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January 29, 1998

Mr Jack W. Pruitt
Director
Retirement Systems Division, Department of State Treasurer
325 North Salisbury Street
Raleigh, North Carolina 27603-1385

Re: Advisory Opinion; Participation of Teachers and Other Full-Time Employees of Charter Schools in the Teachers' and State Employees' Retirement System of North Carolina; N.C. GEN. STAT. §§ 115C-238.29F, 135-1, 135-3

Dear Mr. Pruitt:

On January 9, 1998, you sent a memorandum to all charter schools advising them that "effective February 1, 1998, teachers and other full time, permanent employees of Charter Schools are required to participate in the Teachers' and State Employees' Retirement System." Questions have been raised about the accuracy of this memorandum, and by letter dated January 21, 1998, you requested our opinion as to two questions:

1. Whether your Office's interpretation that the Charter School Act, as amended by 1997 Sess. Laws 430, requires membership in the Retirement System by teachers and other full-time permanent employees of charter schools; and
2. If your interpretation is correct, whether mandatory participation in the Retirement System can be delayed until a later date, such as July 1, 1998, to allow time for the General Assembly, if it so desires, to address this matter.

For the reasons that follow, it is our opinion that the answer to both questions is "yes."

On June 21, 1996, the North Carolina General Assembly enacted 1995 Sess. Laws (1996 Reg. Sess.) 731, the "Charter Schools Act of 1996," which amended N.C. GEN. STAT. Chapter 115C, Article 16, by adding a new Part 6A. Chapter 731 authorized the creation of charter schools in North Carolina and set forth the parameters under which such schools may be allowed to operate. Among other issues addressed by Chapter 731 was the participation of charter school employees in the

Teachers' and State Employees' Retirement System of North Carolina ("the Retirement System"). With regard to such participation, Chapter 731 provided:

In the event a charter school, in its application, elects total independence from the local board of education, its employees shall not be deemed to be employees of the local school administrative unit and shall not be entitled to any State-funded employee benefits, including membership in the North Carolina Teachers' and State Employees' Retirement System or the Teachers' and State Employees' Comprehensive Major Medical Plan. In the event a charter school, in its application, agrees to be subject to some supervision and control of its administrative operations by the local board of education, the employees of the charter school shall be deemed employees of the local school administrative unit for purposes of providing certain State-funded employee benefits, including membership in the Teachers' and State Employees' Retirement System and the Teachers' and State Employees' Comprehensive Major Medical Plan. The Board of Trustees of the Teachers' and State Employees' Retirement System, in consultation with the State Board of Education, shall determine the degree of supervision and control necessary to qualify the employees of the applicant for membership in the Retirement System. In no event shall anything contained in this Part require the North Carolina Teachers' and State Employees' Retirement System to accept employees of a private employer as members or participants of the System.

1995 Sess. Laws (1996 Reg. Sess.) 731, s 2, codified as N.C. GEN. STAT. § 115C-238.29F(e)(4). In connection with this section, the newly-enacted N.C. GEN. STAT. § 115C-238.29B(b)(14) required that applications for operation of a charter school must include

[a] description of whether the school will operate independently of the local board of education or whether it agrees to be subject to some supervision and control of its administrative operations by the local board of education. In the event the charter school elects to operate independently of the local board of education, the application must specify which employee benefits will be offered to its employees and how the benefits will be funded.

On August 22, 1997, 1997 Sess. Laws 430 was signed by the governor and enacted into law. Chapter 430 amended various portions of the Charter School Act of 1996, including sections of that statute dealing with participation of charter school employees in the Retirement System. Chapter 430 rewrote N.C. GEN. STAT. § 115C-238.29F(e)(4) as follows:

The employees of the charter school shall be deemed employees of the local school administrative unit for purposes of providing certain State-funded employee benefits, including membership in the Teachers' and State Employees' Retirement System and the Teachers' and State Employees' Comprehensive Major Medical Plan. *The State Board of Education provides funds to charter schools, approves the original members of the boards of directors of the charter schools, has the authority to grant, supervise, and revoke charters, and demands full accountability from charter schools for school finances and student performance. Accordingly, it is the determination of the General Assembly that charter schools are public schools and that the employees of charter schools are public school employees and are 'teachers' for purposes of membership in the North Carolina Teachers' and State Employees' Retirement System and State Employees' Comprehensive Major Medical Plan. In no event shall anything contained in this Part require the North Carolina Teachers' and State Employees' Retirement System to accept employees of a private employer as members or participants of the System.*

(Language in italics is new with Chapter 430; other language was retained from the previous version of N.C. GEN. STAT. § 115C-238.29F(e)(4).) Chapter 430 also repealed the provisions of N.C. GEN. STAT. § 115C-238.29B(b)(14), and contained the following directive:

The Board of Trustees of the North Carolina Teachers' and State Employees' Retirement System through the Office of the Attorney General shall request a letter of determination or ruling from the Internal Revenue Service, United States Department of Treasury, as to whether the status of the North Carolina Teachers' and State Employees' Retirement System as a governmental plan would be adversely affected by the participation of employees of charter schools. The request shall be made to the Internal Revenue Service after it is approved by the Speaker of the House of Representatives and the President Pro Tempore of the Senate or their designees and no later than 30 days after the effective date of this act. Employees of charter schools are eligible for participation in the North Carolina Teachers' and State Employees' Retirement System upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling.

1997 Sess. Laws 430, s. 12. Chapter 430, then, amended N.C. GEN. STAT. Chapter 115C, Article 16, Part 6A, by removing all language allowing charter schools to choose to operate independently of any supervision by the local school administrative unit, and thereby exclude themselves from participation in various State-sponsored employee benefit programs, including the Retirement System, or to choose to be subject to some such supervision and thereby participate in these State-sponsored benefit plans. In the place of that removed language, the legislature inserted a

provision declaring that "it is the determination of the General Assembly that charter schools are public schools and that the employees of charter schools are public school employees and are 'teachers' for purposes of membership in the North Carolina Teachers' and State Employees' Retirement System and State Employees' Comprehensive Major Medical Plan."

The Retirement System is governed by the provisions of N.C. GEN. STAT. Chapter 135, Article 1. Pursuant to N.C. GEN. STAT. § 135-1(25):

"Teacher" shall mean any teacher, helping teacher, librarian, principal, supervisor, superintendent of public schools or any full-time employee, city or county, superintendent of public instruction, or any full-time employee of Department of Public Instruction, president, dean or teacher, or any full-time employee in any educational institution supported by and under the control of the State: Provided, that the term "teacher" shall not include any part-time, temporary, or substitute teacher or employee, and shall not include those participating in an optional retirement program provided for in G.S. 135-5.1. In all cases of doubt, the Board of Trustees, hereinafter [hereinbefore] defined, shall determine whether any person is a teacher as defined in this Chapter.

Under the provisions of N.C. GEN. STAT. Chapter 135, Article 1, participation in the Retirement System is mandatory for all "teachers." N.C. GEN. STAT. § 135-3(a). Furthermore, all "teachers" are required to make employee contributions to the Retirement System on a monthly basis by a deduction of 6% from their salary. N.C. GEN. STAT. § 135-8(b).

Under the provisions of N.C. GEN. STAT. Chapter 115C, Article 16, Part 6A, as amended in 1997 by Chapter 430, it is clear that participation in the Retirement System has been made mandatory for all charter school and their employees. Not only did Chapter 430 remove from the Charter School Act all references to the ability of a charter school to choose whether or not its employees will participate in the Retirement System, it also stated in explicit terms that "it is the determination of the General Assembly that charter schools are public schools and that the employees of charter schools are public school employees and are 'teachers' for purposes of membership in the North Carolina Teachers' and State Employees' Retirement System. . . ." This language, when read in conjunction with the provisions of N.C. GEN. STAT. Chapter 135, Article 1, making participation in the Retirement System mandatory for all "teachers," inescapably leads to the conclusion that Chapter 430 has made participation in the Retirement System mandatory for all charter school employees. It is our opinion, then, that the Retirement System's interpretation of the provisions of the Charter School Act, as amended by Chapter 430, is correct.

You also asked whether, if your interpretation is correct, mandatory participation can be delayed until a later date, such as July 1, 1998. In our opinion, such a delay of mandatory participation would be a reasonable and responsible method of implementation of the requirements of Chapter 430.

As you noted in your letter, and as we have discussed, there have been different expectations and understandings of what Chapter 430 requires expressed to your Office, to the Department of Public Instruction, and other State agencies and officials. Many charter schools have operated under the expectation that Chapter 430 would not alter the option provided in the original Charter School Act of each charter school to choose whether or not to participate in the Retirement System. Some apparently also believed that each charter school employee would be allowed to choose whether or not to participate in the Retirement System, although no such choice was available under the original language of the Charter School Act.

The implications of these varied understandings are far-reaching. Because many charter schools apparently believed that they would have the option not to participate in the Retirement System, they prepared budgets and entered contracts reflecting that belief. To require these charter schools to begin mandatory participation in the Retirement System, and therefore begin making the required employer contributions to the Retirement System, in the middle of the fiscal year could have a significant if not debilitating effect on the budgets of these schools. Similarly, contracts with employees may not contemplate the required 6% monthly contribution that must be made by employees.

It also seems clear that charter schools will seek to have the General Assembly address this issue during the 1998 short session and further amend the Charter School Act to allow participation in the Retirement System to be at the election of individual charter schools. Should the General Assembly enact such amendments, then the Retirement System would be required to "undo" all contributions and allowances of service credits for employees of charter schools that elect not to participate.

Chapter 430 became effective on August 22, 1997. 1997 Sess. Laws 430, s. 13, *as amended* by 1997 Sess. Laws 456, s. 55.4. It is clear, however, that the General Assembly understood and intended that the provisions of Chapter 430 requiring participation in the Retirement System would not be implemented immediately. As noted above, section 12 of Chapter 430 directed the Retirement System's Board of Trustees, through this Office, to request a letter of determination or ruling from the Internal Revenue Service as to whether the Retirement System's status as a governmental plan would be adversely affected by the participation of employees of charter schools. That letter ruling was provided by the Internal Revenue Service on January 2, 1998. Section 12 also states that: "Employees of charter schools are eligible for participation in the North Carolina

Teachers' and State Employees' Retirement System upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling." Clearly, then, the General Assembly did not intend for mandatory participation of charter schools in the Retirement System to begin on August 22, 1997, but rather understood that full implementation would necessarily be delayed.

This is also reflected in N.C. GEN. STAT. § 115C-238.29F(e)(3), as amended by Chapter 430, section 5, and by section 11 of Chapter 430, which added N.C. GEN. STAT. § 135-8(b)(5)d to the General Statutes. These provisions allow a teacher employed by a local school administrative unit to request a leave of absence to work in a charter school, which must be granted if properly applied for. While on leave of absence to work in a charter school, the teacher may continue to participate in the Retirement System by making "monthly contributions into the annuity savings fund in an amount equal to the employee contribution plus the employer normal and accrued liability contribution on the basis of the compensation the member was earning immediately prior to the interrupted service." N.C. GEN. STAT. § 135-8(b)(5)d. It is my understanding from talking with persons in your Office that approximately 12-16 teachers are currently contributing to the Retirement System under the provisions of this statute. There would have been no need for this statute, of course, if mandatory participation in the Retirement System was intended to begin immediately upon Chapter 430's enactment into law.

Given the concerns and potential problems presented by making participation in the Retirement System mandatory for all charter schools effective February 1, 1998, as is outlined in your memorandum of January 9, 1998, as well as the flexibility built into Chapter 430 by the General Assembly as to implementation of mandatory participation, it is our opinion that it would be a reasonable and responsible method of implementation for the Retirement System to delay mandatory participation until the beginning of the 1998-1999 fiscal year, or July 1, 1998. It should be noted that such delayed mandatory participation in no way limits the ability of charter school employees to take advantage of the leave of absence provisions of N.C. GEN. STAT. § 135-8(b)(5)d if available to them. Moreover, given the language of section 12 of Chapter 430, which states that charter school employees become eligible for participation in the Retirement System upon the first day of the calendar month following the State's receipt of a favorable letter of determination or ruling from the Internal Revenue Service, such a delay does not limit the ability of a charter school to elect to commence participation in the Retirement System effective February 1, 1998. It is only mandatory participation that would be delayed until July 1, 1998.

In summary, it is our opinion that the Retirement System has correctly interpreted the provisions of Chapter 430 as requiring mandatory participation in the Retirement System for all charter schools and all charter school employees. It is our further opinion that the Retirement

Mr. Jack W. Pruitt

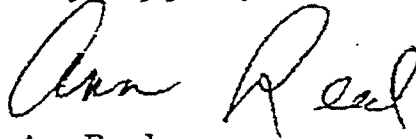
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System may reasonably and responsibly delay implementation of mandatory participation until July 1, 1998.

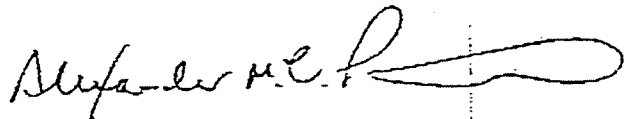
We trust that this fully answers your questions on this matter. Please do not hesitate to contact us if we can provide any additional assistance.

Very truly yours,



Ann Reed

Senior Deputy Attorney General



Alexander McC. Peters

Special Deputy Attorney General

AMP/hs