

VIA EMAIL

October 16, 2014

Mitchell D. Chester, Secretary
The Board of Elementary and Secondary Education
75 Pleasant Street
Malden MA 02148

Re: Lowest Performing 10 Per Cent of Districts

Dear Commissioner Chester:

I was retained by the New Heights of Brockton applicant group to review its participation in a recent phase of the current charter school application cycle. The Board of Elementary and Secondary Education (Board) is an esteemed body performing vital state functions, such as the review and approval of charter school applications. Relative to the long history of the Commonwealth of Massachusetts, charter school laws and regulations are new, and their application and refinement continues to generate novel questions. We are confident that the novel issues raised here will be capably addressed by the Board.

This is request for review or in the alternative a request for waiver. It involves the interpretation, amendment and application of 603 CMR 1.04(9) and that on which it is premised, namely M.G.L. c. 71 §§89(i)(2) and (i)(3). The issues raised here concerning data methodology regulation amendment processes and the interpretation of statutory language are interrelated and together compel a result that differs from the present DESE position to exclude Brockton from the lowest performing 10 per cent of districts.

REGULATION AMENDMENT PROCESSES

On March 25, 2014, after soliciting and reviewing public comment in accordance with the Administrative Procedure Act (APA), M.G.L. c. 30A §3, the Board adopted amendments to 603 CMR 1.00, namely 603 CMR 1.04(9), as presented by you. That adoption changed how the lowest performing 10 per cent of districts were identified by bringing the calculation into line with state accountability standards authorized under M.G.L. c. 69 §1I. The analysis moved the Department of Elementary and Secondary Education (DESE) from reliance on a pure achievement metric to reliance on a blended achievement/growth metric, weighting each 80/20 respectively ((Achievement Rank × 0.8) + (Growth Rank × 0.2) = Weighted Rank).

On June 24, 2014, without soliciting or reviewing public comment, the Board adopted an amended 75/25 achievement/growth weighting ratio, again upon your recommendation via memorandum addressed to the Board four days earlier, dated June 20, 2014 and titled "Weighting of Achievement and Growth in Accountability Calculations."

The Board's amendment of the blended methodology is a regulation within the meaning of M.G.L. c. 30A §1(5). A regulation includes "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it." Like the initial shift from reliance on a pure achievement methodology to reliance on a blended achievement/growth methodology, the shift to an amended blended ratio is an instance of agency rulemaking requiring notice and comment under M.G.L. 30A §§3 and 3A. The Board is required to "give notice and afford interested persons an opportunity to present data, views, or arguments . . . at least twenty-one days prior to its proposed action," including publication in the Massachusetts Register, notification to interested parties, and filing with the state secretary, and to publish any notification "no later than one week prior to the date of any action to which such [notice relates]."

The Board knew any change to the blended ratio would work a substantive effect. You notified the Board of this in the June 20, 2014 memo, stating that:

In conjunction with consideration of amendments to the charter school regulations, we have discussed with you proposed changes to the 80/20 achievement-to-growth ratio used in our current school accountability formula. Under our current regulations, any change in the ratio will affect both our classification of schools for accountability purposes and our calculation of the lowest performing ten per cent of districts for charter cap lift purposes.

Furthermore, in the published 2014-2015 DESE document titled "Application for a Massachusetts Public Charter School" dated April 30, 2014 (Application) – on which the applicant group continues to rely in this application process – the 80/20 weighting ratio was specifically cited as applicable. The Application further promised that "[a]pplicant groups will be kept informed by the [DESE] of future changes that impact the availability of seats in their proposed charter region."

The depth of substantive impact worked by the change in weighting methodology was not known, and does not appear to have been communicated within the divisions of the DESE. The applicant group began the DESE charter application processes in public Fiscal Year 2013/2014 in accordance with the timeline published in the Application. The first step in the process was a Letter of Intent submitted on June 18, 2014. It was due by June 26, 2014.

The applicant group submitted its Prospectus on July 23, 2014. Unbeknownst to the applicant group, on September 26, 2014, more than three months after beginning the application process, and after an enormous expenditure of time and resource, the DESE published revised calculations of the lowest performing 10 per cent districts utilizing the new 75/25 weighting methodology which – despite Brockton's long history of low performance – removed Brockton from the lowest performing 10 per cent of districts in the 2013/2014 year. Prior to this change in methodology, data released in 2012 and 2013 ranked Brockton in the lowest performing 10 per cent of districts. In 2013, Brockton ranked in the lowest performing 3 per cent of districts. In 2012, Brockton ranked in the lowest performing 2 per cent of districts. The multiple of achievement-to-growth for Brockton in 2014 is 23.87 – the average multiple among all 292 ranked districts is 1.69, and the median is less than 1.00. The BESE amendment to the weighted ranking methodology worked a material effect on Brockton's status.

Nonetheless, by telephone call, email and website publication, dated September 30, 2014 the DESE notified the applicant group that they were one of two

commonwealth charter school applicants invited to proceed with their application. Moreover, on October 6, 2014 representatives of the DESE met with the applicant group to discuss further application procedures and logistical details. At no time during that meeting did the DESE mention Brockton's disqualification. As of the date of this correspondence, the DESE website continues to announce the applicant group's invitation to proceed with the application process.

On October 7, 2014 the applicant group received an email from Cliff Chuang, Associate Commissioner for Charter Schools and School Redesign, stating that because the new calculations removed Brockton from the lowest performing 10 per cent of districts in 2013/2014 the group's application could not move forward without a change in location or district configuration.

The applicant group believes the BESE's move from an 80/20 weighted ratio to a 75/25 weighted ratio was made upon unlawful procedure, and that the BESE did not anticipate the depth of its substantive effect.

STATUTORY INTERPRETATION

The proper implementation and application of 603 CMR 1.04(9) and M.G.L. c. 71 §§89(i)(2) and (i)(3) requires analysis of various language pertaining to two-year timeframes. The provisions read in pertinent part as follows (emphasis added):

603 CMR 1.04(9)

The Commissioner shall annually publish a ranking of all districts that are subject to charter school tuition charges, for the purpose of determining the lowest 10% as specified in M.G.L. c. 71, §89(i)(2), and (i)(3). Such ranking shall be calculated by determining *the average ranks* for each district's English language arts, mathematics, and science composite performance index; the per centage of students scoring warning or failing in English language arts, mathematics, and science; the per centage of students scoring advanced in English language arts, mathematics, and science; and student growth per centiles for English language arts and mathematics, *for the two school years immediately preceding the current year*. These calculations shall use weighting consistent with the Department's approved methodology for the state accountability system.

M.G.L. c. 71 §89(i)(2)

Not less than 2 of the new commonwealth charters approved by the board in any year shall be granted for charter schools located in districts where overall student performance on the statewide assessment system approved by the board under section 1I of chapter 69 is in the lowest 10 per cent statewide *in the 2 years preceding the charter application*.

M.G.L. c. 71 §89(i)(3)

In any fiscal year, if the board determines based on student performance data collected pursuant to section 1I, said district is in the lowest 10 per cent of all statewide student performance scores released *in the 2 consecutive school years before the date the charter school application is submitted*, the school district's total charter school tuition payment to commonwealth charter schools may exceed 9

per cent of the district's net school spending but shall not exceed 18 per cent. If a district is no longer in the lowest 10 per cent, the net school spending cap shall be 9 per cent, unless the district net school spending was above 9 per cent in the year prior to moving out of the lowest 10 per cent in which case the net school spending cap shall remain at the higher level plus enrollment previous [sic] approved by the board. The department shall determine and make available to the public a list of the school districts in said lowest 10 per cent.

These provisions must be read in tandem. Like the change to performance calculations, a determination of which 2 years' data is to be used, and in which configuration, can have a dispositive effect on the identification of the lowest performing 10 per cent of districts. The DESE regulation at 603 CMR 1.04(9) calls for the average ranks for the two school years preceding the current year. M.G.L. c. 71 §§89(i)(2) and (i)(3) call for two different things: the rule of prioritization covered by subsection (i)(2) is to be based on any 1 of 2 years preceding the application; the rule of funding covered by subsection (i)(3) is to be based on 2 consecutive years preceding the application.

One Year

In its most recent implementation of the M.G.L. c. 71 §89(i)(2) mandate via 603 CMR 1.04(9) – based on which the DESE notified the applicant group that Brockton no longer fell within the lowest performing 10 per cent of districts – the DESE did not average 2 years of rankings according to its own reading. More importantly, in its initial implementation of the M.G.L. c. 71 §89(i)(2) mandate via 603 CMR 1.04(9), the BESE did not differentiate between prioritization and funding, i.e. any 1 of 2 years versus 2 consecutive years, and instead assumed a district must fall within the lowest performing 10 per cent of districts for two consecutive years to qualify as a priority district. In its most recent implementation, the DESE used only 1 year of rankings, its latest rankings (and again, an improperly weighted ranking), to determine that Brockton no longer fell within the lowest performing 10 per cent of districts.

The BESE's initial and most recent implementations do not account for a fundamental canon of statutory construction: the Legislature is presumed to act intentionally and purposely when it includes language in one section but omits it in another. "Where the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present." *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 232 (2012) (citing *Commonwealth v. Galvin*, 388 Mass. 326, 330 (1983)). The judiciary "will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design." *Cummings Properties, LLC v. Cepoint Networks, LLC*, 78 Mass. App. Ct. 287, 289 (2010).

Two consecutive years among the lowest performing 10 per cent of districts are not required to satisfy M.G.L. c. 71 §89(i)(2) – only one of the two preceding years is. The Legislature could have used the word "consecutive" in M.G.L. c. 71 §89(i)(2), as it did in the very next subsection in an integrated context, M.G.L. c. 71 §89(i)(3), but it intentionally chose not to.

Two Years

Also and only in the alternative, M.G.L. c. 69 §1I and c. 71 §§89(i)(2) and (i)(3) contemplate a measure of discretion in the establishment of a statewide performance assessment system – if otherwise in accordance with law, e.g. the APA

– but they do not give the DESE a choice of which years to utilize among the years of rankings. Therefore, even if consecutive years of rankings were to be required, it is the two years of rankings preceding the charter application that govern – not the two years of most recent rankings.

603 CMR 1.04(1) generally outlines the charter application process, but specifically requires applicants to submit materials in accordance with the schedule, application form, and guidelines established by the DESE. The DESE established and published and pursued extensive application processes that began with an initial submission due no later than June 26, 2013 in Fiscal Year 2013/2014. Applicant groups were referred to as applicants throughout the process once they initiated their application in that year. The DESE Application document referenced *supra* does not permit an applicant group to proceed with any later stage of the application process without completing preceding stages. It is an integrated process, the initial date for which triggers the "2 years preceding the charter application" language of M.G.L. c. 71 §89(i)(2) – note, not the two years preceding the date the charter school application is "submitted" as provided for in M.G.L. c. 71 §89(i)(3). Thus, the 2 years preceding charter applications in this cycle are 2011/2012 and 2012/2013 – and again Brockton ranked in the lowest performing 10 per cent of districts in both years. The understanding of the DESE, as exhibited by its conduct and communication throughout the applicant group's engagement with it, supports this understanding.

Averaging Years

Lastly, and only in the alternative to the alternative, if the 2013/2014 ranking year is to be included in the 2-year determination, and two consecutive years are to be utilized, the DESE must at the very least follow its own regulatory guidelines and average the 2 preceding years of rankings, and for the 2013/2014 year it must use an 80/20 weighted rank, as discussed above.

PRIORITIZATION

Perhaps most significantly of all, because it moots all other discussion on these subjects, is another fundamental canon of statutory construction, that the effectuation of the purpose of legislation must be the principal goal. The overarching purpose of M.G.L. c. 71 §89 is to establish charter schools, not to prevent their establishment. Coordinately, the purpose of M.G.L. c. 71 §89(i)(2) is not to limit the number of charters granted in any particular cycle, but rather to prioritize among competing applications, should there be any. The statutory text itself is "the principal source of insight into Legislative purpose. In interpreting the statute, [courts] attempt to give effect and purpose to all of its words, for *barrenness of accomplishment is not lightly to be imputed to the legislative branch of the government.*" *Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd.*, 453 Mass. 135, 142 (2009) (emphasis added) (internal citations omitted). Absurd results, or results contrary to the Legislature's intention, or results that cause null sets, are to be consciously avoided. *White v. Boston*, 428 Mass. 250, 253 (1998).

If after review the DESE determines that no current applications for charters address a district falling within the lowest 10 per cent of districts, and if no charters are granted in this application cycle because the DESE determines that before it can issue any charters it must first grant them to two districts falling within the lowest 10 per cent of districts, the outcome would bind the DESE to an interpretation that requires the denial of a charter to an applicant group when it is the only applicant group in a given year, even if the group's application addresses a district falling within the lowest 10 per cent of districts. This is an absurd and unintended result, works against the purpose of the charter school statutory scheme, and reduces the

sum of action from 1 to 0 against reason. Again, the purpose of M.G.L. c. 71 §89(i) (2) is not to limit issuance of charters to otherwise qualifying applicants – it is to prioritize lowest performing districts from among others. Where no district falling within the lowest performing 10 per cent of districts is addressed by an applicant group in an application cycle, the DESE retains discretion to grant charters to districts falling outside the lowest performing 10 per cent of districts. And again, it also retains the discretion to grant only one charter addressing a district inside or outside the lowest performing 10 per cent of districts to an applicant if that applicant is the only applicant in an application cycle.

REQUEST FOR REVIEW OR WAIVER

For the foregoing reasons, the undersigned applicant group requests DESE review of the decision to exclude Brockton from the lowest performing 10 per cent of districts in this current charter application cycle and to recalculate its determination of the lowest performing 10 per cent of districts.

In the alternative, the undersigned applicant group requests waiver from the DESE implementation of 603 CMR 1.04(9) for good cause and special circumstances shown. The duration of the waiver sought is up to and including final determination in 2015 of charter issuance to the applicant group. This waiver would permit the DESE to reconfigure its processes, methodologies and determinations with time to issue future rankings prior to the initiation of a charter application cycle, thus eliminating state and applicant waste.

The undersigned applicant group certifies that it has made a good faith effort to comply with all procedures and provisions applicable to its charter application before the DESE.

As a formal matter, the applicant group reserves any and all applicable rights and bases for action, including those pertaining to due process, estoppel, mandamus, detrimental reliance, freedom of information, open meetings, declaratory review, all standards of review, and the like. The applicant group has provided the factual account contained herein to the best of its knowledge and reserves the right to amend it upon new or clarified information.

We truly admire the work of the Board. The gradual introduction of new public educational models to a state as historically involved in public education as ours is Herculean – and perhaps even that descriptor does only some justice to the undertaking. This is righteous work on all sides. Please let me know if I may be of further assistance.

Respectfully submitted on behalf of the New Heights of Brockton applicant group this 16th day of October, 2014.



Justin DuClos

Cc: Mr. Jeff Wulfson
Mr. Cliff Chuang
Mr. Mike Sullivan
Mr. Omari Walker
Ms. Janine Matho
Mr. Marc Kenen