

The Cohen Report

A detailed report on

House Bill 514

By: Gerry Cohen

About Gerry Cohen

I spent 37 years of service on the staff of the North Carolina General Assembly. From 1977 to 2014, I was employed at the General Assembly with four years as staff attorney, 31 years as Director of Legislative Drafting, and two years a Special Counsel. I also incorporated my knowledge of municipal law by serving as a member of the Chapel Hill Town Council from 1973 to 1979.

I was asked by George Battle, General Counsel of Charlotte-Mecklenburg Schools, to do a detailed legal analysis of HB 514. This report sets forth what I found over the course of my research.

Seven Major Findings

Finding #1: A town **CANNOT** incur debt for capital construction or land purchase for a municipal charter school. If implemented, Matthews and Mint Hill (and other towns) would be required to pay upfront for any land purchase or building purchase.

Finding #2: A town **CANNOT** use any state funds to purchase land or construct a building. The only way a municipal charter school could pay to build a school, buy land, and/or buy mobile classrooms would be through any county pass through funds (reducing the operational funds of the municipal charter school) or through donations, grants, or town property taxes.

Finding #3: Teachers in a municipal charter school **CANNOT** be members of TSERS and any school employee who transfers their service credit from TSERS to LGERS would no longer be eligible for eligible for TSERS retiree health benefits, nor the TSERS Disability Income Plan. Additionally, the **Local Government Commission staff is aware of significant accounting issues** arising out of a town operating a charter school.

Finding #4: HB 514 **DOES** give the towns of Matthews and Mint Hill a new ability to use property taxes for these municipal charter schools.

Finding #5: All employees of a municipal charter school **WILL** be employees of the town.

Finding #6: Charlotte-Mecklenburg Schools **CANNOT** manage the charter schools on the town's behalf.

Finding #7: A municipal charter school **IS** a part of the town and is **NOT** a separate entity.

Finding #1:

Can a town incur debt for the purpose of buying land, capital, or mobile classrooms for the municipal charter school?

Answer: NO

Explanation: *Any capital construction or land acquisition would have to be on a “pay-as-you-go” basis, no debt can be incurred by the town for such purpose.* G.S. 115C-218.105(b) flatly forbids municipal indebtedness for a charter school, and the Local Government Bond Act does not allow cities to issue general obligation debt for a school. Furthermore, a local bill cannot authorize a town to incur debt for a Charter School as Article V, Section 4(1) of the North Carolina Constitution requires general laws relating to contracting of local debt and Article XIV, Section 3 forbids local acts on any subject where the Constitution requires general laws.

Finding #2:

Can a municipal charter school use any state funds to purchase land or construct a building?

Answer: NO

Explanation: It is correct that State funds and county appropriations to the local current expense fund to CMS that go to the charter can be used to lease property for a school, but this would reduce such funds available to operate the school. *State funds could NOT be used to purchase land or construct a building.* County appropriations to the local current expense fund that are allocated to the municipal charter CAN be used to purchase land for a charter school or to build a charter school, but this would reduce the amount of such funds available that year to operate the charter school. No indebtedness could be incurred to purchase land or construct the building. Thus the expenditures would be on a “pay-as-you-go” basis.

Finding #3:

Is it true that teachers of this municipal charter school would not be eligible to participate in NC TSERS but instead would only be eligible for LGERS?

Answer: YES

Explanation: *Any employees of the charter school would not be under the TSERS employee retirement system, but would be under the Local Government Employee retirement System (LGERS).*

While G.S. 128-21(10) states that teachers in the public schools are not eligible under LGERS, I believe that the unequivocal language of proposed 115C-218.90(4a) that charter school employees "... shall be eligible for any employee ... retirement benefits ... provided to other employees of the municipality" indicates that all town charter school employee are eligible for LGERS under the terms of the LGERS law. Current state law for LGERS in G.S. 128-21(18) requires that the employee work at least 1,000 hours in a calendar year, while G.S. 128-21 (18a) and (22b) does prohibit LGERS coverage of a temporary employee, defined as "employment for a limited term, in no case to exceed 12 consecutive months on a nonrecurring basis." *It may be that a teacher offered and accepting a 10-month or 12-month contract with the town to teach in the charter school would NOT be eligible for LGERS as they would appear to fit the excluded definition of a temporary employee.* If a charter school employee transferred their service credit from TSERS to LGERS, the employee would no longer be eligible for TSERS retiree health benefits, nor to the TSERS Disability Income Plan. The State Treasurer's Office Retirement Systems Division is aware of the various problems created by House Bill 514, as LGERS was not created for the purpose of public school or charter school employees participating. A current teacher already under TSERS might choose to NOT transfer TSERS service credit and thus preserve eligibility for post-retirement benefits under that system, while enrolling in LGERS and beginning to earn service credit under that system.

Finding #4:

Does HB 514 allow the towns included on the proposed legislation a new ability to utilize property taxes for a municipal charter school?

Answer: YES

Explanation: *G.S. 160A-209 is the statute that allows municipalities to levy ad valorem property taxes.* G.S. 160A-209(b) lists three purposes for levying property tax without limit, while G.S. 160A-209(c) lists 46 more purposes which are subject to a cumulative annual limit of \$1.50 per \$100.00 in assessed valuation. None of the 49 purposes includes charter schools or any form of schools.

Sections 8 and 9 of House Bill 514 taken together authorize the Towns of Matthews and Mint Hill to levy property taxes "... to provide for a charter school operated by the municipality ..." but House Bill 514 does not contain any other authorization for either town to expend any other municipal funds.

G.S. 160A-209(e) authorizes a city after a referendum to levy a property tax "for any purposes for which the city is authorized by its Charter or general law to appropriate money." There is no general law authorizing cities to expend funds on charter schools. Section 9 of House Bill 514 makes the bill a part of the Charter of both cities. G.S. 160A-1(1) states that a charter is the "... entire body of local acts currently in force applicable to a particular city." There is no requirement that a local act use the word "charter" in order for it to fall within the ambit of G.S. 160A-1(1) or the referendum requirement of G.S. 160A-209(e).

Property tax referenda under G.S. 160A-209(e) have been few and far between. Chapel Hill conducted simultaneous successful elections on a bond issue and property tax levy for public transportation in 1973.

The referendum requirement in G.S. 160A-209 is actually required by and implements Article V, Section 2(5) of the State Constitution, which requires than any levy of a property tax for a purpose not authorized uniformly for all municipalities must be approved by a local referendum.

Finding #5:

Could the municipal charter school hire CMS to operate the charter school?

Answer: NO

Explanation: House Bill 514 does not speak to this issue. Legislative staff indicates to me that the charter school law does not authorize CMS to contract to operate a charter school. G.S. 160A-20.1, a privatization statute passed in 1985, does authorize a city to "...contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in.", but in my opinion CMS is not a "person, association, or corporation" and thus the statute is not applicable. While Article 20 of Chapter 160A of the General Statutes (Interlocal Cooperation) does include both cities and local boards of education, and authorizes a contractual agreement "by one unit for one or more other units", I do not believe this authorizes one unit to exercise a power under contract that it did not have the power to exercise on its own. *Thus there would have to be authority for CMS to operate a charter school, which seems lacking.* Additionally, House Bill 514 in its title authorizes "...CERTAIN TOWNS TO OPERATE CHARTER SCHOOLS" and in Section 3 only provides new authority for a municipality to operate a charter school.

Finding #6:

Would all employees of a municipal charter school be town employees?

Answer: YES

Explanation: Proposed G.S. 115C-218.90(4a) in Section 6 of the *current version of House Bill 514 clearly states that all employees of the charter school* "...shall be deemed employees of the municipality ..."

Finding #7:

Can a municipal charter school be an Enterprise Fund?

Answer: NO

Explanation: The town will be operating the Charter school. *It will be part of the town and a department of the city.* While HB514 authorizes the town to appoint a board of directors to “govern” the school, the school is still part of town government and is not a separate entity. Article 3 of Chapter 159 of the General Statutes, the “Local Government Budget and Fiscal Control Act” will govern the financial affairs of the charter school. Under the town budget. The town governing board will have to appropriate funds in its budget ordinance for the operation of the schools, whether local, state, federal, or grant funding. G.S. 159-13(a) requires the annual budget ordinance to cover all operations of the city other than a “Project Ordinance” under G.S. 159-13.2 set out below. The budget ordinance might contain more than one fund. For example, G.S. 159-13(b)(10) specifically provides for a separate fund for property taxes levied by vote of the people as would be the case after a successful referendum under House Bill 514:

“Appropriations made to another fund from a fund established to account for property taxes levied pursuant to a vote of the people may not exceed the amount of revenues other than the property tax available to the fund, except for appropriations from such a fund to an appropriate account in a capital reserve fund.”

Enterprise funds are authorized by Article 16 of Chapter 160A of the General Statutes, all of which cover public utility type operations. G.S. 160A-314(a2) mentions a “public service enterprise fund”. G.S. 160A-311 set out below provides only 10 listed public enterprises, and a charter school is neither listed nor does it appear to be the type of public utility envisioned for enterprise funds.

(1) Electric power generation, transmission, and distribution systems.

- (2) Water supply and distribution systems.
- (3) Wastewater collection, treatment, and disposal systems of all types, Including septic tank systems or other on-site collection or disposal facilities or systems.
- (4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without.
- (5) Public transportation systems.
- (6) Solid waste collection and disposal systems and facilities.
- (7) Cable television systems.
- (8) Off-street parking facilities and systems.
- (9) Airports.
- (10) Stormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types.”

G.S. 159-13.2 might allow the town to set up a separate “project ordinance” to handle charter school funding and operations since much or most of its funds for operation will come from state or county/CMS pass-through funding, but it is not really clear if this is the best method.

“G.S. 159-13.2(b) Alternative Budget Methods. – A local government or public authority may, in its discretion, authorize and budget for a capital project or a grant project either in its annual budget ordinance or in a project ordinance adopted pursuant to this section. A project ordinance authorizes all appropriations necessary for the completion of the project and neither it nor any part of it need be readopted in any subsequent fiscal year.”

Whether the school is financially governed under the town's general fund or a project ordinance, expenditures are restricted to the purposes authorized by law for operation of the school.

I have spoken to staff of the State Treasurer's Office, their Local Government Commission staff is aware of significant accounting issues arising out of a town operating a charter school under the Local Government Budget and Fiscal Control Act. It may be necessary for the town to separately report all school operations through a Project Ordinance in order to allow proper accounting. As discussed under Question 1, the town could not incur any indebtedness for the charter school.