GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE INSPECTOR GENERAL

AUDIT OF THE NOTIFICATION PROCEDURES OF THE D.C. PUBLIC CHARTER SCHOOL BOARD AND THE D.C. BOARD OF ZONING ADJUSTMENT

CHARLES J. WILLOUGHBY
INSPECTOR GENERAL

OIG No. 07-2-28GA **December 4, 2008**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General

December 4, 2008

Thomas A. Nida
Chairman
D.C. Public Charter School Board
3333 14th Street, NW
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Clifford W. Moy
Secretary of the Board of Zoning Adjustment
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Robert C. Bobb
President
D.C. State Board of Education
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Washington, D.C. 20001

Dear Mr. Nida, Mr. Moy, and Mr. Bobb:

Enclosed is our final report summarizing the results of the Office of the Inspector General's (OIG) *"Audit of the Notification Procedures of the D.C. Public Charter School Board and the D.C. Board of Zoning Adjustment (OIG No. 07-2-28GA)."*

Our report contains seven recommendations for necessary action to correct the described deficiencies. We directed one recommendation (Recommendation 1) to the D.C. State Board of Education (SBOE); however, the SBOE did not provide responses to our draft report. Thus, we respectfully request that the SBOE provide our Office with its response no later than December 18, 2008.

We directed the remaining six recommendations (Recommendations 2-6) to the D.C. Public Charter School Board (PCSB). On October 12, 2008, we received the PCSB's response to the draft report. We consider the actions taken and/or planned to be responsive to our recommendations. The full text of the PCSB's response is included at Exhibit D. Our report does not contain any recommendations directed to the D.C. Board of Zoning Adjustment.

We appreciate the cooperation extended to our staff during the audit. If you have questions, please contact William J. DiVello, Assistant Inspector General for Audits, at (202) 727-2540.

Sincerely,

Charles J. Willoughby
Inspector General

CJW/mg

Enclosure

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AUDIT OF THE NOTIFICATION PROCEDURES OF THE D.C. PUBLIC CHARTER SCHOOL BOARD AND THE D.C. BOARD OF ADJUSTMENT

TABLE OF CONTENTS

EXECUTIVE DIGEST ..... **i**

INTRODUCTION **1**

BACKGROUND 1

OBJECTIVES, SCOPE, AND METHODOLOGY 4

PRIOR REVIEWS 5

FINDINGS AND RECOMMENDATIONS **6**

FINDING 1. PCSB COMPLIANCE WITH THE SCHOOL REFORM ACT 6

FINDING 2. PCSB COMPLIANCE WITH THE ANC ACT 12

OTHER MATTERS OF INTEREST **16**

EXHIBITS

EXHIBIT A. SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT 19

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE 21

EXHIBIT C. OAG RESPONSE TO OIG INQUIRY 27

EXHIBIT D. PCSB RESPONSE TO DRAFT REPORT 30

EXECUTIVE DIGEST

OVERVIEW

This report summarizes the results of the Office of the Inspector General's (OIG) Audit of the Notification Procedures of the District of Columbia Public Charter School Board (PCSB) and the District of Columbia Board of Zoning Adjustment (BZA) (OIG No. 07-2-28GA). We conducted the audit in response to concerns raised by the Chairman of Advisory Neighborhood Commission (ANC) 6A.

The overall audit objectives were to: (1) determine if the PCSB is providing proper notification to the ANCs when the PCSB grants or revises a public school charter; (2) evaluate the PCSB's process for notifying the ANCs; and (3) determine if the BZA provided proper notice to ANC 6A when it scheduled hearings with regard to the AppleTree Institute for Education and Innovation's plan to construct a charter school at 138 12th Street, NE.

CONCLUSIONS

This report contains two findings that detail the conditions found during our audit. We determined that the PCSB did not consistently notify the ANCs when it held public hearings on petitions to establish charter schools and amend charters, as required by the School Reform Act. As a result, the Advisory Neighborhood Commissioners (Commissioners) did not get the opportunity to voice their concerns at the hearings. Additionally, we determined that the PCSB did not notify the ANCs of events affecting their neighborhoods, as required by the ANC Act. As a result, the Commissioners did not know when events occurred affecting their neighborhoods, such as when schools moved into their areas, and the Commissioners did not get the opportunity to voice their concerns before these events occurred.

This report also contains a section entitled "Other Matters of Interest." In this section, we discuss the events surrounding AppleTree Institute for Education and Innovation's plan to construct a charter school at 138 12th Street, NE. While we determined that the BZA followed applicable requirements when it scheduled and held meetings with regard to the entity's plan, we wanted to address the concerns raised by ANC 6A in this report. It must be noted that the OIG does not have jurisdiction to render formal or binding legal opinions. Accordingly, we have conducted audit analyses based on informal conclusions regarding the application of law and regulations as applicable. Formal or binding legal opinions, in this instance, are more appropriately rendered by the District of Columbia Attorney General or by the District of Columbia Court of Appeals through the administrative appeals process.

EXECUTIVE DIGEST

SUMMARY OF RECOMMENDATIONS

We directed six recommendations to the Chairman of the Public Charter School Board and one recommendation to the District of Columbia State Board of Education that we believe are necessary to correct the deficiencies noted in this report. The recommendations, in part, center on the following:

- Revising the School Reform Act to require: (a) charter school applicants to identify proposed sites when they submit applications to open public charter schools; (b) the PCSB to notify the appropriate ANCs when charter school applicants identify actual school sites; and (c) the PCSB to give the ANCs an opportunity to provide comments after the applicants identify actual schools sites and before the PCSB grants full approval to open charter schools.

- Implementing measures to ensure: (a) the PCSB provides proper notice to the ANCs when events occur affecting their neighborhoods, as required by the School Reform Act and the ANC Act; (b) the ANCs receive the opportunity to voice their concerns before events affecting their neighborhoods occur; and (c) the PCSB documents compliance with notification requirements.

A summary of the potential benefits resulting from the audit is shown at Exhibit A.

MANAGEMENT RESPONSES AND OIG COMMENTS

On September 25, 2008, the PCSB provided its written response to our draft report. We directed six recommendations to the PCSB; PCSB's response fully addressed the six recommendations and we consider the actions taken and/or planned to be responsive to our recommendations. The full text of PCSB's response is included at Exhibit D.

We directed one recommendation (Recommendation 1) to the D.C. State Board of Education (SBOE); however, the SBOE did not provide responses to our draft report. Thus, we respectfully request that the SBOE provide our Office with its response no later than December 18, 2008. Our report does not contain any recommendations directed to the BZA.

INTRODUCTION

BACKGROUND

Advisory Neighborhood Commissions. The Advisory Neighborhood Commissions (ANCs) advise the D.C. Council, the Mayor, executive agencies, and independent agencies, boards, and commissions on issues affecting their neighborhoods, such as planning, transportation, social services, education, health, public safety, economic development, recreation, sanitation, and alcohol licensing. There are 37 ANCs representing the 8 District wards. Each ANC consists of several Advisory Neighborhood Commissioners (Commissioners). The Commissioners are elected D.C. residents. In total, there are approximately 280 Commissioners.

Public Charter School Board. The Public Charter School Board (PCSB) is a charter independent agency. The D.C. School Reform Act of 1995 (codified as amended at D.C. Code §§ 38-1800.01 – 1835.01 (Supp. 2006)) authorized the PCSB to grant charters to establish public charter schools in Washington, D.C. The Mayor, in consultation with the Council of the District of Columbia, appoints the seven members of the PCSB.[1]

The PCSB, which has been operating since February 1997, is responsible for performing the following functions: (1) receiving and reviewing applications to establish public charter schools; (2) awarding or denying requests to establish public charter schools; (3) monitoring the operations of public charter schools; and (4) renewing, withdrawing, or revoking charters. Both individuals and organizations are eligible to submit applications to establish public charter schools. If approval is granted, the applicant must sign a charter agreement.[2]

The public charter schools are independently-operated public schools. They receive public funding based on the number of enrolled students. Organizations with multiple charter schools operate all of their schools under the same charter. There were 57 organizations operating 82 public charter schools in Washington, D.C. as of September 2007. These schools are located throughout the District. The following table shows the number of schools per ward.

[1] The U.S. Secretary of Education submits a list of recommended individuals to the Mayor and the Mayor selects members from the list.
[2] Charter agreements are also referred to as “contracts” or “charters.”

INTRODUCTION

Table 1. Location of Public Charter Schools

Ward	Total Schools
1	16
2	5
3	1
4	16
5	14
6	9
7	12
8	9

The D.C. School Reform Act of 1995 (as amended in 1996) also provided the D.C. Board of Education (BOE) with authority to authorize charter schools.[3] However, due to legislative changes, the PCSB assumed responsibility for the charter schools authorized by the BOE.[4]

Board of Zoning Adjustment. The Board of Zoning Adjustment (BZA) is an independent, quasi-judicial body. The BZA includes five members, which consist of three mayoral appointees, a rotating member of the District's Zoning Commission, and an appointee of the National Capital Planning Commission.[5]

The BZA is authorized to: (1) vary or modify any part of the Zoning Regulations where, because of an exceptional situation, the strict application of the regulations results in "exceptional practical difficulties or exceptional and undue hardship" upon a property owner; (2) approve certain uses of land; and (3) hear cases where it is alleged that the decision of any administrative officer or body related to the enforcement or administration of the Zoning Regulations is incorrect. Pursuant to D.C. Code § 6-641.07(g)(4)(2001), the BZA may:

> reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken.

[3] The Board of Education became the State Board of Education on June 12, 2007.
[4] In April 2007, the D.C. Council enacted the Public Education Reform Amendment Act of 2007, which established the District of Columbia Public Schools as a cabinet-level agency, subordinate to the Mayor. Under the new governance structure, the BOE is no longer authorized to grant charters.
[5] In cases involving foreign missions and chanceries, the Executive Director of the National Capital Planning Commission becomes the sixth member of the BZA.

INTRODUCTION

Notification Requirements

The ANCs derive their authority to receive notice of various government activities from two sources: (1) the laws establishing the ANCs; and (2) the authorizing laws for particular agencies or entities, which expressly provide notice to the ANCs under specified circumstances.[6]

Advisory Neighborhood Commissions Act. The Advisory Neighborhood Commissions Act of 1975 (D.C. Law 1-21) and the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000 (D.C. Law 13-135) (ANC Act) together establish the types of government action that require 30-day advance notice to ANCs.[7] D.C. Code § 1-309.10(b) (Supp. 2007) provides:

> Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions ... shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single-member district affected by said actions, and to each affected Ward Councilmember, except where shorter notice on good cause made and published with the notice may be provided or in the case of an emergency and such notice shall be published in the District of Columbia Register. In cases in which the 30-day written notice requirement is not satisfied, notification of such proposed government action or actions to the Commissioner representing the affected single-member district shall be made by mail ....

This provision applies to independent agencies and boards, as well as agencies subordinate to the Mayor. D.C. Code § 1-309.10(c)(1) (Supp. 2007) provides, "Proposed District government actions covered by this part shall include, but shall not be limited to actions of the Council of the District of Columbia, the executive branch, or independent agencies, boards, and commissions …."

Home Rule Act. D.C. Code § 1-207.38(d) (Supp. 2007) provides:

> In the manner provided by act of the Council, in addition to any other notice required by law, timely notice shall be given to each Advisory Neighborhood Commission of requested or proposed zoning changes, variances, public improvements, licenses, or permits of significance to neighborhood planning and development within its neighborhood commission area for its review, comment, and recommendation.

[6] Office of the Attorney General letter (dated April 5, 2007) submitted to ANC 6A in response to a request for legal advice on, *inter alia*, the applicability of the notice provisions in various acts. *See* Exhibit B.
[7] *Id.* at 19.

INTRODUCTION

School Reform Act. D.C. Code § 38-1802.03(c) (Supp. 2007) provides, in part:

> Not later than 10 days prior to the scheduled date of a public hearing on a petition to establish a public charter school, an eligible chartering authority:
>
> (1) Shall publish a notice of the hearing in the District of Columbia Register and newspapers of general circulation;
> (2) Shall send a written notification of the hearing date to the eligible applicant who filed the petition;
> (3) Shall send written notification of the hearing date to the Advisory Neighborhood Commission in the area in which the school is located….

D.C. Code § 38-1802.04(c)(10) (Supp. 2007) provides:

> A public charter school seeking to revise its charter shall prepare a petition for approval of the revision and file the petition with the eligible chartering authority that granted the charter. The provisions of § 38-1802.03 shall apply to such a petition in the same manner as such provisions apply to a petition to establish a public charter school.

OBJECTIVES, SCOPE, AND METHODOLOGY

The initial audit objectives were to: (1) determine if the PCSB is providing proper notification to the ANCs when the PCSB grants or revises a public school charter; and (2) evaluate the PCSB's process for notifying the ANCs. We initiated the audit in response to a request submitted by the Chairman of ANC 6A. We announced the audit as the "Audit of the D.C. Public Charter School Board's Notification Procedures." Subsequent to our audit announcement, the Chairman of ANC 6A expressed concerns with BZA's notification procedures and we incorporated these procedures into our review of PCSB's notification procedures. We re-announced the audit as the "Audit of the Notification Procedures of the D.C. Public Charter School Board and the D.C. Board of Zoning Adjustment" and included, as a third objective, whether the BZA provided proper notice to ANC 6A when it scheduled hearings with regard to the AppleTree Institute for Education and Innovation's plan to construct a charter school at 138 12th Street, NE.

To accomplish our objectives, we reviewed applicable regulations and policies and interviewed PCSB and BZA staff. In addition, we reviewed hearing notices published by the PCSB for calendar years 2003 through 2007, and we examined the documents in BZA's file on the AppleTree Institute for Education and Innovation. Further, the audit team interviewed Commissioners to determine if the PCSB and BZA have been providing timely notification to their ANCs. Prior to the issuance of our draft report, we briefed PCSB and BZA officials of our findings.

INTRODUCTION

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

PRIOR REVIEWS

The OIG has not conducted prior related reviews of the PCSB and the BZA. In addition, the OIG did not identify prior related reviews conducted by the Office of the D.C. Auditor or the Government Accountability Office.

FINDINGS AND RECOMMENDATIONS

FINDING 1. PCSB COMPLIANCE WITH THE SCHOOL REFORM ACT

SYNOPSIS

The PCSB did not consistently notify the ANCs when it held public hearings on petitions to establish charter schools and amend charters, as required by the School Reform Act. According to PCSB officials, the agency always notified the ANCs when it held hearings on petitions to establish charters. However, PCSB officials admitted that the agency did not always notify the ANCs when it held hearings on petitions to amend charters. Because the ANCs did not know when the PCSB scheduled public hearings, the ANCs did not have the opportunity to voice their concerns at the hearings.

DISCUSSION

The School Reform Act requires the PCSB to send written notification to the ANCs at least 10 days prior to holding public hearings on petitions to establish charter schools and amend charters.[8] However, the PCSB did not consistently notify the ANCs when it held hearings on petitions to establish charter schools and amend charters. In addition, the School Reform Act requires the PCSB to publish notices in the D.C. Register and newspapers prior to holding the hearings,[9] but the PCSB did not maintain documentation to support its claim that it published some of the notices.

Establishing Charter Schools. The PCSB reviews applications to establish charter schools once a year. From 2003 through 2007, the PCSB received 70 applications to establish charter schools. The PCSB should have notified the ANCs prior to holding the public hearings on the petitions, but the PCSB did not have documentation to support that it complied with the notification requirements. Specifically, the PCSB did not have notices for the 2003, 2004, 2005, and 2006 application cycles. The PCSB only had the notice sent to the ANCs for the 2007 application cycle.

According to the PCSB Deputy Director, the PCSB always notifies the ANCs when it holds public hearings on petitions to establish charter schools, but the agency did not maintain copies of the notices. In addition, the Deputy Director stated that different staff members have been responsible for notifying the ANCs and the staff members were not required to maintain documentation. The School Reform Act does not require the PCSB to maintain copies of the notices; however, the PCSB cannot document compliance with the notification requirements unless it maintains copies of the notices.

[8] D.C. Code §§ 38-1802.03(c)(3) and 38-1802.04(c)(10) (Supp. 2007).
[9] *Id.* § 38-1802.03(c)(1) (Supp. 2007).

FINDINGS AND RECOMMENDATIONS

The lack of documentation may not necessarily indicate the absence of notification. Thus, when we interviewed Commissioners, we asked them if they received notices from the PCSB. We interviewed 17 individuals representing 14 different ANCs, and 13 of the 17 individuals stated that the PCSB did not provide notices to their ANCs.[10] All of the Commissioners interviewed held positions for their ANCs, such as Chairman and Vice Chairman. Because many of the Commissioners did not confirm receiving notices and the PCSB did not document compliance with the notification requirements, we concluded that the PCSB did not consistently notify the ANCs when it held hearings on petitions to establish charter schools and amend charters.

The PCSB also did not have documentation to support its contention that it published notices in the D.C. Register when the PCSB held hearings on petitions to establish charter schools. For the 2004, 2005, and 2007 application cycles, the PCSB had documentation showing it timely provided notice in the D.C. Register. However, the PCSB did not have documentation showing it provided notice in the D.C. Register for the 2003 and 2006 application cycles. Further, the PCSB only had documentation showing it timely provided notice in at least two newspapers for 2004 and 2005 application cycles. For the remaining years, PCSB only had documentation showing it timely published notice in one newspaper. The PCSB publishes notices in *The Washington Post* and *The Washington Times*.

Amending Charter Agreements. When organizations operating charter schools want to amend their charters, they must prepare petitions for approval and file the petitions with the PCSB, and the PCSB must follow the notification provisions in D.C. Code § 38-1802.03.[11] PCSB officials identified two instances requiring amendments. According to officials, the PCSB only has to amend charters for organizations when the PCSB grants the organizations approval to offer different curriculums or new grade levels.

From 2003 through 2007, the PCSB received 17 petitions to amend charters. However, the PCSB did not have documentation to support its contention that it notified the ANCs when the PCSB held public hearings on the 17 petitions. PCSB officials also admitted the agency did not always provide notice to the ANCs when it held hearings on petitions to amend charters.

In addition, the PCSB did not have documentation showing it provided notice in the D.C. Register for 13 of the 17 petitions. Of the four remaining petitions, the PCSB timely provided notice for three. Further, the PCSB did not maintain documentation showing it provided notice in at least 2 newspapers for the 17 petitions. The PCSB only had documentation showing it published notice in 1 newspaper for 9 of the 17 petitions. Of the nine petitions, the PCSB timely posted the notice for eight.

[10] The 17 individuals included 14 current Commissioners, 2 former Commissioners, and 1 ANC staff person.
[11] *See* D.C. Code § 38-1802.04(c)(10) (Supp. 2007).

FINDINGS AND RECOMMENDATIONS

Process for Notifying ANCs. D.C. Code § 38-1802.03(c)(3) (Supp. 2007) provides that the PCSB must "send written notification of the hearing date to the Advisory Neighborhood Commission in the area in which the school is located[.]" This provision assumes applicants seeking to open charter schools have identified sites for their proposed schools prior to public hearings. However, according to PCSB officials, applicants often do not have sites for their proposed schools prior to the hearings. When the PCSB approves an applicant to open a charter school, the PCSB will only grant conditional approval if the applicant has not identified a site. After the applicant identifies a site, the Board of Directors (Board) votes to grant full approval.

Because applicants often do not have sites for their proposed schools prior to public hearings, the PCSB has to send each notice to all of the 37 ANCs. The notices will not indicate where the proposed schools will be located. The Chairman of the PCSB stated that some Commissioners do not want to become involved in the process unless they know the schools will be located in their areas. For these reasons, the PCSB Executive Director believes the ANCs may not have paid attention to the notices sent to them.

Although the School Reform Act does not specifically state the purpose for notifying the ANCs, it may reasonably be inferred that the notification requirement ensures ANCs are aware of events affecting their neighborhoods and gives them an opportunity to voice their concerns before these events occur. It is also understandable that Commissioners do not want to become involved in the process unless the schools will be located in their areas. Therefore, to ensure compliance with the intent of the School Reform Act, we believe: (1) charter school applicants should be required to identify – at a minimum – proposed sites when they submit their applications to open charter schools and the ANCs should have an opportunity to provide comments on the proposed sites at the public hearings;[12] (2) the appropriate ANCs should be notified when the applicants identify their actual sites; and (3) the ANCs should have an opportunity to provide comments on the actual sites before the Board votes to grant full approval.

Conclusion. The PCSB did not consistently comply with the School Reform Act and notify the ANCs when it held public hearings on petitions to establish charter schools and amend charters. In some instances, we determined the PCSB posted notices in the D.C. Register and newspapers when it did not notify the ANCs. However, the School Reform Act specifically requires the PCSB to provide notice directly to the ANCs. Because the PCSB did not notify the ANCs of public hearings, the ANCs did not have the opportunity to attend the hearings and voice their concerns. The ANCs could have learned of the hearings by reading the D.C. Register, *The Washington Post*, or *The Washington Times*; however, when we interviewed

[12] We realize it is unreasonable for applicants to identify actual sites (i.e., purchase buildings and obtain leases) before they know whether the Board will grant them approval to open their charter schools.

FINDINGS AND RECOMMENDATIONS

the Commissioners, several indicated that not all Commissioners read the D.C. Register and the newspapers for PCSB hearing notices.

RECOMMENDATIONS:

We recommended that the District of Columbia State Board of Education submit a proposal to the Council of the District of Columbia to:

1. Revise the School Reform Act to require: (a) charter school applicants to identify proposed sites when they submit their applications to open public charter schools; (b) the PCSB to notify the appropriate ANCs when charter school applicants identify their actual school sites; and (c) the PCSB to give the ANCs an opportunity to provide comments after the applicants identify their actual school sites and before the Board grants full approval.

We recommended that the Chairman, Public Charter School Board:

2. Require charter school applicants to identify proposed school sites when they submit their applications to open charter schools.

3. Send notices to the ANCs prior to holding hearings on petitions to establish charter schools and amend charter agreements, as required by D.C. Code §§ 38-1802.03(c) and 38-1802.04(c)(10).

4. Maintain copies of the notices sent to the ANCs and published in the D.C. Register and newspapers in order to document compliance with the notification requirements.

5. Until legislation is enacted requiring identification of proposed sites, require that notices sent to the ANCs state when applicants have not identified actual school sites and include a caveat to let ANCs know that the schools may be located in any commission territory.

6. Notify the appropriate ANCs when the charter school applicants identify their actual school sites and provide the ANCs with an opportunity to voice their concerns before the Board votes to grant full approval to the applicants.

MANAGEMENT RESPONSES AND OIG COMMENTS

Management Response (Recommendation 1)

The District of Columbia State Board of Education did not provide responses to the draft report.

FINDINGS AND RECOMMENDATIONS

OIG Comment

We respectfully request that the State Board of Education provide our Office with its response no later than December 18, 2008.

Management Response (Recommendation 2)

Prior to granting full approval to applicants to establish charter schools, the PCSB agreed to provide written notification to the ANCs in the areas where the applicants propose to locate their schools and provide the ANCs with the opportunity to voice their concerns. In addition to providing notification to the ANCs prior to granting full approval, the OIG believes the PCSB should require charter school applicants to identify proposed school sites when they submit their applications to open charter schools. This will allow the ANCs to have a general idea where the proposed schools may be located.

OIG Comment

We consider PCSB's action to be responsive to our recommendation.

Management Response (Recommendation 3)

The PCSB concurred with this recommendation. In its response, the PCSB agreed to send written notification to the ANCs in the areas where the charter schools will be located no later than 30 days prior to holding hearings on petitions to establish charter schools and amend existing charter agreements. If the petitions do not identify the areas where the schools will be located, the PCSB agreed to send written notification to all of the ANCs.

OIG Comment

We consider PCSB's action to be responsive to our recommendation.

Management Response (Recommendation 4)

The PCSB concurred with this recommendation. The PCSB agreed to maintain copies of the notices published in the D.C. Register and newspapers and maintain copies of the notices sent to the ANCs.

OIG Comment

We consider PCSB's action to be responsive to our recommendation.

FINDINGS AND RECOMMENDATIONS

Management Response (Recommendations 5 and 6)

The PCSB concurred with these recommendations. Prior to granting full approval to applicants to establish charter schools, the PCSB agreed to provide written notification to the ANCs in the areas where the applicants propose to locate their schools and provide the ANCs with the opportunity to voice their concerns. In its response, the PCSB stated its goal is to correct the deficiencies identified in the report and the PCSB believes this can be accomplished without amending existing charter school legislation. Although we applaud the PCSB's efforts to correct the deficiencies in the report without an amendment to existing legislation, the OIG believes the School Reform Act should be amended as recommended in Recommendation 1. Amending the School Reform Act will ensure consistency and conformity when new members are appointed to the Board of Directors and when there are PCSB personnel changes.

OIG Comment

We consider PCSB's action to be responsive to our recommendations.

FINDINGS AND RECOMMENDATIONS

FINDING 2. PCSB COMPLIANCE WITH THE ANC ACT

SYNOPSIS

The PCSB did not notify the ANCs of events affecting their neighborhoods, as required by the ANC Act. For example, when existing charter school operators opened additional schools in new areas, the PCSB did not notify the appropriate ANCs because the School Reform Act did not require notice. We believe this condition occurred because the PCSB did not know it had to follow the ANC Act. As a result, the ANCs did not know when events occurred affecting their neighborhoods, such as when schools moved into their areas, and the ANCs did not have the opportunity to voice their concerns before these events occurred.

DISCUSSION

The School Reform Act requires the PCSB to notify the ANCs when the Board holds public hearings on petitions to establish charter schools and revise charters (see Finding 1). However, the School Reform Act does not require the PCSB to provide notice to the ANCs when other events occur affecting their neighborhoods. For example, the School Reform Act does not require the PCSB to provide notification when charter school operators request to open additional school locations or increase student enrollment. Consequently, the PCSB did not notify the ANCs of these events.

Compliance with the School Reform Act. The School Reform Act defines a charter as an approved petition to establish a charter school, which includes the following: (1) a statement defining the mission and goals; (2) a description of the proposed rules and policies for governance and operation; (3) articles of incorporation and bylaws; (4) procedures for ensuring the health and safety of students, employees, and guests and for complying with applicable health and safety laws, all applicable civil right statutes, and regulations of the federal and District government; (5) assurance to seek, obtain, and maintain accreditation from a listed entity; (6) an explanation of the relationship between the charter school and the school's employees; and (7) any amendments or conditions agreed to by the applicant pursuant to D.C. Code § 38-1802.03(d).[13] Organizations operate multiple charter schools under the same charter, and the Board only revises their charters when the organizations change their curriculums or offer different grade levels. Thus, if an organization with an existing charter to operate one school wants to open a second school in another area and the second school offers the same grade levels and curriculum as the first school, the PCSB will not revise the organization's charter and the ANC notification procedures are not triggered. Although the Board will not hold a public hearing, the Board will vote on whether to allow the organization to open the additional school at a public meeting. The PCSB follows the

[13] D.C. Code §§ 38-1802.03(h)(2) and 38-1802.02 (Supp. 2007).

FINDINGS AND RECOMMENDATIONS

same public meeting procedures if an organization submits a proposal to increase its student enrollment at a school.

The School Reform Act does not require the PCSB to notify the ANCs when organizations submit proposals to open additional schools or increase student enrollment. However, the ANC Act requires such notification.

Compliance with the ANC Act. The PCSB did not know it had to notify the ANCs of events affecting their neighborhoods pursuant to the ANC Act. However, the PCSB must follow the notice requirements in the ANC Act, as well as the notice requirements in the School Reform Act. In response to ANC 6A's request for legal advice, the Acting Attorney General for the Office of the Attorney General (OAG) stated the following:

> [T]en (10) days written notice to ANCs is expressly required by the Charter School Act whenever the PCSB considers a petition to grant or revise a public school charter …. Although there are not parallel requirements for other Board actions in the Charter School Act such as charter renewal or revocation proceedings, the absence of such provisions is not dispositive to the question of whether additional notice provisions contained elsewhere might apply.[14] In fact, such additional provisions are found in the ANC act itself and are applicable to the PCSB.[15]

The ANC Act requires agencies to provide 30-day written notice of government actions and proposed actions to the ANCs. The ANC Act does not describe all of the specific types of government actions or proposed actions for which the ANCs are entitled to receive notice. However, in a November 2007 opinion, the Attorney General informed the OIG that the D.C. Court of Appeals has held that the notice requirement in the ANC Act applies to proposed government actions that are "of significance to neighborhood planning and development."[16] The fact that the Board will not hold a public hearing when a charter school operator requests to open an additional school does not mean this action is not significant to neighborhood planning and development and the appropriate ANC is not entitled to receive notice.

Rather, according to the OAG's April 2007 opinion, on page 4 "arguably … such action can be viewed as a matter of "significance" insofar as any school expansion in a community would necessarily affect the surrounding neighborhood and its residents."[17] The OAG explained further in its November 2007 opinion as follows:

[14] The OAG refers to the School Reform Act as the Charter School Act.
[15] Letter from Linda Singer, Acting D.C. Attorney General, OAG, to ANC Chair 2-B (Apr. 5, 2007).
[16] Letter from Linda Singer, D.C. Attorney General, OAG, to OIG 2 (Nov. 9, 2007). The November 9, 2007, letter is included in its entirety at Exhibit C.
[17] Letter from Linda Singer, Acting D.C. Attorney General, OAG to ANC 6A Chair 4 (Apr. 5, 2007).

FINDINGS AND RECOMMENDATIONS

> a proposal to open a new school facility is sufficiently significant for a neighborhood to trigger the 30-day notice requirement and the opportunity to comment under the ANC Act …. The fact that the Charter Schools Act does not similarly provide notice when the proposed facility would be operated by a charter school that [already has a charter] does not mean that other legally required notice does not apply …. Thus, because the Charter Schools Act does not specifically provide for notice when a second facility is proposed, the ANC 30-day notice requirement would still apply.[18]

Therefore, when the PCSB holds a public meeting on opening a new school in a neighborhood or increasing the student population of an existing school, the PCSB must provide the appropriate ANCs with 30-day written notice pursuant to the ANC Act.

Conclusion. The PCSB did not comply with the ANC Act and notify the ANCs of events affecting their neighborhoods. The PCSB must follow the notice requirements in the ANC Act, as well as the notice requirements in the School Reform Act. For example, when existing charter school operators opened additional schools in new areas, the PCSB did not notify the appropriate ANCs since the School Reform Act did not require notice. As a result, the ANCs did not know when events affecting their neighborhoods occurred and missed the opportunity to voice their concerns before these events occurred.

RECOMMENDATION:

We recommended that the Chairman, Public Charter School Board:

7. Implement management controls that ensure PCSB staff notifies the ANCs of significant events affecting their neighborhoods, as required by the ANC Act.

MANAGEMENT RESPONSE AND OIG COMMENT

Management Response (Recommendation 7)

The PCBS agreed to send written notification, not later than 30 days prior to PCSB action, to the ANCs in the appropriate areas when organizations operating existing charter schools seek to move their schools to new locations or operate school campuses at new locations, and provide the ANCs with an opportunity to voice their concerns.

[18] Letter from Linda Singer, D.C. Attorney General, to OIG 3 (Nov. 9, 2007).

FINDINGS AND RECOMMENDATIONS

OIG Comment

We consider PCSB's action to be responsive to our recommendation. As mentioned in our report, the PCSB should also notify the appropriate ANC when an organization increases the student population at one of its school campuses because this event will affect the surrounding neighborhood and its residents. Further, the PCSB should also acknowledge there may be other significant events affecting neighborhoods and their residents and thus, the PCSB should assess whether the ANCs are entitled to receive notice when these events occur. When the PCSB performs its assessments, the OIG recommends the PCSB consult with the D.C. Attorney General.

OTHER MATTERS OF INTEREST

BZA'S NOTIFICATION PROCEDURES

Background. On February 9, 2006, AppleTree Institute for Education Innovation (AppleTree Institute) applied for a building permit to expand its existing building located at 138 12th Street NE, Washington, D.C. and change the property use from a private club to a public charter school. AppleTree Institute planned to lease the building to AppleTree Early Learning Public Charter School, which is a separate entity. On April 28, 2006, the Zoning Administrator for the Department of Consumer and Regulatory Affairs denied the permit application. The Zoning Administrator asserted that AppleTree Institute's proposed use of the building as a public charter school failed to meet applicable zoning requirements. Subsequently, on June 27, 2006, AppleTree Institute filed an appeal with the BZA (BZA Appeal Number 17532) seeking to overturn the Zoning Administrator's decision.

On November 21, 2006, the BZA held the public hearing for the appeal.[19] At the hearing, AppleTree Institute presented its case through counsel, and the Zoning Administrator defended his decision. An ANC 6A representative testified and the ANC submitted a report in support of the Zoning Administrator's decision. When the hearing concluded, the BZA scheduled a public decision meeting for January 9, 2007, to rule on AppleTree Institute's appeal. At the meeting, the BZA voted to reverse the Zoning Administrator's decision and grant AppleTree Institute's appeal, and by Order, dated July 25, 2007, the BZA's decision was finalized. On August 2, 2007, ANC 6A filed a Motion for Reconsideration requesting that the BZA reconsider its decision granting AppleTree Institute's appeal and reversing the Zoning Administrator's decision, and subsequently, on August 6, 2007, AppleTree Institute filed a motion in opposition to ANC 6A's request for reconsideration.

On August 9, 2007, the BZA notified the Chairman of ANC 6A by electronic mail (e-mail) that it scheduled a public meeting on August 16, 2007, to consider ANC 6A's Motion for Reconsideration. However, on August 15, 2007, BZA notified the Chairman via e-mail that the meeting had to be rescheduled to August 17, 2007. At the meeting on August 17, 2007, the BZA addressed the five grounds presented in ANC 6A's Motion for Reconsideration. However, the Board did not take questions or comments from the public during the meeting. At the conclusion of the meeting, the Board Chairperson offered an oral motion to deny the Motion for Reconsideration, which the Board passed by a 3-0-2 vote (3 in favor, 0 opposed, and 2 abstentions).

Discussion. While it appears that the BZA properly notified ANC 6A of the hearing on November 21, 2006, the Chairman of the Commission expressed concerns that the BZA did not follow applicable requirements when it: (1) originally scheduled the August 16, 2007,

[19] The Chairman of ANC 6A was notified of the hearing on September 6, 2006, which was in compliance with the 30-day notice requirement in the ANC Act and the more stringent 40-day requirement in BZA's Rules of Practice.

OTHER MATTERS OF INTEREST

meeting; (2) rescheduled the August 16, 2007, meeting to August 17, 2007; and (3) actually held the meeting on August 17, 2007.

Compliance with the ANC Act – As previously indicated, the OIG does not have jurisdiction to render formal or binding legal opinions. Accordingly, we have conducted our audit analyses based on informal conclusions regarding the application of law and regulations as applicable. When the BZA scheduled the public meeting for August 16, 2007, it appears that the BZA was not required to provide a 30-day notice to the ANC in accordance with the ANC Act. The 30-day notice provision in the ANC Act appears to pertain to notice "before the formulation of any final policy decision" for proposed zoning changes.[20] The purpose of the meeting appears to have been to discuss the merits of the Chairman's Motion for Reconsideration *subsequent to* the final decision on the zoning issue. Therefore, the notice provision in the ANC Act appears to be inapplicable to the BZA meeting.

Requirements for Rescheduling Meetings - When the BZA rescheduled the August 16, 2007, public meeting to August 17, 2007, it appears that the BZA was not required to provide at least 10 days notice to the ANC in accordance with 11 DCMR § 3124.3. The 10-day notice requirement set forth at 11 DCMR § 3124.3 appears to apply in circumstances where the Board, on its own motion, decides to reopen the record on an appeal that the Board has heard, but for which it has not yet issued a final decision.[21] Upon reopening the record for further hearing, it appears that the Board is required to give at least 10 days notice before the new hearing date, to parties that participated in the earlier proceedings.[22] However, in addressing ANC 6A's Motion for Reconsideration, the Board did not reopen the record nor did it schedule a hearing. Because the Board's decision in Appeal Number 17532 had already been finalized on July 25, 2007, and the August 17, 2007, meeting was not initiated on the Board's own motion, but rather constituted the rescheduling of a previously scheduled meeting to consider ANC 6A's Motion for Reconsideration, the 10-day notice requirement at 11 DCMR § 3124.3 was apparently not implicated.

Requirements for Reconsiderations and Rehearings - BZA's Rules of Practice, which are codified in Title 11 of the District of Columbia Municipal Regulations (DCMR), set forth different notice requirements for a motion for reconsideration and a motion for rehearing. A key distinction is that in accordance with the BZA's Rules of Practice, the BZA will not even consider a motion for rehearing unless the requester presents new evidence that could not reasonably have been presented at the original hearing.[23] By contrast, the BZA may consider a motion for reconsideration without the requester providing new evidence.[24] For example, a requester might seek to have the BZA make a technical amendment to its order, or clarify certain aspects of its ruling by filing a timely motion for reconsideration. Further, if the BZA

[20] D.C. Code § 1-309.10(c)(1) (2007).
[21] 11 DCMR §§ 3124.2 - .3.
[22] *Id*.
[23] 11 DCMR § 3126.6.
[24] 11 DCMR § 3126.4.

OTHER MATTERS OF INTEREST

decides to consider either of these motions, it could do so via a BZA public meeting, with notice posted at least 7 days in advance at the Office of Zoning as required by 11 DCMR § 3105.7.[25] In other words, the BZA could schedule a public meeting to decide whether to grant or deny a motion for reconsideration or a motion for rehearing. Of course, if the BZA decides to grant a motion for rehearing during the public meeting, it appears that it would then be required to provide notice as in the case of the original hearing.[26] Which is to say, the schedule for the hearing must be posted at least 30 days in advance at the Office of Zoning as required by 11 DCMR § 3105.7 and notice must be mailed to the appropriate ANC at least 40 days in advance as required by 11 DCMR § 3112.14(c).

Public Participation at Public Meetings - The BZA was not required to take comments from the public when the BZA held the public meeting on August 17, 2007. The OIG found no provision in the BZA Rules of Practice or elsewhere requiring the BZA to allow public participation during its public meetings. At the public meeting on August 17, 2007, the BZA Chairperson stated that the "[Board would] not take any public testimony at [its] meeting unless the Board asks someone to come forward."[27] Based on the totality of circumstances surrounding this issue, it appears reasonable to infer that the Board may, in its discretion, allow the public to speak during BZA meetings, but it is not required to do so.

Conclusion. Accordingly, it appears that the BZA followed the applicable Rules of Practice requirements when it scheduled and held meetings with regard to AppleTree Institute's plans to expand its existing building located at 138 12th Street, NE and change the property use from a private club to a public charter school.

[25] 11 DCMR § 3126 (Reconsideration or Rehearing) is silent regarding the manner in which the BZA should consider either of these motions. For example, the DCMR does not require the BZA to hold a meeting in order to decide whether it will grant or deny a motion for reconsideration or rehearing. In addition, the DCMR does not state whether the BZA may rule on the motion based strictly on the papers submitted. Nor does the DCMR address motions for reconsideration or rehearing that are unopposed. However, in order to preserve a record in case of an appeal, prudence would dictate that the BZA schedule a meeting (i.e., a proceeding on the record) to consider these motions.
[26] 11 DCMR § 3126.6.
[27] Transcript of Record at 3, Special Public Meeting, D.C. Bd. of Zoning Adj. (Aug. 17, 2007).

EXHIBIT A. SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

Recommendation	Description of Benefit	Amount and Type of Benefit	Agency Reported Estimated Completion Date	Status[28]
1	**Internal Control.** Ensures the ANCs are notified when charter schools plan to move to their neighborhoods and ensures the ANCs have the opportunity to provide comments on the plans before the PCSB grants approval to the charter school applicants.	Non-Monetary	To Be Determined	Unresolved
2	**Compliance.** Ensures ANCs are notified when charter school applicants plan to open charter schools in their neighborhoods and ensures ANCs are aware of events affecting their neighborhoods.	Non-Monetary	FY 2009	Open
3	**Compliance.** Ensures the ANCs are notified when the PCSB grants charters to charter school applicants and amends charter agreements, as required by the School Reform Act.	Non-Monetary	FY 2009	Closed
4	**Internal Control.** Documents compliance with notifying the ANCs and publishing notices in the D.C. Register and newspapers, as required by the School Reform Act.	Non-Monetary	FY 2009	Closed

[28] This column provides the status of a recommendation as of the report date. For final reports, "**Open**" means management and the OIG are in agreement on the action to be taken, but action is not complete. "**Closed**" means management has advised that the action necessary to correct the condition is complete. If a completion date was not provided, the date of management's response is used. "**Unresolved**" means that management has neither agreed to take the recommended action nor proposed satisfactory alternative actions to correct the condition.

EXHIBIT A. SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

Recommendation	Description of Benefit	Amount and Type of Benefit	Agency Reported Estimated Completion Date	Status[28]
5	**Compliance.** Ensures ANCs are notified when charter school applicants plan to open charter schools, but do not have a definitive location for their schools.	Non-Monetary	FY 2009	Closed
6	**Compliance.** Ensures ANCs are notified when charter school applicants plan to open charter schools in their neighborhoods and ensures the ANCs have the opportunity to provide comments on the plans before the PCSB grants approval to open the charter schools.	Non-Monetary	FY 2009	Closed
7	**Compliance.** Ensures ANCs are notified of significant events affecting their neighborhood, as required by the ANC Act.	Non-Monetary	FY 2009	Closed

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

★ ★ ★

Legal Counsel Division

April 5, 2007

Joseph Fengler
Chair, Advisory Neighborhood Commission 6A
Box 75115
Washington, D.C. 20013

Re: Applicability of the District's Open Meetings Act, the Freedom of Information Act and ANC notice provisions to the Public Charter School Board

Dear Commissioner Fengler:

This responds to your March 14, 2007 letter, in which you seek legal advice concerning the applicability of the District's various "sunshine" laws to the Public Charter School Board. You pose five questions which cover the Open Meetings Act, the Freedom of Information Act and the Advisory Neighborhood Commissions (ANC) Act and its requirements that ANCs be given notice of certain government proposed actions.

For context, you give the following background. You state that on February 26, 2007, a commissioner representing your ANC attempted to present an ANC resolution to the Public Charter School Board (PCSB or Board) and to address the Board during one of its meetings. The matter involved whether the AppleTree Early Learning Public Charter School should be granted an enrollment increase and the ANC wished to present its views. The Commissioner was advised by the Board Chairman that it was not a public hearing and that no one would be heard. The Chairman also advised the Commissioner that PCSB requires one week advance notice of any intention to address the Board and a summary of the substance of the address, after which the Board would decide whether it wants to receive such information.[1]

Your questions are answered separately below in the order in which you present them.

(1) "If there are legal requirements under D.C. Law that require the Public Charter School Board (PCSB) to conduct open proceedings, hearings, and meetings, and to make available for public inspection the files and records of the PCSB?"

[1] For purposes of this analysis, I assume the representations made by you are true and accurate. I do not, however, make any formal finding of fact, nor have I conducted a factual investigation into this matter.

1350 Pennsylvania Avenue, N.W., Suite 409, Washington, D.C. 20004 Phone (202) 727-3400 Fax (202) 724-6160

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

The PCSB was established "within the District of Columbia Government." (Emphasis added.) D.C. Official Code § 38-1802.14 (2006 Supp.).[2] The Board is an "eligible chartering authority" and may approve petitions to establish public charter schools in the District (D.C. Official Code § 38-1802.01), is required to monitor the operations of each school to which it has granted a charter (D.C. Official Code § 38-1802.11), and is "authorized to use the services, personnel, and facilities of the District of Columbia" (D.C. Official Code § 38-1802.14(d)(2)). The Board is also required to hold meetings (at the call of the Chair) for such purposes as considering petitions to grant a charter (D.C. Official Code § 38-1802.03), renew a charter (D.C. Official Code § 38-1802.12) or revoke a charter (D.C. Official Code § 38-1802.13).

The District's "Open Meetings Act" is contained in section 742 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 774, Pub. L. 93-198, D.C. Official Code § 1-207.42 (2006 Repl.), and requires that "[a]ll meetings of any department, agency, board, or commission . . . at which official action of any kind is taken shall be open to the public." It also requires that a written transcript or transcription of any meeting required to be open under the act must be kept and made available to the public. D.C. Official Code § 1-207.42 (b) (2006 Repl.).

Although the term "official action" is not expressly defined by the Open Meetings Act, we have concluded on previous occasions that its definition in the open meetings context is consistent with its definition in the District's anti-bribery laws, which offers the following definition: "Official Action means any decision, opinion, recommendation, judgment, vote, or other conduct that involves an exercise of discretion on the part of the public servant." D.C. Official Code § 22-711(3) (2001). Thus, any such exercise of discretionary authority taken by the PCSB in which a decision is made would be subject to the Open Meetings Act, including its aforementioned statutory duties (*i.e.*, considering charter petitions, renewals and revocations). And, to the extent the type of conduct you describe herein would also involve discretionary activity (*i.e.*, considering whether to increase the enrollment of an existing charter school) the term "official action" would, in all likelihood, apply as well.

(2) "Whether the City's ANCs are entitled to the standard D.C. Government 30-day notice requirements of hearings, meetings, decisions and pending action on matters that affect their ANC?"

ANCs derive their authority to receive notice of various government activity from two sources: (1) the authorizing laws of a particular agency or entity which might expressly require notice to ANCs under specified circumstances; and (2) the Advisory Neighborhood Commissions establishment laws that set forth when ANC notice is required and by whom. In the first instance, ten (10) days written notice to ANCs is expressly required by the Charter School Act whenever the PCSB considers a petition to

[2] This statute was enacted by Congress in An Act making appropriations for fiscal year 1996 to make a further downpayment toward a balanced budget, and for other purposes, approved April 26, 1996, 110 Stat. 1321, Pub. L. 104-134, Title II (District of Columbia School Reform Act of 1995 (Charter School Act), § 2001 *et seq.*)

2

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

grant or revise a public school charter. D.C. Official Code § 38-1802.03(c)(3) (2001).[3] Although there are not parallel requirements for other Board actions in the Charter School Act such as charter renewal or revocation proceedings, the absence of such provisions is not dispositive to the question of whether additional notice provisions contained elsewhere might apply. In fact, such additional provisions are found in the ANC act itself and are applicable to the PCSB.

Section 13(a)-(c) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code § 1-309.10(a)-(c) (2006 Repl.) (collectively, the ANC Act) sets forth the types of actual or proposed government actions for which ANCs are to receive thirty (30) days advance written notice. This includes the following:

> (a) Each Advisory Neighborhood Commission ("Commission") may advise the Council of the District of Columbia, the Mayor and each executive agency, and all **independent agencies, boards and commissions** of the government of the District of Columbia with respect to all proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, **education**, health, safety, budget, and sanitation which affect that Commission area. (Emphasis added.)

D.C. Official Code § 1-309.10(a) (2006 Repl.).[4]

Education is expressly mentioned in § 1-309.10(a) as a subject for which an ANC may advise the other parts of the government (and to receive the necessary notice to enable it to do so). Admittedly, however, that is not the end of the analysis.

The D.C. Court of Appeals in *Kopff v. Dist. of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1373, 1380-81 (D.C. 1977), stated that any notice obligations created in the D.C. Code are limited by the Home Rule Act. The pertinent section of the Home Rule Act can be found in the D.C. Official Code § 1-207.38. It states that timely notice shall be given to an ANC for matters "of significance to neighborhood planning and development within its neighborhood commission area." D.C. Official Code § 1-207.38(d) (2001). The phrase "of significance" was interpreted by the Court in *Kopff* to place a limit on the situations in which an ANC was required to receive notice, even if the subject is explicitly listed in § 1-309.10(a). *Kopff*, 381 A.2d at 1381.

In general *Kopff* requires that notice be given to the ANC for actions which affect neighborhood planning and development if a public hearing is required by law. *Id.* The

[3] Such ten (10) day notice is also required whenever a petition to revise an existing charter is filed. D.C. Official Code § 38-1802.04(c)(10) (2006 Supp.).

[4] Though this subsection states only that these are matters for which the ANC may "advise" the governmental entity and does not specifically mention "notice," notice nonetheless is implied by law insofar as subsection (c) expressly refers to "notices required in subsection (a)" when listing the types of actions or proposed actions that trigger the notice requirement. And, subsection (b) makes such notice period thirty (30) days. D.C. Official Code § 1-309.10 (b) and (c) (2006 Repl.).

3

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

requirement to hold a public hearing is taken to be an implicit determination by the legislator that the proposed government action is significant. *Id.* However, there may be infrequent situations where an ANC is entitled to receive notice about matters affecting its neighborhood, but for which a public hearing is not required.[5] Id.

This Office has issued three earlier interpretations concerning ANC notice requirements. The first holds that notice is not required for the issuance of Asbestos Abatement Permits (April 23, 2004, Memorandum to Kenneth Campbell), the second, that the Office of Planning is not exempt from giving notice to ANCs (August 16, 2004, Letter to Absalom Jordan) and the third, that the ANC notice requirements apply to the District of Columbia Board of Education (June 20, 2005, Letter to Robert Vinsom Brannum).

In the instant case and under the circumstances you describe, it is unclear to us whether notice would have been required. Certainly, if there was a public hearing at which official action was considered with regard to the request to increase the enrollment size of the charter school, or if there was a meeting at which official action was taken on the request – a meeting that the Open Meetings Act requires to be open to the public – ANC notice requirements would apply for two reasons. First, assuming that a request to increase the enrollment of a charter school requires a revision to the original charter, the ten (10) day advance notice requirement to ANCs expressly contained in the Charter School Act for a public hearing would have been triggered. D.C. Official Code § 38-1802.04 (c)(10) ("A public charter school seeking to revise its charter shall prepare a petition for approval . . .. The provisions of § 38-1802.03 shall apply to such a petition in the same manner as such provisions apply to a petition to establish a public charter school.").

Second, the ANC Act separately would require notice to the ANC – not only if there was to be a public hearing or public meeting at which official action was to be taken on the request, but also arguably because such action can be viewed as a matter of "significance" insofar as any school expansion in a community would necessarily affect the surrounding neighborhood and its residents.

The only other issue, then, if notice was in fact required, is whether the PCSB should have utilized the ten (10) day notice provision contained in the Charter School Act or the thirty (30) day notice period in the ANC Act. Applying the rule of statutory interpretation that every effort must be made to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, I conclude that the shorter, express requirement of the ten (10) day notice period enacted by Congress in the Charter School Act modifies the more general ANC thirty (30) day notice provisions contained in the Council initiated ANC Act. *See Myers v. Hollister*, 226 F.2d 346, 348 (1955), *cert. denied*, 350 U.S. 987 (1956). Where PCSB activity occurs for which the Charter School Act would not require notice, but for which the ANC Act would nonetheless require ANCs to be notified, the regular thirty (30) day notice period would apply. Consequently, at the very least, the ANC should have received at least ten (10) days

[5] The D.C. Court of Appeals stated in *Kopff* that "while it is difficult to conceive of many matters, not requiring a hearing, which would be sufficiently significant to neighborhood planning and development to warrant a special notice to an ANC, we do not wish categorically to exclude all such cases." *Kopff*, 381 A.2d at 1381.

4

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

advance notice of any public hearing in which a petition to revise a school charter was to be considered.

(3) "Whether documents and communications of PCSB are available without charge to ANCs or, at the very least, subject to FOIA?"

The District's Freedom of Information Act (D.C. FOIA) applies to the PCSB as a "public body." Freedom of Information Act of 1976, effective March 29, 1977, D.C. Law 1-96, D.C. Official Code § 2-531 *et seq.* (2006 Repl.). Moreover, there is an express provision in the ANC Act, which states: "Each Commission shall have access to District government officials and to all District government official documents and public data pursuant to § 2-531 *et seq.* [D.C. FOIA] that are material to the exercise of its development of recommendations to the District government." D.C. Official Code § 1-309.10(i)(1) (2006 Repl.).

The D.C. FOIA statute applies to "any public record of a public body." D.C. Official Code § 2-532(a) (2006 Repl.). A "public body" is defined as "the Mayor, an agency, or the Council of the District of Columbia."[6] The term "agency" is defined as including both subordinate agencies and independent agencies. D.C. Official Code § 2-502(3) (2006 Repl.). A "Subordinate Agency" is defined as "any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Mayor or the Council, required by law or the Mayor or the Council to administer any law or any rule adopted under the authority of a law." D.C. Official Code § 2-502(5) (2006 Repl.). An "Independent Agency" is defined as "any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this act, to establish administrative procedures, but does not include the several courts of the District and the Tax Division of the Superior Court." D.C. Official Code § 2-502(5) (2006 Repl.).

As previously stated, the PCSB was created by Congress and established as an entity "within the District of Columbia government." D.C. Official Code § 38-1802.14 (a)(1) (2006 Supp.). As a result, whether it is designated as a subordinate or independent agency, it is in all cases a public body for purposes of the D.C. FOIA statute and its "public records" therefore are subject to the act's disclosure requirements.

(4) "Whether the communications, written and electronic, between members of the Board, the officers and/or the staff are subject to FOIA?"

As previously stated, the D.C. FOIA statute requires the disclosure of "public records." Public records are defined as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Public records include information stored in an electronic format." D.C. Official Code § 2-502(18) (2006 Repl.).

[6] Terms in the D.C. FOIA statute have the same meaning as provided in D.C. Official Code § 2-502 (2001), including the term "public body." D.C. Official Code § 2-539 (2001).

5

EXHIBIT B. OAG RESPONSE TO ANC 6A REQUEST FOR LEGAL ADVICE

In principle, all such items should be made available upon request unless covered by one or more of the exemptions from disclosure contained in the D.C. FOIA statute. D.C. Official Code § 2-534 (2006 Repl.). These items, however, would have to be specifically requested through a properly lodged FOIA request which can then be reviewed and considered in due course.

(5) "Whether the communications, written and electronic, between members of the Board, the officers and/or the staff and the staff of the schools under its jurisdiction are available without charge to ANCs or, at the very least, subject to FOIA?"

See answer to question 4, above. Certainly, non-exempt documents in the possession of the PCSB would be subject to disclosure. However, because the charter schools themselves are not part of the District government, but instead are non-profit entities (D.C. Official Code § 38-1802.04(c)(16) (2006 Supp.), I do not believe that they would be subject to FOIA requirements.

As for whether the ANC would have to pay for such documents, I find no exception either in the ANC Act or in the D.C. FOIA statute that expressly exempts ANCs from payment of applicable fees. On the other hand, any such disclosing entity may, pursuant to 1 DCMR § 408.9, waive fees when it is deemed to be either in the public interest or in the interest of the agency to do so. I understand that there is somewhat of a tradition of doing so when document requests are made by an ANC.

If you have any questions, please contact Wayne C. Witkowski, Deputy Attorney General, at 202-724-5524.

Sincerely,

LINDA SINGER
Acting Attorney General for the District of Columbia

By: WAYNE C. WITKOWSKI
Deputy Attorney General
Legal Counsel Division

LS/dps (AL-07-164)

6

EXHIBIT C. OAG RESPONSE TO OIG INQUIRY

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

ATTORNEY GENERAL

November 9, 2007

Ms. [redacted]
Director of School Audits
Office of the Inspector General
717 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: Notice Requirements to Advisory Neighborhood Commissions for Pending Actions at the Public Charter School Board

Dear Ms. [redacted]

This is in response to your e-mail dated October 17, 2007, regarding whether the Public Charter School Board ("PCSB" or "Board") would be required to provide an Advisory Neighborhood Commission ("ANC") 30-days notice under the ANC Act[1] when a charter school seeks approval to establish a second school facility in that ANC's district, and the pending action does not trigger the 10-day notice requirement under the Board's enabling statute. District of Columbia School Reform Act of 1995[2] ("Charter Schools Act"), approved April 26, 1996, 110 Stat. 1321, D.C. Official Code §38-1802.01 *et seq.* (2007 Supp.).[3] Your inquiry is part of an audit by the Office of the Inspector General ("OIG") that was requested by ANC Commissioner Joseph Fengler, Chair of ANC 6A. While you indicate that the OIG is examining in general whether the PCSB is providing legally required notice to ANCs, your specific inquiry to this Office involves the notice requirements for a proposal to open a second school facility. You have interpreted the

[1] The 30-day notice requirement is contained in section 13 of the Advisory Neighborhood Commissions Act of 1975 ("ANC Act"), as amended, effective March 26, 1976, D.C. Law 1-58, D.C. Official Code §1-309.10 (2006 Repl.)

[2] The Charter Schools Act was enacted by Congress as Title II of An Act making appropriations for fiscal year 1996 to make a further down payment toward a balanced budget, and for other purposes.

[3] Under the Charter Schools Act , the PCSB must provide a 10 day notice to an affected ANC when a petition to establish a charter school is filed, D.C. Official Code §38-1802.03(c)(3) (2007 Supp.), and when a charter revision is being considered, D.C. Official Code §38-1802.04(c)(10) (2007 Supp.). In addition, pursuant to the Charter Schools Act an applicant seeking to convert a public school into a charter school must provide notice to all ANCs that represent an area within the attendance area of the public school. D.C. Official Code §38-1802.01(a)(2) (2007 Supp.).

One Judiciary Square, 441 Fourth Street, N.W., Suite 1060N, Washington, D.C. 20001 Office (202) 727-3400 Fax (202) 347-8922

EXHIBIT C. OAG RESPONSE TO OIG INQUIRY

legal advice that this Office provided to Commissioner Fengler, in a letter dated April 5, 2007 ("Fengler letter"), as requiring the 30-day notice in this situation. For the reasons that follow, I agree with your interpretation that the PCSB would be required to provide the 30-day notice under the ANC Act to the ANC for the neighborhood where the proposed second school would be located.

The PCSB takes the position that a charter school's request to open a second facility does not constitute a charter revision;[4] therefore it would not trigger the 10-day notice requirement to the affected ANC under section 2204(c)(10) of the Charter Schools Act. D.C. Official Code §38-1802.04(c)(10) (2007 Supp.)[5] PCSB's practice is not to provide ANC notice under these circumstances. According to PCSB, a determination regarding such a proposal would be considered and voted on at a public meeting, as is the case with all official actions by the Board. The public would have an opportunity to present views on the matter during the comment period of the meeting, but not necessarily prior to a vote by the Board.[6]

The Court of Appeals held in *Kopff v. District of Columbia Alcoholic Beverage Control Board,* 381 A.2d 1373 (D.C. 1977), that the 30-day notice requirement contained in section 13 of the ANC Act, D.C. Official Code § 1-309.10 (2006 Repl.), as construed with the ANC notice requirement in section 738(d) of the Home Rule Act, D.C. Official Code §1-207.38(d), applies only to proposed District government actions that are "of significance to neighborhood planning and development." The Court in *Kopff* held that at a minimum matters requiring a public hearing would be "of significance" and therefore require the 30-day notice. However, the Court also recognized that there may also be infrequent situations where a hearing is not required, but the matter is in the "realm of significance" triggering the notice requirement. *Id.*

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[4] D.C. Official Code §38-1802.03(h)(2) (2007 Supp.) provides that a "charter" is an approved petition to establish a charter school that includes the following: a statement defining the mission and goals of the proposed school and the manner in which the school will conduct any districtwide assessments; a description of the proposed rules and polices for governance and operation of the proposed school; copies of the proposed articles of incorporation and by-laws; a description of the procedures the proposed school plans to follow to ensure the health and safety of students, employees, and guests and to comply with applicable federal and District health and safety laws; and assurance that the proposed school will seek, obtain and maintain accreditation from one of the entities listed in D.C. Official Code §38-1802.02(16); an explanation of the relationship that will exist between the public charter school and the school's employees; and any amendments or conditions agreed to by the eligible applicant pursuant to D.C. Official Code §38-1802.03(d) (2007 Supp.).

[5] Information regarding PCSB's practices contained in this letter are based on a telephone discussion between [redacted], Assistant Attorney General, Legal Counsel Division, and Josephine Baker, PCSB Executive Director.

[6] PCSB states that a charter school's request for increased enrollment, the issue that was addressed in the Fengler letter, would be considered in the same manner at a public meeting.

EXHIBIT C. OAG RESPONSE TO OIG INQUIRY

[redacted] Letter
Notice Requirements to ANCs
November 9, 2007

Page 3 of 3

In my view, a proposal to open a new school facility is sufficiently significant for a neighborhood to trigger the 30-day notice requirement and the opportunity to comment under the ANC Act. It is important to note that section 2203(c)(3) of the Charter Schools Act, D.C. Official Code §38-1802.04(c)(3) (2007 Supp.), provides for an affected ANC to receive notice of a proposed facility (albeit a shorter 10-day notice) when an applicant first petitions for a charter to establish a charter school. The fact that the Charter Schools Act does not similarly provide notice when the proposed facility would be operated by a charter school that has already be granted a charter, does not mean that other legally required notice does not apply. Section 738(d) of the Home Rule Act (D.C. Official Code §1-207.38(d)), provides that the ANCs are entitled to notice under the ANC Act, "*in addition to* any other notice required by law…" Thus, because the Charter Schools Act does not specifically provide for notice when a second facility is proposed, the ANC 30-day notice requirement would still apply.

Please note that while I find that a proposal by a charter school to open a new facility would be sufficiently significant to a neighborhood to require the regular 30-day notice to the affected ANC, nothing in this letter is intended to decide whether the notice requirements would apply to other PCSB official actions. Such determinations would have to be made on a case-by-case basis depending on the particular circumstances.

Sincerely,

Linda Singer
Attorney General for the District of Columbia

LS/sk

(AL-07-164B)

EXHIBIT D. PCSB RESPONSE TO DRAFT REPORT

District of Columbia Public Charter School Board

September 25, 2008

Charles J. Willoughby
Inspector General
Government of the District of Columbia
Office of the Inspector General
717 14th St., NW
5th Floor
Washington, DC 20005

Dear Mr. Willoughby:

The D.C. Public Charter School Board ("PCSB") appreciates the opportunity to provide comments on the Draft Report you distributed on September 4, 2008, *Audit of the Notification Procedures of the D.C. Public Charter School Board and the D.C. Board of Zoning Adjustment*. Our goal is to correct the deficiencies identified in the report applicable to the PCSB, and the PCSB believes that this can be accomplished without the need to amend existing charter school legislation.

The enclosed comments address the findings in the Draft Report and set forth the PCSB's planned corrective actions. Please do not hesitate to contact me with any questions.

Sincerely,

Thomas A. Nida
Chair

Enclosure

cc: Clifford W. Moy, Secretary of the Board of Zoning Adjustment
Robert C. Bobb, President of the State Board of Education
Daniel M. Tangherlini, City Administrator and Deputy Mayor
William Singer, Chief of Budget Execution, Office of the City Administrator
Victor Reinoso, Deputy Mayor for Education
Deborah A. Gist, State Superintendent of Education

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EXHIBIT D. PCSB RESPONSE TO DRAFT REPORT

DC Public Charter School Board Comments and Response to the Office of the Inspector General Draft Report:
Audit of the Notification of Procedures of the DC Public Charter School Board and the DC Board of Zoning Adjustment

September 25, 2008

Comments to Background Section of Draft Report

The Public Charter School Board ("PCSB") is an entity established within the District of Columbia Government. The D.C. School Reform Act of 1996 authorizes the PCSB to review petitions and grant charters to establish public charter schools in Washington, D.C. The Secretary of Education provides a list of individuals qualified to serve on the Board to the Mayor. The Mayor, in consultation with the District of Columbia Council, appoints the seven members of the PCSB.

The public charter schools are independently-operated nonprofit D.C. corporations. Corporations operating a public charter school with multiple campuses operate all of the locations under one charter agreement.

Action Plan to Address Issues Raised in Draft Report

The PCSB has developed the following procedures to be implemented immediately, commencing with the upcoming application review cycle for FY 2009. The PCSB believes these procedures will address the deficiencies raised in the draft report and ensure that the PCSB is in full compliance with all applicable law regarding notification procedures for petitions to establish new charter schools and to amend existing charter school agreements, and requests to relocate an existing charter school.

Procedures Applicable to Receiving New Charter School Petitions

1. Pursuant to the School Reform Act, § 38-1802.03 (a), the PCSB will publish a schedule for receiving petitions to establish a public charter school in the District of Columbia. The PCSB will publish this schedule in the D.C. Register and in newspapers of general circulation. The PCSB shall maintain copies of the notices sent to the D.C. Register and the newspapers.

2. Pursuant to the School Reform Act, § 38-1802.03 (b), the PCSB will hold a public hearing on each petition received within forty-five (45) days of receiving the petition.

3. In accordance with the requirements of the School Reform Act, § 38-1802.03 (c), and the Advisory Neighborhood Commission Act, § 1-309.10 (b), not later than thirty (30) days prior to the scheduled date of a public hearing on a petition, the PCSB will:

1

EXHIBIT D. PCSB RESPONSE TO DRAFT REPORT

a. publish a notice of the hearing in the D.C. Register and newspapers of general circulation; and

b. send written notification of the hearing date to the Advisory Neighborhood Commission ("ANC") in the area in which the school is located. If the petition does not identify the area in which the school will be located, the PCSB shall send written notification to all ANCs.

The PCSB shall maintain copies of the notices sent to the D.C. Register and the newspapers and a copy of the written notification sent to the ANC(s).

Procedures Applicable to Approving Conditionally-Approved Charter School Petitions

When petitions to establish public charter schools are approved on the condition that the petitioners identify the site where the school will be located, the PCSB shall:

1. Not later than thirty (30) days before a conditionally-approved petition is granted full approval, provide written notification to the ANC in the area where the petitioner is proposing to locate the school and provide the ANC with the opportunity to voice any concerns; and

2. Maintain a copy of the written notification sent to the ANC.

Procedures Applicable to Receiving Petitions to Amend Existing Charter Agreements

Pursuant to the School Reform Act, § 38-1802.04 (c) (10), a public charter school seeking to revise its charter agreement must file a petition with the PCSB.

1. Pursuant to the School Reform Act, § 38-1802.03 (a), the PCSB will publish a schedule for receiving petitions to amend existing charter school agreements. The PCSB will publish this schedule in the D.C. Register and in newspapers of general circulation. The PCSB shall maintain copies of the notices sent to the D.C. Register and the newspapers.

2. Pursuant to the School Reform Act, § 38-1802.03 (b), the PCSB will hold a public hearing on each amendment petition received within forty-five (45) days of receiving the petition.

3. In accordance with the requirements of the School Reform Act, § 38-1802.03 (c), and the Advisory Neighborhood Commission Act, §

2

EXHIBIT D. PCSB RESPONSE TO DRAFT REPORT

1-309.10 (b), not later than thirty (30) days prior to the scheduled date of a public hearing on an amendment petition, the PCSB will:

a. publish a notice of the hearing in the D.C. Register and newspapers of general circulation; and

b. send written notification of the hearing date to the ANC in the area in which the school is located.

The PCSB shall maintain copies of the notices sent to the D.C. Register and the newspapers and a copy of the written notification sent to the ANC.

Procedures Applicable to Receiving Requests from Existing Public Charter Schools to Move to a New Site or Add a New Campus

Pursuant to the charter agreement entered into between the PCSB and a public charter school, a public charter school must provide written notice to the PCSB when it seeks to move to a new location or operate a campus at a new location.

1. When the PCSB receives one of these requests from a charter school, it will, in accordance with the requirements of the Advisory Neighborhood Commission Act, § 1-309.10 (b), not later than thirty (30) days prior to PCSB action on the request, send written notification of the request to the ANC in the area in which the school or new campus will be located and provide the ANC with the opportunity to voice any concerns.

2. The PCSB shall maintain a copy of the written notification sent to the ANC.

3