ED, CharterRegs

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Sent: Monday, October 18, 2021 3:34 PM
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Subject: [External] PDE Proposed Rulemaking #6-349 – Comments of Chester Community Charter School
Attachments: 2021.10.18 Chester Community Charter School, Comments on Proposed Rulema....pdf

Dear Independent Regulatory Review Commission:

Please see the attached Comment Letter of the Chester Community Charter School to the Pennsylvania Department of Education's Proposed Rulemaking #6-349. We thank the Independent Regulatory Review Commission and those copied on the attached Comment Letter for their consideration.

Sincerely,
David E. Clark, JR
CEO, Chester Community Charter School

The Chester Community Charter School

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October 18, 2021

Via Electronic Mail
The Honorable George D. Bedwick, Chairman
The Honorable John F. Mizner, Esq., Vice Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
irrc@irrc.state.pa.us

RE: Pennsylvania Department of Education Proposed Rulemaking #6-349 (September 18, 2021) – Charter Schools and Cyber Charter Schools

Dear Independent Regulatory Review Commission:

Chester Community Charter School ("CCCS") appreciates the opportunity to comment on the Pennsylvania Department of Education's ("PDE") Proposed Rulemaking #6-349 ("Proposed Rulemaking" or "PR") relating to charter school and cyber charter schools, published in the PA Bulletin on September 18, 2021.

CCCS was established under the Pennsylvania Charter School Law ("Charter School Law") in 1998 and today serves more than 4,000 students in 12 state-of-the-art buildings on four campuses located in the Chester-Upland School District in Delaware County, Pennsylvania. CCCS prides itself on fulfilling its mission to assist students in developing the necessary academic, social, and emotional skill sets to prepare them for successful academic experiences in high school, post-secondary education and beyond. Recognizing that outstanding teaching is essential to ensuring student learning success, CCCS employs an

exceptional instructional staff that is equipped with proven educational tools and strategies vital to addressing the diverse learning needs of CCCS's students. CCCS is able to attract and retain highly-talented teachers not only by providing a safe, supportive, empowering and rewarding teaching environment, but also by offering competitive compensation packages that include affordable comprehensive health insurance coverage.

While CCCS is not fundamentally opposed to reasonable regulations designed to implement the Charter School Law *as written*, the timing of PDE's Proposed Rulemaking coupled with the language of PDE's Proposed Regulations, statements in PDE's Regulatory Analysis Form ("RAF") submitted to the Independent Regulatory Review Commission ("IRRC"), and public statements by the Wolf Administration[1] (including Acting Secretary Noe Ortega specifically[2]) give rise to concerns that PDE is attempting to amend the Charter School Law by way of regulation as opposed to through an appropriate legislative process. Indeed, many provisions of PDE's Proposed Regulations directly correspond to proposed amendments to the Charter School Law set forth in Senate Bill No. 27 (2021) ("SB 27") and House Bill No. 272 (2021) ("HB 272") currently referred to the Senate Education Committee and House Education Committee (the "Committees"), respectively.

By way of example, this overlap between PDE's Proposed Rulemaking and the proposed legislation at SB 27 and HB 272 is perhaps most obvious with respect to PDE's proposed definition of "educational management service provider" (a term not defined in the Charter School Law) and proposed charter school application requirements related to "educational management service providers" (which do not have a direct statutory basis under the Charter School Law) in Sections 713.1(g) and 713.2(c)(4) of the Proposed Regulations. PDE's proposed definition—which is overbroad in that it can be read to encompass virtually any "entity or individual" that contracts with a charter school to provide services, even if that "entity or individual" does not manage charter school operations—directly corresponds to the definition that SB 27 and HB 272 propose adding by amendment to Section 17-1703-A of the Charter School Law. Similarly, PDE's proposed charter school application requirements directly correspond to

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[1] *See, e.g.*, https://www.governor.pa.gov/newsroom/wolf-administration-proposed-charter-school-regulations-to-benefit-students-and-taxpayers/

[2] *See, e.g.*, https://www.penncapital-star.com/commentary/charter-schools-are-public-schools-they-have-to-be-held-accountable-to-the-taxpayers-opinion/

application requirements that SB 27 and HB 272 propose adding by amendment to Section 17-1719-A of the Charter School Law. While PDE's Proposed Rulemaking does not include any *express* provisions akin to the substantive limitations on "educational management service providers" that SB 27 and HB 272 propose adding to the Charter School Law in an altogether new Section 17-1716.2-A,[3] the close overlap discussed above coupled with public statements by the Wolf Administration give rise to a reasonable concern that PDE is nevertheless attempting to implement those limitations indirectly by empowering charter school "authorizers" to impose restrictions on "educational management service providers" not grounded in the Charter School Law.

CCCS is confident that the IRRC and the Committees will not permit PDE to amend the Charter School Law by way of regulation or otherwise depart from the statutory language *as written* and, therefore, CCCS reserves specific comment on certain provisions of the Proposed Rulemaking. Nevertheless, because of the disastrous impact it could have on a charter school's ability to fulfill its educational mission and perhaps operate altogether, CCCS believes that special attention is particularly warranted with respect to Section 713.9 of the Proposed Regulations (entitled "Health Care Benefits"), in which PDE purportedly seeks to implement the health care provisions of Section 17-1724-A(d) of the Charter School Law, 24 P.S. § 17-1724-A(d). In addition to being contrary to the statutory language and legislative intent, PDE's proposed regulation is contrary to the public interest under key criteria of the Regulatory Review Act ("RRA"), 71 P.S. § 745.5b(b), including with respect to economic impacts and a lack of clarity, feasibility and reasonableness, which PDE completely failed to address in the RAF. Ultimately, PDE seeks to substantially alter the manner in which charter schools procure, offer and contribute financially to health insurance coverage for employees without analyzing (or even acknowledging) the financial and other potential impacts of its proposed regulation on charter schools and their employees.

CCCS respectfully submits the following comments for consideration by the IRRC (as well as the Committees and PDE).

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[3] It is unclear whether PDE's Proposed Rulemaking originally included a proposed regulation akin to proposed Section 17-1716.2-A in SB 27 and HB 272 that was later removed by PDE on its own initiative or based on review by the Office of General Counsel and/or Office of Attorney General. *See* 71 P.S. §§ 732-204(b), 732-301(10).

I. The Health Care Provisions of Section 17-1724-A(d) of the Charter School Law

PDE states in the Proposed Rulemaking that "Section 713.9 seeks to promulgate regulations related to section 17-1724-A of the [Charter School Law]…, which requires that every employee of a charter school be provided the same health care benefits the employee would receive if they worked for the chartering school district." (PR at p. 13.) Before turning to PDE's proposed regulation, it is important to understand the health care provisions set forth in Section 17-1724-A(d) of the Charter School Law, which provides:

> (d) Every employe of a charter school shall be provided the *same health care benefits* as the employe would be provided if he or she were an employe of the local district. The local board of school directors may require the charter school to provide the same terms and conditions with regard to health insurance as the collective bargaining agreement of the school district to include employe contributions to the district's health benefits plan. The charter school shall make any required employer's contribution to the district's health plan to an insurer, a local board of school directors or a contractual representative of school employes, whichever is appropriate to provide the required coverage.

24 P.S. § 17-1724-A(d) (emphasis added).

Section 17-1724-A(d) of the Charter School Law thus has two components. The first sentence of Section 17-1724-A(d) requires a charter school to provide its employees with the "*same health care benefits*" they would be provided if employed by the local school district, while the second and third sentences of Section 17-1724-A(d) authorize (but do not require) a local board of school directors to elect to include a charter school's employees on the local school district's "*health plan*." *Id*. (emphasis added). Where a local board of school directors elects to include a charter school's employees on the local school district's health plan, the charter school is required to make employer contributions to the school district's plan on behalf of the charter school's employees. Accordingly, except where a local board of school directors exercises the election provided under the second and third

sentences of Section 17-1724-A(d), the requirement in the first sentence of Section 17-1724-A(d) to provide the "same health care benefits" controls.

Interpreting this statutory section, the State Charter School Appeal Board ("CAB") held in *Gillingham Charter School v. Pottsville Area School District*, CAB Docket No. 2016-11, October 25, 2017 ("*Gillingham*"), that the language "same health care benefits" used in the first sentence of Section 17-1724-A(d) requires a charter school to provide its employees the same "classes of coverage" as the school district's plan.[4] *Id*. at pp. 26, 67-69. In so holding, the CAB rejected the school district's assertion that the language "same health care benefits" required the charter school's plan to have the same cost-sharing terms as the school district's plan with respect to co-pays and deductibles. *Id*. In support of its interpretation, the CAB sought to determine the meaning of "health care benefits" by looking to the glossary of health insurance terms provided by the federal government at www.healthcare.gov, which defines the term "benefits" as "health care items or services covered under a health insurance plan." *Id*. Thus, the CAB has held that compliance with the first sentence of Section 17-1724-A of the Charter School Law is not dependent upon the costs of coverage or treatment, but rather, whether the charter school provides coverage for the same health care items and services covered under the school district's health plan.

Relying on *Gillingham*, the Court of Common Pleas of Montgomery County held in *Souderton Charter School Collaborative v. Souderton Area School District*, Docket No. 2020-01019 (Montgo. C.C.P., May 4, 2021) (1925(a) Opinion filed in Commonwealth Court, Docket No. 237 CD 2021) ("*Souderton*"), that the school district misapplied Section 17-1724-A(d)'s language "same health care benefits" in attempting to require that "deductibles and patient payments be identical to the plans provided" by the school district. The decision of the Montgomery County Court in *Souderton* is currently on appeal in the Commonwealth Court of Pennsylvania (Docket No. 237 CD 2021).[5]

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[4] The CAB explained that the charter school offered the "same classes of coverage" as the school district where its health plan provided coverage for "singles and families, primary care, OB/GYN care, specialists, physical therapy/occupational therapy, mental health care, radiology, MRI/CAT/PET scans, lab/pathology, inpatient hospitalization, outpatient surgery/care, emergency room, urgent care and prescription drugs (generic, brand, nonformulary and mail order)." *Gillingham* at pp. 26, 67.

[5] On August 16, 2021, CCCS filed an *Amicus Curiae* Brief in support of the positions of Souderton Charter School Collaborative and affirmance of the Montgomery County Court's decision in

The meaning of "benefits" adopted and applied by the CAB in *Gillingham* and the Montgomery County Court in *Souderton* is consistent with the use of "benefits" in the federal health insurance statute at 42 U.S.C. § 18022(b),[6] which refers to "categories and the items and services covered within the categories" in describing the "essential health benefits" covered under a health plan. Further supporting the CAB's interpretation, that federal statute likewise expressly distinguishes the "essential health benefits" covered under a health plan from both (1) the "cost-sharing for such coverage" required at the time of service under the health plan and (2) the premium paid in advance to obtain coverage under the health plan. 42 U.S.C. § 18022(a)-(c); *see also* 42 U.S.C. § 18021. Similarly, other federal insurance statutes refer to "benefits" in terms of the items and services covered under a health plan and as being distinguishable from the costs associated with such coverage. *See, e.g.*, 42 U.S.C. § 300g-111.

Based on the foregoing, the "benefits" covered under a health plan are distinguishable from the costs of obtaining coverage for those "benefits" in the form of cost-sharing at the time of service and premium payments. Appreciation of this distinction is integral to giving proper meaning and effect to the first sentence of Section 17-1724-A(d) of the Charter School Law, which expressly requires a charter school to provide the "same health care *benefits*", not the "same health care *plan*." Nor does the first sentence of Section 17-1724-A(d) make any reference to premiums, premium contributions, cost-sharing, co-payments, deductibles or otherwise relate to the costs of obtaining coverage under a health plan.

Importantly, the General Assembly's use of "health benefits *plan*" and "health *plan*" in the second and third sentences of Section 17-1724-A(d) instead of the language "health care *benefits*" used in the first sentence demonstrates the General Assembly's awareness of the difference between "benefits," as a component of a health plan, and the "health plan" itself. Had the General

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Souderton. Briefing is now completed and the case is scheduled for oral argument before the Commonwealth Court.

[6] PDE acknowledges the relevance of 42 U.S.C. § 18022 in Section 713.9(a) of the Proposed Regulations by expressly relying on that federal statute to define the "benefits" that PDE would require to be covered under a health plan a charter school offers to its employees. As discussed below, however, PDE's awareness of and reliance on this federal statute did not prevent PDE from misconstruing the meaning of "same health care benefits" as used in Section 17-1724-A(d) of the Charter School Law.

Assembly intended to require a charter school to provide its employees the same health plan as the local school district, it would have used the language "same health care plan" in the first sentence of Section 17-1724-A(d) as opposed to "same health care benefits." Instead, the General Assembly deliberately decided that charter school employees would have the same health plan as school district employees only in the instance where the local board of school directors elects to include charter school employees on the *school district's health plan*. The General Assembly likewise decided it is only where a school district has elected to include charter school employees on the *school district's health plan* that a charter school would be required to make the same employer contributions as the school district (and that is only because the charter school's employees are on the *school district's health plan*). Accordingly, where a charter school is providing health insurance coverage for its employees under a *health plan offered by the charter school* (as opposed to the charter school's employees being include on the *school district's health plan*), the charter school is only required to provide coverage for the same "benefits" (*i.e.*, the same health care items and services) as the school district's plan.

The CAB in *Gillingham* also recognized the inherent unreasonableness of interpreting Section 17-1724-A(d) of the Charter School Law to require a charter school to procure health insurance coverage that is identical in every respect to that offered by a school district, including with respect to cost-sharing, stating:

> Given the market and size of the charter school, the reality is that a plan identical to the School District's, *i.e.*, same co-pays, deductibles, etc., is very likely not available to Gillingham. To require charter schools to provide health care plans that are identical in every respect to the local district's plan is an unreasonable burden to place upon charter schools and, if enforced, would most likely result in the closure of many charter schools, an unreasonable and absurd result that the Legislature could not have intended.

Gillingham at p. 68.

II. PDE's Proposed Health Care Requirements in Section 713.9 of the Proposed Regulations

Before turning to the numerous deficiencies in PDE's proposed regulation—including inconsistency with Section 17-1724-A(d) of the Charter School Law, infeasibility, unreasonableness and lack of clarity—it is first important to understand how pertinent provisions of PDE's proposed regulation would operate if promulgated as written. Despite expressly recognizing in Section 713.9(a) of the Proposed Regulations that the first sentence of Section 17-1724-A(d) of the Charter School Law requires a charter school "to provide its employees with the *same health care benefits* as they would be provided if they were an employee of the local school district," PDE would instead require a charter school to "demonstrate that health care benefits provided by the charter school are *meaningfully similar* to those offered by the local school district." (Emphasis added). To satisfy its "*meaningfully similar*" requirement, Section 713.9(a)(1) and (2) of the Proposed Regulations provides a charter school with two options: (1) offer health insurance coverage to its employees; or (2) make contributions to a tax-advantaged account for employees to purchase their own health insurance coverage.

- <u>If the charter school opts to offer health insurance coverage for its employees under Section 713.9(a)(1) of the Proposed Regulations</u>:
  - *"Benefits"* - The health insurance coverage offered by the charter school must cover the categories of benefits set forth in 42 U.S.C. § 18022(b) (providing for "essential health benefits"), *regardless of what categories of benefits are covered under the school district's applicable health plan*.
  - "*Most-Selected Plan*" - If the school district offers more than one health plan to its employees, the charter school must identify the health plan most-selected by the school district's employees (the "most-selected plan"). If the school district only offers one health plan option to the school district's employees, that sole health plan is the most-selected plan of the school district.
  - *Cost-Sharing and Plan Type* - Once the charter school has identified the school district's most-selected plan, the charter school must offer its employees a health plan that: (1) has a "substantially equivalent cost-sharing structure" (*e.g.*, co-pays, deductibles) to the school district's most-selected plan; and (2) is the same "plan type" (*e.g.*,

preferred provider organization (PPO), health maintenance organization (HMO)) as the school district's most-selected plan.[7]

- *Required Contribution* – the charter school is required to make employer contributions to charter school employees' premium costs in an amount not less than the employer contributions the school district makes for the school district's employees under the school district's most-selected plan.

- <u>If the charter school opts to make contributions to employees' tax-advantaged accounts under Section 713.9(a)(2) of the Proposed Regulations</u>:
  - "*Most-Selected Plan*" - The charter school must identify the school district's most-selected plan.
  - *Required Contribution* - Once the charter school has identified the school district's most-selected plan, the charter school must make contributions to charter school employees' tax-advantaged accounts in an amount not less than the employer contributions the school district makes for the school district's employees under the school district's most-selected plan.
  - *Individual Market* – Section 713.9(a)(2) contemplates that employees will use the contributions to purchase their own health insurance coverage in the individual market.
  - *Benefits* – Section 713.9(a)(2) does not contain any requirement or other language relating to the nature of the items and services covered (*i.e.*, "benefits") under the health plan purchased by the employee in the individual market.

Under Section 713.9(c) of the Proposed Regulations, PDE would require charter schools to "present health care benefit plan enrollment options to employees…at each enrollment period" along with "a comparison of what they would have been offered if they were employees of the local school district." Section 713.9(d) of the Proposed Regulations, in turn, provides that the

[7] For example, if a school district's most-selected plan is a PPO plan, PDE's proposed regulation would require the charter school to offer a PPO plan with a "substantially-equivalent cost-sharing structure" as the school district's most-selected plan.

"comparison" required under Section 713.9(c) must include the following statement:

> "UNDER PENNSYLVANIA LAW, CHARTER SCHOOLS, REGIONAL CHARTER SCHOOLS, AND CYBER CHARTER SCHOOLS ARE REQUIRED TO PROVIDE THE SAME HEALTH CARE BENEFITS TO THEIR EMPLOYEES AS THEY WOULD BE PROVIDED IF THEY WERE EMPLOYEES OF THE LOCAL DISTRICT. IF YOU BELIEVE THE PLAN OPTIONS MADE AVAILABLE TO YOU ARE NOT COMPARABLE TO THOSE OFFERED BY YOUR LOCAL DISTRICT, YOU MAY FILE A COMPLAINT WITH THE AUTHORIZER OR AUTHORIZERS OF THE CHARTER SCHOOL, REGIONAL CHARTER SCHOOL, OR CYBER CHARTER SCHOOL."

Accordingly, despite recognizing that the first sentence of Section 17-1724-A(d) of the Charter School Law requires charter schools to provide the "*same health care benefits*" as the local school district, the statement required under Section 713.9(d) of the Proposed Regulations would instruct charter school employees to consider whether the "*plan options*" offered by the charter school are "*comparable*" to the "*plan options*" offered by the local school district. (Emphasis added).

III. Section 713.9(a) of the Proposed Regulations is Inconsistent with the Requirement Under Section 17-1724-A(d) of the Charter School Law to Provide the "Same Health Care Benefits"

Despite expressly acknowledging in Section 713.9(a) of the Proposed Regulations that the first sentence of Section 17-1724-A(d) of the Charter School Law requires a charter school to provide its employees with the "*same health care benefits*" as would be provided if they were employed by the local school district (emphasis added), PDE's proposed regulation fails to implement that requirement in any sense; not with respect to the word "same," the term "benefits," or the correlation between "same" and "benefits." PDE's proposed regulation instead appears designed to require charter schools to pay as much (or more) for health

insurance as school districts on a per employee basis, and without regard for whether the "benefits" covered by charter schools are the "same" as the "benefits" covered by school districts, as further discussed below.

PDE's proposed regulation is directly contrary to the plain language of Section 17-1724-A(d) of the Charter School Law and inconsistent with the statutory interpretation provided by the CAB in *Gillingham* and adopted by the Montgomery County Court in *Souderton*, neither of which decisions was addressed or even acknowledged by PDE. Importantly, the CAB interpreted Section 17-1724-A(d)'s requirement to provide the "same health care benefits" according to the appropriate meaning of "benefits" as used in the health insurance context (*i.e.*, the items and services covered under a health plan, as distinguishable from the costs of coverage) and in a manner that gives effect to *all* statutory language *as written*. PDE, on the other hand, seeks to impose a number of substantive requirements that are not related to "benefits" (including with respect to cost-sharing, plan type and employer contributions), and attempts on the face of its proposed regulation to replace the statutory language "same" with PDE's inconsistent proposed language "meaningfully similar." PDE's proposed diversions from the statutory language are not necessary when the term "benefits" is properly construed according to its appropriate meaning, nor are any of the additional burdens PDE seeks to place on charter schools in offering health insurance to their employees.

PDE's failure to properly construe the "same health care benefits" requirement of Section 17-1724-A(d) of the Charter School Law is further demonstrated by PDE's statement in its Proposed Rulemaking that "[g]iven the variations in health care plans, it is impossible for a charter school to offer an *identical* health care plan to its employees." (PR at p. 13 (emphasis in original).) Section 17-1724-A(d), however, does not require a charter school to provide the "same health care plan"; it requires a charter school to provide the "same health care benefits." This is not a distinction without a difference. As discussed herein, "benefits" are a component of a health care plan, not the health plan itself. The terms "benefits" and "health plan" are therefore not synonymous or interchangeable.

PDE appears to recognize that "benefits" are a distinct component of a health plan in stating in Section 713.9(a)(1)(i) of the Proposed Regulations that a charter school must provide "benefits in each of the categories of benefits as described in 42 U.S.C. § 18022(b) (referring to "benefits" as the items and services covered under a health plan without regard to the cost of such coverage), but in so

stating, PDE fails to require that a charter school provide the "*same* health care benefits" (emphasis added) as a school district. Instead, Section 713.9(a)(1)(i) requires a charter school to provide the "benefits" set forth in 42 U.S.C. § 18022(b) *without regard to and regardless of the "benefits" actually provided by the school district*. Indeed, PDE admits in its Proposed Rulemaking that "section 713.9 does not require charter schools to spend a specific amount on health care plans or include specific benefits." (PR at p. 13.) In making this statement, PDE not only confirms that "benefits" are a distinct component of a health plan, but also concedes that its proposed regulation fails to implement the "same health care benefits" requirement.

PDE's proposed regulation is further contrary to the plain language of the statute and the decisions of the CAB and Montgomery County Court in *Gillingham* and *Souderton*, respectively, by requiring charter schools to offer a health plan with a "substantially equivalent cost-sharing structure" to the school district's health plan. (*See* Section 713.9(a)(1)(i).) Again, when the term "benefits" is properly construed according to its appropriate meaning, a charter school's compliance with the "same health care benefits" requirement is dependent upon the nature of the items and services covered and not the costs associated with obtaining coverage for those items and services. PDE's cost-sharing requirement is thus statutorily improper, as well as unnecessary and overly burdensome.

Moreover, even if it was appropriate for PDE to impose a cost-sharing requirement (which it is not), PDE is again attempting on the face of its proposed regulation to replace the statutory language "same"—this time with PDE's inconsistent proposed language "substantially equivalent." Again, neither PDE's proposed diversion from the statutory language "same" nor its cost-sharing requirement is necessary when properly construing "benefits" according to its appropriate meaning. The same is true of PDE's proposed requirement limiting charter schools to offering the same "plan type" as the school district's most-selected plan, which is likewise inconsistent with the statute and unnecessary. Based on a proper meaning of "benefits" (*i.e.*, the items and services covered under a health plan), a charter school can provide its employees with coverage for the "same health care benefits" as the local school district regardless of the cost-sharing structure and plan type of the health plan(s) offered by the charter school.

PDE's proposed regulation is further inconsistent with the statute in that there is no requirement under Section 17-1724-A(d) of Charter School Law that a charter school make employer premium contributions in the same amount as the

local school district where the charter school's employees are enrolled in the *charter school's health plan*. (*See* Section 713.9(a)(1)(ii).) To the contrary, under the second and third sentences of Section 17-1724-A(d), it is only where a local board of school directors has elected to include a charter school's employees on the *school district's health plan* that a charter school is required to make the same employer contributions as the school district. The purpose of this statutory contribution requirement is not to make the charter school pay as much for health insurance as the school district on a per employee basis (which appears to be the purpose of PDE's proposed regulation), but rather, to account for the fact that the charter school's employees are included on the *school district's health plan*. Section 17-1724-A(d) of the Charter School Law thus makes clear that the charter school, and not the school district, is responsible for making employer contributions to the *school district's health plan* when the charter school's employees are included on the *school district's health plan*.

Finally, there is likewise no statutory authority for PDE's proposition in Section 713.9(a)(2) of the Proposed Regulations for charter schools to "[p]rovide health care coverage" by "contribut[ing] to a tax-advantaged account which the employee may use to pay for the purpose of health care coverage." No provision of Section 17-1724-A(d) of the Charter School Law expressly allows for such contributions, nor could it have been the General Assembly's intent in enacting Section 17-1724-A(d) where PDE appears to be attempting to implement a Final Rule first published in the Federal Register in June 2019 (*see* 84 FR 28888). In addition, far from seeking to implement the statutory language "same health care benefits," PDE's proposed regulation does not require a charter school to provide any "benefits" whatsoever. Instead, PDE contemplates that charter school employees should be left to fend for themselves in purchasing their own coverage in the individual insurance market without any concern for the "benefits" covered under such coverage or how those "benefits" compare to the school district's health plan(s) (let alone whether the "benefits" are the "same"). The lack of any requirement related to "benefits" further indicates that the purpose of PDE's proposed regulation is to make charter schools pay as much for health insurance as school districts on a per employee basis, and not to ensure that charter school employees have coverage for the "same health care benefits" as actually required under the Charter School Law.

For all of the reasons set forth above, and potentially others, Section 713.9(a) of the Proposed Regulations is inconsistent with and unsupported by Section 17-1724-A(d) of the Charter School Law. Through misconstruing the term "benefits,"

conflating "health care benefits" with "health care plan(s)," and diverting from the statutory language "same," PDE's proposed regulation fails to implement the statutory requirement to provide the "same health care benefits." Nor was PDE's proposed regulation designed to do so. As PDE itself succinctly stated in the RAF, again conflating "health care benefits" with "health care plan(s)" and encapsulating other deficiencies discussed above:

> The regulation is intended to serve as a proxy that would indicate that the plan options are meaningfully similar, not necessarily identical, and to ensure charter school employees have health care plans subsidized by their employer to the same extent that district employees have their plans subsidized.

(RAF at p. 12.)

IV. Section 713.9 of the Proposed Regulations Fails to Give Meaning to the Second and Third Sentences of Section 17-1724-A(d) of the Charter School Law

Even without PDE's failure to properly construe and implement the statutory "same health care benefits" requirement for the reasons discussed above, Section 713.9 of the Proposed Regulations is inconsistent with Section 17-1724-A(d) of the Charter School Law on its face because it fails to give any meaning to the second and third sentences of that statutory provision. PDE's proposed regulation is singularly focused on the first sentence of Section 17-1724-A(d) and makes no provision whatsoever for the ability of a local board of school directors to elect to include a charter school's employee's on the local school district's health plan, as provided in the second and third sentences of Section 17-1724-A(d). Section 713.9 of the Proposed Regulations neither provides for this situation expressly nor addresses how it would impact the requirements proposed by PDE. PDE's complete failure to account for this aspect of Section 17-1724-A(d) calls into question the entire structure of PDE's proposed regulation.

V. Section 713.9(a) of the Proposed Regulations is Infeasible, Unreasonable and Lacks Clarity

In addition to being inconsistent with Section 17-1724-A(d) of the Charter School Law and contrary to the intention of the General Assembly, Section 713.9(a)

of the Proposed Regulations is infeasible, unreasonable and lacks clarity for at least the following non-exhaustive reasons. In reviewing, it is important to keep in mind that the following issues arise from requirements proposed by PDE that are not necessary or even designed to implement the "same health care benefits" requirement of Section 17-1724-A(d), and are therefore of PDE's own making and entirely avoidable.

A. Section 713.9(a)(1) unreasonably and unfairly restricts charter schools' freedom to contract and ability to offer employees different health insurance coverage options. Section 713.9(a)(1) strips charter schools of the freedom to contract for health insurance coverage best suited to the specific circumstances of the charter school and the needs of its employees, requiring instead that charter schools offer a health plan that is the same "plan type" and has a "substantially equivalent cost-sharing structure" as the "most-selected health care plan" offered by the local school district. A charter school is therefore precluded from offering its employees any health plan that does not correspond to the school district's most-selected plan, even if the school district offers other health plan options to its own employees. As a result, charter schools are limited to offering employees a single plan option while school districts can offer employees multiple plan options, including with different plan types and cost-sharing structures.

For example, if a school district offers four (4) plan options—PPO Plan A; PPO Plan B; HMO Plan A; and HMO Plan B—and PPO Plan A is the school district's "most-selected plan", then a charter school's plan offering to its employees must correspond to the school district's PPO Plan A. As a result:

- The charter school would be limited to offering its employees a PPO plan (because the school district's most-selected plan is a PPO plan) and would be precluded from offering its employees an HMO Plan (or any other plan type besides a PPO), even though the school district offers its employees two HMO plan options.

- The charter school's PPO plan would be required to have a "substantially equivalent cost-sharing structure" as the school district's PPO Plan A, even if the other plan options offered by the school district have different cost-sharing structures.

- The charter school would be would be precluded from offering any plan options similar to the school district's PPO Plan B, HMO Plan A or HMO

> Plan B, even though the school district offers those plans to its own employees.

Accordingly, Section 713.9(a)(1) inhibits a charters school's freedom to contract and precludes the charter school from offering different health insurance coverage options with different cost-sharing structures and plan types to its employees, while the local school district is not so limited. From an employee perspective, PDE's proposed regulation denies charter school employees the same coverage options available to their counterparts employed by school districts, depriving charter school employees of the ability to choose the coverage option that best suits their needs and the needs of their families. For example, if offered the same options available to the school district's employees, a charter school employee may choose a plan with higher cost-sharing in exchange for lower premiums. The charter school employee would not have the ability to make that choice, however, and would instead be restrained to a sole coverage option akin to the school district's most-selected plan. Making matters worse, the coverage options offered by the school district, including the school district's most-selected plan, are likely based on the terms of a collective bargaining agreement to which neither the charter school nor its employees are parties or were involved in negotiating.

B. *Section 713.9(a) places an unreasonable financial burden on charter schools and their employees and fails to account for disparities in bargaining power between charter schools and public school districts*. As a threshold matter, charter schools in Pennsylvania generally receive approximately 75% of the funding received by traditional public schools and, therefore, any requirement intended to require charter schools to contribute the same amount per employee as local school districts is inherently unreasonable. Moreover, PDE's proposed regulation does not appear to account for the fact that the cost of health insurance coverage is dictated, in large part, by premium amount. As a result, assuming it is even possible for a charter school to negotiate and contract for a health plan that corresponds to the school district's most-selected plan in the manner PDE would require (which PDE failed to address in the RAF and is very much an open question), the charter school and/or its employees may be required to pay more for the same coverage as the school district and/or its employees to the extent that the charter school is not able to negotiate the same premium rates as the school district, which is likely given the disparity in bargaining power the commonly exists between charter schools and public school districts. Even if a charter school is making employer contributions to premium in the same dollar amount as the

school district, a higher premium rate would require charter school employees to pay more than school district employees. And, where a charter school's employer contributions are based on a percentage (%) requirement (as opposed to a fixed dollar amount), a higher premium rate would require the charter school to contribute more than the school district, and the charter school's employees would again be required to pay more than the school district's employees.

This disparity in bargaining power between charter schools and school districts is even more acute in the case of particularly large groups like the School District of Philadelphia and the Bucks and Montgomery County Healthcare Consortium that represent *thousands* of employees and have health plans that are *self-funded*.[8] As provided on the Bucks and Montgomery County Healthcare Consortium's website:

> These [11] school entities have joined together in a unique self-funded arrangement as a large group purchaser of medical insurance, prescription drugs and other employee benefits. The purpose of the arrangement is for consortium members to group together to get the best price possible for health care and employee benefits while also focusing on collectively improving employee health and wellness, potentially leading to even greater cost savings.

http://bmshc.org/index.php/about-us/mission-statement.

An individual charter school cannot possibly be expected to negotiate on the same playing field as such behemoths, nor can any charter school be expected to have a self-funded health plan. Accordingly, any proposed regulation that would require a charter school to contract for a health plan that is "substantially equivalent" or even "meaningfully similar" to a health plan offered by such a group is *per se* unreasonable, without accounting for whether it is even possible for a charter school to contract for such a health plan (regardless of cost) in the first

[8] The School District of Philadelphia states on its website that it is the eighth largest school district in the United States and employs more than 19,000 employees. https://www.philasd.org/about/. The Bucks and Montgomery County Healthcare Consortium states on its website that it consists for 11 school entities in Bucks and Montgomery Counties and covers "6,200 employees and over 16,000 total members." http://bmshc.org/index.php/about-us/mission-statement.

place, which is very much in question. This possibly is even more remote under Section 713.9(a)(2) of the Proposed Regulations, in which PDE proposes leaving charter school employees to fend for themselves in purchasing their own coverage in the individual insurance market. Although PDE did not include any requirement in Section 713.9(a)(2) relating to "benefits", which is perhaps the clearest example of PDE's departure from Section 17-1724-A(d) of the Charter School Law, there is no telling what a charter school employee would have to pay for coverage comparable to such a school district's most-selected plan in the individual insurance market.

C. *Section 713.9(a)'s "most-selected health care plan" requirement is unworkable and unclear*. Section 713.9(a)(1) and (2) set forth proposed requirements that are dependent upon a charter school identifying the "most-selected health care plan" offered by the local school district. It is unclear how a charter school could possibly comply with these requirements, however, where the charter school and school district are engaged in open enrollment at or around the same time (*i.e.*, contemporaneously). Specifically, a charter school would likely not be able to identify the school district's most-selected plan until at or near the end of the enrollment period. Therefore, assuming it would even be possible for a charter school to negotiate and contract for a health plan that corresponds to the school district's most-selected plan in the manner PDE would require generally (which PDE failed to address in the RAF and is very much an open question), it is unclear how the charter school would have enough time to negotiate and contract for a health plan that corresponds to the school district's most-selected plan and complete enrollment for its own employees before the end of the enrollment period. It is likewise unclear whether the charter school would be able to determine, let alone provide reasonable notice to its employees, the amount that the charter school would be required to contribute (which PDE would also have controlled by the school district's most-selected plan) prior to the end of the enrollment period, as further discussed below.

D. *Section 713.9(a)'s employer contribution requirements are unworkable and unclea*r. Section 713.9(a)(1)(ii) and (2) require a charter school to make employer contributions in an amount not less than contributed by the school district for the school district's most-selected plan. These provisions, however, do not specify how the amount of contributions is to be calculated and fail to account for the fact that employer contributions can be structured in different ways, calculated in different ways, fluctuate per employee, and include items such as dependent care and supplemental coverage. It is unclear whether such contributions would be

controlled by the dollar amount contributed by the school district or by the percentage (%) contributed by the school district (where the school district's own contributions are based on a percentage (%) requirement), and whether such contributions would be limited to the employee only or also include contributions for dependent coverage. It is also unclear how the contribution amount would be determined where the school district contributes different amounts for different employees, such as in the case of contributions made to employees with spouses and/or children for dependent coverage (as compared to unmarried employees without children), or where school district employees make premium contributions that are based on a percentage (%) of the employee's salary.

For instance, the thousands of employees enrolled in the School District of Philadelphia's health plans are required to contribute 1.5% of their base salary towards premium. Because not all employees of the School District of Philadelphia are paid the same amount, different employees contribute different amounts to premium, meaning that the School District of Philadelphia contributes different amounts for different employees. How would a charter school calculate PDE's proposed employer contribution requirement under these circumstances?

- Would PDE require the charter school to make the highest amount contributed by the school district, the lowest amount contributed by the school district, or the mean/average amount contributed by the school district? Or would the charter school be required to coordinate its contributions to those made by the school district on a per employee basis based on position and years of experience? Under any of these scenarios, how would a charter school even be in a position to determine the amount of the contributions required? What information would be provided to the charter school by the school district and when? How would the charter school confirm or otherwise be assured of the accuracy of that information? Would the information be provided in time for the charter school to provide reasonable notice to its employees and complete enrollment?

- Or, would PDE require the charter school to calculate its contributions in the same manner as the school district, *i.e.*, the premium amount remaining after applying 1.5% of the charter school employee's base salary? In such a situation, the charter school would be required to contribute more than the school district to the extent that (1) charter school employees contribute less to premium due to lower base salaries, and/or (2) the charter school's health plan (which PDE would require to

be dictated by the school district's most-selected plan) has higher premiums due to a disparity in bargaining power or other consequence of PDE's proposed requirements.

E. *Section 713.9(a)(1)(i)'s requirement of a "substantially equivalent cost-sharing structure" is unworkable and unclear*. Section 713.9(a)(1)(i) requires a charter school to offer a health plan that has a "substantially equivalent cost-sharing structure" to the most-selected plan of the local school district, but the language "substantially equivalent" is unclear and can be interpreted to mean many different things, particularly in the context of analyzing the cost-sharing provisions of a health plan, which are detailed, complex, and include multiple components that apply differently in different scenarios. Specifically, a typical health plan will include cost-sharing components such as deductibles, co-pays, coinsurance and out-of-pocket limits, all or some of which are specific to the particular items or services covered under the health plan—*e.g.*, provider visits (including for primary care, specialists, preventative care, screening and immunization), diagnostic tests (including for x-ray, blood work), imaging (including for MRI/CAT/PET), inpatient hospitalization (including for facility fees and physician/surgeon fees), prescriptions (including for generic drugs, preferred brand drugs, non-preferred brand drugs, specialty drugs), outpatient surgery, emergency room care, emergency medical transportation, urgent care, outpatient behavioral health services, inpatient behavioral health services, outpatient substance abuse services, inpatient substance abuse services, pregnancy (including for office visits, professional services for childbirth and delivery facility services for childbirth), home health care, rehabilitation services, habilitation services, skilled nursing care, medical equipment, and hospice services—and are further dependent upon whether the specific item or service is being provided by an in-network provider or an out-of-network provider and, additionally, may be subject to certain limitations, exceptions, exclusions and/or penalties. All of these components and considerations make up the "cost-sharing structure" of a health plan, and are relevant to determining the cost of a particular item or service to an employee.

The complexity and specificity of cost-sharing provisions, and the innumerable possibilities for differentiation and variation therein, may make it difficult if not impossible for a charter school to procure a health plan with a cost-sharing structure that is the same as a local school district's most-selected plan, without even accounting for the disparity in bargaining power between charter schools and local school districts. This same potential for differentiation

and variation, especially in the case of subtle differences, calls into question what is required in order for different health plans to have cost-sharing structures that are "substantially equivalent." This ambiguity improperly subjects charter schools to an unknown standard and risks inconsistent treatment and application by charter school "authorizers," which may seek to impose unreasonable and unobtainable requirements on charter schools.

These issues are only exacerbated by PDE's proposed requirement that a charter school's health plan include coverage for the "categories of benefits" set forth in 42 Pa. C.S. § 18022(b) *without regard to the categories of benefits actually covered under the school district's plan*. (*See* Section 713.9(a)(1)(i).) PDE's own proposed requirement therefore creates a situation where a school district's health plan may cover different or additional categories of benefits than the charter school's plan. Because certain cost-sharing components are specific to the particular items and services covered (*i.e.*, benefits), the cost-sharing structure of the school district's plan will be materially different from the charter school's plan to the extent the school district's plan includes cost-sharing provisions specific to items and services that are not covered under the charter school's plan.

VI. PDE's RAF Fails to Address the Impacts of its Proposed Health Care Requirements in Section 713.9 of the Proposed Regulations

PDE seeks to impose health care requirements on charter schools that are inconsistent with the plain language of Section 17-1724-A(d) of the Charter School Law and related guidance issued by the CAB. Promulgation of PDE's proposed regulation as written would substantially alter the manner in which charter schools currently procure, offer, and contribute financially to health insurance coverage for charter school employees. Specifically, PDE's proposed regulation would preclude charter schools from offering employees multiple health plan options with different plan types and cost-sharing structures, instead limiting charter schools to offering a health plan with the same plan type and a "substantially equivalent cost-sharing structure" as the most-selected health plan offered by the local school district (*i.e.*, while a school district can offer its employees multiple plan options, a charter school is limited to offering a plan that corresponds to the school district's most-selected plan). (*See* Section 713.9(a)(1)(i).) In addition, PDE's proposed regulation requires charter schools to make employer premium contributions in the same amount as the local school district. (*See* Section 713.9(a)(1)(i) and (a)(2).)

Despite seeking to severely restrain a charter school's freedom to contract and ability to negotiate competitive health insurance contracts best suited to the individual circumstances of the charter school and the needs of its employees, as well as dictating the financial contributions charter schools must make on behalf of employees, PDE failed in its RAF to properly address or analyze the financial and other resultant impacts of its proposed regulation on charter schools and their employees, including in Sections 15, 17, 19, 23 and 24 of the RAF, or the feasibility and reasonableness of its proposed requirements (*e.g.*, the ability of charter schools to obtain the coverage required by PDE, the costs associated with doing so, the ability to complete enrollment by the end of the enrollment period while complying with PDE's "most-selected plan health care plan" requirement, and other issues discussed in Section V above). PDE failed to do so not only with respect to charter schools offering group health insurance coverage to their employees, but also in the case of PDE's proposal to allow employees to purchase their own health insurance coverage in the individual insurance market using charter school contributions to a tax-advantaged account established by the employee (*see* Section 713.9(a)(2).) PDE neither addressed the financial impacts of such contributions on charter schools, nor the ability of affected employees to secure health insurance coverage in the individual market, the costs associated with such coverage based on, *inter alia*, premium amount and cost-sharing structure, or the nature of the health care items and services covered (*i.e.*, benefits). In particular, PDE fails to analyze whether and/or to what extent the health insurance coverage available in the individual market compares to the health plans offered by school districts, including with respect to the "benefits" covered and the costs of coverage.

Given the nature and extent of PDE's proposed regulation and the substantial changes it would require, PDE's failure to address such a significant component in the regulatory review process should be fatal to this aspect of PDE's Proposed Rulemaking. Respectfully, it must be questioned whether PDE even has the capacity to adequately perform such an analysis. Matters related to health insurance are eminently complicated and fall outside of PDE's regulatory expertise; hence the General Assembly's decision to charge the Pennsylvania Insurance Department "with the execution of the laws of this Commonwealth in relation to insurance." 40 P.S. § 41. At a minimum, PDE should seek guidance and input from the Pennsylvania Insurance Department and its actuarial experts.

VII. PDE's Proposed "Comparison" Requirements in Section 713.9(c) and (d) of the Proposed Regulations are Without Statutory Authority, Inconsistent with Section 17-1724-A(d) of the Charter School Law, Infeasible, Unreasonable and Lack Clarity

Section 713.9(c) of the Proposed Regulation would require charter schools to provide employees with a "comparison of what they would have been offered if they were employees of the local school district," which "comparison" must include the statement set forth in Section 713.9(d) of the Proposed Regulations. There is no statutory basis for such a "comparison" under Section 17-1724-A(d) of the Charter School Law, nor is such a "comparison" necessary for implementation or enforcement of Section 17-1724-A(d)'s "same health care benefits" requirement. Indeed, PDE's proposed "comparison" requirement is superfluous and redundant where both the Charter School Law and Section 713.9(e) of the Proposed Regulations already provide "authorizers" with the ability to review the "health care benefits" offered by charter schools. Regardless, any utility that PDE attempts to ascribe to its "comparison" requirement is outweighed by the potential to confuse and mislead charter school employees for the reasons discussed below.

A. *The required statement set forth in Section 713.9(d) is both internally inconsistent and contrary to Section 17-1724-A(d) of the Charter School Law*. The statement PDE would require be included with the "comparison" is internally inconsistent in that it informs charter school employees that the Charter School Law requires that they provided the "*same health care benefits*" as employees of the local school district, but then instructs charter school employees to consider whether the "*plan options*" offered by the charter school are "*comparable*" to the "*plan options*" offered by the school district. The terms "benefits" and "plans" are not synonymous or interchangeable. Similarly, the proposed statement is contrary to Section 17-1724-A(d) of the Charter School Law, which does not require a charter school to provide "plan options" that are the same or even "comparable" to those offered by the local school district, but rather, requires that a charter school provide the "same health care benefits."

B. *PDE's proposed "comparison" requirement in Section 713.9(c) is unworkable and unclear*. For the reasons discussed below, Section 713.9(c) is ambiguous in that is unclear what information would need to be included in the "comparison" proposed by PDE, and it is likewise unclear how PDE's proposed "comparison" requirement would apply in different situations. What is clear,

however, is that the more information PDE would require a charter school to include in a "comparison," the more PDE's "comparison" requirement will stray from the statutory language and the greater the likelihood that a charter school employee will be misled into believing that the charter school is not complying with the Charter School Law, even though it is. Indeed, to the extent PDE can even impose a "comparison" requirement in the first place, anything more than a comparison of "benefits" (*i.e.*, the items and services covered under a health plan) would not be consistent with Section 17-1724-A(d) of the Charter School Law.

1. The "comparison" requirement appears to apply regardless of whether a charter school proceeds under Section 713.9(a)(1) or (a)(2), but if a charter school proceeds under subsection (a)(2), it is unclear how the charter school could compare its contributions to a tax-advantaged account against the health plan(s) offered by the school district. Indeed, the situations are inherently not comparable. Accordingly, requiring a "comparison" in this situation would be unreasonable and likely to mislead or confuse charter school employees.

2. Subsections (c) and (d) of Section 713.9 both use the word "options" (plural) with respect to charter school plan offerings, but the result of PDE's "most-selected health care plan" requirement is that a charter school will only be able to offer its employees a single plan option that corresponds to the school district's most-selected plan, as discussed above. In that regard, it is unclear whether the "comparison" would need to account for the school district's most-selected plan only or all plan options offered by the school district. If a charter school is required to compare the charter school's plan offering against *all* plans offered by the school district (including, but not limited to, the school district's most-selected plan), there is a strong likelihood that the respective plan offerings will not appear "comparable." For example, the respective plan offerings will not appear "comparable" where a charter school has only one plan option (based on the school district's most-selected plan) and the school district has two or more plan options. Similarly, if a school district offers multiple plan types (*e.g.*, PPO, HMO) but a charter school is limited to the plan type of the school district's most-selected plan, the respective plan offerings will not appear "comparable." Finally, if a school district offers health plan options with different cost-sharing structures, the respective plan offerings with not appear "comparable." Accordingly, any such

requirement would be unreasonable and likely to mislead or confuse charter school employees.

3. Even if PDE's proposed "comparison" requirement were limited to a comparison of "benefits," it could nevertheless risk misleading charter school employees. Because Section 713.9(a)(1) requires a charter school's plan to include the "categories of benefits" set forth in 42 U.S.C. § 18022(b) *without regard to the categories of benefits actually covered under the school district's plan*, PDE's own requirement creates a situation where a school district may cover different or additional categories of benefits. Accordingly, any differences that exist with respect to "benefits" based on a charter school's compliance with PDE's own proposed requirement will make it appear that the respective plan offerings are not "comparable." This issue would only be exacerbated if a charter school is required to address all plan options offered by the school district (as opposed to only the school district's "most-selected plan").

4. It is unclear whether PDE would require the "comparison" to include a comparison of premium costs (including with respect to employer contributions and employee responsibility), but if it does, it is likely that the respective plan offerings will not appear "comparable." Even without accounting for the disparity in bargaining power between charter schools and school districts, it is highly unlikely that the health plan offered by the charter school will have the same premium rates as the health plan(s) offered by the school district. This issue would only be exacerbated if a charter school is required to address all plan options offered by the school district (as opposed to only the school district's "most-selected plan").

5. The statement required under Section 713.9(d) is misleading and may cause confusion as written in that it does not account for the ability of charter schools to offer health insurance coverage that is superior to that provided by the school district. Specifically, use of the language "same health care benefits" and "comparable" without providing for the ability of charter schools to provide superior coverage may give charter school employee's the mistaken impression that the charter school is not complying with the Charter School Law.

In closing, PDE's Proposed Rulemaking is inconsistent with the Charter School Law, contrary to the intention of the General Assembly, and is not in the public interest for the reasons discussed above. CCCS sincerely thanks the IRRC, as well as the Committees and PDE, for consideration of these comments.

Respectfully,

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/s/ Robert C. Olivo
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