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FORMAL OPINION	)	No. 12-01
OF	)	AG Alpha No. ED SB AGBDO
JOHN W. SUTHERS Attorney General	)	January 23, 2012

This opinion, requested by Commissioner of Education Robert K. Hammond, concerns whether it is permissible for the State Board of Education (hereinafter the "State Board") to grant waivers to a school district under the Innovation Schools Act of 2008 (hereinafter the "Act"), when the program for which waivers are being requested is an entirely new program and not an existing school. For the reasons discussed in this memorandum, I conclude that the State Board may grant waivers to a school district under the Innovation Schools Act for a new program, unless the innovations are likely to result in a decrease in academic achievement or unless the plan for the new school is not fiscally feasible.

QUESTION PRESENTED AND CONCLUSION

Question: Whether the State Board has the authority to approve waivers under the Act for an innovation school that is not a pre-existing school.

Answer: Yes. So long as the proposed school is not likely to result in a decrease in academic achievement or unless the plan for the new school is not fiscally feasible, the State Board has the authority to approve waivers for a new innovation school.

BACKGROUND

I. The Innovation Schools Act of 2008

A. Purpose of the Act

Enacted in 2008, the Act begins with a recognition of the importance of preserving local flexibility by granting each school district board of education the control of instruction in the schools of the district, and that this doctrine of "local control" is based on the belief that the delivery of educational services must be tailored to the specific population of students that schools are intended to serve. Section 22-32.5-102(1)(a - b), C.R.S. Furthermore, in tailoring the delivery of educational services, the Act specifies that the principal and the faculty employed at the school should have the maximum degree of flexibility possible to determine the most effective and efficient manner in which to meet their students' needs. Section 2-32.5-102(1)(c), C.R.S.

To that end, the Act declares the purpose of the legislation to be granting each local school district board of education the authority to grant public schools of the district the maximum degree of flexibility possible to meet the needs of individual students and the communities in which they live. Section 22-32.5-102(1)(d), C.R.S. The Act encourages local school district boards of education to delegate to each public school a high degree of autonomy in implementing curriculum, making personnel decisions, and organizing the school day. Section 22-32.5-102(1)(e). C.R.S. In order to accomplish this, the Act allows school districts to "create and manage a portfolio of schools that meet a variety of educational needs, including identifying elementary, middle or junior high, and high schools to collectively operate as a vertically integrated innovation zone of schools..." Section 22-32.5-102(2)(d), C.R.S.

B. Submission and Approval of Innovation School Plans

Innovation Schools and Innovation School Zones may be created by the submission of an innovation plan to the local board of education, either on the initiative of a local public school or a group of public schools, section 22-32.5-104(1)(a), C.R.S., or on the initiative of the local board of education itself. Section 22-32.5-104(2), C.R.S. If the plan is submitted by a local school or group of schools, the local board of education must either approve or disapprove the plan for creating an innovation school or an innovation school zone within sixty days of receiving the plan. Section 22-32.5-104(1)(b), C.R.S. If the plan is initiated by the local board of education, then the local board of education is required to ensure that each public school that would be affected by the plan has an opportunity to participate in the creation of the plan. Finally, the local board of education may, but is not required to, seek designation of the school district as a district of innovation by the State Board pursuant to section 22-32.5-107, C.R.S.

Each innovation plan, whether initiated by a local school or group of schools or by the local board of education, must include certain information. For a plan to create an individual innovation school, this information must include a statement of

the public school's mission and why the designation as an innovation school would enhance the school's ability to achieve its mission; a description of the innovations the public school would implement; a listing of the programs, policies or operational documents within the public school that would be effected by the identified innovations; identification of the improvements in academic a performance; an estimate of cost savings the public school expects to achieve; evidence of majority support for the plan by the administrators and teachers employed at the school, and evidence of majority support by the school advisory council; a statement of the level of support by other persons employed at the public school, by students and parents, and by the surrounding community; a description of any statutes, regulations or school district policies that would need to be waived in order to implement the plan; and a description of any provisions of the collective bargaining agreement in effect for personnel at the school that would need to be waived for the plan to be implemented. Section 22-32.5-104(3)(a-i), C.R.S. Similar descriptions must also be included in a plan for an Innovation School Zone. Section 22-32.5-104(4), C.R.S.

C. State Board Designation of Districts of Innovation

Once an innovation plan is submitted to and approved by a local board of education pursuant to section 22-32.5-104(1) or (2), C.R.S., the local board of education may, but is not required to, seek designation by the State Board as a "district of innovation". Section 22-32.5-107(1), C.R.S. In order to seek such designation, the local board must submit the innovation plan to the Commissioner of Education for review and comment by the Commissioner and the State Board. Within sixty days after receiving the plan, the Commissioner and the State Board must review the plan and respond with any suggested changes or additions to the plan, including suggestions for further innovations or for measures to increase the likelihood that the innovations will result in greater academic achievement. Based upon the Commissioner's and the State Board's comments, the local board of education may then choose to withdraw and resubmit its plan. Section 22-32.5-107(2), C.R.S. Tellingly, the Commissioner's and State Board's review of the plan is not required to determine whether or not the plan comports with the statutory criteria for plan inclusion, just suggestions for further innovations or measures to improve academic achievement.

Within sixty days after receiving the local board's plan for innovation, the Act states that the State Board:

> "shall designate the local school board's school district as a district of innovation unless the State Board concludes that the submitted plan:

(I) Is likely to result in a decrease in academic achievement in the innovation schools or innovation school zones; or

(II) Is not fiscally feasible."

Section 22-32.5-107(3)(a), C.R.S.

The Act goes on to state that, upon designation of a district of innovation, the State Board "*shall* waive any statutes or rules specified in the school district's innovation plan as they pertain to the innovation schools or innovation school zones of the district of innovation...", with a few specified exceptions. Section 22-32.5-108(1), C.R.S. (Emphasis added.) Furthermore, on or after the date on which the State Board designates a school district as a district of innovation, any collective bargaining agreement entered into by the local school board "shall include a term that allows each innovation school and each innovation school zone in the school district to waive any provisions of the collective bargaining agreement identified in the innovation plan as needing to be waived for the innovation school or the innovation school zone to implement its identified innovations." Section 22-32.5-109(1)(a), C.R.S. However, before any such waiver can take effect, the school district must obtain the approval, by means of a secret ballot vote, of at least sixty percent of the members of the collective bargaining unit who are employed at the innovation school. Section 22-32.5-109(1)(b), C.R.S.

D. Denver Public School's Innovation Schools Act Applications

In the Spring of 2011, the Denver Public Schools Board of Education approved two innovation plans. Both plans underwent review by the Denver Public School's Office of School Reform and Innovation and an Application Review Team before winning final approval from the Board of Education. The first, the Denver Center for 21st Century Learning at Wyman ("DC-21"), was slated to open in the former Wyman Elementary School building in Northeast Denver and to have a focus on successfully preparing and graduating high-risk students grades six through twelve. The second, High Tech Early College ("HTEC"), would also be located in Northeast Denver and would be a concurrent enrollment program allowing students to earn a dual high school diploma and Associate of Arts degree in partnership with the Community College of Aurora.

Both innovation plans involved the creation of entirely new schools, not the conversion of existing public schools to innovation schools. Thus, neither proposed school had existing administrators, faculty, staff, or accountability committees from which to obtain evidence that "a majority of the administrators employed at the public school, a majority of the teachers employed at the public school, and a majority of the school accountability committee for the public school consent to

designation as an innovation school" as set forth in section 22-32.5-104(3)(f), C.R.S. The HTEC Plan sought to meet this requirement by stating that "[a]s a new school, HTEC administrators, faculty, and staff demonstrate their support for the Innovation Plan by choosing to work at the school. Additionally, as a new school, a Collaborative School Committee has not been established." High Tech Early College Innovation School Application at p. 44. Similarly, the DC-21 Plan stated that "DC-21 is a new school who has not yet hired any faculty or staff beyond the principal. DC-21 in its hiring process will be looking for teachers and staff who are naturally innovative and believe in this innovation plan to drive student achievement. Administrators, faculty and other staff employed by the school will receive a copy of the Innovation Plan. By accepting employment at DC-21, employees are showing their belief in and commitment to the innovation plan." Denver Center for 21st Century Learning at Wyman Innovation School Application at p. 52.

E. State Board Approval of the Innovation Plans

The DC-21 Plan was submitted by DPS to the State Board for approval for designation as a District of Innovation pursuant to 22-32.5-107(3)(a), C.R.S., on April 8, 2011. The HTEC Plan was submitted on May 6, 2011. Both Plans were submitted because DPS sought waivers from state statutes and rules specified in the Innovation Plans for the respective schools.

The State Board considered both Innovation Plans at their June 8, 2011, meeting. In its staff recommendation concerning the item, CDE noted that the Innovation Plans did not comply with the requirements of section 22-32.5-104(3)(f), C.R.S., in that there was no evidence that a majority of the administrators, teachers, and school accountability committee consented to the designation as an innovation school. However, the Department recommended construing the statute broadly and "finding that if a school does not yet exist, the district cannot comply with this subsection of the Act." The Department found that, with the exception of this subsection, the applications were in compliance with the requirements set forth in the Act. Finally, the Department noted that the Act requires the State Board to grant innovation status and waivers unless (1) the innovations are likely to result in a decrease in academic achievement or (2) the plan is not fiscally feasible. Since DPS believed that the plans were designed to increase student achievement and were fiscally sound, the Department recommended that the State Board approve the applications for HTEC and DC-21. The State Board agreed, and granted the requested waivers of statute and rule for the proposed innovation schools.

DISCUSSION

The legal matter at issue is whether the State Board has the authority to approve waivers under the Act for an innovation school that is not a pre-existing

school. In examining this issue, this memorandum examines two separate questions — the authority of the local school district to approve Innovation Plans and the oversight authority of the State Board with respect to requests for waivers.

I. Authority of Local School Boards

The initial question is whether, as the statute is currently written, a local school district is authorized to approve a plan of innovation that involves the creation of a new school. I conclude that it is.

When construing statutes, the court must determine and give effect to the intent of the legislature, and adopt the statutory construction that best effectuates the legislative purposes underlying the enactment. *City and County of Denver v. Gonzales*, 17 P.3d 137, 140 (Colo. 2001); *Shapiro and Meinhold v. Zartman*, 823 P.2d 120, 123 (Colo. 1992). Thus, a statute should be given the construction which will render it effective in accomplishing the purpose for which it was enacted. *Zaba v. Motor Vehicle Division*, 183 Colo. 335, 340, 516 P.2d 634 (1973); *Firstbank of North Longmont v. Banking Bd.*, 648 P.2d 684, 685 (Colo.App. 1982). In determining the intent of the general assembly, it is presumed that a just and reasonable result is intended, and that the public interest is favored over any private interest. In making that determination, the court may consider, among other things, the consequences of a particular construction. *Hoffman v. Hoffman*, 872 P.2d 1367, 1369 (Colo.App. 1994). In this regard, perhaps the best guide to the intent of the legislature is the declaration of policy that frequently forms the initial part of the enactment. *St. Luke's Hosp. v. Indus. Comm'n*, 142 Colo. 28, 33, 349 P.2d 995 (1960).

In construing the Act, therefore, I note that the Act recognizes the importance of preserving local flexibility by granting each school district board of education the control of instruction in the schools of the district, and that this doctrine of "local control" is based on the belief that the delivery of educational services must be tailored to the specific population of students that schools are intended to serve. Section 22-32.5-102(1)(a - b), C.R.S. According to the Act, the legislative purpose underlying the legislation is to grant each local school district board of education the authority to give its schools the maximum degree of flexibility possible to meet the needs of individual students and the communities in which they live. Section 22-32.5-102(1)(d), C.R.S. Thus, the Act encourages local school district boards of education to delegate to each public school a high degree of autonomy in implementing curriculum, making personnel decisions, and organizing the school day. Section 22-32.5-102(1)(e), C.R.S. In order to accomplish this, the Act allows school districts to "create and manage a portfolio of schools that meet a variety of educational needs, including identifying elementary, middle or junior high, and high schools to collectively operate as a vertically integrated innovation zone of schools." Section 22-32.5-102(2)(d), C.R.S.

Thus, the Act is intended by the legislature as an empowerment of, and not a restriction upon, local school districts in granting local schools maximum flexibility and autonomy consistent with the local board's constitutional authority of control of instruction in their respective districts. Colo. Const. art. IX, § 15. Nothing in the Act limits its terms to previously existing schools. Although the statute requires innovation plans to include evidence of majority support from administrators, faculty and the school accountability committee for existing schools proposing such a plan, section 22-32.5-104(3)(f), C.R.S., nothing in the statute requires such approval as a precondition for a local board of education to approve an innovation plan. Indeed, for innovation plans initiated by the local board itself, the statute requires only an "opportunity to participate in the creation of the plan" for those schools which would be affected. Section 22-32.5-104(2), C.R.S. Clearly, if the innovation plan contemplates only the creation of an entirely new school, no existing administrators, faculty, or accountability committee members would be affected.

The alternative construction would de facto limit the applicability of the Act to only those preexisting schools with an established administration, faculty and accountability committee, since it would otherwise be impossible to provide evidence of majority support for the plan from these groupings. However, such an interpretation would create the absurd result of the Act actually restricting the flexibility and autonomy of local districts rather than increasing it, as the Act clearly intended. When giving statutory language such a stilted interpretation creates an absurd result, the intention of the legislature will prevail over such interpretation. *People v. Bowman*, 812 P.2d 725, 729 (Colo.App. 1991); *People v. Pipkin*, 762 P.2d 736, 737 (Colo.App. 1988). Thus, a statutory interpretation that defeats the legislative intent or leads to an absurd result will not be followed. *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998); *State Bd. of Med. Exam'rs v. Saddoris*, 825 P.2d 39, 42 (Colo. 1992). No provision of the law should be interpreted in a way which requires an impossible task. *People in Interest of K.M.J.*, 698 P.2d 1380, 1382 (Colo.App. 1984).

The legislative intent behind section 22-32.5-104(3)(f), C.R.S. is clear – if the innovation plan would affect the existing employment of administrators or faculty at an existing school, then the plan must include evidence that a majority of such administrators and faculty are in favor of the plan. The Innovation Plans for DC-21 and for HTEC, by contrast, involve new schools which will not affect the existing employment of faculty and administrators, and thus no such evidence need be provided. Indeed, the provision of such evidence would be impossible in such a circumstance, since no administrators or faculty for such schools exist. Rather, as stated in the Plans at issue, administrators and faculty would demonstrate support for these innovative educational programs by voluntarily accepting employment at the new schools.

II. Limited Oversight Role of the State Board

Under the wording of section 22-32.5-107, C.R.S., the Department and State Board's review of innovation plans submitted by the district is limited to whether such a plan would decrease academic achievement or would be fiscally unfeasible.

Courts must interpret statutory language by first looking to the plain meaning, then to the objective of the general assembly, giving a sensible, yet harmonious effect to the statute. *Matter of Title, Ballot Title for 1997-98 # 62*, 961 P.2d 1077, 1079-1080 (Colo. 1998). In the case of the Act, innovation plans are submitted to the State Board after review and comment by the Commissioner of Education. However, it is clear from the language of the Act that the Commissioner's review of the plan is not meant to determine whether or not all the plan elements in section 22-32.5-104(3), C.R.S., are present. Rather, the review is clearly intended to be limited to whether the plan's proposed educational program will increase academic achievement. Thus, section 22-32.5-107(2), C.R.S., specifies that the Commissioner may suggest additions or alterations to the plan that would result in "further innovations" or that "will result in greater academic achievement within the innovation schools..."

Furthermore, the State Board's ability to reject District of Innovation status for an innovation plan is statutorily restricted. Thus, section 22-32.5-107(3)(a), C.R.S., states that:

> "...the State Board *shall* designate the local school board's school district as a district of innovation *unless* the state board concludes that the submitted plan:
>
> (I) Is likely to result in a decrease in academic achievement in the innovation schools or innovation school zones; or
>
> (II) Is not fiscally feasible."

(emphasis added). Thus, the State Board can reject District of Innovation status (and the waivers of statute and regulation that are dependent upon it), but only for concerns over the plan's ability to increase academic achievement or fiscal soundness — not for failure to follow all the plan factors set forth in section 22-32.5-104(3), C.R.S. In the case of DC-21 and HTEC, the State Board found that the plans in question were designed to increase student achievement and were fiscally sound. Thus, the State Board's approval of District of Innovation status for these plans was in conformance with their statutory role under the Act.

CONCLUSION

Based upon the foregoing, I conclude that the Act can be used for a local board of education to grant innovation school status to a new educational program, and that, so long as the proposed school is not likely to result in a decrease in academic achievement or unless the plan for the new school is not fiscally feasible, the State Board has the authority to approve waivers for a new innovation school.

Issued this 23rd day of January, 2012.

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