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State of Michigan
Department of Education
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Attn: Sheila Alles, Interim Superintendent
Tammy Hatfield, Public School Academy Unit Supervisor

As legal counsel to the Highpoint Virtual Academy of Michigan board of directors, we write to bring to your attention a serious problem created by the recent revisions to the 2018-19 Michigan Pupil Accounting Manual ("PAM"), specifically Section 5-O-C which applies to schools of excellence which are cyber schools ("Cyber Schools") established under Part 6E of the Michigan Revised School Code. This new update would radically reinterpret a long-standing statutory provision and to do so in a manner that would directly undermine the explicit statutory rights of Michigan students and families to enroll in certain public schools. If this misguided statutory reinterpretation is not quickly corrected, in addition to causing serious harm to students potentially most in need, the Department of Education ("Department") will be creating significant legal exposure for itself and/or the authorizing bodies and the Cyber Schools which are being required to enforce the PAM directives.

The Department, through the PAM, has interpreted and implemented M.C.L. § 380.553a(2)(b), an operational standard for Cyber Schools, in the same manner since the statute became effective over six (6) years ago. Now, without notice or explanation, the Department purports to give that statutory section a radically new interpretation, converting it from a statute governing the operation of a Cyber School to a statute dramatically restricting pupil enrollment rights. This new interpretation is in direct conflict with other long-standing statutory provisions which protect and control such enrollment rights.

In the latest version of the PAM, the Department has added a new section to 5-O-C entitled "Instructional Time Requirements, Tracking Participation, and Part-Time Memberships." In that new section, the PAM now states:

"A cyber school cannot enroll a pupil if, at the time of enrollment, less than 1,098 hours remain in the cyber school's schedule." See newly released 2018-19 PAM § 5-O-C (3).

Since the underlying statute became effective over six years ago, all Cyber Schools, their authorizers, and the Department have consistently and universally interpreted the underlying statute to be an operational requirement of each such school that any pupil have access to 1,098 hours of educational programming and that a full-time equivalent pupil participate in the educational programing for at least 1,098 hours. It had never been suggested by anyone – including the Department -- that the statute meant that a pupil was forbidden from enrolling in a Cyber School at any time after the commencement of the school year unless the Cyber School created an entirely new school calendar for that transferring pupil.

For the past six years, admission policies have been written, approved by authorizers, relied upon by schools and families alike, and appropriately funded by the Department that consistently recognized that the 1,098 hours reference in M.C.L § 380.553a(2)(b) was a requirement for the school to meet in the design and implementation of its educational program, not a ban on specific pupil enrollment. In fact, student admission and enrollment are not even addressed by M.C.L. § 380.553a.

Admission and enrollment in a Cyber School are specifically governed and controlled by M.C.L. § 380.556. The upshot of this statute is very simple: except for the enrollment caps set forth in M.C.L. § 380.552 (2)(d), a Cyber School may only limit enrollment within a particular range of age or grade level, and if it does so must then run an appropriate lottery if those limits are reached. Other than those very specifically carved-out and allowable limitations, a Cyber School may only limit admission on a basis "that would be legal if used by a school district." See M.C.L. § 380.556(2).

Is the Department seriously contending that it would be legal for a school district to deny enrollment to an otherwise eligible pupil because the educational program of the district had already begun and there were not the full 1,098 hours remaining of educational programming in that specific school year?

The matter of admission limitations is clear from the plain language of M.C.L. § 380.556(2). However, M.C.L. § 380.556(3) further reinforces the point. M.C.L. § 380.556(3) states that schools of excellence are, "open to all individuals who reside in this state who meet the admission policy." The admission policy is a specifically required document which is part of a Cyber School's charter school contract. As such, the policy is specifically reviewed and approved by the authorizer and the Department. See M.C.L. § 380.552(7)(e)(iii). This provision, again specifically about admissions and enrollment, further demonstrates the error in now attempting to convert the school operational requirements found in M.C.L. § 380.553a into new pupil application and enrollment regulations.

Further evidence that this new interpretation is clearly in error is the frequent use by the legislature of the defined term "membership" throughout the provisions discussing enrollment in Cyber Schools. That carefully defined term appears 21 times in relation to Cyber Schools. See M.C.L. § 380.552. The legislature went so far as to cross-reference the term as follows: "Membership" means that term as defined in section 6 of the State School Aid Act of 1979, MCL 388.1606." See M.C.L. § 380.552(17)(a).

As the Department is surely aware from even a cursory review of M.C.L. § 386.1606, pupil enrollment throughout the school year is explicitly embedded in the statutorily defined and cross-referenced term "membership." Again, the Department's new interpretation relies upon on unsupportable proposition, in this instance that the legislature simultaneously used a phrase and cross-reference for Cyber Schools that explicitly contemplates mid-year enrollments, but then somehow barred such students from enrolling elsewhere in the bill. No theory or cannon of statutory construction would support such an interpretation of the Cyber School provisions.[1]

The statutory provisions are clear – just as they had been to the Department from the time these provisions were enacted until two weeks ago – that there is no ban on admission and enrollment during the school year.

What is as perplexing as this radical new interpretation is the question of what the Department seeks to accomplish with it? A reasonable inference is that Department is trying to accomplish through the PAM what the Michigan legislature has chosen not to do through legislation, which is limit access and enrollment to Cyber Schools - thus reducing the funding for such schools. Further, the Department's actions appear to be a politically motivated bureaucratic overreach which lacks a rational basis and serves no public purpose.

As the Department is well-aware, Michigan's Cyber Schools often serve as a public school of last resort. Many students seek out Cyber Schools to address urgent and critical needs, including, but not limited to, personal and family health issues and severe bullying situations. These very real and urgent needs of Michigan's children and families that do not fit nicely into the schedules and calendars adopted by the Department or individual schools. The Department's newly proposed interpretation would have the effect of barring these families, no matter what the urgent need, problem or crisis they may be facing, from exercising their firmly established statutory right to consider enrollment in a Cyber School. In addition to being legally wrong, this would be a reprehensible development – a Departmental forced lock-out from a public school that could help these children and families most in need.

For all the above reasons, we urge the Department to abandon this radical new course and return to the well-settled interpretation and application of these statutes that schools, authorizers, and most importantly Michigan's families, have relied upon since their enactment.

Sincerely,

Douglas J. McNeil
SaundersWinterMcNeil

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[1] If this matter results in litigation, which it surely would if this new interpretation is maintained because in addition to the impacted schools there would be hundreds of seriously injured families -- growing to the thousands over time -- locked out of a public school they have a right to enroll in, the Department may wish to consider that no judicial deference will be given to this radically changed interpretation of the statute. "An agency's interpretation of a statute is entitled to deference, but generally only if that interpretation has been relied on for a long time..." King v. State of Michigan, 488 Mich 208, 214 (2010).