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**Testimony of Nicole D. Snyder, Esq.  
on Behalf of the Pennsylvania Coalition of Public Charter Schools  
Special Education Funding Commission  
September 26, 2013**

Thank You Senator Browne, Representative O'Neill and members of the Commission for the opportunity to present testimony on behalf of the Pennsylvania Coalition of Public Charter Schools regarding the important matter of special education funding. We appreciate your strong commitment to ensuring equitable special education funding and we applaud your efforts in this vital matter that impacts so many individuals and schools throughout the Commonwealth.

**I. BACKGROUND**

Our office, Latsha Davis & McKenna, P.C., serves as solicitor for the Pennsylvania Coalition of Public Charter Schools ("PCPCS") and proudly provides legal counsel to charter schools and cyber charter schools throughout the Commonwealth, including representing schools in special education matters.

As a special education attorney for brick and mortar and cyber charter schools throughout Pennsylvania, I have observed first-hand the diligent commitment of charter school professionals to providing a free appropriate public education ("FAPE") to students with disabilities. I also witness and will discuss some of the struggles school personnel face when working within the constraints of both our funding system and some legal realities that do not always support the positive changes they strive to enact to better educational outcomes for the students with disabilities who have chosen to enroll their schools.

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In my practice, I have also had the opportunity to meet so many dedicated parents and exceptionally talented students who advocate for appropriate special education services. They too face struggles and frustrations in part due to funding and legal challenges just mentioned. I appreciate and respect their commitment to their children's futures, starting with the personal choice they made, for whatever their own reasons, to try a different type of public school.

As you know, the Pennsylvania Coalition of Public Charter Schools ("PCPCS") is a statewide organization for charter schools and cyber charter schools that promotes educational quality, transparency and accountability. PCPCS supports thoughtful legislation, including Act 3 of 2013, that reforms special education funding and accountability in an equitable and efficient way that takes into consideration the choice made by thousands of parents and guardians in the Commonwealth to enroll their students with special needs in charter and cyber charter schools.

PCPCS has been supportive of this legislation and this Commission from inception because this Commission and this legislation both recognize the intrinsic value of the special education student as an individual in this Commonwealth, regardless of the public school that the parent and student choose to attend.

## **II. STUDENT-CENTERED DECISION-MAKING**

Some prior testimony might have you believe that it is a dollar amount that leaves a district and enters a charter school. That is not the case. When a parent or guardian makes the thoughtful decision to send his or her child with special needs to a charter or cyber charter school, a **STUDENT**, and not a dollar amount, leaves the district and enrolls in the charter school or cyber charter school. The parent has now chosen the charter or cyber charter as the school that has the great honor and privilege to educate his or her most precious gift. Moreover, this student is a parent's greatest priority, and quite possibly even a future teacher, a future leader and a future taxpayer, but most importantly, this student is an exceptional person in his or her own right, with unique needs. This student is really all of our hopes for a brighter future. We, therefore, all have a duty, regardless of what public school this student elects, to offer this student an equitable chance to reach his or her full potential. This duty and mission starts with equitable funding.

Unfortunately, for far too many students with disabilities throughout the Commonwealth, equitable funding is not currently the reality. This includes inequitable funding for some special education students in charter and cyber charter schools.

## **III. CHARTER AND CYBER CHARTER SPECIAL EDUCATION REGULATIONS**

To be clear, charter schools and cyber charter schools must comply with Chapter 711 of Title 22 of the Pennsylvania Code, entitled "Charter School and Cyber Charter School Services and Programs for Children with Disabilities." There are 23 sections within Chapter 711 that direct the provision of special education in charters and cyber charters together with a myriad of additional federal special education regulations also incorporated into Chapter 711 by reference. Charter schools and cyber charter schools may not deny enrollment or otherwise discriminate in admission policies or practices on the basis of a child's disability or the child's need for special education or supplementary aids or services. 22 Pa. Code 711.7. Many students come to charter and cyber

charter schools having already been identified as requiring high cost services by a school district of residence or early intervention program. As required by IDEA, the new Multidisciplinary (“MDT”) Team or Individualized Education Program (“IEP”) Team, depending upon the student’s status, reviews the data and records received from the prior district, when the prior district send them. When a child with an IEP transfers to a charter school or cyber charter school, the charter school or cyber charter school is responsible upon enrollment for ensuring that the child receives special education and related services in conformity with the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA. 22 Pa. Code § 711.41.

Providing FAPE in charter and cyber charter schools involves navigating a complex set of mandates drafted with traditional school district delivery models in mind. Charter and cyber charter schools face unique challenges and opportunities when they balance innovation against the existing statutory and regulatory framework. It cannot be denied that there are significant costs associated with implementing IEPs at charters and cyber charters.

#### **IV. AUTONOMY WITH ACCOUNTABILITY**

Consequently, districts should not be able to unilaterally avoid special education funding obligations by second-guessing IEP team decisions made while that student is enrolled in a charter or cyber, particularly where districts do not retain the responsibility to provide FAPE to those students. That said, PCPCS welcomes state-level assistance to charter and cyber charter schools in oversight and accountability that respects the mandates of IDEA and FERPA for confidentiality of student information and that is independent of any impetus to reduce funding for a charter or cyber student in order to increase funding for a district student.

It has not been our experience that the special educators or parents who comprise the IEP team take the decision lightly to evaluate, to identify or to provide special education services for a student or to exit that student from special education services. There are a host of procedural safeguards in place at the state and federal levels that already ensure the integrity of this process and decisions made by IEP teams.

Like district schools, charter schools and cyber charter schools assume the duty to ensure that a student with a disability receives FAPE regardless of the charter or cyber charter school’s size, population, area of concentration or any budgetary or logistical constraints. Districts cannot second-guess IEP team decisions when they do not continue to retain the obligation to provide FAPE to those students.

#### **V. CHARTER AND CYBER CHARTER FUNDING FORMULA**

Charter schools and cyber charter schools receive state funding for enrolled students from the school district of residence of each student pursuant to state statute, Section 24 P.S. § 17-1725-A. For non-special education students, the charter school receives for each student enrolled no less than the budgeted total expenditure per average daily membership (ADM) of the prior school year, as defined in section 2501(20), **MINUS** the budgeted expenditures of the district of residence for:

- nonpublic school programs;
- adult education programs;
- community/junior college programs;
- student transportation services;
- for special education programs;
- facilities acquisition, construction and improvement services; and
- other financing uses, including debt service and fund transfers.

We ask the Commission to please take into consideration that, by virtue of this basic education formula, all charter and cyber charter school students currently receive funding that is only a fraction of that received by their peers in district schools. All charter and cyber charter schools are funded at only 70-80% of district funding. Charters and cyber charters do not receive construction funding and/or reimbursements and do not have access to the state's municipal bond pool. Charter and cyber charter schools already need to do more with less resources than districts in educating students by virtue of the basic education formula.

For special education students, charter schools and cyber charter schools receive for each student enrolled the same funding as for each non-special education student just mentioned plus an additional amount determined by dividing the district of residence's total special education expenditure by the product of multiplying the combined percentage of Section 2509.5(k) times the district of residence's total average daily membership for the prior school year. This calculation assumes a DISTRICT special education incidence rate of 16 percent regardless of what the charter school's or cyber charter school's actual special education incidence rate is.

## **VI. AVOIDING A ONE-SIZE-FITS ALL APPROACH AND DATA REVIEW**

Not all charter schools and cyber charter schools throughout the Commonwealth are the same just as not all districts throughout the Commonwealth are the same. As illustrated in the supplemental chart we have provided and as reported in the Pennsylvania Department of Education, Bureau of Special Education's Data at a Glance for 2012-2013, a number of charter schools throughout the Commonwealth had a special education incidence rate of over 40 percent, including higher than state-average percentages of high cost, low incidence disabilities.

Special education rates above the state average are not limited to brick and mortar charter schools but rather a number of cyber charter schools have special education incidence rates above the assumed 16 percent state average. Other charters and cyber charters are at the state average or under the state average.

However, overall numbers and percentages do not tell the whole story for charter schools or cyber charter schools just as they do not tell the whole story for districts. In fairness, some charter schools track closer to the state average and their representative district's incidence rates or even slightly below. Many charter schools have their highest concentration of students with disabilities in the specific learning disability category, historically thought of as requiring less high cost and intensive services. It is important to understand that where this is true for charters and cyber charters, this also tracks state and district special needs' compositions throughout the

Commonwealth as well. Additionally, at least as the current formula is set, at times the needs of lower cost/higher incidence disabilities off-set high cost and/or low incidence disabilities, particularly where charters and cyber charters do not have taxing authority to make up for any shortfall. Moreover, many students have secondary disability classifications that require high cost services. Those costs may not be captured by simply reviewing only the primary disability classifications of students. Basing policy on averages is easier, but it is also a sure way to guarantee inequities in both under and over funding.

In line with this premise, PCPCS opposes any recommendation to use the greater of the actual incidence rate or 16% equitable sharing of special education costs to a charter or cyber as a recommended formula. The Coalition similarly opposes any reconciliation option. It is not equitable to adjust for a higher incidence rate and not for a lower incidence rate to the detriment of charter or cyber charter students. Moreover, it is better to appropriately fund special education at the outset and there is no reason why monies appropriately allocated based upon need or cost would revert to a district for a student who is no longer in the district.

## **VII. LABELS VS. NEEDS AND IMPACT ANALYSIS**

As this Commission has recognized in prior hearings, it is similarly important to remember that the label or disability category alone cannot drive funding decisions. Students in any disability category recognized under IDEA may have complex and costly needs that we must appropriately fund regardless of that label. Some students who are eligible only under Section 504 but not IDEA may similarly have high cost needs not addressed by the current formula.

Some examples of higher cost services for students with disabilities at charter and cyber charter schools may include:

- professionals, paraprofessionals and personal care assistants;
- behavioral and inclusion consultants;
- transition services particularly with a vocational or transition to work component;
- alternative placements at approved private schools and private schools;
- transportation adaptations and accommodations;
- transportation to alternative placements;
- assistive technology, communication and augmentative devices;
- vision support services;
- alternative curriculum;
- related services and locating qualified therapists in all areas;
- extended school year services;
- additional staffing to meet needs;
- outfitting classrooms and modifying online programs to meet needs, etc.

For some small charter schools with only one or a few students needing a particular service for an individualized type of specially designed instruction for a student, the effects of high costs can be exacerbated as there might not be a way to off-set the costs or to utilize that high-cost service for multiple students within the charter or cyber charter school. Moreover, the cost of any service may

vary significantly from region to region within the Commonwealth. The cost of a service to a charter or cyber may significantly outweigh the cost of that same service to a district. The amount currently received from one district might not counter-act a lower than necessary per pupil allocation received from another district.

Whereas a district can conceivably raise taxes to cover additional costs that can't otherwise be offset, charters and cyber charters do not have that same avenue. Equally disturbing is that some districts do not always pay charters or cyber charters for special education students at all or on time. In such cases, cyber charters and charters must go through a costly and time consuming reconciliation process with the State to obtain funding. This is often after a charter or cyber has had to output the monies to educate the special education student.

### **VIII. INTERMEDIATE UNITS**

Intermediate Units ("IUs") have not been required by law to provide services to cyber or charter school students upon request of charter and cyber schools. There is unfortunately no current legislative mandate for IUs to actually provide services to charters or cyber charters. See 24 P.S. § 17-1725-A(4); 24 P.S. § 17-1744-A. There is only a mandate to provide assistance, which has not been interpreted to mandate actual services. Some IUs, therefore, refuse to fill the need of services requested by charters and cyber charters. Some IUs also do not provide necessary support or training to charters and cyber charters. Charters and cyber charters cannot share services or placement options in the same way that districts are permitted to do so. As a result, charters and cyber charters often need to contract with private providers to meet the related service needs of their students.

Contracting with some IUs can also prove difficult for charters and cyber charters even with willing parties and neither contract terms nor Medical Assistance billing practices have been traditionally consistent from IU to IU. Amounts charged in relation to services provided by IUs throughout the state should be examined with an eye toward maximizing the potential for savings for taxpayers and students.

Even when services are provided by IUs to charters or cyber charters, the charter or cyber, and not the IU, remains the school that is ultimately responsible to the parent and student even if services rendered by the IU do not confer FAPE. This leaves charters and cyber charters vulnerable to costly litigation and compensatory education claims and is in large part why PCPCS cannot support any legislation that would require that special education funding or services be handled directly by or through IUs. The IUs would not retain FAPE obligations and would not be required to indemnify, defend or hold charter and cyber charter schools harmless should they fail to offer FAPE. This strikes not only at the heart of the autonomy and innovation envisioned by the Charter School Law but also at the very essence of ensuring FAPE for those students. As an alternative, PCPCS would be supportive of legislation that would encourage shared service models and charter-specific IUs throughout the State utilized at the election of charters and cyber charters.

## **IX. LEAST RESTRICTIVE ENVIRONMENT/INCLUSION**

Another cost consideration for the Commission is the extent to which charter and cyber charter schools must modify their instructional programs and classrooms to deliver education in the least restrictive environment (“LRE”). While essential for students and mandated by state and federal law, this often requires costly adaptations to curriculum and new supplementary aids and services and even one-to-one teachers and/or aides for students within the regular education classroom. The mental health system often does not meet the needs of students with behavioral needs through TSS services. Even when behavioral support services are offered through the mental health system, they are often not adequate to meet student needs and so charters and cyber charters must provide those services. Some disputes among parents and schools regarding LRE decisions are among the most difficult to resolve and the most costly to address.

## **X. ALTERNATIVE PROGRAMS AND PLACEMENTS**

Additionally, program and placement costs can be extremely high and currently cyber charters and charters have no ability to compel districts or IUs to offer alternative placement options to them, even at cost. The 4010 approved private school (APS) options are at times not adequate to meet needs statewide for districts or charters. There is no guarantee that even if an alternative placement is available for a student that the state reimbursement will be available to offset costs well in excess of the per pupil allocation or will continue to be available for a student. APS tuition costs alone can exceed well over 4 times what a charter or cyber charter school receives to educate a student.

## **XI. TRANSPORTATION**

When faced with students who ultimately require an alternative placement in order to receive FAPE, many charter and cyber students do not receive transportation from districts of residence to their alternative schools. Per the Charter School Law and Chapter 711 regulations, districts still retain transportation funds for charter and cyber charter students as part of the basic education formula. However, charters and cyber charters must often pay high transportation costs in order to get students to their alternative placements, without reimbursement. Similarly, any modifications or special accommodations fall on charters and cyber charters to fund and fulfill. 22 Pa. Code Ch. 711.42; 24 P.S. §§ 17-1725-A-1726-A.

## **XII. CONTINGENCY FUNDS**

State contingency funding is often not sufficient to meet the needs of special education students with severe disabilities as prior testimony has indicated. The setting of a threshold limit on the ability to obtain contingency funding does not take into account how servicing a student’s needs can have a real impact on one school as opposed to another school or district. The contingency fund and the way in which funds are allocated should continue to be studied. Schools do not always receive them and the qualification thresholds are very high.

### **XIII. PDE 363 REPORTING AND ALLOCATIONS**

How a district of residence reports numbers on the district's Pennsylvania Department of Education ("PDE") 363 form drives special education funding for charters and cyber charters. The Commission should consider this form and process. At a minimum, the form is subject to potential intentional or unintentional manipulation of data reported by a district. The PDE 363 form allows districts to make deductions not authorized by Pennsylvania statute and allows for a potential ability to double-count basic education costs as special education costs. At best, the current special education funding formula incorporated within the form assumes percentages and rates that are not based on a charter school student's actual needs or tiered levels or even a charter school's special education population, but rather based off of averages from a district as reported by that district. The PDE 363 is not the best method for funding education. The Commission should devise an independent and equitable formula that provides consistent and fair funding for all special education students, regardless of what type of public school they attend. The driving force for this Commission's recommendation must be what is right for the children and the 363 form does not accomplish this.

### **XIV. MINIMIZING LITIGATION AND ENCOURAGING APPROPRIATE SPENDING**

Finally, as a special education attorney, I want to echo some of the statements made before the Commission by some of my attorney colleagues, such as Ira Weiss, Esq. and Audrey Rasmussen, Esq. and add that special education litigation has become increasingly costly, not only in terms of dollars, but in terms of parent, student and teacher time, resources and the ability to maintain long-lasting productive and collegial relationships among schools and parents. As state funding decreases, spending on special education simultaneously may go down for a myriad of reasons. When necessary spending goes down, appropriate services and supports may too decline and disputes arise as a consequence.

Moreover, providing FAPE does not actually insulate a school from claims or complaints. IDEA clearly respects the rights of both parents and schools to bring complaints. It is much more frequent that parents file the complaints. Prevailing parties are entitled to numerous remedies, such as compensatory education, attorneys' fees and sometimes tuition reimbursement for private education. Even where schools have strong positions, administrators often engage in a balancing act where they weigh costs and resources involved in defending their actions and programs against the costs of protracted litigation.

Due process hearings and compensatory education claims coupled with demands for attorneys' fees and costs drive up the overall costs of education for all. Any funding formula should take these significant costs into consideration. Unnecessary litigation does not serve anyone in our Commonwealth, least of all our students. The time of teachers is much better spent preparing lesson plans than preparing for cross-examination. The time of parents is much better spent engaging meaningfully with their children than in attending contentious IEP meetings. We need



to begin to invest more resources in encouraging compromise where we can and in seeking out means of alternative dispute resolution. Adequate funding for special education will help.

It has been so encouraging and refreshing to hear productive advocacy in support of special education students' needs, such as the testimony provided by the parents and students who have testified throughout these Commission hearings. This is a positive start toward addressing this issue.

Some thoughts to minimize litigation, include:

- Investing in alternative dispute resolution processes and outreach to parents and advocacy groups about the benefits of those processes;
- Promoting great Response to Intervention and Instruction (RTII) programs, Truancy Elimination Programs; School-Wide Positive Behavior Support Programs and Student Assistance Programs (SAP);
- Providing resources to meet the needs of students with Section 504 plans as well as students with IEPs;
- Statewide policies, procedures and monitoring efforts that address the real needs of students and costs associated with meeting those needs;
- Making trainings and professional development opportunities available to cyber charters and charters that really address the core needs of their students;
- Allowing cyber charters the ability to benefit from the use of brick and mortar locations where some special education and student support services might be more effectively delivered on a case by case basis;
- Investing in early childhood education programs and options; and
- Revisiting regulations and directives to allow for innovation in alternative types of schools, particularly cyber charter schools, while respecting federal law.

I suspect, however, that this Commission is already setting the best example of how to address this particular problem and that is by encouraging us to listen to one another with an eye toward doing right by all students.

## **XV. CONCLUSION**

A summary of recommendations follows. I appreciate your time and thoughtful consideration of today's testimony. I welcome follow-up questions and the ability to supplement this testimony with additional information you may request. On behalf of PCPCS, thank you for your consideration of our thoughts and we welcome the opportunity to work together toward the common goal of equitable special education funding in the Commonwealth of Pennsylvania.

## SUMMARY OF RECOMMENDATIONS

- Treat and fund all special education students the same regardless of which form of public education parents choose. No child is second class.
- Eliminate the current formula based on assumptions and move toward a tiered approach that is based on actual needs and costs.
- Reward best practices in special education programs and regular education programs and incentivize schools into making appropriate spending decisions and to utilize resources to advance student outcomes;
- Obtain fairly reported data on needs and costs from charters, cyber charters, districts, parents, Intermediate Units and the Pennsylvania Department of Education that represents individual programs, services and students;
- Increase and supplement special education funding for charter and cyber charter school students, including making revisions to the contingency fund;
- Recognize the impact that reduced federal funding may have on special education programs in the Commonwealth and allocate resources wherever possible;
- Review Intermediate Unit services and charges and consider alternatives to traditional IUs for charters and cyber charters, including charter and cyber-charter specific IUs and options for shared and pooled services;
- Allow charters and cyber charters to share services and alternative placements in the same way that districts are permitted in order to contain private provider costs and to meet the needs of their students in a cost-efficient and appropriate way.
- Ensure that charters and cyber charters receive transportation or appropriate funding for transportation to meet the needs of students with disabilities;
- Set a review period that allows for reconsideration of decisions the Commission makes to enhance the formula to best serve the needs of students with disabilities regardless of their school of choice;
- Reject arguments and advocacy positions that seek to do no more than value the education of a special education student in one school over the education of a special education student in another school;
- Revisit regulations and directives to allow for innovation in alternative types of schools, particularly cyber charters, while respecting federal law; and
- Appreciate the compelling reality that students are individuals and costs and needs vary widely from student to student and from school to school. Regardless, each school needs equitable funding sufficient to meet each student's special needs without diverting necessary resources and funds away from other necessary programs.