



Bricker & Eckler LLP

Community School Alert



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Bricker & Eckler LLP

100 South Third Street
Columbus, Ohio 43215-4291

Phone 614 . 227 . 2300
Fax 614 . 227 . 2390
info@bricker.com
www.bricker.com

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CINCINNATI-DAYTON

Report of December 30, 2009 Meeting with ODE Regarding Conversion School/Sponsor District “Operational Independence”

Two weeks ago, we issued a Community School Alert concerning letters recently sent by the Ohio Department of Education to a large number of conversion community schools throughout the state. The letters, though slightly different for each school, all directed the schools to establish “operational independence” from their sponsor school districts, specifically prohibiting such things as the shared use of treasurers, administrators, teaching and other staff, and facilities. Although the letters asserted that the ordered separation was required by state and federal law, no citation to legal authority was provided.

On December 15, we sent a letter to ODE in which we questioned ODE’s assertions concerning state and federal law and in which we emphasized the very serious consequences likely to result from the separation ODE was ordering. We asked for an opportunity to meet with ODE “to discuss the ramifications of ODE’s position regarding conversion community schools and to consider whether or not there may be other ways to attain ODE’s goals.”

On December 30, such a meeting was held. In attendance from ODE were Superintendent of Public Instruction Deborah Delisle, new Chief Operating Officer Francis Pompey, Executive Director of the Center for School Options and Finance, Kimberly Murnieks, and then chief legal counsel Matthew DeTemple; and, from Bricker and Eckler, attorneys Susan Greenberger and Nick Pittner.

The purpose of this Community School Alert is to report to you what transpired during the nearly two-hour meeting and to provide you with additional analysis of the issues discussed.

Executive Summary

We believe that ODE failed to identify any sound legal authority for the separation it has demanded between conversion schools and their sponsors.

In terms of state law, ODE relied upon a statute which states generally that a community school “is a public school, independent of any school district.” We believe ODE’s understanding of this phrase is flawed and that their reading is clearly inconsistent with subsequent language in the same statute as well as with various other statutes. ODE also expressed a concern that conflicts of interest could arise when school district personnel perform services for a sponsored conversion school. We referred ODE to opinions of the Ohio Attorney General and the Ohio Ethics Commission that have approved similar relationships.

In terms of federal law, ODE cited to federal guidance concerning charter schools that are attempting to double-dip in terms of the federal grants. ODE conceded this guidance was, as a matter of federal law, inapplicable to the current issue; and ODE indicated that it knew of no relevant federal authority. However, ODE also stated that it has chosen, as a matter of policy, to utilize the admittedly inapplicable federal guidance in the current context.

ODE also contended that traditional public schools could offer the same programs as are available in the collaborative conversion schools, thus negating the need for the latter. We disputed the implicit presumption that if

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conventional school districts could provide programs presently provided by conversion schools, the latter could effectively be shut down by ODE. We also sought to describe examples (which ODE declined to hear) of circumstances in which conversion schools might succeed where similar programs, if offered by a traditional district, might not.

ODE also asserted that in past years, believing that conversion schools could not operate on a collaborative model, some districts passed up the opportunity to establish conversion schools, and superintendents of these districts have complained that their districts consequently were disadvantaged. We suggested that ODE assist districts that did not establish collaborative conversion schools in the past to do so now.

ODE also indicated that some conversion schools may have been established “solely for the grants.” We pointed out that motivations for establishing a conversion school (specifically, the grants) are not relevant to such school’s right to exist.

Finally, we called to ODE’s attention the fact that, in the past, ODE has expressly permitted conversion schools and sponsors to collaborate in the very ways that ODE now asserts are unlawful.

Throughout the meeting, ODE was unwavering in its opposition to conversion school/sponsor district collaboration. However, ODE indicated that it might seek an opinion about this from the Ohio Attorney General, and ODE agreed to consider postponing the 90 day deadline contained in the letters to the schools. We do not yet know whether ODE will pursue such an opinion, nor do we know if ODE will modify either its substantive position or the 90 day deadline.

A more detailed report of the meeting follows.

State Law

ODE’s Position

ODE indicated (as it has on other recent occasions), that it bases its contention that conversion school/sponsor district operational collaboration violates state law on a phrase in section 3314.01(B) of the Ohio Revised Code, which reads as follows (with the phrase relied upon by ODE underscored):

(B) A community school created under this chapter is a public school, independent of any school district, and is part of the state’s program of education. A community school may sue and be sued, acquire facilities as needed, contract for any services necessary for the operation of the school, and enter into contracts with a sponsor pursuant to

this chapter. The governing authority of a community school may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.

Secondarily, ODE expressed concern that conflict of interest and incompatibility of office issues could arise if sponsor district personnel such as treasurers and superintendents also provide services to a conversion school sponsored by the district. ODE indicated that it may request an opinion from the Ohio Attorney General regarding such arrangements. ODE also expressed a concern as to whether these arrangements have been documented through separate contracts (other than the sponsor contract) between the conversion school and the sponsor district.

Analysis

We expressed our belief that ODE’s reading of Section 3314.01 of the Ohio Revised Code is legally unsound – especially when considered in the context of the whole of Chapter 3314 (which contains more than 60 statutes governing the establishment and operation of Ohio’s community schools). In our opinion, the phrase on which ODE relies – “independent of any school district” – *establishes* the independent status of community schools as a matter of law. That status is consistent with the fact that every community school in Ohio is a corporation under Chapter 1702 of the Ohio Revised Code, each with its own governing authority. As a result, and by operation of the very language cited by ODE, every community school in Ohio *is* legally distinct from any school district, and every community school has all of the powers associated with independent entities, including the power to choose with whom to contract.

The community school “independence” that ODE seemingly espouses would actually be curtailed, in significant and unreasonable ways, by ODE’s current demands. ODE’s asserted reading of Section 3314.01 would presumably permit community schools throughout the state to contract for services with any private for-profit or non-profit entity, or with any governmental entity, *except* that no community school in the state – start-up or conversion – could contract with any traditional school district. Such a constraint on the discretion of community schools is inconsistent with the succeeding sentence of Section 3314.01, which provides, without limitation, that community schools “may sue and be sued, acquire facilities as needed, contract for any services necessary

for the operation of the school, and enter into contracts with a sponsor pursuant to this chapter.” It is also inconsistent with other explicit provisions of Ohio law (and with the historical position of ODE).

Numerous provisions in the Ohio Revised Code clearly permit, and in some cases require, the kinds of interrelationships between school districts and community schools that ODE now seeks to prohibit. Perhaps most notably, Ohio law assigns to sponsoring school districts the primary responsibility to act as the employer of the conversion school’s staff, with such staff included in the bargaining units of the district. (See R.C. 3314.03(A)(17) and 3314.10) At our meeting, ODE suggested that districts could negate the effect of these laws through negotiations with their unions. That suggestion, however, does nothing to rebut the fundamental inconsistency between ODE’s demands and Ohio law (to say nothing of the odds, or costs, of success in such negotiations).

Chapter 3314 has other provisions that facilitate community school/sponsor district collaboration, including section 3314.08(G), which authorizes school districts to provide services to sponsored community schools, and section 3314.03(C), which permits community schools to make payments to sponsors.¹

Additionally, new provisions were enacted by H.B. 1 that are expressly aimed at fostering community school/school district collaborations (such as section 3306.51, which authorizes grants for school districts and community schools that have “a collaborative agreement to share programming and resources to promote successful academic achievement for students and academic and fiscal efficiencies”).²

With respect to the concerns expressed by ODE related to potential conflicts of interests when sponsor district employees provide services to sponsored conversion schools, there exist numerous opinions of the Ohio Ethics Commission and the Attorney General that have approved similar relationships (for example, in the context of Ohio’s county boards of developmental disabilities and the non-profits created by those boards). In 2004, our office sent copies of

a number of these opinions to ODE in connection with our description to ODE of the model on which many of the conversion schools operated. Following a subsequent meeting at ODE that included Mr. DeTemple, ODE agreed that sponsor district administrators could serve on the governing boards of sponsored community schools (advice reiterated three years later in the context of H.B. 79, described below), with such administrators serving in their official capacities as representatives of the sponsor districts.

In a letter we sent to ODE following up on the December 30 meeting, we again referred ODE to these opinions (as well as to a more recent, informal advisory opinion of the Ohio Ethics Commission issued to Treasurer Cordray’s office, approving a relationship between that office and a non-profit created by that office that appears to parallel, in material respects, the conversion school/sponsor district relationships questioned by ODE). Our follow-up letter to ODE, together with many of the authorities cited in this report (and in the letter to ODE), can be accessed online at <http://www.bricker.com/Publications/attachments/ode.pdf>.

Federal Law

ODE’s Position

In the letters it sent to the conversion schools, ODE asserted that conversion school/sponsor district operational collaboration also violates federal law. When we inquired at the meeting as to supporting authority, ODE cited to federal guidance which indicates that a state “may not award [P]CSP start-up subgrants to multiple charter schools established under a single charter where the charter schools are merely extensions of each other.”

Analysis

In further discussion, ODE acknowledged that the cited federal guidance was not in fact relevant to the current dispute, and ODE further indicated that it could not identify any documented federal guidance

¹ It is also relevant to note that students of most conversion schools are regarded as students of the sponsor district for purposes of the report card issued by ODE to the district. (See R.C. 3302.03(C)(6)) Also, in appropriate circumstances, the sponsor is expressly authorized to “take over the operations” of the sponsored community school. (See R.C. 3314.073) See also R.C. 3313.537 (requiring sponsor districts to permit conversion school students in grades 7 through 12 to participate in extracurricular activities in the district subject to certain requirements, one of which, at the district’s option, is that the community school students take a course in the district).

² See also R.C. 3306.291(A), enacted by H.B. 1, which provides as follows:

(A) A subcommittee of the Ohio school funding advisory council is hereby established to study and make recommendations to foster collaboration between school districts and community schools established under Chapter 3314. of the Revised Code. The subcommittee shall recommend fiscal strategies, including changes to the funding model established under this chapter, that will provide incentives and compensation for Ohio school districts and community schools to enter into collaborative agreements that result in creative and innovative academic programming for students and academic and fiscal efficiency. The subcommittee shall report its findings and recommendations to the council and, in accordance with section 101.68 of the Revised Code the general assembly not later than September 1, 2010, and periodically thereafter at the direction of the superintendent of public instruction.

that prohibited resource-sharing between conversion community schools and their sponsor school districts. ODE did assert that federal authorities are “watching” what happens in Ohio. Additionally, ODE indicated that, as a matter of *policy*, ODE had determined to rely upon the admittedly inapplicable federal guidance to prohibit the conversion school/sponsor district collaborations described in ODE’s letters, and to make compliance with such prohibitions a condition not just for federal grant eligibility but also for the continued existence of the schools.

Policy Considerations

At our meeting, ODE repeatedly stated that it was concerned only with conversion schools’ compliance with law and that policy considerations were therefore not relevant to the discussion. Yet, as indicated above, in the context of federal law ODE acknowledged that it had made a *policy* decision to apply federal guidance in this context, where such guidance is not otherwise applicable. And in the context of state law, we noted that ODE recently undertook an effort (unsuccessful) to amend Ohio law so that the law would in fact require what ODE is now ordering – complete operational independence between conversion schools and their school district sponsors.³

In this context, we were deeply disappointed by ODE’s refusal to permit discussion of the likely consequences of the new “operational independence” requirement in terms of the impact on students, families, schools, and staff. We believe that to the extent ODE’s opposition to collaboration is a matter of *policy*, it is appropriate, indeed necessary, for ODE to entertain information concerning the implications of that policy.

Moreover, despite ODE’s assertion that its opposition was premised solely on law, other policy-related themes emerged. Superintendent Delisle indicated that during the period when many conversion schools were first established in Ohio, some districts in northeastern Ohio, including hers, were advised by their attorneys that conversion schools could not operate on the collaborative model ODE now challenges. She indicated that some superintendents have complained that other districts thus benefited in ways that their own districts did not. We responded that, however unfortunate, the fact that some districts did not avail themselves of this opportunity in past years does not constitute a legal basis for now imposing restrictions that will effectively shut down many of the conversion schools that were established. Instead, districts

that regret not previously establishing collaborative community schools could be encouraged by ODE to do so now. This would amount to a continuation of ODE’s policy in past years, when ODE facilitated the development of such schools.

We also were told that school districts that collaborate with conversion schools could find ways of offering, through the district itself, the programs currently provided through conversion schools; in this way, ODE suggested, there would be no net loss of options if the conversion schools closed. In particular, educational options and the new flexible credit opportunities were cited. We believe, however, that the existence of alternative strategies for innovation is fundamentally irrelevant to the present controversy. School districts and community schools are entitled to innovate using any of the tools authorized by law, without arbitrary limitations imposed by ODE. There are many and varied reasons why conversion community schools are established, and their purposes cannot necessarily be duplicated by other means. As we attempted to point out to ODE, in some cases it is precisely the *separate identity* of the conversion school that appeals to families and that, together with the sharing of resources with the sponsor district, enables the school to succeed.

Finally, we were told that some conversion schools were created “just for the grants,” something ODE evidently perceives as improper. Setting aside the accuracy or inaccuracy of the assertion, we question its premise. The fundamental purpose of the grants is to motivate and support the establishment of innovative educational programs (just as is the case with Race To The Top funding, which is currently driving programmatic and other decisions in Ohio and throughout the nation). It is unclear to us why grant funding should be regarded as a suspect motivation in the context of innovation that results from collaboration between a conversion school and a traditional public school district.

Past Practice

The subsection of the Ohio Revised Code cited by ODE as justification for the current opposition to conversion school/sponsor district collaboration – Section 3314.01(B) – has existed in its present form since the initial enactment of Ohio’s community school program in 1997. And, conversion community schools have operated in collaboration with sponsor school districts since the early years of the

³ The representatives of ODE in attendance at our meeting expressed a lack of familiarity with the proposed amendment, and we were therefore unable to ascertain from them why ODE sought to change the law or why ODE now contends that the changes it unsuccessfully sought are nonetheless required by law.

Education Law Group

Jerry E. Nathan, Chair
614.227.2358
jnathan@bricker.com

Laura G. Anthony
614.227.2366
lanthony@bricker.com

H. Randy Bank
614.227.8336
rbank@bricker.com

Melissa Martinez Bondy
614.227.8875
mbondy@bricker.com

Diana S. Brown
614.227.8823
dbrown@bricker.com

James P. Burnes
614.227.8804
jburnes@bricker.com

Kimball Carey
614.227.2327
kcarey@bricker.com

Jennifer A. Flint
614.227.2316
jflint@bricker.com

Dane A. Gaschen
614.227.8887
dgaschen@bricker.com

Susan E. Geary
614.227.2330
sgeary@bricker.com

Susan B. Greenberger
614.227.8848
sgreenberger@bricker.com

Warren I. Grody
614.227.2332
wgrody@bricker.com

Susan L. Oppenheimer
614.227.8822
soppenheimer@bricker.com

Nicholas A. Pittner
614.227.8815
npittner@bricker.com

C. Allen Shaffer
614.227.4868
ashaffer@bricker.com

Sue W. Yount
614.227.2336
syount@bricker.com

past decade. Such schools have always operated subject to ODE's oversight and approval.

In short, ODE has not always opposed the interrelationships between conversion schools and sponsors that ODE now seeks to prohibit. In fact, in past years ODE has expressly *approved* the collaborative approach it now condemns. Because the ODE representatives at our meeting did not appear to be fully familiar with ODE's history in this regard, we have included with our follow-up letter to ODE copies of past communications that support our contention that ODE's recent opposition constitutes a change in policy.

Specifically, we have sent a series of communications, which some of you may recall, related to requirements imposed by H.B. 79 three years ago. These include a Community School Alert that we sent in February of 2007, notifying recipients of potential risks that school district employees could incur if they continued to serve on governing boards of community schools; a Weekly Update from then Superintendent of Public Instruction Susan Zelman, expressing ODE's position that the new law did not affect "current district employees serving on governing authorities" and also did not affect "the community school's authority to contract with the sponsor for fiscal or other services"; and an Advisory Letter issued by ODE's Office of Community Schools, dated March 15, 2007 (and entitled *Governing Authorities Membership Guidance*), which assures school district employees that they may continue to serve on the governing boards of community schools and advises as follows:

Second, H.B. 79 does not affect a conversion community school's ability to contract with the sponsoring district for fiscal or other services.

Additionally, we have sent excerpts from the 2006 CSADM Manual and from an ODE powerpoint presentation, each containing ODE's instructions as to how school districts and community schools should report, and divide funding on account of, students who are educated in part by each entity.⁴

Many sponsor districts and conversion schools have operated collaboratively over the past decade *in accordance with the foregoing advice of ODE*. These are among the schools that received ODE's recent letter.

What Next?

At our meeting on December 30, ODE appeared firm in its opposition to conversion school/sponsor district collaboration. Nevertheless, ODE indicated that it may seek an opinion of the Ohio Attorney General on this issue, and it agreed to consider extending the 90 day deadline previously communicated to conversion schools (although as of this time, to our knowledge, no such extension has been granted).

Based on these facts, we continue to suggest that schools and districts that wish to retain their collaborative model not make irrevocable changes at this time. As this Alert indicates, we believe that the collaborative model is consistent with law, and we are yet hopeful that ODE will reconsider its position to the contrary. At a minimum, we hope that ODE will moderate its demands.

As we indicated to ODE at the end of our meeting, in the event that ODE persists in its demands, the conversion schools' options will be limited. The schools may choose to modify the manner of their operations, in order to satisfy ODE's demands; or, alternatively, if they believe they either cannot continue to operate on the terms required by ODE (or cannot maintain fiscal integrity and student achievement while operating on those terms), the schools may close. As yet another option, schools may choose to challenge ODE's new requirements through litigation. Once again, you may want to communicate directly with ODE about your school.

In the coming weeks, we intend to remain in contact with ODE officials about these matters. As we await further developments, you might also consider contacting legislators, State Board of Education members, or others who may be able to help resolve this controversy.

⁴ The powerpoint states as follows:

While a student may take coursework at the community school and the local district, they must be enrolled in one or the other and the school they are enrolled in will receive the foundation funds. Services received from the district the student is not enrolled in are paid for via a contractual agreement between the two entities outside the foundation payment system