



OFFICE OF CORPORATION COUNSEL

PAUL BARGREN
Corporation Counsel

MARK A. GRADY
COLLEEN A. FOLEY
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
JENNIFER K. RHODES
DEWEY B. MARTIN
JAMES M. CARROLL
PAUL D. KUGLITSCH
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
Assistant Corporation Counsel

Date: November 2, 2015

To: Members of the County Board

cc: County Executive Abele
Comptroller Manske
Elizabeth Stephens
Other Interested Parties

From: Paul Bargren *PB*
Corporation Counsel

Re: Opportunity Schools and Partnership Program – File No. 15-491

This report responds to the Substitute Resolution adopted on September 24, 2015, by your Honorable Body in File No. 15-491.

The Resolution in File No. 15-491 opposes the Opportunity Schools and Partnership Program created by the Legislature in 2015 Wisconsin Act 55 as Wis. Stat. §§ 119.9000-9005. File No. 15-491 became finally effective when it was returned unsigned by the County Executive on September 29, 2015.

In the Resolution, your Honorable Body “requests [that] Corporation Counsel produce an analysis of liability issues for Milwaukee County due to this legislation as soon as practicable.”

Background

The Act 55 legislation requires the County Executive to name an Opportunity Schools Commissioner by November 11, 2015. § 119.9001(2)(a). The Commissioner is then required to select at least one Opportunity School from among MPS underperforming schools for the 2016-17 school year. § 119.9002(2)(a)1. The Commissioner could stay with just the one Opportunity School or could select up to a total of eleven (11) Opportunity Schools by the 2018-19 school year. § 119.9002(2)(a).

The Commissioner is directed to locate an individual, group, person, or governing body of a charter or private non-sectarian school to operate each Opportunity School. § 119.9002(2)(d). However, it is the Commissioner who has sole authority to hire and fire principals and teachers for the Opportunity Schools, and they do not receive any Civil Service protection.

§§ 119.9002(5), 119.9003. Current MPS educators at the Opportunity School must reapply for work there or seek a transfer elsewhere in MPS. *Id.* Opportunity School staff are not MPS employees, so if they stay at the school they lose or at least break MPS seniority and other benefits. The budget, program, curriculum, calendar, building and grounds, transportation, dress

code and student discipline at an Opportunity School are all also under the Commissioner's direct control. §§ 119.9002(6)-(15), 119.9003.

The Commissioner is to exercise his or her powers "independently of the [MPS] board and under the supervision of the county executive." § 119.9004(1)(a).

For funding, Opportunity Schools will receive a per pupil amount from the state equal to the amount paid to charter schools, and state funding to MPS will be reduced by a like amount.

§ 119.9005. Beginning in the 2017-18 school year, the Commissioner may charge each Opportunity School a fee of up to 3% of revenue, up to an aggregate of \$750,000, apparently to fund the Commissioner's activities. § 119.9003(5). The Commissioner may also accept private charitable donations for the program. § 119.9003(15).

Although the Opportunity Schools program is limited to at most 11 schools and might involve only one, emotions are running high, and opponents have referred to it as "the takeover of MPS." See, e.g., <http://stopmpstakeover.com/> and www.facebook.com/Stop-the-Takeover-of-MPS

Role of Corporation Counsel

Unknown to me, the legislature directed that my Office "shall be the legal adviser of and attorney for the commission and the opportunity schools and partnership program."

§ 119.9001(5)(a). However, that statute goes on to require the commissioner must "retain an attorney to represent the commissioner and the opportunity schools and partnership program in any matter if any of the following applies: The county executive, the county corporation counsel or the commissioner determines that"

- Specialized legal expertise is needed,
- Corporation Counsel does not have sufficient staff to handle the legal needs of the program, or
- A conflict of interest exists.

In other words, if I decide my Office is unable to serve the Commissioner's needs, I am free – and indeed obliged – to notify the Commissioner the he or she must seek outside counsel. See also Wis. Stat. § 119.9001(5)(b). Outside counsel would be paid for by the Commissioner. The statute makes no provision for County payment of outside counsel, and there is no reason for the County to assume it should do so. Moreover, the Opportunity School initiative is established as a "**program**" "**within**" MPS. § 119.9004(1)(a). Thus if funds of the Opportunity School program are the obligation of any other entity, it is MPS, not Milwaukee County.

That said, to the extent time is spent by me or my staff on Opportunity School projects, it must be viewed as an unfunded mandate imposed by the legislature. See Wis. Stat. § 66.0143. However such work will be absorbed within my Office's existing budget.

Analysis

I have not identified any liability issues for Milwaukee County due to this legislation.

As you are aware, Milwaukee county officials are frequently named in liability, civil right and discrimination lawsuits for actions allegedly taken in the course of performing their official or statutory duties. When this happens, the county's insurance program steps in to provide a defense and cover damages, if any. Should a legal action arise out of the Executive's actions in naming or supervising a Commissioner (which seems unlikely, and those are the only two duties assigned by Act 55 to the Executive in the Opportunity Schools programs), insurance coverage

would be available, in my view, since these are statutory duties now assigned to the Executive as part of his County responsibilities.

My Office has not incurred liability in the practice of law on behalf of the County and there is no reason to believe it will do so in the practice of law in this statutorily mandated duty.

I do not foresee any additional financial liability on the part of the County resulting from this legislation. No County funds are implicated by the Legislation. Officials including the Director of Administrative Services testified at the September 18 meeting of the Intergovernmental Relations Committee that no County money will be spent in support of this program.

There is no provision in the County budget for additional appropriation or spending for this program. In particular, as to the Office of Corporation Counsel, if legal work cannot be readily absorbed by existing staff, I will notify the Commissioner that he or she must obtain outside counsel. Funding for that or any other Commissioner expense is up to the Commissioner; under the statute, those are not County expenses.

Additional matter

The resolution states that “it is the policy of this County that ... [t]he Commissioner of the (OSPP) may not be an employee of Milwaukee County.”

This must be interpreted as meaning that the Commissioner, when selected, may not be added to the ranks of County employees. The County Board is not able to dictate that the Executive is prohibited from choosing a current County employee as Commissioner should the Executive choose to do so, just as the Board is not able to dictate that a current County employee is unable to leave County employment to take the position of Commissioner should the employee wish to do so. However, upon assumption of duties as Commissioner, such an employee would leave County employment.

The resolution also states that “Milwaukee County employees, including its elected officials, may only engage in activities related to the OSPP that are explicitly mandated by statute, and may not otherwise engage in activities related to the OSPP not specifically required by statute.”

The County Board may not dictate the activities of elected officials, although this would prevent their use of county resources in non-mandated activities. Likewise employees may engage in Opportunity School activities after hours, without the use of county resources, should they see fit, consistent with County employment policies.