



October 18, 2021

Via Electronic Mail

Division of Charter Schools
Pennsylvania Department of Education
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**Re: Pennsylvania's Department of Education - Proposed Charter
School Regulations**

To Whom It May Concern:

Barton Gilman's Charter School Practice has offices in Boston, Providence, New York City, Milford, Connecticut and Philadelphia. As such, our firm represents charter schools and charter school networks in Pennsylvania, Rhode Island, Massachusetts, New York, New Jersey and Maryland. Our firm represents, sits as Legal Advisory members or has provided legal support for the Maine League of Charter Schools, the Massachusetts Public Charter Schools Association, the Connecticut Charter Schools Association, the Northeast Charter Schools Network, Pennsylvania Coalition of Public Charter Schools, Philadelphia Charters for Excellence, Maryland Alliance of Public Charter Schools, New Jersey Association of Charter Schools, the New York Association of Charter Schools and the New York City Charter Schools Center. Our firm has three sitting members of the National Alliance for Public Charter Schools' (NAPCS) Legal Advisory Council, and one of our team members is a Senior Fellow for the NAPCS. Additionally, one of our team members founded the Center for Learner Equity (formerly the National Center for Special Education in Charter Schools) which provides technical assistance and professional development for charter schools nationwide. Our Education Practice has five former/current teachers on the attorney team, one active college professor, four adjuncts and one special education due process master. In fact, we practice in many of the jurisdictions cited in the preamble of the proposed Charter School Regulations introduced by the Pennsylvania Department of Education.

Please accept this letter as our public comment regarding [Regulation #6-349: Charter Schools and Cyber Charter Schools](#) and our objections to the proposed regulations. Primarily, the changes proposed are outside of the scope of the power of the regulatory process and seek to re-write portions of Pennsylvania's Charter School Law by circumventing the General Assembly. The areas that the Department focuses on are already part of Charter School Law and in most part, already required by the Department's own Standard Charter Application. By releasing the regulations in the form provided, Governor Wolf signals that he does not support real charter school reform but does support the forced and false narrative that charter schools are doing their part in the educational paradigm. By doing so, the Governor dishonors the boards, administrators and staff that also went above and beyond for their students and families during the COVID-19 Pandemic and in this time of epic uncertainty, has sought to shift the sands under the feet of charter school students and families.

Additionally, while the Department purports to rely on 'exemplar' charter school laws throughout the country, it has selected a hodge-podge of state laws to 'correct' what it, in its sole discretion (but clearly, given the changes, was done in concert with the School District of Philadelphia) requires to be corrected – no input from the charter school community in Pennsylvania. These states were chosen due to "proximity" to Pennsylvania but failed to include any analysis of New York Charter School Law or Indiana's Charter School Law – ranked first in the NAPCS' Model Charter School Law while including Colorado and Minnesota Charter School Law. See, *Measuring Up to The Model: A Ranking of State Public Charter School Laws*, 2020 Edition.

In fact, the proposed regulatory support relies on Maryland, which is ranked by the NAPCS as the worst charter school law in the country:

Maryland has the nation's weakest charter school law, ranking No. 45 (out of 45). While Maryland's law does not cap charter public school growth, it allows only district authorizers and provides little autonomy, insufficient accountability, and inequitable funding to charter schools.

Id. At 6.

Query: When the Department conducted its state law analysis, what was the selection criteria of the states reviewed, especially Maryland – whose charter schools are not local education agencies (LEAs), whose employees are not employees of the charter school but employees of the school, and whose charter schools are part of the enrollment system of the county or city system where the charter school is located?

Query: If proximity was the chief factor, why was New York’s charter school law not included but Colorado and Minnesota’s charter school laws were?

Query: If Maryland’s Charter School Law was used as a model for the application process, did the Department:

- (1) Review the State Board of Maryland’s decision in *The DaVinci Collaborative v. Baltimore City Schools* which reversed and remanded a denial of a charter application by Baltimore City Schools which found that their process lacked transparency?
- (2) Review the interactive charter application process employed by Maryland County Boards which requires meetings throughout the charter school application process and the provision of feedback from authorizers and allowance for continued submission?

The Pennsylvania charter school proposed regulation addresses the following key areas:

1. Application Requirements
2. Enrollment
3. Board of Trustees
4. Fiscal and Auditing Standards
5. Redirection Process
6. School Staff-health care.

This proposed regulation is not merely a clarification of the Charter School Law, rather it imposes additional requirements on charter schools that were not contemplated by the Charter School Law or required by any Charter School Appeal Board or Commonwealth Court decisions. Examples of problematic provisions are detailed below:

Application Requirements

In drafting the application regulations, it would be helpful for the Department to “show its work” in terms of its analysis of the following: (1) how many applications were filed from 2014 until present in the School District of Philadelphia and how many were granted? (2) how many applications were filed in the Commonwealth of Pennsylvania and how many were granted?

Note: Given that the standard application developed by the Department (as late as 2018) is used throughout the Commonwealth and charter applicants are required to ensure compliance with federal law, has the Department considered a revision to the charter application to also include compliance with those laws regarding English Language Learners? Has the Department conducted any analysis of how

many charter applications were denied by authorizer's due to a lack of information regarding English Language Learners by applicants? Why was this requirement not included in the proposed regulations?

§ 713.2(c)(3)(ii) requires a charter applicant to demonstrate for each grade or age level the projected number of students receiving special education services by primary disability. This requirement exceeds anything in the current charter application and is an unrealistic standard to set for charter schools. How does the Department propose that a charter school develop that projection if a charter school draws from more than one district? How does a cyber charter school applicant– which would draw from the entire Commonwealth and from entirety of the K-12 continuum meet such a standard?

Note: Has the Department contemplated language that would prevent school districts of residence from “counseling” out students to enroll in cyber charter schools? Has the Department contemplated any relief for charter schools when school districts of residence fail or refuse to transfer students’ records – especially special education records – to charter schools which impede the charter school’s implementation of IEPs or who have failed to identify the student (in some cases, for years), before enrollment in a charter school?

§ 713.2(c)(4) requires a charter applicant to submit an organizational chart showing the proposed governance structure of the charter school or regional charter school, including lines of authority and reporting among the board of trustees, administrators, staff, and any educational management service provider with which the charter school or regional charter school has contracted or intends to contract.

Note: While this provision purports to correct a problem, it is a misnomer. Just like school district boards, the reporting structure ends with the charter school board of trustees – to which management reports and which oversees any and all contracts – including those of educational management service providers.

§ 713.2(v) requires a charter applicant to demonstrate the standards for board of trustees’ performance, including compliance with all applicable laws, regulations, and terms of the charter.

Note: This implies to impose an additional burden on charter applicants when the standard the board of trustees must adhere to is complying with all applicable laws, regulations, and terms of the charter. Such a decision, too, should be, under best practices for all non-profits, be developed and left to the charter school board of trustees as to a board’s self-assessment.

§ 713.2(vi) requires a charter applicant to provide 13 items regarding contracting with an educational management service provider including things such as: the service provider's record in serving student populations, demonstrated management of nonacademic school functions, and fees paid to the service provider must be expressed as a percentage of all school expenditures.

Note: The Charter School Law permits the use of education management service providers and CAB and the Commonwealth Court have determined the requirements that must be detailed regarding a service provider in a charter application.

Enrollment

§ 713.4 requires charter schools or regional charter schools to create enrollment policies within 3 months of the effective date of the proposed regulation to detail its enrollment policies regarding the random selection of students.

Note: The Charter School Law requires charter schools to ensure a random selection process and creating policies is not necessary or effective for education reform. Such policies are already included as part of the standard application form. Additionally, in the School District of Philadelphia, such form is required to be uploaded into the Charter Schools' Office's Epicenter system on a yearly basis. Finally, additionally, has the Department conducted any analysis of the effect that this regulation will have on the ApplyPhillyCharter - consolidated enrollment and lottery system for the City of Philadelphia?

§ 713.5 requires cyber charter schools to create enrollment policies within 3 months of the effective date of the proposed regulation to detail its enrollment policies regarding the random selection of students.

Note: The Cyber Charter School Law also requires such a policy in the Standard Charter Application form.

Board of Trustees

§ 713.6 requires Board of Trustees members to file a statement of financial interest with the State Ethics Commission, clarifies members are public officials, imposes recusal requirements, and implements penalties for violations. The Charter School Law already states that members of the board of trustees are public officials.

Note: Charter schools' board of trustees' members have long been declared public officials – which is already part of Charter School law. Statements of Financial Interests are not under the jurisdiction of the Pennsylvania Department of Education but are under the jurisdiction of Ethics Commission. Hence, this is the

reasons why there is no corresponding provision in the education regulations (or the Pennsylvania School Code) for school district board members, intermediate unit board members, career and tech school board members.

Fiscal and Auditing Standards

§ 713.7 requires charter schools to adhere to generally accepted standards of fiscal management and audit requirements and requires any audits to include a review of enrollment records, fees charged by any educational management service provider, the required number of certified staff, percentage of payroll contributed to employee retirement programs, and a review of financial expenditures.

Note: The Charter School Law already requires charter schools to complete an audit pursuant to section 437 of the school code and this proposed regulation creates additional requirements for the audit.

Under Section 437 of the Pennsylvania School Code of 1949, “the accounts of the school treasurer shall be audited annually as hereinafter provided.” This is specifically referenced in the Charter School under section 1719. The delineation of standards for such audit is not even included in Section XXIV of the School Code:

<https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1949&sessInd=0&smthLwInd=0&act=14&chpt=24&sctn=1&subscn=0>

The objection here is not that such standards would be required – it is that such standards are already in place and have long been utilized under standards set by the auditing professionals, which the Department is more than aware since charter schools submit their independent financial audits to the Department on a yearly basis.

Redirection Process

§ 713.8 explains requirements for the redirection process adds requirements to the form on which charter schools are required to provide information.

Note: This section explains the requirements for charter schools; yet there are no requirements on school districts or penalties for not promptly dispersing payments to charter schools. Or refusing to do so altogether – forcing the charter schools to engage in the redirection process.

Has the Department reviewed this draft provision through the lens of the Elementary and Secondary School Emergency Relief (ESSER) Fund? ESSR provided \$122.775 billion (with nearly \$122 billion going to SEAs for distribution) provided in the form of grants to States (to remain available through

September 30, 2023). The funds are allocated from the Federal to State level based on each State's share of Title I funds received in the most recent fiscal year and such subgrants from the States to the local educational agency (LEA) level would be based on each LEA's share (including charter schools that are LEAs) of Title I funds received in the most recent fiscal year.

Pennsylvania received America Recovery Plan ESSER allocations of Five Billion Dollars, which while a portion went to charter schools, proportionately, the largest recipients of such funds were school districts. By devolving charter school per-pupil allocations to a greater bureaucracy which is designed to delay funding and changes the funding structure from 12 months to 11 months, has the Department reviewed whether this proposed shift in the per pupil allocation structure violates ESSR's mandate that state are required to maintain support of elementary and secondary education in fiscal years 2022 and 2023 at least at the proportionate levels of such support by the State relative to overall spending? Additionally, since a condition of receiving ESSER funds is that an SEA may not reduce funding in fiscal year 2022 and 2023 for certain LEAs (highest percentages of economically disadvantaged students) by an amount that exceeds the overall per-pupil reduction in State funds across all LEAs in the State and are prohibited from reducing State funding for any LEA that is among the 20 percent of LEAs collectively with the highest percentage of economically disadvantaged students below the level of funding provided to such LEAs in FY 2019, how does such a proposed regulation square with such a prohibition given Pennsylvania's acceptance of its ESSER allocation?

School Staff

§ 713.9 requires charter schools to provide the same health care benefits to its employees as they would be provided if they were an employee of the local district and requires charter schools to provide benefits in each of the categories described in 42 U.S.C. § 18022(b) and is funded in an amount not less than the contribution by the charter school's authorizer.

Note:

PDE also should be made to explain why it choose this path when all of its preamble material referenced reveals that no referenced state charter school law referenced has the requirements for the health care plans in the manner that PDE has proffered.

For example, a Horace Mann charter school in Massachusetts is the same as a "conversion" school in Pennsylvania so the reference is not germane for the proposition that the PDE has proffered. Additionally, the Horace Mann Charter School provisions under Massachusetts charter school law apply to very few

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charter schools in Massachusetts. Did PDE contact the Massachusetts Department of Elementary and Secondary Education regarding Horace Mann charter schools or look at the close to 100 other independent charter schools in Massachusetts that do not have to follow the same health care benefits requirements as school districts in the manner described by the Department?

Given that in Maryland, employees are not employees of the charter school but are employees of the school district, how does the Department expect that a small charter school could compete in the large school district insurance market at the same rates and the same contributions?

The Pennsylvania charter school community is under attack at a time when our educators and families can ill-afford to be undermined by constant tired talking points which fail to acknowledge what charter schools have been able to achieve in the face of such adversity. It is imperative that both the Department and Governor Wolf pull back the proposed charter school regulations and engage with Pennsylvania's charter school sector for meaningful charter school reform that also accounts for the concerns of the charter schools and authorizer overreach.

Sincerely,

/s/ Patricia A. Hennessy

Patricia A. Hennessy
Partner