

December 19, 2018

Via Regular Mail and Email

Sean Dusek, Superintendent
Kenai Peninsula Borough School District
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RE: ABCHS Charter Preferences

Dear Superintendent Dusek,

This letter is in response to your question about whether the Kenai Peninsula Borough School Board may permit or reject Aurora Borealis Charter High School's request to include a preference for Aurora Borealis Charter School 8th graders into its proposed charter. Alaska statutes and regulations do not specify any groups or types of students who may, or must, be given enrollment preference at charter schools. Instead, pursuant to AS 14.03.250, a District shall provide a charter school application procedure that includes the contract elements set forth in AS 14.03.255(c). There is nothing in AS 14.03.255(c) that provides for student preferences, nor is there in the State's charter school regulations, 4 AAC 33.110-119. The District also has a Board Policy and Regulation for charter schools, BP/AR 6187, which does not address preferences. Given this statutory and regulatory silence, the District may reject a requested preference from a charter school. There does not appear to be *any* preference an Alaska school district must approve for a charter school.

Alaska's statutes and regulations make it less clear whether the District may *allow* a charter school to adopt the proposed 8th grade preference. DEED has previously approved at least two preferences for students at charter schools: sibling preference and preference for students of the charter school staff. However, the preferences are not set in statute nor regulation. A district – and DEED itself – does not have explicit legal authorization to grant any preferences. Further, AS 14.03.265(b) states that if it is not possible to accommodate all eligible students [at a charter school] who submit a timely application, students shall be accepted by random drawing. By its plain language, this statute would seem to prohibit any preference, because a preference defeats the requirement that the drawing be "random." Still, DEED has permitted some limited preferences. I do not consider the 8th grade preference to be a limited one, as it applies to all ABCS 8th graders and could significantly limit access to ABCHS for non-ABCS students.



The proposed 8th grade preference could be challenged through an Office of Civil Rights complaint or a lawsuit, either as a violation of AS 14.03.265(b) or as a civil rights claim. OCR complaints are highly fact specific, and a complainant would have to demonstrate the District has a policy that discriminates against a person due to their status in a protected class or that the policy violates a federal law. A claimant would also have to demonstrate a harm – in other words, a student attending ABCS would have to gain admission to ABCHS over a non-ABCS student based on that student's status alone. Whether a parent would challenge the preference is speculative. However, OCR complaints usually result in corrective conduct, not fines. Even if the District was found to have been in violation of a civil rights statute, the exposure would be limited. The District would be ordered to cease enforcing the preference. It is likely a court would order a similar remedy if the District was found in violation of AS 14.03.265(b).

In sum, Alaska's charter school statutes and regulations allow the District to reject the proposed 8th grade preference. Alternatively, the District may be allowed to authorize the preference, but the absence of affirmative language addressing preferences in statute and regulation poses a challenge. If the District required ABCHS to remove the preference from its application and ABCHS refused, the District should deny the application. ABCHS's remedy would be to appeal that decision to DEED under AS 14.03.250-253. If the District authorized the preference, please note that DEED could reject it on review or it could be subsequently challenged by a community member as described above.

If you or the School Board have any additional questions about this, please let me know.

Sincerely,

JERMAIN, DUNNAGAN & OWENS, P.C.



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