



COMMONWEALTH OF VIRGINIA

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March 4, 2010

The Honorable Joseph D. Morrissey
Member, House of Delegates
General Assembly Building, Room 413
Richmond, Virginia 23219

Dear Delegate Morrissey:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a particular portion of a charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science is inconsistent with or violates § 22.1-212.14(D).

Response

It is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science about which you inquire does not conflict with § 22.1-212.14(D).

Background

You relate that the School Board of the City of Richmond (“School Board”) and the Patrick Henry School of Science (“Patrick Henry”) have entered into an agreement (the “Agreement”) for a public charter school. You state the Agreement requires Patrick Henry to expend hundreds of thousands of dollars as a precondition to opening its doors in order to make the building compliant with the Americans with Disabilities Act¹ (“ADA”). Further, you note that other schools in the City of Richmond do not bear such a burden. You also note that it is uncommon for a landlord to require the lessee of the premises to make a tenant responsible for making permanent improvements, such as making a building ADA compliant.

Applicable Law and Discussion

Article 2, § E(1) of the Agreement requires Patrick Henry to

be responsible for all costs associated with the construction, maintenance and upkeep for the Patrick Henry building for the duration of the Charter. [Patrick Henry] shall prepare a schedule for bringing the Patrick Henry school building and property into compliance

¹See 42 U.S.C.S. §§ 12131 to 12165 (2009) (Title II of ADA).

with the Americans with Disabilities Act (ADA) and shall bring the facility into compliance in accordance with the schedule; that schedule shall not cause the School Board to violate the consent decree in the case *Bacon v. City of Richmond*. All costs associated with bringing the facility into compliance with the ADA shall be borne entirely by [Patrick Henry].

Article 1.2, Chapter 13 of Title 22.1, §§ 22.1-212.5 through 22.1-212.16, of the *Virginia Code* governs the establishment of charter schools. Section 22.1-212.14(D) provides, in relevant part, that “[f]unding and service agreements between local school boards and public charter schools shall not provide a financial incentive or constitute a financial disincentive to the establishment of a public charter school, including any regional public charter school.” The prohibition in § 22.1-212.14(D) is narrow and prohibits a financial “disincentive” in the “funding and service agreements” between a local school board and a public charter school. Therefore, even if making a building ADA complaint is a financial impediment or is financially disadvantageous in some way, if this requirement does not relate to the “funding and service agreements,” it is not prohibited by § 22.1-212.14(D).

Section § 22.1-212.14(C) provides further guidance:

Services provided the public charter school by the local school board or the relevant school boards, in the case of regional public charter schools, may include food services; custodial and maintenance services; curriculum, media, and library services; warehousing and merchandising; and such other services not prohibited by the provisions of this article or state and federal laws.

Section E(1) of the Agreement plainly does not infringe upon the prohibition for a financial disincentive with respect to a “service agreement[]” as that term is used in § 22.1-212.14(D).

Second, as with the “service agreement[],” the Agreement does not infringe on the prohibition for financial disincentives with respect to the “funding agreement[.]” A funding agreement in this context does not refer to a precondition for opening the doors of the school. Rather, § 22.1-212.14(D) refers to funding agreement between the school board and the charter school after the school has opened. In other words, the “funding agreement” refers to the ongoing operations of the school, not startup costs.² This reading of subsection D of § 22.1-212.14 harmonizes that subsection with subsection (B), which expressly authorizes a school board to state “the conditions for funding the public charter school.” A requirement that Patrick Henry make the building ADA compliant is one of those conditions.³

Finally, you note that other schools in the City of Richmond are not required to make their buildings ADA complaint. I have no reason to dispute this assertion. You also note that it is unusual for a

²The type of funding agreement that is contemplated by § 22.1-212.14 appears at Appendix E of the Agreement.

³I note that § 22.1-212.6(C) requires a public charter school to be responsible for its own operations, including contracts for services. Further, § 22.1-212.6(D) provides that “[a]ll other costs for the operation and maintenance of the facilities used by the public charter school shall be subject to negotiation between the public charter school and the school division.” Finally, § 22.1-212.6(A) mandates that public charter schools are subject to all federal and state laws and regulations. Requiring that Patrick Henry be ADA compliant merely ensures that the school meets the federal standards and requirements, specifically, the ADA requirements.

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landlord to require a lessee to make a building ADA compliant. That is also my understanding of standard practice in the real estate industry. Neither fact, however, renders § E(1) incompatible with § 22.1-212.14(D).

Conclusion

Accordingly, it is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science about which you inquire does not conflict with § 22.1-212.14(D).

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken Cuccinelli II", with a horizontal line underneath the name.

Kenneth T. Cuccinelli, II
Attorney General