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March 18, 2022

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**Independent Regulatory
Review Commission**

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

**RE: Pennsylvania Department of Education Final-Form Regulation—Charter Schools
and Cyber Charter Schools (Regulation No. 6-349; IRRC No. 3315)**

Dear Chairman Bedwick and Vice Chairman Mizner:

Thank you for this further opportunity to comment on the Pennsylvania Department of Education's ("PDE") proposed regulations relating to charter schools and cyber charter schools (Regulation No. 6-349; IRRC No. 3315), which PDE has now submitted to the Independent Regulatory Review Commission ("IRRC"), the Senate Education Committee and the House Education Committee as a Final-Form Regulation ("Final-Form Regulation"). This letter serves as a follow-up to the comment letter submitted by CSMI, LLC ("CSMI") on October 18, 2021 with respect to PDE's Proposed Rulemaking, which is incorporated herein by reference ("October 18, 2021 Comment Letter").

CSMI is a Pennsylvania consulting group that provides varying support services to governing boards and administrators of educational institutions, including the Chester Community Charter School ("CCCS") located in the Chester Upland School District, Delaware County, Pennsylvania. In that capacity, CSMI continues to be principally concerned with PDE's proposed definition and use of the term "educational management service provider," the requirements PDE seeks to impose on charter schools with respect to "educational management service providers," and PDE's inadequate and incomplete analysis of these provisions and their resulting impacts in its Regulatory Analysis Form ("RAF"). Notwithstanding the legitimate concerns expressed by CSMI, members of the Committees and other commenters to the Proposed Rulemaking—and without adequately addressing those concerns in its Comment and Response Document ("Comment Responses") or RAF—PDE's Final-Form Regulation continues to propose overbroad and statutorily unauthorized requirements relating to "educational management service providers," none of which are provided for in the Pennsylvania Charter School Law ("CSL"), 24 P.S. §§ 17-1701-A *et seq.*¹

¹ Specifically, Section 713.2 of the Final-Form Regulation seeks to mandate the "minimum" categories of information that "authorizers" must include in charter school application forms, including more than a dozen specific

More generally, CSMI continues to be concerned regarding PDE's lack of statutory authority to impose requirements in excess of that provided in the CSL, and what CSMI and other stakeholders worry is an attempt to amend the CSL through regulations as opposed to through an appropriate legislative process. In that regard, CSMI echoes the following statements of the Senate Education Committee in its November 8, 2021 letter to the IRRC:

Despite the introduction of numerous bills and ongoing discussions related to charter and cyber charter school reform in the Legislature, the Department has circumvented the legislative process through proposed regulation #6-349, which goes beyond the scope of providing clarifications to the charter school law and instead institutes policy changes that have the effect of creating new law....It is not for PDE to expand those minimum requirements provided in statute and overstep the role of the authorizing local school board of directors and the legislature to establish new minimum standards as it attempts to do in sections 713.2 of the proposed regulations. It would be more appropriate for PDE to provide recommendations to authorizing school districts who request additional direction from the Department.

Indeed, CSMI reiterates that many provisions in PDE's proposed regulation are not grounded in any statutory language currently set forth in the CSL, but instead, directly correspond to proposed amendments set forth in Senate Bill No. 27 (2021) ("SB 27") and House Bill No. 272 (2021) ("HB 272"), which have not been and may never be enacted into law. Simply stated, PDE's Final-Form Regulation is not an appropriate mechanism for instituting policy changes that have the effect of creating new law. Such matters should instead be reserved for the General Assembly, as is appropriate and required under Pennsylvania law.

In connection with and in addition to the discussion above, CSMI respectfully submits the following comments for consideration by the IRRC and the Committees:

1. PDE Does Not Have Statutory Authority to Impose Charter School Application Requirements.

As CSMI explained in its October 18, 2021 Comment Letter, PDE fundamentally lacks statutory authority to promulgate any regulations that seek to impose charter school application requirements beyond those set forth in Section 17-1719-A of the CSL, 24 P.S. § 17-1719-A. PDE

categories relating to "educational management service providers" in subsection (c)(4), none of which are provided for in Section 17-1719-A of the CSL, 24 P.S. § 17-1719-A. In addition, Section 713.7(c) of the Final-Form Regulation would require annual audits conducted by charter schools to specifically include, *inter alia*, "[a] review of the fees charged by any educational management service provider with which the charter school entity has a contract, if applicable." PDE has not adequately clarified what would be required for a such a "review," nor has PDE identified any statutory authority that would permit PDE to impose regulations in excess of the requirement in Section 17-1729-A(a)(3) of the CSL, 24 P.S. § 17-1729-A, that a charter school "meet generally accepted standards of fiscal management or audit requirements."

did not meaningfully respond to the careful statutory analysis offered by CSMI. Instead, as it did in its RAF to the Proposed Rulemaking, PDE went no further than citing to its general authority to promulgate regulations under Section 17-1732-A(c) of the CSL, 24 P.S. § 17-1732-A(c), and claiming that it seeks to implement the statutory application requirements set forth in Section 17-1719-A of the CSL. (See PDE Comment Responses at p. 70; *see also id.* at p. 39.)

Section 17-1719-A of the CSL, however, does not grant PDE any authority to impose minimum application requirements on “authorizers,” mandate use of specific application forms by “authorizers,” or dictate the specific information that must be provided by a charter school applicant in order to address the seventeen (17) categories enumerated in Section 17-1719-A. Moreover, to the extent PDE believes it has general or implied regulatory authority to implement Section 17-1719-A of the CSL by dictating what must be included in a charter school application, that claim is belied by the fact that “local boards of school directors” (and not PDE) have exclusive authority to accept, review and approve charter school applications under Section 17-1717-A of the CSL. *See* 24 P.S. § 17-1717-A; *see also* 24 P.S. § 17-1703-A (definitions of “charter school” and “regional charter school”). Most important here, this includes the authority to determine “[t]he extent to which the application considers the information requested in section 1719-A and conforms to the legislative intent outlined in section 1702-A.” 24 P.S. § 17-1717-A(e)(2)(iii). In addition to this exclusive grant of authority, the *absolute discretion* of school boards to determine the sufficiency of a charter application with respect to the categories of information set forth in Section 17-1719-A of the CSL is firmly demonstrated by the General Assembly’s decision to use the flexible language “the extent to which” instead of imposing a more stringent and definitive standard. Accordingly, PDE has no authority, express or implied, to usurp the authority or limit the discretion of local boards of school directors to determine the sufficiency of a charter application.

It is only with respect to *cyber charter schools* that PDE is afforded any authority with respect to review and approval of an initial charter school application, including with respect to whether an applicant has satisfied the statutory application requirements. *See* 24 P.S. § 17-1745-A; *see also* 24 P.S. § 17-1703-A (definition of “cyber charter school”). PDE is likewise afforded authority to review and approve an application by two or more existing charter schools to consolidate into a multiple charter school organization (“MCSO”) under Section 17-1729.1-A of the CSL, but even in that instance, PDE does not have any role in reviewing or approving the relevant charter schools’ initial charter school applications, which is reserved for the charter schools’ respective local boards of school directors. *See* 24 P.S. § 17-1729.1-A.

Perhaps more importantly with respect to the MCSO provisions in Section 17-1729.1-A of the CSL, which PDE failed to acknowledge or address in submitting its Final-Form Regulation, is that the General Assembly expressly granted PDE authority to not only “develop and issue a standard application form that multiple charter school organization applicants must submit” but also to include in that standard application form “[a]ny other information as deemed necessary by [PDE].” 24 P.S. § 17-1729.1-A(c). Section 17-1719-A of the CSL, on the other hand, does not include any such express grant of authority or similar language. As the Pennsylvania Supreme Court has repeatedly held:

[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded. Moreover, where a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.

In re Vencil Appeal of Pa. State Police, 152 A.3d 235, 244 (Pa. 2017) (quoting *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1996)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Adhering to the principles of statutory construction, the General Assembly’s express grant of authority to PDE to impose application requirements for MCSOs under Section 17-1729.1-A without similarly granting PDE authority to impose application requirements for charter schools under Section 17-1719-A demonstrates that the General Assembly did not intend for PDE to have such authority.

PDE completely failed to address the fundamental statutory issues discussed above in submitting its Final-Form Rulemaking. Quite to the contrary, PDE’s Comment Responses actually contradict PDE’s own claim of authority to impose charter school application content requirements. Specifically, PDE has expressly acknowledged (as it must) that, *inter alia*:

- PDE lacks authority to mandate that “authorizers” not review incomplete applications (*i.e.*, charter school applications that fail to include all of the categories of information PDE seeks to require). (*See* PDE Comment Responses at p. 68 (“[PDE] notes the commenter’s request that the rulemaking include a provision that incomplete applications need not be reviewed by the authorizer; however, we believe such a provision would outstrip requirements of 1717-A of the CSL and create practical and procedural challenges for charter school applicants and authorizers alike.”));
- PDE lacks authority to require “authorizers” to have their charter school application forms approved by PDE. (*See* PDE Comment Responses at p. 6 (“The CSL does not require the Department to approve an authorizer’s application for establishing a charter school..., and there is nothing in the regulation indicating that such approval is required.”));
- PDE lacks authority to exercise “oversight” over charter applications submitted to school boards. (*See* PDE Comment Responses at p. 69 (“The Department...is unable to accept the recommendation [to exercise oversight over district applications] due to section 1717-A of the CSL...requiring an application to establish a charter school...be submitted to the local board of school directors.”));
- “The CSL does not permit the Department to limit the requirements that an authorizer may include in a charter school or regional charter school application.” (PDE Comment Responses at p. 40);

- “The Department does not have authority to impose evaluation criteria upon authorizers.” (PDE Comment Responses at p. 69.)

Notwithstanding PDE’s own recognition of the limits of its statutory authority, PDE nevertheless persists in its efforts to *mandate* the “minimum” categories of information that “authorizers” *must* include in charter school application forms. In so doing, PDE is necessarily attempting to improperly limit the exclusive authority and absolute discretion of local boards of school directors to determine the sufficiency of charter applications. PDE is likewise necessarily attempting to impermissibly impose evaluation criteria contrary to that established by the General Assembly in Section 17-1717-A(e)(2)(iii).

Finally, notwithstanding any claim by PDE that Section 713.2 of its proposed regulations is merely intended to “clarify” the CSL’s application requirements, it is now apparent that PDE is attempting to use its application regulation to dictate the terms of written charters and impose additional operational requirements on charter schools. Specifically, Section 17-1720-A(a) of the CSL provides that “[u]pon approval of a charter application section 1717-A, a written charter shall be developed which shall contain the provisions of the charter application.” 24 P.S. § 17-1720-A(a). In submitting its Final-Form Regulation, PDE has now included new language in Section 713.2(d) that parrots Section 17-1720-A(a) of the CSL, providing: “UPON APPROVAL OF A CHARTER APPLICATION UNDER SECTION 1717-A OF THE CHARTER SCHOOL LAW, A WRITTEN CHARTER SHALL BE DEVELOPED WHICH SHALL CONTAIN THE PROVISIONS OF THE CHARTER APPLICATION.” Thus, PDE is not merely seeking to mandate that which must be included in charter school applications, but to mandate that which must be included in legally binding written charters. Again, local boards of school directors (and not PDE) have exclusive authority to determine such matters in accordance with the provisions of the CSL.

Accordingly, especially when coupled with PDE’s lack of authority to review and approve charter school applications, which authority is expressly reserved for local boards of school directors under Section 17-1717-A of the CSL, the absence of language in Section 17-1719-A expressly granting PDE authority to impose charter school application requirements demonstrates that Section 713.2 of PDE’s Final-Form Regulation is without statutory authority and contrary to the intention of the General Assembly. It is therefore respectfully submitted that Section 713.2 of the Final-Form Regulation must be rejected and disapproved.

2. PDE’s Does Not Have Statutory Authority to Impose Application Requirements Related to “Educational Management Service Providers.”

Even if PDE had statutory authority to impose charter school application requirements generally (which it does not for the reasons discussed above), PDE nevertheless lacks statutory authority to impose application requirements specific to “educational management service providers.” PDE cites Section 17-1719-A of the CSL as providing statutory authority for Section 713.2 of its Final-Form Regulation, but that statutory section does not use the term “educational management service provider” or establish any application requirements related thereto. The absence of such statutory language is not a mere distinction without a difference for the multiple reasons discussed below.

First, PDE fails to recognize that the application requirements it seeks to impose with respect to “educational management service providers” are almost invariably established first by *statute*, not by regulation. *See, e.g.*, Model Statute of the National Alliance for Public Charter Schools § VI(1)(K);² W. Va. Code § 18-5G-8(c) (West Virginia); KRS § 160.1593(4) (Kansas); Burns Ind. Code Ann. § 20-24-3-2.5 (Indiana); Wyo. Stat. § 21-3-307(a)(xxiv) (Wyoming). While PDE attempts to rely on the regulations of other states as purported support for its application requirements in Section 713.2 of the Final-Form Regulation, PDE fails to analyze whether such regulations have a direct statutory basis. (*See* RAF at pp. 3-4.) Perhaps most deficient, PDE continues to claim, as it did in its RAF to the Proposed Rulemaking, that its proposed application requirements “mirror” those set forth in the Colorado Code of Regulations. (RAF at p. 3.) Among other reasons discussed in CSMI’s October 18, 2021 Comment Letter,³ PDE’s proposed regulation clearly does not “mirror” Colorado’s where there is a direct statutory basis for both Colorado’s definition of “education management provider” in the regulation at 1 CCR § 302-1-2.00(5) and Colorado’s charter school application requirements related to “education management providers” in the regulation at 1 CCR § 302-1-4.00(1)(r). Specifically, Colorado’s regulatory definition of “education management provider” directly corresponds to a statutory definition of that term, *see* C.R.S. § 22-30.5-103(3.5), and Colorado’s regulatory charter school application requirements related to “education management provider[s]” are identical to statutory application requirements for “education management provider[s]”, *see* C.R.S. § 22-30.5-106(1)(s). It is thus clear that PDE is attempting to implement by *regulation* charter school application requirements that must instead be implemented by *statutory enactment*.

Next, PDE has completely failed to address or even acknowledge Section 17-1729.1-A(c)(4) of the CSL, 24 P.S. § 17-1729.1-A(c)(4), which is the only provision of the CSL that actually uses the term “educational management service provider.” Unlike the application requirements set forth in Section 17-1719-A of the CSL for charter schools—which are silent with respect to “educational management service providers”—Section 17-1729.1-A(c) of the CSL makes specific provision for “educational management service providers” in establishing application requirements for multiple charter school organizations (designated above as “MCSOs”).⁴ Specifically, Section 17-1729.1-A(c)(4) expressly provides, in pertinent part, that

² Available at <https://www.publiccharters.org/publications/model-law-supporting-high-quality-charter-public-schools>.

³ In addition to the direct statutory authority for Colorado’s relevant regulations, Colorado’s regulatory definition (and statutory definition, for that matter) of “education management provider” is markedly different from PDE’s proposed definition of “educational management service provider” in Section 713.1 of the Final-Form Regulation. Specifically, Colorado defines “education management provider” to mean “a nonprofit, not-for-profit, or for-profit entity that contracts with an Institute Charter School to *provide, manage, or oversee all or substantially all of the Educational services provided by the Institute Charter School*. 1 CCR § 302-1-2.00(5) (emphasis added); *see also* C.R.S. § 22-30.5-103(3.5).

⁴ As discussed above, Section 17-1729.1-A(c) of the CSL also expressly grants PDE authority in connection with MCSO applications to “develop and issue a standard application form that [MCSO] applications must submit” and to include in that standard application form “[a]ny other information as deemed necessary by [PDE].” 24 P.S. § 17-1729.1-A(c). As further discussed above, Section 17-1719-A of the CSL does not similarly grant PDE such

an MCSO application must include “[a]n organizational chart clearly presenting the proposed governance structure” of the MCSO, including “any educational management service provider that will play a role in providing management services to the charter schools.” 24 P.S. § 17-1729.1-A(c)(4). Adhering to the principles of statutory construction, the General Assembly’s express inclusion of an MCSO application requirement specific to “educational management service providers” in Section 17-1729.1-A(c)(4) without making similar provision in Section 17-1719-A demonstrates that the General Assembly did not intend to impose such a requirement for charter school applications. *See, e.g., In re Vencil*, 152 A.3d at 244 (Pa. 2017); *Fonner*, 724 A.2d at 907; *Russello*, 464 U.S. at 23.

Finally, even if PDE had statutory authority to impose charter school application requirements relating to “educational management service providers” notwithstanding the discussion above, any such statutory authority would not permit PDE to promulgate regulations that are inconsistent with or more expansive than Section 17-1729.1-A(c)(4) of the CSL. Specifically, as purported statutory authority for its “educational management service provider” application requirements in Section 713.2(c)(4) of Final-Form Regulation, PDE attempts to proceed under the auspices of Section 17-1719-A(4) of the CSL. *Compare* 24 P.S. § 17-1719-A(4) (requiring an application to address “the proposed governance structure of the charter school”) *with* Section 713.2(c)(4) of the Final-Form Regulation (requiring an application to address the “proposed governance structure of the charter school”). To the extent PDE even has any such statutory authority under Section 17-1719-A(4) of the CSL, however, that authority would necessarily be limited to a charter school’s “*proposed governance structure*.” 24 P.S. § 17-1719-A(4) (emphasis added). In that regard, the General Assembly has already made clear in Section 17-1729.1-A(c)(4) of the CSL that “educational management service providers” are relevant to the “proposed governance structure” of a charter school only to the extent that such entities “will play a role in providing management services to the charter school[.]” 24 P.S. § 17-1729.1-A(c)(4).

Importantly, Section 17-1729.1-A(c)(4) of the CSL and its related subsection (c)(5) provide, in full:

(c)The application form shall contain the following information:

....

(4) An organizational chart clearly presenting the proposed governance structure of the multiple charter school organization, including lines of authority and reporting between the board of trustees, chief administrator, administrators, staff and *any educational management service provider that will play a role in providing management services to the charter schools* under its jurisdiction.

authority with respect to charter school applications, *i.e.*, Section 17-1719-A neither provides for PDE to develop an application form nor provides for PDE to require submission of any information not identified in the statute.

(5) A clear description of the roles and responsibilities for the board of trustees, chief administrator, administrators and any other entities, including a charter school foundation, *shown in the organizational chart.*

24 P.S. § 17-1729.1-A(c)(4)-(5) (emphasis added). Thus, an “educational management service provider” need only be shown on the organizational chart if it “will play a role in providing management services” and, only if an “educational management service provider” is so included on the organizational charter is an application required to provide a “description of the roles and responsibilities” of the “educational management service provider.” *Id.* The General Assembly’s reason for limiting application of Section 17-1729.1-A(c)(4) to entities that “will play a role in providing management services” is self-obvious: a charter school’s “governance structure” consists of only those persons and entities actually responsible for management of the charter school’s operations.

PDE appears to be attempting to mimic the above-quoted statutory language in Section 713.2(c)(4)(iii)-(iv) of its Final-Form Regulation, except that PDE has removed the requirement that an “educational management service provider” must be involved in the management of the charter school. Specifically, Section 713.2(c)(4)(iii)-(iv) of PDE’s Final-Form Regulation provides:

(c) The application forms in subsection (a) shall, at a minimum, include the following:

....

(4) Proposed governance structure of the charter school or regional charter school, including:

....

(iii) 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.*

(iv) A description of the roles and responsibilities of the board of trustees, administrators, a charter school foundation, if applicable, and *any other entities shown in the organizational chart, including any educational management service provider.* This includes....

(Emphasis added). PDE thus impermissibly attempts to replace Section 17-1729.1-A(c)(4) of the CSL’s specific requirement as to “any educational management service provider that will play a role in providing management services” with a much broader requirement that would encompass “any educational management service provider with which the charter school or regional charter

school has contracted or intends to contract,” regardless of the nature or extent of the service(s) provided to the charter school.

Based on the foregoing, PDE is without statutory authority to impose any charter school application requirements specific to “educational management service providers” and, even if PDE held any such authority (which it does not), PDE would nevertheless be prohibited, at a minimum, from imposing any application requirements that are inconsistent with and/or more expansive than those set forth in Section 17-1729.1-A(c)(4)-(5) of the CSL. In that regard, there can be no statutory authority for PDE’s “educational management service provider” application requirements in Section 713.2(c)(4) of the Final-Form Regulation to the extent that such requirements are not expressly limited to “educational management service providers” that are actually engaged in managing charter schools.

3. PDE’s Proposed Definition of “Educational Management Service Provider” is Overbroad and Used Without Proper Context.

Even if PDE was not without statutory authority, PDE’s defined term “educational management service provider” remains overbroad and continues to be used in PDE’s Final-Form Regulation without proper context. As discussed below and in CSMI’s October 18, 2021 Comment Letter, a broad spectrum of statutory, regulatory and secondary sources—including those found in Pennsylvania and cited by PDE itself—make clear that terms like “educational management service provider,” “education service provider” and “education management provider” are to be defined and used in a manner that encompasses only those entities actually tasked with management or control over charter school operations. PDE recognizes as much in its RAF by representing that its proposed regulations seek transparency and accountability with respect to “the for-profit and nonprofit organizations that play a role in the management of charter school entities.” (RAF at pp. 3, 14, 15.) PDE’s proposed regulations related to “educational management service providers,” however, are not limited to such “for-profit and nonprofit organizations” and instead improperly encompass entities that neither manage nor control charter schools.

Although PDE has updated its definition of “educational management service provider” in Section 713.1 of the Final-Form Regulation, that definition remains broad and the relevant requirements of Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation continue to apply generally to all entities falling under the broad definition of “educational management service provider” without regard to the nature and extent of the service(s) actually being provided to the charter school. Specifically, all of the relevant application requirements set forth in Section 713.2(c)(4) of the Final-Form Regulation apply to “any educational management service provider with which the charter school or regional charter school has contracted or intends to contract” or where “the charter school or regional charter school has contracted with or intends to contract with an educational management service provider.” (See Section 713.2(c)(4)(iv)(iii) and (c)(4)(v)(A)-(M) of Final-Form Regulation.) Likewise, the relevant audit requirement set forth in Section 713.7(c)(2) of the Final-Form Regulation applies to “any educational management service provider with which the charter school entity has a contract.” Such broadly applicable regulatory requirements are contrary to Pennsylvania law and other relevant authorities, as further discussed below.

By way of background, the overbreadth of PDE's proposed definition of "educational management service provider" and the proposed regulatory requirements related thereto was the focus of numerous comments submitted in connection with PDE's Proposed Rulemaking. PDE summarily responded to the legitimate concerns raised by CSMI and other commenters by stating that "[i]n the final-form rulemaking the definition of 'educational management service provider' is revised to align with the definition contained in 24 P.S. § 5-501(b)(3) for consistency." (See, e.g., PDE Comment Responses at p. 63.) In that regard, the Section 713.1 of the Final-Form Regulation ("Definitions") now provides, in pertinent part:

Educational management service provider—A for-profit education management organization, nonprofit charter management organization, school design provider, business manager or any other partner entity with which a school contracts to provide educational design, business services, comprehensive management or personnel functions. The term may not include a charter school foundation.

(Alterations omitted). Notwithstanding this definitional update, PDE's claim that its proposed regulations "align with" Section 5-501(b)(3) of the Public School Code is not accurate.

While PDE has conformed its proposed definition of "educational management service provider" to that set forth in Section 5-501(b)(3) of the Public School Code, that definitional change, by itself, is insufficient to address the concerns raised by CSMI and others or cure the overbreadth that continues to plague PDE's proposed regulations related to "educational management service providers." Importantly, it was CSMI that identified the inconsistency between PDE's proposed regulations and Section 5-501(b)(3) of the Public School Code. (See CSMI October 18, 2021 Comment Letter at pp. 5-9.) That inconsistency, however, was not based solely on PDE's original proposed definition of "educational management service provider," but also resulted from the manner and context (or lack thereof) in which PDE used the defined term "educational management service provider" in Sections 713.2(c)(4) and 713.7(c)(2) of its proposed regulations. Specifically, CSMI explained the significance of Section 5-501(b)(3) of the Public School Code's use of the term "educational management service provider" in the specific context of an entity that has been contracted by a public school district to "operate" a school building as a means of satisfying the school district's statutory obligation to "maintain a sufficient number of elementary public schools." (See CSMI October 18, 2021 Comment Letter at pp. 7-9 (citing 24 P.S. § 5-501(b)(3)).)⁵ Thus, while PDE has adopted Section 5-501(b)(3) of the Public School

⁵ Section 5-501 of the Public School Code provides, in pertinent part:

(a) The board of school directors in every school district shall establish, equip, furnish, and maintain a sufficient number of elementary public schools, in compliance with the provisions of this act, to educate every person, residing in such district, between the ages of six and twenty-one years, who may attend.

(b) A board of school directors may satisfy the requirement set forth in subsection (a) by any of the following:

(3) *Contracting with an education management service provider to operate a school building.* For purposes of this paragraph, "education management service provider" shall mean a for-profit education management

Code's definition of "educational management service provider" in Section 713.1 of the Final-Form Regulation, PDE has improperly removed that term from all necessary context by divorcing the defined term from its use in connection with an entity that has been contracted to "operate" a public school.

Based on the discussion above (including that in Section 2), it is clear that PDE's requirements related to "educational management service providers" in Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation—which broadly encompass entities that are not tasked with management or control of charter schools—are inconsistent with both of the Pennsylvania statutory provisions that actually use the term "educational management service provider": Section 5-501(b)(3) of the Public School Code and Section 17-1729.1-A(c)(4) of the CSL. Specifically, Section 5-501(b)(3) of the Public School Code establishes that the term "educational management service provider" is appropriately used in the context of an entity that "operates" a school building. 24 P.S. § 5-501(b)(3). Likewise, Section 17-1729.1-A(c)(4) of the CSL establishes that "educational management service providers" are relevant to the "governance structure of the charter school" only to the extent that such an entity "will play a role in providing management services." 24 P.S. § 17-1729.1-A(c)(4).⁶ Accordingly, by applying to any "educational management service provider" with which a charter school "has contracted" or "intends to contract" without regard for the nature or scope of the service(s) provided to the charter school, Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation are impermissibly broad under Pennsylvania law.

The overbreadth of Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation is likewise established by other relevant statutory, regulatory and secondary sources—including those cited by PDE—all of which define or use "educational management service provider" (and similar terms) in a manner that encompasses only those entities actually tasked with management or control over charter schools. Specifically:

- The Colorado Code of Regulations, which PDE erroneously claims to "mirror" (*see* RAF at p. 3), defines the term "education management provider" as an entity that contracts with a charter school to "provide, manage, or oversee all or substantially all

organization, nonprofit charter management organization, school design provider, business manager or any other partner entity with which a school district contracts to provide educational design, business services, comprehensive management or personnel functions. The term shall not include a charter school foundation.

24 P.S. § 5-501 (emphasis added).

⁶ Interestingly, PDE's claim in its RAF that it seeks transparency and accountability with respect to "the for-profit and nonprofit organizations that play a role in the management of charter school entities" (*see* RAF at pp. 3, 14, 15) uses language remarkably similar to that found in Section 17-1729.1-A(c)(4) of the CSL. *See* 24 P.S. § 17-1729.1-A(c)(4) (referring to an "educational management service provider that will play a role in providing management services to the charter schools"). Despite playing lip service to this statutory limitation, it is clear that PDE's proposed regulations with respect to "educational management service providers" are not limited to such entities.

of the Educational services provided” by a charter school. 1 CCR § 302-1-2.00(5). While not recognized by PDE, this regulatory definition directly corresponds with a virtually identical statutory definition set forth in the Colorado statute at C.R.S § 22-30.5-103(3.5). Thus, Colorado’s narrowly tailored definition of “education management provider” makes clear that all regulatory (and statutory) requirements using that term apply only to entities that “provide, manage, or oversee all or substantially all of the Educational services provided” by a charter school.

- The report PDE cites on page 22 of its RAF describes a “charter management organization” (sometimes referred to as an “education management organization” where the entity is for-profit as opposed to nonprofit) as an organization that “will control every aspect of the school’s operations, including curriculum, personnel policies, operating policies and finances. The critical feature is the direct control of operations.” J.L. Woodworth, *et al.*, *Charter Management Organizations*, CREDO, Stanford University, 2017, at p. 2. Excluded from this definition are “[o]rganizations which contract with charter schools to provide only a small portion of operations, such as physical therapy or speech therapy....These types of contract services do not involve the management and operation of the school overall.” *Id.* at p. 3. Thus, PDE’s own cited secondary source establishes that terms like “educational management service provider” should be limited to entities that manage or operate a charter school.
- The charter school application requirements set forth in the model statute published by the National Alliance for Public Charter Schools provide, in pertinent part: “In the case of a proposed charter public school that intends to contract with an education service provider *for educational program implementation or comprehensive management*, the application shall additionally require the applicants to....” Available at <https://www.publiccharters.org/publications/model-law-supporting-high-quality-charter-public-schools> (§ VI(1)(K)) (emphasis added).
- The model statute published by the American Legislative Exchange Council (ALEC) provides, in pertinent part, that a charter school has the power to “contract with an education service provider *for the management and operation of the public charter school* so long as the school’s Board or Commission retains oversight authority over the school....” Available at <https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/> (§ 6(H)(1)(c)) (emphasis added).
- The charter school application requirements in West Virginia’s charter school statute provide, in pertinent part: “If the applicant intends to contract with an education service provider *for educational program implementation or comprehensive management*, the application shall additionally require the application to provide the following information with respect to the educational service provider....” W. Va. Code § 18-5G-8(c) (emphasis added).
- The charter school application requirements in Kentucky’s charter school statute provide, in pertinent part: “If the public charter school intends to contract with an

education service provider *for educational program implementation or comprehensive management*, the application shall additionally require the application to....” KRS § 160.1593(4) (emphasis added).

- The charter school application requirements in Indiana’s charter school statute provide, in pertinent part: “If a proposed charter school intends to contract with an education service provider *for substantial educational services, management services, or both educational services and management services*, the request for proposals shall require the applicants to provide the following....” Burns Ind. Code Ann. § 20-24-3-2.5 (emphasis added).
- The charter school application requirements in Wyoming’s charter school statute provide, in pertinent part: “In the case of proposed charter school that intends to contract with an education service provider *for educational program implementation or comprehensive management*, the application shall additional require the applicant to....” Wyo. Stat. § 21-3-307(a)(xxiv) (emphasis added).

The above sources demonstrate that terms like “educational management service provider,” “education management provider” and “education service provider” must either be (1) clearly defined as being limited to entities that actually manage or control charter school operations or (2) used in concert with other language reinforcing that any requirements apply only with respect to entities that actually manage or control charter school operations. PDE’s Final-Form Regulation accomplishes neither.

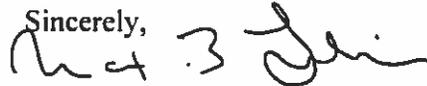
Finally, as touched on above, PDE’s own statements regarding its intended purpose in proposing requirements related to “educational management service providers” in Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation demonstrate that such proposed requirements are impermissibly broad. Specifically, PDE has repeatedly represented that it seeks transparency and accountability with respect to “the for-profit and nonprofit organizations that play a role in the management of charter school entities.” (RAF at pp. 3, 14, 15; *see also, e.g.*, Preamble at “Purpose and Background”.) PDE has likewise repeatedly represented that its proposed audit requirement in Section 713.7(c)(2) of the Final-Form Regulation is directed at charter schools that are “managed by an external organization such as an educational management service provider.” (Preamble at “Section 713.7 Fiscal Management and Audit Requirements; PDE Comment Responses at p. 52.) Despite these statements by PDE, it is clear that Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation are not limited to such entities, but rather, apply generally to any entity that can be said to fall under PDE’s expansive definition of “educational management service provider” without regard to the nature or extent of the service(s) the entity actually provides to the charter school.

Based on the foregoing, notwithstanding PDE’s isolated efforts to conform its proposed definition of “educational management service provider” to Section 5-501(b)(3) of the Public School Code, PDE’s proposed requirements in Sections 713.2(c)(4) and 713.7(c)(2) of the Final-Form Regulation are nevertheless impermissibly broad on account of not being expressly limited to entities that actually manage or control charter school operations. Thus, even if PDE had underlying statutory authority to promulgate such regulations (which it does not), PDE’s

proposed regulations related to “educational management service providers” must be rejected and disapproved.

* * *

CSMI respectfully submits that PDE’s Final-Form Regulation should be disapproved for all of the reasons discussed herein and in CSMI’s October 18, 2021 Comment Letter. CSMI thanks the IRRC and its staff for consideration of these comments.

Sincerely,


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