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November 5, 2021

The Honorable George D. Bedwick
Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Proposed Regulation #6-349

Dear Chairman Bedwick:

I submit for your consideration the following comments on the Proposed Regulation #6-349: Charter Schools and Cyber Charter Schools published in the *Pennsylvania Bulletin* on September 18, 2021.

As chairman of the Pennsylvania House of Representatives Education Committee, charged with legislative oversight over the Pennsylvania Department of Education (“PDE”), it is the Committee’s role to ensure that regulations proposed by PDE are consistent with the legislative intent of the General Assembly, the statutory authority of the agency, and do not impose unreasonable requirements on the regulated community.

In determining whether a regulation is adopted within an agency's granted power, we must look for statutory language authorizing the agency to promulgate the legislative rule and examine that language to determine whether the rule falls within its grant of authority.” *Marcellus Shale Coalition v. Department of Environmental Protection*, 216 A.3d 448, 459 (Pa. Cmwlth.), *appeals quashed*, 223 A.3d 655 (Pa. 2019) (citing *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1239-41). We must consider “the purpose of the statute and its reasonable effect” and whether “the regulation is consistent with the enabling statute.

Section 1702-A of the Charter School Law [24 P.S. §§ 1701-A – 1751-A] lays out the intent of the General Assembly when enacting the charter school provisions:

It is the intent of the General Assembly, in enacting this article [commonly referred to as the Charter School Law] to provide pupils and community members to establish and maintain schools that operate independently from the existing school district structure as a method to accomplish all of the following:

- (1) Improve pupil learning.
- (2) Increase learning opportunities for all pupils.
- (3) Encourage the use of different and innovative teaching methods.
- (4) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
- (5) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
- (6) Hold the schools established under this act accountable for meeting measurable academic standards and provide the school with a method to establish accountability systems.

With this in mind, I outline the inconsistencies imposed by Proposed Regulation #6-349 when compared with the Charter School Law [24 P.S. §§ 1701-A – 1751-A] which will harm the 170,000 Pennsylvania students enrolled in either a charter school or a cyber charter school and the tens of thousands of students who are on a waitlist for entry to a charter school entity.

Preamble:

In its preamble to the proposed regulation, PDE states that:

Transparency, *equity*, quality, and accountability in the establishment, governance, and operation of charter school entities are vital to ensuring that constituencies impacting charter school entities — including the boards of trustees that govern charter school entities, the for-profit and nonprofit organizations that play a role in the management of charter school entities, and authorizers of charter school entities — adhere to the structural norms that maintain the effectiveness of the [Charter School Law].

I feel a correction must be made in the preamble to reflect the explicit intent of the General Assembly when enacting the Charter School Law, which was to “increase learning opportunities for *all pupils*.” In other words, strive to provide equal opportunity for a good education to all students. Additionally, the concept of equality is reflected in federal law, which mandates that students may not be discriminated against for any reason, including intellectual or physical ability or disability, as required under Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Individuals with Disabilities Education Act (IDEA).

While equity and equality may sound similar, words are carriers of meaning and semantic distinctions matter. Where equality means that student A and student B are treated equally, equity means “adjusting shares in order to make students A and B equal.” Therefore, ‘equity’ requires treating some identity groups unequally to ensure that outcomes are equalized in order to redress a perceived imbalance.¹ That is not the intent of the Charter School Law.

¹ Mike Gonzalez, “Biden’s Embrace of ‘Equity’ Means He’s Abandoned the Quest for Equality,” The Heritage Foundation, <https://www.heritage.org/progressivism/commentary/bidens-embrace-equity-means-hes-abandoned-the-quest-equality>, last visited on November 2, 2021.

Section 713.1 - Definitions

Educational Management Service Provider:

The proposed regulation includes the following definition for “educational management service provider:”

[A] nonprofit or for-profit charter management organization, education management organization, school design provider, business manager or any other entity or individual that enters into a contract or agreement with a charter school entity to provide educational design, business services, management or personnel functions or to implement the charter. The term shall not include a charter school foundation.

While the Charter School Law expressly permits a charter school entity to “[m]ake contracts and leases for the procurement of services, equipment and supplies,” an educational management service provider is but one type of service provider. [24 P.S. § 17–1714–A (a)(5)].

As you have heard from other stakeholders, there are concerns that the definition is overly broad and could include individuals or entities that do not manage charter school operations.

The term is mentioned only once in the Charter School Law—in reference to information to be provided in an application for a multiple charter school organization under section 1729.1-A (c) of the Charter School Law. That reference indicates that an educational service provider “play[s] a role in providing *management services* to the charter schools under its jurisdiction.”

As such, this definition should be limited to individuals or entities who contract with a charter school entity to exercise management or operational oversight responsibilities.

Furthermore, the definition proposed by the PDE includes terms that are not used in the Charter School Law and potentially need additional explanation. For example, “school design provider” could be an entity that provides architectural design or curriculum design, but neither should not be considered an entity that provides management or operational oversight responsibilities.

Section 713.2 - Contents of Charter School or Regional Charter School Application

I have concerns that these expanded requirements will provide a basis for an authorizer to not renew or revoke a charter if its operations vary from the details in application.

Many of the details required to be included in the application by the proposed regulation are more expansive than what is required under section 1719-A of the Charter School Law, and may be difficult or impossible to estimate or know at the time of the application and have little or no bearing on the potential for the applicant to meet the requirements of section 1719-A or to provide comprehensive learning experiences for students or other factors allowed for evaluation of a charter school application. The Charter School Law allows a charter school to be established by an individual, one or more teachers, and parents or guardians of students who will attend the charter school. The expansive nature of the proposed regulation could make it impossible and expensive for these individuals to establish new charter schools.

Additional Information Requests by Authorizer:

The proposed regulation permits an authorizer to require an applicant submit additional information for the local board of directors to evaluate the application in accordance with section 1717-A(e)(2) of the Charter School Law. But that subsection of the law, describes the “criteria” upon which a charter school application shall be evaluated by a local board of school directors or PDE. It does not give the authorizer carte blanche to ask for unlimited information in the application. It is section 1719-A that controls the range of details to be submitted with the application. Allowing an authorizer to ask for additional information that is not in line with the requirements of 1719-A has the potential to create an open-ended application where an authorizer could repeatedly ask for additional information and is never satiated.

Projected Grade Level and Age to be Served:

The Charter School Law simply requires a charter school application to include the grade or age levels proposed to be served by the school. It is unreasonable to expect a charter school applicant--during the application phase--to be able to provide the following projections:

- Projected number of students receiving special education services by primary disability.
- Projected number of English Learners.
- Projected composition of the student population by race, ethnicity, and students who are economically disadvantaged

A charter school applicant may be able to project this information based on the population of the catchment area or its marketing targets for the proposed new charter school, but the law does not require this very detailed information to be provided at the time of application. It is unreasonable to require a charter school applicant to ascertain the projected number of special education students, by primary disability, or the number of English Learners before the charter school is established.

The applicant should provide the authorizer with information on how they plan to serve and conduct outreach to their students and their parents or legal guardians in the admission policy section of the application form.

Admission Policy:

Requiring an applicant to list enrollment capacity by grade level is an attempt by PDE to institute grade level caps which is not the intent of the statute.

Financial Plan:

Additionally, the following application data required pursuant Proposed Regulation #6-349 are unreasonable:

- A proposed 5-year general fund budget by account code, in accordance with the Department’s Chart of Accounts for PA Local Educational Agencies, that includes revenues and expenditures.
- The anticipated sum of revenues and expenditures not accounted in the account codes.
- The budgeted fund balance for the proposed first year of operation and unrestricted fund balances for each year of the charter term.
- The number of projected full time equivalent employees

- Excessively detailed information on whom the charter school entity will contract with or intends to contract with to provide educational management services as well as potential conflicts of interest; requested information may be unknown at the time of application.

This required information is speculative. And while the proposed regulation requires detailed information for the charter schools to report, the regulation does not inform school districts how to evaluate this information. For example, section 1717-A requires school boards to evaluate a charter school application based on the capability of the applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the adopted charter.

Physical Facility:

Section 1719-A (11) requires an applicant to submit “a description of and address of the physical facility in which the charter school will be located and the ownership thereof and any lease arrangements.”

The proposed regulations expand this requirement to include in addition to the lease arrangements:

- Any estimated additional monthly payments (for example, utilities, property taxes, common space custodial services, and the like).
- How the facility is suitable for the proposed school.
- Square footage for each space where instruction of students will occur and a description of how the space will be used (for example, kindergarten classroom, gymnasium for physical education, music instruction, and the like).

The Commonwealth Court and the Charter Appeal Board have spoken clearly on this issue. [*See Central Dauphin Sch. Dist. v. Founding Coalition, Infinity Charter Sch.*, 847 A.2d 195, 202-203 (Cmwlth. 2004)]. The law merely requires a description and address of the physical facility and ownership or lease arrangements, and failure to provide information regarding other monthly payments, the specific dimensions of classrooms, a description of how the facility is suitable for the school, or other details is not required.

Liability Insurance:

Most concerning is section 713.2 (17) as it relates to “adequate liability and other appropriate insurance” and how PDE will define other appropriate insurance for the charter school. In past negotiations with the Administration, PDE defined it with insurance products that either did not exist or were not available to charter school entities. The concern is PDE will require insurance products that a charter school could not purchase resulting in non-compliance and jeopardizing its charter.

Section 713.3 - Contents of Cyber Charter School Applications

A cyber charter school applicant is required to submit a PDE application including the items identified in § 713.2 (c). Therefore, the concerns expressed with section 713.2 also apply to this section of the proposed regulations.

Section 713.4 - Random Selection Policies for a Charter School or Regional Charter School

Pursuant to sections 1715-A (2) and (3) of the Charter School Law, “[a] charter school shall be accountable to the parents, the public and the Commonwealth, with the delineation of that accountability reflected in the charter. Strategies for meaningful parent and community involvement shall be developed and implemented by each school. A charter school shall not unlawfully discriminate in admissions, hiring or operation.” Therefore, a charter school entity must “ensure random selection of students for enrollment.”

Section 713.4 (c)(2) requires a charter school to submit its admission policy in a renewal application of the charter school entity. A renewal application process is not required by law or by this Proposed Regulation #6-349.

Section 713.8 - Relating to Redirection Process

This section does not align with section 1725-A(a)(5) of the Charter School Law and adds unreasonable requirements and timelines. The Proposed Regulation #6-349 addresses redirection requests for the months of July through May but fails to address redirection requests from the month of June. How will rolling enrollment be factored into the redirection process?

Furthermore, the Charter School Law does not require a charter school entity to submit payment requests to a school district “no later than ten (10) days before the fifth of each month” nor does it prohibit a charter school request to the PDE Secretary to include tuition for the month after the month in which the request was submitted as the Proposed Regulation #6-349 requires.

I would be remissive if I did not point out Proposed Regulation #6-349 does not address concerns with a school district claiming deductions on PDE Form 363 that are more than what the Charter School Law allows, which is one of the reasons a charter school entity submits a request to PDE Secretary seeking to have the estimated amount withheld from State payments that will be made to the authorizing school district.

It was not the intent of the General Assembly to cause cashflow concerns for either a charter school or school district or to impose unfunded reporting mandates on charter schools. Furthermore, I question whether this language clarifies the process.

Section 713.9 - Relating to Health Care Benefits

This section requires a charter school “demonstrate that health care benefits provided by the charter school are “meaningfully similar” to those offered by the local school district.” Section 1724-A of the Charter School Law, requires “every employe of a charter school shall be

provided the same health care benefits as the employee would be provided if he or she were an employee of the local district.”

PDE gives no guidance as to what constitutes “meaningfully similar.” As we know, a charter school has different purchasing power from a school district and cannot raise taxes ~~like a school district~~ to pay for increasing healthcare premiums.

Secondly, a school district may offer different benefit plans for different collective bargaining groups.

Lastly, the Charter School Law does not require a charter school entity to provide a comparison of benefits to its employees nor does the law provide for complaints regarding benefits to be made to the charter authorizer as required by Proposed Regulation #6-349.

This section also requires a “charter school, regional charter school, or cyber charter school [to] present health care benefit plan enrollment options to employees, including a comparison of what they would have been offered if they were employees of the local school district, at each enrollment period...” There is a lack of clarity with this proposed provision. For example:

- Is a charter school or cyber charter school expected to receive healthcare information from their authorizer?
- What are the consequences for a charter or cyber charter school that does not provide an exact comparison?
- Similarly, what are the consequences for a school district that does not provide information for a charter school entity to comply with this section?

Additional Comments:

Guidance not provided in the proposed regulation:

PDE did not include guidance for the following sections of the Charter School Law that would assist or direct the conduct of authorizers or the Charter Appeal Board (created under section 1721-A):

- Section 1720-A provides for a charter renewal “for a period of no less than three (3) nor more than five (5) years and may be renewed for five (5) year periods upon reauthorization by the local board of school directors of a school district or the appeal board.” Unfortunately, Proposed Regulation #6-349 does not provide guidance to revoke or deny a renewal of a charter or cyber school charter.
- Section 1728-A requires an authorizing school board to conduct a comprehensive review of a charter before granting a five-year renewal of the charter. The proposed regulation does not provide guidance to an authorizer nor requires PDE to create a sample report for a charter school to comply with this section.
- Section 1729-A provides the bases for the revocation or nonrenewal of a charter as following:
 1. One or more material violations of any of the conditions, standards or procedures contained in the written charter signed pursuant to section 1720-A.

2. Failure to meet the requirements for student performance set forth in 22 Pa. Code Ch. 5 (relating to curriculum) or subsequent regulations promulgated to replace 22 Pa. Code Ch. 5 or failure to meet any performance standard set forth in the written charter signed pursuant to section 1716-A.
3. Failure to meet generally accepted standards of fiscal management or audit requirements.
4. Violation of provisions of this article.
5. Violation of any provision of law from which the charter school has not been exempted, including Federal laws and regulations governing children with disabilities.
6. The charter school has been convicted of fraud.

Conclusion:

Proposed Regulation #6-349 is faulty and if implemented would have a negative impact on our charter and cyber charter schools and their students, several of whom reside within failing school district boundaries and underserved or economically disadvantaged areas.

I, therefore, ask the Independent Regulatory Review Commission to disapprove this regulation in its proposed form since several provisions of the regulation are contrary to intent of the law, lack clarity and impose unreasonable requirements on charter schools and cyber charter schools that could provide a basis for not renewing or revoking a charter if its operations vary from Proposed Regulation #6-349. To permit or endorse PDE's proposed regulation that is contrary to the intent of the law and that neglects to provide guidance for numerous sections of the Charter School Law sets a dangerous precedent.

Please note that the General Assembly is considering two bills--Senate Bill 1 (Martin) in the Senate and House Bill 1685 (Topper)--that attempt to modernize the Charter School Law. The General Assembly should be given time to address outstanding issues before a narrow focused, anti-charter school regulation is implemented.

Finally, this letter represents my concerns at this time and should not limit me from providing future comments or concerns regarding Proposed Regulation #6-349.

Thank you for your attention to my concerns, as well as those of numerous stakeholders, with this proposed regulation and I respectfully ask for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read 'Curt', written in a cursive style.

Representative Curt Sonney
Chair, House Education Committee