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Independent Regulatory
Review Commission

18 March 2022

Via Email

Independent Regulatory Review Commission
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RA-EDCHARTERREGS@pa.gov

Re: Final Rulemaking
Department of Education Regulation #6-349 (IRRC #3315)

Dear Commissioners:

Please accept this letter from our Firm, Barton Gilman LLP, as our public comment regarding final rulemaking number 6-349 of the Pennsylvania Department of Education ("Department"). In October 2021, our Firm submitted public comment during the proposed regulation stage, but many of the concerns raised are still in the final rulemaking. The Department's responses to the public comments are unsatisfactory and do not demonstrate the necessity, practicality, and legality of the final rulemaking. It is troubling that the Department insists on promulgating this final rulemaking despite objections from political leaders, charter school leaders, students and families, attorneys, and other stakeholders in the regulated community.

The Department has not had meaningful consultation with the regulated community (especially charter school applicants who would be subject to the very processes enumerated in the proposed regulations but not yet enacted – resulting in a decrease in applications as well as a de facto cap on the number of charter schools operating in the Commonwealth since no applications have been approved at the authorizer level since the 2019-20 cohort) to determine the feasibility, practicality, or necessity of such final rulemaking. Instead, the Department focused all its efforts on politicizing the issue of charter regulations to the detriment of students and families across the Commonwealth. One look no farther than the preamble of the regulations – which misstates charter school laws from numerous jurisdictions and ignores good authorizing practices elsewhere. Also, it bears repeating that one must remember which organization the Department requested to give the primary assist in writing the proposed regulations – the PSBA (see Hearing Testimony of PSBA given on October 20, 2021) – and, most importantly, who the Department did not ask – the Pennsylvania Association of Public Charter Schools, the Philadelphia Charter Schools for Excellence, the Pennsylvania Cyber Charter Schools Association, the Philadelphia African

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American Charter Schools Association, not the various law firms and business management professionals who work with charter schools and charter school applicants in the Commonwealth of Pennsylvania. Symptomatic of the global problem, our schools have had zero seats at the table set by the Pennsylvania Department of Education – both in the instant situation as well as the pandemic response, the development of the state's ESSA Plan or any other statewide initiatives – despite our schools educating close to 170,000 students. The Department cannot have it both ways – it cannot make us David and Goliath at the same time.

It is without question that the final rulemaking will require additional information and criteria for charter and cyber charter applications that are not currently required. Although the Department claims it is simply requiring information which it believes is "essential for authorizers to ensure the school meets the General Assembly's intent, as described in section 1702-A of the CSL . . .," the information listed in section 713.2(c) of the final rulemaking is more expansive than what is currently required by the CSL. Decisions of the State Charter School Appeal Board ("CAB") and Commonwealth Court resolve any ambiguous areas of the CSL. Any additional ambiguities must be resolved by the General Assembly—not through promulgating regulations against the will of the regulated community and elected leaders.

<u>Barton Gilman's Concerns</u>

The Department will create a standard application with the requirements in the final rulemaking which is a minimum of what District's must require to authorize a charter. Districts will be able to impose additional requirements not contemplated in the CSL. It is concerning to the charter school community the increasing perception that anytime CAB votes to approve a charter application, seemingly on grounds involving authorizer overreach, that authorizers suddenly find approval in their hearts to avoid CAB issuing a written decision addressing that overreach and establish precedent that the information required by the authorizers is above and beyond the requirements of the CSL. This final rulemaking not only circumvents the role of the General Assembly, but it attempts to circumvent the legal process established by the General Assembly to deal with resolving any ambiguities of the charter application process.

The educational management service provider provision at § 713.2(c)(4)(v) in the final rulemaking has thirteen requirements, among them include: evidence of the educational management service provider's record in serving student populations, including demonstrated academic achievement and growth; demonstrated management of nonacademic school functions, including proficiency with public school-based accounting, if applicable; the final or proposed contract between the charter school and educational management service provider; evidence that the charter school's board will retain real and substantial authority over the operation of the school, educational decisions, and staff of the charter school.

CAB, the Commonwealth Court, and the Pennsylvania Supreme Court have all held that education management service providers are permitted under the CSL and have established a framework for analyzing the legality of the arrangement between an education management service provider and a charter applicant. The requirements according to precedent are that the Board of Trustees of the charter applicant has "real and substantial authority for the educational decisions, and the teachers are employees of the charter school itself." *Carbondale Area Sch. Dist. v. Fell Charter Sch.*, 829 A.2d 400, 407 (Pa. Commw. Ct. 2003); *see W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 812 A.2d 1172, 1185 (Pa. 2002) (holding that contractual agreements between education management service providers and charter applicants do not violate the CSL when the Board retains ultimate control of the operations of the charter school); *see also Sch. Dist. of City of York v. Lincoln-Edison Charter Sch.*, 798 A.2d 295, 301 (Pa. Commw. Ct. 2002) (holding that contractual arrangements with education management service providers satisfies the CSL when the Board, always, retains the authority to oversee and approve the day-to-day operational decision making of the education management service provider). The proposed requirements now add that a school district or the Department itself – despite having no privity to the contract at issue, not being part of the negotiations or being a party to the agreement – can deny a charter application because the traditional public school community does not like educational management companies and charter schools. This is especially galling since the Department itself has outsourced its own renewal responsibilities related to cyber charter schools.

The information required by § 713.2(c)(4)(v) goes above and beyond what the judiciary has established is required to determine the legality of a relationship between a charter applicant and an education management service provider. The analysis "requires examination of the corporate documents for the charter school as well as the (proposed) management agreement with the for-profit service provider to determine whether the charter school board of directors retains ultimate control over the direction of the school." *Insight PA Cyber Charter Sch. v. Dep't of Educ.*, 162 A.3d 591, 597 (Pa. Commw. Ct. 2017).

The Commonwealth Court advised that authorizers and the Commonwealth Court should be mindful not to interject themselves into the role of "contract scrivener or negotiator." *Id.* "Under the CSL and Collegium, management agreements must be products of arms-length negotiations between separate and independent entities. In the absence of any express or specific provision in the statute, regulation, or precedent that requires or prohibits a specific term, the parties have the freedom to negotiate and to contract." *Id.*

The final rulemaking is not clear at § 713.2(c)(12)(ii): "Describe how the facility is suitable for the proposed school. The applicant shall consider the necessity of renovation to the facility and compliance with applicable building codes and accessibility for individuals

with disabilities." This requires applicants to consider the necessity of renovation, but it is unclear how an applicant is supposed to do this and seemingly, not mentioning renovations in the applicant could theoretically be grounds for denying a charter application. If a charter applicant has a facility that is up to all applicable building codes and regulations and fulfills the purposes for which the charter intends to use it, how would an applicant demonstrate considering the necessity of renovation? Additionally, the standard of how the facility is "suitable" is nebulous and continues the practice of the inequity of facilities accessible to charter schools and their students. Let us consider the following:

1. A city school district's Board Chair voted to deny a Charter Agreement with an approved applicant proposing to use a former Catholic School facility, even though the District had approved another charter school to use that facility for over 10 years. The rationale for that vote was that the facility was deemed unsuitable - despite being occupied by another charter school for over 10 years. While ultimately outvoted, it is illustrative of the bad faith applied to charter school facility access.
2. Multiple school districts have voted to not permit the sale or rent of unused school buildings to charter schools;
3. In 2012, a rural school district included the following language in a proposed lease for a community center: "No groups in direct competition with the District are authorized to use the facility. Those groups in competition are defined as entities that serve the same purpose of the District at the same age level, i.e., charter schools."
4. Charter school opponents have repeatedly resisted the inclusion of Right of First Refusal language in charter school reform legislation.

Although the Department repeatedly tries to assure the regulated community that requirements in the final rulemaking will not be in effect for applicants applying prior to November 15, 2022, the language as written is problematic. "Authorizers may not require a charter school or regional charter school applicant that submits an application prior to November 15, 2022, to reapply using the application form that meets the requirements of subsection (c) or to submit supplemental materials to meet the requirements of subsection (c), unless such requirements were required by the authorizer prior to November 15, 2022, or the applicant requests to reapply using the application aligned to subsection (c)." § 713.2(h).

As written, "unless such requirements were required by the authorizer prior to November 15, 2022 . . ." gives districts the ability to require the new contents of a charter application contemplated in this final rulemaking prior to November 15, 2022—despite the Department stating its intention is not to require current applicants to comply with this new process. This also flies in the face of the constitutionality of such action in cases pending before the Charter School Appeal Board and in the Commonwealth Court - particularly since it is long

established jurisprudence in Pennsylvania, from *Menges v. Dentler*, 33 Pa. 495 (1859) that the "guarantee of a 'remedy by due course of law' in Art. I, § 11 of the Pennsylvania Constitition, means that a case cannot be altered, in its 'substance,' by subsequent law[.]" Id. Specifically, a case is altered in its "substance" once state action affects a "cause of action" that has "accrued." *Lewis v. Pennsylvania Railroad Co.*, 220 Pa. 317 (324), 69 A. 821, 823 (1908) ("the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated.") As such, interference with a vested right is a violation of Art. I, § 11. *Gibson v. Commonwealth*, 490 Pa. 156, 161, 415 A.2d 80, 83 (1980) (quoting *Lewis*, 220 Pa. at 3, 24, 69 A. at 823).

The redirection process at § 713.8 is problematic, but the recent addition of the word business days changes the current process and is not required by the CSL. In the final rulemaking, charter schools will be required to submit a payment request to the district no later than 10 business days before the 5th of each month to permit a school district time to make a payment. § 713.8 However, current instructions from the Department indicate that redirection requests must be received between the 15th and 25th of the month for deduction and payment on the last Thursday of the next month. The addition of business days will likely require charter schools to submit a payment request earlier than the 25th of the month, changing current practice. It bears repeating that such regulatory course correction fails to address the greatest issue with the redirection process: the lack of penalties towards districts who refuse to make direct payments to charter schools and cyber charter schools as a protest tactic – forcing those schools to wait on delayed payments from the state.

We raised concerns during the proposed regulation stage that the random selection enrollment policies at § 713.4 were not necessary, that the substance of the enrollment policies is already required by the CSL and inquired whether an analysis was done to determine how the regulation will impact the ApplyPhillyCharter application system. The Department stated it appreciates the comment and that the phase-in period will allow authorizers to adjust any common application. This response from the Department still does not explain why this provision is necessary nor does it reflect any understanding of the ApplyPhillyCharter system or the MOU that has established how the system operates.

Additionally, we raised concerns regarding the fiscal and auditing standards requirements at § 713.7, specifically that the requirement for an audit already exist under the CSL which must conform to section 437 of the Pennsylvania School Code, 24 P.S. § 4-437 and the proposed regulation creates additional requirements. The Department responded that this provision would provide clarification and consistency to authorizers and applicants. The Department also stated, "Precise accounting and auditing standards will make it easier for charter schools to meet the auditing requirement and for charter school authorizers to annually assess a charter school entity's operation, as required by the Public School Code."

However, again, this final rulemaking contains auditing requirements above what is currently required, nor does it contain any limitations against charter school authorizers who violate this provision.

IRRC Concerns

Our Firm has several of the same concerns raised by the IRRC in its Comments ("IRRC Comments") of the proposed regulation dated November 17, 2021 and is concerned by several of the Department's responses to the IRRC Comments.

The Regulatory Review Act requires: "To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." 71 P.S.§ 745.2(a). IRRC commented the following regarding such:

> *We strongly encourage the Department to organize additional stakeholder meetings with representatives from all segments of the commenters and the regulated community. This would allow the Department and the regulated community an opportunity to resolve as many remaining concerns as possible prior to the submittal of the final-form regulation.*

IRRC Comments, 2.

Although the Department claims it considered input from the regulated community, no additional meetings with the regulated community were held between IRRC recommending such and the Department promulgating this final rulemaking. The Department lists all its measures to receive input from the regulated community prior to issuing the proposed regulation, but the Department ignored the recommendation from the IRRC to hold additional stakeholder meetings to "resolve as many remaining concerns as possible prior to the submittal of the final-form regulation." The Department has not taken any meaningful measures, let alone any measures at all, to consult with the regulated community and fully consider their concerns since recommended to do so by the IRRC.

Concerning the Department's failure to hold additional stakeholder meetings, essentially all stakeholders agree that reform regarding the CSL is necessary to resolve ambiguities and for equity purposes; however, regulations by the Department are not the way to resolve such issues. The Department is intent on rushing these regulations through for political purposes to support the current administration's anti-charter sentiment, especially since the Department failed to hold additional meetings with stakeholders when recommended to do so by the IRRC. If the intent of this final rulemaking is to provide clarification and a genuine attempt to resolve ambiguities of the application process,

meaningful discussion should have, and must have, been facilitated by the Department—which it has not.

The IRRC also commented:

> *We ask the Department to explain the reasonableness of requirements such as in Subparagraphs (c)(3)(ii), (iii), and (iv), and to explain how the regulation is to be implemented by the regulated community related to items unknown at the time of application.*

IRRC Comments, 4.

The Department provides a generic response that the Secretary is authorized to promulgate regulations relating to charter schools under 24 P.S. § 17-1732-A(c) and incorrectly asserts that the final rulemaking does not add requirements to the application. However, Representative Curt Sonney submitted a comment expressing concern that the information listed under § 713.2(c) is more expansive than what is required under the CSL. The Department responded that it "believes the information listed in section 713.2(c) is essential for authorizers to ensure the school meets the General Assembly's intent, as described in section 1702-A of the CSL (24 P.S. § 17-1702-A)."

It is unclear whether the Department is alleging that it is simply codifying current requirements of the application or whether it is requiring additional requirements to conform with the intent of the General Assembly, appearing to give two different answers to the same concern. This only reinforces the appearance that the Department is pushing this final rulemaking through without meaningful consultation and input from the regulated community, and without consideration of such, for political purposes—to the detriment of students, families, and educators across the Commonwealth.

Charter schools and cyber charter schools have demonstrated their commitment to engage in fair and reasonable discussion on how to reform Pennsylvania's Charter School law. Yet, the voices of their students and families are drowned out by its opponents – most of whom have never engaged with a charter school student or parent or stepped foot inside a charter school building. We urge the IRRC to reject this blatantly performative political stunt which serves only to enable political talking points to charter school opponents and urge the Department to re-engage with the charter school community to be inclusive in the public school conversation.

Sincerely,

/s/ Patricia A. Hennessy

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