning July 1, 2011, and every year thereafter, the department of education may expend funds up to 110 percent of budgeted amounts as necessary to fund chartered public school tuition payments under 194-B:11, I.” The current version differs from RSA 198:42 (Supp. 2010), which, prior to the amendment, provided that “[f]or fiscal year-beginning July 1, 2006, and every fiscal year thereafter, the amount necessary to fund charter school tuition payments . . . is hereby appropriated to the department from the education trust fund . . . .”

Thus, prior to the 2011 amendments, RSA 198:42 provided an open-ended appropriation to fund chartered public schools. Under the current version of RSA 198:42, however, it is a limited appropriation when expending funds beyond 110 percent. Although the Legislature has required the Department of Education to issue payment “regardless of the balance of funds available in the education trust fund” as it relates to the 110 percent of budgeted amounts, this requirement does not extend to charter school tuition amounts beyond the 110 percent amount. Instead, when seeking to expend additional funds, the Legislature expressly limited the Department of Education’s authority and required it to first obtain both Fiscal Committee and Governor and Council approvals.

Specifically, current RSA 198:42, IV states, in pertinent part, that “[i]n the event that chartered public school tuition payments exceed budgeted amounts by over 10 percent, the department of education may expend funds in excess of said amounts, *with the approval of the fiscal committee of the general court and governor and council. Said funds shall be paid from the education trust fund established under RSA 198:39 upon the warrant of the governor out of any money in the fund not otherwise appropriated.*”

This interpretation is consistent with the protections provided within, and obligations imposed by the Legislature upon the State Board and the Department of Education deriving from, the general budget and appropriation statutes. *See* RSA Chapter 9. Specifically, RSA 9:19 prohibits the State Board from “expend[ing] any money or mak[ing] any contract or bargain, or in any way bind[ing] the state in excess of the amount voted by the legislature.” If the Board or the Department does so, each individual State Board member or Department official “shall be held personally liable for the amount of the excess expended, contract or bargained above the appropriation,” and could be removed from his/her position by the Governor. *See* RSA 9:20; 9:21.

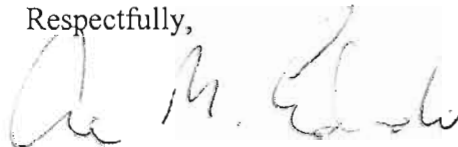
Under RSA 198:42, IV, the Legislature voted to allow the Department to spend only 110 percent of the budgeted amounts. If the Department sought to expend more, it would need both Fiscal Committee and Governor and Council approval. As the Department does not have such approval, there is no current appropriation. Because there is no current appropriation, the State Board cannot approve charter school applications and bind the State to expend funds absent such approval or a legislative change. As a result, the State Board conditionally denied charter school applications based on funding source issues.

Given the State Board's decision, it has denied all pending applications on this basis alone without conducting a review of the remainder of the elements outlined in RSA 194-B:3. It will also deny any subsequently submitted applications on this basis until such time as the Department of Education obtains the requisite approvals under RSA 198:42, IV.

As such, the State Board advised applicants to either reapply under RSA 194-B:3-a in a subsequent year or immediately apply under the process for locally approved charter schools pursuant to RSA 194-B:3. If, however, funding becomes available, the State Board encourages applicants to seek reconsideration under RSA 194-B:3, XII. Once funding becomes available, the State Board will conduct a review of any charter school application brought before it and make an assessment based on all the elements set forth in RSA 194-B:3, II, (a)-(bb) and (dd).

Thank you for your considerate attention to this matter.

Respectfully,



Anne M. Edwards  
Associate Attorney General

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