

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL  
KARL A. RACINE

Legal Counsel Division

March 29, 2017

Commissioner Renee Bowser  
Advisory Neighborhood Commission 4D  
5322 2nd Street, NW  
Washington, DC 20011

**Re: Questions Concerning Use Agreements**

Commissioner Bowser:

You asked us two questions about use agreements:

- (1) **Does the public function that a charter school fulfills affect the provisions it can request in a use agreement?**

No. We know of no statute or regulation that would preclude a charter school from seeking contract provisions similar to those that a private entity fulfilling a private function could seek in this context. If, however, you have specific questions about specific provisions, you should contact this office.

- (2) **May an ANC agree to a use agreement with a charter school that:**

- **Requires the ANC to add the charter school to its insurance policy? Yes, but only if the ANC's insurer consents.**
- **Requires the ANC to waive subrogation? Not without clarifying what that involves.**
- **Requires the ANC to indemnify and hold the school harmless in cases of injury to third parties or damage to school property, without any limits on the District's liability? No.**

To answer your second question, we discuss each type of provision in turn:

(1) **Adding the Charter School to ANC Insurance:** The ANC has the authority to purchase insurance,<sup>1</sup> and we have not identified any law that prevents an ANC from agreeing (assuming its insurer consents) that a charter school whose space the ANC is using will be added to the ANC's insurance policy.

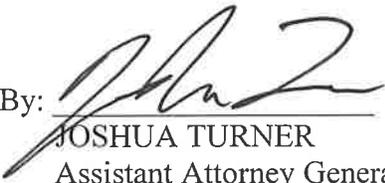
(2) **Subrogation Waiver:** Subrogation means that one person advances or challenges a claim in another person's place.<sup>2</sup> For example, if one person pays a debt to another person, but someone else really should have paid that debt, the person who actually paid may sometimes be able to recover that loss from the party that should have paid.<sup>3</sup> To waive subrogation means to agree that, in at least some instances, a party that would otherwise have been able to stand in another party's shoes will not be able to. A provision that seeks a waiver of subrogation needs to be clear about when that waiver will apply and who it will apply to. Otherwise, the ANC should not agree to it. If you have specific questions about what types of waivers are appropriate and what types are not, feel free to contact our office.

(3) **Unlimited Indemnification:** An ANC cannot agree to an unlimited indemnification provision because any contract provision that contains no ceiling on the District's potential liability to a third party violates federal appropriations law.<sup>4</sup>

If you have any questions, please contact Josh Turner, Assistant Attorney General, at 442-9834, or Janet M. Robins, Deputy Attorney General, Legal Counsel Division, at 724-5524.

Sincerely,

KARL A. RACINE  
Attorney General for the District of Columbia

By:   
JOSHUA TURNER  
Assistant Attorney General  
Legal Counsel Division

(AL-17-117)

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<sup>1</sup> See D.C. Official Code § 1-309.13(l)(1) (2012 Repl. and 2016 Supp.) (“A Commission may expend its funds to purchase insurance or obtain indemnification against any loss in connection with the assets of the Commission or any liability in connection with the activities of the Commission”).

<sup>2</sup> See *National Union Fire Ins. Co. v. Riggs Nat'l Bank*, 646 A.2d 966, 968 (D.C. 1994).

<sup>3</sup> See *id.*

<sup>4</sup> See 31 U.S.C. § 1341 (federal limits on obligations and expenditures); GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II, at 6-59 – 6-60 (3d ed. 2006) (“GAO and numerous courts have adhered to the rule that, absent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited”).