

**DATE:** March 14, 2024

**TO:** Colorado League of Charter Schools and CFOMW Tax, LLC

**FROM:** Brownstein Hyatt Farber Schreck, LLP

**RE:** Government Instrumentality for Purposes of the Employee Retention Tax Credit  
With Respect to Colorado District-Authorized Charter Schools

---

**NOTE TO THIRD PARTIES IN RECEIPT OF THE MEMORANDUM:**

By receiving this memorandum (this “Memo”), you acknowledge and agree to the following terms. This Memo was prepared for Colorado League of Charter Schools and CFOMW Tax, LLC based on their instructions to us, and the scope of our review was determined in consultation with Colorado League of Charter Schools and CFOMW Tax, LLC and was limited solely to matters that Colorado League of Charter Schools and CFOMW Tax, LLC requested us to review. The Memo is being provided to you as a courtesy and for your convenience only to facilitate your independent review and not to induce you to make a claim for the employee retention tax credit, or enter into any engagement or other transaction with Colorado League of Charter Schools, CFOMW Tax, LLC or anyone else. You and your advisors will be undertaking your own reviews, investigations and other diligence as you believe is prudent, and you and they do not intend to, and agree and acknowledge that you are not entitled to, rely, and neither you nor any of your affiliates will make any claim of reliance, on this Memo in connection with your or their decision to make a claim for the employee retention tax credit (or cause a claim for the employee retention tax credit to be made) or for any other purpose. We do not make any representation or warranty as to the accuracy, completeness or sufficiency of this Memo. You acknowledge that our furnishing the Memo (i) does not create any attorney-client relationship whatsoever between you and our firm with respect to your consideration of the subject matter of this Memo or otherwise, and (ii) is not to be viewed as providing you with legal, financial, tax or other advice or opinions with respect thereto.

**I. BACKGROUND**

Colorado League of Charter Schools and CFOMW Tax, LLC engaged Brownstein Hyatt Farber Schreck, LLP (“Brownstein”) to analyze whether a Colorado district-authorized charter school was an instrumentality of the government of the United States or the government of any state or political subdivision thereof (“government instrumentality”) during the period after March 12, 2020 and before January 1, 2022 (the “Applicable Dates”), for purposes of determining whether a Colorado

district-authorized<sup>1</sup> charter school would be disqualified from being an “eligible employer” for purposes of the employee retention tax credit (“ERTC”).

In order to properly claim the ERTC, a claimant must satisfy numerous criteria, including that (subject to certain exceptions that are inapplicable to Colorado charter schools) such claimant not be a government instrumentality.<sup>2</sup> The Internal Revenue Service (the “IRS”) has advised that for purposes of the ERTC, the six-factor, facts-and-circumstances test from Revenue Ruling 57-128 should be used to determine whether an organization is a government instrumentality.<sup>3</sup> The IRS has also instructed that no one factor is determinative and government instrumentality status is based on all facts and circumstances.<sup>4</sup> Since this analysis requires the consideration of all facts and circumstances specific to the applicable organization, this Memo was prepared specifically with respect to the CS Schools (as defined herein). Accordingly, the analysis and conclusions with respect to the instrumentality factors herein may differ with respect to other Colorado charter schools to the extent their facts and circumstances (whether or not discussed herein) differ from the CS Schools.

## **II. FACTS AND STATE LAW**

### **A. Enabling Legislation**

The Charter Schools Act authorizes the creation of charter schools in Colorado and is the primary source of regulatory authority with respect to charter schools.<sup>5</sup> The purposes of the Charter Schools Act (and charter schools generally) are:

- To improve pupil learning by creating schools with high, rigorous standards for pupil performance;
- To increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low-achieving;
- To encourage diverse approaches to learning and education and the use of different, innovative, research-based, or proven teaching methods;
- To promote the development of longitudinal analysis of student progress, in addition to participation in the Colorado student assessment program, to measure pupil learning and achievement;
- To create new employment options and professional opportunities for teachers and principals, including the opportunity to be responsible for the achievement results of students at the school site;
- To provide parents and pupils with expanded choices in the types of education opportunities that are available within the public school system;
- To encourage parental and community involvement with public schools;

---

<sup>1</sup> References in this Memo to “charter schools” refer to district-authorized charter schools.

<sup>2</sup> IRS Notice 2021-20 § III.A.; IRS Notice 2021-23 § III.B.; IRS Notice 2021-49 § I.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> C.R.S. § 22-30.5-101, et. seq.

- To address the formation of research-based charter schools that use programs that are proven to be effective;
- To hold charter schools accountable for performance through the “Education Accountability Act of 2009”, including but not limited to meeting state, school district, and school targets for the measures used to determine the levels of attainment of the performance indicators;
- To provide an avenue for citizens to participate in the educational process and environment; and
- To provide citizens with multiple avenues by which they can obtain authorization for a charter school.<sup>6</sup>

Colorado has various types of schools (e.g., public, charter, private), and a charter school is a public school that enters into a charter contract pursuant to the Charter Schools Act.<sup>7</sup> A charter contract is a written contractual agreement between a charter school and the chartering school district’s board of education which (in addition to the Charter Schools Act) sets forth the terms and conditions for operating a charter school.<sup>8</sup>

## **B. Formation**

A proposal to establish a charter school in Colorado may be made by any person or group of persons and the process requires preparing an application, which serves as the basis upon which the charter applicant and the chartering local board of education negotiate a charter contract.<sup>9</sup> Once prepared, the application is submitted to the local school district of the proposed charter school, where such application is initially reviewed by the district’s accountability committee.<sup>10</sup> Provided that the application contains the requisite statutory information (e.g., vision and mission statements of the proposed charter school, descriptions of the proposed charter school’s educational program, etc.), the application is submitted to the local board of education (which makes the ultimate decision).<sup>11</sup>

An organization that will be referred to herein as Charter School 1 (or “CS1”)<sup>12</sup> was formed as a Colorado nonprofit corporation to establish a public charter school in Colorado to provide a rigorous, high-quality education for students in kindergarten through fifth grade.<sup>13</sup>

---

<sup>6</sup> C.R.S. § 22-30.5-102(2).

<sup>7</sup> C.R.S. § 22-30.5-103(2).

<sup>8</sup> C.R.S. §§ 22-30.5-105 and 22-30.5-103(4).

<sup>9</sup> C.R.S. § 22-30.5-106(1).

<sup>10</sup> C.R.S. §§ 22-30.5-107(1)(c) and 22-30.5-107(1.5).

<sup>11</sup> C.R.S. §§ 22-30.5-107(1)(b) and (c).

<sup>12</sup> Note: Identifying information regarding particular organizations (including specific dates of relevant documents) have been removed from this Memo for privacy reasons but may be made available upon request subject to each such organization’s prior written consent.

<sup>13</sup> CS1 Attachment to Articles of Incorporation, § II.

An organization that will be referred to herein as Charter School 2 (“CS2”) was formed as a Colorado nonprofit corporation to establish a public charter school in Colorado to provide a rigorous, high-quality education for students in kindergarten through fifth grade (the CS1 charter school and CS2 charter school are collectively referred to herein as the “CS Schools” and each, a “CS School”).<sup>14</sup>

An organization that will be referred to herein as Network (“Network”) was formed as a Colorado nonprofit corporation to establish a network of charter schools in the state of Colorado and support such charter schools in an administrative capacity.<sup>15</sup> Network is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”).<sup>16</sup>

Subsequently, CS1 and CS2 merged with and into Network in order to be operated as a charter school network.<sup>17</sup> Pursuant to the DPS Charter School Network Contract for Network dated effective in 2023 (the “Charter Contract”), the School District No. 1 in the City and County of Denver and State of Colorado (the “District”) has authorized the CS Schools as charter schools pursuant to C.R.S. § 22-30.5-103 and Network as a charter school network pursuant to C.R.S. § 22-30.5-104.7.<sup>18</sup>

This Memo is based upon an analysis of the Charter Contract. Accordingly, the analysis and ultimate conclusions herein may differ if any charter contract in effect during the Applicable Dates contained different terms than the Charter Contract.

### **C. Governance and Control**

As opposed to a public school which is governed by a publicly elected local school board, a charter school is administered and governed by a governing body in the manner agreed to by the charter school applicant and the chartering local board of education, which may include the charter school applicant contracting with a third-party education management provider for such services.<sup>19</sup> Additionally, a charter school is responsible for its own operation including, but not limited to, preparation of a budget, contracting for services, facilities, and personnel matters.<sup>20</sup> However, employees of Network and the CS Schools shall be members of the Public Employees Retirement System.<sup>21</sup>

The Charter Contract recognizes Network as a charter school network pursuant to C.R.S. § 22-30.5-104.7, so it is responsible for the governance, oversight, and monitoring of compliance and performance for each CS School.<sup>22</sup> Additionally, Network and the District agreed in the Charter Contract that the articles of incorporation and bylaws of Network would provide for the governance

---

<sup>14</sup> CS2 Attachment to Articles of Incorporation, § II.

<sup>15</sup> Network Attachment to Articles of Incorporation, § II.

<sup>16</sup> Network Articles of Incorporation, Art. II.

<sup>17</sup> C.R.S. § 22-30.5-104.7.

<sup>18</sup> Charter Contract § 1.

<sup>19</sup> C.R.S. §§ 22-30.5-104(4)(a) and (b).

<sup>20</sup> C.R.S. § 22-30.5-104(7)(a).

<sup>21</sup> C.R.S. § 22-30.5-111(3).

<sup>22</sup> Charter Contract § 1 and C.R.S. § 22-30.5-104.7(1)

of Network (and the CS Schools).<sup>23</sup> Pursuant to Network’s bylaws (the “Bylaws”), Network’s board of trustees (“Board of Trustees”) governs and directly manages the CS Schools.<sup>24</sup> The requirements for the composition for the Board of Trustees are addressed in the Bylaws. The Bylaws provide that the Board of Trustees will be comprised of at least seven (7) and no more than thirteen (13) members (each, a “Trustee”).<sup>25</sup> The Bylaws further provide that the term of office for each Trustee is three (3) years.<sup>26</sup> The Trustees have staggered terms, such that one-third of the Trustees are up for election each year.<sup>27</sup> At the annual meeting of the Board of Trustees, the governance committee (which is made up of at least three (3) persons elected by the Board of Trustees) presents a slate of potential Trustees for election by the Board of Trustees.<sup>28</sup> If a Trustee resigns or is dismissed, the vacancy may be filled upon recommendation of a qualified candidate<sup>29</sup> by the governance committee and the unanimous vote of the entire Board of Trustees.<sup>30</sup>

Network is responsible for its own operations and has the authority to: (1) contract for goods and services; (2) prepare budgets; (3) select, supervise, evaluate, and determine the compensation for personnel; (4) promote and terminate personnel; (5) lease facilities for school purposes; and (6) adopt of policies and bylaws consistent with the terms of the Charter Contract.<sup>31</sup> However, any borrowing above five percent (5%) of Network’s budget is subject to prior approval from the District.<sup>32</sup>

Network’s Board of Trustees has full authority and responsibility, including ultimate responsibility for Network and each CS School’s fiscal, legal and contractual compliance matters, as is appropriate to a Colorado charter school and Colorado nonprofit corporation and all authority and responsibility necessary or proper to exercise the powers granted by the Charter Contract or by law.<sup>33</sup>

However, while nothing in the Charter Contract or Network’s Bylaws or Network’s articles of incorporation gives any governmental entity the authority to appoint or remove members of Network’s governing board, state law does provide for certain emergency powers.<sup>34</sup> Under the statutory emergency powers, the District may request that the commissioner of education (“Commissioner”) permit external control over a charter school or its management, by submitting a written statement identifying the emergency that justifies external control and the form of control requested.<sup>35</sup> Provided that the applicable procedures are followed and the Commissioner finds there

---

<sup>23</sup> Charter Contract § 5.

<sup>24</sup> Charter Contract § 1.

<sup>25</sup> Bylaws Art. III, § 1.

<sup>26</sup> Id. at Art. III, § 4.

<sup>27</sup> Id. at Art. III, § 5.

<sup>28</sup> Id. at Art. III, § 3 and Art. VI, § 2.

<sup>29</sup> The Bylaws do not specify any qualifications, and it is up to the governance committee to study the qualifications of potential candidates (as deemed relevant by the governance committee) and present a slate of the best qualified nominees to the Board of Trustees. Id. at Art. VI, § 3.

<sup>30</sup> Id. at Art. III, § 6.

<sup>31</sup> Charter Contract § 20.D.

<sup>32</sup> Id.

<sup>33</sup> Id. at § 20.E.

<sup>34</sup> C.R.S. § 22-30.5-703.

<sup>35</sup> C.R.S. §§ 22-30.5-702(5) and 22-30.5-703.

to be a sufficient emergency and justification, the Commissioner may issue an order which permits, among other things, the ability to remove and appoint any member of the charter school's governing board or officers.<sup>36</sup>

#### **D. Oversight**

During the term of the charter contract, the school district is required to annually review a charter school's performance, which at a minimum, includes reviewing the charter school's progress in meeting the objectives identified in charter school's plan and the results of the charter school's most recent annual financial audit.<sup>37</sup>

Network is required to comply with all state financial and budget rules, regulations, and financial reporting requirements to which the District is required to comply, including but not limited to: (1) undergoing an independent financial audit by a Colorado certified public accountant each year; (2) preparing quarterly financial reports for the District in compliance with C.R.S. § 22-45-102(1)(b); (3) adopt an annual budget for each CS School and Network as a whole and a budget statement that describes the major objectives of the educational program and manner in which the budget proposes to fulfill such objectives, in accordance with C.R.S. § 22-44-105.<sup>38</sup>

Each CS School shall be subject to review of its operations, including related records, when the District, in its sole discretion, deems such review necessary.<sup>39</sup> Additionally, the District is permitted access at all reasonable times to any facility owned, leased or utilized in any way by the CS School as a school for purposes of inspection and review of such CS School's operation and to monitor compliance with the terms of the Charter Contract.<sup>40</sup> It is our understanding from discussions with Network representatives, that although the District is permitted access and review, that the District does not exercise such rights other than to the extent required under Colorado law (e.g., when reviews that are statutorily required to renew the Charter Contract).

#### **E. Financing**

As part of charter school contract, the charter school and the school district agree on any funding and services to be provided by the school district to the charter school.<sup>41</sup> It is our understanding from discussions with Network representatives that government funding (whether through grants or the school district) typically serves as the primary (if not sole) source of funding for the CS Schools.

---

<sup>36</sup> C.R.S. § 22-30.5-703.

<sup>37</sup> C.R.S. §§ 22-30.5-110(1)(b) and 22-11-210.

<sup>38</sup> Charter Contract § 17.A.

<sup>39</sup> Id. at § 10.

<sup>40</sup> Id. at § 16.

<sup>41</sup> C.R.S. § 22-30.5-112(2)(a)(I).

## **F. Dissolution**

Upon termination of the Charter Contract or if Network ceases operations or otherwise dissolves, then, at the sole discretion of the District, any assets owned by Network after debts and obligations have been paid, will become the property of the District.<sup>42</sup>

## **G. Regulatory Requirements**

Colorado law regulates public schools, charter school, and private to various degrees, and all such schools are subject to various state regulatory requirements. For example, Colorado law requires that all students wear eye protective devices when participating in industrial art shops or laboratories and chemistry or physics laboratories when such students are engaged in or observing an activity or using hazardous substances likely to cause injury to the eyes.<sup>43</sup> Similarly, the law relating to criminal background checks on school personnel is applicable to public schools, charter schools and private in Colorado.<sup>44</sup>

Charter schools in Colorado may have many of the same requirements and duties as district schools that may not apply to private schools. As some examples:

- A charter school is required to be nonsectarian and shall not charge tuition (subject to certain exceptions),<sup>45</sup>
- A charter school is subject to the same accreditation and standardized testing programs; and<sup>46</sup>
- A charter school shall annually complete a governmental audit that complies with the requirements of the department of education.<sup>47</sup>

However, there are a number of public school requirements that are automatically waived for charter schools, and a charter school may also apply to the chartering local board of education (which would then apply to the state board on behalf of the charter school) for a waiver of a state statute or state rule that is not an automatic waiver (subject to certain exceptions for non-waivable items such as statues relating to notification to parents of alleged criminal conduct by charter school employees).<sup>48</sup>

---

<sup>42</sup> Charter Contract § 22.B.e.

<sup>43</sup> C.R.S. §§ 22-3-101 and 102.

<sup>44</sup> C.R.S. §§ 22-32-109.7; 22-1-121 and 22-30.5-110.5.

<sup>45</sup> C.R.S. § 22-30.5-104(1).

<sup>46</sup> C.R.S. § 22-30.5-104(2)(b).

<sup>47</sup> C.R.S. § 22-30.5-104(4)(a).

<sup>48</sup> C.R.S. § 22-30.5-104(6)(c). *See also* Charter Contract Appendices A and B.

## **H. Miscellaneous**

In order to clarify the status of charter schools for purposes of tax-exempt financing, a charter school, as a public school, is a governmental entity.<sup>49</sup> However, financial obligations of a charter school shall not constitute debt or financial obligations of the school district unless the school district specifically assumes such obligations.<sup>50</sup>

The Board of Trustees shall enjoy all individual immunities from liability provided by law including, without limitation, the immunities of the Colorado Governmental Immunity Act, Part 10 of Title 24, C.R.S.<sup>51</sup>

For purposes of any law (excluding title 1 (elections), title 7 (corporations and associations) and title 22 (education) of the Colorado Revised Statutes), that applies to or exempts a public entities or a public official, a charter school has the same public status as a public school in the same school district and board directors (by virtue of their roles in a public charter school), are deemed public servants.<sup>52</sup> Additionally, a person who is a director of a charter school after May 15, 2023, shall take, sign, and file an oath of office.<sup>53</sup> Note, the provisions described in this paragraph did not become effective law until May 15, 2023. However, the legislative history indicates that this legislation was intended to clarify (rather than change) the application of certain laws to charter schools.<sup>54</sup>

## **III. SUMMARY OF REVIEW**

Though the CS Schools are publicly funded and perform a governmental function by providing public education, they do not perform this function on behalf of the District (or any other governmental authority). The day-to-day operations of the CS Schools are conducted by the Board of Trustees, and no governmental authority has the power to appoint or remove the Trustee under ordinary circumstances. The CS Schools comply with numerous requirements designed to ensure the integrity of their operations, but the Trustees are otherwise in control of the CS Schools. Accordingly, after applying all of the CS Schools' facts and circumstances to the six-factor test in Revenue Ruling 57-128 discussed in detail in the following section, our view is that the weight of the authorities weigh in favor of the position that the CS Schools are not government instrumentalities for purposes of the ERTC (and we note that the mere failure of one or more of the factors isn't necessarily determinative as to instrumentality status).

Please note, while our view is that the six-factor test in Revenue Ruling 57-128 as applied to the facts and circumstances of the CS Schools weighs in favor of the position that the CS Schools are not government instrumentalities, this does not mean that the CS Schools are automatically eligible

---

<sup>49</sup> C.R.S. § 22-30.5-104(4.5)(a).

<sup>50</sup> Id.

<sup>51</sup> Charter Contract § 20.E.

<sup>52</sup> C.R.S. § 22-30.5-104.9(2).

<sup>53</sup> C.R.S. § 22-30.5-104.9(4).

<sup>54</sup> See Bill Summary for Colorado Senate Bill 23-287, *available at* <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/31RehearingExhibit1.pdf>.

to claim the ERTC. Rather, and provided that the IRS agrees that the CS Schools are not government instrumentalities, the CS Schools are not automatically excluded from claiming the ERTC (as a result of being government instrumentalities). Additionally, as of the date of this Memo, the House of Representatives recently passed the Tax Relief for American Families and Workers Act of 2024.<sup>55</sup> This legislation has not passed the Senate, but if it does in its current form, claims for the ERTC made after January 31, 2024 would not be permitted.<sup>56</sup>

#### **IV. FEDERAL TAX LAW**

##### **A. Revenue Ruling 57-128**

The six-factor, facts-and-circumstances test from Revenue Ruling 57-128 is used to determine whether an association is a government instrumentality such that services performed in its employ are exempted from employment by reason of the provisions of section 3121(b)(7) of the Federal Insurance Contributions Act (“FICA”).<sup>57</sup> However, the IRS has advised that the same test will be used to determine whether an organization is a government instrumentality for purposes of the ERTC.<sup>58</sup> The six factors in Revenue Ruling 57-128 are:

1. Whether the organization is used for a governmental purpose and performs a governmental function;
2. Whether performance of the organization’s function is on behalf of one or more states or political subdivisions;
3. Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner;
4. Whether control and supervision of the organization is vested in a public authority or authorities;
5. If expressed or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and
6. The degree of financial autonomy and the source of its operating expenses.<sup>59</sup>

##### **B. Revenue Ruling 69-453**

In Revenue Ruling 69-453, a group of individuals formed a soil and water district to make surveys and conduct research concerning the problems of soil erosion to assist community conservation commissions and planning and zoning boards. The district was not a government instrumentality because (1) the district acted on behalf of private individuals in a manner consistent with the

---

<sup>55</sup> H.R. 7024.

<sup>56</sup> Id.

<sup>57</sup> Rev. Rul. 57-128.

<sup>58</sup> IRS Notice 2021-20 § III. A.; IRS Notice 2021-23 § III. B.; IRS Notice 2021-49 § I.

<sup>59</sup> Rev. Rul. 57-128.

organizational purposes (and the benefits provided to the public does not mean that the district was operated on behalf of the state); (2) the organization was operated by a board of supervisors that did not take an oath of office and no government body had the authority to remove the supervisors from office; and (3) the state law concerning the district was regulatory in nature (e.g., requiring an annual report on the district's operations and financial state), and rather than being designed to control the district's operations, the regulations were designed to insure the integrity of the district.

### **C. Revenue Ruling 56-224**

In Revenue Ruling 56-224, a school was organized as a private nonprofit corporation under a state statute to promote the education of individuals who were deaf and hard of hearing and nonverbal. The state had a program for the overall supervision of the education of the deaf and administered that supervision through one of its agencies. The state also had another program that set standards, aims and practices of a child care program which was administered through a separate state agency. The school came under the jurisdiction of both agencies and the school was required to annually report to both agencies and the state legislature. All of the school's funding came from the state and it submitted an annual budget for approval by the state legislature. However, the school was ultimately not found to be a government instrumentality because, aside from compliance with the aforementioned items, the school's affairs were otherwise directed by a board of trustees, and such trustees were elected by the members of the organization at its annual meetings (and not by a governmental entity).

### **D. Technical Advice Memorandum 9413003**<sup>60</sup>

In Technical Advice Memorandum 9413003, an organization promoted and regulated high school athletics. The organization's staff were legislatively defined as "teachers" for purposes of inclusion in the state's teachers' retirement system. The organization's primary governing body was its executive committee, and the committee members were chosen by the organization's members as well as the state's Superintendent of Education and the state's Department of Education. Though the organization's operations benefitted the public and the state exercised some supervision and control over its activities (through the Superintendent of Education and Department of Education), it was not a government instrumentality, because: (1) day-to-day control was in the organization's membership rather than the state, (2) funding was from membership dues and the organization's revenue producing activities, and (3) the organization could not incur debt, liability or obligations that would impose any debt, liability, or obligations on the state.

### **E. Technical Advice Memorandum 200222029**

In Technical Advice Memorandum 200222029, an organization was publicly incorporated and chartered by a special act of a governmental General Assembly for the care and guardianship of orphaned children. The organization provided residential and nonresidential treatment and educational programs, and operated a foster care program for the state's Department of Children

---

<sup>60</sup> Technical Advice Memorandums are designed to provide guidance to IRS personnel on the interpretation and application of the tax law to a specific set of facts, but may not be used or cited as precedent.

and Families. The organization was considered a public school for purposes of the state's teachers' retirement system. Each child residing at the organization was subject to oversight by the local school system and representatives of the state's education department made periodic visits to provide such oversight. The state's department of education also set the organization's curriculum and accredited it. The organization was subject to various licensing and standard requirements and state-imposed regulations with respect to its programs (including audit requirements that were submitted to the state). The organization was governed by board of directors, none of which were appointed by the state.

While some of factors in Revenue Ruling 57-128 favored classification as an instrumentality, the overall analysis found that the organization was not an instrumentality, noting that (1) the state's inability to appoint board members demonstrated that the organization did not perform services on behalf of the state; (2) upon the organization's dissolution, its assets would be distributed to a similar section 501(c)(3) organization rather than the state; and (3) though the organization was subject to various regulations and licensing and standard requirements that gave the appearance of some control by the state, the organization was in fact governed by an independent board of directors.

#### **F. Chief Counsel Advisory 201519027**<sup>61</sup>

In Chief Counsel Advisory 201519027, a charter school was publicly funded and performed the governmental function of providing public education within a state. It was also subject to various state regulatory requirements (including financial audits and rules for how state appropriations were required to be spent), the state Attorney General provided the charter school with an opinion letter that it was a governmental entity under state law, and it is suggested that state law provided that charter schools were considered governmental entities.

The charter school's charter provided that it would be governed by a board, the members of which served for a set term of years and expiring positions would be elected by parents of enrolled students at the school's parent meeting. If a member resigned or was dismissed, the school's governing board would select a replacement to fill the remainder of the unexpired term. If the school did not comply with its charter or failed to comply with state statutory requirements that applied to charter schools, the entity which chartered the school could exercise direct control over the school by (1) removing a charter school director or finance officer, (2) removing a governing board member, (3) appointing an interim director or mentor to work with the charter school or (4) terminating the school's charter.

However, the charter school didn't qualify as a government instrumentality because it didn't perform its educational function on behalf of the state. The state exercised no meaningful control over the charter school's day-to-day operations or its budget, and the state's laws permitted the

---

<sup>61</sup> Chief Counsel Advice is written advice or instructions prepared by any component of the IRS Chief Counsel's Office to field employees of the IRS or of the Office of Chief Counsel that conveys a legal interpretation of a revenue provision, an IRS or Chief Counsel position or policy concerning a revenue provision, or a legal interpretation of state law, foreign law, or other federal law relating to the assessment or collection of liabilities under revenue provisions. It may not be used or cited as precedent.

charter school to be operated by a board of directors that was independent from the local school district.

Control and supervision of the school was found to not be vested in any public authority because neither the charter nor bylaws provided any governmental entity with the authority to manage the school's day-to-day operations, appoint its governing board, or serve on its governing board. Additionally, the charter school was even permitted (though it did not) to delegate management duties to a private management company. Though the chartering entity had the authority to remove directors and appoint an interim director, this authority arose where the school failed to comply with its charter or with certain statutory provisions that applied to charter schools, and the state did not have the authority to exercise control over the charter school under ordinary circumstances (where the charter school was operating in compliance with its charter and with state law).

#### **G. Private Letter Ruling 200507008**<sup>62</sup>

In Private Letter Ruling 200507008, a charter school was a government instrumentality and provided an educational function on behalf of the government, where it was formed in response to the closure of the sole elementary school in the locality. Though day-to-day management was provided by the school's board of directors, it was subject to investigations and numerous statutory requirements, and the state Commissioner of Education was permitted to appoint board members if the school failed to satisfy certain obligations.

### **V. ANALYSIS**

#### **A. Factor 1: Whether the organization is used for a governmental purpose and performs a governmental function**

Providing education for students in kindergarten through fifth grade is a governmental purpose and function.<sup>63</sup> Colorado has promulgated rules and standards applicable to the CS Schools and as an alternative to standard or traditional public education in Colorado that is provided by school districts,<sup>64</sup> and Colorado League of Charter Schools and CFOMW Tax, LLC readily acknowledge that the IRS would likely find that the CS Schools serve a governmental purpose.

Conclusion: This factor does support government instrumentality status for the CS Schools.

#### **B. Factor 2: Whether performance of the organization's function is on behalf of one or more states or political subdivisions**

Where the board of supervisors of a soil and water district did not take an oath of office, that was evidence that the soil and water district did not perform its functions on behalf of the state.<sup>65</sup>

---

<sup>62</sup> Private Letter Rulings may not be used or cited as precedent (except for the taxpayer that is the subject of the ruling).

<sup>63</sup> CCA 201519027 and PLR 200507008.

<sup>64</sup> C.R.S. § 22-30.5-102.

<sup>65</sup> Rev. Rul. 69-453.

Similarly, where a state Attorney General provided an opinion letter that a charter school was a governmental entity under state law, and it is suggested that state law also provided that charter schools were considered governmental entities, such facts were evidence (but not dispositive), that the charter school was an instrumentality.

With respect to the CS Schools, state law provides that for certain purposes of Colorado law (1) the CS Schools have the same public status as public schools in their district, and (2) the Trustees are public servants.<sup>66</sup> Though such statutory provisions became effective after the Applicable Dates, the legislative history indicates that these provisions were intended to clarify (rather than change) the application of certain laws to charter schools.<sup>67</sup> However, in determining instrumentality status for federal employment tax purposes, the IRS applies the factors in Revenue Ruling 57-128 in making such determination (and state law is simply one of the facts and circumstances included within such analysis).<sup>68</sup>

Though state law is a factor, guidance suggests that the relevant inquiry for this factor is whether a majority of the individuals who administer the entity — the governing board and executive officers — are appointed by and subject to removal by public officials.<sup>69</sup> Public officials exercise regulatory oversight over the CS Schools, but the Board of Trustees governs and directly manages the CS Schools.<sup>70</sup> Pursuant to the Charter Contract and the Bylaws, the Trustees are neither appointed by, nor subject to removal by, public officials, and there are no public officials on the Board of Trustees. Similar to the charter school in Chief Counsel Advisory 201519027 (where governmental authority to appoint and remove directors arose where the school failed to comply with its charter or with certain statutory provisions), governmental authority to appoint or remove Trustees is permitted by state law in emergency situations.

Conclusion: While state law suggests that the CS Schools function on behalf of the state, public officials do not have the right to appoint or remove Trustees under ordinary circumstances. Accordingly, this factor does not support government instrumentality status for the CS Schools.

**C. Factor 3: Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner**

Government funding is the primary (if not sole) source of funding for the CS Schools, and if the Charter Contract terminates or the CS Schools cease operations or otherwise dissolve, after debts and obligations are satisfied, any assets remaining would become the property of the District.<sup>71</sup> Additionally, any borrowing above five percent (5%) of Network’s budget is subject to prior

---

<sup>66</sup> C.R.S. § 22-30.5-104.9.

<sup>67</sup> See Bill Summary for Colorado Senate Bill 23-287, *available at* <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/31RehearingExhibit1.pdf>.

<sup>68</sup> IRS Notice 2021-20 § III.A. See also CCA 201519027.

<sup>69</sup> CCA 201519027 and TAM 20022029.

<sup>70</sup> Charter Contract § 1.

<sup>71</sup> Charter Contract § 22.B.e.

approval from the District.<sup>72</sup> These facts are indicative that the District has the powers and interests of an owner,<sup>73</sup> however they are not dispositive in the government instrumentality analysis.<sup>74</sup>

An entity under the control of private individuals cannot be an instrumentality.<sup>75</sup> Accordingly, even if a charter school receives government funding and its assets would be transferred to a governmental entity upon dissolution, the government still may not have the powers or interests of an owner where control of such charter school rests with a board of private individuals that operate independently from the local school district.<sup>76</sup> Additionally, where a charter school is permitted to delegate management activities of the school to others (regardless of whether or not it has done so), the fact that permissible delegation exists is significant because it further separates the control of the charter school from the government.<sup>77</sup>

The CS Schools are operated by the Trustees, and such Trustees are appointed and removed independently from the District or public officials (except in emergency situations). Additionally, and though the CS Schools have not done so, Colorado law provides that a charter school is administered and governed by a governing body in the manner agreed to by the charter school applicant and the chartering local board of education, which may include the charter school applicant contracting with a third-party education management provider for such services.<sup>78</sup>

Conclusion: While there are some facts that to suggest that the District has the interests of an owner, there are private interests involved, so this factor does not support government instrumentality status for the CS Schools.

**D. Factor 4: Whether control and supervision of the organization is vested in public authority or authorities**

This factor looks to the control and oversight of the day-to-day operations,<sup>79</sup> and asks whether the government has the authority to manage the operations of the organization or supersede the actions of the board of directors.<sup>80</sup>

Where a charter school is subject to numerous statutory requirements, control and supervision can be deemed to be vested in a public authority.<sup>81</sup> However, extensive regulation does not equate to control. So where state law is regulatory in nature and designed to insure the integrity of an organization's operations as opposed to control its operations, control and supervision is not vested in public authorities.<sup>82</sup> Even where a state administers a program through its agencies for the overall

---

<sup>72</sup> Id. at § 20.D.

<sup>73</sup> See CCA 201519027, TAM 20022029 and PLR 200507008.

<sup>74</sup> Rev. Rul. 56-224.

<sup>75</sup> CCA 201519027 citing Rev. Rul. 65-26 and Rev. Rul. 69-453.

<sup>76</sup> CCA 201519027.

<sup>77</sup> CCA 201519027.

<sup>78</sup> C.R.S. §§ 22-30.5-104(4)(a) and (b).

<sup>79</sup> See Rev. Rul. 56-224, CCA 201519027, TAM 200222029, TAM 9413003, and PLR 200507008.

<sup>80</sup> Rev. Rul. 69-453.

<sup>81</sup> PLR 200507008.

<sup>82</sup> Rev. Rul. 69-453.

supervision of an organization, or sets standards, aims, and practices (including but not limited to, requiring audits, annual reports, budget submissions), such administration is not sufficient to say that control and supervision are vested in public authorities.<sup>83</sup>

State and local governmental entities exercise regulatory oversight over the CS Schools, but such oversight is designed to ensure the integrity of the CS Schools rather than to direct their operations. For instance, and similar to the school in Revenue Ruling 56-224, because the CS Schools receive substantially all funding from government sources, they are required to comply with all state financial and budget rules, regulations, and financial reporting requirements to which the District is required to comply (including but not limited to: (1) undergoing an independent financial audit by a Colorado certified public accountant each year; (2) preparing quarterly financial reports for the District in compliance with C.R.S. § 22-45-102(1)(b); (3) adopt an annual budget for each CS School and Network as a whole and a budget statement that describes the major objectives of the educational program and manner in which the budget proposes to fulfill such objectives, in accordance with C.R.S. § 22-44-105).<sup>84</sup> The CS Schools are also subject to review and inspection by the District, when the District in its sole discretion deems such review necessary,<sup>85</sup> and the District is permitted access at all reasonable times to any facility owned, leased or utilized in any way by the CS School as a school for purposes of inspection and review of such CS School's operation and to monitor compliance with the terms of the Charter Contract.<sup>86</sup> Such inspection and monitoring rights are consistent with the school in Revenue Ruling 56-224, but it is our understanding that the District does not actually exercise such inspection rights except to the extent required under Colorado law (e.g., when reviews that are statutorily required to renew the Charter Contract). Additionally, while the school in Revenue Ruling 56-224 was subject to the overall supervision by government agencies, its affairs were managed by a board of directors that were elected by members at annual meetings (and not by a governmental entity, similar to the CS Schools).

Rather than public authorities, control of the CS Schools is vested in the Board of Trustees (and such Trustee are not appointed nor removed by public officials except in the case of an emergency). The Board of Trustees governs and directly manages the day-to-day operations of the CS Schools, including, but not limited to, (1) contracting for goods and services; (2) preparing budgets; (3) selecting, supervising, evaluating, and determining the compensation for personnel; (4) promoting and terminating personnel; (5) leasing facilities for school purposes; and (6) adopting of policies and bylaws consistent with the terms of the Charter Contract.<sup>87</sup> Colorado law regulating the activities of the CS Schools is largely regulatory and intended to insure the integrity of the CS Schools, rather than to direct their operations. Additionally, while the CS Schools are subject to Colorado regulatory requirements, they are exempt from many rules that apply to public schools.<sup>88</sup>

---

<sup>83</sup> Rev. Rul. 56-224 and TAM 200222029.

<sup>84</sup> Charter Contract § 17.A.

<sup>85</sup> Id. at § 10.

<sup>86</sup> Id. at § 16.

<sup>87</sup> Charter Contract § 20.D.

<sup>88</sup> C.R.S. § 22-30.5-104(6)(c). *See also* Charter Contract Appendices A and B.

Conclusion: This factor does not support government instrumentality status for the CS Schools.

**E. Factor 5: If express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists**

Colorado law authorizes local boards of education to grant charters and enter into charter contracts to establish charter schools.<sup>89</sup> Although there is no specific legislation creating the CS Schools, they were chartered pursuant to the authority of the Colorado Charter Schools Act. Express statutory authority is necessary for the creation and use of a charter school in Colorado and such statutory authority exists.<sup>90</sup>

Conclusion: This factor does support government instrumentality status for the CS Schools.

**F. Factor 6: The degree of financial autonomy and the source of its operating expenses**

Where a government entity pays all of an organization's operating expenses, including wages and benefits, this factor weighs heavily in favor of finding that the organization is an instrumentality.<sup>91</sup> Similarly, where virtually the entire operating budget of an organization comes from the state or the federal government, this factor weighs in favor of finding that the organization is an instrumentality. However, an entity that receives public funding may still be financially autonomous where it is not subject to meaningful governmental control, supervision or oversight over the school's budget, salaries, employee terminations, and contracts.<sup>92</sup> Similarly, where a political subdivision has no liability for any bonds, notes, or indebtedness of any type whatsoever of another organization, it weighs against finding that such organization is an instrumentality of the political subdivision.<sup>93</sup>

The CS Schools receive substantially all of their funding from government sources and are required to comply with all state financial and budget rules, regulations, and financial reporting requirements to which the District is required to comply, including but not limited to: (1) undergoing an independent financial audit by a Colorado certified public accountant each year; (2) preparing quarterly financial reports for the District in compliance with C.R.S. § 22-45-102(1)(b); (3) adopt an annual budget for each CS School and Network as a whole and a budget statement that describes the major objectives of the educational program and manner in which the budget proposes to fulfill such objectives, in accordance with C.R.S. § 22-44-105.<sup>94</sup> Network does prepare budgets, but it is not permitted to borrow in excess of five percent (5%) of such budget without District approval.<sup>95</sup>

---

<sup>89</sup> C.R.S. § 22-30.5-107.

<sup>90</sup> C.R.S. § 22-30.5-104.

<sup>91</sup> *Smith v. Reg'l Transit Auth.*, No. CIV.A. 12-3059, 2015 WL 6442337, at \*11 (E.D. La. Oct. 23, 2015), *aff'd*, 827 F.3d 412 (5th Cir. 2016).

<sup>92</sup> CCA 201519027.

<sup>93</sup> *Andrus v. Unum Life Ins. Co. of Am.*, No. CV 16-1112, 2017 WL 2364247, at \*8 (E.D. La. May 31, 2017).

<sup>94</sup> Charter Contract § 17.A.

<sup>95</sup> Charter Contract § 20.D.

However, Network does determine the salaries of the personnel at the CS Schools, and its financial obligations are not debt or financial obligations of the District unless the district specifically assumes such obligations.<sup>96</sup>

Conclusion: Though there is some financial autonomy, this factor slightly supports government instrumentality status for the CS Schools.

---

<sup>96</sup> Charter Contract § 20.D. and C.R.S. § 22-30.5-104(4.5)(a).