



Via Hand Delivery

June 6, 2012

The Honorable Arcelio Aponte, President
New Jersey State Board of Education
River View Executive Plaza
Building 100, P.O. Box 500
Trenton, NJ 08625-0500

Re: N.J.A.C. 6A:11, Charter Schools

Dear Mr. Aponte and fellow members of the State Board:

Education Law Center ("ELC") works to secure the legal rights of New Jersey's 1.3 million public school children to high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. As an advocate for students in New Jersey's high need school districts, ELC serves as counsel to the class of urban school children in the landmark Abbott v. Burke education equity case and provides legal services to students in special education, student discipline, school residency and other matters. As one of the nation's premier advocates for education rights, ELC has substantial expertise in this area.

ELC strongly opposes the proposal of the Acting Commissioner for the expansion of the State's charter school program through regulation, as set forth in the Acting Commissioner's First Discussion Paper dated May 2, 2012, and Second Discussion Paper dated June 6, 2012. This proposal, if adopted, would allow the expansion of the charter school program without legislative approval and in violation of clear legislative intent. In addition, aspects of the proposal change the existing agency interpretation without reasoned explanation or evidentiary support, and are therefore arbitrary and capricious, while other aspects of the proposal fail to spell out policy of general applicability within the regulations themselves, in violation of the Administrative Procedure Act. Moreover, this flawed proposal would have a disparate impact on public school districts with substantial enrollments of Black

and Latino students, raising concerns under the New Jersey Law Against Discrimination. For the reasons set forth below, this proposal must be flatly rejected.

The permissible scope of New Jersey's charter school program has been clearly delineated by the Legislature in the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to 18A:36A-18. From the outset of implementation of the program, the statute has explicitly provided: "The commissioner may not implement any recommended expansion, modification, or termination of the [charter school] program until the Legislature acts on that recommendation." N.J.S.A. 18A:36A-16(e)(emphasis added). This principle of construction set forth clearly in the statute requires that the statute must be strictly construed, and that any implementing regulations must be narrowly tailored to comply with the clear language and intent of the statute.

Unfortunately, Acting Commissioner Cerf, through his proposed changes to the charter school regulations, N.J.A.C. 6A:11, disregards the Legislature's unambiguous pronouncement and seeks to both expand and modify the charter school program without legislative approval. In six areas - virtual charter schools, restructured renewal, satellite campus, amendment of charters, one year conditional renewal, and summary revocation - the Acting Commissioner's proposal represents a completely unauthorized expansion and/or substantial modification of the charter school program.

Virtual charter schools

First, having already taken the improper step of granting approval to virtual charter schools for the upcoming school year, the Acting Commissioner attempts to establish authority for his unprecedented action through regulatory change alone. However, any revision of existing regulations to authorize virtual or online charter schools clearly constitutes an expansion of the charter school program that is expressly forbidden without Legislative authorization. N.J.S.A. 18A:36A-16(e). Moreover, this expansion is not only beyond the contemplation of the existing statute, but also directly violates explicit statutory requirements.

The proposal notes that the Department seeks "to enable innovative programs that focus on online instruction to locate in New Jersey," by adding the following sentence to the regulatory definition of "region of residence": "A region of

residence for a charter school focusing on online instruction need not include contiguous districts and may use any configuration of school districts." N.J.A.C. 6A:11-1.2 (proposed). The proposal then seeks to delete the following existing regulatory requirement regarding the physical location of the charter school because of its inconsistency with the new definitions of "region of residence" and "satellite campus": "A charter school shall locate its facility in its district of residence or in one of the districts of its region of residence." N.J.A.C. 6A:11-2.1(m)(with region of residence defined in the existing regulation as "contiguous school districts in which a charter school operates and is the charter school's district of residence," N.J.A.C. 6A:11-1.2).

In making these changes, the proposal directly contravenes the Charter School Program Act of 1995. Indeed, one of the specific statutory prerequisites for charter school approval is: "A description of, and address for, the physical facility in which the charter school will be located." N.J.S.A. 18A:36A-5(j). In another section of the statute, the Legislature set forth options for charter school locations, stating that, "A charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location." N.J.S.A. 18A:36A-10. Thus, the Legislature has specifically mandated that every charter school must possess a "physical facility," by requiring that the "description" and "address" of such physical facility "shall" be included in each charter school application. N.J.S.A. 18A:36A-5. Furthermore, the Legislature tied the location of a charter school to the particular "school district in which the charter school is located," by establishing preference for enrollment and free tuition for students who reside in that school district. N.J.S.A. 18A:36A-8. These provisions, as well as the fact that no virtual or online charter schools have been allowed to operate since New Jersey's charter school law was enacted in 1995, establishes beyond doubt that the Legislature neither contemplated nor authorized "virtual" schools that exist only online.¹

¹ It is inconceivable that the Legislature intended other than a bricks and mortar school in which teachers are teaching and students are learning together in classrooms when it enacted the physical facility requirement in 1995. This physical facility requirement has remained unaltered during amendments to the Charter School Program Act in 2000, 2002, and 2011, with the exception of the addition of language clarifying that the location of a charter school may be "in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location," and the facility itself is "exempt from public school facility regulations except those pertaining to the health or safety

In short, under the existing legislative language, the regulatory amendments to N.J.A.C. 6A:11-1.2 (proposed) and 6A:11-2.1(m) must be rejected.

In addition to the fact that virtual charters are not authorized by the current legislation, the creation of K-12 virtual charter schools conflicts with the Legislature's stated policies underlying the creation of New Jersey charter school program. Based on the current data available, there is inadequate evidence to show that virtual K-12 charter schools will "offer the potential to improve pupil learning" or "establish a new form of accountability for schools," as intended by the Legislature. See N.J.A.C. 18A:36A-2. To the contrary, the evidence from other states regarding student learning demonstrates significant problems that underscore the necessity of awaiting express Legislative authorization for expanding the charter program to include virtual charters.² Similarly, the experience in other states demonstrates that moving from face-to-face learning to virtual schools presents a number of problematic accountability issues.³ Concerns about the

of the pupils." N.J.S.A. 18A:36A-10. Clearly, the Legislature's requirement for a "physical facility in which the charter school will be located" did not contemplate the establishment of virtual classrooms, or the creation of a home office for an online enterprise, but instead addressed the physical location of actual classrooms. N.J.S.A. 18A:36A-5(j).

² In states where studies have been performed, such as Ohio, Pennsylvania, and Colorado, the results have shown negative educational results for students. See, e.g., Burt Hubbard, (October 3, 2011). *Public Schools Also Lose When Online Students Fail*; retrieved May 29, 2012, http://www.edweek.org/ew/articles/2011/10/03/06enc_online.h31.html; *Charter School Performance in Pennsylvania* (April 2011); retrieved May 30, 2012, http://credo.stanford.edu/reports/PA%20State%20Report_20110404_FINAL.pdf. A study looking at Educational Management Organizations (EMOs) nationwide found that only 27.4 percent of the virtual schools managed by for-profit EMOs achieved Adequate Yearly Progress, as compared to approximately 52 percent of all public schools, and 51.4 percent of the brick-and-mortar schools managed by for-profit EMOs. Miron, G., Urschel, J.L., Yat Aguilar, M.A., & Dailey, B. (2011). *Profiles of for-profit and nonprofit education management organizations: Thirteenth annual report - 2010-2011*. Boulder, CO: National Education Policy Center. Retrieved May 30, 2012 from <http://nepc.colorado.edu/publication/EMO-profiles-10-11>.

³ Accountability issues include: continued funding for students no longer attending the virtual school, lack of involvement of teachers, inadequate assessment and verification of student work, lack of certification of teachers, overly burdensome workloads for teachers, and difficulty assessing the costs and benefits of virtual charter schools. See, e.g., Glass, Gene V. (2009). *The Realities of K-12 Virtual Education*. Boulder and Tempe: Education and the Public Interest Center & Education Policy Research

equity and efficacy of public school offerings and the accountability of public funds are precisely why the Legislature reserved to itself the sole ability to expand, modify, or terminate the charter school program. N.J.S.A. 18A:36A-16(e). Only by thoroughly vetting any expansion of the charter school program through the legislative process will the appropriate accountability measures be put into place at the outset to protect New Jersey students.⁴

For all of the reasons set forth above, the implementation of virtual charter schools in the absence of new legislation specifically authorizing their creation violates New Jersey's Charter School Program Act. Put differently, if Mr. Cerf believes that virtual or online charter schools should be a component of New Jersey's charter school program, the Acting Commissioner must present an appropriate amendment to the Charter School law to the Legislature for consideration.

Restructured Renewal

Second, the proposal newly defines the concept of "restructured renewal," without any statutory authority for such a practice. As proposed, "restructured renewal" is intended to mean: "a charter school that is renewed upon a fundamental restructuring of its organization and practices, subject to approval of the Commissioner, and will be considered a new charter school." N.J.A.C. 6A:11-1.2 (proposed) (as amended by agency initiated changes). The proposal would expand the Commissioner's powers to include the ability to "grant

Unit. Retrieved May 29, 2012 from <http://www.scribd.com/doc/70116262/Pb-Glass-Virtual>. See also, Saul, S. (2011, Dec. 12). Profits and Questions at Online Charter Schools. *The New York Times*. Retrieved May 29, 2012, http://www.nytimes.com/2011/12/13/education/online-schools-score-better-on-wall-street-than-in-classrooms.html?_r=1&pagewanted=all; Glass, G. V. & Welner, K.G. (2011). *Online K-12 Schooling in the U.S.: Uncertain Private Ventures in Need of Public Regulation*. Boulder, CO: National Education Policy Center. Retrieved May 29, 2012 from <http://nepc.colorado.edu/publication/online-k-12-schooling>.

⁴ For recommendations to address some of the issues regarding virtual schools, see Glass, Gene V. (2009), *The Realities of K-12 Virtual Education*. Boulder and Tempe: Education and the Public Interest Center & Education Policy Research Unit. Retrieved May 29, 2012 from <http://www.scribd.com/doc/70116262/Pb-Glass-Virtual>. For an example of model legislation for virtual charter schools, see Bathon, J. (2011), *Model Legislation Related to Online Learning Opportunities for Students in Public Elementary and Secondary Education Schools*. Boulder, CO: National Education Policy Center. Retrieved May 30, 2012 from <http://nepc.colorado.edu/publication/online-k-12-schooling>.

restructured renewal of a school that is at risk of revocation of its charter for serious violations of law, the school's charter or failure to meet one or more of the standards set forth in the performance framework." N.J.A.C. 6A:11-2.3(d)(proposed). According to the proposal, restructured renewal is intended to offer "an alternative to closing a struggling charter school" that will be available in "limited and carefully selected circumstances." However, New Jersey's charter school law is devoid of any authority for the Commissioner to undertake the fundamental restructuring of a charter school that is contemplated by the proposed regulations.

Rather, the concept of restructured renewal is precisely the type of expansion or modification of the charter school program for which legislative approval must be obtained. Indeed, even if the Legislature were to approve restructured renewal in "limited and carefully selected circumstances," the proposed regulation contains no such limitations on the Commissioner's use of such renewal. To the contrary, the agency initiated change makes explicit that a charter that undergoes restructured renewal will be considered a new charter school. The formation of a charter school in this manner violates the specific procedures set forth by the Legislature for the establishment of a charter school. See N.J.S.A. 18A:36A-4 (requiring, *inter alia*, submission of application in school year preceding school year in which charter school will be established, notice of the filing of the application to relevant officials and governing bodies of the district in which there are students eligible for enrollment, and sixty day period to comment by school district). For these reasons, the regulatory amendments to N.J.A.C. 6A:11-1.2 (proposed) and 6A:11-2.3(d) (proposed) must be rejected.

Satellite Campus

Third, the proposal's creation and use of the term "satellite campus" again lacks any basis in statutory authority. A satellite campus is defined as a school facility within any district with a priority school or "former Abbott district" that is "operated by a charter school under the school's charter that is in addition to the facility identified in the charter school application or charter, if subsequently amended." N.J.A.C. 6A:11-1.2 (proposed). According to the proposal, a charter school may apply to the Commissioner to amend its charter by "opening a new satellite campus." N.J.A.C. 6A:11-2.6(a)(1)(iv) (proposed). This proposal would circumvent the current law's requirement that a charter school apply and be approved for a

particular physical facility, N.J.S.A. 18A:36A-5(j), undermines the current law's requirement that all officials and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school must receive notice of a charter school application, and shortens the time frame for review and recommendation by the relevant board of education or State district superintendent from 60 to 21 days, N.J.S.A. 18A:36A-4(c). Most important, nowhere in the statute does the Legislature authorize the expansion of a charter school, once approved, or any expansion of the charter school program without legislative approval. Therefore, N.J.A.C. 6A:11-1.2 (proposed) and 6A:11-2.6(a)(1)(iv)(proposed) must be rejected.

Amendment of Charters

Fourth, the proposal impermissibly expands the Commissioner's power to amend charters in violation of the statute. The proposal would allow existing charters to be amended in such circumstances as "changing or adding a district or region of residence or opening a new satellite campus," N.J.A.C. 6A:11-2.6(a)(1) (proposed), and would delete the current regulatory requirement that an amendment "shall not change the mission, goals and objectives of a charter school," N.J.A.C. 6A:11-2.6(a)(2). There is no explicit statutory authority for the amendment of charters, once granted. Indeed, the current regulation allows an amendment only when "the mission, goals and objectives" of a charter school would not be changed by such amendment. Id. Again, the proposal violates New Jersey's charter school law by circumventing the statutory requirements for notice and input prior to approval of a charter and by expanding the charter school program without legislative approval. Therefore, the changes to N.J.A.C. 6A:11-2.6(a) must be rejected.

One Year Conditional Renewal

Fifth, the proposal impermissibly expands the statute by authorizing one-year conditional renewals of charters. N.J.A.C. 6A:11-2.3(a). Conditional, one-year renewals are simply not authorized by the existing statute, which provides only for the granting of a charter for a four-year period and its renewal for a five-year period. N.J.S.A. 18A:36A:-17. In his report of October 1, 2001, following the statutorily mandated study of the charter school program, the Commissioner specifically made a recommendation for "modified legislation" that would "authorize the Commissioner to grant conditional renewals for one year."

However, the Legislature has not acted upon that recommendation and, until it does, this change cannot be effectuated through regulation alone.

Summary Revocation

Sixth, the proposal fails to follow statutory guidelines for summary revocation of a charter. The statute authorizes the summary revocation of a charter in the sole instance when a charter school has been placed on probationary status to allow implementation of a remedial plan and "the plan is unsuccessful." N.J.S.A. 18A:36A-17. As proposed by the Acting Commissioner, this summary revocation may occur not once the remedial plan proves unsuccessful, but in the event that the remedial plan is "deemed to be insufficient." N.J.A.C. 6A:11-2.4(a)(6)(proposed). Because this standard for summary revocation is inconsistent with the statute, N.J.A.C. 6A:11-2.4(a)(6)(proposed) must be rejected.

If the members of the State Board determine that the Acting Commissioner's proposals regarding virtual charter schools, restructured renewal, satellite campus, amendment of charters, one year conditional renewal, and summary revocation are important to the success of the charter school program, then your obligation is to instruct the Acting Commissioner to go to the Legislature and seek legislative approval for these program expansions.

Aside from these clear statutory violations, there are several additional areas in which proposed regulatory changes are arbitrary and capricious or in violation of the agency's obligation to establish policy pursuant to the Administrative Procedure Act.

First, the newly proposed definition for performance framework is deficient. As proposed, performance framework means "the standards for charter schools in each of the following components: instructional program; operations; fiscal management; and governance." N.J.A.C. 6A:11-1.2 (proposed). While the components listed are similar to those under the QSAC law that apply to all other public school districts, the proposal is striking for its lack of specific standards within each component area - as is provided in the District Performance Review Indicators under QSAC - and for its omission of the component of personnel. It is unclear why the Acting Commissioner does not specifically require charter schools, which function as independent school districts, to follow the

specific district performance review standards laid out for other public schools districts under QSAC, N.J.A.C. 6A:30, App. A, nor why the Commissioner fails to provide a rationale for the omission of personnel from the performance framework. Instead, the proposal refers to the development of standards, but fails to lay out what those standards will be. At a minimum, any standards that will govern the performance of all charter schools must be developed pursuant to the Administrative Procedure Act, and must themselves be subject to public comment.

Second, the newly proposed definition of "charter agreement" is superfluous. N.J.A.C. 6A:11-1.2 (proposed). The definition provided, "a written agreement between a charter school and the Commissioner that sets forth criteria the charter school shall be expected to satisfy," is duplicative of the charter itself that is granted by the Commissioner. Since the statute already requires that a charter school "shall operate in accordance with its charter," N.J.S.A. 18A:36A-11, there is no need for an additional "charter agreement."

Third, the newly proposed definition of "educator evaluation system," and its use in regulations governing the renewal of charters and tenure acquisition, is also unwarranted. N.J.A.C. 6A:11-1.2(proposed); N.J.A.C. 6A:11-2.3(b)(11); N.J.A.C. 6A:11-6.1. Although proposed "to ensure consistency with the New Jersey Educator Effectiveness Task Force recommendations for improving student achievement by instituting educator evaluation systems in New Jersey schools," the proposal fails to acknowledge that the Task Force recommendations are in a pilot stage only. Any extension of the educator evaluation system to charter schools must await the outcome of the pilot, and the adoption of authorizing legislation and/or duly promulgated regulations.

Fourth, the proposal incorrectly characterizes as a "stylistic" change the requirement that the annual report include evidence of "curriculum that is compliant with the Core Curriculum Content Standards," N.J.A.C. 6A:11-2.2(a) (1) (iii) (proposed), rather than evidence of "the attainment of the core Curriculum Content Standards and the delivery of an educational program leading to high student academic achievement," N.J.A.C. 6A:11-2.2(a) (1) (iii). This change in language, rather than being one of style, changes the substance of the level of evidence to be provided in the annual report from one of attainment to that of compliance, without offering any reasoned explanation for this substantial undercutting of the reporting requirement.

Fifth, in two instances, the proposal refers to standards or criteria that will be used to judge charter applications that are not set forth within the proposed regulations themselves. In N.J.A.C. 6A:11-2.1(b)(3)(proposed), the proposal provides that the evaluation of phase one applications will be based on standards that will be set forth in the phase one application form. Similarly, in N.J.A.C. 6A:11-2.1(g)(proposed), the proposal provides that criteria for those applicants eligible for the expedited application round will be set forth in that application. In both cases, the Acting Commissioner's proposal circumvents the Administrative Procedure Act by failing to adopt standards or criteria of general applicability pursuant to the public notice and comment requirements of that Act.

Finally, in an agency initiated change, the proposal drastically alters the criteria for tenure acquisition for charter school employees from the criteria set forth in existing law to unspecified "guidelines developed by the Commissioner." N.J.A.C. 6A:11-6.1 (proposed). While the Charter School Program Act of 1995 authorizes the Commissioner to "promulgat[e]" guidelines for the acquisition of streamline tenure in charter schools, N.J.S.A. 18A:36A-14(e), such promulgation must necessarily be undertaken in accordance with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 to 24.

In light of the serious legal violations outlined above, ELC urges the State Board to consult with the Attorney General's office before proceeding any further toward adoption of this legally flawed proposal. Thank you for your consideration of these comments.

Respectfully,



Elizabeth Athos, Esq.
Senior Attorney

Cc: Hon. Jeffrey S. Chiesa, Attorney General
Hon. Teresa M. Ruiz, Chair, Senate Education Committee
Hon. Patrick J. Diegnan, Chair, Assembly Educ. Committee