

Memorandum – Updated 1 NOV 23

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: 1 Nov 2023

Points (Updated)

1. A review of Statute demonstrating that the State School Board has taken actions outside of statutory authority, including.
****We understand the language does not expressly direct statutorily approved authorizers to apply to the State Board before they can authorize, though the State Office of Education stated legislative intent was to require LEAs/Universities to apply.**
 - 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.
****Seek to clarify the timeline of any application process, which currently results in an statutorily approved authorizer taking upwards of 24 months to begin authorizing.**
 - b. Requiring Iron County Schools to “apply” to the State School Board prior to being able to approve a charter application.
****Charter applicant has subsequently applied to the State Charter School Board and has been approved. Still seeking adjustment to timeline for approved authorizers to begin authorizing. See point 1.a. above.**
 - 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.
****A meaningful conversation with Attorney General’s Office, with an understanding on clarity on language used when conversing with a charter school board of directors. (Will explain the policy discussion)**
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.
****Conversation by Legislative Staff with USU regarding 100% proficiency requirement have taken place. We seek to have this clarified in the process used by USU, to include allowing for clarifying amendments to subsequent charters authorized charters. That is essential. See**
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.
****The State Charter School Board has adopted a new Strategic Plan that, we are optimistic, we change both the manner and focus of future oversight activities; further, proposed**

legislation will memorialize the changed focus on oversight, as well ensure greater due process for charters alleged to have committed errors or non-compliance.

4. Excessive reports – State Board of Education Auditor found over 400 reports due a year. Audit provided upon request. **Future discussion**
5. Special Education Flexibility as identified in 53E-8-302(2).
****Still need to address a process to eliminate “kill switches.”**

Outstanding discussion

1. Clarify timeline for statutorily approved authorizers to begin authorizing, **Rule277-552-3**
2. Ensure the requirement for 100% proficiency is adjusted to come into compliance of 53g-5-404(5)(c).
3. Explain the clarification on legal communications to charter school boards.
4. To better understand why this formal complain was submitted in the first place, provide in detail an example of ‘what happened.’
5. Explain Special Education ‘kill switches’, a process for appeal must exist
6. Presentation of Draft Legislation to address most of these issues – Seek status as Committee Bill for Administrative Rules Review Committee
7. Request annual report of progress being made relative to these issues

Outstanding Discussion 1

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.
- (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**

Solution: Clarify if the intent is an actual application process by LEAs, and timeframe of approval, prior to operating charter schools.

Outstanding Discussion 2

53G-5-404 Requirements of a charter school

Authorizer imposing performance standards – USU requirements

- (5)(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

It needs to be noted that when staff for Administrative Rules Review spoke to the staff at Utah State University they noted it was desired to achieve 100%, a goal they would “strive” for, though the goals, charter and subsequent Agreement all have 100% as a requirement.

It should be noted that a consequence of non-compliance can be termination. While that option is not likely to be exercised in a situation like this, it could also include placing a charter school on ‘Warning’ or “probation” as well requiring them to develop a remediation plan, hire consultants, engage in authorizer oversight, etc. If 100% remains a requirement per formal documents, it guarantees failure to comply.

Solution: Communicate with USU, ensure charters are not being held to 100% proficiency requirements

Outstanding Discussion #3

Understanding previous point re: legal conversations within Executive Session

The previous document cited two statutes that clarified that all allegations relative to criminal prosecution is handled by the District Attorney 53E-3-401(1)(e) and, further that they may not conduct litigation (53E-3-401 (11)(a). Further, Utah State Bar Rules of Professional Conduct, Chapter 13, Section 5 was cited, regarding conduct that may be perceived as “intimidate others.”

The concern is that Board of Directors would be into an executive session with the SCSB and supporting staff, and at some point would be informed that they would or could be prosecuted. We understand there is a balance between explaining possible outcomes, versus the perception of simply ‘do as you are told or you will be prosecuted.’ Understanding that the attorney in this circumstance may not engage in litigation or prosecution, how any related discussion is handled is extremely important. Charter Schools retain a couple options to disagree with the State Charter School Board, or even the State Board, and what may be perceived as a threat is contrary to legislative intent.

It should be kept in mind that it is reasonable that most of the times in which a charter school board of directors goes into an executive session would be one in which the Board of Directors disagrees with the conclusion and/or recommendations of the State Charter School Board.

Solution: In speaking with the Attorney General’s office, they will speak with the Assistant Attorney Generals who handled Education matters, and ask them to be very thoughtful regarding nomenclature used in such executive sessions.

Outstanding Discussions #4

What happened leading to this formal complain

The Utah Military Academy story

When Representative Oda and Throckmorton first met with Administrative Rules Review Staff with a list of concerns and complaints, there were two requests. The first, was to ensure the conversation was about specific Rules and Policies, which was the bulk of the original complaint. The second, that staff would frequently hear concerns and complaints, though people were frequently afraid to speak up regarding their specific experience. We immediately volunteered to tell what happened to UMA, which has resulted in significant harm to the school, personnel, reputation, performance and has growth.

Outstanding Discussion #5

Understanding Special Education ‘Kill Switches’

Special Education is both a State and Federal Law. Better known by Sped, at the Federal level it is known by the acronym of the Federal law, which is Individuals with Disabilities Education Act, or IDEA. For ease of oversight and implementation the State Board has wisely adopted the Federal handbook, which then makes this the official policy for the State of Utah, all LEAs, Charters and schools.

Found within Utah law is 53E-3-802, which was updated in 2019. It is not a suggestion, but the law. Paragraph two below:

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

(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;**

There is often intentional ambiguity within the law, as well the Federal policy handbook, which allows for schools to implement flexibility. Yet, this can be used against charter schools, with no process of appeal.

Example: A school may pay for a portion of an employee's salary from Sped/IDEA funds from those restricted accounts, if the employee spends a portion of their time doing Sped/IDEA work. With no set formulaic standard, and no process to appeal, the simple act of disagreement is deemed a violation of law.

The ‘kill switch’ terminology fits, in that schools have felt they have been targeted, and without standards or appeals, every school can be found in violation. Thus, every school can be guilty.

Solution: A review and appeal process must be established.

Outstanding Discussion #6

Presentation of Draft Legislation to address many concerns raised Seeking Status as “Committee Bill” by Administrative Rules Review Committee

In the previous, formal complaint, the non-compliance by SCSB staff to their own policies was highlight. We shared the processes adopted by the SCSB, yet not complied with. Since this time the SCSB under the leadership of Dr. Brian Bowles, Chairman, and Dr. Cindy Phillips, have developed a Strategic Plan that should significantly alter this discussion. This plan has subsequently been unanimously adopted by the full State Charter School Board. In addition, they have engaged in a significant restructuring of staff, to include a new Executive Director and promotion of a highly respected employee to a new position of Deputy Director.

It should be noted that a concern raised, was not just non-compliance by SCSB staff to their own policies, though also enforcing oversight in areas a charter school is accountable to other entities. The SCSB recognizes this is Examples include school lunch, SITLA, Special Education, etc. The Strategic Plan they have adopted recognizes this and will no longer engage in such activities. Representatives Oda and Throckmorton are optimistic that this will address the many examples of oversight concerns by previous SCSB Staff.

Presentation of Draft Legislation by Rep. Curt Oda, Rep. Matt Throckmorton, Dr. Cindy Phillips (or assign), Dr. Paul Kremer. Representative Karianne Lisonbee has expressed desire and willingness to be the House Sponsor.

Solution: Adopt draft legislation as Committee Bill

Outstanding Discussion #7

Annual presentation to the Admin Rules Review Update on the ‘400 reports’ audit

We understand the purpose of the Administrative Rules Review Committee is to not have regular reporting and oversight to any specific agency or department within the State of Utah. The expected process for oversight of charter schools is that of the Education Standing Committee. Both legislators have extensive experience with both committees, as Representative Oda chaired the Admin Rules Review Committee for many years, and Representative Throckmorton served on the Education Standing and Interim Committee for many years. And both have spent two plus decades work various policy issues before many committees.

From our original document:

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.*

The State of Utah annually invests approaching a billion dollars within charter schools. And for many years, many serious complaints, and concerns have been raised regarding activities on the

authorizing aspect of charter schools. Admin Rules Review is perfectly situated to oversee these compliance concerns, and your engagement thus far has helped, and will significantly help and support resolutions.

We are optimistic that the new Strategic Plan, and the draft legislation, as well the awareness and commitment from the Attorney General's office, will significantly alter the landscape of charter schools in Utah. Utah should be – quite literally – the premier education state in the Union. We have some of the finest models found anywhere, yet we are not. That can and should change.

Request: Annual report on implementation on draft legislation, new Strategic Plan and other items agreed upon.