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Comments of the Center for Law in Response to Proposed Amendments to Special Education Regulations 603 CMR 28.00 and in Response to Proposed Regulations for Commonwealth of MA Virtual Schools 603 CMR 52.00

Enclosed please find the comments of the Center for Law and Education in response to Proposed Amendments to Special Education Regulations 603 CMR 28.00 and in Response to Proposed Regulations for Commonwealth of MA Virtual Schools 603 CMR 52.00.

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.

Thank you for this opportunity to comment and for your consideration.

Proposed Amendment to Special Education Regulation

603 CMR 28.10

(6) **Program schools.** DELETE: "Commonwealth of Massachusetts virtual schools" from subsection (a) and at subsection (b) after "(school choice)" ADD: and M.G.L. c. 71, § 94 (Commonwealth of Massachusetts virtual schools)...."

Rationale: The proposed amendment is more logically placed in subsection (b) rather than subsection (a) because pursuant to M.G.L. c. 71 section 94(h) and (k), the virtual school acts similarly to a "school choice" district in that it is able to bill the resident school district for the instructional services pursuant to 603 CMR 10.07(3).

Commonwealth of MA Virtual Schools

603 CMR 52.00

52.02: Definitions

Applicant. (f) Before “parents” ADD: “ten or more” ; after “parents” **ADD:** “guardians.”

ADD clarification consistent with the statute: “provided, however, that private and parochial schools and for profit business or corporate entities shall be prohibited from applying for a certificate.” M.G.L. c. 71, §94(b).

Rationale: It is not apparent to us why the requirements for “parents” obtaining a certificate for a Commonwealth of Massachusetts virtual school should be less demanding than for obtaining a charter.

Board of Trustees. After “Boards of Trustees shall be considered public employers for purposes of tort liability under M.G.L. c. 258.”

ADD: “Boards of trustees of a Commonwealth of Massachusetts virtual school whose applicants for a certificate include a public school district or districts, an education collaborative, public institution of higher education shall be considered public employers for collective bargaining purposes under M.G.L. c. 150E.”

Certificate: Clarify and ADD: “A certificate of organization as defined in G.L. 71, §94(a) allows the grantee to oversee the governance and operations of the commonwealth virtual school consistent with the terms of G.L. c. 71, §94(a), and regulations under 603 CMR 52.00, in the terms set forth for issuance of a certificate at 603 CMR 52.04 and such additional conditions as the Board specifies.”

Commonwealth of Massachusetts Virtual School (“virtual school” or “school”): After “A Commonwealth virtual school as defined in G.L. c. 71, § 94(a)” **DELETE** “.” **ADD:** “operates under a certificate of organization issued by the Board.”

DELETE: “virtual school”

A CMVS cannot be equated with a “virtual school” because it is inconsistent with subsection (s) of MGL c. 71, § 94 that describes a “virtual school” as not a CMVS when it is operated by a single school district enrolling only students residing in that district.

Online Course: After “...whose students are not required to be located at the same physical premises as the teacher. **Clarify and ADD:** “It may be synchronous (communication in which participants interact in real time) or asynchronous (communication separated in real time, e.g., online forums or discussion groups).”

Terms of Certificate: After “Those material terms specified by the Board” **ADD:** “in addition to those required by GL c. 71, §94(a) and its regulations 603 CMR 52.00.”

52.03: General Provisions

(2) Waivers: **DELETE:** “The Board may waive provisions of 603 CMR 52.00 for good cause.” **After** “Upon written request from an applicant or Commonwealth of Massachusetts virtual school board of trustees, the Board may waive the applicability of one or more provisions of 603 CMR 52.00 [**DELETE** “(.) These waivers shall be granted”] “only under circumstances the Board deems exceptional and such waivers shall be granted only to the extent allowed by law. . . . (a)... (b)...(c)...(d)...”

Rationale: The term “only under circumstances that the Board deems **exceptional...**” properly suggests a higher standard than “good cause.” We support the intent of the proposed regulations and want to underscore that granting waivers of any of the provisions of 603 CMR 52.00 ought to be considered as most unusual and only in truly exceptional circumstances that in the Board’s judgment is substantiated as such. The Board’s overriding obligation is to protect school age children and youth in the Commonwealth, especially those students accessing learning through a virtual school who are likely to be among the most vulnerable.

(3) Prohibitions. Clarify what is meant by CMVS “shall not charge students any fee related to the provision of required education programs.”

We support the intent of the proposed regulation but think it essential for DESE to clarify by defining what is meant by “required education programs.” We are assuming this language seeks to make certain that each public student’s right to a free public education under the State Constitution is ensured. We assume that the provision includes but is not limited to those courses that comprise the MA Core Curriculum which are *recommended* to districts, and also includes what would typically be considered elective courses in the fine arts, music, social sciences, and any courses for which students would receive academic credit toward receipt of a high school diploma. Further clarification seems warranted.

(4) Immediate Closure. CLE supports this provision and the explicit authorization granted to the Commissioner.

However, it should be noted that this provision expressly refers to “accessibility requirements” for the first [and only] time in this proposed set of regulations, and only in the context of ordering closure of a “facility owned or leased by or for a [CMVS] where fire, health, safety or safety codes, regulations, laws, or accessibility requirements are not met.”

A glaring omission to the regulation of CMVS is the framework for ensuring that these schools providing teaching and instruction using the Internet or other computer-based methods to students who are not required to be located at the physical premises of the school is the failure to address and mandate consistent with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act accessibility for students with disabilities. Nor there a single reference to the independent obligations of the Board, DESE, and the boards of trustees of the CMVS to ensure that the framework for delivering effective teaching and instruction is consistent with UDL principles. This should not be an after-the-fact consideration but an integral consideration of any certificate being granted.

52.04: Applications for and Granting of Certificates

(3) Evaluation and Approval

The Department reviews applications to ensure that the applicant has, at a minimum, demonstrated the ability

(a) “to address all the requirements included in MGL c. 71, §94, including *identification of educational programs* identified in the statute....”

CLARIFY: A CMVS has an enormous legal responsibility to school-age children and youth in the Commonwealth who enroll in such school. It is essential that there is absolute clarity as to what responsibilities they have for meeting the diverse needs of students, including those who are educationally disadvantaged, those with disabilities, including with an IEP under IDEA and MGL c. 71B, those protected under Section 504 and the ADA, those who are English language learners under MGL c.71A, etc.

CLARIFY the meaning of this provision. What is meant by “the *identification of educational programs* identified in the statute;” as well as the term “*educational programs*”.

CLARIFY and ADD: what criteria the Department will use to assess the capacity of the applicant to meet the legal mandates for providing effective teaching and instruction to all diverse students, including but not limited to students with disabilities and students with limited English proficiency, protected by federal and state laws.

(b) to conform with MGL c.71 § 94, and all other applicable laws and regulations including, but not limited to those related to ELL and students with disabilities and any guidelines issued by the Department.

Clarify and ADD language expressly recognizing the obligations of the CMVS to demonstrate it has the ability to ensure that it can provide FAPE to every child with an Individualized Education Program (IEP) –one that provides for an integrated program (not silos) which enables the child with such related services ,as needed, to benefit from her specialized instruction; enables the child to maximize her integration with non-disabled peers; and it has developed a plan and process for ensuring a method for reviewing the IEP for each enrolled child with a disability, a process for meeting with the members of the student’s prior IEP Team, and has employed or contracted with highly qualified teachers and support personnel who will attend such meeting and are prepared to demonstrate their knowledge and skills to meet the needs of the students.

ADD language similarly setting set forth the criteria required to be demonstrated by the applicant to meet the needs of ELL students.

ADD provisions for the CMVS to demonstrate its capacity to meet the requirements

of ADA and Section 504 for students with disabilities; that it has in place a framework for ensuring that its online services are accessible to students with disabilities under these federal laws and consistent with UDL principles. Consider adding a provision through regulation or guidance that any applicant shall have consulted with resource centers knowledgeable in the field (e.g., CAST) and can demonstrate that the web-based delivery model they are using meets the standards for accessibility required by ADA.

Creation of CMVS provides a new opportunity to enhance learning opportunities for all students, not only students whose disabilities create barriers to learning, and ought to be taken advantage of through incorporation of a web-based platform that is consistent with the framework for UDL, so as to provide e.g., embedded supports, to enhance the likelihood of success of all students, including struggling learners, who may have dropped out of school, attaining the academic outcomes consistent with those expected of their age and grade appropriate peers in a typical public school. The Board and the Department have a clear legal obligation to ensure that any CMVS is prepared and capable of doing so.

(f) **We support this provision** that requires CMVS assure that students will meet the same performance standards and assessment requirements set by the Board for students in other public schools.

However, we urge that additional guidance be provided given the likely hurdles still to be confronted by many within the targeted population [drop-outs, expelled students, pregnant/parenting students,], e.g., encouraging a CMVS to adopt the Mass Core Completion recommendations so as to help ensure students who successfully complete their online courses graduate with a regular high school diploma and are college and career ready.

(h) DELETE: “or, if a waiver of those requirements is requested, a research-based model”

Rationale: This provision is inconsistent with MGL c. 71 §94 and proposed regulation 603 CMR 52.03(2) which expressly states that no waiver shall be granted barring “*exceptional*” circumstances. The power and authority of that limitation is completely undermined by this proposed language suggesting *it is routine to seek a waiver...*“if a waiver of those requirements [to establish a method for tracking learning time that is acceptable to the Department] is requested...”

ADD: “(m): to develop and implement a recruitment and retention plan that is designed to help sustain the engagement of its targeted students and maintain their enrollment until the successful completion of their courses.”

ADD: “(n): to develop a professional development plan for all online teachers and teachers employed or under contract by a CMVS. Such professional development shall be consistent with the MA Standards for Professional Development.”

Rationale: Such a provision would help ensure that teachers employed or contracted by or for a CMVS are provided opportunities to deepen their knowledge

of their core academic discipline as well as best practices for delivering effective online and site-based teaching and instruction to diverse learners.

(5) Conditions for Opening New CMVS.

Opening procedures requirements include, but are not limited to, the following

- (a) **The terms of the proposed contract**, in such cases where the virtual school's board of trustees intends to procure substantially all educational services from another person or organization, the board shall submit for the Commissioner's approval the terms of the contract;

CLE supports proposed regulation 603 CMR 52.04(5)(a) authoring the Commissioner to have broad oversight responsibilities as this provision as critical to the protection of students. We would further specify as follows:

ADD: As subparts to (a):

(i) "The Commissioner shall ensure that those providing educational services to public school students, [many whom will be identified as struggling learners,] are '*proven providers*' with a track record of success in student achievement performance (based, in part, on state assessments) and evidence of academic program success, based on successful completion of online courses by students by grade, targeted subgroup, retention, graduation (if applicable)."

(ii) The term "substantially all" shall mean more than 50% of educational programming and/or services."

(b)

- (c) **DELETE reference to expulsion/modify and clarify:** "Criteria and procedures for expulsion of students"

Rationale: We question whether there can be any predicate for expelling a student who is enrolled in a CMVS. To the extent a student is dis-enrolled presumably there ought to be clear criteria and procedures for informing the sending school district for purposes of funding as well as the sending district's responsibility for ensuring that the State's compulsory education law is being implemented and enforced.

ADD: "policy on student discipline to be reviewed for due process safeguards and filed with DESE and which shall make clear that disciplinary exclusion resulting in denial of access to learning shall only be used as a last resort and in circumstances in which the student is engaged in behavior that is violent and likely to cause serious injury to self or others."

- (d) **ADD after** "written documentation that a criminal background check....; "*and written documentation that all CMVS teachers are 'highly qualified' consistent with ESEA, IDEA and state laws*"

(e) **ADD** explicit reference to ensuring that the CMVS has provided “written documentation that its online, web-based delivery system is accessible to students with disabilities consistent with the ADA standards and is provided within the UDL framework.”

(f) **ADD:** “written documentation of an enrollment policy and a recruitment and retention plan”

52.05: Student Recruitment, Enrollment, and Retention

(1) Statewide Cap. CLE supports the proposed Statewide cap of 2% and DESE’s interpretation that “once two percent is reached, no additional full-time enrollments will be allowed.”

(2) Student Recruitment and Retention. **After** “must develop a recruitment” **ADD:** “and retention” [and] **after** “strategy” **ADD:** “and plan...”

Rationale: it is not sufficient for a CMVS to have a recruitment strategy; what is essential is both a recruitment and retention strategy and plan for ensuring diverse students successfully complete their online courses.

(5) Enrollment Conditions: **CLE supports** the provision that bars a CMVS from administering tests to potential applications or predicate enrollment on results from any standardized or non-standardized test. We also believe it is important to make explicit that “A virtual school shall not use financial or technology incentives to recruit students.” However, if this innovative method of obtaining teaching and instruction is to be made available so as to ensure equal educational opportunity to school age youth from low-income families who do not have Internet access and/or lack access to a PC/laptop computer, CMVS’s recruitment plan must address how that obstacle shall be addressed.

ADD clarification that requirements for enrollment in a CMVS, including but not limited to attendance by parents at informational meetings and interviews, shall not be designed, intended or used to discriminate against students.

(6) Enrollment Process.

(b) **ADD:** However, consistent with MGL c. 71, § 94 and 52.05 enrollment shall not be restricted to students who fall within the categories of students within the CMVS’s preferences as specified in the Terms of Certificate.

(c) **ADD and clarify** steps to be taken to ensure that students enrolled in a CMVS receive procedural safeguards prior to being dis-enrolled. It is not adequate to state: “When a student stops attending for any reason, the virtual school shall attempt to fill the vacancy.”

(7) Repeat Enrollment Process.

CLE supports the idea behind the safeguard/disincentive providing that “[t]he total number of students attending a Commonwealth of Massachusetts virtual school in a given year cannot exceed the total number of students approved in the certificate.” We wonder, however, if this won’t incentivize CMVS’s to inflate projected numbers of students, especially given the upfront funding for students.

(11) Enrollment Restrictions.

CLE supports the guidance issued by the Department authorizing a school committee to restrict full-time enrollment of future students in a CMVS if the district’s total full-time enrollment exceeds one percent of the total enrollment in the district.

(12) Individual Online Course Enrollment

CLE supports the meaning and intent of this provision. However, we wonder whether it might make sense to clarify here too that under no circumstances can a CMVS charge an individual student –even if the student’s parents do not object –when a student’s district does not reach agreement with the CMVS, e.g., because the course is offered at the student’s school, albeit not at the desired time, or the LEA has not budgeted for such supplemental costs.

Rationale: Failing to clarify this point might lead to inconsistent interpretation/application and create a two-tiered system for students whose families have funds to purchase online course enrollment and those for whom no such option exists.

(14) Online Learning Experience.

CLE supports the intent of this provision and appreciates the Department’s effort to ensure that such assessment cannot be used to “counsel out” certain students.

(15) Educational Tools.

CLE supports this provision that a CMVS shall ensure that all enrolled students have access to necessary technology and materials to participate in the virtual school’s education program and shall provide such technology and materials free of charge to students as required by state law.

Clarify here or elsewhere as appropriate that to the extent every student is not provided a computer and Internet access, and if equal access allows a CMVS to provide enrolled students access to a facility with computer based access to the web-based system operated by the CMVS that the facility must be staffed by highly qualified teachers who are present to provide appropriate instruction, support and interventions.

[Query whether the right to an adequate public education ---to be taught to College and Career ready standards, to be provided teaching and instruction aligned with the Common Core State Standards and to be tested by the PARCC computer based

assessment system doesn't require the State to provide every school age child a personal computer.]

52.06 Board of Trustees and Staff

(4) Teacher License --

ADD after MGL c. 71,§38G, reference to requirement that teachers shall be “highly qualified” consistent with ESEA and IDEA; that CMVS shall ensure that their teachers receive professional development each year to deepen substantive knowledge and to improve their communication and technical skills in providing effective online teaching and instruction, in particular, to meet the diverse needs of their students.

52.07 Funding

(5) Transportation. Clarify: school activities that qualify for transportation include accessing the virtual school's courses in a location provided and overseen by the virtual school.

52.08 Reporting Requirements and Ongoing Review

(1) Annual Report

(2) Accountability Reviews. After “The Department” **DELETE** “may” **ADD:** “shall send evaluation teams...”

(9) Notification of Circumstances. ADD “(g) decreases in enrollment (more than 10 percent lower than any previously reported figure); (h) decreases in percentage of students, disaggregated by subgroups) successfully completing online courses from one semester/school-year to the next school-year.”