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Senate of Pennsylvania

November 8, 2021

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

Re: Comments to Proposed Regulation #6-349: Charter Schools and Cyber Charter Schools

Dear Commissioners,

Pursuant to section 5(d) of the Regulatory Review Act, the Senate Education Committee submits this letter to offer comments and convey the committee's objections to the Pennsylvania Department of Education's (PDE) Charter School and Cyber Charter School proposed regulation #6-349.

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, over 1,500 public comments have been submitted and after holding the hearing and reviewing public comments, this committee wishes to express concern with many aspects of the proposed regulation including the statutory authority of PDE to promulgate these proposed regulations.

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," that 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 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.

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 proposed 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 the proposed regulation. It would be more appropriate for PDE to provide recommendations to authorizing school districts who request additional direction from the Department.

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 proposed 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 stated, “the Governor’s proposed regulations will harm the schools of the families that are already disenfranchised and least prepared to take such harm.” Should these proposed regulations 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, even if these legislative considerations were not serious and significant reasons to disapprove the proposed regulations, a lack of clarity in a number of the proposed regulations will likely have significant negative impacts. Section 713.9, which requires charter and cyber charter schools to provide the same level of health care benefits as the benefits provided to teachers at the authorizing school district, is in dire need of clarification as this could have significant financial and practical impacts to charter schools and their employees. When asked at the hearing for an explanation, PDE stated that the proposed regulations do not require a specific investment level but would ensure that coverage by type/range of coverage afforded to employees match and that employees at a charter school would receive the same level or benefit under each of those insurance types. This appears to contradict the Preamble of the proposed regulation which states, it is “impossible for a charter school to offer an identical health care plan” and “does not require charter schools to ... include specific benefits”. With regard to cost, the Preamble also asserts that the proposed regulation, “requires charter schools to have health care plans subsidized by their employer to the same extent that district employees have their plans subsidized” but “does not require charter schools to spend a specific amount on health care plans” and then goes on to provide an example of noncompliance where a treatment costs more for a charter employee than a district employee. Aside from the contradictory statements made in both the hearing and the Preamble, one must remember that schools of varying sizes cannot achieve the same economies of scale and can have widely varying costs impacting not only the school but ultimately the taxpayer. Some schools use consortiums, may self-insure or offer the option for an employee to select a lower premium/higher deductible plan and it is unclear whether a charter school would need to align with these structures and how cost sharing would be verified or enforced. 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.

The need for section 713.9 is also unclear because, as was stated during the hearing, there is fierce competition amongst school entities for certified educators, so benefits packages need to be competitive. Moreover, complaints regarding the quality of health care plans being offered by charters are rare. This section of the regulation causes more confusion to the regulated community because it does not contemplate scenarios where a charter school may offer more attractive benefit packages than the local school district, charter schools who have negotiated health care benefits through their collective bargaining units, or how a charter school will be able to comply with the regulation if a school district will not or cannot provide the necessary information. Some of these questions and more are echoed in the public comments submitted by the School District of Philadelphia.

Section 713.6 of the proposed regulation states that members of a charter or cyber charter school Board of Trustees are public officials subject to the Public Official and Employee Ethics Act, which is already clearly stated in section 1714-A(11) of the PSC. While this is a worthy requirement, PDE testified at the hearing that some individuals are not currently following the law. It is uncertain whether these same individuals will follow this regulation, so perhaps the Department should direct its resources to outreach and compliance with existing law within the regulated community, rather than re-regulating what is already required in the law. The Department also testified that 713.6 did not present any conflicts with the current processes and practices of the State Ethics Commission (SEC), however, one stakeholder stated during the hearing that the filing of statement of financial interests with certain entities goes above and beyond what is currently required by the Commission.

Sections 713.4 and 713.5 of the proposed regulation require that the admissions policy of the charter or cyber charter school be posted online “in a language that students and parents can understand....” When asked at the hearing for clarity on what this would include, PDE stated the charter school would need to ensure that all communities have reasonable access to the policy in a language that they understand. It is important to know whether a charter should be posting the policy in all languages believed to be the first language of their community or posted in English but available for translation.

As a point of clarity, the Department should specify the type of days i.e. calendar days or business days referenced in 713.8. During the hearing PDE did confirm they intended for payment requests to be made 10 calendar days before the 5th day of each month, but this is not specified in the proposed regulation.

Section 713.2 requires school districts to use the PDE form or a district form that meets the minimum application standards set forth in the regulation and it should be made clear that districts will not need to have their form officially approved by PDE as stated in their testimony from the October 20, 2021 hearing. In addition, section 713.3 requires cyber charter schools to utilize a PDE form for applications and it should be plainly stated that cyber charter applicants that have already submitted their applications to the Department prior to the effective date of the regulations will not need to submit a new application and the original application will be honored. It is unclear to the committee and stakeholders how changes to the application requirements will ultimately impact the renewal process.

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.

These comments and concerns with proposed regulation #6-349 are by no means an exhaustive list of the issues that are concerning to the committee. We strongly encourage the Independent Regulatory Review Commission and PDE to refer to the public comments submitted, especially those from the regulated community. The grounds for terminating a charter are quite clear, therefore it is essential that any ambiguity in the regulations be resolved so as not to inadvertently cause the termination of a charter and closure of a school serving a community in need. **Due to the overwhelmingly negative impact the proposed regulations would have on charter schools, especially smaller and minority operated charter schools, we strongly urge the Department to abandon further development of these proposed regulations and work with members of the legislature to achieve consensus on reform through the legislative process.**

Sincerely,