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March 17, 2008

The Hon. Richard P. Mills
Commissioner of Education
New York State Education Department
89 Washington Avenue
Albany, New York 12234

Re: Comments on Public Participation Regulations

Dear Commissioner Mills:

The Campaign for Fiscal Equity (CFE) brought the litigation that established the New York State constitutional right to a sound basic education. Together with the Alliance for Quality Education (AQE) and other coalition partners, our organizations played a leading role in the development and the enactment of the Education Budget and Reform Act of 2007-2008 that established the Contract for Excellence (named for CFE). One of the driving principles underlying both the litigation and the legislation is to ensure that the voice and the views of the public are given an active and substantial role in determining how these hard won new resources, distributed based on need, tied to accountability, and delivered through the Contract for Excellence development approval processes are effectively utilized to achieve the goal of academic excellence for all public school children. In the first year of the Contract, despite limited inclusion of the public statewide contrary to the law, the input of our organizations and members of the public had a substantial impact on the approval process. We looked to the development of the final regulations as a place to further clarify the processes for this expansive public participation as required by the legislation. Instead, we find that the New York State Education Department has issued proposed final regulations that misinterpret the law and severely limit and undermine one of its basic tenets.

CFE and AQE write to express our strong objections to the draft regulations issued by the State Education Department ("SED") interpreting the public participation provisions of the Contract for Excellence ("C4E") law. Specifically, CFE and AQE urge you to reconsider the regulations surrounding Section 211-d[4] of the Education Law, which concerns the "public process" through which districts subject to C4E must develop their contracts. These regulations impermissibly distort both the plain text and the spirit of the statute.

Section 211-d[4](a) states that all contracts for the 2008-09 academic year and beyond "shall be developed through a public process, in consultation with parents or persons in parental relation, teachers, administrators, and any distinguished educator appointed" pursuant to another provision of the C4E statute. Section 211-d[4](b) additionally provides that this "public process" must "include at least one public hearing." Instead of facilitating a

truly "public" process, the draft regulations promulgated by SED contort both the meaning of the terms "public" and "in consultation with" to limit participants in this "public process" to only those persons expressly enumerated in Section 211-d[4](a): parents, teachers, administrators, and "distinguished educators." This interpretation of Section 211-d[4] cannot stand.

It is well settled that an agency may only adopt regulations that are not "inconsistent with the statutory language or its underlying purposes." *Gen. Elec. Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004) (citation omitted). First and foremost, the draft regulations are inconsistent with the plain meaning of the term "public." As commonly understood, "public" means either "exposed to general view" and/or encompassing "all of the people." Merriam-Webster's Dictionary of Law (1996), *available at* http://www.dictionary.com (last visited Mar. 8, 2008). The statutory language gives no indication that the Legislature intended to abandon this meaning in favor of a definition that limits the "public" to a select few.

Second, where "a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase generally refers to and modifies all of the preceding clauses." *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.*, 87 N.Y.2d 574. New York courts have frequently understood the phrase "in consultation with" as supplementary to and/or inclusive of, rather than limiting, the persons who are entitled to carry out particular functions or actions. For example, in interpreting the scope of a guardian's right to make health care decisions for a mentally retarded person, the Court of Appeals noted that in order to withhold life-sustaining treatment from such a person, her attending physician, "in consultation with" at least one other medical professional, must confirm the person's inability to make health care decisions for herself. *In re M.B.*, 6 N.Y.3d 437, 451 (2006) (interpreting N.Y. Surr. Ct. Proc. Act § 1750-b). In the Court's view, the phrase "in consultation with" required "two health care professionals to assess" the mentally retarded person's ability to make health care decisions. *Id.* With respect to Section 211-d[4], CFE believes a court would similarly construe the phrase "in consultation with" as describing the people who *must* be involved in the "public process" by which contracts are developed, as opposed to restricting who *may* be included.

Third, given that the "public process" established by statute must include "at least one public hearing," N.Y. Educ. Law § 211-d[4](b), the State's open meetings law likely applies. CFE and AQE expect that any public hearing to develop a district's contract likely would be held by its school board. Local boards of education constitute "public bodies" under the open meetings law, *see* N.Y. Pub. Officers Law § 102[2], and are subject to its requirements. *See, e.g.*, *Rampello v. E. Irondequoit Cent. Sch. Dist.*, 236 A.D.2d 297 (4th Dep't 1997) (concluding school board meeting was held in violation of open meetings law). Accordingly, except where an executive session is called, any public hearing convened by a school board in furtherance of the "public process" to develop a contract for excellence must be "open to the general public." N.Y. Pub. Officers Law § 103(a). Moreover, the open meetings law makes clear that regulations "affecting a public body" cannot circumvent its

terms. Instead, to the extent that any such regulations are "more restrictive with respect to public access" than the open meetings law, they are "superseded." *Id.* § 110[1].

The application of the open meetings law to the "public hearings" envisioned under Section 211-d[4](b) exposes the perversity of SED's position. If the general public is entitled by statute to participate in a "public hearing" included as part the "public process" established by Section 211-d[4], why is that general public not entitled to participate in the process itself? Moreover, as used throughout the open meetings law, the term "public" carries a broad, inclusive meaning that suggests SED's interpretation is not only overly restrictive, but also violates the overall purpose of the C4E statute: enhancing accountability of our school districts to *all* stakeholders, not just a select few.

As the organizations whose fight for educational equity inspired the enactment of the Contract for Excellence legislation, we are baffled by SED's attempt to preclude our participation in the development of the contracts themselves. We strongly urge you to revise the draft regulations to enable educational advocacy organizations, such as CFE and AQE, to participate in the "public process" called for by law. Any other result would run counter to the plain terms and purpose of the statute itself.

Very truly yours,

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cc: Johanna Duncan-Poitier, Deputy Commissioner
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