Report from the
Commission to Study Issues
Relating to Students Receiving Special Education Services
While Attending a Chartered Public School

Date: 10/24/2016

Commission established pursuant to RSA 186-C:30
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**Acronyms used in this report:**

- **DOE** means Department of Education.
- **LEA** means local education agency and means the resident school district.
- **FAPE** means free appropriate public education.
- **LRE** means least restrictive environment.
Background

HB 1128, "An Act establishing a committee to study issues related to students receiving special education services while attending a chartered public school", was signed by the Governor on July 28, 2014. The committee's charge was to "study issues related to services mandated under Section 504 of the Rehabilitation Act of 1973 and special education services for students who attend a chartered public school, including responsibility for funding and provision of special education services in a manner that ensures that children with disabilities have an equal opportunity to enroll and fully participate in a chartered public school and to receive all services in the child's individualized education plan."

As a result of HB 1128, it was determined that there should be a broader commission to study issues and recommend findings related to students receiving special education services while attending chartered public schools. HB 126, "An Act establishing a commission to study issues related to students receiving special education services while attending a chartered public school", introduced the following year, was signed by the Governor on June 11, 2016 (the full text of HB 126 may be found in Appendix A). The commission was established through an amendment to RSA 186-C.

The commission was made up of a broad and diverse group of stakeholders, in accordance with the requirements established in RSA 186-C:30, I. Members included representatives from the general court, and one or more representatives from the NH Department of education, NH School Administrators Association, NH Council on Developmental Disabilities, NH Association of Special Education Administrators, Disability Rights Center – NH, NH Council of School Attorneys, Parent Information Center, NH School Boards Association, and NH Public Charter School Association, administrators/directors from chartered public schools, and parents, including parents of children with disabilities attending chartered public schools. A majority of commission members were in attendance at each meeting. Contact information for commission members may be found in Appendix B. Appendix B also includes names of presenters to the commission, and guests.

The duties of the commission are detailed in RSA 186-C:30, II:

The commission shall study issues relating to students receiving special education services while attending a chartered public school, including but not limited to the following:

(a) The provision of special education services to students attending chartered public schools, including the nature and amount of such services, how such services should be provided, and where such services should be provided;

(b) The nature of communications between the chartered public school and the local education agency, including the involvement of a chartered public school in the individualized education plan meetings;

(c) The funding for children in need of special education services who are attending a chartered public school and whether such funding is sufficient to ensure a free and appropriate public education;

(d) The nature of the legal relationship between the local education agency and the chartered public school; and

(e) Any other issues which the commission deems relevant to the objective of the study.

The Commission held meetings between August 13, 2015 and September 19, 2016. A subgroup was designated to consolidate input from all commission members and develop an initial draft of the report.

Materials/data and input from stakeholders that informed the work of the Commission, as well as supporting documentation are included in the report's appendices.
Executive Summary

The *Commission to Study Issues Relating to Students Receiving Special Education Services While Attending a Chartered Public School* was pleased to find that that in most instances, school district administrators, administrators of chartered public schools, and parents of children with disabilities are able to work together to ensure that the special education needs of children with disabilities who are attending chartered public schools are met.

The Commission’s work was guided by an overall commitment to ensuring that students with disabilities should have equal access to chartered public schools as do students without disabilities.

*The Commission consistently heard, from diverse stakeholders, that “when it works, it works well”. Credit was given to school districts and chartered public schools that are committed to working together to meet the needs of children with disabilities who are enrolled in chartered public schools. While no one expressed that everything is working well 100% of the time, the overarching theme was that the child is the priority.*

Funding issues were the most-often cited concern by representatives from both school districts and public chartered schools. LEA Administrators who spoke to the Commission reported that they often incur additional costs in serving children with disabilities attending chartered public schools. Under the current system, the state has designated the resident LEA for each student with a disability as the entity responsible for the provision of FAPE for that student. In addition to costs, other concerns raised by LEAs regarding the current model included the need and ability to replicate services at charter schools, and difficulties in monitoring the provision of FAPE at a setting where the LEA has limited opportunity for direct oversight or control. Two Commission members questioned the constitutionality of the current system. Areas of concern from representatives of chartered public schools and parents of children with disabilities attending chartered public schools included practices that discourage children with disabilities from enrolling in chartered public schools, the need for safeguards to ensure that children with disabilities do not unilaterally have services reduced or eligibility for special education terminated once the child enrolls in a chartered public school. Additionally, it was noted that clear procedures for ensuring that the child’s parent and the chartered public school have a role in determining how and where services are provided to a child with a disability who is attending a charter school so that the disruption in the student’s school day is minimized would be helpful.

While this report includes several recommendations focused on the area of funding, the lack of consistent and comprehensive data made it impossible for the Commission to reach conclusions and make substantive recommendations related to funding. Once the necessary data becomes available, further study focused on the funding issue may be warranted.

The Commission identified several areas where a new or different approach, additional resources, or revisions in legislation, process, policy, or forms/documents/reports, along with updated data-collection and more effective use of the data collected will streamline the process, provide clarity and minimize the misinterpretation of the requirements under which chartered public schools and school districts operate in order to ensure the provision of a free appropriate public education (FAPE) in the least restrictive environment (LRE) in accordance with State and Federal requirements. The development and dissemination of user-friendly materials and training for all stakeholder groups is a recommendation crossing several areas of the Commission’s charge.

The Commission also determined that comprehensive data, detailed in our findings and recommendations, is an important factor in achieving positive outcomes for children with disabilities who are attending chartered public schools. Areas where chartered public schools are experiencing challenges are not being identified in a formal way so that the chartered public schools can be provided with additional resources or targeted technical assistance. Areas where outcomes indicate that chartered public schools are utilizing best practices resulting in positive outcomes for children with disabilities are also not being recognized so that they can be broadly replicated by other chartered public schools and district public schools throughout the state.
FINDINGS AND RECOMMENDATIONS

Unless otherwise noted, the findings and recommendations listed below received the endorsement of an overwhelming majority (more than 75%) of members present.

FINDINGS RELATED TO COST / FINANCE / FUNDING:

1. NH has adopted a hybrid model for providing special education services to children with disabilities who are attending chartered public schools that is atypical, with the LEA being responsible for ensuring the provision of a FAPE (providing and funding special education and related services to children with disabilities from their school district who are attending chartered public schools).

2. While comprehensive data is not currently available, LEA administrators who provided input to the Commission reported that they often incur additional costs in providing special education and related services to a child with a disability who is attending a chartered public school. We know that there are also times when LEAs can realize cost savings (e.g. when an LEA does not have its own public high school, or when the environment at a charter school results in a child, such as a child with anxiety, needing fewer services).

3. One factor that was cited for the additional costs of providing special education and related services to children with disabilities attending chartered public schools is the inability to take advantage of economies of scale.

4. The overall State and Federal funding provided for special education poses challenges for LEAs in meeting their obligation to provide a FAPE to all eligible children with disabilities, including children with disabilities attending chartered public schools.

RECOMMENDATIONS RELATED TO COST / FINANCE / FUNDING:

1. Additional, targeted funding should be provided to LEAs when they incur additional costs (as calculated using a consistent formula) in serving children with disabilities attending chartered public schools.

2. NH DOE provide model language and a memorandum detailing how chartered public schools and LEAs can share information within the constraints of FERPA, so that LEAs can share personnel when more than one LEA has a child with disabilities attending the same chartered public school and the children’s needs could be met by the same service provider.

3. NH DOE and NH DHHS determine a way to fund travel time and costs for school district personnel who are serving children with disabilities at a chartered public school, particularly when the charter school is outside of the child’s resident LEA’s boundaries (e.g. by working within or modifying the State Plan for the Medicaid to Schools program or other funding mechanisms).

The following recommendations were also considered the Commission:

1. The current funding system for special education at chartered public schools should be maintained. [8 members in support / 5 members opposed]

2. Through legislation, provide additional / targeted funding for chartered public schools to enable them to assume the responsibility for providing and overseeing the provision of FAPE to children with disabilities attending chartered public schools. A specific mechanism was not identified. [6 members in opposition / 4 members in support]

3. Establish a process to enable chartered public schools to assume the responsibility for providing and overseeing the provision of FAPE to children with disabilities attending chartered public schools. [7 members in opposition / 5 members in support]
FINDINGS RELATED TO DATA:
1. The lack of data, including data regarding the costs related to providing special education and related services to children with disabilities attending chartered public schools, and data about outcomes of such children, is problematic.
2. The current system, including through data, of monitoring/overseeing the provision of special education and related services at chartered public schools is insufficient.

RECOMMENDATIONS RELATED TO DATA:
1. DOE collect data, including through the existing MS-25 report, to demonstrate the actual cost differential between providing FAPE to an individual child with a disability in a district public school and providing the same services to the child when he/she is attending a chartered public school.
2. NH DOE, LEAs and charter schools collect data specifically related to the performance of children with disabilities, on factors related to the indicators in the DOE’s State Performance Plan and Annual Performance Report, to identify areas where charter schools are achieving outcomes substantially higher or lower than the state average, and identify reasons that may explain the differences.

FINDINGS RELATED TO THE MODEL FOR SERVING CHILDREN WITH DISABILITIES ATTENDING CHARTER SCHOOLS:
1. In most instances, school district administrators, administrators of chartered public schools, and parents of children with disabilities are able to work together to ensure that the special education needs of children with disabilities who are attending chartered public schools are met. Processes are generally working well for children with disabilities attending or considering enrolling in a chartered public school, LEAs, and the State Education Agency.
2. RSA 194-B:11, III says, “... At the meeting, the IEP team shall determine how to ensure the provision of a free and appropriate public education in accordance with the child’s IEP. ...”. This includes the specific location where the services are to be provided; as stated in IDEA, US DOE regulations 34 CFR 300.320 (a)(7), the IEP, developed by the IEP team, includes, “… the anticipated frequency, location, and duration of [the child’s special education and related] services and modifications”.
3. The Commission supported the establishment of a permanent and dedicated state-funded position of a full-time chartered public school officer at the NH DOE. According to the purpose statement in the bill, “The chartered public school program officer position under this act provides statewide administrative oversight, support, and guidance to ensure the chartered public school education program, including the delivery of special education services, complies with state and federal requirements. The Commission was pleased with the signing during its tenure of SB 483, an Act establishing the position of chartered public school program officer in the department of education, effective 7/1/2017. One of the chartered public school program officer’s responsibilities is to “work closely with the resident school districts and chartered public schools to assure appropriate support for students with disabilities”.
4. SB 483, Act establishing the position of chartered public school program officer in the department of education, has an effective date of 7/1/2017. The legislature should allocate monies to fully fund this position.
5. The Commission consistently heard from diverse stakeholders, “when it works, it works well”. Credit was given to school districts and chartered public schools that are committed to working together to ensure that the needs of the child with a disability are met.
RECOMMENDATIONS RELATED TO THE MODEL FOR SERVING CHILDREN WITH DISABILITIES ATTENDING CHARTER SCHOOLS:

1. The Commission recommends that the entity responsible for the provision and oversight of FAPE should receive the funding to allow them to meet that responsibility.

2. The list of options (RSA 194-B:11, III(b)) for how and where special education and related services are provided should be maintained.

3. Revise RSA 194-B:11, III(b) to read, “When a child is enrolled by a parent in a charted public school, the local education agency of the child’s resident district shall convene a meeting of the individualized education program (IEP) team and shall invite a representative of the charted public school to that meeting as a participating member of the IEP team. At the meeting, the IEP team shall determine how to ensure the provision of a free and appropriate public education in accordance with the child’s IEP. . . .”

4. Amend RSA 194:31-a to read, “Student Records.—All elementary and secondary educational institutions including academies, private schools and public schools shall, upon request of a private school, a chartered public school, or a school district as authorized by a parent, student, or former student, furnish a student record to any elementary or secondary educational institution. There shall be no charge for any record furnished pursuant to this section”. Reference this amended statute in RSA 194-B.

5. Through legislation, and as needed, rulemaking, develop a process for LEAs and chartered public schools to use to eliminate interruptions in special education and related services when a child with a disability who is attending a chartered public school moves from one LEA to another during the school year.

6. Through a FY memo and the Procedural Safeguards handbook, the NH DOE will caution that the option selected for the provision of services shall not result in the child’s school day being reduced below the minimum established by Ed 306.18, unless the IEP team, which includes the representative of the chartered public school, determines otherwise.

7. DOE clarify that IEP team members may participate in IEP team meetings through alternate means, including telephone or video conferencing.

8. NH DOE explain through a FY memo and in the Procedural Safeguards handbook how existing dispute resolution options may be used by chartered public schools, LEAs and/or parents to resolve disputes about how and where services are provided.

9. NH DOE explain that when a child with a disability applies for, or enrolls in, a chartered public school, the child’s special education or related services may not be reduced or removed unless the IEP team, which includes a representative from the chartered public school, determines that such a change is appropriate. The decision and the reason for the change in eligibility or in the nature or extent of the child’s special education or related services shall be included in the written prior notice.

10. NH DOE include in a FY memo, in the Procedural Safeguards handbook, and in the NH DOE’s Special Education Policy and Procedures Manual, a clear prohibition on a charter school denying the enrollment of a child on the basis of the child’s disability, on a LEA having policies, procedures or actions that discourage parents from choosing to enroll their child with a disability in a chartered public school or that encourage parents “opt their child out” of special education while the child is attending a chartered public school, or that unilaterally reduce a child’s special education and/or related services once the child enrolls in a chartered public school, as well as the steps that the NH DOE will take in response to any such actions. Include in each document, information about processes that parents may use when they allege that a chartered public school or LEA has violated their/their child’s rights (e.g. discouraged the child’s attendance at the charter school, reduced or terminated the child’s services, or failed to implement the IEP).
11. Whenever a charter school or school district become aware that the family of a child with a disability has chosen to enroll their child with a disability in a chartered public school, or the family is considering enrolling their child in a chartered public school, both the chartered public school and the school district shall provide notification to the family of the family’s right to receive special education services to the maximum extent appropriate. A model notification form shall be developed by the NH Department of Education and distributed to chartered public schools and school districts in the state. The notice shall be tailored to protect the child’s rights during and following the enrollment process, and shall include information about the right of the family to give or deny consent to any decision of the local educational agency to reduce or change the special education or related services received by the child.

12. To assist LEAs and chartered public schools in providing FAPE to students with disabilities attending charter schools, the NH Association of Special Education Administrators, NH Chartered Public Schools Association, NH School Administrators’ Association, and NH School Boards’ Association should work together to draft and disseminate model forms, including a model contract or MOU for LEAs and chartered public schools to use when a LEA is contracting with a chartered public school to provide direct services. Some of the items the form(s) may include are: specific services to be provided and the frequency, duration and location of each service, the entity responsible for providing each service, the type/certification/licensure of the individual providing the service, and any documentation procedures and requirements.

FINDINGS RELATED TO MONITORING AND ACHIEVING QUALITY OUTCOMES:

1. Staff of chartered public schools and LEAs, as well as, for relevant topics, parents, will benefit from training, technical assistance and/or mentoring on topics, including rights, roles, responsibilities, procedures, collaboration and best practices.

2. There is currently no mechanism that is either effective or used consistently to identify and disseminate best practices, including those developed by chartered public schools and school district public schools, that help chartered public schools and school districts meet the needs of children with disabilities who are attending chartered public schools.

RECOMMENDATIONS RELATED TO MONITORING AND ACHIEVING QUALITY OUTCOMES:

1. The NH DOE should provide or identify sources for training (related to serving children with disabilities who are attending charter schools) that charter schools and LEAs have identified as needs.

2. NH DOE convene and utilize a stakeholders’ group (on a short- or long-term basis) to provide feedback and input on the provision of special education services at chartered public schools in NH. One of the tasks of the stakeholders’ group is to determine a mechanism or mechanisms for identifying and disseminating best practices to help chartered public schools and school districts meet the needs of children with disabilities who are attending charter schools, including practices that minimize the impact on budgets and staffing.
Resources

- NH RSAs that govern special education services at charter schools
- NH Rules for the Education of Children with Disabilities
- Previous [Commission] meeting minutes and presenters
- NH Department of Education
- NH Bureau of Special Education
- The NH Alliance for Public Charter Schools
- NH Association of Special Education Administrators
- NH School Administrators Association
- NH DOE Bureau of Special Education publications and resources including numbered memorandums and training materials.
- The National Center for Special Education in Charter Schools
- Each charter school’s application that outlines how the school will coordinate with the school district for “matters pertaining to any required special education programs or services including method of compliance with federal and state laws pertaining to children with disabilities.” [RSA194-B:3 II (m)]
- School districts and charter schools who do work collaboratively to find solutions for special education services.
- A NH DOE stakeholders group could provide feedback and input on special education services at NH charter schools.
- State Advisory Committee on the Education of Children with Disabilities (RSA 186-C:3-b, II) includes "a representative of a chartered public school, appointed by the governor”, but that slot has often been unfilled).
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<tr>
<td>Representative Rick Ladd, member from the House Education Committee</td>
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<td>Representative Mary Gorman, from the House Education Committee</td>
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<td>Representative Ken Weyler, from the House Finance Committee</td>
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<td>Senator John Reagan, from the Senate</td>
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<td>Santina Thibedeau, representing the NH Department of Education</td>
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<td>Beth McClure, involved with the management or operation of a chartered public school</td>
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<td>Karin Cevasco, Director involved with management or operation of a chartered public school</td>
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<td>Meryl Levin, involved with the management or operation of a chartered public school</td>
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<td>Heather Tyler, parent of at least one child attending a chartered public school</td>
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<td>Christopher O'Reilly, parent of at least one child attending a chartered public school</td>
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<td>Lisa Witte, parent of at least one child attending a chartered public school</td>
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<td>Jennifer Pomykato, representing the New Hampshire School Administrators Association</td>
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<td>P. Alan Pardy, representing the NH Association of Special Education Administrators</td>
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<td>Chris Rueggeberg, representing the NH Council on Developmental Disabilities</td>
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<td>Michael Skibbie, Esq, representing the Disabilities Rights Center-NH</td>
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<td>Gerald Zelin, representing the NH Council of School Attorneys</td>
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<td>Lauren Rhim, representing the NH Public Charter School Association</td>
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<td>Barrett Christina, representing the NH School Boards Association</td>
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<td>Bonnie Dunham, representing the Parent Information Center</td>
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<td>Christina D'Allesandro, parent of a child with a disability</td>
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<td>Paloma Sylvan, parent of a school-age child</td>
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Minority Report(s)

Any minority reports submitted by Commission members are included on the following pages
Minority Report to HB 126
The Commission to Study Issues Related to Students Receiving Special Education Services while Attending a Chartered Public School (RSA186-C:30)

Representative Mary Gorman

As indicated by the August 31, 2016 minutes, the majority of the Commission present voted not to include a chart depicting the State’s base adequacy payments to district schools and charter schools in the final report. The rationale being base adequacy is not relevant to the charge of studying SPED issues of children attending a charter school.

The minority disagrees.

One of the duties of the commission is to “study the funding for children in need of special education services who are attending a chartered public school and whether such funding is sufficient to ensure a free and appropriate public education.”

Analysis of funding for children with an IEP in a charter school is incomplete without the examination of funding for an adequate education as determined by the State.

Funding for special education in NH begins with the State’s responsibility to define and to fund an adequate education for all students.

Base adequacy is the State’s fiscal responsibility to provide an adequate education to all pupils whether in a district school or charter school. Charters are awarded an additional grant of $2,036 for each pupil who is a resident in attendance. In 2017, charter schools will receive an additional $1,000 per pupil as established by HB 563. Payment to district schools will remain the same.

| Adequacy Payment per Pupil for Grades 1-12 |
|-----------------|-----------------|-----------------|
|                 | 2015            | 2016*           | 2017**          |
| District schools| $3,498.30        | $3,561.27       | $3,561.27       |
| Charter schools | $5,498.30        | $5,597.27       | $6,597.27       |
| Charter/District| 157%            | 157%            | 185%            |

*CPI adjustment

**As established by HB 563

This additional money to charter schools per pupil provides added resources for their programs which include students with an IEP. Special education does not occur in a vacuum. Special education services are to be conducted in the least restricted environment. Ideally, this is in the integrated classroom. All children, including those with an IEP, benefit from the increased dollars awarded to charter schools on a per pupil basis.

A common miscalculation is to compare adequacy payments to charter schools to the average cost per district public school pupil. It is a comparison of two unrelated quantities.

Adequacy refers to the State’s fiscal responsibility to provide an adequate education to all pupils whether in a district school or charter school. Adequacy per pupil at a district school is $3,561.27. Adequacy per pupil at a charter school is $6,597.27.

The average cost per district public school pupil is $14,001 statewide. It represents the sum of all current expenses-including special education for charter schools- from all funding sources, e.g. state & federal revenues, and property taxes (which are raised locally and stay locally) of every school district associated with their daily operations less transportation, food service revenue, and out of district placement divided by the ADM in attendance statewide. It is an intermediate figure or middle position on a scale of evaluation of all towns and their costs per pupil from Franklin at $10,000 to Errol at $30,000. **It is not a sum paid to districts by the State.**

*Note: ADM is Average Daily Membership*
Commission to Study Issues
Relating to Students Receiving Special Education Services
While Attending a Chartered Public School

Minority Report
October 2016
The Department of Education (DOE) would like to recognize the members of the Commission for all their efforts towards the development of this Report. The DOE can endorse some of the recommendations within the report. However, many of the recommendations seem short sighted on the impact to parents and students with disabilities who attend Charter Schools.

Throughout the report there are recommendations that include modifying the Procedural Safeguards handbook. The Procedural Safeguards handbook is a document based on the Individuals with Disabilities Education Act 2004 Subpart E--Procedural Safeguards; Due Process Procedures for Parents and Children. Procedural safeguards are an integral part of IDEA's requirements. They represent guarantees for parents and their child with disabilities, as well as offer both school and parents a variety of options for resolving any disagreements.

The DOE disagrees with the following recommendation:

**Commission Recommendation:** Through a FY memo and the Procedural Safeguards handbook, the NH DOE will caution that the option selected for the provision of services shall not result in the child’s school day being reduced below the minimum established by Ed 306.18, unless the IEP team, which includes the representative of the chartered public school, determines otherwise.

**DOE Explanation:** IDEA's purpose for Procedural Safeguards is to have a variety of options for resolving disagreements. This recommendation is not about disagreements but rather to caution parents. The DOE is not certain how to “caution that the option selected for the provision of services shall not result in the child’s school day being reduced below the minimum established by Ed 306.18, unless the IEP team, which includes the representative of the chartered public school, determines otherwise.”

**DOE Recommendation:** The DOE would recommend revising RSA 186:C to address this recommendation. The legislative process would allow an opportunity for the public through a public hearing to give testimony and information so that intent of this recommendation can be captured.

**Commission Recommendation:** NH DOE explain through a FY memo and in the Procedural Safeguards handbook how existing dispute resolution options may be used by chartered public schools, LEAs and/or parents to resolve disputes about how and where services are provided.

**DOE Explanation:** The Procedural Safeguards outline how LEA and parents can resolve disputes as outlined in IDEA. Currently, there is no legislative process for when LEA and chartered schools have a special education dispute or chartered public schools and parents have a dispute.

**DOE Recommendation:** The DOE would recommend revising RSA 186:C to address this recommendation through a state process. The legislative process would allow an opportunity for the public through a public hearing to give testimony and information so that intent of this recommendation can be captured.
Commission Recommendation: NH DOE include in a FY memo, in the Procedural Safeguards handbook, and in the NH DOE’s Special Education Policy and Procedures Manual, a clear prohibition on a charter school denying the enrollment of a child on the basis of the child’s disability, on a LEA having policies, procedures or actions that discourage parents from choosing to enroll their child with a disability in a chartered public school or that encourage parents “opt their child out” of special education while the child is attending a chartered public school, or that unilaterally reduce a child’s special education and/or related services once the child enrolls in a chartered public school, as well as the steps that the NH DOE will take in response to any such actions. Include in each document, information about processes that parents may use when they allege that a chartered public school or LEA has violated their/their child’s rights (e.g. discouraged the child’s attendance at the charter school, or reduced or terminated the child’s services).

DOE Explanation: This recommendation has several processes that the DOE should implement. First, the DOE should establish a statement that prohibits a charter school denying the enrollment of a child on the basis of the child’s disability, on a LEA having policies, procedures or actions that discourage parents from choosing to enroll their child with a disability in a chartered public school or that encourage parents “opt their child out” of special education while the child is attending a chartered public school, or that unilaterally reduce a child’s special education and/or related services once the child enrolls in a chartered public school. Secondly, to establish a dispute resolution mechanism that parents may use when they allege that a chartered public school or LEA has violated their/their child’s rights (e.g. discouraged the child’s attendance at the charter school, or reduced or terminated the child’s services). Currently, there are mechanisms in place when a parent alleges that LEA has violated their child’s rights which are outlined in IDEA and the Procedural Safeguards.

DOE recommendation: Currently, there is no federal or state legislative process for when a Charter school has violated a child’s right for special education. The DOE would recommend revising RSA 186:C to address this recommendation. The legislative process would allow an opportunity for the public through a public hearing to give testimony and information so that intent of this recommendation can be captured.

Commission Recommendation: DOE clarify that IEP team members may participate in IEP team meetings through alternate means, including telephone or video conferencing.

DOE Explanation: Pursuant to CFR 300.322 and CFR 300.328, other methods or alternative means is based on the participation of the LEA and parent. Since there is no federal regulation, state statute or administrative rules that govern chartered public school staff using alternative methods, the DOE has not basis to clarify what does not exist.

DOE Recommendation: The DOE would recommend revising RSA 186:C to address this recommendation. The legislative process would allow an opportunity for the public through a public hearing to give testimony and information so that intent of this recommendation can be captured.
**Commission Recommendation:** Whenever a charter school or school district become aware that the family of a child with a disability has chosen to enroll their child with a disability in a chartered public school, or the family is considering enrolling their child in a chartered public school, both the chartered public school and the school district shall provide notification to the family of the family’s right to receive special education services to the maximum extent appropriate. A model notification form shall be developed by the NH Department of Education and distributed to chartered public schools and school districts in the State. The notice shall be tailored to protect the child’s rights during and following the enrollment process, and shall include information about the right of the family to give or deny consent to any decision of the local educational agency to reduce or change the special education or related services received by the child.

**DOE Explanation:** The DOE is aware that there is no requirement of a traditional public school to inform parents when enrolling their child with an IEP that they have a right to receive special education services to the maximum extent appropriate. However, this recommendation would recommend that the DOE create such a statement. The recommendation would also instruct the DOE to create a model form in which to deliver this information.

**DOE Recommendation:** Since there is no federal regulation, state statute or administrative rule that govern a notice of this nature, DOE has not basis to the content of the model form nor to the requirements of when and how the notice must be provided to the parent. The DOE would recommend revising RSA 186:C to address this recommendation. The legislative process would allow an opportunity for the public through a public hearing to give testimony and information so that intent of this recommendation can be captured.

We Commission members concur with this Minority Report.

Date: 10/25/2016

By: [sign name here]

Virginia M. Barry, Ph.D.

[print name here]

Date: ____________

By: [sign name here]

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Date: ____________

By: [sign name here]

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Date: ____________

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[print name here]
Commission to Study Issues Relating to Students
Receiving Special Education Services
While Attending a Chartered Public School

Commission established pursuant to New Hampshire Revised
Statutes Annotated 186-C:30

October 2016

MINORITY REPORT
Conclusions and Recommendations

Reconciling RSA 194-B:11, III with the special education laws is like trying to pound a square peg into a round hole. School districts, charter schools, and parents usually manage to round off the corners through compromise and good will. However, those compromises mask flaws that always lurk underneath and sometimes rise to the surface.

RSA 194-B:11, III is flawed on three levels.

The first level involves the basic outline of the statute. Federal law expects the State, not school districts, to provide special education for children with disabilities attending charter schools like New Hampshire’s charter schools. RSA 194-B:11, III, in contrast, imposes programmatic and financial responsibility for special education on the school district in which the charter school student resides. This is irrational and unfair, since the school district has no control over the charter school. The current regime also increases costs for school districts, which violates Part 1, Article 28-a of the New Hampshire Constitution.¹

For elaboration on those points, see Appendix B attached hereto.

We recommend that the legislature repeal RSA 194-B:11, III and insert in its place a system that tracks federal law. The new statute should make the State, not school districts, responsible for special education at charter schools.

¹The average annual per pupil cost for educating a child with disabilities is approximately twice the current average annual per pupil cost for educating a child who is not disabled. (Appendix C attached hereto, pp. 3-4.) Today, New Hampshire’s average annual per pupil cost is approximately $15,000 for nondisabled children and approximately $30,000 for children with disabilities.

When a child with disabilities attends a charter school, the New Hampshire Department of Education gives the school district only $1,856 in differentiated adequacy aid to help defray that student’s special education costs. RSA 194-B:11, I(b)(1) as amended by N.H. Laws of 2016, Chapter 22; RSA 198:40-a, III.

Testimony and written statements the Commission received indicate that school districts occasionally save money when a special education student transfers from a district school to a charter school. This arises in at least two circumstances: (1) when the student needs fewer special services at the charter school due to the smaller size of classes there; or (2) when a school district does not operate its own schools and ordinarily pays tuition for every resident student to attend another district’s public schools. In the latter situation, if the student transfers to a charter school, the district of residence avoids paying basic tuition and must fund only special education.

In the absence of such special circumstances, it is generally more expensive for a school district to provide special education and related services to students attending charter schools than to provide special education and related services to students attending the district’s own schools. This is attributable in part to economies of scale available within the district’s schools. The school district also incurs increased transportation costs, for students and/or itinerant staff, when parents chose to place a child with disabilities at a charter school located far from home.

The Commission lacked enough data to conclude with certainty that the current system increases costs for New Hampshire school districts as a whole. Our sense is that the current system does increase the net cost for school districts as a whole. It is clear, from the information we received, that RSA 194-B:11, III increases net costs for many school districts, such as Manchester and Newmarket, and thereby violates Part 1, Article 28-a for them.
The second level involves the statute’s details. Portions of RSA 194-B:11, III are sloppily written. Even if the legislature decides to keep the current outline of the statute, some language in the statute should be tightened. See Appendix A attached hereto for specific recommendations.

Third, RSA 194-B:11, III conflicts with RSA 186-C, New Hampshire’s special education statute. RSA 186-C:9 and :10 contemplate that school districts will provide or fund special education at state-approved special education programs. RSA 186-C:5, I(a) establishes a mechanism for any school, including a charter school, to obtain such program approval.

No New Hampshire charter school has applied for program approval under RSA 186-C, not even ones that recruit children with disabilities or that have large numbers of students with disabilities.

Appendix A includes a proposal to require that any charter school with a large number of special education students obtain program approval. This will guarantee quality control. It will also empower the State Department of Education to set the rates an approved charter school charges school districts for special education and related services.

Response to Majority Report

We disagree with portions of the Majority Report that rely on the premise that special education, being a “right,” is portable and that portability is boundless.

For example, Medicaid may create a “right” to public funding for a medical procedure. Does that give a patient the right to public funding for medical costs and transportation if the patient chooses a hospital in Paris, France, when the procedure can be competently performed in a hospital close to home?

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits unreasonable discrimination against students with disabilities.\(^2\) Courts have held this gives every student with disabilities the following rights: (1) to attend a public school; and (2) to receive services that cost at least as much as the school’s average annual per pupil cost for nondisabled children.\(^3\) Courts have rejected the notion that the U.S. Constitution guarantees appropriate special education.\(^4\)

The federal Individuals with Disabilities Education Act (IDEA) goes further, by creating a right to special education. A school district fulfills its duties under the IDEA when it offers a


“free appropriate public education” (FAPE) in its own public schools. (See Appendix C attached hereto, pp. 8-9.)

The IDEA does not require public funding for an unnecessarily expensive or distant school. Nor does Fourteenth Amendment equal protection require that a state’s school choice statute guarantee public funding for special education outside a student’s home district when a FAPE is available within the home district.\(^5\)

We ardently support public education. Like everyone else on the Commission, we would like every child to receive the best possible public education.

On the other hand, we recognize that public resources are finite. The more money a school district spends on a student with disabilities attending a charter school, the less money the school district has to educate disabled and nondisabled children attending its own public schools.

Those cost considerations should motivate the legislature to set reasonable limits on what the public must spend for specialized services when a parent chooses to send a child with disabilities to a charter school while a FAPE is available at less cost within the resident district’s schools.

We Commission members concur with this Minority Report.

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APPENDIX A

Proposed Statutory Amendments

1. Amend RSA 194-B to provide that, whenever a charter school applies to the State Board of Education for approval or to renew approval:

   (a) the State Board shall provide written notice to the superintendent of schools for the district in which the charter school is located; and

   (b) the school district shall then have an opportunity to submit written comments before the State Board makes a decision on the application.

2. Amend RSA 194-B by adding that, if over 25 percent of a charter school’s students qualify for special education, the school must first obtain approval under RSA 186-C:5 to operate as a special education program.

3. Amend RSA 186-C:7-c by authorizing the State Department of Education to set the rate a charter school may charge school districts when the charter school provides special education or related services.

   **Explanation:**

   RSA 194-B:11, III(b) requires that the district of residence provide special education and related services to a student with disabilities attending a charter school. Options listed in that statute include shuttling the student between the charter school and the district’s own schools, paying the charter school to provide the services, sending school staff to the charter school, or providing the services at a neutral site.

   The trend has been for school districts to pay charter schools, especially when the charter school is located far from the district where the student resides. This is because: (1) shuttling students raises transportation costs and often disrupts their school day; and (2) sending school district employees to charter schools likewise raises transportation costs and often fractures the employee’s work day.

   RSA 186-C:7-c, II currently directs the State Department of Education to set rates each private state-approved special education school may charge school districts for special education and related services.
4. Amend RSA 194-B:8, I, regarding prohibited forms of discrimination.

This statute currently provides as follows: "A chartered public school shall not discriminate nor violate individual civil rights in any manner prohibited by law. A chartered public school shall not discriminate against any child with a disability as defined in RSA 186-C. A chartered public school shall provide due process in accordance with state and federal laws and rules." (Emphasis added.)

The italicized language should be deleted and replaced with the following: "A chartered public school shall not discriminate on the basis of disability against any child with a disability as defined in RSA 186-C."

Explanation:

RSA 194-B:8, I currently prohibits a charter school from discriminating against a child who qualifies for special education, even when the discrimination is reasonable and is unrelated to the fact that the child qualifies for special education.

The language of Section 504 of the Rehabilitation Act of 1973 provides a more reasonable model. Section 504 says, "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added).

5. Amend RSA 194-B:6 to immunize school districts from liability for a charter school’s acts or omissions regarding implementation of the special education laws.

RSA 194-B:6 currently states: "No host, sending, or receiving district shall be held liable for damages in an action to recover for: (a) bodily injury, personal injury, or property damage as defined in RSA 507-B:1, or (b) for failure to educate pupils, where such actions arise out of the establishment or operation of a chartered public school." (Emphasis added.)

Courts have held that claims for compensatory education are not damage claims. This is because an award of compensatory education directs a school district to provide services going forward, to make up for services the student missed in the past, not monetary compensation for physical or economic injury.

6. Amend RSA 194-B:11, III(a)-(b) as follows (by removing the struck-through language and by adding the italicized language):

“(a) The fact that a child with disabilities attends a chartered public school does
not relieve the district of residence of its duty to offer a free appropriate public education under RSA 186-C. In accordance with current department of education standards, While a child with disabilities under RSA 186-C attends a chartered public school, the funding and educational decision-making process for children with disabilities attending a chartered public school shall be the joint responsibility of the resident district and the chartered public school, both of which shall retain all current options available to the parent and to the school district. The district of residence shall ordinarily be obligated to fund the cost of special education, related services, supplementary aids and services, transition services, vocational education, and transportation within the limits set forth in paragraph (b)(6) below, while the chartered public school shall ordinarily be obligated to fund the cost of accommodations, modifications, and courses that satisfy the child’s transition service needs.

(b) When a child is enrolled by a parent in a chartered public school, the local education agency of the child's resident district shall convene a meeting of the individualized education program (IEP) team and shall invite a representative of the chartered public school to that meeting. The chartered public school shall send at least one representative to that meeting. At the meeting, the IEP team shall determine offer a “charter school IEP” that assumes the child will continue to be enrolled at the chartered public school, that offers a free appropriate public education to the extent feasible given the parent's decision to enroll the child in the chartered public school, and that clearly identifies for each element of the IEP which entity (the school district or the chartered public school) is responsible for funding and implementing that element of the IEP. To ensure the provision of a free and appropriate public education in accordance with the child’s IEP, the child's IEP, including but not limited to special education, and related services, accommodations, modifications, supplementary aids and services, supports for school personnel, transition services, transition services needs, and vocational education, shall be provided using any or all of the methods listed below starting with in the least restrictive appropriate environment:

(1) The resident district may send staff to the chartered public school; or

(2) The resident district may contract with a service provider to provide the services at the chartered public school; or

(3) The resident district may provide the services at the resident district school; or

(4) The resident district may provide the services at the service provider's location; or

(5) The resident district may contract with a chartered public school to
provide the services; and

(6) If the child due to his or her disability requires transportation to and/or from the chartered public school before, after, or during the school day in order to receive special education and related services as provided in the IEP, the child's resident district shall provide transportation for the child, except that the resident district shall not be required to transport the child beyond the resident district's boundaries."

Explanation:

A. The IDEA requires that an IEP include more than special education and related services. An IEP must also include modifications, accommodations, supplementary aids and services, supports for school personnel, and (starting no later than age 16) transition services. 20 U.S.C. § 1414(d)(1)(A)(IV), (VIII); 34 C.F.R. § 300.320. New Hampshire law adds that an IEP also include vocational education and, if the child is age 14 or older, transition service needs (which means courses to prepare a child for life after elementary and secondary school). N.H. Code of Admin. Rules, Ed 1109.01(a)(10, (11).

B. Modifications, accommodations, transition service needs, and supports for school personnel are ordinarily not expensive.

C. Modifications, accommodations, and supports for school personnel tend to permeate the school day. It is unreasonable to expect a school district, which has no control over the charter school, to be responsible for ensuring that the charter school implements those portions of the IEP.

D. The clause “in accordance with current department of education standards” in RSA 194-B:11, III(a) is nonsense. That clause has been in the statute since 1995 when RSA 194-B was first enacted. Back in 1995, the New Hampshire Board of Education’s special education rules were entitled “State Standards,” but they said nothing about charter schools. The State Board of Education’s special education rules are still silent on charter schools.

E. 194-B:11, III(b) currently speaks of placement in the “least restrictive environment.” The IDEA requires that the responsible public educational agency provide special education in the least restrictive “appropriate” environment. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). We recommend amending RSA 194-
B:11, III(b) by inserting “appropriate.”

F. The IDEA categorizes transportation as a “related service,” which a school district must provide when “required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26)(A). School districts ordinarily provide transportation to students with disabilities when: (a) the student has a disability that makes it difficult or impossible to walk to school (transportation based on disability per se); (b) the student’s disability interferes with transportation on a regular school bus (again transportation based on disability per se); or (c) the school district assigns the child to a distant out-of-district school because it cannot provide appropriate special education in its own public schools (transportation based on distance per se). When a parent enrolls a student with disabilities in a distant charter school where special education will be provided, the parent may argue that transportation is necessary for the student to access special education (transportation based on distance per se), even though a free appropriate public education is available in the resident district’s schools. Our proposed amendments to RSA 194-B:11, III(b)(6) restrict the distance of publicly-funded transportation and rule out publicly-funded transportation when the need for transportation arises solely from the location of the charter school as distinguished from the child’s disability per se. However, these amendments should be coordinated with RSA 194-B:2, V, which addresses transportation for charter school students in general, in order to avoid discrimination based on the fact that a student qualifies for special education.

7. Amend RSA 194-B:11, III(c) as follows (by removing the struck-through language and by adding the italicized language):

“(c) Consistent with section 5210(l) of the Elementary and Secondary Education Act and section 300.209 of the Individuals with Disabilities Education Act, when When a parent enrolls a child with a disability in a chartered public school, the child and the child’s parents shall retain all rights under federal and state special education law, including the child’s right to be provided with have a free and appropriate public education available, which includes all of the special education and related services included in the child’s IEP. The child’s resident district shall have the responsibility, including financial responsibility, to ensure the provision of the special education and related services in the child’s IEP, and the chartered public school shall cooperate with the child’s resident district in the provision of the child’s special education and related services.”

Explanation:
A. Section 5210(1) of the ESEA merely defines the term "charter school." The ESEA says nothing about special education at charter schools.

B. The reference to section 300.209 of the IDEA is nonsense and dishonest. The IDEA contains no such section. The U.S. Department of Education’s regulations implementing the IDEA, at 34 C.F.R. § 300.209(d), impose responsibility on the State, not on school districts, when a student attends a charter school that is not operated by a school district and that is not an LEA.

C. The IDEA does not confer a right to "be provided" with a FAPE. It requires that every child with disabilities in a participating state have a FAPE "available." 20 U.S.C. § 1412(a)(1)(A). Parents remain free to spurn a FAPE by opting out of special education or by enrolling their child in a school that does provide a FAPE.

D. My proposed amendments to RSA 194-B:11, III(a) and (b), set forth in Section 6 of this memorandum, allocate responsibility for services while a special education child attends a charter school.

8. Add the following as RSA 194-B:11, III(d) and (e)

"(d) In the event of a disagreement over what to include in a child’s charter school IEP, or over the allocation of responsibility to implement or fund any element of that IEP, the parent, school district, or charter school may initiate an impartial due process hearing pursuant to the Individuals with Education Disabilities Act, 20 U.S.C. § 1415, and the hearing officer shall have jurisdiction over the school district, the chartered public school, and the State Department of Education.

(e) If a parent refuses to allow the chartered public school to disclose relevant information to the school district in which the student resides, or refuses to allow representatives of that school district to observe their child in chartered public chartered school, the school district shall have no responsibility for the child’s special education while the child attends the chartered public school until the parents cooperate by allowing the disclosure of relevant information and by allowing such observation."