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Senate of Pennsylvania

March 15, 2022

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
[via email to irrc@irrc.state.pa.us]

Re: Disapproval of Final-Form Regulation #6-349: Charter Schools and Cyber Charter Schools

Dear Commissioners,

Pursuant to section 5.1(j.2) of the Regulatory Review Act (RRA), the Senate Education Committee writes to express our disapproval of the Pennsylvania Department of Education's (PDE) Charter School and Cyber Charter School final-form regulation #6-349. Regulation #6-349 puts educational outcomes of Pennsylvania students at risk and circumvents the necessary and deliberative legislative process of the General Assembly. This letter also serves as notice that the Committee is exercising its authority to extend its review of this final-form regulation for 14 days, as provided for under Section 5.1(j.2) of the RRA.

On October 20, 2021, the Senate Education Committee held a public hearing to discuss proposed regulation #6-349 and invited stakeholders representing authorizers of charter and cyber charter schools, as well as representatives from charter and cyber charter schools. According to PDE, 223 public comments and 1,557 form letters have been submitted and after holding the hearing and reviewing public comments, this committee expressed concerns with many aspects of the proposed regulation including the statutory authority of PDE to promulgate these proposed regulations. These concerns were delivered to the Independent Regulatory Review Commission (IRRC) on November 8, 2021, and to the detriment of Pennsylvania's public education system and the legislative process, were left largely unaddressed in the final rulemaking.

First and foremost, while sections 1732-A(c)(1) and 1751-A of the Public School Code of 1949 (PSC) state that "[t]he secretary may promulgate additional regulations related to charter schools," and, "[t]he department may issue regulations to implement this subdivision," they should not be interpreted so broadly as to give the Secretary of Education or PDE legislative authority. Even where there are policy areas upon which we can agree, it is paramount that policy changes to the law go through the legislative process. 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 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.

During the October 20, 2021 hearing, PDE testified that regulations are intended to “clarify and provide some more parameters around the current law,” but this final-form regulation goes well beyond clarifying the law and in some cases makes policy decisions of such a substantial nature that they must be addressed through legislation. For example, section 1719-A of the PSC establishes the minimum requirements for charter school applications and 1717-A(e)(2) of the PSC permits an authorizing school district to consider additional criteria and information from the charter school applicant. One charter school representative testified that the information is expanded from 17 to 81 paragraphs of information. Beyond the expanded scope, others indicated that some of the materials requested would include information that is impossible for a charter applicant to know at the time of submission, including the numbers of English Language Learners and special education students to be served by the school, and information related to potential lease agreements. 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 Regulation #6-349.

Secondly, even if these policy decisions were the proper subject of regulation under the regulatory authority granted to PDE under the PSC, any such regulation must still serve the specifically enumerated legislative purpose of the Code. Section 1702-A of the PSC clearly lays out the intent of the General Assembly to improve pupil learning, increase learning opportunities, encourage innovative teaching methods, create professional opportunities for teachers, provide parents and pupils with expanded educational choices and hold these schools accountable. It is deeply concerning to this committee to have received testimony that indicates these regulations will have a net opposite effect to the Legislature’s intent and may lead to additional closures of schools, many of whom are small, single site, minority operated and attended charter schools – thereby reducing, rather than expanding, school choice. Families choose charter schools for a number of reasons, including academic programming, ability to meet certain educational or social and emotional needs, health and safety concerns and more. During the hearing, one stakeholder referenced a national trend of using bureaucratic mandates as a means to target and close smaller charter schools that disproportionately serve minority and economically disadvantaged students. In Philadelphia, these schools employ 50 percent of teachers of color and will suffer a larger administrative burden than their larger counterparts, which will inevitably result in closure. That same stakeholder testified that, “the Governor’s proposed regulations will harm the schools of the families that are already disenfranchised and least prepared to take such harm.” Should Regulation #6-349 result in the closure of charter schools as some predict, children may be forced back into a situation that is not in the best interest of their health, safety or welfare and could also create strain on other educational entities receiving these displaced students, which has an impact on all students.

Third, after extensive feedback, the Department eliminated substantial portions of Section 713.9 as it relates to health care benefits in the proposed regulation. In much of its place, PDE inserted language which reflects Section 1724-A(d) of the PSC. However, this final-form regulation still lacks necessary guidance and raises significant questions both regarding practical implementation and statutory authority. For example, Regulation #6-349 would require regional and cyber charter schools to provide health care benefits equal to the benefits provided by the school district in which the charter school’s administrative building resides. A one-size-fits-all approach to health care does not work and charter school employees should not be hamstrung by regulation but provided with the same ability to be flexible and creative when negotiating their health care benefits. A practical outcome of this regulation would be the undue financial burden placed on a smaller charter school that simply cannot leverage its size and staffing levels in the same manner that a school district can when negotiating benefits.

Finally, the economic and fiscal impact to the regulated community remains in question. While PDE reports “modest costs” to charter school entities in section 18 of the Regulatory Analysis Form (RAF), stakeholders have indicated these estimates are inaccurate. For instance, section 713.8 stipulates that a charter school may only file a redirection request from July through May, between the 15th and 25th of the month, and when asked about June during the hearing, PDE testified that their administrative

operations did not allow for the redirection request to be handled prior to the close of the fiscal year and would result in a payment as early as August. This would require a charter, who did not receive the legally required payment from the school district by June 5th, to wait until July 15th to submit their redirection request and possibly receive payment in August, which could potentially cause significant cash flow problems for the charter school. This is unacceptable, especially when failure to pay bills in a timely manner could be a material violation of the generally accepted standards of fiscal management, which is grounds for termination or nonrenewal of a charter according to sections 1729-A(3) and 1741-A(3) of the PSC. How can charters pay bills in a timely manner when they are not being paid in a timely manner? Understanding there is a valid interest in reducing duplicate payments and verifying residency, especially in areas with larger transient populations, it is important to acknowledge the number of school districts whose standard practice is not to make the 12 monthly payments as required in section 1725-A(5) of the PSC.

Throughout the comment and response document, the Department repeats the false narrative that they have “not been provided evidence of how these regulations would negatively impact charter schools.” However, ample evidence has been provided by the regulated community through testimony and public comment. Furthermore, the inclusion of significant policy changes to the laws governing charter schools within this regulation go well beyond the Department’s authority and are deeply concerning to the committee as such changes should be reserved for the legislative process. **Based upon PDE’s failure to correct and meaningfully respond to many of the objections raised in our comment letter on the proposed regulation, and numerous other commenters including IRRC, we urge the Commission to exercise its independence and reject final-form regulation #6-349.** IRRC’s rejection will help pave the way for a more constructive dialog between the Executive and Legislative branches to consider common sense education reforms that do not impair our public education system and harm our students.

Sincerely,