

Memorandum

To: Legislative Administrative Rules Review Committee
Representative Karianne Lisonbee
Representative Kera Birkeland

From: Representative Matt Throckmorton (ret)
Interested party, volunteer, advocate.
Representative Curt Oda (ret)
Utah Military Academy Board of Directors, Vice Chairman

Re: State School Board and State Charter School Board Non-compliance with Statute and Process

Date: 27 June 2023

Points

1. A review of Statute demonstrating that the State School Board has taken actions outside of statutory authority, including.
 - a. Requiring authorizers to apply in order to begin authorizing activities. This has resulted in both Utah State University and Utah Technical University adopting provisions not allowed by law.
 - b. Requiring Iron County Schools to “apply” to the State School Board prior to being able to approve a charter application.
 - c. The State School Board or State Charter School Board inviting non-qualifying attorneys into executive sessions with charter school boards of directors and engaging in discussion regarding possible litigation.
 2. Utah State University, in their capacity as a charter school authorizer, requiring charter applicants to pledge achievement of 100% student proficiency, both within the application and in the signed Agreement.
 3. The State Charter School Board has demonstrated a significant pattern of action outside of their own adopted processes relative to oversight of charter schools they have authorized.
 4. Excessive reports – State Board of Education Auditor found over 400 reports due a year. Audit provided upon request.
 5. Special Education Flexibility as identified in
- Attached: State Board Rule R277-552-3

****This document has been updated on Pages 7, 11 and 19. ****

Point 1: State Board of Education non-compliance by requiring authorizers to apply to authorize.

Background: Who can be an Authorizer?

Effective 5/3/2023

53G-5-205. Charter school authorizers -- Power and duties -- Charter application minimum standard.

- (1) The following entities are eligible to authorize charter schools:
 - (a) the State Charter School Board;
 - (b) a local school board;
 - (c) a board of trustees of an institution in the state system of higher education as described in Section 53B-1-102; or
 - (d) a board of trustees of a private, nonprofit college or university in the state that is accredited by the Northwest Commission on Colleges and Universities.
- Amended by Chapter 235, 2023 General Session

Effective 7/1/2022

53G-5-102. Definitions.

As used in this chapter:

- (2) "Board of trustees of a higher education institution" or "board of trustees" means:
 - (a) the board of trustees of:
 - (i) the University of Utah;
 - (ii) Utah State University;
 - (iii) Weber State University;
 - (iv) Southern Utah University;
 - (v) Snow College;
 - (vi) Utah Tech University;
 - (vii) Utah Valley University; or
 - (viii) Salt Lake Community College; or
 - (b) a technical college board of trustees described in Section 53B-2a-108.
- (3) "Charter school authorizer" or "authorizer" means an entity listed in Section 53G-5-205 that authorizes a charter school.

Amended by Chapter 1, 2021 Special Session 2

Further Background: State School Board may act only as they are expressly authorized to act by Statute.

53E-3-401. Powers of the state board -- Adoption of rules -- Enforcement -- Attorney.

- (1) As used in this section:
 - (a) "Education entity" means:
 - (i) an entity that receives a distribution of state funds through a grant program managed by the state board under this public education code;
 - (ii) an entity that enters into a contract with the state board to provide an educational good or service;
 - (iii) a school district;
 - (iv) a charter school; or
 - (v) a regional education service agency, as that term is defined in Section 53G-4-410.
 - (b) "Educational good or service" means a good or service that is required or regulated under:

- (i) this public education code; or
 - (ii) a rule, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and authorized under this public education code.
- (2)
- (a) The state board has general control and supervision of the state's public education system.
 - (b) "General control and supervision" as used in Utah Constitution, Article X, Section 3, means directed to the whole system.
- (3) **The state board may not govern, manage, or operate school districts, institutions, and programs, unless granted that authority by statute.**

Point 1. A. Statute relative to Higher Education authorizing, it does not require the authorizer to seek approval from the State Board of Education to begin authorizing charter schools.

Effective 5/5/2021

53G-5-306. Charter schools authorized by a board of trustees of a higher education institution -- Application process -- Board of trustees responsibilities.

- (1) Except as provided in Subsection (6), an applicant identified in Section 53G-5-302 may enter into an agreement with a board of trustees of a higher education institution authorizing the applicant to establish and operate a charter school.
- (2)
 - (a) An applicant applying for authorization from a board of trustees to establish and operate a charter school shall provide a copy of the application to the local school board of the school district in which the proposed charter school will be located either before or at the same time the applicant files the application with the board of trustees.
 - (b) The local school board may review the application and offer suggestions or recommendations to the applicant or the board of trustees before acting on the application.
 - (c) The board of trustees shall give due consideration to suggestions or recommendations made by the local school board under Subsection (2)(b).
- (3) The state board shall make a rule providing a timeline for the opening of a charter school following the approval of a charter school application by a board of trustees.
- (4) After approval of a charter school application, the applicant and the board of trustees shall set forth the terms and conditions for the operation of the charter school in a written charter agreement.
- (5)
 - (a) The school's charter agreement may include a provision that the charter school pay an annual fee for the board of trustees' costs in providing oversight of, and technical support to, the charter school in accordance with Section 53G-5-205.
 - (b) In the first two years that a charter school is in operation, an annual fee described in Subsection (5)(a) may not exceed the product of 3% of the revenue the charter school receives from the state in the current fiscal year.
 - (c) Beginning with the third year that a charter school is in operation, an annual fee described in Subsection (5)(a) may not exceed the product of 1% of the revenue a charter school receives from the state in the current fiscal year.
 - (d) An annual fee described in Subsection (5)(a) shall be:
 - (i) paid to the board of trustees' higher education institution; and
 - (ii) expended as directed by the board of trustees.
- (6)
 - (a) In addition to complying with the requirements of this section, a **technical college board of trustees described in Section 53B-2a-108 shall obtain the approval of the Utah Board of Higher Education before entering into an agreement to establish and operate a charter school.**
 - (b) If a technical college board of trustees approves an application to establish and operate a charter school, the technical college board of trustees shall submit the application to the Utah Board of Higher Education.
 - (c) The Utah Board of Higher Education shall, by majority vote, within 60 days of receipt of an application described in Subsection (6)(b), approve or deny the application.

- (d) The Utah Board of Higher Education may deny an application approved by a technical college board of trustees if the proposed charter school does not accomplish a purpose of charter schools as provided in Section 53G-5-104.
- (e) A charter school application may not be denied on the basis that the establishment of the charter school will have any or all of the following impacts on a public school, including another charter school:
 - (i) an enrollment decline;
 - (ii) a decrease in funding; or
 - (iii) a modification of programs or services.
- (7)
 - (a) Subject to the requirements of this chapter and other related provisions, a technical college board of trustees may establish:
 - (i) procedures for submitting applications to establish and operate a charter school; or
 - (ii) criteria for approval of an application to establish and operate a charter school.
 - (b) The Utah Board of Higher Education may not establish policy governing the procedures or criteria described in Subsection (7)(a).
- (8) Before a technical college board of trustees accepts a charter school application, the technical college board of trustees shall, in accordance with state board rules, establish and make public:
 - (a) application requirements, in accordance with Section 53G-5-302;
 - (b) the application process, including timelines, in accordance with this section; and
 - (c) minimum academic, financial, and enrollment standards.

Amended by Chapter 324, 2021 General Session

Comment: Paragraph 6 makes legislative intent very clear. This is the only reference in law for an institution of higher education having to seek an additional step in authorizing. It demonstrates the legislature contemplated all institutions of higher education and only added an additional step to technical colleges. For context, Statute identifies all LEAs, of which there are 41; all institutions of higher education, of which there are 10; and the 1 State Charter School Board: Thus, statute creates 52 possible Authorizers within Utah, and of those 52 Authorizers the State Legislature created an additional step for only 1 Authorizer, which is identified in 53G-5-306(6)(a).

Point 1. A. Further clarity that the Legislature did not allow the State School Board to force authorizers to apply to the State School Board before beginning authorizing charter schools.

Effective 5/3/2023

53G-5-205. Charter school authorizers -- Power and duties -- Charter application minimum standard.

- (5) **The state board shall, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules establishing minimum standards that a charter school authorizer is required to apply when:**
- (a) evaluating a charter school application; or
 - (b) monitoring charter school compliance.
- (6) The minimum standards described in Subsection (5) shall include:
- (a) reasonable consequences for an authorizer that fails to comply with statute or state board rule;
 - (b) a process for an authorizer to review:
 - (i) the skill and expertise of a proposed charter school's governing board; and
 - (ii) the functioning operation of the charter school governing board of an authorized charter school;
 - (c) a process for an authorizer to review the financial viability of a proposed charter school and of an authorized charter school;
 - (d) a process to evaluate:
 - (i) how well an authorizer's authorized charter school complies with the charter school's charter agreement;
 - (ii) whether an authorizer's authorized charter school maintains reasonable academic standards; and
 - (iii) standards that an authorizer is required to meet to demonstrate the authorizer's capacity to oversee, monitor, and evaluate the charter schools the authorizer authorizes.

Amended by Chapter 235, 2023 General Session

Comment: Paragraph 5 makes it clear the State Board can establish minimum standards, though nowhere does statute grant authority for the State Board to set criteria for an authorizer to begin authorizing. Both Utah State University and Utah Technical University were forced to meet additional criteria, which schools authorized by the State Board do not have to meet, to begin authorizing. More recently Iron County Schools were told they could not authorize a charter school until they applied to the State Board of Education and were approved. No such statutory authority exists for the State Board to require such an application.

****UPDATE****

53G-5-205 (4) has relevant language:

- (4) Within 60 days after an authorizer's approval of an application for a new charter school, the state board may direct an authorizer to do the following if the authorizer or charter school applicant failed to follow statutory or state board rule requirements made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act:
 - (a) reconsider the authorizer's approval of an application for a new charter school; and
 - (b) correct deficiencies in the charter school application or authorizer's application process as described in statute or state board rule, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, before approving the new application.

Comment: This section of law clearly applies AFTER an authorizer has approved a charter school. The reference to State Board Rulemaking would make no sense to require an authorizer to apply to authorizer, 60-days AFTER they have authorized a new charter. Clearly, the legislator did not intend to grant the State Board the ability to make authorizers apply prior to authorizing.

Point 1. B. Requiring Iron County Schools to apply to be an authorizer.

Effective 5/14/2019

53G-5-305. Charters authorized by local school boards -- Application process -- Local school board responsibilities.

- (1)
 - (a) An applicant identified in Section 53G-5-302 may submit an application to a local school board to establish and operate a charter school within the geographical boundaries of the school district administered by the local school board.
 - (b)
 - (i) The principal, teachers, or parents of students at an existing public school may submit an application to the local school board to convert the school or a portion of the school to charter status.
 - (A) If the entire school is applying for charter status, at least two-thirds of the licensed educators employed at the school and at least two-thirds of the parents of students enrolled at the school must have signed a petition approving the application prior to its submission to the charter school authorizer.
 - (B) If only a portion of the school is applying for charter status, the percentage is reduced to a simple majority.
 - (ii) The local school board may not approve an application submitted under Subsection (1)(b)(i) unless the local school board determines that:
 - (A) students opting not to attend the proposed converted school would have access to a comparable public education alternative; and
 - (B) current teachers who choose not to teach at the converted charter school or who are not retained by the school at the time of its conversion would receive a first preference for transfer to open teaching positions for which they qualify within the school district, and, if no positions are open, contract provisions or local school board policy regarding reduction in staff would apply.
- (2)
 - (a) An existing public school that converts to charter status under a charter granted by a local school board may:
 - (i) continue to receive the same services from the school district that it received prior to its conversion; or
 - (ii) contract out for some or all of those services with other public or private providers.
 - (b) Any other charter school authorized by a local school board may contract with the local school board to receive some or all of the services referred to in Subsection (2)(a).
 - (c) Except as specified in a charter agreement, local school board assets do not transfer to an existing public school that converts to charter status under a charter granted by a local school board under this section.
- (3)
 - (a) A local school board that receives an application for a charter school under this section shall, within 45 days, either accept or reject the application.
 - (b) If the local school board rejects the application, it shall notify the applicant in writing of the reason for the rejection.
 - (c) The applicant may submit a revised application for reconsideration by the local school board.
 - (d) If the local school board refuses to authorize the applicant, the applicant may seek a charter from another authorizer.

- (4) The state board shall make a rule providing for a timeline for the opening of a charter school following the approval of a charter school application by a local school board.
- (5) After approval of a charter school application and in accordance with Section 53G-5-303, the applicant and the local school board shall set forth the terms and conditions for the operation of the charter school in a written charter agreement.
- (6) A local school board may terminate a charter school it authorizes as provided in Sections 53G-5-501 and 53G-5-503.
- (7) In addition to the exemptions described in Sections 53G-5-405, 53G-7-202, and 53G-5-407, a charter school authorized by a local school board is:
 - (a) not required to separately submit a report or information required under this public education code to the state board if the information is included in a report or information that is submitted by the local school board or school district; and
 - (b) exempt from the requirement under Section 53G-5-404 that a charter school shall be organized and managed under Title 16, Chapter 6a, Utah Revised Nonprofit Corporation Act.
- (8) Before a local school board accepts a charter school application, the local school board shall, in accordance with state board rules, establish and make public the local school board's:
 - (a) application requirements, in accordance with Section 53G-5-302;
 - (b) application process, including timelines, in accordance with this section; and
 - (c) minimum academic, financial, and enrollment standards.

Amended by Chapter 293, 2019 General Session

Comment: No where in this section of law, specific to LEAs, does statute grant the State Board Rule making authority relative to an LEA applying to begin authorizing.

Comment 2: In the process of forcing qualifying institutions of higher education to apply, they illegally denied Snow College authorizing activities, and approved both Utah State University and Utah Technical University, requiring/accepting grounds that exceed state law. In both cases, these grounds must be revoked. USU was required to force all approved charters to pledge 100% proficiency; UTU was required to limit what charters could apply geographically, and that an applying charter school must have the same “Vision” as UTU. Snow College was directed to “apply to authorize” and were treated in such a way, both publicly and privately, that they withdrew the application. They must be notified that if the seek to authorize that can begin so immediately.

Comment 3: State Board Rule R277-552-3. Charter School Authorization Process, section -3 requires statutorily approved authorizers to apply to the State Board of Education before they can authorize. As established, the authority of the State Board to write a Rule requiring additional action for an authorizer to begin authorizing does not exist.

Of note, in R277-552-3 (4) states:

- “(4) An existing authorizer may not authorize a new charter school for the 2021-22 school year and beyond until the Board approves the authorizer’s application process.”

Thus, existing authorizers, such as Jordan School District, Salt Lake School District, etc have been required to submit documents for approval to continue authorizing activities they have engaged in for many years.

Action: R277-552-3 (4) must be revoked.

Point 1. C. State School Board or State Charter School Board engaging non-qualifying attorney to discuss litigation with charter school Board of Directors

53E-3-401. Powers of the state board -- Adoption of rules -- Enforcement -- Attorney.

- (1) As used in this section:
- (e) **The state board shall report criminal conduct of an education entity to the district attorney of the county where the education entity is located.**
- (9) The state board may audit the use of state funds by an education entity that receives those state funds as a distribution from the state board.
- (10) The state board may require, by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, that if an LEA contracts with a third party contractor for an educational good or service, the LEA shall require in the contract that the third party contractor shall provide, upon request of the LEA, information necessary for the LEA to verify that the educational good or service complies with:
 - (a) this public education code; and
 - (b) state board rule authorized under this public education code.
- (11)
 - (a) **The state board may appoint an attorney to provide legal advice to the state board and coordinate legal affairs for the state board and the state board's employees.**
 - (b) **An attorney described in Subsection (11)(a) shall cooperate with the Office of the Attorney General.**
 - (c) **An attorney described in Subsection (11)(a) may not:**
 - (i) **conduct litigation;**
 - (ii) settle claims covered by the Risk Management Fund created in Section 63A-4-201; or
 - (iii) issue formal legal opinions.
- (12) The state board shall ensure that any training or certification that an employee of the public education system is required to complete under this title or by rule complies with Title 63G, Chapter 22, State Training and Certification Requirements.

Amended by Chapter 253, 2020 General Session

Amended by Chapter 408, 2020 General Session

Comment: The SCSB has a practice of taking charter school boards into executive session, and bringing in an assistant attorney general, who essentially threatens the charter school board with civil and criminal action if they do not follow guidance of the SCSB. The SCSB has not been authorized to retain legal counsel, thus they are relying on the State Board attorney. Paragraph 8(e) makes it clear that if the SCSB alleges criminal conduct they are to consult with the district attorney the activity has taken place within. Paragraph 11 allows the hiring of an attorney, though the history of “cooperate” as found in 11(b) would not extend to inviting the assistant attorney general into an executive session to threaten a charter school board with legal action. It should be noted, the clear intent of this law 11(c)(i) is to not engage in litigation. The clear intent for litigation is found in 8(e). It should be noted that the practice of inviting either the school board attorney, or an assistant attorney general into an executive session is illegal, though it should be viewed in a broader context of law. Charter Schools can in fact appeal the decision of the SCSB and even the State Board. Legal threats are essentially saying that if a charter school board chooses to exercise Utah Statute to appeal, they will be legally attacked. This must be not only unethical

but a serious breach of attorney ethics and Utah Bar. It is a chilling violation of statute, ethics and legislative intent.

****UPDATE****

Utah State Bar – Rules of Professional Conduct

Chapter 13. Rules of Professional Conduct Preamble: A Lawyer's Responsibilities.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or **intimidate others**. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Comment: There are many responsibilities required of attorneys. We have established that the attorney representing the State Board of Education cannot engage in litigation, nor criminal prosecution, this specific jurisdiction is granted to the District Attorney within the county the activity has taken place. Thus, the State Board cannot transfer authority to the Attorney General's office, that the legislature has not granted the State Board by Statute. Chapter 13 makes it clear that attorneys are not to "intimidate," among other activities. This is also consistent with limitation on public employees coercing or threatening individuals to manipulate a desired outcome.

Point 2. Utah State University requires charter applicants to implement authorizing requirements that exceed state law during the application process and subsequent signed agreement.

Effective 5/3/2023

53G-5-404. Requirements for charter schools.

- (1) A charter school shall be nonsectarian in its programs, admission policies, employment practices, and operations.
- (2) A charter school may not charge tuition or fees, except those fees normally charged by other public schools.
- (3) A charter school shall meet all applicable federal, state, and local health, safety, and civil rights requirements.
- (4)
 - (a) A charter school shall:
 - (i) make the same annual reports required of other public schools under this public education code, including an annual financial audit report described in Section 53G-4-404;
 - (ii) ensure that the charter school meets the data and reporting standards described in Section 53E-3-501; and
 - (iii) use fund and program accounting methods and standardized account codes capable of producing financial reports that comply with:
 - (A) generally accepted accounting principles;
 - (B) the financial reporting requirements applicable to LEAs established by the state board under Section 53E-3-501; and
 - (C) accounting report standards established by the state auditor as described in Section 51-2a-301.
 - (b) Before, and as a condition for opening a charter school:
 - (i) a charter school shall:
 - (A) certify to the authorizer that the charter school's accounting methods meet the requirements described in Subsection (4)(a)(iii); or
 - (B) if the authorizer requires, conduct a performance demonstration to verify that the charter school's accounting methods meet the requirements described in Subsection (4)(a)(iii); and
 - (ii) the authorizer shall certify to the state board that the charter school's accounting methods meet the requirements described in Subsection (4)(a)(iii).
 - (c) A charter school shall file the charter school's annual financial audit report with the Office of the State Auditor within six months of the end of the fiscal year.
 - (d) For the limited purpose of compliance with federal and state law governing use of public education funds, including restricted funds, and making annual financial audit reports under this section, a charter school is a government entity governed by the public education code.
- (5)
 - (a) A charter school shall be accountable to the charter school's authorizer for performance as provided in the school's charter agreement.
 - (b) To measure the performance of a charter school, an authorizer may use data contained in:
 - (i) the charter school's annual financial audit report;
 - (ii) a report submitted by the charter school as required by statute; or
 - (iii) a report submitted by the charter school as required by its charter agreement.
 - (c) **A charter school authorizer may not impose performance standards, except as permitted by statute, that limit, infringe, or prohibit a charter school's ability to successfully accomplish**

the purposes of charter schools as provided in Section 53G-5-104 or as otherwise provided in law.

Amended by Chapter 352, 2023 General Session

Comment: Utah State University, while applying to the State School Board to authorize, pledged to Make all of their approved charters obtain 100% student proficiency at the insistence of the State School Board. This is a noble pledge, though a clear violation and in fact an impossibility to obtain. A charter that obtained 99% student proficiency would in fact be eligible for closure by violating the terms of their charter and Agreement. This requirement is forced upon all charter applicants for approval.

Point 3. Pattern of action outside of their own adopted processes

Background: Statute provides consistent authority and guidance for the SCSB. An example, guidance to “monitor” is found in both Statute and the SCSB By-laws. The key elements for Point 3 are found in **53G-5-5 Termination of a Charter Agreement**

- (1) Subject to the requirements of Subsection (3), a charter school authorizer may terminate a school's charter agreement for any of the following reasons:
 - (a) failure of the charter school to meet the requirements stated in the charter agreement;
 - (b) failure to meet generally accepted standards of fiscal management;
 - (c)
 - (i) designation as a low performing school under Title 53E, Chapter 5, Part 3, School Improvement and Leadership Development; and
 - (ii) failure to improve the school's performance under the conditions described in Title 53E, Chapter 5, Part 3, School Improvement and Leadership Development;
 - (d) violation of requirements under this chapter or another law; or
 - (e) **other good cause shown.**

Paragraph (e) is striking in the breadth of what can be used to close a charter school. Literally, any “cause” that SCSB determines is “good” can be used. Of course, a process for termination the charter school agreement must be followed, though there is little ground for a charter school to establish as guiding authority in defense. An example, **53G-5-204 Charter school innovative practices -- Report to State Charter School Board**, is an entire section that is consistent with **53G-5-104 Purpose of charter schools**. Charter school boards and school leaders will insist these two sections, among others, ensure charter schools great flexibility, yet **53G-5-5(1)(e) “other good cause shown”** creates an attitude that innovative practices are used as non-compliance.

From this statutory authority the SCSB has adopted policies to govern their activities. There are two relevant Policies: The first is a one-page policy titled “Oversight Policy” that states they will follow the other policy titled “Oversight Model.” The Oversight Model Policy has two figures (attached below, Figure 1 and Figure 2), which are to guide the oversight work. It should be noted that there are discrepancies between the two figures.

A key challenge for charter schools is when they receive a Notice of Concern. As both clarified and implied in both Statute and Policy, this is a three process: Step one is the actual notice of concern; step two is some form of communication and remedy, addressed in policy as ‘working with the charter’; and third, either resolved or the charter fails to resolve, leading to various remedies, to include termination.

Effective 5/3/2023

53G-5-501. Noncompliance -- Rulemaking.

- (1) If a charter school is found to be out of compliance with the requirements of Section 53G-5-404 or the school's charter agreement, the charter school authorizer shall notify the following in writing that **the charter school has a reasonable time to remedy the deficiency, except as otherwise provided in Subsection 53G-5-503(4):**
 - (a) the charter school governing board; and
 - (b) if the charter school is a qualifying charter school with outstanding bonds issued in accordance with Part 6, Charter School Credit Enhancement Program, the Utah Charter School Finance Authority.
- (2)
 - (a) **If the charter school does not remedy the deficiency within the established timeline, the authorizer may:**
 - (i) subject to the requirements of Subsection (4), take one or more of the following actions:
 - (A) remove a charter school director or finance officer;
 - (B) remove a charter school governing board member;
 - (C) appoint an interim director, mentor, or finance officer to work with the charter school; or
 - (D) appoint a governing board member;
 - (ii) subject to the requirements of Section 53G-5-503, terminate the school's charter agreement; or
 - (iii) transfer operation and control of the charter school to a high performing charter school, as defined in Subsection 53G-5-502(1), including reconstituting the governing board to effectuate the transfer.

The SCSB has adopted policies to implement these laws, in the two previously stated Policies. Of the two diagrams, the one titled “SCSB Oversight Model” provides specific steps, that the SCSB staff consistently disregard. The common practice is that the SCSB staff will receive a complaint, they may or may not notify the charter school regarding the complaint, and move right towards sending a Notice of Concern. It is then common practice that a charter school will send a very detailed response to the Notice of Concern and never receive a response from SCSB staff. Without SCSB response to the material sent by the charter school it is impossible for the charter school to understand if their Actions satisfy the concern. From here, without a chance to engage SCSB staff, and sadly, without even the chance to engage Board members of the SCSB, they are moved directly to “Warning” or “probation” status. It should also be noted that former SCSB Executive Director has bragged about how many notices of concern they have mailed out. It is clear they view this as a metric of success. SCSB have also made statements about penalizing charter schools, again, a serious concern.

Within the “SCSB Oversight Model” itself this policy, on the second to bottom tier titled “Review and Research” it states:

“It is anticipated and hoped that during this stage, many concerns and complaints can and will be resolved.”

To the right of this tier, in a box it states:

“seeks understanding, informal, assesses if deficiencies exist, and school may remedy deficiency.”

The Tier above this titled “Notice of Concern” additional clarification is provided, with a key being “based on identified and unresolved deficiencies.” Further, charter schools will be afforded “training and mentoring,” obviously to resolve deficiencies. It should be noted that it is common that charters may have no idea or notice they are being investigated, and will not have an opportunity to address anything until they receive a Notice of Concern.

The intent of statute and SCSB policy is that between these two Tiers, charter schools are to be given a chance to respond and possibly correct, before they even received a Notice of Concern. And, even with the Notice of Concern, they continue to receive an opportunity to correct, receive support and mentoring. If the last 20 charter schools that have been placed on Warning or Probation are surveyed, they will likely note the lack of notice provided and the lack of opportunity to work with SCSB staff to resolve any deficiencies. It is the common practice of the SCSB staff to move rapidly to “warning” and corrective action without working with charter school staff to resolve issues.

Policy “Oversight Model”: Charter School Accountability Framework

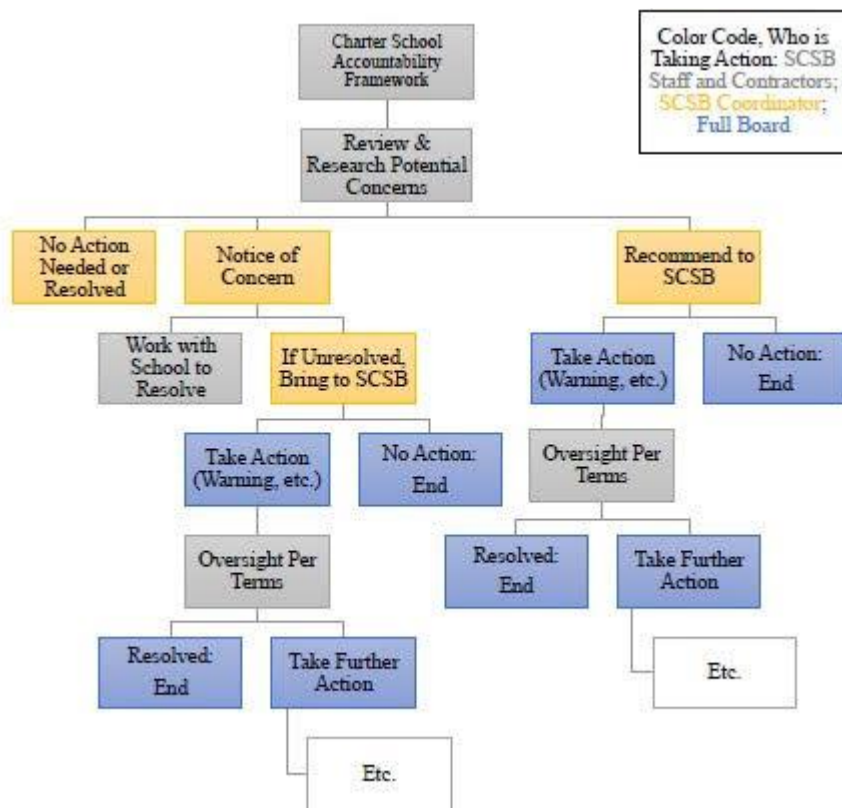


Figure 1

Policy “Oversight Model”: SCSB Oversight Model

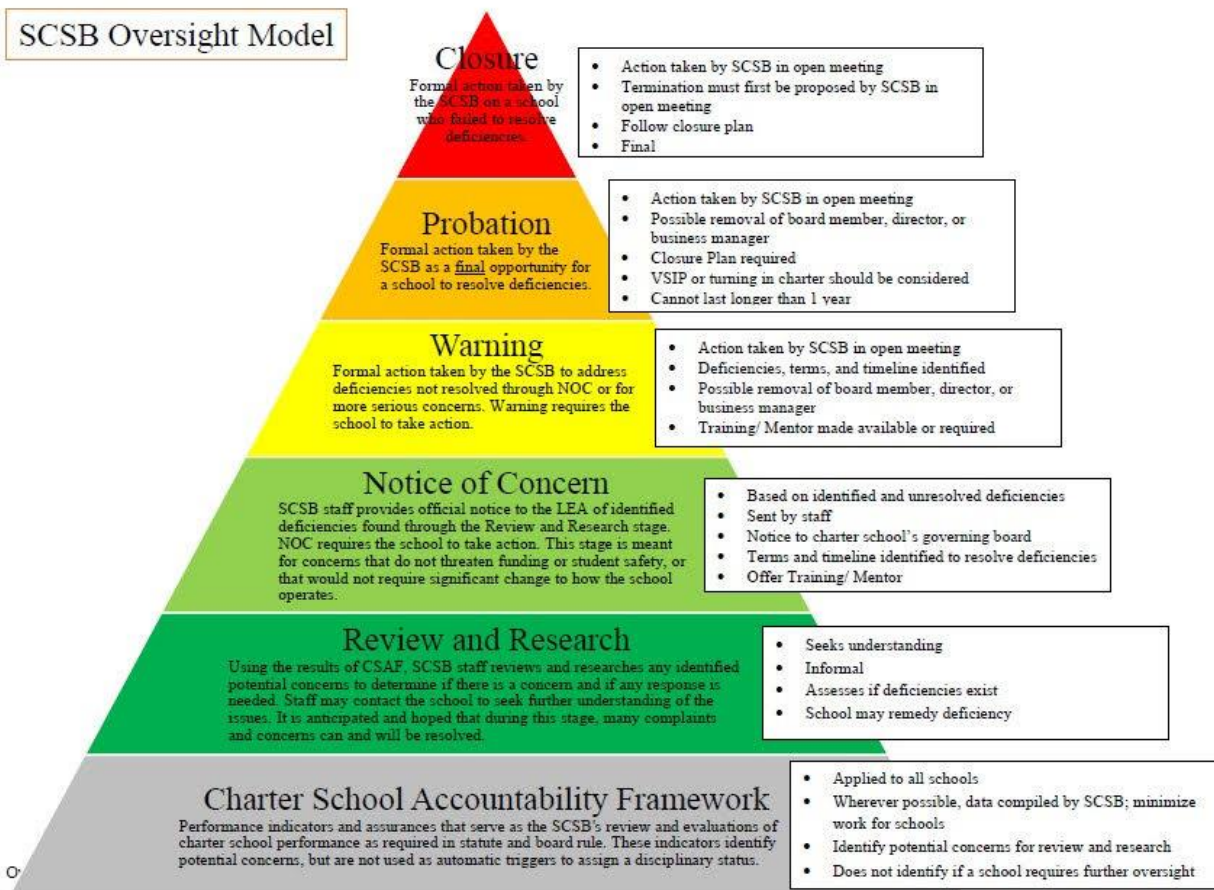


Figure 2

An additional concern to be considered would possibly be reflected by the overly broad language found in **53G-5-5(1)(e)** “**other good cause shown.**” Charter schools frequently suffer a form of “double jeopardy” relative to compliance issues regulated by other entities. This could include Special Education, school lunch, School and Institutional Trust Lands (SITLA), etc. While the SCSB has broad oversight of charter schools, it is very common that a charter school will be notified by another agency of the State Office of Education relative to compliance questions with a specific charter. The charter school will respond to that agency, and identify a solution to the question raised, yet the SCSB staff will frequently intervene, and send a “Notice of Concern” for the exact issue. A greater concern are the times in which SCSB staff have sought to determine compliance with these other regulatory areas, that they clearly have no training, understanding or knowledge. As in, SITLA may be satisfied with the process and submission of the annual grant, though SCSB staff we disagree and hold the charter in non-compliance for conduct already deemed sufficient by the other agency staff.

It should be noted that these policies do not consistently identify due process for resolving issues before a charter receives a Notice of Concern, and possibly even put on “warning” or “probation.” Under the “Oversight Model” (Figure 1) it is clear that they are to “Work with school to resolve” though the same policy also makes it clear SCSB does not have to work with a charter school, and move right to Notice of Concern. There is no clarity as to why one action was chosen over the other. It is common that a charter school will never know they are being investigated, they will get a Notice of Concern, the charter school will respond in detail to the Notice of Concern, then never hear a response to the submission, and then be placed on “Warning.” This speaks of a lack of inherent Due Process. How can any charter school successfully navigate the statute and policies without meaningful engagement?

Under the “SCSB Oversight Model” there are many statements that imply working with a charter school to resolve deficiencies prior to any action being taken. This theme is consistent throughout the statute. In fact, there is only one area of law that clearly states the SCSB may move right towards closure, which is referenced in **53G-5-501(1)**:

“..., except as otherwise provided in Subsection **53G-5-503(4)**.”

(This reference was shared above, page 12.)

When you read the reference found within this section of law that enables immediate closure you find another conflicting, yet clearly implied process for remedy.

53G-5-503(4):

“(4)

- (a) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the state board shall make rules that require a charter school to report any threats to the health, safety, or welfare of its students to the State Charter School Board in a timely manner.
- (b) The rules under Subsection (4)(a) shall also require the charter school report to include what steps the charter school has taken to remedy the threat.

Ironically, or possibly, inconsistently, while 53G-5-501(1) can move right to closure, the law referenced itself directs to charter school to “...report...what steps...has been taken to remedy the threat.” For the many, many instances where the SCSB has decided to not “work with the school” in resolving Notices of Concern, almost none of them ever reflect eminent harm to students. Again, in order for 53G-5-503(4)(b) to be executed, it can only take place if the charter has been notified, and given time to respond with how they remedied the threat.

It is clear that the SCSB has a pattern of inconsistent conduct relative to inconsistent policies and language. It is also very clear that the ‘intent’ of the legislature that in all cases, to include safety of students, the authorizer is to work with the charter school in finding remedies. Notice of Concern was never intended as a metric to measure the success of staff, but a tool when solutions cannot be found or agreed upon.

Something very unfortunate has become of the constant violations of statute and policy by SCSB staff: a culture of perceived criminality of charter school boards and administration by the faculty, staff and parents of the charter schools.

The SCSB has acted very aggressive towards several charter schools, denying them due process, as the SCSB somewhat follow their policies. The community of each charter school becomes aware of the allegations, though rarely all of the details, though a perception is created that every perceived wrong doing at the charter school must be elevated to complaints to various state agencies. Every time a parent is not happy, a staff member is terminated, a decision is made about school lunch or field trips, etc adults have been taught that they must contact the state and file complaints. Charter school leaders will tell of this form of harassment taking place years after the Notice of Concern. Most complaints by faculty, staff and parents, by law are handled by the LEA Board of Directors, just like a school district, yet instead charter school administration is responding to a steady stream of oversight by SCSB staff. This is a significant breach in trust between a community and the leadership of the charter school.

It is suggested that a survey drafted and sent to the last 20 charter schools that have received a Notice of Concern, and if they believe they were afforded due process according to the SCSBs own Policy.

- Question 1: Were you notified of compliance questions raised, or complaints made against your charter school prior to receiving a Notice of Concern?
- Question 2: Were you able to discuss meaningfully with SCSB to resolve?
- Question 3: Were areas of non-compliance by other agencies the source of SCSB actions?
- Question 4: Were complaint(s) areas properly addressed by the LEA Board of Directors, not authority granted by 53G-5 to the SCSB?
- Question 5: Was the basis of the complaint employment related, and thus addressed by a different section of Statute?
- Question 6: Once notified by SCSB, did the SCSB provide timely feedback to your response?
- Question 7: Were you able to raise concerns with the actual Board of the SCSB about the complaints, nature of process or your response?
- Question 7: Were you notified of the ability to appeal the decision by the SCSB?
- Question 8: At any time were you told by legal counsel from the State Board or Attorney General's office that appealing a decision would be grounds for further, much more aggressive legal action?

Charter schools are 'at-will' for employment and 'choice' for parents, thus if an employee or parents are dissatisfied by the response of the charter school board of directors the intent of State statute is for the employee or parent to have the ease of leaving the charter school. Did the SCSB engage in regulatory oversight of a question or complaint that should have remained the purview of the charter school board? ****UPDATE** A formal survey has been created and responses are being gathered.**

R277-552-3. Charter School Authorization Process.

- (1) An individual or non-profit organization as described in Subsection 53G-5-302(2)(b) may apply to open a charter school from any **statutorily approved authorizer.**
- (2) **An authorizer shall submit a process to the Board for approval of:**
 - (a) a new charter school;
 - (b) a request from a school to change authorizers;
 - (c) a charter school expansion; or
 - (d) a satellite school.
- (3) **A new authorizer shall submit a new charter school application process to the Board for approval at least six months before accepting applications for a new charter school.**
- (4) **An existing authorizer may not authorize a new charter school for the 2021-22 school year and beyond until the Board approves the authorizer's application process.**
- (5) **(a) The Board shall approve** or deny an authorizer's proposed application process, including expansion and satellite approval processes, within 90 days of receipt of the proposed process from an authorizer.
 - (b) If the Board denies an application process, the Superintendent shall provide a written explanation of the reasons for the denial to the applicant within 45 days.
 - (c) If an authorizer's application process is denied, the authorizer may submit a revised application process for approval at any time.
- (6) An authorizer shall have an application and charter agreement, which shall include all elements required by Title 53G, Chapter 5, Part 3, Charter School Authorization.
- (7) An authorizer shall maintain the official signed charter agreement, which shall presumptively be the final, and complete agreement between a school and the school's authorizer.
- (8) An authorizer's review process for a new charter school shall include:

- (a) a plan for mandatory pre-operational and other trainings;
 - (b) an evaluation of the school’s governing board, including:
 - (i) a review of the resumes of and background information of proposed governing board members; and
 - (ii) a capacity interview of the proposed governing board;
 - (c) an evaluation of the school’s financial viability, including:
 - (i) a market analysis;
 - (ii) anticipated enrollment; and
 - (iii) anticipated and break even budgets;
 - (d) an evaluation of the school’s academic program and academic standards by which the authorizer will hold the school accountable; and
 - (e) an evaluation of the school’s proposed pre-operational plan, including implementation of:
 - (i) applicable legal requirements for public schools;
 - (ii) required policies;
 - (iii) student data systems, including student data privacy requirements;
 - (iv) reporting; and
 - (v) financial management.
- (9) An authorizer’s review process shall include contacting the school district in which a proposed charter school will be located and consideration of any feedback provided by the district.
- (10) An authorizer shall design its approval process so that the authorizer notifies the Superintendent of an authorizer approval of a request identified in Subsection (2) no later than October 1, one fiscal year before the state fiscal year the charter school intends to serve students

Point 4 Excessive Reports

On December 13, 2019, State Legislative Auditor Kade Minchey submitted Audit Number 2019 14. The purpose was to determine how many audits, surveys, informational requirements are made of public schools in Utah every year. These reports create such a large body of information, it needs to be reviewed.

Point 5 Special Education flexibility in Utah.

This law allows school officials shall make the best decisions for the students and to maximize local control and flexibility. When charter schools do this, they can be targeted by the State Office. Thus, all decisions made by the school official can be used against the school official, a 'kill switch. If they take the most restrictive, they are in violation of paragraphs 2(b) and 2(c). If they do and the state disagrees, they are now in violation of general Special Education codes.

Effective 5/14/2019

53E-3-802. Federal programs -- School official duties.

- (1) **School officials may:**
 - (a) apply for, receive, and administer funds made available through programs of the federal government;
 - (b) only expend federal funds for the purposes for which they are received and are accounted for by the state, school district, or charter school; and
 - (c) reduce or eliminate a program created with or expanded by federal funds to the extent allowed by law when federal funds for that program are subsequently reduced or eliminated.
- (2) **School officials shall:**
 - (a) prioritize resources, especially to resolve conflicts between federal provisions or between federal and state programs, including:
 - (i) providing first priority to meeting state goals, objectives, program needs, and accountability systems as they relate to federal programs; and
 - (ii) subject to Subsection (4), providing second priority to implementing federal goals, objectives, program needs, and accountability systems that do not directly and simultaneously advance state goals, objectives, program needs, and accountability systems;
 - (b) **interpret the provisions of federal programs in the best interest of students in this state;**
 - (c) **maximize local control and flexibility;**
 - (d) minimize additional state resources that are diverted to implement federal programs beyond the federal money that is provided to fund the programs;
 - (e) request changes to federal educational programs, especially programs that are underfunded or provide conflicts with other state or federal programs, including:
 - (i) federal statutes;
 - (ii) federal regulations; and
 - (iii) other federal policies and interpretations of program provisions; and
 - (f) seek waivers from all possible federal statutes, requirements, regulations, and program provisions from federal education officials to:
 - (i) maximize state flexibility in implementing program provisions; and
 - (ii) receive reasonable time to comply with federal program provisions.

- (3) The requirements of school officials under this part, including the responsibility to lobby federal officials, are not intended to mandate school officials to incur costs or require the hiring of lobbyists, but are intended to be performed in the course of school officials' normal duties.
- (4)
 - (a) As used in this Subsection (4):
 - (i) "Available Education Fund revenue surplus" means the Education Fund revenue surplus after the statutory transfers and set-asides described in Section 63J-1-313.
 - (ii) "Education Fund revenue surplus" means the same as that term is defined in Section 63J-1-313.
 - (b) Before prioritizing the implementation of a future federal goal, objective, program need, or accountability system that does not directly and simultaneously advance a state goal, objective, program need, or accountability system, the state board may:
 - (i) determine the financial impact of failure to implement the federal goal, objective, program need, or accountability system; and
 - (ii) if the state board determines that failure to implement the federal goal, objective, program need, or accountability system may result in a financial loss, request that the Legislature mitigate the financial loss.
 - (c) A mitigation requested under Subsection (4)(b)(ii) may include appropriating available Education Fund revenue surplus through an appropriations act, including an appropriations act passed during a special session called by the governor or a general session.
 - (d) This mitigation option is in addition to and does not restrict or conflict with the state's authority provided in this part.