



**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON CHARTER SCHOOLS

FROM: Joyce L. Kiel, Senior Staff Attorney

RE: Creating an Appeal Process for Denial, Nonrenewal, and Revocation of a Charter

DATE: November 20, 2006

This Memo was prepared for the Special Committee on Charter Schools. At its October 17, 2006 meeting, the committee asked staff to draft a memorandum providing various options for creating an appeal process when a decision is made to: deny a proposed charter school; nonrenew an existing charter school contract; or revoke a charter. This Memo:

- Describes current law relating to the process for establishing a charter.
- Lists questions and options relating to amending current law to create an appeal process for denial of a charter.
- Describes current law relating to nonrenewal of a charter.
- Lists questions and options relating to amending current law to create an appeal process for nonrenewal of a charter.
- Describes current law relating to revocation of a charter.
- Lists questions and options relating to amending current law to create an appeal process for revocation of a charter.

This Memo is intended to facilitate discussion and is not intended to be an exhaustive list of questions or options that may be considered by the committee.

CURRENT LAW ON ESTABLISHING CHARTER SCHOOLS

Under current law, two types of entities may establish or contract for the establishment of (collectively referred to hereinafter as “establish”) charter schools: (a) school boards; and (b) certain

entities listed under s. 118.40 (2r), Stats., that are independent of school boards (collectively referred to hereinafter as “(2r) authorizers”). Under current law, (2r) authorizers are limited to: the Common Council of the City of Milwaukee, the Chancellor of the University of Wisconsin (UW)-Milwaukee, the Chancellor of the UW-Parkside, and the Milwaukee Area Technical College (MATC) District Board.¹

School Boards

School boards have two methods of establishing charter schools: (a) based on teacher petition under s. 118.40 (1m), Stats.; and (b) based on school board initiative under s. 118.40 (2m), Stats.

Teacher Petition

A petition signed by at least 10% of the teachers employed by the school district or by at least 50% of the teachers employed at one school of the school district may present a written petition containing 15 required elements² requesting that the school board establish a charter school. [s. 118.40

¹The committee is also considering the issue of permitting additional authorizers as discussed in Memo No. 3. If additional authorizers are permitted, decisions made by the committee regarding establishing an appeal process should be analyzed with respect to their applicability to the additional authorizers.

²The 15 required elements are:

1. The name of the person who is seeking to establish the charter school.
2. The name of the person who will be in charge of the charter school and the manner in which administrative services will be provided.
3. A description of the educational program of the school.
4. The methods the school will use to enable pupils to attain the educational goals under s. 118.01.
5. The method by which pupil progress in attaining the educational goals under s. 118.01 will be measured.
6. The governance structure of the school, including the method to be followed by the school to ensure parental involvement.
7. Subject to sub. (7) (a) and (am) and ss. 118.19 (1) and 121.02 (1) (a) 2., the qualifications that must be met by the individuals to be employed in the school.
8. The procedures that the school will follow to ensure the health and safety of the pupils.
9. The means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population.
10. The requirements for admission to the school.
11. The manner in which annual audits of the financial and programmatic operations of the school will be performed.

(1m), Stats.] Within 30 days after receiving such a petition, the school board must hold a public hearing on the petition. At the hearing, the school board must consider the level of employee and parental support for the proposed charter school and the fiscal impact on the school district of establishing the charter school. The school board may, but is not required to, grant the petition. [s. 118.40 (2) (a), Stats.] If the school board grants the petition, it must contract for the operation of the charter school with the person named in the petition as the person seeking to establish the school. [s. 118.40 (3) (a), Stats.]

If a teacher petition is presented to the Board of School Directors of the Milwaukee Public Schools (MPS), the MPS Board is required to grant or deny the petition within 30 days after the public hearing. If the MPS Board denies a petition, the person seeking to establish the charter school may, within 30 days after the denial, appeal the denial to the Department of Public Instruction (DPI). DPI must issue a decision within 30 days after receiving the appeal. DPI's decision is final and is not subject to judicial review under ch. 227, Stats.³ [s. 118.40 (2) (c), Stats.] Current law does not specify the criteria DPI would use to review the MPS Board's decision. According to DPI staff, no appeal has been made to DPI under this provision. Again, this appeal process applies only to MPS and only with respect to the denial of teacher petitions.

School Board Initiative

A school board may, on its own initiative, contract with a person to operate a charter school. [s. 118.40 (2m), Stats.] If this would result in converting a private school to a charter school⁴ or if it would establish a charter school that is not an instrumentality of the school district, the school board is required to hold a public hearing about the proposed contract. At the hearing, the school board must consider the level of employee and parental support for the proposed charter school and the fiscal impact on the school district of establishing the charter school. [s. 118.40 (2m) (am), Stats.] If the school board decides not to go forward with a proposal, current statutes do not provide for an appeal to DPI or to any other entity.

A school board may itself begin development of a proposal for a charter school. However, in most cases, an individual, group of individuals, or entity will have asked--on either a formal or informal basis--that a school board consider establishing a charter school. According to surveys conducted by

12. The procedures for disciplining pupils.

13. The public school alternatives for pupils who reside in the school district and do not wish to attend or are not admitted to the charter school.

14. A description of the school facilities and the types and limits of the liability insurance that the school will carry.

15. The effect of the establishment of the charter school on the liability of the school district. [s. 118.40 (1m) (b), Stats.]

³ Chapter 227, Stats., provides for judicial review of certain decisions made by state agencies under certain circumstances.

⁴ A school board may not enter into a contract that would result in the conversion of a private, sectarian school to a charter school. [s. 118.40 (3) (c), Stats.]

DPI, concepts or proposals typically come from: school district administrators or staff; a cooperative educational service agency (CESA); teachers; parents; a non-profit community organization; or a for-profit business. In some cases, there may be only informal discussion with school board members or school district staff about a concept for a charter school. Although current statutes do not address the matter, current statutes would not prohibit a school board from establishing a policy regarding how proposals for a charter school that are not teacher petitions may be made to the school board.

DPI has surveyed school boards about actions taken on new charter school petitions or proposals, and DPI summarized that information in “2003-04 Legislative Report on Charter Schools,” a copy of which has already been provided to the committee. The report provides information about decisions made by school boards by describing two levels of decision-making.

A *first-level decision* is defined as a concept approval or participation in a consortium whereby a school board supported further study or a school board clerk and district administrator provided a signature on a charter school planning grant application submitted to DPI for the purpose of seeking federal grant funds to develop a new charter school. According to the report, for the 2003-04 school year, 74 petitions or proposals were filed with a school board for a first-level decision and 72 were approved. Of the two that were denied, the reasons for denial were: financial reasons, declining enrollment, and turnover in administrative staff. (More than one reason for denial can be given.) According to preliminary data provided by DPI staff, for the 2004-05 school year, 102 petitions or proposals were filed for a first-level decision and 98 were approved. Of the four that were denied, the reasons for denial were: financial reasons, declining enrollment, concerns about the capacity of the school district to support the proposal, and withdrawal from a multi-district consortium.

A *second-level decision* is defined as a decision on whether to issue a charter, sign an agreement to participate in a multi-district charter school, or sign an implementation grant to seek federal charter school start-up funds from DPI. According to the report, for the 2003-04 school year, 48 second-level decisions were made by school boards and 47 were approvals. The report did not specify the reason for the one denial. According to preliminary data provided by DPI staff, for the 2004-05 school year, 83 second-level decisions were made by school boards and 80 were approvals. Of the three that were denied, the reasons for denial were: financial reasons and declining enrollment.

(2r) Authorizers

Under current law, the Milwaukee Common Council, the Chancellor of the UW-Milwaukee, the Chancellor of the UW-Parkside, and the MATC District Board may be (2r) authorizers. However, these UW chancellors cannot establish a charter school without the approval of the Board of Regents of the UW System. [s. 118.40 (2r) (b) 2., Stats.] Decisions by the Milwaukee Common Council, MATC Board, and UW System Board of Regents would be made by majority vote of a quorum at a meeting of the body.

Current law does not provide a process for petitioning or applying to a (2r) authorizer for a charter. Also, there is no clear statutory process to appeal a decision made by a (2r) authorizer not to go forward with a proposed charter.

QUESTIONS AND OPTIONS RELATING TO CREATING AN APPEAL PROCESS FOR DENIAL OF A CHARTER

This section sets forth questions and options that may be considered in connection with proposing amendments to current law to create an appeal process for denial of a charter. They are set forth separately under the headings of: (a) school board initiative denials; (b) teacher petition denials; and (c) denials by (2r) authorizers.

School Board Initiative Denials

It is somewhat of a contradiction in terms to create an appeal process for a school board initiative denial as that suggests that the school board has denied its own initiative for a charter. In reality, proposals or concepts are typically brought to a school board by others, and it appears that this is the situation for which the committee seemed interested in establishing an appeal process. A formal appeal seems to be feasible only if it relates to a decision made by a school board in response to a formal request for a decision. Thus, depending on the committee's wishes, it may be appropriate to propose creation of an additional process for requesting that a school board establish a charter school, as outlined in Questions 1. and 2., below.

1. Should a written non-teacher petition process (teachers are already permitted to petition under current law) or some other application process, or both, be established to formally request that a school board consider a proposal for a charter school?

If a non-teacher petition process is established, how many signatures should be required?

Options include a certain percentage or a fixed number of electors who reside in the school district.

2. If so, should the [non-teacher petition] [application] [or both] include the 15 elements that are currently required for a teacher petition or should different information be required?

If different information is required, what should that consist of?

Options include any subset of the 15 elements set forth in footnote 2 or a separate list of items of information.

If a subset of the 15 elements is preferred, which elements should be included?

If a separate list is preferred, there are several ways to approach this:

- First, each school board could be required to develop a policy to establish the items that should be on the list.
- Second, DPI could be required to promulgate an administrative rule setting forth the application form and items of information to be included.
- Third, the items could be specified in the statutes (for example, requiring information about the educational vision and philosophy of the charter school, how it will differ

from schools currently available to pupils in the school district, why a charter is needed to achieve the educational vision, what educational program will be implemented, and what grade levels will be served).

- Fourth, a hybrid approach could be used with the statutes specifying some items and the school board specifying any additional items it requires.
3. Current law requires a school board to hold a public hearing on a school board initiative for a charter school (as noted above, a separate statute requires a hearing on a teacher petition for a charter school) at least 30 days before entering into a contract only if the contract would convert a private school to a charter school or establish a charter school that is not an instrumentality of the school district.

Should a public hearing also be required on a school board initiative proposal even if it would not convert a private school or establish a noninstrumentality charter school?

If a [non-teacher petition] [application process] [or both] is adopted in Question 1., above, should a public hearing be required on all [non-teacher petitions] [applications] for a charter school? If so, should the deadline be the same as the deadline for a hearing following receipt of a teacher petition, that is, within 30 days after receiving the [non-teacher petition] [application] or some other number of days?

4. Current law specifies that *at a public hearing* (in the two situations when one is currently required to be held), the school board must consider the level of employee and parental support for the proposed charter school and the fiscal impact on the school district of establishing the charter school.

Should these be specified as factors that a school board considers in making a decision about establishing a charter school, rather than factors to be considered at a hearing?

Should the statutes specify other factors to be considered in making a decision? If so, what other factors should be specified?

As an alternative, should a school board be required to develop a policy setting forth the factors it will use in making a decision?

5. Current law provides a 30-day deadline after the hearing for the MPS Board to make a decision on a teacher petition for a school board. Should a school board be required to render an approval or denial decision on a [non-teacher petition] [application] within a certain time period after the [non-teacher petition] [application] is submitted or, if the committee recommends in Question 3., above, that a hearing be held on a [non-teacher petition] [application], within a certain time period after the hearing?

Options could be any number of days specified by the committee.

6. Should a school board decision denying a [non-teacher petition] [application] be required to be in writing and specify its findings and reasons for denial? (It should be noted that it is

difficult for a reviewing entity to conduct a review unless there is some record to be reviewed.)

7. Should a process be established whereby an aggrieved person must request the school board to review its decision before the person can appeal a school board denial for a proposed charter school to another entity?
8. Who should be entitled to appeal the school board decision? If a non-teacher petition process is used, should it be limited to the person who is listed on the petition as seeking to establish the charter school? If an application process is used, should it be limited to a person who made the application? (As noted above, current law provides that, with respect to the appeal that can be made following the denial of the MPS Board for a teacher petition, the appeal to DPI can be made only by the person seeking to establish the charter school.)
9. Should there be a deadline for requesting an appeal? If so, what should the deadline be?

Options include the 30-day deadline after the denial that applies when the MPS Board denies a teacher petition for a charter or some other number of days.

10. Who should an appeal of a denial be made to?

Options include DPI, the Division of Hearings and Appeals in the Department of Administration, or some other entity created explicitly to review denials of a charter school [non-teacher petition] [application]. (An example of an entity with a special review function is the School District Boundary Appeals Board created under s. 15.375 (2), Stats., to review certain school reorganization proposals. It consists of 12 school board members appointed by the State Superintendent of Public Instruction, equally representing districts with small, medium, and large enrollments. Some of its decisions are made by a panel of three members appointed by the State Superintendent; other decisions are made by a panel of seven members.)

If appeals are expected to be numerous, should positions be authorized or appropriations created or supplemented for the entity that will be conducting the appeal.

11. Should the statutes specify the factors that the reviewing entity must use to evaluate a school board denial? If so, what factors should be specified?
12. What remedy should the reviewing entity be able to order?

If the reviewing entity can order a school board to enter into a contract for the operation of a charter school, the school board and person seeking to establish the charter school will still have to negotiate the terms of the contract, including the amount of money that will be paid by the school district to the charter school. If the school board is not a willing participant, concerns may be raised about whether the school board is being reasonable in its negotiations. Should some mechanism be established to resolve disputes in such situations, such as requiring DPI to provide mediation services or requiring binding arbitration?

Should the reviewing entity be able to order that a (2r) authorizer may contract for the operation of the proposed charter school, regardless of any statutory limitations that would otherwise apply to the (2r) authorizer?

13. Should there be a deadline for the reviewing entity to issue its decision? If so, what should the deadline be?

Options include the 30-day deadline applicable to DPI when there is an appeal of a denial by the MPS Board of a teacher petition for a charter or any other number of days specified by the committee.

14. Should the decision of the reviewing entity be subject to judicial review under ch. 227, Stats?

Current law provides that DPI's decision on teacher petition denials by the MPS Board are *not* subject to judicial review under ch. 227, Stats. However, it is noted that, according to the materials that Todd Ziebarth provided to the committee about the appeals process used in various states, a few states provide for judicial review after an appeal.

If the reviewing entity's decision were subject to judicial review, a court would not substitute its judgment for that of the reviewing entity but would determine whether the reviewing entity based its decision on the relevant facts and made a determination that a reasonable person could reach.

15. In a common or union high school district, should the ability to overturn a school board denial be one of the powers of the annual meeting of electors residing in the school district? (Such a provision could not be applied to unified school districts or MPS as they do not hold annual meetings.)

Should the statutes provide for a referendum process so that the question of whether to overturn a school board denial could be put on the ballot at a forthcoming election?

Teacher Petition Denials

1. Current law provides a 30-day deadline after the public hearing for the MPS Board to make an approval or denial decision on a teacher petition for a charter school. Current law does not require other school boards to make a decision nor does it impose a deadline for them to do so. Should all school boards be required to render an approval or denial decision on a teacher petition as is required of the MPS Board? If so, should the 30-day decision deadline that applies to the MPS Board be applied to all school boards?
2. Should the process for an appeal to DPI that currently applies only to teacher petitions denied by the MPS Board be extended to decisions made by other school boards about teacher petitions?
3. Should changes be made to the current appeals process for denial of teacher petitions by the MPS Board? That is, should certain decisions the committee makes above with respect to an appeal process for non-teacher petitions and applications also apply to an appeal process for teacher petitions, for example, should current law be changed for MPS (and for other school

districts if the committee decides yes on Question 2.) teacher petition denials with respect to Questions 8., 9., 13., and 14., above, under “School Board Initiative Denials”?

- Question 8., above, should the person entitled to an appeal continue to be only the person seeking to establish the charter school?
 - Question 9., above, should the deadline for requesting an appeal continue to be 30 days after the denial?
 - Question 13., above, should the deadline to issue a decision on a teacher petition denial continue to be 30 days?
 - Question 14., above, should a teacher petition denial by DPI continue not to be subject to judicial review?
4. Should the decisions that the committee makes with respect to Questions 6., 7., 10., 11., and 12., above, under “School Board Initiative Denials” be applied to teacher petition denials?
- Question 6., above, should a written decision specifying the findings and reason for the decision be required?
 - Question 7., above, should a request for review be required before an appeal can be made?
 - Question 10., above, should the appeal be made to DPI as under current law with respect to MPS teacher petition denials or to some other reviewing entity?
 - Question 11., above, should the factors used by the reviewing entity be specified?
 - Question 12., above, what remedy may be ordered?

Denials by (2r) Authorizers

As with school board initiated charter schools, there is no statutory process for petitioning or applying to a (2r) authorizer to establish a charter school.

1. Should such an application or petition process be created? If so, should decisions that the committee makes with respect to Questions 1. to 14., above,⁵ under “School Board Initiative Denials” be applied when a (2r) authorizer denies a petition or application for a charter school? If not, should other provisions be applied?

⁵ Question 15., above, would not be applicable to (2r) authorizers.

CURRENT LAW ON NONRENEWAL OF A CHARTER

Under current law, a charter school contract may not exceed five school years. It can be renewed for one or more terms not exceeding five school years. [s. 118.40 (3) (b), Stats.] Current statutes do not require that a school board or (2r) authorizer follow a certain process or consider certain factors before deciding not to renew a contract. However, it is possible that a contract could include language regarding these matters.

Current statutes do not provide a clear process for appeal of a decision to nonrenew a charter, although an argument could be made that ch. 68, Stats. (relating to review of municipal administrative decisions), could be applied to nonrenewal decisions made by the MATC Board or Common Council of Milwaukee (unless either has elected a different process) and that ch. 227, Stats., could be applied to decisions made by the UW (2r) authorizers. Neither of these statutes would apply to nonrenewal decisions made by a school board. It is possible that, under common law, a court has discretion to hear a petition to review a nonrenewal decision.

QUESTIONS AND OPTIONS RELATING TO CREATING AN APPEAL PROCESS FOR NONRENEWAL OF A CHARTER

This section sets forth questions and options that may be considered in connection with proposing amendments to current law to create an appeal process for nonrenewal of a charter.

1. Should the statutes require that a school board or (2r) authorizer give written notice of intent not to renew and the reasons for nonrenewal at least a certain number of days before the contract is due to expire? If so, what number of days should be the minimum? (Note that the number of days selected may depend on allowing time for any process decided on below to take place.)
2. Should the school board or (2r) authorizer be required to hold a public hearing on the proposed nonrenewal if a request is made by a certain deadline?
3. Should an appeal process be created for a proposed nonrenewal? If so, should the decisions that the committee makes with respect to Questions 7. to 14., above, under “School Board Initiative Denials” be applied to nonrenewals or should different decisions be made?
 - Question 7., above, should a request for review be required before an appeal can be made?
 - Question 8., above, who should be entitled to appeal? Should it be only the person operating the school or should others be permitted to appeal? If the latter, which others?
 - Question 9., above, what should be the deadline for requesting an appeal?
 - Question 10., above, should the appeal be made to DPI as under current law with respect to MPS teacher petition denials or to some other reviewing entity?
 - Question 11., above, should the factors used by the reviewing entity be specified?

Options include: the level of parental support; the potential for the school to offer additional or alternative choices; the potential to implement innovative educational programs or methods; the availability of comparable programs; or other factors suggested by the committee.

- Question 12., above, what remedy may be ordered?
 - Question 13., above, what should be the deadline to issue a decision?
 - Question 14., above, should the decision be subject to judicial review?
4. Should the statutes provide for the school to continue to be operated while an appeal is pending, for example, until the end of the semester or school year?

CURRENT LAW ON REVOCATION OF A CHARTER

Under current law, a charter school contract may be revoked by a school board or (2r) authorizer if the school board or (2r) authorizer finds that any of the following occurred:

- (a) The charter school violated the contract.
- (b) The pupils enrolled in the charter school failed to make sufficient progress toward attaining the educational goals under s. 118.01, Stats.
- (c) The charter school failed to comply with generally accepted accounting standards of fiscal management.
- (d) The charter school violated s. 118.40, Stats. [s. 118.40 (5), Stats.]

Current law does not specify when the revocation goes into effect. This means that the decision regarding the effective date may be established by the school board or (2r) authorizer. However, it is possible that a contract could include language regarding this issue.

Current statutes do not provide a clear process for appeal of a decision to revoke a charter, although an argument could be made that ch. 68, Stats., could be applied to revocation decisions made by the MATC Board or Common Council of Milwaukee (unless either has elected a different process) and that ch. 227, Stats., could be applied to revocation decisions made by the UW (2r) authorizers. Neither of these statutes would apply to revocation decisions made by a school board. It is possible that, under common law, a court has discretion to hear a petition to review a revocation decision.

QUESTIONS AND OPTIONS RELATING TO CREATING AN APPEAL PROCESS FOR REVOCATION OF A CHARTER

This section sets forth questions and options that may be considered in connection with proposing amendments to current law to create an appeal process for revocation of a charter.

1. Should the statutes require that a school board or (2r) authorizer give written notice of intent to revoke and the reasons for revocation at least a certain number of days before the revocation may go into effect? If so, how many days should be specified as the minimum?
2. Should the school board or (2r) authorizer be required to hold a public hearing on the proposed revocation if a request is made by a certain deadline?
3. Should an appeal process be created for a proposed revocation? If so, should the decisions that the committee makes with respect to Questions 7. to 14., above, under “School Board Initiative Denials” be applied to revocation or should different decisions be made?
 - Question 7., above, should a request for review be required before an appeal can be made?
 - Question 8., above, who should be entitled to appeal? Should it be only the person operating the school or should others be permitted to appeal? If the latter, which others?
 - Question 9., above, what should be the deadline for requesting an appeal?
 - Question 10., above, should the appeal be made to DPI as under current law with respect to MPS teacher petition denials or to some other reviewing entity?
 - Question 11., above, should the factors used by the reviewing entity be specified? Should the factors be limited to those for which revocation is permitted as outlined above?
 - Question 12., above, what remedy may be ordered?
 - Question 13., above, what should be the deadline to issue a decision?
 - Question 14., above, should the decision be subject to judicial review?
4. Should the statutes provide for the school to continue to be operated while an appeal is pending, for example, until the end of the semester or school year? Should an exception to the continued operation provision apply if the school board or (2r) authorizer determines that conditions at the school present an imminent threat to the health or safety of the pupils?