

**Minutes of the Special Meeting  
of the Massachusetts Board of Elementary and Secondary Education**

**November 7, 2009  
1:07 p.m. – 3:03 p.m.**

**Massachusetts Department of Elementary and Secondary Education  
Gloucester City Hall  
Gloucester, MA**

Members of the Board of Elementary and Secondary Education Present:

**Maura Banta**, Chair, Melrose  
**Harneen Chernow**, Vice Chair, Jamaica Plain  
**Gerald Chertavian**, Cambridge  
**Michael D'Ortenzio Jr.**, Chair, Student Advisory Council, Wellesley  
**Thomas E. Fortmann**, Lexington  
**Beverly Holmes**, Springfield  
**Jeff Howard**, Reading  
**Ruth Kaplan**, Brookline  
**Paul Reville**, Secretary of Education, Worcester

**Mitchell D. Chester**, Commissioner of Elementary and Secondary Education, Secretary to the Board

Members of the Board of Elementary and Secondary Education Absent:

**Dana Mohler-Faria**, Bridgewater  
**Sandra L. Stotsky**, Brookline

Chair Banta called the meeting to order at 1:07 p.m.

**Welcome & Introductions**

Chair Banta thanked the city and community of Gloucester for hosting today's special meeting. The chair said by the attendance it is very clear that this is an important discussion, and thanked the audience for its commitment to public education. Chair Banta provided an overview of the meeting and its objective, which was to reach a common understanding of the options available to the Board with respect to the charter that has been granted to the Gloucester Community Arts Charter School. The chair said she knows the discussion has grown heated as a result of the commitment of the community, and said she wanted to ensure that everyone is heard.

**Brief History of the Gloucester Community Arts Charter School**

Commissioner Chester said this process began last summer when the founding group of the Gloucester Community Arts Charter School submitted a prospectus to the

Department. The commissioner reviewed the timeline, including the application process, the December 11<sup>th</sup> public hearing, individuals who addressed the Board during the public comment period at regular meetings, the Board's February 24<sup>th</sup> vote to grant a charter to Gloucester Community Arts and to approve an accompanying fiscal trigger, the Joint Committee on Education's oversight hearing on June 8, 2009, correspondence from Governor Patrick on this matter, and today's special meeting.

Commissioner Chester said when he walked outside prior to the start of today's meeting to meet with parents and community members, he heard their concerns and felt their passion. Commissioner Chester said he wanted to be as clear as he could to the community that his recommendation to the Board to approve the charter and attach a fiscal trigger was based on his assessment of the merits of the application, and not based on any other calculus. The fiscal trigger was prompted by the state's fiscal situation as well as concerns expressed by the Gloucester community. Commissioner Chester said his recommendation was not based on any kind of assessment that the Gloucester Public Schools was failing its students.

### **Outside Consultant's Overview**

Chair Banta said the Board hired an outside consultant to review options available to the Board and address the following three questions:

1. What are the Board's procedural options, consistent with state law?
2. What is the legal standard required to justify revocation of a charter, specifically, for material misrepresentation?
3. What are the procedural steps required for revocation of a charter?

The chair introduced David Kerrigan, Esq., of Kenney & Sams, P.C. Mr. Kerrigan thanked the Board and the members of the public for taking the time to consider these issues. Mr. Kerrigan said he has practiced law for 22 years, including 12 years in private practice and 8 years in the Attorney General's office with the government bureau that handled administrative appeals from boards and agencies. In that role, Mr. Kerrigan supervised the litigation strategy in defending the Board's decision to revoke a charter.

Mr. Kerrigan said he came to this matter with a fresh view and is impartial. He said he reviewed background materials provided by the Board, including the application of the Gloucester Community Arts Charter School, correspondence with the Governor and legislators, and documentation submitted by Superintendent Farmer and others. Mr. Kerrigan said he spoke with Mayor Kirk and Rep Ferrante and also reached out to others the Gloucester community to get their view on these questions.

Mr. Kerrigan said the charter school statute provides that a charter once issued shall be for five years. He said the Board may revoke if the charter was not fulfilled, or if the conditions of the charter were violated. Mr. Kerrigan said according to the state charter school regulations, the Board may suspend or revoke a charter for cause, including material misrepresentation, failure to comply with terms, financial insolvency, or misappropriation. Mr. Kerrigan said the options available to the Board to undo the grant

of the charter are suspension or revocation. They also include probation, but that is not relevant here. Mr. Kerrigan said he also looked at whether the Board could reopen or reconsider its decision to grant a charter, but nothing in the statute says this can be done. Mr. Kerrigan said the statute provides procedural safeguards under Chapter 30A, including the right of the charter school to request an adjudicatory hearing, where parties have the right to defend, call witnesses, and appeal the final decision to Superior Court.

Mr. Kerrigan said reconsideration, if it was to revoke or take back a charter, would not be consistent with law. Robert's Rules of Order would not allow reconsideration at this point in any event because it is available only at the meeting at which the original action is taken or the next business day. He added that although there are cases that uphold a board's authority to reconsider a decision, this authority is always subject to limitations in the law. Mr. Kerrigan said the Board cannot reconsider or reopen a decision to grant a charter except by following the legal procedures to revoke the charter. He noted that the Board's decision to grant a charter is not considered an adjudicatory proceeding. He concluded that the Board has the option to suspend or revoke the charter, based on the standards in the statute and regulations.

On the second question, Mr. Kerrigan said the term "material misrepresentation" means the false representation of a material fact, with knowledge of its falsity, for the purpose of inducing a person to act, and the person did act in reliance on it. He said a misrepresentation is material if it is one of the principal grounds on which the person relied.

On the third question, Mr. Kerrigan said the process to revoke is spelled out in statute and regulation. If the Board were to revoke a charter, it would take a vote on its intent to revoke and send notice to the charter school. The notice must be sent sixty days before the revocation is to take effect. The charter school has the right to ask for a hearing under the statute. The opportunity to be heard would include the opportunity to present evidence and call witnesses. A hearing officer would make findings. The matter would then come back to the Board, and the Board would make the final decision. Mr. Kerrigan said the statute allows the charter school to appeal a revocation to the Superior Court. He said this would not be a short process.

### **Presentation by Gloucester Officials**

Gloucester Mayor Carolyn Kirk welcomed the Board to Gloucester. Senator Bruce Tarr extended his appreciation to the Board, and said if there is a silver lining in this matter, it is that the Board was able to witness first hand the commitment the city has for the education of all children in Gloucester. Senator Tarr said this conversation should have happened a long time ago. He said the recommendation from the Department's Charter School Office not to approve the charter leaves us with no understanding of the merits that made the charter worthy of approval. The senator said that Secretary Reville's email suggests that his vote to grant the charter was not based on educational considerations. Senator Tarr said Chapter 71, Section 89(11) allows the Board to develop procedures and guidelines for revocation, and suggested the Board could go beyond the grounds that are listed in the regulation. The senator said the examples presented are not exclusive, and

may also include misfeasance or malfeasance, or inappropriate action by the Board. Senator Tarr said there are two possibilities: either the grant of authority contemplates the Board will have the authority to revoke or suspend and will develop such rules; or if not, the Board should comply with Chapter 30A and move forward. Senator Tarr also said the Board has shown precedent in waiving its rules. He said innovation is present in the Gloucester Public Schools. Senator Tarr said that until this matter is resolved with integrity, any movement with regard to the proposed charter school legislation is in jeopardy.

Representative Ann-Margaret Ferrante endorsed Senator Tarr's statement. She said the legislation on charter schools is in jeopardy because of how this decision was made to grant a charter. Rep. Ferrante said the questions posed to Mr. Kerrigan were too narrow. She said the process around this charter appears to have been arbitrary and capricious. Rep. Ferrante said Board members commented that they rely on the expertise of the charter school office, whereas the charter school office did not recommend granting this charter. Rep. Ferrante said the Board must have the right to go back and redo a decision when the process was so flawed. She said the key question is if the reasoning behind the votes to grant the charter was faulty, does the Board have the authority to revoke?

Gloucester School Committee Chair Greg Verga asked Board members to examine all the evidence it has received about the flaws in the process and revisit the decision.

Gloucester Superintendent Christopher Farmer said he does not believe the authors of the charter application are bad people, but they may have been injudicious in their rhetoric. Supt. Farmer reviewed matters that he believed demonstrated that the Board did not do its due diligence at the February 24, 2009 regular meeting. Those matters included no Board member attending the December 11, 2008 public hearing in Gloucester, the Charter School Office not recommending that a charter be granted, the February 5, 2009 email from Secretary Reville to Commissioner Chester, comments by Board member Jeff Howard at the February 24<sup>th</sup> regular meeting that the concerns of the community had not been addressed, Board member Tom Fortmann recognizing the work of the Charter School Office and the commissioner praising the office, and the commissioner's correspondence to Board members about the February 5<sup>th</sup> email. He questioned whether the communication to Board members complied with the open meeting law.

Supt. Farmer cited three regulations that the Board should have checked out, including ensuring the thoroughness and accuracy of the charter application, that the charter school has access to a school facility, and that the charter school could meet its enrollment projections. Supt. Farmer said the Charter School Office wrote that there was little evidence of a significant demand for the proposed school.

Mayor Kirk asked the Board to reflect on whether some misrepresentations were the driving force behind its vote. Mayor Kirk said the community will respect the decision of the Board if it is based on an honest reflection.

Mayor Kirk said this is a fight about money, and that reality cannot be ignored. She said she appreciated the commissioner's introduction of the fiscal trigger. The mayor said there need to be funding reforms on Beacon Hill and asked the Board and others to take up the fight for charter school funding and Chapter 70 aid for Gloucester. Mayor Kirk said Gloucester needs to come to grips with improving education and closing achievement gaps. Mayor Kirk said if the charter school moves forward, it cannot work in isolation from the public school district. The mayor when this is over, it should be over. The mayor said what is important is the accuracy and solidness of the Board's decision.

Supt. Farmer submitted an additional written analysis to the Board.

Board member Ruth Kaplan asked Mr. Kerrigan to respond to Sen. Tarr's comment that the regulation on suspension or revocation for cause lists examples and would allow for other grounds. Mr. Kerrigan said he agreed that the regulation provides examples, as noted by the phrase "including but not limited to," and he added that if the Board decides to suspend or revoke a charter for any reason, it must follow the standards and procedures in the statute.

### **Comments from the Secretary**

Secretary Reville said he appreciated the opportunity to be here and to witness the commitment of the people of Gloucester for their schools. With regard to his February 5<sup>th</sup> email, the secretary said he was sorry for the role he played in further inflaming controversy. Secretary Reville said he is the parent of a public school student in an urban district, and his career has been about improving public education. The secretary said his current job is to work closely with Governor Patrick and advance his agenda to close achievement gaps.

Secretary Reville said the boards and commissioners do not work for him, and he protects the prerogatives of the boards. He said that prior to his February 5<sup>th</sup> email, he heard from Commissioner Chester that the commissioner was leaning towards a favorable decision on the Gloucester application. Secretary Reville said that he too saw promise in the application. He said the email was one part of a lengthy conversation with the commissioner about the broader education reform agenda.

Secretary Reville said that at no time did he pressure Commissioner Chester. The secretary noted that one of Commissioner Chester's greatest concerns was financial, and the commissioner insisted that the charter be conditioned on a financial trigger. Secretary Reville said he initially opposed the idea of a fiscal trigger, but that he came around to see the value of building in this protection and voted for the trigger through his proxy. Secretary Reville said he never contacted other Board members, although he would have been within his rights to do so. He said he was unable to attend the February 24<sup>th</sup> meeting because he was in Washington, D.C. meeting with U.S. Secretary of Education Arne Duncan.

The secretary said this is not a conversation about a conspiracy to do harm to this community; rather, this is about whether this small arts charter school, started by a group of parents and teachers, will serve the children and community well. Secretary Reville said he hopes the Board and community can find a positive and constructive way to resolve this matter.

### **Presentation by Gloucester Community Arts Officials**

Amy Ballin, chair of the board of trustees for Gloucester Community Arts (GCA) Charter School, said the school is busy with plans to open in September 2010, and is convening experts in curriculum design and arts education. Ms. Ballin said the school will focus on rigorous skill development and expression through the arts, and will draw on research. Ms. Ballin said the board of trustees has convened and expanded, is designing a system of collecting and utilizing data, and is planning an enrollment lottery for March 15, 2010. She said the school has received numerous inquiries about recruitment.

Ms. Ballin said the school is in final negotiations for a site, and hopes to make an announcement about a signed lease in downtown Gloucester within a few weeks. The school has hired a grant writer, and expects to announce an award from a Boston foundation shortly. Ms. Ballin said the school is about to launch an enrollment push, and that it is on schedule to open in September 2010. Ms. Ballin said that Gloucester suffers from an achievement gap as do other school districts and that a significant population is underserved. Ms. Ballin said the charter school movement is intended to create new models of education. She said that during her time in Newburyport, the district found that many at-risk students left the school system, went to a charter school, and found success. Ms. Ballin noted that in Salem, parents have a choice from among a charter school, a magnet school, and six elementary schools, and the school district has strengthened its offerings in the face of competition. Ms. Ballin said that GCA represents a new approach for parents who need a new option. She added that the school is interested in implementing a weighted admissions lottery so that the student body will reflect the range of students in the Gloucester Public Schools.

Kate Ruff, a member of GCA's board of trustees, said she was looking for a way to get involved in the schools after the birth of her second child. She said being a social scientist, she turned to the data and saw that some students were not thriving in the system, including special education and low income students. Ms. Ruff said Gloucester had fewer students in the *Advanced* category compared to the state average, there is a disparity in MCAS performance among Gloucester schools, and there has been a decline in enrollment, especially after the 1<sup>st</sup> and 5<sup>th</sup> grades. Ms. Ruff said 50 percent of parents who have contacted GCA and provided an address live in the downtown area. Ms. Ruff said GCA will be a small K-8 school with multi-age classrooms and that it will integrate academics and the arts, foster self-efficacy, and engage parents. She said her motivation is how many "D" students just need a different approach.

Peter Brau, a parent and resident of Ward 2, said the challenge of education is for youth to rise above shortcomings. Mr. Brau said that his children are assigned to Veterans, a low performing school, and parents in Ward 2 are looking for a viable public option.

Tad Heuer from Foley and Hoag, counsel for GCA, said the purpose of this meeting was narrow – whether the Board is convinced of material misrepresentation in the charter application. Mr. Heuer said the standard for material misrepresentation has a high threshold. He said the action the Board takes would affect every charter decision, given that certainty, finality, and stability are key for a charter school at this fragile early stage. Mr. Heuer said if the Board decides to hold a hearing and asks GCA to do a point-by-point response, it will do that. Mr. Heuer said the school stands by everything in its application.

Mr. Heuer said each element of material misrepresentation that Mr. Kerrigan listed is required before the Board can find material misrepresentation. Mr. Heuer said there must be a willful and deliberate misrepresentation, an intent to deceive, the information presented must be false and the person making the statement must know it is false, and the information must be a fact, not an opinion or matter of judgment. He said GCA looked at the publicly available data and came to a different conclusion than the school district, and that is not misrepresentation. Mr. Heuer said that to be “material,” the misrepresentation must have been relied upon in a way that changed or would have changed the vote. He added that the information presented by the opponents is not new.

Mr. Heuer said that two years ago in the *Hudson* case, the Supreme Judicial Court held that local school boards have no right to challenge the Board's decision to grant a charter. Mr. Heuer said if the Board does hold a hearing to decide whether to revoke, GCA is not without further recourse, having all rights and review under Chapter 30A, including the right to challenge the Board's decision.

Mr. Heuer said with regard to the statute on suspending or revoking for cause and the earlier questions about examples of misrepresentation "including, but not limited to," the legal principle is that things are known by the company they keep. The examples of grounds for revocation are all serious matters requiring a high threshold; hence material misrepresentation must meet a high threshold too.

Mr. Heuer said this meeting is not about the popularity of the charter or about money, but rather whether the Board is convinced there has been material misrepresentation. Mr. Heuer submitted to the Board that the allegations do not even come close to the standard. He concluded by agreeing with the mayor that everyone involved in this matter needs a timely and clear determination by the Board.

### **Board Discussion and Review of Procedural Options**

Chair Banta said the Board is here today to reach a common understanding. She asked Mr. Kerrigan to review the procedural options.

Mr. Kerrigan said the charter has been granted for a term of five years. Mr. Kerrigan said the statute requires that if the charter were taken away, there needs to be a certain process, including notice to the charter school, an opportunity for a hearing, presenting

witnesses, a defense, and cross-examination. A hearing officer would then make findings and recommendations. The Board would then decide whether to revoke the charter.

Mr. Kerrigan said he agreed with the general tenor of Mr. Heuer's remarks about the "including but not limited to" regulation concerning grounds for revocation. He said all the examples are fault-based reasons. Mr. Kerrigan said that in his view, simply reconsidering the grant of the charter is not consistent with state law; if the Board were to take away the charter, it would have to follow the process in state statute.

Vice Chair Harneen Chernow said this was a tough meeting for her. Ms. Chernow said she was impressed by the dedication and commitment of the public school community in Gloucester. Ms. Chernow asked Mr. Kerrigan if any option other than revocation is available if the Board believes it took inappropriate action on something. Mr. Kerrigan said there is a line of cases that permits a board or agency to reconsider a decision, but it must be done consistent with limitations in the law. Mr. Kerrigan said in this case, reconsideration is inconsistent with the law, and the Board would have to go through the revocation process as required by law.

Ms. Kaplan asked if procedural irregularity by the Board itself in approving the charter could be considered as a ground for revocation. Mr. Kerrigan said he did not think the examples listed in the regulation are exclusive. Ms. Kaplan asked Mr. Heuer to send his comments to the Board in writing.

Board member Gerald Chertavian asked whether appeal rights to Superior Court applied to the charter school only, or to other parties as well. Mr. Kerrigan said a party would have to show it had legal standing, requiring a showing of particularized harm. Colin Zick from Foley Hoag said this was referenced in the *Hudson* decision.

Senator Tarr said the city would like to reserve the right to brief the Board legally in writing.

### **Next Steps**

Chair Banta said the Board will give careful consideration to what it heard today. The chair said Mr. Kerrigan will send the Board a written report. Chair Banta said there was a lot of great discussion here today and the Board has to be clear and sure of its next steps. She said the Board will be thoughtful in considering all the information that has been presented. Chair Banta thanked the people of Gloucester. She said the Board will decide on options at its November 17, 2009 regular meeting.

### **On a motion duly made and seconded, it was:**

**VOTED: that the Board of Elementary and Secondary Education adjourn the meeting at 3:03 p.m., subject to the call of the chair.**

The vote was unanimous.

Respectfully submitted,

Mitchell D. Chester  
Commissioner of Elementary and Secondary Education  
and Secretary to the Board