

## *Improving Public Education: A Sampling of Education Reform Law*

In the last two years, the U.S. Congress and the Pennsylvania General Assembly have adopted a number of laws whose stated purpose is to improve the quality of public education. These laws share a common emphasis on “competition” and “choice,” in the belief that competition that serves to improve quality of services in the business sector will have the same effect in public education. In June 2002, the U.S. Supreme Court advanced the cause by permitting the public funding of nonpublic and parochial schools. The paradigm of the public school district as the single repository of public revenues has been replaced. The new model looks more like higher education, that is, a network of fully funded and partially funded public and nonpublic institutions of basic education. When private industries failed, the government bailed them out with public funds. When the state and federal politicians perceived some public schools to be bankrupt (literally and figuratively), they turned to the private sector and private institutions. It remains to be seen whether these reforms will enable more students to obtain a better public education or whether they will simply result in limited public school funding being spread more thinly. In any event, “traditional” public schools cannot ignore these reforms. This article discusses some of the changes that have been adopted.

### **THE STATE OF CYBER SCHOOLS IN PA Highlights of Amendments to CSL**

As part of Act 88 of 2002, the General Assembly preempted the courts by amending the Charter School Law (“CSL”) to include cyber charter schools. <sup>[1]</sup> The legislation benefited from the guidance of the KPMG report on cyber schools and the litigation against Einstein Academy and Morrisville Borough School District.

The Pennsylvania Department of Education (“PDE”), not a single school district, will now grant charters to cyber schools. For current cyber schools chartered by single districts, PDE will review and approve the renewal of the charter. Current cyber schools become subject to the amendments upon renewal of their charters. The application must be submitted to PDE by October 1 of the school year preceding operation, which means the new cyber schools will begin operation in school year 2003-2004.

When the Secretary withholds subsidies, a school district is entitled to an **adjudication** to challenge whether the enrolled students are residents of the district. The school district must notify the Secretary within 30 days after the Secretary makes the deduction. The scope of the hearing is limited to whether the charter school documented that its students were enrolled, the period of time during which each student was enrolled, the appropriate school district of residence and whether the amounts deducted were accurate. Because cyber schools are now authorized by statute, most payments should be direct tuition payments from the school district to the cyber schools. This is particularly true in light of the new enrollment notice requirements.

Cyber schools have deadlines for informing the school district of student enrollment, and school districts must respond promptly if they disagree and explain why. If the disagreement is not resolved, the district may appeal to PDE. PDE’s determination may be appealed to Commonwealth Court. The district is required to continue making payments to the cyber school until the dispute is resolved. Thirty days after a determination in favor of the district, the cyber school must refund the payment.

The amended CSL requires more accountability:

- q To school districts, by requiring cyber schools to provide upon request, the charter, charter school application, all annual reports, a list of all students who are residents of the particular district;
- q To students’ instruction, by requiring, among other things, the following information as part of the new application:
  - An explanation of the amount of online time required.

- The manner in which teachers will deliver instruction, assess academic progress and communicate with students.
- A specific explanation of any cooperative learning opportunities, meetings with students and parents, field trips, or study sessions.
- A description of how the cyber school will define and monitor a student's school days, including delineation of online and offline time.
- Privacy and security measures to ensure the confidentiality of data gathered online.
- Methods to insure the authenticity of student work and adequate monitoring of exams.
- Policies regarding truancy, absences and withdrawal of students, including how the cyber school will monitor attendance.
- The types and frequency of communication between the cyber school and the student and the manner in which the cyber school will communicate with parents.

School districts are prohibited from receiving discounts or waivers of tuition payment or entering into agreements to receive funds from a cyber school except for the provision of specific services.

Existing cyber schools (chartered before August 15, 2002) shall be subject to certain of the new requirements, including:

- Enrollment notices and information availability to school districts;
- Provision of enumerated information to parents;
- Provision of free technology and services; and
- Maintenance of an administrative office within the Commonwealth.

PDE is to determine whether these existing schools are in compliance with all new amendments, whether enrollment notifications have been provided to school districts, and how the cyber school intends to inform parents about the delivery of services. PDE then is to notify the chartering district and the cyber school of any areas of noncompliance and publish the notification on the PDE web site. The cyber school must forward the PDE report to parents of enrolled students. The "hammer" appears to be full disclosure to the chartering school district and parents without any authority in PDE to revoke an existing charter.

School districts have the following responsibilities: provision of educational records to the cyber school within 10 days of receipt of the admissions notice; access to their facilities for administration of standardized tests; upon request, assistance in the delivery of services to a student with disabilities at the same charge they charge other school districts; assuming the student's compliance with eligibility requirements and no similar extracurricular activity at the cyber school, permitting a student to participate in extracurricular activities; and payments for tuition.

The new tuition payment is the same formula as that for brick and mortar charter schools, which is roughly a calculation of what the District spends per pupil (after excluding certain expenses). The charter school is paid that amount for each student enrolled; a higher amount is paid for special education students. The subsidy provision for 2001-2002 adds a new subsidy which is 1/3 the tuition charges for charter schools and cyber charter schools. This specific recognition of existing cyber schools as well as the same recognition in the new licensing provision undercuts any effort to argue the lack of statutory authority. The authority has been created after the fact.

### **Highlights of Litigation**

The mother case, *PSBA v. Zogby*<sup>iiii</sup>, was decided not on the merits but rather on a matter of jurisdiction and standing. The Commonwealth Court refused to hold a trial on the central issue of whether cyber schools are authorized. Instead, the court found in favor of PSBA on the procedural issue that the Secretary should have held hearings before withholding subsidies. This resolution

mirrored the court's prior decision in *Boyertown Area S.D. v. Zogby*<sup>[iii]</sup>, which held that the Secretary's decision was an adjudication requiring a hearing. In *Boyertown* the majority held that the school districts should be permitted to challenge the legality of the charter and violations of the charter. On the contrary, *PSBA* held that districts were restricted to challenging whether a student attends the charter school and for what period of time he/she attended. One explanation is the majority in *Boyertown* became the minority in *PSBA*. The amended CSL permits only challenges related to student enrollment.

On July 9, 2002, in an unreported decision, the Commonwealth Court reversed the Adams County trial court's injunction against Einstein Academy, which prohibited Einstein Academy from enrolling or presenting educational services to students of the plaintiff school districts.<sup>[iv]</sup> Consistent with *Zogby*, the court held that the non-chartering school districts lack standing to challenge the grant of a charter school application. Unless *Zogby* is reversed by the Pennsylvania Supreme Court, non-chartering school districts may be without recourse to challenge the illegal grant of a charter or violations of the charter or CSL.

## Empowerment Act

Under the Education Empowerment Act ("EEA"),<sup>[v]</sup> adopted in May 2000, the Pennsylvania Department of Education ("PDE") identifies school districts with a "history of low test performance." These districts are placed on the Empowerment List and required to develop a School District Improvement Plan, and the school boards of those districts are granted additional powers. A history of low test performance is defined as a "combined average of fifty percent or more of the students scoring in the bottom measured group of twenty-five per centum or below basic level of performance on the Pennsylvania system of school assessment ["PSSA"] tests under 22 Pa. Code Ch. 4 (relating to academic standards and assessment) in math and reading in the most recent two school years for which scores are available."<sup>[vi]</sup> Additional powers granted to school boards of district on the List include the following:<sup>[vii]</sup>

- Establish or convert school to charter school.
- Designate school as independent school.
- Employ up to 25% of professional staff without certification.
- Contract with for-profit or non-profit organization to operate school and employ its own staff.
- Reconstitute a school, by removing all or a significant percentage of the administration, faculty and staff of a school to create a new school with new leadership and personnel, as an alternative to closure of the school.
- Reassign, suspend or dismiss a professional employee without regard to seniority.

So far 10 school districts have been placed on the List: Aliquippa S.D., Allentown City S.D., Clairton City S.D., Duquesne City S.D., Lancaster City S.D., Philadelphia City S.D., Steelton-Highspire S.D., Sto-Rox S.D., Wilkinsburg S.D. and York City S.D.

The EEA further provides that if a school district on the List does not meet the goals for improving educational performance as set forth in its Improvement Plan and maintains a history of low test performance on the PSSA, after the third year on the List, the school district will be declared an Education Empowerment District (although a one-year extension may be granted by PDE). Two school districts in the state were declared Empowerment Districts immediately: Harrisburg S.D.<sup>[viii]</sup> and Chester Upland S.D.<sup>[ix]</sup> The empowerment district is governed by a Board of Control consisting of three members appointed by the Secretary of Education. The Board of Control has all the powers of the local school board except the power to tax, as well as the powers granted to districts on the list.

One district that has attempted to take full advantage of the EEA powers is Chester Upland School District. Effective with the 2001-02 school year, the Board of Control for Chester Upland

entered into a five-year contract with the for-profit company, Edison Schools, Inc., to operate all but one of the schools in the district. Although teachers and classified employees remained district employees, all principals and vice principals were furloughed and offered teaching positions. New principals brought in by Edison are Edison employees and therefore lack tenure rights and are not eligible for membership in PSERS. For the first year, central administration remained employees of the school district, but Edison will fill these positions starting in 2002-03.

Several legal challenges have been brought to the EEA but none has been successful thus far in having the law struck down.<sup>[x]</sup> Currently, PAESSP is representing the principals who were furloughed in Chester Upland. Before the Board of Control is the argument that the board abused its discretion by furloughing all principals rather than exercising discretion and considering the accomplishments and qualifications of each individual. Once that is resolved, PAESSP will bring an action in Commonwealth Court challenging the constitutionality of the EEA. Unlike the plaintiffs in *Alaica*, the Chester Upland principals have been injured by the EEA through the loss of their positions.

Another aspect of the EEA applicable to all school districts is the *Mandate Waiver Program*, which allows school districts to obtain a waiver from certain School Code mandates "if the waiver will enable the school district to improve its instructional program or operate in a more effective, efficient or economical manner." School Code requirements that have been waived include:

- Public bidding requirements;
- The prohibition against board action to permanently close a school until at least three months after public hearing;
- Requirement that superintendent obtain letter of eligibility from PDE (to allow Chester Upland School District to bring in a chief operating officer from Edison);
- Requirement that school district run alternative education program only for "disruptive youth";
- The number of days a certified teacher can substitute in an area in which he/she is not certified extended from 15 to 30 days;
- Class size and class load requirements for special education classes.<sup>[xi]</sup>

## School Vouchers

The battleground for vouchers has shifted from the federal courts to the state legislatures and state courts. The U.S. Supreme Court, in a 5-to-4 ruling, upheld the use of public money for religious school tuition.<sup>[xii]</sup>

Ohio's pilot project scholarship program gives educational choices to families in any Ohio school district that is under state control pursuant to a federal court order (currently Cleveland City School District). The program provides tuition aid for certain students to attend participating public or private schools of their parents' choosing and tutorial aid for students who choose to remain enrolled in public school. The tuition aid is distributed to parents according to financial need and where the aid is spent depends solely upon where parents choose to enroll their children. In the 1999-2000 school year, 82% of the participating private schools had a religious affiliation, none of the adjacent public schools participated and 96% of the students participating the scholarship program were enrolled in religiously-affiliated schools. Sixty percent of the students were from families at or below the poverty line. Cleveland students also have the option of enrolling in community schools, which are funded under state law but run by their own school boards and receive twice the per student funding as participating private schools, or magnet schools, which are public schools emphasizing a particular subject area, teaching method or service.

Because the government aid reached the religious school only by way of the deliberate choices of parents, the court attributed the advancement or endorsement of religion to the parents not the government. The court found the program to be neutral in all respects toward religion and to be part of Ohio's general undertaking to provide educational opportunities to children in a failed school district. The majority reasoned that the assistance a) is to a broad class of students and parents,

who are defined without reference to religion, and, b) permitted participation of all district schools and adjacent public schools. The only preference recognized by the court is for low-income families, who receive greater assistance and have higher priority for admission.

In his dissenting opinion, Justice Stevens argued that the voluntary character of the private parental choice to prefer a parochial education over an education in the public school system was irrelevant to the question of whether the government's choice to pay for religious indoctrination is constitutionally permissible. In a frequently quoted excerpt from his opinion, he concludes, *"whenever we move a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."*

When the voucher battleground shifts back to the Pennsylvania General Assembly, it is significant to point out that the Pennsylvania Constitution provides additional hurdles to voucher advocates. Three provisions exist in the Pennsylvania Constitution.<sup>[xiii]</sup> State amendments barring aid to religious schools, the so-called *"Blaine amendments,"* are holdovers from the 1800s, an era of anti-immigrant, anti-Catholic sentiment – 37 states have similar amendments. The pro-voucher groups will probably frame and challenge any *Blaine* amendments on the grounds that they were borne of bigotry and are discrimination against religion and free exercise. Those who support strict separation of church and state will argue that while vouchers may be an appealing attempt to give educational choice to poor students, the scheme is a breach of the state constitution's establishment prohibitions.<sup>[xiv]</sup>

### **No Child Left Behind Act of 2001**

In January 2002, President Bush signed into law his education proposal, the No Child Left Behind Act of 2001 ("NCLB"), which reauthorized and amended Title I of the Elementary and Secondary Education Act. Relevant to reform, the NCLB includes mandatory statewide assessments, limited school choice for students in schools that need improvement and a requirement that poor performing schools provide "supplemental education services" to certain students.<sup>[xv]</sup> In Pennsylvania, 256 schools in 80 school districts will be required to offer public school choice for the 2002-03 school year.<sup>[xvi]</sup>

Starting with the 2005-06 school year, NCLB requires that states administer annual statewide assessments in reading and mathematics for grades 3 through 8, to be developed by each state and aligned to that state's academic standards. An assessment test in science must be offered once for each grade level – elementary, middle and secondary – starting with the 2007-08 school year. Because the PSSAs in reading and mathematics currently are administered only in grades 5, 8 and 11, Pennsylvania will have to adopt academic standards and prepare assessments for grades 3, 4, 6 and 7 for reading and mathematics, and also develop assessments aligned to the science standards that were adopted in January 2002 for grades 4, 7 and 10. Some 4<sup>th</sup> and 8<sup>th</sup> graders in each state must take the National Assessment of Educational Progress in reading and math every other year. These results are intended to provide a point of comparison with the state's assessments. On July 5, 2002, the U.S. Department of Education published regulations on how the states should develop their standards and assessments pursuant to NCLB.<sup>[xvii]</sup>

Each state must define a measure of "adequate yearly progress" that must be increased year by year so that by the 2013-14 school year, all students will perform at the "proficient" level. What constitutes proficiency is set by each state. Adequate yearly progress is the minimum percentage of students who must be at the proficient level for both reading and mathematics. Progress must be measured for a number of subgroups within each school, including poverty, racial and ethnic group, students with disabilities and limited English proficiency. If the students in any one subgroup do not meet the targeted level of proficiency for that year, then the entire school is considered as needing improvement.

The NCLB imposes additional restrictions each year that a school fails to meet the state's

progress goals. A school in need of improvement will receive technical assistance from the school district and must provide **public school choice**. Public school choice means that students attending a school that needs improvement must be permitted to transfer to another public or charter school **within** the school district. Schools must permit students to enroll to the extent permitted by health and safety code limits on building capacity. If space is limited, priority for transfer is to be given to low-achieving students from low-income families (as defined by the school district). A school district must spend a portion of its Title I funding on transporting students who exercise their option to transfer to another school. Although the NCLB does not require districts to allow students to attend schools in another district, it encourages “cooperative agreements” between school districts to permit transfers, especially where all the schools in a district need improvement or where there is only one school in the district for a particular grade level.

A school that does not make adequate yearly progress for three consecutive years must continue to offer public school choice to all students and must also provide **supplemental educational services** to disadvantaged children. Supplemental educational services are defined as “tutoring and other academic enrichment services,” that are provided in addition to instruction during the school day and which are “high quality, research-based, and specifically designed to increase the academic achievement of eligible children.” Parents can choose the services their child needs from a list of approved providers. These services are to be paid for using a portion of the district’s Title I funding.

After the fourth consecutive year of failing to make adequate yearly progress, the district must implement certain **corrective actions** to improve the school, such as replacing certain staff or fully implementing a new curriculum, as well as continuing to offer public school choice and supplemental educational services. After five years of inadequate progress, a school will be required to **restructure** through, for example, an alternative governance structure, state takeover, the hiring of a private management contractor, converting to a charter school, or significant staff restructuring.

It is unclear what effect, if any, NCLB will have on the state Empowerment Act. Many, but not all, of the schools in districts placed on the Empowerment List appear on the federal school improvement list.

A report on the impact of the first major reform in Pennsylvania, the Charter School Law of 1997, was commissioned by PDE. In October 2001, the Evaluation Center at Western Michigan University prepared an interim report (“WMU Report”) on charter schools in Pennsylvania as part of its contract with PDE.<sup>[xviii]</sup> In July 2002, the Pennsylvania School Reform Network (“PSRN”), a project of the Education Law Center-PA, issued a report on the WMU Report. According to PSRN, the WMU Report concluded that charter schools have lower PSSA scores than traditional schools, enroll fewer low income and special education students, and that charter schools are not held as accountable as traditional public schools. WMU’s final report, covering the first five years of charter schools, is due in October 2002. And so begins the process of accessing the quality of the reforms.

<sup>[ii]</sup> The new subsection on cyber charter schools is found at 24 P.S. §1741-A through §1751-A. Cyber charter schools are distinguished from charter schools approved during the 2001-2002 school year under 24 P.S. §§1717-A or 1718-A. Not until these charter schools are renewed do they qualify as cyber charter schools. A cyber charter school is defined as one that is chartered by PDE and which “uses technology in order to provide a significant portion of its curriculum and deliver a significant portion of instruction to its students through the Internet or other electronic means.”

<sup>[iii]</sup> 2002 WL 1306836 (Pa. Cmwlth. Ct. June 17, 2002)

<sup>[iii]</sup> 797 A.2d 421 (Pa. Cmwlth. Ct. 2002)

<sup>[iv]</sup> After a push from the Secretary, Morrisville Borough School District decided to hold revocation hearings of the charter of Einstein Academy beginning on July 16, 2002.

<sup>[v]</sup> 24 P.S. §§ 17-1701-B to 17-1716-B.

<sup>[vi]</sup> *Id.* § 17-1702-B.

[vii] *Id.* § 17-1704-B.

[viii] In *Harrisburg S.D. v. Zogby*, 789 A.2d 797 (Pa. Cmwlth. Ct. Jan 03, 2002), the designation of Harrisburg S.D. as an Empowerment District was struck down as unconstitutional "special legislation" because that section of the EEA could only apply to Harrisburg School District. This decision is on appeal to the Pennsylvania Supreme Court and the school district continues to operate as an Empowerment District pending disposition of the appeal.

[ix] Chester Upland was declared an Empowerment District because it had a History of Low Test Performance plus it had been certified as financially distressed for two years. § 1705-B(h)(3).

[x] In *Alaica v. Ridge*, 784 A.2d 837 (Pa. Cmwlth. Ct. 2001), claims by teachers and taxpayers seeking a declaration of unconstitutionality were not ripe for review because none of the plaintiffs had yet been injured by the law. In *Allentown S.D. v. Department of Education*, 782 A.2d 635 (Pa. Cmwlth. Ct. 2001), the court held that 50% threshold for PSSA scores can be based upon a two-year average rather than upon results of each of two consecutive years. *Warren v. Ridge*, 762 A.2d 1126 (Pa. Cmwlth. Ct. 2000) held that the section of EEA designating Chester Upland as an Empowerment District was invalid as special legislation and in violation of equal protection. Subsequently, the General Assembly broadened the language so that other districts may qualify.

[xi] Information about these and other waivers is available on the PDE website, [www.pde.state.pa.us](http://www.pde.state.pa.us) by selecting "Mandate Waivers" from PDE's "Hot Picks."

[xii] *Zelman v. Simmons-Harris*, 2002 WL 1378554 (U.S. Supreme Ct. June 27, 2002).

[xiii] **Art. III, § 15. Public school money not available to sectarian schools.** No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

**Art. III, § 29. Appropriations for public assistance.** No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

**Art. III, § 30. Charitable and educational appropriations.** No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

[xiv] Lori Goldstein, "In States, Hurdles Loom" in *The New York Times*, June 30, 2002, at WK3.

[xv] Additional Information on NCLB is available on both the PDE website, [www.pde.state.pa.us/nclb](http://www.pde.state.pa.us/nclb) and the DOE website dedicated to NCLB, [www.nochildleftbehind.gov](http://www.nochildleftbehind.gov). A report that analyzes how NCLB compares with existing state education reform laws has been prepared by the Education Commission of the States, titled *No State Left Behind: The Challenges and Opportunities of ESEA 2001* (February 2002), and available at [www.ecs.org/html/Special/ESEA/NSLB\\_main.htm](http://www.ecs.org/html/Special/ESEA/NSLB_main.htm).

[xvi] The list of Pennsylvania schools placed on the federal school improvement list can be found at [www.pde.state.pa.us/k12/lib/k12/SchoolImprovement.pdf](http://www.pde.state.pa.us/k12/lib/k12/SchoolImprovement.pdf).

[xvii] 67 Fed. Reg. 45038 (July 5, 2002), available at [www.access.gpo.gov/su\\_docs/fedreg/a020705c.html](http://www.access.gpo.gov/su_docs/fedreg/a020705c.html).

[xviii] The WMU Report was not publicly released by PDE or WMU.