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VIA EMAIL

October 31, 2014

Ms. Margaret A. McKenna, Chair
Mr. Mitchell D. Chester, Secretary
The Board of Elementary and Secondary Education
75 Pleasant Street
Malden MA 02148

Re: M.G.L. ch. 71 §89(i) » Legislative History

Dear Ms. McKenna & Mr. Chester:

I have again been engaged by the New Heights of Brockton charter school applicant group, which presently has a charter application pending before the Board of Elementary and Secondary Education (BESE). My charge is to discern the legislative intent of M.G.L. ch. 71 §89(i). The applicant group believes the Department of Elementary and Secondary Education (DESE) did not accurately interpret that provision before alerting it to the potential ineligibility of its charter proposal due to a focus on the Brockton district, which was recently sited outside the lowest performing 10 per cent of districts by DESE with specific reference to M.G.L. ch. 71 §89(i)(2) ¶2.

The BESE currently has a Request for Review/Waiver (Request) from the applicant group outstanding before it. This letter is in furtherance of that Request, and primarily issue No. 3 noted below. Through that Request the applicant group has asked the BESE to review its methodologies for compliance with M.G.L. ch. 71 §89 and M.G.L. ch. 30A, and to some extent 603 CMR 1.04(9), specifically with regard to three issues:

1. The decision to shift from an 80/20 to a 75/25 achievement-to-growth weighted ranking;
2. The decision to consider only 1 year and the latest year of rankings in its removal of Brockton from its list of the lowest performing 10 per cent of districts; and
3. The decision to disallow issuance of a charter to any applicant group addressing a district not in the lowest performing 10 per cent of districts when there are not at least two charters also being issued to applicant groups addressing districts in the lowest performing 10 per cent of districts in the same application cycle.

The applicant group reiterates these positions as previously articulated, and further reiterates that it is only seeking a waiver in the alternative to the review and reconsideration of these issues by the BESE.

Over the past several days I visited the State Archives, the State Library, various state offices, and spoke with key policy leaders, experts and officials who have long been active in the Commonwealth's business of continually and responsibly maintaining and upgrading its educational infrastructure. I reviewed paper records from the General Court and Governor's office, digital archives from an array of other primary and secondary sources, and multimedia files capturing live debate, and in that process discussed developing issues with the aforementioned leaders, experts and officials. I tracked the petitioning, amendment and enactment of bills, from the Education Reform Act of 1993 to An Act Relative to the Achievement Gap Act of 2010 (ARTAG), and conducted intertextual analyses on the evolution of the Commonwealth's charter school provisions, most particularly M.G.L. ch. 71 §89(i). Here I share with you my findings.

Prior to passage of St. 2000 ch. 227, M.G.L. ch. 71 §89(i) read in pertinent part:

> In approving new charters in any year, the board may give priority to proposals for schools located in low performing districts or schools based upon, but not limited to, such indicators as scores on state wide assessments, and drop out rates.

After passage of St. 2000 ch. 227, the pertinent passage read:

> Not less than three of the new 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 of education pursuant to section 1I of chapter 69 is at or below the statewide average in the year preceding said charter application.

The next iteration of this provision came via St. 2010 ch. 12 (ARTAG), and is the current language appearing at M.G.L. ch. 71 §89(i)(2) ¶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.

These provisions began as and still remain prioritization provisions. Understanding this more completely requires tracking the legislative history. Context is the fundamental component of legislative intent, but of course all of what transpires in the years leading up to and surrounding a piece of legislation cannot practicably be codified into it. Here it is the surrounding circumstances concerning the numerousness of charter proposals that elucidate the meaning of M.G.L. ch. 71 §89(i)(2) ¶2.

The history of DESE charter application cycles shows that this current 2014/2015 cycle is an outlying year for its low number of final commonwealth charter applications – only 2. Of the 19 permissible data-known cycles in which a prospectus was submitted none have yielded fewer than the current 2 final applications. In fact, in all but this current cycle the BESE received final applications that numbered at least or more than the "not less than" figure set out in M.G.L. ch. 71 §89(i).

Application Cycle History

Application Cycle Year	*Letters of Intent*	*Commonwealth Prospectus*	*Horace Mann Prospectus*	*Total Prospectus*	*Commonwealth Final Applications*	*Horace Mann Final Applications*	*Total Final Apps*	*# Commonwealth Approved*	*# Horace Mann Approved*	*Total Approved*
1994		64	0	**64**	48	0	**48**	15	0	**15**
1994-1995		26	0	**26**	36	0	**36**	7	0	**7**
1995-1996			0	**0**		0	**0**	3	0	**3**
*1996-1997**	*0*	*0*	*0*	**0**	*0*	*0*	**0**	*0*	*0*	**0**
1997-1998	74	48	13	**61**	25	10	**35**	8	5	**13**
1998-1999	38	31	4	**35**	9	1	**10**	5	1	**6**
1999-2000	4	0	2	**2**	0	2	**2**	0	1	**1**
2000-2001	38	32	1	**33**	16	1	**17**	6	1	**7**
2001-2002	34	27	0	**27**	9	0	**9**	5	0	**5**
2002-2003	37	25	0	**25**	11	0	**11**	5	0	**5**
2003-2004	20	12	2	**14**	5	2	**7**	3	1	**4**
2004-2005	15	8	0	**8**	5	0	**5**	2	0	**2**
2005-2006		14	0	**14**	4	0	**4**	3	0	**3**
2006-2007	10	10	0	**10**	4	0	**4**	1	0	**1**
2007-2008	12	9	1	**10**	4	1	**5**	2	1	**3**
2008-2009	11	7	0	**7**	3	0	**3**	1	0	**1**
2009-2010	20	13	1	**14**	7	0	**7**	1	0	**1**
2010-2011	63	38	4	**42**	20	3	**23**	13	3	**16**
2011-2012	19	5	2	**7**	5	1	**6**	3	1	**4**
2012-2013	24	21	1	**22**	10	1	**11**	4	1	**5**
2013-2014	16	10	0	**10**	6	0	**6**	2	0	**2**
2014-2015	10	4	4	**8**						
Totals	**421**	**404**	**35**	**439**	**227**	**22**	**249**	**89**	**15**	**104**

**1996-1997* *Cap reached, no application cycle*

Approval Rate (Prospectus) as of 2013-2014: 24%
Approval Rate (Applications) as of 2013-2014: 42%

Last updated on: 09/30/14

But this did not stop the BESE from on 5 separate occasions approving fewer than the "not less than" figure, all of them while the St. 2000 ch. 227 iteration was in effect and the legislative intention likely remained clearer, as the officials involved at those times were closer to the shift from the purely discretionary prioritization of the original language to the mandated prioritization (i.e. "not less than three"). Those years were 2004/2005, 2006/2007, 2007/2008, 2008/2009, and 2009/2010.

Other than the initializing years – which are the equivalent of a cap lift – the years following cap lifts have yielded the most applications, namely 1997/1998, 2000/2001, 2010/2011. Because that fact and historical application cycles supported the assumption, in 2000 and 2010 the legislature assumed that more applications than the "not less than" figure would continue to be submitted to DESE. St. 2000 ch. 227 limited the number of commonwealth charters that could be issued in a single year to 7 until the 72 cap was reached because the legislature anticipated demand and qualification for charters might regularly exceed even that figure.

Debate from the Senate floor supports this understanding of the context. The most important change in language for these purposes came via St. 2000 ch. 227 – the shift from BESE discretionary prioritization to mandated prioritization. Senate Bill 2027 was introduced in October 1999 without a "not less than" figure. Amendments were offered through June 2000, including proposed versions of the "not less than" language. In July 2000, a conference committee was established to reconcile differences among the engrossed House and Senate versions. Among others, Senator Robert Antonioni was appointed to the conference committee. When the matter went into conference neither version included a finite "not less than" figure. When it came out, the reconciled version did – three – and the conference committee report was put up for debate on July 29, 2000.

Senator Antonioni spoke:

> We also indicate that not less than three of the charters awarded each year be awarded in low performing areas that are at or below the state average. We also stagger the increase in charter schools, both for Horace Mann and commonwealth charter schools. What we are doing is increasing the cap for both of these on a staggered basis over five years.

Senator Henri S. Rauschenbach then asked:

> Just a further elaboration or clarification. How well you're doing on the MCAS – could you elaborate on how many commonwealth charters, Horace Mann charters in any given year – is what you're suggesting the charter schools report is the prioritization of who is eligible to receive a charter [sic] is going to depend on your relative MCAS standing?

Senator Antonioni responded with the answer then and now (emphasis added):

> The way that the charters are awarded is this – we allow up to seven in each year of both the Horace Mann and commonwealth charter schools varieties. We indicate that *of those 14 prospective charters, not less than three* have to [be] located in an area that scores at or below the state average in the MCAS at the time of application for that charter schools [sic]. The reason we do that is *to try and place something of a priority* on areas where students may need some additional help and to provide an additional avenue of choice in those areas, by the same token.

Both the Senate and the House adopted the conference committee report that same day. Two days later the bill was enacted by both the Senate and the House and laid before the Governor. The Governor signed the bill into law on August 10, 2000.

Senator Antonioni's remarks confirm that M.G.L. ch. 71 §89(i)(2) ¶2 is designed to prioritize low performing districts from among expected numerous applications – some of which might address low performing districts, some of which might not. It was not designed to prevent charter issuance when the number of applications addressing districts within the lowest performing 10 per cent does not reach the "not less than" figure.

Presciently, Susan Barker – then Assistant Commissioner for Charter Schools – commented on the legislation at the request of the Governor's office. In a memo dated August 8, 2000 addressed to Governor Argeo P. Cellucci and Lieutenant Governor Jane Swift, Sara R. Lombardi, then Director of Legislative Research, wrote a note about a section of the memo titled Revising Certain Priorities in Charter School Approval, which covered the changes to M.G.L. ch. 71 §89(i) (emphasis added):

> DOE recommends that this bill be signed. In the limited comments provided, the Assistant Commissioner for Charter Schools, Susan Barker, notes as negative aspects of the bill that: (1) *by giving priority* to charter schools based on performance on statewide tests, *the bill unfortunately may suggests [sic] that charter initiatives are designed for failing schools alone* and also will require DOE to rank schools by their performance on such tests, a practice which DOE so far has purposely avoided . . . .

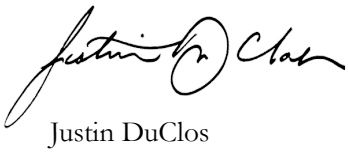
Ms. Barker predicted that the "not less than" language might be misinterpreted in a future unknowable set of circumstances, one possibility being a cycle that yields a small number of charter applications. And she predicted it might be misinterpreted in precisely the way the applicant group has been told BESE reads the provision, i.e. that no charters will be issued because none address the lowest performing 10 per cent of districts.

M.G.L. ch. 71 §89(i)(2) ¶2 is specifically not a cap provision and is unlike actual cap provisions contained in other subsections of M.G.L. ch. 71 §89(i), such as the total cap, type caps, population-based caps, and funding caps. M.G.L. ch. 71 §89(i)(2) ¶2 is a mandate for prioritizing among competing applications, some that address districts within the lowest performing 10 per cent, and some that do not. If there are no such competing applications the prioritization mandate does not come into play and the BESE retains its full discretion. Consequently, the BESE need not issue at least 2 charters addressing districts within the lowest performing 10 per cent before issuing any others when there are not at least 2 final applications addressing districts within the lowest performing 10 per cent.

I cannot stress enough the admiration the applicant group has for the work being done by the BESE and DESE on new and existing charter school projects across the Commonwealth. The applicant group has undertaken this and prior research and analyses to better inform a process it holds in the highest regard.

The applicant group again requests that the BESE review the DESE position on this matter. Should you have any questions, please contact me directly at your convenience.

Sincerely,



Justin DuClos

Cc: Mr. Omari Walker
Mr. Michael Sullivan, Esq.