

ELC EDUCATION LAW CENTER

May 5, 2017

Diane Shoener
Director, State Board of Education Office
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, New Jersey 08625-0500

Email: chapter11@doe.state.nj.us

Re: Proposed Amendments and New Rules Governing
Charter Schools, N.J.A.C. 6A:11
PRN 2017-036

Dear Director Shoener:

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. ELC serves as counsel to the class of urban school children in the landmark Abbott v. Burke education equity litigation 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 for over 40 years, ELC has substantial expertise with New Jersey's charter school program, most notably whether charter schools operate equitably, effectively and strengthen education for all children in the communities they serve.

ELC COMMENTS ON PROPOSAL

Satellite Campus

The State Board's current satellite campus proposal, N.J.A.C. 6A:11-4.17(b) (proposed), authorizes charter schools to "operate more than one satellite campus in its district or region of residence, subject to charter amendment approval..." This expansion of the State's charter school program through regulation is being undertaken without legislative approval and

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in violation of clear legislative intent. ELC acknowledges that an appellate panel ruled in 2014 that the State Board acted validly when it adopted regulations authorizing a charter school's creation of a satellite campus. Education Law Center on behalf of Abbott v. Burke Plaintiff Schoolchildren, v. New Jersey State Board of Education, 438 N.J. Super 108 (App. Div. 2014). Specifically, the court in that case held that: "Permitting the addition of a new building for purposes of expanding a successful charter school is consistent with [the] legislative purposes of the Act." 438 N.J. at 120 (emphasis added). However, by allowing charter schools to establish multiple satellite campuses, the State Board's current proposal goes far beyond that ruling.

New Jersey's charter school program, as delineated by the Legislature in the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to 18A:36A-18, was not intended to expand endlessly without legislative approval. From the outset of implementation of the program, the Legislature "authorize[d] the establishment of not more than 135 charter schools during the 48 months following the effective date of this act," N.J.S.A. 18A:36A-3(b), with no more than 500 students in each of those schools, N.J.S.A. 18A:36A-4(e). The Legislature further mandated an evaluation of the charter program within six years of its initiation, by October 1, 2001, which included "a recommendation on the advisability of the continuation, modification, expansion, or termination of the program." N.J.S.A. 18A:36A-16(e). The statute explicitly provides: "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.

If the State believes that its proposal allowing charter schools more than one satellite campus is important to the success of the charter school program, then the State should attempt to obtain the approval of the Legislature for this program expansion.

Facilities

Understanding that the monies for charter schools would come directly from the budgets of traditional school districts,

the Legislature struck a balance, allowing use of those monies to operate charter schools, but not to build them. In stating that "[a] charter school shall not construct a facility with public funds other than federal funds," N.J.S.A. 18A:36A-10, the Legislature clearly intended that charter schools rely on federal - or private - funds for their facilities. The State Board's attempt to distinguish between "construction" of a facility on the one hand, and a facility's "rehabilitation" or "expansion" on the other, violates that clear legislative language and intent. Both the newly proposed definitions of "construction" and "expansion," N.J.A.C. 6A:11-1.2 (proposed), and the newly proposed regulation that "a charter school may use State and local funds for the rehabilitation or expansion of a facility," N.J.A.C. 6A:11-4.17(a)(proposed), must be withdrawn because they are inconsistent with the Charter School Program Act.

Performance Framework

The newly proposed definition for performance framework, N.J.A.C. 6A:11-1.2 (proposed), is deficient. The Performance Framework definition attempts to set forth standards for charter schools only in the areas of academic, financial, and organizational performance. N.J.A.C. 6A:11-1.2 (proposed). While the components listed are similar to the instructional program, fiscal management, and operational areas under the QSAC law that apply to all other public school districts, the proposal is striking for its omission of the components of personnel and governance. It is unclear why the State 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 State fails to provide a rationale for the omission of personnel and governance from the performance framework.

Admission/Enrollment

ELC commends the State Board for authorizing the establishment of "a weighted lottery that favors educationally disadvantaged students" in admission to charter schools. N.J.A.C. 6A:11-4.5(f). With regard to two other proposed regulations related to admission policies, ELC notes that the statutory language proposed by the State Board has already been interpreted by the courts, and should therefore be codified in a manner that conveys the judicial interpretation to the public.

First, the State Board proposes to codify the statutory provision that "[a] charter school may give enrollment priority to a sibling of a student enrolled in the charter school." N.J.S.A. 18A:36A-8(c); N.J.A.C. 6A:11-4.5 (c) (proposed). Just as the Appellate Division did in its In re Red Bank Charter School decision, 367 N.J. Super. 462 (App. Div. 2004), the State Board should draft its regulation to make clear that "[t]he statutory sibling preference is not mandatory and in particular circumstances, might not be appropriate, especially if its operation exacerbates existing racial/ethnic imbalance." 367 N.J. Super. at 481-482.

Second, in language virtually identical to the statutory provision at N.J.S.A. 18A:36A-8(e), the State Board proposes that a "charter school's admission policy shall seek, to the maximum extent practicable, the enrollment of a cross-section of the community's school-age population, including racial and academic factors." N.J.A.C. 6A:11-4.5(e). There, too, the courts have spoken, with the New Jersey Supreme Court having interpreted the statutory requirement for enrollment of a cross-section of the community's school-age population as mandating a comparison to the population of the schools of the district of residence. In re Grant of Charter School Application of Englewood on the Palisades Charter School, 164 N.J. 316, 325-328 (2000). The fact that comparison is required to the demographics of the students enrolled in the host district, and not, for example, to general census figures, must be set forth clearly in the regulations.

ELC COMMENTS ON CRITICAL REGULATORY AMENDMENTS NEEDED

The Act establishes a program of charter schools as a mechanism to improve and reform public education, particularly for students in high needs districts. N.J.S.A. 18A:36A-2 and -3(b). However, the evidence is clear that, while some charter schools perform very well, many charters are not successful. Current data from the Department shows that urban charter schools are performing overall no better than district schools and, in some cases, are among the lowest performing schools in the state, on par with the performance of public schools in the poorest districts. Thus, there is an urgent and compelling need for the Department to strengthen the regulatory framework for accountability and oversight of the charter program to ensure the Act's reform objectives are achieved.

1. Codifying Annual Assessment of Charter Schools

Under the Act, the Commissioner "shall annually assess whether each charter school is meeting the goals of its charter, and shall conduct a comprehensive review prior to granting a renewal of the charter." N.J.S.A. 18A:36A-16. The current regulations are silent as to the Act's mandate for an annual assessment, except to specify that the Commissioner assess annually "the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence." N.J.A.C. 6A:11-2.2(c).

In contrast to the current regulatory proposal that would require reporting only on "each charter school's academic performance based on the Performance Framework," N.J.A.C. 6A:11-2.1(d), ELC urges the Department to promptly promulgate a broader regulation that will codify and interpret the Act's requirement for an annual assessment by the Commissioner of each charter school. Not only must this include an assessment of the school's student composition and segregation effects (see discussion under number 2, below), but also must address whether the charter school is meeting other important goals of its charter, N.J.S.A. 18A:36A-16, and is complying with state regulations concerning assessment, testing, civil rights, school discipline, special and bilingual education, and student health and safety, N.J.S.A. 18A:36A-9,-11,-16.

In addition, the regulations should require the Department to post the annual assessments on its website. This level of transparency is essential to ensure that parents are able to make informed decisions regarding their choice of school for their children, and policymakers and the public can be informed about whether the charter school program is meeting the Act's reform objectives.

2. Addressing Segregative Effect, Funding Impact, and Anti-Discrimination

Existing case law has firmly established the constitutional requirement mandating the Commissioner of Education (Commissioner) to assess both the segregative effects and the funding impact that a proposed or existing charter school will have on its district of residence, in order to avoid the deprivation of a thorough and efficient education to district students under Art. 8, para. 7 of the New Jersey Constitution. See, e.g., In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316 (2000); IMO Proposed

However, data from the Department show that the vast majority of charter schools enroll far fewer children with special needs than their host districts, leaving those students who cost more to educate in traditional school districts. This raises serious concerns about whether currently operating charter schools are under-serving students with disabilities, English language learners, and students eligible for the national free lunch program and, therefore, are operating in a manner inconsistent with the Act's comparable student composition and anti-discrimination provisions. Regulatory amendments are needed to ensure that the annual assessment addresses whether charter schools are serving these distinct student populations at levels comparable to their host districts, or are engaging in practices that have a disparate impact on groups or subgroups of students. If necessary, the regulations must also require corrective action plans - including outreach and recruitment - to ensure that charter schools serve comparable and proportionate numbers of all student groups and subgroups within the host district.

ELC supports the requirements of the current charter school regulations that the Commissioner assess the student composition of a charter school, and the segregative effect that the loss of students may have on the host district, both prior to the granting of the charter and annually thereafter. N.J.A.C. 6A:11-2.1(k), -2.2(c). These provisions are critical to meeting the Act's mandate that the admissions policy of charter schools seek, "to the maximum extent practicable," a "cross section of the community's school age population including racial and academic factors," N.J.S.A. 18A:36A-8(e), and the Act's prohibition against "policies and practices" that discriminate "on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district," N.J.S.A. 18A:36A-7. See also N.J.S.A. 18A:36A-16(e)(5) (requiring evaluation of charter school program include "comparative demographics of student enrollments in school districts of residence and the charter schools located within those districts," on non-exclusionary bases of "race, gender, socioeconomic status, enrollment of special education students, enrollment of students of limited English proficiency, and student progress toward meeting the core curriculum content standards as measured by student results on Statewide assessment

tests.") These provisions are also critical to meeting the Commissioner's obligations under the constitutional provision that bars segregation not only on race, but also on religious principles, color, ancestry and national origin. N.J. Const. Art. I, para. 5.

In light of constitutional, statutory, and regulatory directives, any limitation of the initial and annual assessments of segregative effects to race would be arbitrary and capricious. ELC therefore requests that the State Board set forth clearly in its regulations that the segregative effects of charter schools will be assessed not only based on race, but also on religion, ethnicity, gender, disability, English language learner status, socioeconomic status, and students at-risk of dropping out or with other special academic needs.

In addition, ELC requests that the State Board revise its rules to codify the requirement that a segregative effects assessment be performed prior to the granting of any charter renewal or amendment, as well as prior to the granting of an application and annually thereafter. The obligation is an ongoing one, and the Commissioner cannot close her eyes to segregative effects that may develop once a charter school has commenced operation.

Finally, with regard to segregative effects, ELC asks that the State Board immediately promulgate regulations to ensure that all assessments of the segregative effects of charter schools - on applications, amendments, and annual operations - be produced in a written form that sets forth the data considered and the basis for any conclusions reached. Administrative agencies are required as a matter of fundamental due process to provide notice of their actions and their reasons for taking them. Meyer v. NJ Dept. of Human Services, 269 N.J. Super. 310, 313 (App. Div. 1993). To ensure full accountability and transparency, these written assessments should be posted on the DOE website.

For funding impacts, similar to segregative effects, these regulations must be revised to codify the scope of the Commissioner's obligation. This includes the necessity to conduct funding evaluations prior to the granting, renewal, or expansion of a charter school either when a district raises the issue that its ability to deliver a thorough and efficient education will be negatively impacted, or when affected students, parents and stakeholders present such information. In addition, the Commissioner must be required to conduct such an

evaluation in any district where the enrollment in charter schools encompasses a significant segment of the student population, or 5% of the district's students at a minimum. Of course, the Commissioner's evaluation must also be memorialized in writing and posted on the Department's website.

3. Tracking Data For Students Leaving and Entering Charter Schools

There are currently no regulatory requirements to keep track of students who leave or enter charter schools during the school year. This data is significant because any students who leave a charter school to return to their host district, or enter a charter school from a host district, after the October 15th enrollment count will be doing so without any funding. ELC is aware of anecdotal reports that some students leave charter schools after October 15th and prior to administration of State assessments. If such practices do occur, it would disadvantage both the charter schools that make every effort to accommodate all students and the host district schools that must accept former charter students during the school term, without requisite funding. To ensure that such practices do not occur, it is important that the State require charter schools to report to the Department, and to notify districts, the following information: the date of every student departure that occurs on or after October 15th; the characteristics of every departing student; the reasons for the departure; and the identification of the school and/or district to which the student is transferring. In addition, host districts should be required to provide the same information to the Department for any student who leaves a district school and enters a charter school.

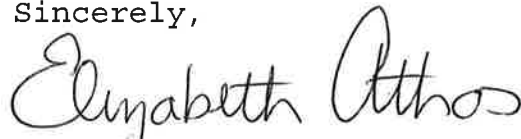
4. Independent Program Evaluation of Charter Schools

Under the Act, N.J.S.A. 18A:36A-16, the Commissioner commissioned an "independent study of the charter school program" in 2001, approximately five years into the implementation of charter school program. Today, with more operating charter schools and fifteen more years of experience under the State's belt -- and serious questions about the level of academic performance and whether the charter program is meeting the Act's reform goals -- it is imperative that the Commissioner promptly undertake a second independent and rigorous program evaluation of charter schools performance, programs, practices and innovations. Such an evaluation is critical not only to inform the future direction of the charter

program, but also to assist host public schools in their own reform efforts.

Thank you for your consideration of these comments. If I can provide additional information, please do not hesitate to contact me at (973) 624-1815, ext. 20.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth Athos". The signature is written in black ink and is positioned above the typed name.

Elizabeth Athos, Esq.
Senior Attorney

cc: Donna Arons, DAG