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House of Representatives
Commonwealth of Pennsylvania
Harrisburg

REPRESENTATIVE CURT SONNEY
4th Legislative District

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MAR 18 2022

March 17, 2022

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Independent Regulatory
Review Commission

RE: Disapproval of Final-Form Regulation (Department of Education Regulation No. 6-349 and Independent Regulatory Review Commission No. 3315)

Dear Commissioners:

On behalf of the Education Committee of the Pennsylvania House of Representatives ("Committee"), and in accordance with section 5.1(j.2) of the Regulatory Review Act¹, the Committee is providing notice that it has disapproved the Pennsylvania Department of Education's ("Department") Final-Form Regulation No. 6-349, which purports to clarify elements of the Charter School Law ("CSL").²

The following explanation outlines the reasons for our disapproval.

Compliance with the Regulatory Review Act:

As the Independent Regulatory Review Commission ("Commission") pointed out in its November 17, 2021 comments on the proposed regulation, the Regulatory Review Act provides the following directive:

To the greatest extent possible, this act is intended to encourage the resolution of objectives to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.³

To meet this obligation of the Act, the Commission "strongly [encouraged] the Department to organize additional stakeholder meetings with representatives from all segments of the commenter and the regulated community." Yet, in its Regulatory Analysis Form ("RAF"), after submitting the proposed regulation, the Department admittedly only reviewed the submitted comments, and testified, and listened to testimony of other stakeholders, at an October 20, 2021 Senate Education Committee hearing, but did not meet or otherwise engage with the regulated community, as encouraged.⁴

¹ 71 P.S. § 745.5a(j.2).

² 24 P.S. §§ 17-1701-A - 1751-A.

³ 71 P.S. § 741.2(a).

⁴ See PA Dept. of Education, Regulatory Analysis Form, No.6-349, p. 11.

Additionally, the Department admitted that it did not consider alternative regulatory provisions, and without explanation, deems the final-form regulation to be the least burdensome option without additional, meaningful discussions with the stakeholders.⁵

The Department states in the RAF that the final-form regulation clarifies the CSL and sets conditions that emphasize accountability, quality, and transparency in the establishment, governance, and operation of charter school entities.⁶ When the General Assembly granted authority to the Department to issue regulations under the CSL the intent was to provide guidance for all stakeholders, not to single out charter schools, regional charter schools and cyber charter schools (collectively, "charter school entities"). The final rulemaking does not emphasize accountability, quality, and transparency to all parties involved in the establishment of charter school entities.

The Committee cannot agree to this regulation when the Department has failed to attempt to reach a consensus on the final-form regulation among all parties, which is one of the explicitly stated fundamental purposes of the regulatory review process. Stakeholders continue to ask for more clarification in the final rulemaking in several areas (applications, redirection process, and health care benefits to name a few). If the Department had held additional public meetings, as it was highly recommended to do so, these areas of concern could have been addressed.

Furthermore, many provisions remain in the regulation that would have negative impact on our charter and cyber charter schools and their students and those on a waiting list, many of whom reside within failing school district boundaries and underserved or economically disadvantaged areas.

Final-form Regulation No. 349 is contrary to the intent of the law, lacks guidance for authorizers, and imposes unreasonable requirements on charter and cyber charter schools that could provide a basis for not authorizing, renewing, or revoking a charter if its operations vary from the regulation as submitted to the Commission.

GENERAL PROVISIONS

Section 713.1 - Definitions.

The definition for "authorizer" should be clarified as follows:

- 1) A local board of school directors of a school district in which a proposed or approved charter school is located.
- 2) The boards of school directors of one or more school districts in which a proposed or approved regional charter school is located.
- 3) A board of public education of a school district of the first class in which a proposed or approved charter school is located.
- 4) The department, for a cyber charter school.

⁵ *Id.* at 21.

⁶ *Id.* at 1 and 3.

APPLICATION REQUIREMENTS

Sections 713.2 and 713.3 – Contents of Charter School, Regional Charter School and Cyber Charter School Application

The House Education Committee remains concerned that many of the details required to be included in the application by the final-form regulation are more expansive than what is required under section 1719-A of the CSL, 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 CSL 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 final-form regulation continues to permit an authorizer to require an applicant to submit additional information for the local board of school directors to evaluate the application in accordance with section 1717-A(e)(2) of the CSL. 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 the Department. It does not give the authorizer carte blanche to ask for unlimited information in the application. It is section 1719-A, not section 1717-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 satisfied.

Real and Substantial Authority:

Section 713.2(c)(4)(v)(F) requires the charter school entity, if it plans to contract with an educational management service provider, to provide evidence that the charter school entity’s board of trustees will retain “real and substantial authority” over the operation of the school, educational decisions, and staff of the charter school entity. Once again, the Department missed an opportunity to explain what constitutes “real and substantial authority” and ignores the advice of our Commonwealth Court in *Insight PA Cyber Charter School v. Department of Education* (“*Insight*”):

Promulgated regulations, setting forth the Department’s view of what provisions must and must not be included in a provider agreement to satisfy the ‘real and substantial authority’ test would be beneficial to charter school applicants and chartering authorities.⁷

The “real and substantial authority” test derives from *West Chester Area School District v. Collegium Charter School* (“*Collegium*”) and its progeny, including *Insight*.⁸ The test requires examination of the corporate documents for the charter school as well as the proposed

⁷ *Insight PA Cyber Charter Sch. v. Dept. of Ed.*, 162 A.3d 591, 598 n.6 (Pa. Cmwlth. 2017).

⁸ *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452 (Pa. Cmwlth. 2000), *aff’d*, 571 Pa. 503, 812 A.2d 1172 (2002).

management agreement to determine whether the charter school entity's board of trustees retains "ultimate control" over the direction of the school.⁹

The Commonwealth Court in *Insight* cautioned chartering authorities not to "interject [themselves] into the role of a contract scrivener or negotiator."¹⁰ The Court recognized that provisions of the CSL place the ultimate authority over the governance of a charter school entity in the hands of the school's board of trustees.¹¹ "Under the CSL...management agreements must be products of arms-length negotiations between separate and independent entities."¹² However, the parties are free to negotiate and contract absent provisions in statute that require or prohibit a specific term.¹³

Accordingly, chartering authorities and charter school entity applicants should be given more guidance regarding the review of applicable documents and the evidence that meets the "real and substantial authority" test based on the line of cases starting with *Collegium*. For example, the courts have explained that:

- Articles of incorporation should demonstrate that the charter school entity is organized as a nonprofit corporation under Pennsylvania law, is not a shell company for the educational management service provider, and is capable of negotiating and entering into a management services agreement that is both commercially reasonable and consistent with the board's duty to promote the interest of the students served by the charter school entity.¹⁴
- The corporate bylaws of the charter school entity should demonstrate that the charter school entity's board of trustees has full authority and ultimate power to operate the school, including determining general, academic, financial, personnel, and other policies, as outlined in the CSL.¹⁵
- The management service agreement between the charter school entity and the educational management service provider should clearly demonstrate the following:
 - The board of directors is independent from the educational management service provider.
 - The educational management service provider can exercise no authority which may not be delegated by the CSL and other applicable laws.
 - None of the charter school entity's trustees have a financial interest in, or receive compensation from, the educational management service provider.
 - The trustees retained the power to negotiate the terms of the contract with the educational management service provider and to terminate the contract.¹⁶

⁹ *Insight*, 162 A.3d at 594-595.

¹⁰ *Id.* at 598.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 597-598.

¹⁵ *Id.* at 598.

¹⁶ *Id.* at 596-597.

Other Application Concerns:

The final rulemaking requires detailed financial information for the charter schools to report, but it does not inform school districts how to evaluate this information. We suggest that the Department include more guidance to chartering authorizers in this area.

The final-form regulation requires “adequate liability and other appropriate insurance”. We remain concerned as to how this requirement will be interpreted by different chartering authorizers. In past negotiations with the Administration on amendments to the CSL, the Department described insurance products that either did not exist or were not available to charter school entities. Our concern is the Department will require insurance products that a charter school could not purchase, thus resulting in non-compliance and jeopardizing its charter.

ENROLLMENT

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

The final-form regulation should include a definition for “random selection” so that there is no confusion for applicants or chartering authorizers.

Section 1723-A (relating to enrollment) of the CSL offers clearer guidance than this section of the regulation. The regulation seems to be focused more on data collection, rather than the actual *process* of random selection.

Section 713.4(c)(2) requires a charter school to submit its admission policy in a renewal application of the charter school entity. The renewal process is a subject that the Department said it would not be addressing in the final-form regulation.¹⁷

Section 713.4(c)(4) requires that the random selection process of the charter school entity be posted on the school’s website “in a language that students and parents can understand.” The Department failed to further clarify, as requested by the Commission, whether a charter school entity must post the policy in all languages believed to be the first language of their community or in English but available for translation.

Section 713.5 - Random selection policies for a cyber charter school

Section 713.5(a) prohibits a cyber charter school from restricting enrollment based on availability of attendance slots unless terms are agreed to by the Department and the cyber charter school as part of a written charter.

However, section 1723-A(d)(1) of the CSL does not reflect the same concept. Rather, the CSL states that a cyber charter school *may not be subject to a cap* by any past or future action of a board of school directors unless agreed to by the cyber charter school. While a cyber charter may not be subject to a cap imposed by a local school board, the cyber charter school is not prohibited from self-restricting the number of attendance slots.

¹⁷ See Final-Form Regulation, Purpose and Background, (“An area that the regulation does not address is the renewal process.”).

A cyber charter school may not be able to accommodate an unlimited number of students. Like a charter school, cyber charter schools need to consider optimal teacher-student ratios to effectuate quality education.

REDIRECTION PROCESS

Section 713.8 - Relating to Redirection Process

Most of the concerns expressed by stakeholders related to the redirection process were not addressed by the Department in the final-form regulation. The Department made only one clarifying edit in this section. The following issues should also be addressed by the Department:

- The CSL does not require a charter school entity to submit payment requests to a school district “no later than ten (10) business days before the fifth of each month.”
- The final-form regulation does not address concerns with a school district claiming deductions on form PDE-363 that are more than what the CSL allows, which is one of the reasons a charter school entity submits a redirection request to the Department seeking payment. Thus, subsections (b) and (c) should be clarified to apply to partial or inadequate payments by a school district.
- Automatic notification of a redirection request should be provided to the authorizing school district at the same time it is submitted to the Department to avoid duplicate payments.
- Subsection (e) requires requests for redirection payment to be submitted to the Department between the 15th and 25th of each month from July through May. The Department failed to clarify why the month of June is not included.
- The CSL does not prohibit a charter school request to the Department from including tuition for the ensuing month after the request was submitted as is prohibited under subsection (f) of the final-form regulation.

It was not the intent of the General Assembly to cause cashflow concerns for either charter school entities or school districts. We question whether the final rulemaking clarifies the process.

SCHOOL STAFF

Section 713.9 - Health Care Benefits

The CSL requires a charter school to provide its employees with “the same health care benefits” as the authorizing school district’s employees or, in the case of a regional charter school and cyber charter school, the same health care benefits as the school district where their administrative office is located.

In the final-form regulation, the Department removed provisions that many stakeholders found troubling in the proposed regulation and merely repeated the exact language from the CSL without additional guidance. By this action, the Department missed a chance to clarify how a charter, regional charter, or cyber charter school could meet this requirement.

For example, the Department should have explained that the phrase “the same health care benefits” does not mean that the charters must provide the same health care plan; it means that

the components of the health care plan –the specific items and services covered—should be similar.

By not providing clarification, section 713.9 (b) of the final-form regulation gives charter authorizers the authority to interpret the phrase “the same health care benefits” however they chose when evaluating whether to approve a new charter or renew existing charters. Section 1719-A(17) of the CSL and sections 713.2 (c)(17) and 713.3 (a) of the final-form regulation require charter, regional charter, and cyber charter schools to provide a description of how the charter school entity will provide adequate insurance for it’s employees. Then, section 713.9 (b) provides: “[a]uthorizers may consider the evidence provided by charter schools, regional charter schools, and cyber charter schools as required in subsection (a) [regarding health care benefits] when making charter renewal determinations.” By granting authorizers this power, the final-form regulation without further clarification may allow charter school entity authorizers to invent barriers that prevent new charter schools from being established and existing charters from being renewed.

Furthermore, the new language in section 713.9.(b) references “charter renewal determinations” which is a subject that the Department said they would not be addressing in final-form regulation and was not contained in the proposed regulations for the public to comment on last year.¹⁸

The requirement for charter school entities to provide the same health care benefits as school districts may not be feasible based on the disparity in bargaining power between charter schools and school districts. This disparity is even more acute in the case of particularly large groups, like the School District of Philadelphia, or consortia that have health plans that are self-funded. An individual charter school cannot possibly be expected to negotiate on the same playing field as a self-funded health plan.

According to the 2021 Kaiser Family Foundation Annual Survey on Employer Health Benefits, most businesses with 200 or more employees are self-insured. And, it’s the same for school districts across the Commonwealth.

According to a 2015 report by the Legislative Budget and Finance Committee regarding “Merging Commonwealth of Pennsylvania Public School District Health Care Plans,” about 85 percent of School Districts self-insure their medical coverage, either directly or through different consortia that provide health insurance to over 400 school districts. At the time of the study, the consortia ranged in size from 4 school districts to 48 school districts. The smallest consortium had 1,450 covered employees and the largest had over 48,000 covered employees. In addition, the School District of Philadelphia, which employs over 18,000 employees, offers its school district employees medical coverage through the Philadelphia Federation of Teachers Health and Welfare Fund, a self-funded plan.

Self-insured health insurance means that the employer is using their own money to cover their employees' claims. For employers who are able to do so, self-insuring can provide financial

¹⁸ *Id.*

savings as well as the option to tailor-make a health plan to suit the employer's and employees' needs.

Conversely, many charter and cyber charter schools, which are smaller in terms of the number of employees, purchase health insurance coverage from a commercial broker. Each state has its own laws and regulations pertaining to health insurance, and state-regulated plans sold within the state are overseen by the state insurance commissioner. But state-based laws and regulations only pertain to fully-insured plans – they do not apply to self-insured plans. For example, when a state imposes rules to require health plans to cover vasectomies or infertility treatment, the requirements do not apply to self-insured plans.

Hence, it may not be reasonable or achievable to provide the same health care benefits to the charter or cyber charter school employees as would be provided if they were an employees of a local school district.

Finally, stakeholders asked for further discussion with the Department on determining how section 713.9 would impact charter schools that engage in collective bargaining agreements just as school districts do. It is our understanding that the meeting never happened.

There are many issues with this section of the regulation and, quite frankly, with the language of the CSL, and those issues are due to the tremendous change in the health insurance market since the enactment of section 1724-A (d) in 1997, such as the enactment of The Patient Protection and Affordable Care Act¹⁹. This is the reason it is more important to update the statute, rather than to write regulations for a 25-year old law.

ADDITIONAL COMMENTS

It is unacceptable for an agency of the Commonwealth to state “[t]he Department acknowledges the comment but asserts regulating how authorizers revoke or deny a charter is outside the scope of what the Department is able to regulate.”²⁰ In addition to the House Education Committee, other stakeholders believe the final-form regulation should include guidance on the charter renewal process. It seems antithetical that the Department can regulate what can and cannot be included in an application and what an authorizer may or may not consider when evaluating a charter renewal application, but is unable to provide guidance to chartering authorizers regarding denying or revoking a charter.

The Committee respects the need to hold charter school entities accountable, both financially and academically, but providing a new regulation to the CSL – a law that hasn’t been thoroughly updated in over 25 years – during the last year of Governor Wolf’s Administration seems inefficient. We should be focused on negotiating the various pending legislation that has been introduced to update the CSL.

¹⁹ Public Law 111-148, 124 Stat. 119.

²⁰ PA Dept. of Ed., Charter Schools and Cyber Charter Schools: Comment and Response Document, Response to Comment 12, p. 22.

Based upon the Department of Education's failure to meaningfully respond to the objections raised on the proposed regulations by numerous stakeholders, including the Commission, we urge the Commission to exercise its independence and reject this final rulemaking. The Commission's rejection will give the General Assembly more time to negotiate with the Governor and the Department on pending legislation that will provide more comprehensive reform of the CSL and will better benefit all students in the Commonwealth.

Sincerely,

A handwritten signature in black ink, appearing to read "Curt Sonney". The signature is written in a cursive, flowing style.

Representative Curt Sonney, Chairman
On behalf of the House Education Committee

Enclosure (Official Vote Record)

cc: Noe Ortega, Secretary, Pennsylvania Department of Education