

MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

REPLY TO: Thomas J. Ziko
Education Section
Telephone: (919) 716-6920
FAX: (919) 716-6764

June 23, 1998

Michael E. Ward
State Superintendent of Public Instruction
301 N. Wilmington Street
Raleigh, North Carolina 27601-2825

Re: Advisory Opinion; Student Lottery for Admission to Proposed Charter School Must Be Conducted After the State Board Grants the Charter; G.S. § 115C-238.29E.

Dear Dr. Ward:

You have requested the opinion of this office regarding the following inquiry:

May a charter school applicant legally have an enrollment period and conduct its lottery prior to the final approval of its application by the State Board of Education?

In our opinion, the answer to your inquiry is "no."

In responding to the question you have raised, we recognize that several basic principles of statutory construction are applicable. Our courts have long held that the "primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E.2d 281 (1972). In ascertaining this intent, courts "consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* at 303. The language of a statute will be construed so as to avoid an absurd result. *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E.2d 1 (1966). Bearing in mind these fundamental principles, we turn now to examine the Charter School Act itself.

The Charter School Act, Part 6A of Chapter 115C of the General Statutes, which governs charter schools in this state, can be fairly divided into three major sections: the charter application and approval process; the operation of approved charter schools; and the revocation

or termination of such charters. Sections 115C-238.29B, 115C-238.29C, and 115C-238.29D, for example, describe the application process up to and including final approval of the charter application. Those sections consistently use the term "applicant" when referring to the entity seeking to establish a charter school. G.S. 115C-238.29B(a) provides that, "Any person, group of persons, or nonprofit corporation *seeking to establish* a charter school may *apply to establish* a charter school." (Emphasis added). Subsection (c) of that section provides that, "An *applicant* shall submit the *application* to a chartering entity for preliminary approval." (Emphasis added). Likewise G.S. 115C-238.290 provides that, "The State Board shall grant final approval of an *application* if it finds that the *application* meets the requirements set out in this Part or adopted by the State Board. . . ." (Emphasis added).

Following those sections of the Act governing the charter application and approval processes is a section entitled "Charter School Operation," G.S. 115C-238.29E. Subsection (a) of that section states, in part, that, "A charter school that is *approved* by the State shall be a public school within the local school administrative unit in which it is located." From the foregoing sections of the statutes, it is evident that up until final approval of a charter school application by the State Board, the entity seeking to establish a charter school is not a "charter school" but rather is an "applicant."

The relevant provisions regarding enrollment are found in G.S. 115C-238.29F(g). All of those provisions govern what a "charter school" may or may not do during the admissions process. For example, subsection (g)(1) provides that, "Any child who is qualified under the laws of this State for admission to a public school is qualified for admission to a charter school." The lottery requirement found in (g)(6), provides, in relevant part, as follows:

During each period of enrollment, the *charter school* shall enroll an eligible student who submits a timely application, unless the number of applications exceeds the capacity of a program, class, grade level, or building. In this case, students shall be accepted by lot.

G.S. 115C-238.29F (Emphasis added).

The Charter School Act thus distinctly separates the entity that applies for the charter, the "applicant," from the entity that is the "charter school" itself. There is no provision for an "applicant" to enroll students or to conduct a lottery. That authority is clearly given to the charter school which cannot and does not exist prior to the State Board's final approval of the application. Thus an applicant may not, consistent with the plain language of the statute, enroll students or conduct a lottery prior to the final approval of the application.

Moreover, it is difficult to envision how the enrollment of students prior to the approval of the charter could satisfy the clear legislative intent for charter schools to be open to all

Michael E. Ward
June 23, 1998
Page 3

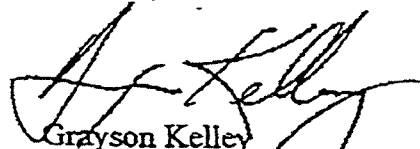
students in North Carolina. G.S. 115C-238.29F(g)(1) and (4). The legislature intended that charter schools not discriminate against children "on the basis of ethnicity, national origin, gender, or disability," and that it achieve diversity in terms of race and ethnicity. G.S. 115C-238.29F(5). Most importantly, the lottery requirement itself is intended to insure that all students have a fair and equal opportunity to be admitted to the school should more students apply to a charter school for enrollment than the school can accommodate under its charter. G.S. 115C-238.29F(6). Enrolling students and conducting a lottery prior to the approval of the charter application could well run afoul of the legislative intent that charter schools be open to every qualified student.

Finally, a contrary interpretation of the enrollment and lottery provisions of the Act would defy common sense. An applicant for a charter school cannot commit to parents and parents cannot commit to the applicant until the application for charter school status is finally approved. An applicant has no way of knowing what provisions of its application the State Board will or will not approve. In fact, the statutes require at a minimum that certain things be included in the charter school application to be reviewed in the approval process. Among other requirements, the applicant must include in the application "admission policies and procedures" and "the number of students to be served." G.S. 115C-238.29B. An applicant seeking to establish a charter school has no way to determine beforehand whether the State Board will approve its enrollment request or its admissions policies. Thus, it is logically impossible to have a meaningful "enrollment" period that precedes the granting of final approval as a charter school.

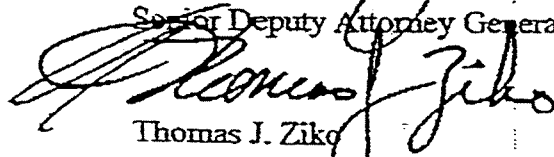
In summary, it is our opinion that the legislature intended for a charter school to begin and end its enrollment period, and to conduct a lottery if necessary, only after the State Board of Education has finally approved the issuing of the charter. Insofar as the charter school does not exist prior to that time, it is not legal, nor is it possible, for an applicant that has not received final chartering approval to "enroll" students in a charter school.

We hope this adequately addresses your inquiry.

Sincerely,



Grayson Kelley
Senior Deputy Attorney General



Thomas J. Ziko
Special Deputy Attorney General