Proposed Work Plan to Review the Process for Granting Charters in Massachusetts
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11/22/09 DRAFT

Scope of Services

The discussion of the Scope of Services sought in RFR 10LGLRS1 is among the briefest this consultant can remember:

On February 24, 2009, the Board of Elementary and Secondary Education (Board) granted a charter to the Gloucester Community Arts Charter School (GCACS) pursuant to G.L. c. 71, § 89. Since the granting of that charter, questions have been raised regarding whether the Board and the Department of Elementary and Secondary Education (Department) followed the established process in granting a charter to GCACS. In particular, allegations have been made that this charter was awarded solely because of a desire to advance a political agenda.

The Board and the Department seek an impartial outside consultant to review the process used in granting a charter to GCACS for the purpose of identifying the range of procedural options consistent with state law that are open to the Board and identifying the legal standard required to justify revocation of a charter.

Developing a Work Plan

It is impossible to present a coherent work plan without some reference to key events as reported in the media. It is equally impossible to present a work plan that does not prejudice the outcome of this work, unless it is recognized up front that the facts reported may not be accurate, complete or a fair reflection of the participant's intent or motive. It is also important to confine the discussion to the charter approval process itself, rather than national politics surrounding the charter concept, state politics surrounding the charter school statute, or the local politics surrounding a charter school in Gloucester. As I see this project, it is a narrow review of the integrity of the charter approval process, not a broad critique of public policy on charter schools.

This work plan is offered in the form of a straw man discussion. It lacks the references and citations that would be part of a final report. I cannot offer a complete report as my response to an RFR. More important, it represents set of working hypotheses to structure the problem in a way that supports the short deadline for action that the Department faces. It is meant to suggest my best understanding of the problem at the moment, recognizing that it is likely to change in the course of the in-depth research required of any study you would expect to rely on for guidance in your decisions. As a practical matter, this additional research involves a review of the written record, further analysis of administrative law, and whatever interviews and oral input the General Counsel deems appropriate.

Facts Derived From the Public Record

After reviewing the situation as reported in the media this my best understanding of the undisputed facts:

Charter school applications are considered by the Massachusetts Board of Elementary and Secondary Education (Board). The eleven-member Board includes the Secretary of Education (Secretary), the Commissioner of Elementary and Secondary Education (Commissioner), and a Chairperson. The Secretary makes recommendations on charter approval to the Board, based in part on staff recommendations.

On February 5, 2009 the Secretary sent the Commissioner an email suggesting that political factors related to support for the Governor's education agenda were part of the decision process on three charter applications coming before the Board, including one presented by the Gloucester Community Arts Charter School (GCACS). The email suggested that approval of the GCACS charter was both the "best candidate" for that purpose and a "bitter pill" for the Commissioner to swallow. On February 13 the Commissioner recommended that the Board approve only GCAS. The Board approved the GCAS application on February 24 on a 6-5 vote. Had the Commissioner voted against approval, the charter would have been denied.

On September 20, the *Gloucester Times* released a complete copy of the February 5th email that it had acquired as a public record. The Secretary said its influence on the chartering process was being distorted. The Commissioner said the email did not affect his decision making on GCACS. The nine remaining board members agreed that they did not receive the Secretary's email, nor had the Secretary or Commissioner engaged with them in any communication pressing for a favorable vote. The Secretary, Commissioner, Chair, and Board denied politics played a role in the charter decision. On September 22, without suggesting any wrongful action by the Secretary, Commissioner or Board, the Governor wrote the Board stating that the Secretary should not have sent the email, and asking the Board to "start over" the GCACS application process. RFR 10LGLRS1 reflects the Department's effort to understand if and how that might be accomplished.

The Challenge

On what basis might the Board "start over?" The Massachusetts charter statute (found at Chapter 71, Section 89 of the Massachusetts General Laws) identifies a charter as a "license." By implication charter holders are licensees. State charter law permits charter revocation "if the school has not fulfilled any conditions imposed by the Board in connection with the grant of its charter or the school has violated any provision of its charter", and directs the Board to develop procedures and guidelines.

These can be found Chapter 603 section 1.13 of the Code of Massachusetts Regulations. Charters may be revoked "for cause, including, but… not limited to a material misrepresentation in the application for approval of the charter," and "criminal

convictions on the part of charter school administrators or its Board of trustees." The remaining items on the list assume the charter school is in operation. At this time GCAS has not hired a principal, found a suitable building, or enrolled students.

I am not sure that the Board has defined what makes a misrepresentation "material." One plausible definition would be a misrepresentation of fact that, if corrected, could not have become a basis for granting a charter, or would become the basis for denying a charter. Such misrepresentations could be inadvertent or deliberate. This creates at least two kinds of potential material representations. The first involves no judgment on the part of decision makers: when the misrepresentation is corrected, the application is either barred or not barred. Despite arguments about the appropriate reference source, once a source is selected, the 30,000 "community population" threshold triggering the law's regional school option is an example of this kind of misrepresentation.

The second type of misrepresentation requires substantial judgment on the part of decision makers. In this case, it is objectively difficult to define what the true facts are and, if they can be identified, there is likely to be no clear line a third party might employ to determine whether or not an application should have been approved or not. Examples here include the adequacy of an applicant's educational and financial plan, projected enrollment, and discussion of existing public school options. In many case the truth of these representations can only be known after the fact, and the applicant's prior knowledge of that truth will be almost impossible to prove.

While it is possible that the GCACS application contains the second type material misrepresentation and opponents of the GCACS application argue that such misrepresentations do exist, the reason the Governor has asked the Board to "start over" goes to procedure rather than the merits of the case for GCACS.

Case of First Impression

Here I believe we have a case of first impression in the administration of charter legislation. Since the 1994 charter statute was passed, Massachusetts has revoked four charters, all for cause, and all based on the failures of an operational school. It has never revoked a charter for a failure of the chartering process. To the best of my knowledge, after some research and consultation on national trends, no charters have been revoked for failures of the initial chartering process. By the fall of 2002, chartering agencies across the nation declined to renew or revoke 194 charters. From 2005 to 2008, the top 50 chartering agencies declined to renew 80 charters and revoked 44 more. More research needs to be done, but it is possible that precedent to help resolve the GCACS situation will not be found in any administrative law specific to charter schools.

This leaves us with Massachusetts' law related to the powers and duties of the Department and its officers, the application of administrative law in analogous settings in Massachusetts and other jurisdictions, and the employment of general principles of administrative law.

Politics and the Chartering Process

As noted in the Scope of Work, RFR 10LGLRS1 was issued in part to address the implications of *"allegations…. that this charter was awarded solely because of a desire to advance a political agenda."*

The Secretary's decision to communicate the role charter authorization might play in realizing or thwarting the Governor's broad education program in an email to the Commissioner might have been a political misstep. But neither the email nor anything else now in the public record proves the allegation. Only the Commissioner knows the role that politics played in his decisive vote for charter approval. Moreover, given the vast discretion the law delegates to the Board in chartering decisions, settling the question one way or another as a matter of objective fact is virtually impossible. Above all, even if it could be proved, in the absence of some other evidence such as bribery, it would not seem to violate any law.

Neither Massachusetts charter law nor relevant Department regulations exclude political considerations from the Board's chartering decisions. The Board of Education consists entirely of voting members appointed by a current or preceding Governor. The Secretary and Commissioner are political appointees who are expected to exchange views on the politics of policy matters and to pursue the political agenda of their administration. One of the Board's members is appointed by the Governor for a term equal to her own, the rest are appointed for terms of five years.

As discussed above, the Massachusetts statute delegates enormous discretion to the Board in implementation of the law - specifically in the decision to grant charters. It is no secret that political considerations and perspectives play a role when boards and agencies exercise such discretion. Moreover, there is no general legal argument that bars political considerations from agency decision-making. Indeed, this one reason it is widely accepted that "elections matter." Whatever the merits as matter of public policy, whatever the approach of individual Board members to the exercise of their duties, political consideration have been built into the chartering process. Finally, Massachusetts is not alone in passing a charter law that creates a wide scope for political consideration in the approval process. Every state statute invites political issues into charter decisions to a greater or lesser degree.

Public Confidence

The plain facts of the matter disclosed to the public thus far indicate that the fundamental problem here is one of public confidence in the chartering process and so the integrity of the state's charter schools program - and every local charter school. The matter is complicated by the fact that the public does not understand the extent to which political factors necessarily play a role in implementation of the state's charter statute and every charter statute. So much of the law involves judgment calls about an applicant, and while administrative law is premised on the idea that agency experience will narrow the range of discretion that is required, it will never disappear.

A second problem is that some after some 15 years of chartering that experience remains largely a disorganized mass of individual knowledge and diverse reports in the Department, Board, and the broader education reform community, rather than as refinements of, or additions to, principles or precedents guiding the staff and board in the application of existing regulations to the chartering process. And the situation is made still worse when political appointees state that politics is not a factor, suggesting to the average citizen that political considerations might not only be inappropriate, and their revelation impolitic, but also illegal.

My working hypothesis is that, because they address only the applicant's role in the chartering process, the state charter statute and the regulations promulgated by the Department offer no rationale for "starting over" based on the board's procedural shortcomings. This brings us to the fundamental question: Can a legal basis for starting the chartering process over be grounded in the practical need to maintain public confidence in the fairness of government process, rather than the words that fall within the four corners of the charter statute?

A Way Out?

To get at this question, it helps to start with a hypothetical involving legal fault. Consider the following scenario: Unbeknownst to a charter applicant, six Board members take bribes from a third party in exchange for favorable votes. No doubt, if these circumstances were proved, the State of Massachusetts would find some route to change the outcome and "start over," despite the fact that charter law and regulations only cover revocations based on a misrepresentation instigated by charter applicants. Failing to respond would simply destroy public confidence in the charter programs. Whether withdrawal of the charter was termed a nullification or a revocation, legal rationales would be identified to demonstrate that the extent of improper process negated the Board's decision. Because the applicant bore no responsibility for the defective process, it would also be fair for the charter review to start over.

If this failure of process would justify a rehearing, and a legal rationale for doing so would be found, the same logic might apply to lesser failures of process.

There is a case to be made that the Board's overall due diligence on the GCACS application was not up to standards for a decision with substantial implications for the children, parents, taxpayers, and citizens of Gloucester. In particular, the local public hearing on GCACS required by Board regulation was postponed, no Board members were present when the hearing was rescheduled, and rules were waived to give that hearing the same status as a hearing where Board members were in attendance. Moreover, it appears that the Board was never informed that the Department's charter office staff either opposed authorization or harbored serious doubts about the GCACS application, and had produced documents stating as much. It is entirely reasonable for those opposed to the school to feel they did not receive an opportunity to be heard by the

Board. When combined with the Secretary's undisclosed political communication to the Commissioner, these facts might reasonably cast doubt on the integrity of the process.

The subsequent public outcry over the failure of process has been sufficiently widespread for the Governor to conclude: 1) that doubt has spread beyond Gloucester, 2) that it has undermined public confidence – perhaps not to the level of a case of bribery, but certainly to the point where the charter program and schools are at risk, and 3) that if corrective action is not taken, serious and needless damage will be done to an important legislative reform option. It is now November; GCACS has not found a building, hired a principal or enrolled students. In this case it is reasonable to conclude that 1) the government's interest in public confidence outweighs the interests of those organizing this one charter school, 2) the Board's chartering process was sufficiently flawed to nullify its earlier decision, and 3) because no procedural fault lies with the applicant, the authorization process should begin anew, with reasonable time for the applicant to revise their application if it desires to account for the progress of time.

On Appeal….

Massachusetts' charter law requires the Board to develop procedures for charter revocation. The regulations promulgated by the Board provide charter holders with the full rights of review available in Chapter 30A, Section 13 of the Massachusetts General Laws, and Chapter 801, Section 1 of the Code of Massachusetts Regulations. It is certainly possible that GCACS would appeal any Board decision that left it without a charter. It may be less likely that GCACS would appeal a decision that simply turned back the clock on approval of their current applicant, but the prospect of appeal cannot be discounted.

A deeper analysis is required, but should GCACS choose to pursue an appeal, two alternatives seem likely:

If the GCACS charter is a nullity, the theory is that the actual approval process departed sufficiently from the required process that no charter could have been issued - whatever its conformity to the ministerial aspects of charter authorization, and whatever written documents the applicant might hold stating the contrary. If this theory holds with the administrative law's fact finder, GCACS has no charter. Therefore it has no basis for appeal via Chapter 30, Section 13, and the case will be dismissed.

If the fact finder determines that a charter was issued, the Board will have to make a case about 1) the extent to which the process was flawed, and then 2) that the broad policy implications of a process with such flaws outweighs the rights of this charter holder.

Whether or not the theory is nullification, the decision on appeal is likely to rest on broad principles of administrative law rather than precedent. The most important factors are likely to be: the general responsibilities of agencies to protect the integrity of their decision processes, the rights of a licensee, and the actual effects of a decision to revoke

but start over a review on a licensee. There will be insights into each gained by the research that will be pursued in this project to assess the nullification theory.

Hard Cases Make Bad Law

Although this analysis of the GCACS situation must be confined to legal issues, decisions to resolve it cannot be based solely on legal thinking. The choice of remedy here will have substantial precedential effects, not only on the Massachusetts charter program, but nationally. Someone needs to think through how the solution to GCACS might create new problems in future chartering decisions. This case involves an unusual intersection of politics, history, law, administrative practice, and policy. I am prepared to address these matters to the extent to the extent directed.