

**Analysis of Comments from Public on
Proposed Regulations for Innovations Schools
603 CMR 48.00
June 2010**

Unless otherwise indicated, the regulations referred to are the proposed regulations as published for public comment after a vote by the Board of Elementary and Secondary Education (Board) on April 27, 2010 (<http://www.doe.mass.edu/news/news.aspx?id=5505>). References to “the statute” are to M.G.L. c. 71 § 92 as authorized by section 3 of St. 2010, c. 12 (“an Act relative to the achievement gap”).

Comment was received from the following individuals and organizations:

1. Representative William Brownsberger (Rep. Brownsberger)
2. Citizens for Public Schools (CPS)
3. Greenfield Public Schools (GPS)
4. Hampshire Educational Collaborative (HEC)
5. Massachusetts Advocates for Children (MAC)
6. Massachusetts Association of School Committees (MASC)
7. Massachusetts Municipal Association (MMA)
8. Massachusetts Teachers Association (MTA)
9. Christina McClure (Ms. McClure)
10. Representative Martha M. Walz, House Chair of the Massachusetts Legislature’s Joint Committee on Education (Chair Walz)

48.01: Scope, Purpose, and Authority

1. Chair Walz: Suggests that this section state that the purpose of the regulations is to provide rules and procedures with respect to virtual innovation schools and that the regulations be titled “Virtual Innovation Schools”.

ESE Response: We agree that the primary purpose of these regulations is to provide rules and procedures with respect to virtual innovation schools as required by the statute; however, there is a need to provide minimal procedures for innovation schools generally.

48.02: Definitions

No public comment was received related to this section.

48.03: General Provisions

2. HEC: There are no qualifications for waivers; anything can be waived, including reporting requirements, which contradicts the purpose of the law.

3. MTA: In 48.03(3), recommends striking the clause “except as may be waived as provided herein” and all language including and following “Pursuant to M.G.L. c. 71 § 92”; Recommends striking all of 48.03(4). The Board has no authority to determine whether public school laws are superseded by its regulations or an innovation plan; whether public school laws are superseded by any conflicting provisions of § 92 or an innovation plan is up to the judgment of a court of competent jurisdiction. The regulations are inconsistent with the Administrative Procedure Act, M.G.L. c. 30A, because 603 CMR 48.03(4) permits the Board to waive unspecified sections of its own regulations without a public comment process.

4. Chair Walz: The statute does not grant the Board authority to waive the applicability of any law or regulation; the innovation plan, not the Board, determines which laws do not apply to the Innovation School. Suggests a middle road between the Board approving all waivers and an Innovation School waiving all laws: perhaps the Board could have the ability to veto waivers of law, rather than approving all proposed waivers. Suggests that the last sentence of 48.03(3) should be deleted since it is unclear.

ESE Response: We believe that state oversight in this area is both necessary and appropriate, given the state’s constitutional obligation to ensure an adequate education for all students, but agree that we should streamline the process so that it provides accountability without blocking reasonable and innovative proposals that are consistent with the statute and our constitutional obligation. The regulation as revised simplifies the process for an innovation plan committee to obtain approval, by requiring only the Commissioner’s approval; it also permits the innovation plan committee to refer an adverse decision by the Commissioner to the Board and eliminates the language regarding exceptional circumstances.

48.04: Innovation Schools in Public School Buildings [Reserved]

5. Chair Walz: Asks for what purpose ESE anticipates reserving this section.

ESE Response: Because the innovation schools initiative is new, we believe that future regulations may be required as these schools begin operation and other issues that may require regulation are identified.

48.05: Virtual Innovation Schools, General Comments

6. HEC: Poses several clarifying questions: Does a virtual innovation school student follow the guidelines of home or sponsoring school regarding credit recovery? How will student eligibility in virtual innovation schools be impacted by the availability of courses in their home district/school? Who assigns diplomas in virtual schools, home or sponsoring district? Who handles communication with home and sponsoring districts?

ESE Response: The sponsoring district is responsible for determining and implementing all educational policies of the virtual innovation school as outlined in the innovation plan.

7. MASC: Finds the regulatory guidance in this section to be reasonable.

ESE Response: None required.

8. MMA: Supports the structure proposed in the regulations for establishing and operating virtual innovation schools which maintains local control over and accountability for programs and revenues and would oppose any attempts to weaken them.

ESE Response: None required.

48.05(1): Virtual Innovation Schools: Eligibility for enrollment

9. Rep. Brownsberger: The mechanism for determining eligibility for enrollment seems unduly restrictive and should not require a home district sign off. The tuition level set in the choice law is so low that home districts are substantially protected from marginal cost impacts. However, if a home district sign off is included, the regulations should place a burden of justification on the sending district. The legislature intended for virtual innovation schools to be open to all Massachusetts students that they are prepared to receive, which is not reflected by the requirement in the regulations for home district sign off or the itemization of a relatively rare set of cases in which virtual enrollment would be appropriate.

10. GPS: Expresses concern about the “resident district veto,” the lack of clarity about which school committee to appeal to, the lack of a timeline for responding to a parental appeal, and the lack of a process to notify the home district that a student has applied to a virtual innovation school. Suggests procedural safeguards to ensure that parents are treated fairly, have a prompt response, and that home districts are notified. Suggests that if the resident veto remains, the home district must provide the parent with a detailed rationale founded upon solid evidence that the veto is in the best educational interests of the student. Requests clarification on the provision in the regulations prohibiting enrollment in a virtual innovation school through the inter-district school choice program established under Chapter 76, Section 12B.

11. Ms. McClure: The requirement that both superintendents agree that the student would benefit from placement is unfair. A parent should be able to choose to environment that is most beneficial to their child and be able to enroll their child in a virtual school without an appeal to the home superintendent who may reject the request. A pre-placement summer [virtual] or trial periods could be utilized to assist parents in determining if a virtual placement would be beneficial. Innovation schools should be administered under the [school] choice program and students should be allowed to enroll directly rather than go through their home district.

12. MAC: Expresses general concern that virtual innovation schools may become “cyber-dumping grounds” for children that districts feel are too difficult or troublesome to educate and that there is no standardized, formal process for initial enrollment into a virtual innovation school and no explicit evaluation point when the continued enrollment is re-assessed. Recommends that the regulations be revised to require that the home district provide written justification for a virtual school placement and a plan for a return to the home district.

13. MASC: Is pleased with the manner in which ESE proposes to establish eligibility for enrollment in a virtual school but is concerned about open ended funding obligations for students who, in part, are currently served at little or no cost to a school district through adult basic education programs. Believes that it is essential to retain the proposed provisions of 603 CMR

48.05(1) which conditions student eligibility to enroll in a virtual school upon the joint approval of the superintendents of the home and sponsoring school districts.

14. MMA: Would oppose any change to the regulations that remove authority from the superintendent of schools or local school district. Would strongly oppose any changes that would authorize entities other than municipal and regional school districts to establish a virtual innovation school and have access through assessment, withholding or in any other way to school aid or local revenues without a clear locally-voted approval and appropriation.

15. MTA: Without clear safeguards, subsections (d), (e), and (f) could be abused by districts attempting to exclude more challenging students from the school environment. The regulations should address issues of equity, including how ESE will monitor that districts are not systematically excluding certain populations, adherence to time on learning requirements, and whether students under 16 are engaged in learning activities during the academic day.

16. Chair Walz: Strongly objects to the requirement that a student's home district agree that the student may enroll in a virtual school. The statute does not grant such veto authority to the home district and such veto authority is not provided under the state's school choice model. The student's enrollment should be a matter involving only the student, his or her parents or guardians, and the sponsoring district. Notes that as the author of the virtual school provision in the statute, the intent of the virtual school provision is that any student in the state is eligible to enroll in a virtual school if the school accepts the student. Recommends that checks and balances to ensure that the best interests of students are being served be addressed through other provisions in the regulations. Strongly objects to the extremely limited list identifying the students who might benefit from being enrolled in a virtual school and suggests that a wide range of students should be encouraged to consider a variety of options. Urges the inclusion of a provision in the regulations for the sponsoring district to provide written notice of any rejection of a student's request to enroll in a virtual school within a given timeframe, and a rationale addressing the educational needs of the student for why the request was denied. Recommends that a provision for a parent or guardian to appeal a sponsoring district's rejection to the school committee, with further appeal to the Board, to help prevent sponsoring districts from denying enrollment to students because they are traditionally more difficult or expensive to educate, such as special education students, English language learners, or low income students.

ESE Response: Many of the comments above suggest that this section, which governs enrollment in virtual schools and requires approval by the superintendent of each student's home district, would be too restrictive and difficult to implement fairly. The trend nationally is for virtual schools to be open to all students, with parental choice being the determining factor. The revised regulations reflect this viewpoint. We do add an important caveat that a school district cannot compel a student to enroll in a virtual school. Broadening the eligibility for enrollment creates the potential for

a significant number of students to enroll at virtual schools, including students who are now in private or parochial schools or are home schooled. This in turn creates the potential for a significant fiscal impact on the sending districts and the Commonwealth, since these students are not currently educated at public expense. In the absence of reliable data on the numbers of students who might enroll, it is not clear whether enrollment limits might be necessary or appropriate. (By way of comparison, the statutes on both the charter school and inter-district school choice programs contain enrollment limits.) We will need to keep a close eye on this.

48.05(2): Virtual Innovation Schools: Curriculum, instruction, and assessment

17. Chair Walz: Agrees that the virtual school should be required only to provide a mechanism to assure that students enrolled in the school have the necessary access, but is concerned about the potential heavy burden on districts to provide access “as needed” in subsection (d); urges a change in the language to clarify that districts must ensure that students have access to computer equipment, telecommunication services, and related technical support but do not need to pay for such access and equipment for all students.

ESE Response: We believe the current “as needed” sufficiently addresses this concern.

18. HEC: There are no state guidelines pertaining to attendance and participation recordkeeping for students of virtual innovation schools in subsection 48.05(2)(c).

ESE Response: Attendance and participation recordkeeping are local responsibilities for all public schools. In addition, 48.05(8) requires virtual innovation schools to comply with all reporting requirements established by ESE for all public schools, and provides ESE the ability to collect additional data specific to virtual innovation schools should the need arise.

48.05(3)-(6): Virtual Innovation Schools: Educators; Guidance services; Special education services; Procurement of educational management services

19. HEC: Poses several clarifying questions: Who is responsible for ensuring that "periodic individual in person meetings" take place? Who is accountable for identifying special needs of a virtual innovation school student? Should there be any language in the regulations pertaining to physical space and access to virtual innovation schools? Also notes that there is no language in the law or regulations addressing accountability in the case of partnership between faculty and external service provider.

ESE Response: The leadership of the sponsoring district and the innovation school are responsible for ensuring compliance with these and all other laws and regulations. Accountability in the case of partnership between faculty and any external service provider will be governed by the terms of the performance contract contained within the innovation plan.

20. MAC: Expresses concern that the regulations are silent on issues such as class size, teacher-student ratio, minimum enrollment, or individualized instruction. Recommends that virtual schools be required to provide students counseling and supports that relate to the individual circumstances which triggered their enrollment.

ESE Response: We believe that specific educational and programmatic decisions are intended to be addressed in the specific innovation plans for each proposed school which are subject to public scrutiny and must be approved by the sponsoring school committee.

21. MTA: Recommends striking “through an educational collaborative, or through a contract with an educational management organization” from subsection (3), and striking all of subsection (6). The regulations allow private contractors to provide teachers for “virtual innovation schools”. There is nothing in the statute that authorizes subcontracting unit work to private contractors. On the contrary, it is clear from the language of the statute that new innovation schools are public schools subject to, as the statute says, public school laws. There is a specific requirement in section (l) of the statute to negotiate with the local union over the extent to which the contract governs the school. The board cannot, by regulation, privatize innovation schools where the statute has emphatically created a public enterprise.

ESE Response: Nothing in the statute prohibits the procurement of educational services from other providers, and the statute expressly refers to Innovation Schools in which “an external partner is primarily responsible for developing the innovation plan under which the school operates and the external partner is responsible for meeting the terms of the innovation plan” (M.G.L. c.71, s. 92(d)). The statute makes clear that an Innovation School, including a Virtual Innovation School, shall be a public school, operating within a school district under an innovation plan authorized by the school committee. Further, the statute requires the sponsoring district and the local teachers’ union to “negotiate waivers or modifications to the applicable collective bargaining agreement necessary for the school to implement the innovation plan” (M.G.L. c.71, s.92(l)). It is unclear whether the Legislature intended this provision to apply to EMOs or other external partners that operate virtual schools, and this will need to be resolved in the labor relations arena.

48.05(7): Virtual Innovation Schools: Funding

22. Chair Walz: Suggests that the reference to a student's individualized education plan should be changed to individualized education program.

ESE Response: The correction is made in the revised regulations.

23. HEC: The process for student enrollment and per-pupil allocation across districts is not clearly defined. Since school choice is not allowed, what is the mechanism for moving the per-pupil allocation? May parents pay tuition? Will there be access to federal funding, state and local?

ESE Response: The specific mechanisms for enrollment, funding, and tuition collection should be articulated by the sponsoring district in its innovation plan. Parents of students residing in Massachusetts would not pay tuition, but each sponsoring district may determine out-of-state tuition rates pursuant to M.G.L. c.71, s.6A, as indicated in Section 48.05(1).

Miscellaneous Comments

24. HEC: Poses several general questions about innovation schools: Who approves the curriculum? Will students be counted in the AYP calculations? Who is responsible for quality control of instruction, curriculum, etc.?

ESE Response: As indicated in the statute, local school committees approve innovation plans, which define the curriculum and the process for oversight of the innovation schools, including a performance contract. Innovation schools are considered public schools within the authorizing school district, and as such, will be issued AYP determinations as schools and will also be included in district AYP determinations as any other district school.