

CENTER FOR LAW AND EDUCATION

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To: Cliff Chuang, Associate Commissioner, DESE
From: Jenny Chou, Kathleen Boundy
Re: Follow-up to Focus Group – July 15, 2013—Charter School Recruitment/Retention Efforts
Date: 7-26-13

The Center for Law and Education (CLE), a national advocacy organization with offices in Boston and Washington, D.C., strives to assist low-income students, parents, and advocates improve their public schools and work with their communities to fulfill every student's right to a high-quality education. CLE assists organizations and community groups seeking to challenge policies and systemic practices that impede low-income students, who are disproportionately students of color, English Language Learners, and students with disabilities, from attaining the same high academic standards set for all students. For over 35 years, CLE has played a major role in the shaping of education legislation and policies at the national and state level, including Title I of the Elementary and Secondary Education Act, reauthorized as the No Child Left Behind Act of 2001 (NCLB), and the Individuals with Disabilities Education Act (IDEA). In Massachusetts, CLE provides legal and technical assistance, including co-counseling, to public interest and private pro bono counsel representing indigent students in education law related matters. In the fall of 2008, CLE formed a collaborative partnership with the Boston law firm, Choate, Hall and Stewart, and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School to provide direct representation to low-income students who are subject to disciplinary suspensions/expulsions, inappropriate educational placements, and "push-outs" through inappropriate referrals to the juvenile court. Through our MA based work, CLE has both represented and provided on-going legal support to counsel representing students, with and without disabilities, who were enrolled in charter schools and subject to suspension, expulsion and other 'push-out' practices. In addition, CLE authored *Charter Schools and Students with Disabilities: A Preliminary Analysis of Issues and Concerns*¹ (2012) under a contract with the Council of Parent Attorneys and Advocates.

We appreciate the invitation to share our concerns about charter schools in MA – concerns that while not specific to only charters in MA, reflect our experience in representing MA students from low-income families residing primarily in Boston. Below we address three issues that fall under the umbrella of denial of equal educational opportunity to our clients by charter schools, in particular Commonwealth charters that operate as stand-alone LEAs. The related issues are: 1) the selective and discriminatory enrollment of students with limited English proficiency and

¹ See KATHLEEN B. BOUNDY, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, *CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: PRELIMINARY ANALYSIS OF THE LEGAL ISSUES AND AREAS OF CONCERN* 157, 159 (2012), available at www.copaa.org/resource/collection/7D72B914-2EC7-4664-9124-A32598DA1ABE/Charter-Schools-and-Students-with-DisabilitiesFINAL.pdf.

students with disabilities who have challenging learning needs; 2) failure to provide specialized instruction and related services necessary for students with disabilities having a range of educational needs to progress in the general education curriculum and misusing 603 C.M.R. §28.10(6) to change their educational placements; and 3) adoption and use of discipline policies and practices that violate due process and result in excessive rates of suspension and unlawful exclusion of students. As is evident from the data, these push-out policies and practices contribute to high attrition rates for the already limited enrollment of LEP students and those with disabilities with IEPs, and we suspect, target struggling learners.

Under-enrollment of Students with Limited English Proficiency and Students with Disabilities

Data from the MA DESE affirms that charter schools serve a disproportionately low percentage of LEP students and to a less extent, students with disabilities. This is especially notable as compared to the traditional public schools in the urban districts they serve, e.g., Boston Public Schools (BPS).² A breakdown of the students with disabilities enrolled at least in the Commonwealth charter schools revealed that these schools serve a very different subset of students with disabilities than those in traditional Boston public schools.³ Operating as independent, stand-alone LEAs, many Commonwealth charter schools essentially enroll only those students with disabilities who can be educated with limited specialized instruction and support services in primarily inclusive classrooms and/or limited English proficient students who require minimal assistance from ESL or bilingual educators. This selectivity in admissions is discriminatory to the extent that, e.g., the charter schools are incapable of providing or fail to provide, the array of programming and support services necessary to meet the educational needs of the students admitted to the school in violation the Equal Educational Opportunity Act, 20 U.S.C. § 1703(f) and MGL c. 71A, or the right to a free appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1)(A), MGL, c. 71B, and federal and state civil rights laws.

The under-enrollment of LEP students and those with disabilities in charter schools⁴ may be explained by inadequate recruitment and admission policies that screen out or target certain students perceived as having greater educational needs. For example, some charter schools, in particular, Commonwealth charter schools that function as stand-alone LEAs, fail to engage in adequate and effective outreach to non-English speaking families who may also need additional support to navigate the charter school process and complete the application. Some charters, by asking parents to disclose whether their children are classified as LEP or have an Individualized Education Program (IEP), may indirectly discourage parents from completing the application process. Still others more directly discourage parents from applying by planting seeds of doubt and fear that the charter school, as a stand-alone LEA, cannot meet their children's specific

² KATHLEEN J. SKINNER, MASS. TEACHERS ASS'N, CHARTER SCHOOL SUCCESS OR SELECTIVE OUT-MIGRATION OF LOW-ACHIEVERS (2009), *available at* <http://www.massteacher.org/teaching/cepp/~media/Files/PDFs/CEPP/charterschools0909.ashx>. (LEP students comprised only 1.9% of the charter school population in Boston as opposed to 18.9% of students enrolled in BPS).

³ See SKINNER, *supra* note 2.

⁴ See school Profiles, which include demographic and enrollment data from the 2012-2013 school year collected by the Massachusetts Department of Elementary and Secondary Education and available at: <http://profiles.doe.mass.edu/>

needs, whether a need for limited LEP supports, or for special education services beyond that provided to the vast majority of students participating in an inclusive, one-size-fits-all regular education classroom.

In addition, many charter schools, including most of the Commonwealth schools serving Boston students, require parents to sign “commitment contracts” that impose time constraints and responsibilities on parents that may have financial implications for low-income families, non-English speaking parents, and single-parent families. Moreover, due to inadequate recruitment efforts on the part of charter schools, including inadequate dissemination of information in languages other than English, information regarding the charter schools’ legal obligation to provide LEP students an equal educational opportunity and students with disabilities a free and appropriate public education, parents of LEP students and those with special education needs will not likely be sufficiently knowledgeable about their rights, or feel able to challenge. Many parents of children with challenging learning needs “choose” to send their children to traditional public schools based on a mistaken belief that charters are not required by law to provide specialized services to these subgroups.

Furthermore, as discussed below, we know from both anecdotal and documented evidence that many charters actively “encourage” parents to remove their children from the charter school, often due to their challenging behavior and/or low test scores. Whether through inappropriately invoking 603 C.M.R. § 28.10(6) or, using the threat of expulsion – often based on automatic suspensions for trivial and subjective offenses (e.g., giggling, leaning back in chair, having a bad attitude, being insubordinate) - the end result is the same -- parents fearful of expulsion or unwilling to leave their children in placements where it is made clear they are “not wanted,” remove them from the charter schools. From our experience, we are also aware that many charter schools often fail to refer students with possible disabilities for evaluation, as is required by IDEA’s “child find” obligations, and discourage parents from seeking to initiate the special education eligibility process.

Push-out Policies and High Attrition of Students with Disabilities

Attrition through Failure to Provide FAPE through the Required Continuum of Alternative Educational Placements and Misuse of 603 C.M.R. § 28.10(6)

Charter schools, including Commonwealth charter schools, as stand-alone LEAs, are required in spite of their limited capacity, to provide specialized instruction and supportive services necessary to meet the needs of students with different disabilities through a continuum of alternative settings. 34 CFR §300.115. The continuum ranges from the least restrictive to the most restrictive provision of specialized instruction, in general, instruction in regular classes, special pull-out classes, substantially separate classes, special programs and schools. 34 CFR §300.115(b)(1). It is not enough for *any* LEA to provide only inclusion classrooms, as some students require provision of direct instruction, additional structure, and certain related services that cannot necessarily be effectively provided in an inclusion classroom. These may be students

with specific learning disabilities and executive functioning deficits or serious social, emotional and behavioral manifestations that impede their learning full-time in the inclusion classroom.⁵

These students have a right to be educated to the maximum extent appropriate with students without disabilities, consistent with IDEA’s requirement of least restrictive environment (LRE). 20 U.S.C. §1412(a)(5)(B). Removal of a child in need of special education from the regular education environment is to occur “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁶ The determination of LRE must be based on each student’s IEP, not on a diagnosis or specific disability label. Students cannot be placed in separate or more restrictive placements solely because they require modifications to the general curriculum.⁷ This was underscored by the U.S. Department of Education, Office for Special Education Programs (OSEP) in *Letter to Wohle*, 50 IDELR 138 (OSEP 2008). Yet, this is exactly what the stand-alone Commonwealth charter schools are doing by misusing MA special education regulation 603 CMR § 28.10(6) to remove *enrolled* students with more challenging disability-related educational needs from their schools contrary to their rights and each charter school’s obligation under law.

Instead, the general curriculum must, to the extent appropriate, be adapted or modified to meet the student's unique needs. Furthermore, a district's obligation to expose students to the general curriculum does not end simply because the LRE for a student with a disability is determined to fall outside of a regular education setting.

Through our representation of students, we are aware that many Boston based Commonwealth charter schools misuse 603 CMR § 28.10(6) to remove particular students with special education needs whose disabilities present academic and, perhaps, behavioral, challenges from the stand-alone district school. Contrary to the manner in which it is currently being used to attempt to “validate” the removal of students with disabilities, the regulation, as promulgated, allows charter schools *in only very limited circumstances* to forego programmatic and financial responsibility to educate certain students with low-incidence disabilities whose significant special education needs cannot, as determined by the IEP Team, be met by the charter/school district. Regulation 603 CMR §28.10(6) authorizes consideration of such removal only after the student’s IEP Team determines that (1) the student’s special needs are so significant that they cannot be met by the charter school modifying its curriculum, and (2) the student’s needs require consideration of an “out-of-district” placement through an “out-of-district day or residential school” placement. In other words, the student’s needs are so serious as to require consideration of the most restrictive program and placement options under the LRE provision of federal and state law. If the student’s needs are so significant to require consideration of an “out-

⁵ Because the continuum ranges from the least restrictive to the most restrictive provision of specialized instruction, in general, instruction in regular classes, special pull-out classes, substantially separate classes, special schools [34 CFR 300.115(b)(1)], it is not altogether clear –barring participation in a collaborative with other LEAs or through other contractual arrangements -- how any stand-alone Commonwealth charter school can meet this mandate and how the MA DESE, as the SEA, is approving of decisions by the MA Board of Education, as the authorizing agent for Commonwealth charter schools.

⁶ 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. §300.114(a).

⁷ 34 C.F.R. §300.116(e).

of-district program,” the charter IEP Team must schedule a follow-up meeting “to determine placement”, and must invite representatives of the school district where the student resides to participate as a member of the placement team pursuant to 603 CMR 28.06(2)(e)(1). At the subsequent Team meeting convened by the charter school, the Team first considers if the school district where the student resides has an “in-district program” that could provide the services recommended by the Team, and if so, the charter school must arrange with the school district where the student resides to deliver the necessary services or *alternatively* develop an appropriate in-district program at the charter school for the student.⁸ 603 CMR 28.10(6)(a)(2). However, if the placement Team determines that the student requires an “out-of-district program” to provide the services identified on the student's IEP, then the placement proposed to the parent “shall be an out-of district day or residential school, depending on the needs of the student.” With parental consent to the proposed IEP and proposed placement, “programmatic and financial responsibility shall return to the school district where the student resides” which “shall implement the placement determination of the Team...” 603 CMR 28.10(6)(a).

Greater DESE oversight and monitoring is needed to examine the scope of this problem and to mitigate what we believe is a serious misuse of this regulation that has the effect of pushing out students who are *already* under-represented among those enrolled in the charter schools, and who typically do NOT have a low-incident disability that requires such substantial modification of the curriculum as to trigger consideration of an out-of-district separate day or residential school program. Low-income Boston parents are at a serious disadvantage in obtaining timely counsel to challenge the determination of the charter IEP Team and to assert their child’s right to “stay-put” when the Commonwealth charter has indicated that it cannot or does not plan to educate the child whom it is dis-enrolling in this manner.

Attrition through Discipline Policies and Practices Resulting in Excessive Rates of Suspension and Unlawful Exclusion of Students without Due Process

Many MA charter schools operate under a “no-excuses” model that incorporates zero tolerance discipline exclusion policies for non-violent school code violations that are applied in an arbitrary manner that contributes to high suspension, expulsion, and as discussed above, attrition rates⁹. Based on our experience, students are subject to “automatic” suspension for accumulating demerits for numerous behavioral indiscretions (e.g. “bad attitude”, “using a superior voice”, “humming”, “poor posture,” “violating dress code,” “talking in class,” “closing eyes too many times during free reading”). Charter school administrators and teachers document such transgressions and assign demerits for offenses falling under such broadly defined and subjective categories as “disrespect,” “insubordination,” or “counter-productive behavior.” After three “automatic” suspensions, regardless how trivial the violations, the student is subject to expulsion, a punishment which, given the non-violent/non-emergency nature of the violations, is significantly disproportionate to the behavior at issue.

The charter schools’ use of these vague and poorly defined code violations deprives students of their constitutionally required notice of the behaviors for which they may be sanctioned. School

⁸ We are unaware of any such program ever being developed and implemented, but would think this approach consistent with the kind of “innovation” and research based practices expected of MA charter schools.

⁹See Skinner, note 2, at 26.

exclusion policies based on such violations also enhance the likelihood of certain students, e.g., those who are struggling academically, those whose behaviors may be a manifestation of their disability, and those who may have some challenging behaviors, including some who may be suspected but not yet identified as having a disability, being arbitrarily and capriciously targeted by teachers and administrators for such subjectively determined transgressions.

Students are suspended routinely without due process based on their School Codes filed with DESE that document the lack of basic minimal procedural protections to which they are entitled under *Goss v. Lopez*.¹⁰ For example, consistent with our experience, students who are subject to automatic suspensions, including for accumulation of demerits for apparently such unacceptable behavior as “yawning” or behaviors vaguely identified as “disrespect”, do not receive notice of the charges against them nor do they receive an opportunity to present their side of the story prior to a suspension; indeed, some handbooks explicitly deny students the right to a hearing.¹¹ Many charter school discipline codes/policies that we have reviewed fail to provide additional procedural safeguards when facts are in dispute and students face yet another suspension or even permanent expulsion from school (e.g. as a result of three suspensions of two days each for giggling, wearing the wrong attire, talking in class)¹² as is required by *Goss* and *Mathews v. Eldridge*.¹³ Some charter schools have policies that allow the school to extend suspensions upon an arbitrary determination at a “re-entry” meeting that the student is “not ready to return” to school.¹⁴

The combination of these so-called “no excuses” policies, arbitrary and capricious practices, and denial of due process contributes to the high suspension and attrition rates for struggling students, in particular, based on MA DESE data, students with disabilities. This data is likely further skewed by the failure of charter schools to refer for evaluation for special education eligibility under-performing and/or behaviorally challenging students suspected but not yet identified as having disabilities. These students are most vulnerable to being “pushed-out” by the charters and “voluntarily” removed under threat of expulsion by parents who may not be knowledgeable of or able to effectively raise the charter schools obligations under “childfind” in order to invoke their children’s right to protection during any pending evaluation under both federal and state special education laws.

Role of the State

We believe that the issues we have described are common to many charter schools, in particular, the stand-alone Commonwealth charters, and have serious implications for students, especially

¹⁰ 419 U.S. 565, 576-579 (1975).

¹¹ See e.g. *Community Charter School of Cambridge Student and Family Handbook*, available at <http://www.ccs.cambridge.org/sites/default/files/adminfiles/Student%20Handbook/CCSC%2012%20StudFamHandbookv-FIN1.pdf>.

¹² See e.g. *Boston Renaissance Charter Public School Family Handbook*, available at <http://www.bostonrenaissance.org/ourpages/auto/2012/11/26/56430876/SY%2012-13%20Family%20Handbook.pdf>; *The City on the Hill Student and Family Handbook*, available at <http://www.cityonahill.org/files/Student%20Handbook%2012-13%202.pdf>.

¹³ 424 U.S. 319, 335 (1976).

¹⁴ See e.g. *The City on the Hill Student and Family Handbook*, available at <http://www.cityonahill.org/files/Student%20Handbook%2012-13%202.pdf>.

those from low-income families seeking equal educational opportunities to benefit from public “schools of choice.” Charter schools, as the Board of Education and the Department of Elementary and Secondary Education are well aware, are expected to provide innovative programs, learning and assessments; to provide teachers a place for using alternative, innovative methods of educational instruction and school structure and management; and to provide models for replication in other public schools, while still being accountable for students' educational outcomes.¹⁵ Accountability for improved performance cannot be based solely on test outcomes of select students after those students with greater educational needs have been selectively “counseled out,” discarded, or otherwise weeded out of the enrollment through an array of “push-out” policies and practices, including excessive use of suspension without due process and under threat of expulsion.

While we acknowledge that some charter schools are clearly doing a better job than others in meeting the statutory requirements, too few are meeting, or even attempting to accept the challenge to develop and implement innovative, effective and replicable programming and instructional methods and strategies for improving the educational outcomes of those students who present with more challenging needs.

We hope that the State Board of Education and DESE will pick up this challenge to help ensure that the existing charter schools, for example in Boston, are held accountable to serve students representative of ALL district children. We hope the BOE and DESE will take this opportunity to monitor and review who is being served, to question selective enrollments so well documented by other studies, to scrutinize policies that create disincentives for serving a representative population, as well as state regulations that create loopholes and encourage selective exclusion through “sham” ‘changes in placement’ [603 C.M.R. § 28.10(6)].

Toward this end, we urge BOE and DESE to require the development and implementation of innovative programming, specialized instruction and methodologies for students who may be struggling to learn in the charter schools because of the obstacles created by their disabilities. For example, instead of making it easy for the primarily Commonwealth charters to send students with challenging disability-related educational needs back to unnecessarily restrictive, substantially separate programs in BPS, why can't BOE and DESE oversee the development and assessment of different integrated program models that might be replicated by BPS so as to reduce the very high numbers of students who are not being appropriately educated in the least restrictive environments, consistent with their rights, by the traditional public schools? The State can also request evidence that the charter schools are, through provision of effective specialized instruction and innovative, research based strategies and technologies, actually educating a significant percentage of students with “low-incident” disabilities who were not previously educated in the mainstream, and share the results of their innovative, integrated programming model with the traditional public schools. Additionally, given the well-documented research of the detrimental effects of out-of-school suspensions on students' opportunity to learn, a possible area of focused charter school innovation could be to establish more effective student support practices that lead to improved school climate and sense of community for all students through limiting the use of exclusionary discipline.

¹⁵ M.G.L. c. 71 § 89

Finally, we urge that charter schools be held accountable based on the statutory criteria for obtaining and renewing a charter – criteria focused on innovation, research, and replication of models, methods, and strategies for improving teaching, instruction and learning for ALL students –not just those who remain in the charter after the weaker students have been weeded out. The challenge of education is not teaching those who are prepared to learn, but those who, because of disability related needs, may be a disruption in class, and/or those who may struggle academically and require differentiated instruction, additional supports and services to help meet their academic, social and emotional needs.