

June 23, 2003

Mr. Gary Stivers  
Executive Director  
Idaho State Board of Education  
P.O. Box 83720  
Boise, ID 83720-0037

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: State Board of Education as a Chartering Entity

Dear Mr. Stivers:

**QUESTION PRESENTED**

Whether the State Board of Education (“Board”) has legal authority to grant an initial petition for charter school status under the Public Charter Schools Act of 1998 (“Act”).

**CONCLUSION**

The State Board of Education does not have legal authority to grant an initial Petition for Charter School status under the Act.

**ANALYSIS**

Your letter of June 11, 2003, seeking legal guidance refers to article IX, section 9 of the Idaho Constitution and Evans v. Andrus, 124 Idaho 6, 855 P.2d 467 (1993), in support of the proposition that the Board has broad authority over all state educational institutions and the public school system of Idaho and therefore has the authority to grant an initial petition for a charter school. Article IX, section 9, refers to compulsory school attendance. This opinion assumes you meant article IX, section 2, which creates the Board. The Evans case does not support any conclusion as to the Board’s authority to perform specific acts pursuant to its general supervisory authority and is inapplicable to the issue and my conclusion herein. The court in Evans simply recites article IX, section 2 of the Idaho Constitution in reaching its conclusion that House Bill 345 (1993), which would have divided the Board into three smaller boards, was unconstitutional because article IX, section 2, contemplates a single board of education.

In relevant part, article IX, section 2 provides:

The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law.

(Emphasis added.) It is the “powers and duties . . . which shall be prescribed by law” that are relevant to your inquiry rather than the number of boards of education this section allows.

The Idaho Legislature has prescribed several powers and duties of the Board. Idaho Code § 33-101 states that “for the general supervision, governance and control of the public school systems, including public community colleges, a state board of education is created.” Idaho Code § 33-107 describes the general powers and duties of the Board as including the power to “(1) perform all duties prescribed for it by the school laws of the state” and “(3) have general supervision, through its executive departments and offices, of all entities of public education supported in whole or in part by state funds.” Idaho Code § 33-116 provides that “all school districts in Idaho, including specially chartered school districts, shall be under the supervision and control of the state board.” The legislature has also placed limitations on the Board’s authority with regard to thoroughness and uniformity in the public school system. Idaho Code § 33-1612 provides that, “Authority to govern the school district, vested in the board of trustees of the school district, not delegated to the state board, is reserved to the board of trustees.”

Charter schools, as part of Idaho’s public education system, are, in certain circumstances, subject to supervision by the Board. Idaho Code § 33-5210(1) provides that, “All public charter schools are under the general supervision of the state board of education.”<sup>1</sup> The legislature has also placed limitations on the authority of the Board such as that “[e]ach charter school is otherwise exempt from rules governing school districts which have been promulgated by the state board of education or by the superintendent of public instruction,” with certain specific exceptions as enumerated in Idaho Code § 33-5210(3). It does not limit the Board’s authority to generally supervise charter schools. The legislature has clearly vested authority in the Board to decide an appeal from a denial of a charter school petition by a district board of trustees pursuant to Idaho Code § 33-5207.

However, the Public Charter Schools Act of 1998, Idaho Code §§ 33-5201, *et seq.*, taken as a whole, does not contemplate the Board acting as an initial chartering entity. Idaho Code § 33-5205(1) provides that a petition to establish a new or a conversion charter school shall be submitted to the board of trustees of a school district. It does not authorize any other entity to review or approve the initial petition. Idaho Code §§ 33-5205(2) and (3) provide for only a school district board of trustees granting a charter for the operation of a charter school. Idaho Code § 33-5206(5) describes the process for submitting notice of the local board of trustees’ approval to the Board to assist the Board

in implementing the limitations on the number of charter school approvals pursuant to Idaho Code § 33-5203(2).

The only statutory mention of Board review and approval of charter school petitions relates to the appeal process under Idaho Code § 33-5207(5)(b). *See also* Idaho Code § 33-5209(3), which reads: “A decision to revoke, not to renew, or not to approve a revision of a charter may be appealed directly to the state board of education. The state board shall essentially follow the procedure as provided in section 33-5207, Idaho Code.” Where the legislature has specifically mandated that initial petitions for the establishment of charter schools are to be reviewed by the board of trustees of the school district, and where the Board has only been granted the authority to approve or renew a charter in the context of an appeal of a school district denial, the Board has no authority to consider or grant initial petitions for a charter to operate a school.

When a legislative enactment is unambiguous and its meaning and intent is clear on its face, as is the Act on the question at issue here, the enactment must be given the clearly mandated effect and there is no need or occasion for the use of legislative history as an aid in construing the meaning of the enactment. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991); Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). Nevertheless, a review of the legislative history of the Act serves only to bolster our conclusion.

In 1997, an interim legislative committee on charter schools drafted proposed legislation for charter schools and held several public hearings across the state. On a number of occasions, including at its July 24, 1997, meeting, the interim committee considered the question of which government entities should be authorized to grant charters. On that date the committee decided against multiple charter-granting entities, choosing instead to draft proposed statutory language that would authorize local boards of trustees and the Idaho Superintendent of Public Instruction to grant initial charter petitions, with the Board being the entity to which charter denials were to be appealed. At its October 27-29, 1997, meeting, the interim committee modified its proposed language by deleting the superintendent of public instruction’s authority to grant a charter. Instead, all initial applications would go to the local school districts’ boards of trustees.

On January 27, 1998, the interim committee’s proposed legislation was introduced in the House Education Committee by Representative Fred Tilman. The minutes reflect Representative Tilman’s description of the charter school application approval process as follows:

[A]n application for a charter school must be approved by the local school district’s Board of Trustees. This last change means that these schools will not be state charter schools approved by the State Superintendent.

However, if an application is denied by a local school district's Board of Trustees, the proposed charter school may appeal to the State Board of Education.

On February 10, 1998, Rep. Tilman again described the proposed Act (then House Bill 517) to the House Education Committee. The minutes of the Committee meeting reflect his statements as follows:

The bill states the process to be followed to start a charter school making sure the request must go before the local school district's Board of Trustees for approval. The bill also allows for an appeals process to the State Board of Education should the request be denied by the local school district. He pointed out that the approval of the Superintendent of Public Instruction is no longer required.

House Bill 517 was introduced in the Senate Education Committee on February 20, 1998, where various committee members each described portions of the bill. The minutes reflect that Senator Dunklin explained that:

Section 33-5207 outlines who can grant a charter and how the decision might be appealed. The petition for a charter begins with the local school board. However, there is an appeal process. . . . If it is still denied, they can go to the State Board of Education and the State Board can override the local school board. The State Board then assumes the responsibility as the chartering entity.

The changes made to the proposed legislation from the time it was drafted and debated by the interim legislative committee to the final version presented to the legislature, and the comments legislators made through the process, show clearly that the legislature did not intend to grant any state-level entity the authority to approve an initial petition for a charter school. Had the legislature intended to vest the authority to approve initial petitions for charter schools with the Board, it could have done so in 1998 and every year since then in which it has addressed proposed amendments to the Act.

Your letter indicates that the Board plans to "initiate policy to make it a chartering entity for Public Charter Schools in Idaho." In light of the foregoing, such a policy would likely be found by a court to be outside the statutory authority of the Board.

The applicable general rule of law is:

The validity of a rule or regulation depends upon whether the administrative agency was empowered to adopt the particular rule, that is, whether the rule was within the agency's statutory authority. It must be

within the matter covered by the enabling statute, and comply with the underlying legislative intent. Regulations made by an agency that exceed its statutory authority are invalid or void. An agency may not go beyond declared statutory policy.

2 Am. Jur. 2d Administrative Law § 225 (footnotes omitted), citing Curtis v. Canyon Highway Dist. No. 4, 122 Idaho 73, 831 P.2d 541 (1992), for the proposition that a rule must be adopted pursuant to statutory authority to be valid.

The concept applies whether the Board attempts to acquire the chartering authority through rulemaking or policymaking.

The Idaho Court of Appeals, in the case of Roberts v. Transportation Department, 121 Idaho 727, 827 P.2d 1178 (1991), summed up the Idaho law generally applicable to the extent of and limits on the Board's or other administrative agencies' authority in carrying out statutory functions. The court held that an agency "cannot validly subvert the legislation by promulgating contrary rules." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). See also Fahn v. Cowlitz County, 93 Wash. 2d 368, 610 P.2d 857 (1980) ("An administrative agency is limited to the power and authority granted it by the legislature"); Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 41 P.3d 237 (2001) ("A regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that regulation and must fail") (quoting Levin v. Idaho State Board of Medicine, 133 Idaho 413, 987 P.2d 1028 (1999)). In light of the clearly expressed legislative intent of the Act, the Board does not have the authority, through policy or administrative rule, to act as the initial authorizing body for charter schools.

Based upon the foregoing, I conclude that the Idaho Legislature did not intend the Board to have the authority to approve initial petitions for charter schools. It is clear from the language of the Act itself that the Board has no statutory authority to consider or grant initial charter school petitions. The Board's primary role under the Act is that of an appellate body, authorized to hear appeals of denials of initial charter school petitions by local school district boards of trustees. Additionally, the legislative history reveals no ambiguities on this point.

It should be understood that an Attorney General's Legal Guideline is not a directive but is an objective review of what statutes authorize, as well as the best prediction available of how a reviewing court is likely to view that authority.

Very truly yours,

TERRY E. COFFIN  
Division Chief  
Contracts & Administrative Law Division

---

<sup>1</sup> Note that the SBE’s authority over charter schools is limited to “general supervision” in Idaho Code § 33-5210, in contrast to the “supervision and control” the SBE exercises over school districts pursuant to Idaho Code § 33-116. *See also* I.C. § 33-101 which grants broad legislative authority to the Board “for the general supervision, governance and control” of all state educational institutions and the public school system.