Proposed Amendments to Charter School Regulations (603 CMR 1.00)

Summary of Public Comments

May 20, 2010

Unless otherwise indicated, the regulations referred to are the proposed regulations as published for public comment by the Board of Elementary and Secondary Education on February 23, 2010. References to "the statute" are to M.G.L. c. 71, § 89, as amended by Chapter 12 of the Acts of 2010. Comments are organized by regulation section. Numbers in parentheses after each comment refer to the list of persons and organizations submitting comments, as shown on the attached list.

Abbreviations:

BESE Board of Elementary and Secondary Education
c.12 Chapter 12 of the Acts of 2010 ("An act relative to the achievement gap")
CSO Charter school office
ESE Department of Elementary and Secondary Education (also referred to as "Department")

1.02: Definitions

Definition of "charter applicant" should prohibit all ESE employees from participating as a member of a charter applicant group. (1)

ESE response: Participation by ESE employees in a charter applicant group is already governed by the extensive requirements and restrictions of the state's conflict of interest statute (M.G.L. c. 268A). No evidence has been presented to indicate that additional restrictions are needed.

Definition of "charter school" should specify the circumstances where a Horace Mann charter school is not treated as a separate LEA. (4)

ESE response: We agree, and clarification has been added.

Definition of proven provider should require 5 years of experience in successful schools for individuals. (4)

ESE response: We have changed the requirement to 5 years to match the parallel requirement for organizations.

Definition of "regional charter school" should include a provision that limits enrollment to students from the districts specified in the region. (5)

ESE response: Section (n) of the statute now contains a provision requiring a school to apply for an expansion of its region when its out-of-region enrollment exceeds 20 percent.

Definition of "regional charter school" should be based on a school serving more than one district, not municipality. (4)

ESE response: It has been the long-standing practice to define a charter school's service area in terms of the districts from which it draws students, rather than the towns. This practice has worked well in terms of administering enrollment, funding, and transportation requirements. Consistent with this practice, a charter school serving a single regional school district would not be considered a regional charter school.

1.03: General Provisions

The BESE should not be permitted to waive compliance with any of the criteria for new charter applications. (1)

ESE response: See related comments under section 1.05.

The BESE should solicit comment from the school districts served by a charter school prior to granting a waiver under this section. (5)

ESE response: We agree that it would strengthen the waiver process by providing notice and opportunity to comment on those requests that would impact school districts.

Charter trustees should be required to attend training on state ethics law and open meeting law. (2)

ESE response: Charter school trustees and staff are now required, under recently enacted changes to the state ethics law, to take an on-line training program provided by the State Ethics Commission. Responsibility for the administration of the open meeting law will be taken over by the Office of the Attorney General as of July 1, 2010, and we will defer to that office as to appropriate training requirements.

Charter school trustee meeting notices should be posted in the local community, and minutes should be submitted to the superintendent and school committee chair within 48 hours. (2)

ESE response: These comments address the requirements in the state's open meeting law (M.G.L. c.30A, §§ 11A, and 11A½). As noted above, the Office of the Attorney General is assuming responsibility for the administration of the open meeting law and we defer to their jurisdiction.

1.04: Charter Application and Procedures for Granting Charters

New charter schools should be required to demonstrate a minimum level of enrollment prior to February 1 in order to open. (1)

ESE response: Under the statute, charter schools have until April 1 to report their pre-enrollment data to sending districts. Changing this date to February 1 would be problematic because the BESE does not award new charters until the end of February.

The recommendation of the CSO should be presumptive and the opinion of the Commissioner can only overcome the CSO recommendation with a report that refutes and addresses in detail each of the CSO findings. (1)

ESE response: The CSO is an administrative unit of the Department and its members are staff to the Commissioner. We believe it would be ill-advised to give the opinions of subordinate staff, however valuable, a special legal status above that of the agency head. We note that this issue has already been addressed by c.12, which requires the Commissioner to provide the CSO's analysis to the BESE for use in their final determination.

A number of comments were received regarding the provision governing applications from individuals or groups previously associated with a private school or parochial school (section 1.04(f)). Some commenters felt that the current provision is too limiting and there should be no barriers to a private school closing and reopening as a charter school, subject to all requirements relating to charter schools (include open enrollment provisions). (15), (16), (18) Others felt that more demanding requirements should be imposed. (4), (6)

ESE response: The relevant provision in section (d) of the statute reads as follows: "Private and parochial schools shall not be eligible for charter school status." Because public funding of private and parochial schools is already prohibited by the anti-aid amendment of the Constitution, we have to assume under the rules of statutory construction that the Legislature intended a broader meaning for this clause, namely a prohibition on conversions in whatever guise they might occur. Therefore, we are maintaining the basic framework included in the initial draft and are providing more clarity to the criteria by which this determination will be made.

Need to clarify in section 1.04(1)(a) that track (i) for Horace Mann schools is intended only for new schools. (4)

ESE response: We agree and have made this clarification.

1.05: Criteria for Assessment and Approval of Charter Applications, Awarding of Charters

The BESE should not be permitted to waive any of the conditions for opening if it would prejudice the rights and due process of the sending and/or host district and/or opposition. (1)

ESE response: It is not clear what due process rights are in question here, but to the degree that a school district has due process rights established in statute or case law, such rights would automatically supersede the provisions of this regulation. The reference to the "opposition" is vague and it is unlikely any due process rights attach to such a group, however it might be defined.

There should be deadlines for the completion of the conditions for opening and for notifying the sending districts. Failure to meet all conditions should result in revocation. (1), (2), (4)

ESE response: ESE has published sub-regulatory guidance containing recommended dates for the completion of all opening activities. The Commissioner retains discretion to allow extra time as needed to respond to unique local circumstances. We have clarified that failure to meet the conditions specified in 1.05(3) could result in revocation.

A charter school should be required to have an occupancy permit prior to April 1 in order to open the following school year. (2)

ESE response: It would be almost impossible for a newly-chartered school to comply with this deadline and it is not clear what benefit this would provide.

The definition of "other" school districts with which a charter school is expected to collaborate is vague and needs more definition. (2), (4)

ESE response: We have clarified that for Commonwealth charter schools, we require efforts to collaborate with the districts from which it draws students and for Horace Mann schools, we require efforts to collaborate with other schools within the host district.

If a petition in support of an application is required, then all of the names on the petition need to be submitted so that they can be verified. (2)

ESE response: We do not require a petition, and we do not and would not give a petition significant weight in the evaluation process because we do not have the resources to validate the names. No further regulation is needed for these reasons.

The regulations should clarify that an application must meet all of the stated criteria before a charter can be awarded. (2), (3), (4), (13), (17)

ESE response: We believe that the comments relating to compliance with the "stated criteria" are referring to the 163 criteria listed in the appendix to the charter school application form. This exhaustive list is used as a tool for evaluating the strength of each application. It has never been the Department's policy or practice to require all successful charter applications to rate highly on every one of these criteria. Every application has some weaknesses and it is unlikely any applications for new charter schools would ever be successful if this were to be adopted as a new standard. Both the statute and the existing regulations contain a much shorter list of requirements and assurances needed for a successful charter application. In future application cycles, the Department's summative materials will reference these items more explicitly.

In districts where the net school spending cap is scheduled to be increased over a period of years, applicants should be permitted to request provisional allotment of seats to be made available in the out years. (9), (14), (16)

ESE response: We agree that this would help applicants develop cohesive long-range plans. Additional language incorporating this recommendation has been added to section 1.05(5).

The regulations for the qualification of "proven providers" need additional clarification with respect to the criteria and standards to be applied and the relationship between the providers' past work and the proposed program. (4), (6), (7), (16)

ESE response: The requirement for proven provider status in order to exceed the 9% net school spending cap is one of the most significant changes enacted in c.12. We have made several changes in the proposed amendments in an attempt to expand and clarify the list of factors that will be considered in evaluating requests for proven provider status. At the same time, we have tried to retain some flexibility to allow applicants to provide other sources of evidence. Given that we have no prior experience with this process, we are also reluctant to establish arbitrary scores for specific metrics that might have the unintended consequence of eliminating otherwise well-qualified individuals and organizations from consideration. It is our intent to provide the BESE with a comprehensive, public report identifying the specific evidence in support of each applicant recommended for proven provider status.We also intend to consult with stakeholders at the

conclusion of the 2010 application cycle, with the expectation that our first-year experience will allow us to establish more refined and useful criteria for use in 2011 and beyond.

The regulations should require an assurance that student demographics in a proposed charter school will match the demographics of the host district. (6)

ESE response: Charter schools should be required to make a good faith effort to recruit and retain a diverse student body. But we note that charter schools cannot control the enrollment decisions of parents; they must accept students via an open lottery process; and they may not discriminate on the basis of specific student characteristics. As a result, we believe this proposal would be both illegal and unworkable.

The regulations should require an assurance that charter schools will provide annual attrition data to the Department. (6)

ESE response: Attrition data is already available to the Department through SIMS reporting.

Charter schools should be prohibited from requiring parents and students to sign a "contract" prior to enrollment. (6)

ESE response: Whether such a document is appropriate or not would depend on its specific contents. If it contained provisions that would have the effect of discriminating against certain students or discouraging enrollment by certain students, it would violate existing statutory and regulatory prohibitions against discrimination. But if the purpose is simply to ensure that parents and students are informed about reasonable school rules and expectations, then it may be acceptable. The Department has a problem resolution process to address any perceived concerns on a case-by-case basis.

The calculation of the bottom 10% of districts, for purposes of the smart cap lift, should be based on all districts, not just those subject to charter school tuition charges. (4)

ESE response: We think that including vocational schools, non-operating school districts, and charter schools themselves in the calculation would be misleading because none of those entities could ever be subject to the smart cap lift.

1.06: Charter School Enrollment and Student Recruitment

The use of financial incentives to enroll students should be prohibited. (1)

ESE response: This suggestion, submitted in response to one particular recent event, merits additional discussion. Because it was not included in the initial draft, and other interested parties did not have an opportunity to comment, we are deferring it for consideration at a later date.

Charter schools should be required to provide sending districts with the names of students who have pre-enrolled for the following year. (1), (2)

ESE response: The required release of student names in this fashion would likely violate students' privacy rights under the federal Family Educational Rights and Privacy Act (FERPA) and under the Commonwealth's student record law.

Parents should be required to sign affidavits prior to April 1 committing to enrollment for the following school year. (2)

ESE response: We believe that any such "commitment" would be legally unenforceable.

Charter schools must consult with the student's sending district when considering special education placements outside the school. (2)

ESE response: This is already required by 603 CMR 28.10(6)(a).

The regulations should clarify that retaining a student in grade does not create a "vacancy" that must be filled pursuant to section (n) of the statute. (7)

ESE response: The statutory language is as follows: "When a student <u>stops attending</u> a charter school for any reason, the charter school shall fill the vacancy …" (emphasis supplied). A student who has been retained in grade has not stopped attending the school, so we do not believe this provision requires further clarification.

The regulations should clarify that a student who pre-enrolls but never attends the school creates a vacancy that must be filled pursuant to section (n) of the statute. (4)

ESE response: If a new student withdraws from the enrollment process prior to the start of school, then he or she has never attended the school. As a practical matter, a charter school would have considerable incentive to voluntarily fill this student's place, because the school will not receive any tuition payment if it is not filled.

The section governing the backfilling of vacancies (1.06(4)(iii)) should specify that vacancies not filled by February 15 must be filled when the new school year starts, not September as it currently reads, since some schools start in August. (12)

ESE response: The reference to September is contained in the statute. Nothing prevents a school from backfilling a vacancy earlier, and schools that start in August will likely find it advantageous to do so.

Charter schools should be given more flexibility in determining what grade to backfill a vacancy, to avoid issues of overcrowding in some grades. (12)

ESE response: The requirement that the vacancy must be filled in the grade cohort of the student who left is contained in the statute.

The section on mailing lists needs to be clarified. (4), (7), (8), (19)

ESE response: Section 1.06(4)(vi) has been expanded to include: a 30-day response requirement for mailing data; a requirement that mailing data be in electronic format; a clarification that mailing data can be requested by either the school or the district; a clarification that the requesting party will bear the cost of the mailing house's services but that no charge can be made for the mailing data itself; and a clarification as to the required languages for the mailing. We have not adopted the suggestion that districts must provide information on each individual family's language, as that would require the prohibited disclosure of confidential student information. We have also not adopted a suggestion to include students who are two to three years away from being eligible to enroll.

The requirement for providing names to third party mail houses should be eliminated, and instead districts should be allowed to pass on charter school information through existing parent/guardian communication channels. (6)

ESE response: We believe this is inconsistent with the statutory requirements.

The non-discriminatory language in 1.06(2) needs to be clarified. (6)

ESE response: We have added suggested language clarifying that schools may not require attendance at interviews or informational meetings with potential students and their families as a condition of enrollment.

Charter schools should be required to provide the names of students on the waiting list to the district superintendents. (6)

ESE response: Without a specific reason or need to provide this information, its release would likely violate the students' privacy rights under the Commonwealth's student records law.

The regulations need to clarify how "last half of grades" will be calculated in schools with an odd number of grades (6), (16)

ESE response: We agree. Clarifying language has been added.

1.08: Charter School Funding

Commonwealth charter schools should be required to enter into memoranda of understanding with their host district. (2)

ESE response: Memoranda of understanding are used by Horace Mann charter schools to document the services that the host district will be providing to the school. Because Commonwealth charter schools typically do not receive any services other than transportation from their host district, it is unclear what the purpose of this requirement would be.

Special education transportation should be excluded from the foundation budget tuition calculation. (2)

ESE response: The foundation budget does not include any pupil transportation costs, so there is nothing to exclude.

The requirement for the BESE to notify the Governor and Legislature if a community has insufficient local aid to cover its charter tuition payment should be eliminated. (2)

ESE response: We do not understand the problem being identified here. As a practical matter, this situation has never occurred and is not likely to occur.

Districts should not be required to pay for charter school transportation, because the cost of transportation is already included in the charter tuition payments. (2), (11)

ESE response: The transportation requirement is contained in the statute. Tuition payments do not include an allowance for transportation.

The funding formula for charter schools is unfair. (2), (11)

ESE response: The charter school funding mechanism is contained in the statute.

Supports the proposed language in paragraph (8) to allow withholding of charter tuition payments when charter schools have not submitted required enrollment reports. (5)

ESE response: None required.

Districts that limit transportation to district schools based on attendance zones should be permitted to limit charter transportation based on those same zones. (4)

ESE response: The proposed language in the draft regulations which prohibits this practice is a codification of a long-standing Department interpretation of the statute. To do otherwise would be inconsistent, in our opinion, with the requirement that a charter school be open to all students in the district.

The transportation provisions need further clarification to avoid excessive charges when a charter school is providing transportation itself. (4), (5), (8)

ESE response: The Department recognizes that this is an area where it is difficult to strike a balance. If a charter school elects or is required to provide transportation, it needs to be done as efficiently as possible. At the same time, we need to avoid providing any financial incentive for the district to not provide the transportation, because in most cases the district can provide it at a lower cost than the charter school. We have tried to further clarify the language, but this remains an area where disputes are likely.

Additional regulation is needed on expenditures from capital reserves and rent payments to affiliated organizations. (5), (6)

ESE response: We agree that both of these areas require some controls. For capital reserves, we propose modifying the regulations to require ESE approval to use capital funds for a different purpose than that for which the funds were set aside. With respect to rent payments, we are studying the feasibility of including a test for arms length transactions as part of the annual audit.

1.09: Ongoing Review of Charter Schools

The Department should evaluate the conduct of charter school boards of trustees on an annual or as-needed basis. (2)

ESE response: A review of the trustees' activities and other governance issues is already included in the Department's charter school monitoring protocol. We do not think any additional regulation is needed to carry out these activities.

1.11: Amendments to Charters

The Department should provide notice and opportunity to comment on all requests for major amendments. (5)

ESE response: Notice and opportunity to comment already exists in 1.11(5) for districts for major amendments that would potentially impact the districts, including changes in location, districts served, maximum enrollment, or grades served.

1.12: Renewal of Charters

The regulations should define a range of measures for determining academic success, including attrition; demographics; attendance and non-attendance rates; curriculum and grade distribution for the seven curriculum frameworks; (6)

ESE response: Criteria for renewal are set out in the CSO's Common School Performance Criteria, which is being updated to reflect the provisions of c.12. We agree that at least some of these measures should be referenced in that document.

1.13: Charter Revocation, Probation, Suspension, and Non-Renewal

The definition of fraud or gross mismanagement should be expanded to include failure to abide by the requirements of the open meeting law. (2)

ESE response: As of July 1, 2010, the Office of the Attorney General will assume responsibility for the administration of the open meeting law, including any necessary enforcement actions. Findings and reports from oversight and audit agencies are reviewed and considered as part of a charter school's renewal. We do not believe that any additional regulatory authority is required in this area.

Miscellaneous comments

Supports the proposed revisions because ESE has demonstrated high standards and success in its award of new charters and review of existing charter schools. (10)

ESE response: None required.

All of the provisions in the statute should be incorporated into the regulations. (4)

ESE response: The Administrative Procedure Act, G.L. c. 30A, s. 1, provides that a regulation is a rule "adopted by an agency to implement or interpret the law enforced or administered by it." Similarly, Executive Order 485 requires agency regulations to be concise. Consistent with the Administrative Procedure Act and the executive order, the regulations do not repeat what is already in statute, but interpret or amplify it where needed. The Department will issue sub-regulatory guidance, including advisories, manuals, and instructions, reflecting both statutory and regulatory requirements, to help interested parties understand and apply all of the provisions.

The proposed amendments weaken the charter school approval process and make DOE actions less assessable. (13)

ESE response: We respectfully disagree.