

July 24, 2012

**SUBJECT**

Commission Discussion: Consideration of Hearing Officer's Recommendation Regarding Summit Public Charter School Petition Denial

**APPLICABLE STATUTE, RULE, OR POLICY**

I.C. § 33-5207  
IDAPA 08.02.04.401

**BACKGROUND**

On April 5, 2012, the Public Charter School Commission (PCSC) moved to deny the petition for Summit Public Charter School (Summit). Summit appealed this decision to the State Superintendent of Public Instruction, and a hearing was conducted by a hearing officer on June 28, 2012.

The hearing officer has issued to the PCSC a recommendation that the PCSC affirm its denial decision. In accordance with IDAPA 08.02.04.401.08, the PCSC will review the hearing officer's recommendation and make a final decision to affirm or reverse its initial decision within ten business days of this meeting.

**DISCUSSION**

The PCSC denied Summit's petition on five specific grounds, which are detailed in the Decision to Deny included with these materials.

Prior to the appeal hearing, Summit submitted to the hearing officer a revised, draft lease agreement. At the hearing, PCSC counsel stipulated that this document successfully resolved the first of the five identified grounds for petition denial.

Also prior to the appeal hearing, Summit submitted to the hearing officer a revised student handbook that addressed most, but not all, of Ms. Rebecca Stallcop's previously cited trademark concerns regarding that document.

No additional, new documents to address the remaining grounds for petition denial were submitted. Summit indicated during the hearing that its board did not understand that such materials could be submitted and were critical to the hearing officer's recommendation. However, Summit's opportunity to submit new materials was addressed during the April 5, 2012, PCSC meeting; in communications between the petitioners and SDE staff; in a phone conversation between the petitioners and PCSC staff; in IDAPA 08.02.04.401.05; and during the pre-hearing conference held on June 18, 2012.

The petitioners have indicated their belief that Summit can address the remaining grounds for denial, and have expressed a desire for this

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opportunity, should the PCSC elect to review additional materials. Statute and administrative rule are silent regarding whether or not an authorized chartering entity may consider additional materials at this stage of an appeal.

The PCSC must make its final decision to affirm or reverse its initial decision within ten business days.

**IMPACT**

If the PCSC affirms its decision to deny the petition, the petitioners could appeal to the State Board of Education, or they could decide to not proceed further. The petitioners could also choose to repeat the petitioning process, beginning with an SDE sufficiency review, with the intention of a smoother progression now that the petition is more fully developed.

**STAFF COMMENTS AND RECOMMENDATIONS**

Staff notes that although the petitioners express great passion for their proposed school, they consistently take slow or incomplete action in response to recommendations from state agencies. This is reflected not only in the unusually high number of petition reviews the Summit petition has undergone with both the SDE and the PCSC (seven, compared to the usual two-three), but also in Summit's failure to follow clear instruction from the SDE and administrative rule regarding the appeal process.

Although the PCSC indicated when making its petition denial decision that it hoped Summit would use the hearing process to address the PCSC's outstanding concerns regarding the petition, the petitioners failed to provide the hearing officer with documents addressing most of the grounds for denial.

This pattern of repeated failure to address identified issues in a timely fashion, despite clear and repeated guidance, raises serious concerns about Summit's ability to effectively operate a school and comply with federal, state, and authorizer requirements over the long term. For this reason, and because documents addressing most of the grounds for petition denial were not submitted to the hearing officer, staff must agree with the hearing officer's recommendation to affirm the PCSC's decision dated April 10, 2012.

**COMMISSION ACTION**

A motion to affirm the initial decision to deny the petition for Summit Public Charter School.

**OR**

A motion to reverse the initial decision and approve the petition for Summit Public Charter School.

Moved by \_\_\_\_\_ Seconded by \_\_\_\_\_ Carried Yes \_\_\_\_\_ No \_\_\_\_\_

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STATE OF IDAHO  
PUBLIC CHARTER SCHOOL COMMISSION

In the Matter of ) Case No.: 2011-01  
SUMMIT PUBLIC CHARTER SCHOOL ) PUBLIC CHARTER SCHOOL  
PETITION FOR A NEW PUBLIC ) COMMISSION DECISION DENYING  
) CHARTER

The petition from SUMMIT PUBLIC CHARTER SCHOOL for a public charter school, referred to as SUMMIT PUBLIC CHARTER SCHOOL ("Summit"), was submitted to the Public Charter School Commission ("PCSC") pursuant to Idaho Code §33-5203(5). The PCSC held meetings open to the public on December 15, 2011, and April 5, 2012, to consider this petition.

The PCSC, in its discretion, hereby denies this petition for a charter, as defined by Idaho Code § 33-5202A(2), pursuant to Idaho Code § 33-5205(1)(d). Specifically, the PCSC denies the charter on the following grounds:

1. Concerns regarding facility option 1, Westwood Mall, particularly:
  - Uncertainty associated with the landlord's option to terminate the lease with 30 days notice based on events beyond Summit's control; and
  - Illegality of the Summit's agreement to the service of alcohol, beer, or wine within 300 feet of the school.
2. Inadequate budgetary information and supporting documentation to indicate that Summit will have sufficient funds to remain fiscally viable in the event facility option 2 or facility option 3 is used.

PUBLIC CHARTER SCHOOL COMMISSION DECISION - 1

3. Failure to provide updated petition appendix materials with reference to use of the Harbor Method and training by The Academy removed; similarly, failure to remove outdated appendix materials.
4. Additional, unaddressed concerns and recommendations contained in the March 26, 2012, Public Charter School Commission Staff Review of Public Charter School Petition, including:
  - Self-appointing school board;
  - Inconsistency throughout petition regarding minimum number of board members;
  - Inconsistency throughout petition regarding the name of the school;
  - Inclusion of professional development with The Academy in revised Albertson's grant budget (Appendix AA);
  - Insufficient documentation regarding estimated remodeling costs for facility option 1;
  - Unexplained inconsistencies between best-case and worst-case budget scenarios;
  - Apparent misunderstanding of dual-enrollment (Appendix M); and
  - Apparent inadequacy of planned budgetary expenditures to meet certain commitments, such as provision of contracted special education services and the goals listed in Appendix T.

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5. History of slow or incomplete action in response to recommendations from state agencies.

IT IS SO ORDERED.

Dated this 10<sup>th</sup> day of April 2012.

*Alan Reed*

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PUBLIC CHARTER SCHOOL COMMISSION  
Alan Reed, Chairman

NOTICE: Pursuant to Idaho Code § 33-5207, the petitioner may appeal this decision to the state superintendent of public instruction within thirty (30) days of the date of the written decision.

PUBLIC CHARTER SCHOOL COMMISSION DECISION - 3

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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of April 2012, I caused to be served a true and correct copy of the foregoing by placing a copy thereof in the United States Mail, postage prepaid, addressed to:

Summit Public Charter School  
Jonathan Braack, Board Chair  
4739 Kimmi Court  
Chubbuck, ID 83202

Tom Luna  
Superintendent of Public Instruction  
State Department of Education  
P.O. Box 83720  
Boise, ID 83720-0027



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PUBLIC CHARTER SCHOOL COMMISSION  
Helen Pline

PUBLIC CHARTER SCHOOL COMMISSION DECISION - 4

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OFFICE OF THE IDAHO  
STATE BOARD OF EDUCATION

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STATE OF IDAHO  
PUBLIC CHARTER SCHOOL COMMISSION

In the matter of the Appeal of the  
SUMMIT PUBLIC CHARTER SCHOOL  
PETITION FOR A CHARTER TO  
ESTABLISH A NEW PUBLIC  
CHARTER SCHOOL

Case No. 2011-01

HEARING OFFICER'S  
RECOMMENDATION

INTRODUCTION

This document is written in narrative style. Findings of fact and reasoning regarding those facts are intertwined throughout the document. Sections or paragraphs are labeled for convenience only. A description of the procedural background is presented and then factual findings and reasoning from the written record and comments at the hearing. A formal recommendation at the end is part of and concludes the discussion.

PROCEDURAL BACKGROUND

Pursuant to notice, a hearing was held in the above-entitled matter on Thursday, June 28, 2012, at 10:00 a.m. at the office of HOPKINS RODEN CROCKETT

HEARING OFFICER'S RECOMMENDATION - 1

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HANSEN & HOOPEs, PLLC, 428 Park Ave, Idaho Falls, ID 83402 on the April 10, 2012 written decision (“the Decision”) of the Public Charter School Commission (“PCSC or Commission”) denying the SUMMIT PUBLIC CHARTER SCHOOL PETITION, and thus a charter for a new school. The hearing was held under the authority of Idaho Code § 33-5207(1) and Idaho Code § 67-5242 and its subsections, as well as the Rules Governing Public Charter Schools, IDAPA 08.02.04, and in particular, Section 401.

Section 401 requires a public hearing and a review of the record, with written findings and a recommendation to the Commission to either affirm the denial or to reconsider and potentially approve the petition and issue a charter.

A telephone prehearing conference was held on June 18, 2012, to assess issues provided by Section 401 for such conferences and determinations were made to aid in the conduct of the hearing.

The State Department of Education (“Department”) expected to have 2-3 people present and one witness of approximately thirty (30) minutes duration. Summit Public Charter School, Inc. (“Summit”) expected to have 4-6 people present and up to three witnesses, the duration of which was not known. As the Appellant, it was anticipated that Summit would be allowed to proceed first. The hearing duration was limited to a maximum of two (2) hours. The parties would be allowed to present their information through oral testimony or written summary; provided, the hearing officer might limit the time of individual witnesses and/or reserve time for each party to cross-examine the other’s witnesses.

HEARING OFFICER’S RECOMMENDATION - 2

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The issues for hearing were the items identified as being deficient in the Decision. There was discussion about completing the record and Summit was made responsible to arrange for the hearing officer and the Department legal counsel, Jennifer Swartz, to receive copies of audio recordings and written minutes of the Commission meetings/hearings on the petition, on or before Thursday, June 21, 2012. The Department was made responsible to arrange for the hearing officer and the Summit representative, Jonathan Braak, to receive a complete copy of the Charter School Commission Staff Review dated March 26, 2012, on or before Thursday, June 21, 2012. Items identified in the written appeal as being provided in a “yellow folder,” consisting of written material collected prior to the April 5, 2012 Charter School Commission hearing, but after the submission deadline, were considered a part of the record for hearing and did not need to be duplicated in a separate submission.

Summit made some procedural errors in the manner in which the appeal was made, however, except for the items to complete the record, above, it appeared there was substantial compliance and it also appeared that if those materials were timely exchanged, the Department would not suffer undue prejudice from those errors.

Section 401 and the Notice of Prehearing Telephone Conference also provided for discussion of additional information that might be provided to the hearing officer that had not been considered by the Commission. It was specified that the hearing was not subject to the formal rules of evidence and that it was not being conducted as an adversarial hearing.

HEARING OFFICER’S RECOMMENDATION - 3

FINDINGS FROM THE WRITTEN RECORD AND HEARING

**Summit.** Summit Public Charter School, Inc. is an Idaho non-profit non-member corporation. Its personnel consist of its volunteer board of directors who are people with real jobs and real families who must make extra time to work on the petition and related supporting documentation. It is likely that they have each contributed many hours of time since the beginning of the petition process.

**PCSC and Staff.** The Department, the staff assigned to assist the Public Charter School Commission, Commission members and their legal counsel likewise appear to be dedicated individuals whose aim is to fulfill their obligations to properly administer the Idaho public charter school laws and regulations. It is their position that the petition and materials submitted in support of it must be complete and accurate, because if a charter is granted, the public, the school and the Department must rely on those written materials as the framework or guiding documents as a public charter school proceeds forward with planning and operations and evaluating future performance.

**Petition Process and Reviews.** Summit has completed many items to the satisfaction of the PCSC, but except as noted below, the items stated in the Decision as grounds for denial were not corrected or adequately addressed in writing prior to the hearing. The PCSC staff has conducted seven (7) reviews of the petition and related written supporting materials and provided written reports/comments to Summit regarding items determined to be insufficient. The last staff review report was dated March 26, 2012. It was represented that most approved petitions have gone through two (2) or perhaps three (3) staff reviews before being accurate and correct.

**Additional Record Items.** Written minutes of two PCSC meetings were received by the Hearing Officer and considered part of the record. Those meetings, held December 15, 2011 and April 5, 2012, addressed the Summit Public Charter School New Charter Petition. As noted, the written Decision denying the petition was issued April 10, 2012. The audio recording of the meetings was not available due to technology difficulties, but the written minutes were stipulated as being an adequate record of those proceedings, and the Hearing Officer had reviewed them and agreed that they were adequate. Summit presented the Hearing Officer with a revised lease omitting reference to service of alcohol within the Westwood Mall (for whatever reason, the “yellow folder” received by the Hearing Officer only had one page – the Department already had the revised lease) Summit also presented one estimate on issue 4.e., remodeling costs for the Westwood Mall, facility Option 1. Both were accepted into the record without objection.

**Hearing Issues.** At the hearing, the Department stipulated that updated information had satisfied the Department as to the items identified in ground for denial number “1” relating to the Westwood Mall in the Decision. Those concerns were related to a termination clause in a prior version of the proposed lease, and potential conflict with laws relating to the service of alcoholic beverages within 300 feet of a school premises. The termination clause had been removed from the lease, and the potential tenant who intended to serve alcoholic beverages withdrew their consideration of the Westwood Mall as a business premises.

Thus, the issues to address at the hearing were pared down by that stipulation to the following (as numbered in the Decision):

2. Inadequate budgetary information and documentation to show sufficient funds to remain fiscally viable if facility option 2 or 3 is used.
3. Failure to provide updated materials removing reference to use of the Harbor Method and training by The Academy; and, failing to remove outdated appendix materials of that nature.
4. Unaddressed concerns and recommendations from the March 26, 2012 PSCS Staff Review:
  - a. Self-appointing school board;
  - b. Inconsistency regarding minimum number of board members;
  - c. Inconsistency regarding the name of the school;
  - d. Inclusion of professional development with the Academy in revised Albertson's grant budget (Appendix AA);
  - e. Insufficient documentation on estimated remodeling costs for facility option 1;
  - f. Unexplained inconsistencies between best-case and worst-case budget scenarios;
  - g. Misunderstanding of dual-enrollment (Appendix M);
  - h. Inadequacy of planned budgetary expenditures to meet commitments, e.g. contracted special education and goals listed in Appendix T;
5. History of slow or incomplete action in response to recommendations from state agencies.

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**The Parties' Representatives.** The Department was represented by Tamara Baysinger of the Office of the State Board of Education/PCSC staff and Jennifer Swartz, Deputy Attorney General assigned to the PCSC. Summit was represented by five people, who were officers and/or directors, i. e. Jonathan Braack, Susan Hall, Greg Smith, Richard Kirkham, and Heath Mitchell.

**The Hearing Process.** The hearing turned out to be an event of frustration for both parties and the Hearing Officer. Summit did not have legal counsel at the hearing, volunteer or paid, and they erroneously believed the hearing was being held to provide them with further explanation of the Decision's points of denial, such that they approached it as a meeting and discussion forum. That was unfortunate, as Section 401 provided an opportunity for Summit to prepare and submit, prior to the hearing, written information to address each of the enumerated hearing issues. Otherwise, the hearing was conducted verbally and it was largely an instructional session in the sense that Summit learned that the appeal and hearing had been an opportunity to "dot the i's and cross the t's" and correct or adequately address the items appearing as hearing issues. Summit verbally expressed that they had the information or ability to provide the information but had not understood that they could have done so prior to the hearing – other than the information they had included in the appeal record contained in the "yellow folder," and the minutes, lease and remodeling estimate referenced above.

Items deserving specific discussion at the hearing, and in this document, are the following ones.

HEARING OFFICER'S RECOMMENDATION - 7

**Budgetary Information.** The budgetary information did not present best-case, worst-case and likely-case scenarios for facility Options 2 and 3. It is the Department's position that the information is necessary because a school's first choice of facility does not always come to fruition, and Options 2 and 3 appeared to have greater start-up costs that might not be able to be met with the same anticipated revenues. Changes that had been made to the best-case and worst-case scenarios for Option 1 were not well-explained, and while the PSCS spreadsheet format was interpreted by Summit as limiting the space for comment and explanation, it is a point that was addressed as some length in the March 26, 2012 Staff Review and which requires more than cryptic side notes on a spreadsheet.

**Editing Errors.** Editing errors resulted in the references to The Harbor Method and training by The Academy. Editing errors were also responsible for not removing outdated or corrected materials, inconsistency of the school name, and professional development by and payments to The Academy in the start-up grant. The petition and supporting materials need to be accurate to eliminate possible confusion.

**Inconsistent Minimum Number of Directors.** In the record provided to the Hearing Officer, the Articles of Incorporation provide for a minimum of three (3) board members. The By-Laws provide for an initial number of five (5), a minimum of three (3) and a maximum of nine (9), and the ability of a 2/3 vote of any existing board to alter the number of directors. Unfortunately, the Petition itself stated that the initial number when the school opens is six (6), a potential conflict if the existing board did not

meet and vote by a 2/3 majority to ensure that number is not in conflict with its organic documents, i.e. its Articles and By-Laws.

**Self-Appointing School Board.** It is not unusual, and in fact would be the norm, that the initial board of directors of an Idaho non-profit corporation would be self-appointed by being named in the Articles of Incorporation. The By-Laws provided to the Hearing Officer had a provision whereby members of the board could be nominated prior to the annual meeting by other board members or by non-board members, presumably members of the public at large, parents, etc. Therefore, the ground for Denial on a self-appointed board seemed to be addressed, unless the Hearing Officer received information inconsistent with that provided to the PSCS, and if that occurred, it would need correction.

**Misunderstanding of Dual Enrollment.** The Summit petition does misinterpret dual enrollment as set forth in Idaho Code section 33-203. Again, Summit did not have volunteer or paid legal counsel, at least at the hearing, and as this Hearing Officer explained to them at the hearing, their written materials interpret the law in reverse. This seems to be a fundamental error when made by persons who wish to start and operate a new school.

Dual enrollment provides a mechanism whereby home school, private school or public charter school students may enroll in any program in their own public school district, as long as they meet the same eligibility requirements that the public school students must meet to so enroll. It is not a mechanism for a public school student to enroll in a program offered by a home school instructor, private school or public

charter school. Though the statute does not limit the potential programs for dual enrollment, typical examples are areas where the instruction or opportunity cannot feasibly be provided by home school or public charter schools due to the number of needed participants or cost of facilities. This might include things such as participation on a sports team, band, choir or special instructional classes like advanced math or English, chemistry or physics and related labs, welding or shop classes or perhaps ESL.

**Post-Hearing Procedures.** Prior to hearing, this Hearing Officer had reviewed IDAPA 08.02.04 in performance of the duties of that position, and particularly Sections 400 and 401. Sections 401.04 and 401.05 make provision for providing information to a hearing officer that had not been presented to the PCSC and for the exchange of such prior to the hearing. Section 401.08 describes a procedure whereby the PCSC holds an additional public hearing after receiving the hearing officer's recommendation but is silent on whether more information can be submitted by a petitioner.

Because of the inability to conduct a normal hearing due to Summit's belief about the purpose of the hearing, this Hearing Officer made inquiry of the Department and its counsel as to whether Summit would be permitted to give additional written information to the PCSC after these findings and recommendation are received. While having no knowledge of a precedent or set policy, it was stated that the PCSC does not view the petition process as adversarial, and that it might be possible for Summit to make one more attempt to adequately address the grounds of denial stated in the Decision. Regardless of the final recommendation, it would be appropriate for the PCSC hearing

notice to advise Summit as to whether additional information will be accepted prior to or at the review hearing, since the PCSC may follow a hearing officer recommendation but is not bound to do so.

Summit inquired as to the process that occurs following the delivery of this document to the PSCS. They were instructed to carefully review IDAPA 08.02.04 Section 401, as it contains provisions that specifically outline what occurs after the PCSC receives the recommendation (i. e. subsections 401.08, 401.09 and 401.10).

#### RECOMMENDATION

Section 401 of IDAPA 08.02.04 governs the Summit appeal and the duties of this Hearing Officer. Paraphrased, it states that the hearing officer is to review the action of the authorized chartering entity (PCSC in this case) and conduct a public hearing, and issue a recommendation within ten (10) days after the date of the hearing. It is to include specific findings on all major facts at issue and a reasoned statement in support of a recommendation affirming or reversing the decision of the [PCSC].

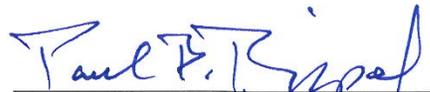
While Section 401 does permit additional information to be provided to the Hearing Officer for inclusion in the record and thus consideration of the PCSC Decision, in this case only the remodel cost estimate was information not already required to be in the record by Section 401. It may be that Summit could have presented adequate written information to the Hearing Officer had they understood the purpose of the hearing as described in Section 401, and it may be that they could do so before the PCSC if the opportunity to provide additional information exists at the PCSC review of this recommendation. However, to conclude that the grounds still remaining for denial from

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the Decision would be corrected or satisfied would require the Hearing Officer to speculate, which is not permissible.

Accordingly, on this record, the Hearing Officer is constrained to affirm the Public Charter School Commission Decision dated April 10, 2012, except as modified by the stipulation regarding the Westwood Mall lease issues and on the self-appointing school board issue.

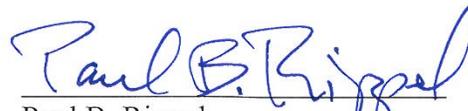
Dated this 5<sup>th</sup> day of JULY, 2012.

  
Paul B. Rippel, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the persons named below, by prepaid first class mail.

DATED this 5<sup>th</sup> day of JULY, 2012.

  
Paul B. Rippel

Jonathan Braak  
Authorized Representative  
Summit Public Charter School, Inc.  
4739 Kimmi Court  
Chubbuck, Idaho 83202

Superintendent Tom Luna  
Idaho Department of Education  
650 West State Street  
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Boise, Idaho 83720-0027

Attn: Tamara Baysinger, OSBE/PCSC, and  
Jennifer Swartz, Deputy Attorney General  
Idaho State Board of Education  
650 West State Street, Room 307  
P.O. Box 83720  
Boise, ID 83720-0037

HEARING OFFICER'S RECOMMENDATION - 12