COMMONWEALTH OF MASSACHUSETTS
BOARD OF ELEMENTARY AND SECONDARY EDUCATION

Middlesex, ss

In the Matter of the Robert M. Hughes Academy Charter School	)))))	**Docket No. CSO-10-01**

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION'S RESPONSE TO THE PETITIONER'S OBJECTIONS TO THE HEARING OFFICER'S INITIAL DECISION

The Department of Elementary and Secondary Education (the "Department") submits this response to the Robert M. Hughes Academy Charter Public School's (the "School") objections to the Hearing Officer's Initial Decision.

The School objects to over 150 of the Hearing Officer's findings of fact, as well as many of his conclusions of law. The School's objections, however, fail to demonstrate that there are any legitimate reasons to reject the Hearing Officer's comprehensive findings and conclusions. To the contrary, the School's "objections" are, in essence, no more than a thinly veiled attempt to rehash the arguments it made unsuccessfully before the Hearing Officer. The Hearing Officer's careful, detailed findings and conclusions are fully supported by the evidence. Thus, nothing in the School's objections warrants rejection of the Hearing Officer's findings and conclusions.

In evaluating the School's objections, it is important to note that the School does not object to certain findings of fact that, standing alone, provide the Board with ample

foundation to find cause to revoke the School's charter. For example, the School does not object to the following findings:

- "The evidence of pervasive and egregious misconduct by Principal Henry and Teachers during the School's administration of MCAS tests in April 2009 and May 2009 is overwhelming." Initial Decision, Finding 28.

- ". . . the certifications made by Principal Henry to the Department concerning the 2009 MCAS results are false for the reasons described in more detail below." Initial Decision, Finding 43.

- "I found the Teachers who testified were credible, especially the two teachers who contacted the Department's investigators in the Fall. The teachers were aware that they had done something wrong and that it was likely their actions would bring adverse consequences. I also find that the Department made no promises of favorable treatment for their testimony." Initial Decision, Finding 107.

- "I find that the purpose of Principal Henry's meeting with the teachers and the bonus payments was to obstruct the Department's investigation into the 2009 MCAS results." Initial Decision, Finding 114.

These findings support the Hearing Officer's careful analysis that cause exists under the Department's regulations to revoke the School's charter. As the Hearing Officer noted:

> I emphasize that the regulation [603 C.M.R. 1.13(e)] allows revocation for activities by either the School's administrator's "or" its board of trustees. Thus, under the express terms of the regulation, it is sufficient that the evidence in this case shows persuasively that Principal Henry directed the educator misconduct on the 2009 MCAS tests and that other administrators also participated in the test administration misconduct (e.g., by showing copies of the test to teachers in advance) or in the attempted cover up (e.g., by paying bonuses to teachers for giving the "right" answers in the investigator role-plays). Under the text of the regulation, the evidence need not demonstrate that the School's board of trustees directed or participated in the test administration misconduct.

Initial Decision at pp. 89-90 (footnote omitted).

The Hearing Officer also found that there are additional and independently sufficient grounds for revocation, including that the School cannot fulfill a condition imposed by the Board of Elementary and Secondary Education in connection with the renewal of its charter (Initial Decision at pp. 91-92) and gross mismanagement on the part of the School's Board of Trustees (Initial Decision at pp. 93-95). The School objects to many of the findings of fact that relate these grounds for revocation, as well as to other findings that relate to the administration of the 2009 MCAS tests. For the reasons set out below, the School's objections are without merit.

The Chasen Report

Many of the School's objections relate to the Chasen Report.[1] The Chasen Report is the School's internal investigative report into allegations of misconduct during the administration of the 2009 MCAS tests. It supports the Hearing Officer's findings of widespread and egregious misconduct during the administration of the MCAS test at the School. The School argues that the Hearing Officer erred by admitting the Chasen Report into evidence on the grounds that the report is protected from disclosure by the attorney-client privilege and the work product doctrine. The short answer to this assertion is that the School's Board of Trustees chose to provide the Chasen Report to the Board of Elementary and Secondary Education at its January 26, 2010 meeting, thereby making the report a public document and waiving all privileges, if any, that may have attached to the report. U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 684-85 (1st Cir. 1997)(University waived attorney-client privilege when it disclosed documents to outside entity).

[1] See, for example, the School's preliminary objection no. 4, and objection to Findings 30, 69, 72, 76, 77, 79, 80, 84, 103 and 115.

Selective Evidence

Many of the School's objections are based on its claim that the Hearing Officer failed to rely on certain evidence that the School points to in the record.[2] This argument is without merit because the Hearing Officer is not required to credit the School's version of events. Rather, it is the role of the Hearing Officer to decide what to focus on and what to believe**.** See Silva v. Securities Division, 61 Mass. App. Ct. 350, 359 (2004)(when there is conflicting evidence, it is appropriate for the hearing officer to decide what to believe); see also Morris v. Board of Registration in Medicine, (405 Mass. 103, 106 (1989) (credibility findings are made by administrative magistrates who heard witnesses).

Reasonable Inferences

The School objects to the Hearing Officer's findings of fact on the grounds that they assume facts not in evidence.[3] This argument too is unavailing because the Hearing Officer's findings are based on evidence presented during the hearing or represent a reasonable inference from the evidence based on common experience or common sense. For example, the School objects to Finding 73 on the grounds that the Department did not present evidence to support the Hearing Officer's finding that on a multiple choice test, pointing out a wrong answer is equivalent to giving the student an answer. The School's argument fails in the first instance because the Department did introduce evidence regarding the proper administration of the MCAS, including that pointing out wrong answers would violate proper test protocol. Viator, I Tr. 96. Nevertheless, even in the

[2] See, for example, the School's objection to Findings 18, 32, 55, 102, 129-131, 133-134, 138, 140, 141, 142, 151 and 152.
[3] See, for example, the School's objection to Findings 29, 73, 91, 127, 129, 141, 144, 145, 148-150, and 154.

absence of such evidence, there was substantial evidence to show that Principal Henry told teachers to point out wrong answers on the MCAS tests. Teacher N, II Tr. 13-14; Teacher R, II Tr. 108. From that evidence, it is reasonable to draw the inference that pointing out wrong answers is equivalent to giving the student an answer. See Langlitz v. Board of Registration in Medicine, 396 Mass. 374, 382 (1985)(Board's determination that advertisement was inherently misleading was a matter of common sense and experience); School Committee of Brookline v. Bureau of Special Education Appeals, 389 Mass. 705, 716 (1983)(noting agency's right to draw reasonable inferences from the facts).

Adequate Yearly Progress

The School objects to the findings relating to Adequate Yearly Progress ("AYP") because it claims the Hearing Officer mischaracterized the testimony of Matthew Pakos, Manager of School Improvement Grant Programs, or reached a conclusion lacking evidentiary support.[4] The School's objections concerning the AYP findings are baseless and illogical, and the School improperly attempts to usurp the Hearing Officer's authority to draw conclusions from evidence presented during the hearing. Contrary to the School's position, all of the Hearing Officer's findings and conclusions are properly supported by the evidence.

Findings 168, 173, and part of 176 concern the Hearing Officer's determination that because the Department invalidated the School's 2009 MCAS scores, the School cannot meet the academic condition placed on its charter in January 2009. The School objects to this finding based on a narrow slice of testimony by Mr. Pakos, taken out of context, in which he speculates, in response to a hypothetical question on cross-

[4] See, for example, the School's objections to Findings 35, 168-170, 173, 175-177, and 184-185.

examination, about the theoretical possibility of measuring academic improvement by use of test results in non-consecutive years. The school's objection is meritless for a variety of reasons.

First, the Hearing Officer acted within his discretion to afford to Mr. Pakos' remark about the possibility of "theoretically" rendering some measure of the improvement using data from the 2008 and 2010 MCAS tests whatever weight he deemed appropriate. Pakos, I Tr. 210. The School's naked assertion that the Hearing Officer "mischaracterized" Mr. Pakos' testimony amounts to no more than a disagreement with the conclusion the Hearing Officer reached. To support its position the School offers, without more, the conclusion it believes the Hearing Officer should have reached ("this means the school may have the opportunity to satisfy its academic performance condition"). This however is not an objection, but rather a disagreement about an issue that is for the Hearing Officer to decide.

Second, the School's position itself mischaracterizes Mr. Pakos' testimony. Mr. Pakos testified that MCAS scores from non-consecutive years could, theoretically, render some measure of improvement. However, he also testified it would be irregular to use two non-consequent years to make an AYP determination, and that the Department has only used consequent years to determine AYP. Additionally, Mary Street, Director of the Charter School Office, testified explicitly that AYP cannot be measured without MCAS data in consecutive years. Pakos, I Tr. 201; Street, IV Tr. 175. Therefore, the School's objections fail to acknowledge the evidence clearly established in the record and relied on by the Hearing Officer.

In similar fashion, the School's objections to Findings 169, 170, 175, and 177 lack merit. The School objects to these Findings on the grounds that there was no evidence that "the Department does not have the statutory or regulatory authority to use the School's 2010 MCAS scores once the scores have been released in place of the 2009 scores." School's objection to Finding 170. In effect, the School is suggesting that as a reward for the School's misconduct, the Department is required to alter its policy, treat the School differently from all other schools in the Commonwealth, and evaluate the School's test scores in an unorthodox manner that is inconsistent with the very notion of "Adequate *Yearly* Progress." Certainly, the Hearing Officer was under no obligation to reach such an absurd conclusion. In fact, the Hearing Officer's findings with respect to AYP are sound and are based on the evidence presented during the hearing and none of the School's objections have merit.

Factual Basis for Findings

The School repeatedly objects to the Hearing Officer's findings of fact based on the inferences that the School draws from the findings.[5] In these objections, it appears that the School does not contest the actual findings of fact, but rather raises arguments in anticipation of negative inferences that might possibly be drawn from the findings. These objections must fail because they do not provide legally sufficient grounds to disturb the findings. For example, the School objects to Findings 44-47 where the Hearing Officer determines that the School's Board of Trustees had detailed knowledge of the 2009 MCAS results before the Department contacted the School questioning those results. The Hearing Officer's findings are unassailable as they are based on the testimony of witnesses from the School and exhibits from the School, including Board of Trustees'

[5] See, for example, the School's objection to Findings 44-47, 57-58, 136, 137, 146, 148,

minutes and email messages. The School does not argue otherwise. Instead, the School objects to the findings "*to the extent that it implies* that Board of Trustees should have reason to question the results of the 2009 MCAS test as reported to them by Principal Henry." School's objection to Findings 44-47 (emphasis added). While the Department believes that the Board of Trustees did have reason to question the results of the 2009 MCAS results, that matter is simply not addressed in these findings of fact.

Burden of Proof

In its preliminary objections, the School argues that the Hearing Officer erred because he did not rule on the parties' motions on the burden of proof. The Hearing Officer, however, indicated that the issue of which party bore the burden of proof would be relevant only if he determined at the end of the hearing that the evidence was in equipoise. Far from being in equipoise, the Hearing Officer found that the evidence of pervasive and egregious misconduct by the principal and teachers during the administration of the 2009 MCAS tests was "overwhelming," constituting both fraud and gross mismanagement. Initial decision at p. 90. Likewise, the Hearing Officer concluded that the Board of Trustees' actions amounted to gross mismanagement based on its repeated failures to address glaring problems. Initial Decision at p. 93-95.

Limitation on Scope of Hearing

The School also argues that the Hearing Officer erred because he did not limit the scope of the hearing to the School's conduct after January 27, 2009, the date that the Board renewed the School's charter for a second time.[6] The School's argument ignores the fact that the Department has consistently taken the position that one of the reasons supporting the revocation of the School's charter is the history of poor governance

[6] See, for example, the School's preliminary objection no. 2, and objection to Finding 139,

demonstrated by the School's Board of Trustees. In these circumstances, the Hearing Officer appropriately exercised his considerable discretion and rejected the School's argument to arbitrarily limit the scope of evidence. Rate Setting Commission v. Baystate Medical Center, 442 Mass. 744 (1996)(agency has wide discretion in ruling on evidence).

Criminal Offender Record Information

The School makes numerous baseless objections to the Hearing Officer's findings as they relate to Criminal Offender Record Information (CORI).[7] These frivolous objections can more properly be characterized as disagreements with the Hearing Officer's findings rather than challenges based on recognized legal principles. As such, they are not properly before the Board of Elementary and Secondary Education.

The Hearing Officer's findings relating to CORI were based on testimony, exhibits and reasonable inferences drawn from the evidence. Initial Decision, Findings 244-259. With respect to each of these findings, the Hearing Officer cited to testimony, exhibits, or both, to support his findings. Even though the Hearing Officer's findings are supported by evidence in the record, the School makes unfounded objections. Typically, the School erroneously states that a finding implies certain facts and then asserts that the implied facts are not supported by evidence in the record. For example, the Hearing Officer found:

> Only after the Board of Trustees fired Principal Henry in December 2009 for her role in the MCAS tests did the Board learn that Ms. Henry had a criminal record. See Baker, 6 Tr. 108. The January 8, 2010, Executive Committee Minutes state that no CORI information was found in Principal Henry's personnel file after she was fired. Exh. 175, page 369. Since the Federal Bureau of Investigation (F.B.I.) did not execute its search warrant at the School's offices until February 19, 2010, the missing records are not the result of the F.B.I.'s actions. See Exh. 311 (search inventory).

[7] See, for example, the School's preliminary objection no. 3, and objection to Findings 244-250, 252-257.

Initial Decision, Finding 244. The School objects to the last sentence in this finding on grounds that:

> . . . it is speculative in that it implies the CORI record for Ms. Henry was removed from Ms. Henry's personnel file by the School. There was no evidence at the Hearings to support such a finding. Further, the Department's favored witness did not testify about any tampering with the CORI records which she controls.

School's objection to Finding 244. Finding 244, however, merely states that as of January 8, 2010, Ms. Henry's personnel file was devoid of CORI information and that that was not as a result of the FBI's actions on February 19, 2010. Accordingly, there is no sound reason for any objection to this finding.

Use of the Word "Teachers"

The School objects to certain findings on the grounds that the use of the word "Teachers" is overly broad. The School argues that the term "Teachers" assumes that "all" teachers at the School were involved in the conduct described in the specific finding.[8] The School's objection is without merit because with respect to each challenged finding, the Hearing Officer cites to several places in the record to support his determination. In the present matter, the Hearing Officer as the trier of fact has made the determination what weight to be given to the evidence and these factual determinations should not be disturbed. See Commonwealth v. Dabrieo, 370 Mass. 728, 734 (1976).

Conclusion

For the reasons set forth above, the Department requests that the Board of Elementary and Secondary Education reject the School's objections and affirm and adopt the Hearing Officer's Initial Decision in its entirety.

[8] See, for example, the School's objection to Findings 71, 77, 86, and 104.

Respectfully submitted,

MASSACHUSETTS DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION

By its attorneys,

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May 20, 2010

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CERTIFICATE OF SERVICE

I, Deborah Steenland, Counsel for the Department of Elementary & Secondary Education (Department), do hereby certify that on this date I caused to be served a copy of:

- Department of Elementary and Secondary Education's Response to the Petitioner's Objections to the Hearing Officer's Initial Decision

by email at approximately 8:30 p.m. upon RMH by emailing it to their attorneys, Denzil D. McKenzie, Esq., and Garrett Lee at dmckenzie@mckenzielawpc.com and Glee@mckenzielawpc.com and upon Rhoda Schneider, General Counsel, Department of Elementary and Secondary Education by hand.

Signed under the pains and penalties of perjury this 20th day of May, 2010.

/s/ Deborah Steenland

Deborah Steenland, Esq.