



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

June 14, 2019

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SENT VIA CERTIFIED MAIL AND E-MAIL

Dear Mr. Matthews,

Thank you for your interest in forming a Multiple Charter School Organization (MCSO). After reviewing the Freire Charter Schools MCSO Application, it is the decision of the Pennsylvania Department of Education to deny the Application, at this time, for the reasons explained in the enclosed decision.

If you have any questions, please feel free to contact my office.

Sincerely,

A handwritten signature in cursive script, reading "David W. Volkman".

David W. Volkman
Executive Deputy Secretary

Background

Pursuant to section 1729.1-A of the Charter School Law (CSL), the Pennsylvania Department of Education (PDE) has the authority and responsibility to receive, review, and act upon applications for the establishment of a Multiple Charter School Organization (MCSO). 24 P.S. § 17-1729.1-A(a)(1)(i). An MCSO applicant must also submit its application for approval by each school district that has chartered a charter school included in the MCSO proposal (chartering school district). 24 P.S. § 17-1729.1-A(a)(1)(ii). As part of the application requirements established by PDE pursuant to subsection (c), PDE requires that an MCSO application submitted to PDE contain evidence that the application was first submitted to each chartering school district. The identical MCSO application approved by the chartering school districts may then be submitted to PDE.

On May 2, 2019, PDE received an MCSO application (Application) submitted by two charter schools: Freire Charter School and TECH Freire Charter School, both in Philadelphia, to form Freire Charter Schools MCSO (Applicant). Summary information is provided in Table 1, below:

Table 1. Schools Proposed for MCSO

School name	Authorizing district	Location	School Performance Profile score in top 25% in both 2016-17 and 2017-18
Freire Charter School	SD of Philadelphia	2027 Chestnut St., 19103	Yes
TECH Freire Charter School	SD of Philadelphia	2221 N. Broad St., 19132	No

According to the Applicant, the Application was received by the authorizer for both schools, the School District of Philadelphia, on May 1, 2019, and by the Department of Education on May 2, 2019.

An MCSO is established through the merger¹ of two or more charter schools into a single non-profit corporate entity. 24 P.S. § 17-1729.1-A(a)(1). An MCSO has the authority to operate multiple charter schools “under the oversight of a single board of trustees and a [single] chief administrator who shall oversee and manage the operations of the individual charter schools under its organization[.]” 24 P.S. § 17-1729.1-A(a)(2)(i). An MCSO “shall be regarded as the holder of the charter of each individual charter school under its oversight” 24 P.S. § 17-1729.1-A(e).

A charter school is an independent public school. 24 P.S. § 17-1703-A. Pennsylvania law recognizes that each charter school is an independent Local Education Agency (LEA), separate from the chartering

¹ Although section 1729.1-A uses the term “consolidation,” the term “merger” reflects the current provisions of Pennsylvania’s Associations Code, 15 Pa.C.S. § 101 *et seq.* The term “merger” is defined in the Associations Code as: “A transaction in which two or more merging associations are combined into a surviving association pursuant to a document filed by the department or similar office in another jurisdiction.” 15 Pa.C.S. § 312(a). The General Comments to section 312 of the Associations Code further explain: “The term ‘merger’ in this chapter includes the transaction formerly known under Pennsylvania law as a consolidation in which a new entity results from the combination of two or more pre-existing entities.” 15 Pa.C.S. § 312.

school district, the enrolled students' resident school districts, and PDE (as the State Education Agency (SEA)). An MCSO by definition is not a charter school, but rather is an organization that, once established, operates the individual charter schools similar to a single LEA; this contemplates administrative efficiencies for the newly created MCSO. *Cf.* 24 P.S. §§ 17-1703-A, 17-1729.1-A.

Decision

Based on a thorough review of the Application and its attachments, as well as publicly available information from Applicant's member schools and the authorizing school district, PDE denies the Application. Deficiencies in the Application were identified in the following areas:

- Finance and Staffing
- Student Services
- Governance
- General Application Requirements

I. Finance and Staffing

The Applicant's reported fund balances are below recommended levels. The Applicant failed to provide sufficient information to demonstrate proper planning and preparation concerning staff retirement benefits.

The Applicant provided required financial, operational, and control policies, and does not have any basic audit or internal control findings for either school in the most recent independent audits. It is notable that because TECH Freire Charter School is in its third year of operations, only two years of audits are available, making it difficult to identify and assess financial trends. Generally, projected and actual revenues and expenditures are appropriately aligned.

However, while unrestricted fund balances have grown modestly, they are below Government Finance Officers Association-recommended levels of no less than two months of general fund operating revenues or general fund operating expenditures, leaving little cushion in the event of lower-than-anticipated enrollment or other financial challenges. Projected budgets do not reflect increased efficiencies or reductions in operational or staffing costs associated with the transition to an MCSO structure.

Additionally, the Applicant failed to provide information on how its dual retirement systems will transition under the MCSO. Currently, Freire Charter School employees participate in the Pennsylvania Public School Employees' Retirement System (PSERS), with voluntary participation in an additional 403(b) plan. TECH Freire Charter School maintains only a Section 403(b) deferred compensation plan. The Applicant does not provide sufficient detail on how the resulting MCSO will provide all employees under the new, merged organization with equivalent retirement system benefits, or how the resulting MCSO will manage separate retirement systems or facilitate quarterly payments to PSERS for employees remaining in that system pursuant to section 17-1724-A. *See* Application, MCSO p.31.²

² All citations to application page numbers will use the format provided by the Applicant, "MCSO p.XXXX."

Importantly, the Charter School Law and Public School Employee Retirement Code do not contemplate an MCSO's participation in PSERS.³

II. Student Services

The Applicant's proposed provision of service to English learners is not described in sufficient detail.

Section 10c of the MCSO application requires that an applicant describe how the merger may impact academic programming and services, including services to students receiving special education services, English learners, and at-risk learners.

In response, the Applicant explained: "The merger will not result in any reduction in programming or services, including to special education, English Learner, or at-risk students" and that the merger will enable the hiring of staff "with deeper, more specific expertise that would create efficiencies and allow us to better serve students." See Application, MCSO p.31, 33, 63-70. Specific, detailed information on how the resulting MCSO will serve at-risk student populations is lacking. Of note is that the applicant proposed to serve 10 English learners across both schools in each year of enrollment projections; this equates to less than one percent of the estimated student enrollment and less than one-tenth of the rate of English learners served by the School District of Philadelphia (12 percent). See Application, MCSO p.34. The proposed MCSO will be unable to publicly report data on English learner progress under Pennsylvania's approved Every Student Succeeds Act Plan⁴; this is concerning given that the School District of Philadelphia's most recent (2018) Annual Charter Evaluation of Freire Charter School noted a lack of timely identification for a high proportion of the school's English learners.⁵

III. Governance

The Applicant's proposed governance structure does not guarantee adequate controls for conflicts of interest.

A "charter school" is "an independent public school established and operated pursuant to a charter from the local board of school directors . . ." 24 P.S. § 17-1703-A. Charter schools are intended to "[p]rovide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system." 24 P.S. § 17-1702-A. The CSL requires that a charter school "be accountable to the parents, the public and the Commonwealth, with a delineation of that accountability reflected in the charter." 24 P.S. § 17-1715-A(2). A charter school shall also develop strategies "for

³ A charter school is considered a public school for purposes of section 8102 of the Public School Employee Retirement Code. 24 P.S. § 17-1724-A(c). Furthermore, all employees of a charter school "shall be enrolled" in PSERS unless a charter school provides benefits through another retirement program at the time of application. *Id.* As noted above, an MCSO does not meet the definition of a charter school under section 1703-A of the CSL. Therefore, the MCSO may no longer participate in PSERS, but an MCSO is still subject to the requirements of the CSL and must provide retirement benefits. 24 P.S. § 17-1729.1-A(a)(2)(ii).

⁴ See Pennsylvania Department of Education, Pennsylvania Consolidated State Plan, available at: <https://www.education.pa.gov/Documents/K-12/ESSA/Resources/PA%20ESSA%20Consolidated%20State%20Plan%20Final.pdf>.

⁵ See School District of Philadelphia, Annual Charter Evaluation 2018 - Freire Charter School, at 16, available at: <https://drive.google.com/file/d/13oUT6xsvPMqEtt7UPvbmzbA8a708VIG/view>.

meaningful parent and community involvement.” *Id.* An MCSO is subject to all requirements of the CSL including accountability to parents, the public, and the Commonwealth, as well as providing meaningful parent and community involvement. 24 P.S. 17-1729.1-A(a)(2)(ii). An MCSO applicant must provide a clear description of the method for the appointment or election of members of the board of trustees. 24 P.S. § 17-1729.1-A(c)(6).

While the Applicant’s proposed MCSO Board includes representation from both schools and all proposed members already serve on one of the current individual school boards, there are several concerns related to organizational structure. First, the MCSO Application provides an organizational chart showing the relationship between the MCSO Board of Directors, Build the Future, and the Head of School. *See* Application, MCSO p.3506. Based on the organizational chart provided, it appears that there will be a separate reporting structure between Build the Future, the Charter Management Organization (CMO) that provides budget and administrative support services; the proposed MCSO Board; and the Applicant’s CEO. It is unclear from the application what this reporting relationship would entail or what portions of the CMO’s operations would be supervised by the Board or the CEO. This information is critical for review because the board must retain real and substantial authority over the operations of the school, educational decisions, and staff. *Carbondale Area School District v. Fell Charter School*, 829 A.2d 400, 407 (Pa. Cmwlth. 2003) (internal citation omitted).

In addition, there are several instances in which it is unclear whether the Applicant will operate at sufficient “arm’s length” from other entities including an out of state school, the Freire Schools Foundation, and/or Build the Future Foundation. These cases include using Foundation payments to refinance a Freire Charter School loan, an advancement of funds by Freire Charter School to Build the Future, and overlap of board membership between Freire Charter School and TECH Freire Charter School.

Relatedly, the lease between the Building Hope Broad Street Co. and TECH Freire Charter School includes provisions that could impact the Applicant’s independence and operations if the provision is carried over to the new board. The current lease states that:

During the term, if the Tenant [TECH Freire Charter School] (i) does not enroll at least ninety-five percent (95%) of the students that Tenant projected in its enrollment projections delivered to Landlord prior to the date of this Lease, (ii) does not have annual increases in its students’ scores in standardized achievement tests beginning in Lease Year 2 or (iii) suffers a material adverse change in any of the other economic or educational projections delivered to Landlord prior to the date of this Lease, Landlord shall have the right to nominate and seat one person to be a member of the governing body (board of directors or other similar body) of Tenant subject to Tenant’s consent to such nominee not to be unreasonably withheld or delayed. The Landlord’s nominee shall not be removed by Tenant or its governing body without the prior written consent of Landlord, not to be unreasonably withheld or delayed but in all events subject to Landlord’s right hereunder to nominate and seat a replacement for any such removed person.

See Application, MCSO p. 2926. It also requires that the school not amend or modify its charter or operate any new public school charter campuses in the state of Pennsylvania without prior written approval from the Landlord.

IV. General Application Requirements

The applicant failed to comply with application requirements.

PDE is authorized and responsible for developing and issuing a standard MCSO application form that MCSO applicants must submit to PDE and to each chartering school district. The application form must include information related to eight areas specifically set forth in subsection (c)(1)-(8), in addition to “any other information as deemed necessary by [PDE].” 24 P.S. § 17-1729.1-A(c)(1)-(8) and (9). Establishment of an MCSO is also “[s]ubject to the requirements of 15 Pa.C.S. Pt. II Subpt. C (relating to nonprofit corporations)” 24 P.S. § 17-1729.1-A(a)(1). For the reasons that follow, and as set forth in PDE guidance, the applicant must submit and receive approval from the chartering school district before PDE may approve the application.

Although section 1729.1-A uses the term “consolidation,” the term “merger” reflects the current provisions of Pennsylvania’s Associations Code, 15 Pa.C.S. § 101 *et seq.* The term “merger” is defined in the Associations Code as: “A transaction in which two or more merging associations are combined into a surviving association pursuant to a document filed by the department or similar office in another jurisdiction.” 15 Pa.C.S. § 312(a). The General Comments to section 312 of the Associations Code further explain: “The term ‘merger’ in this chapter includes the transaction formerly known under Pennsylvania law as a consolidation in which a new entity results from the combination of two or more pre-existing entities.” 15 Pa.C.S. § 312.

Section 314 of the Associations Code provides:

If the law of this Commonwealth other than this chapter requires notice to or the approval of a governmental agency or officer of the Commonwealth in connection with the participation under an organic law that is not part of this title by a domestic or foreign association in a transaction which is a form of transaction authorized by this chapter, the notice must be given or the approval obtained by the association before it may participate in any form of transaction under this chapter.

15 Pa.C.S. § 314(a).

In short, Pennsylvania law requires that a regulated entity provide notice to or receive approvals from another governmental agency or officer for the proposed merger, and such notice must be made or approvals must be received before the merger may occur.

In the instant matter, the CSL requires approval of the merger by both PDE and each chartering school district. 24 P.S. § 17-1729.1-A(a)(1). PDE, as the agency charged with creation of the standard application form and administration of the Public School Code, has the authority to interpret the Public School Code. The General Assembly did not provide express direction concerning the sequence of submission and review of MCSO applications to the chartering school district(s) and PDE. An MCSO, itself, unlike the individual charter schools within its organization, is not subject to the nonrenewal or termination provisions of section 1729-A. *See* 24 P.S. §§ 17-1729-A, 17-1729.1-A. This fact necessitates a thorough review of the proposal by the chartering school district(s) and PDE to include

current operations and general compliance with state and federal laws. In order to adequately assess a proposed MCSO, a comprehensive understanding of the current operations of the member charter schools is required. As the entities that initially granted the charters pursuant to sections 1717-A and 1718-A, 24 P.S. §§ 17-1717-A, 17-1718-A, and as the entities that have ongoing authorizer responsibilities (inclusive of annual reviews and cyclical renewal decisions), school districts are uniquely positioned to evaluate the proposed MCSO on the operations and outcomes of the charter schools. PDE, as the State Education Agency, is uniquely positioned to evaluate the proposed MCSO on its general compliance with state and federal laws, and relies on the operations and outcomes reviews by the chartering school districts to inform its thorough review of operations. Therefore, the most logical and reasonable way to implement the requirements of section 1729.1-A of the CSL relating to submission and review of an MCSO application is through a sequential review.

The following description of the MCSO application sequential review process is set forth in the Multiple Charter School Organization Application Guide developed and published by PDE after consultation with a wide range of stakeholders and notice to the field:

Under this sequential review process, the establishment of an MCSO begins with the submission of a complete and verified MCSO Application to the chartering school district(s) for each charter school under the proposed MCSO. In the case of a regional charter school, or when the charter schools seeking to form an MCSO have different chartering school districts, the MCSO Application must be submitted to all chartering school districts simultaneously. Chartering school district(s) have 45 days to review and act on an application for creation of an MCSO; if no action occurs within the 45 days, the application is deemed approved. 24 P.S. § 17-1729.1-A(a)(2). If a chartering school district disapproves an application and that disapproval is subsequently reversed by the State Charter School Appeal Board (CAB), *see* 24 P.S. § 17-1729.1-A(f), the application will be considered approved as of the date of CAB's written determination unless otherwise stayed by an appropriate order.

After approval by the chartering school district(s) (or CAB) or the passage of 45 days, the MCSO Application is submitted to the Department. The MCSO Application submitted to the Department must be identical to that approved by the chartering school district(s). The Department has 45 days for review and action. 24 P.S. § 17- 1729.1-A(a)(1). Disapproval by the Department is also subject to an appeal to CAB. *See* 24 P.S. § 17-1729.1-A(f). This sequential review allows charter schools to address and resolve any concerns with the chartering school district(s), which have closer oversight of the charter schools, before seeking the Department's approval. Also, the sequential review eliminates the possibility of conflicting decisions on an MCSO Application being issued by the chartering school district(s) and the Department at the same time.

In addition, the sequential review requirement established by PDE pursuant to section 1729.1-A(c)(9) allows PDE to confirm receipt of applications by and approvals from each of the chartering school districts and, upon approval by PDE, issue the MCSO applicant a single letter evidencing that all necessary approvals have been obtained. This requirement reduces the burden on the applicant and on the Pennsylvania Department of State to obtain sufficient evidence of the statutory approvals required by section 314(a) of the Associations Code. 15 Pa.C.S. § 314(a).

In summary, the Applicant failed to submit its application to form an MCSO to the chartering school district at least 45 days prior to submitting its application to PDE, limiting opportunities for thorough evaluation of the proposal from both chartering school district and PDE vantage points.

Conclusion

Based on the deficiencies identified above, individually, collectively, and in any combination, the Application is denied.

The Applicant may appeal this decision to the State Charter School Appeal Board (CAB). 24 P.S. § 17-1729.1-A(f). If the Applicant files an appeal with CAB, it shall serve a copy of its appeal on PDE at the following address:

Pennsylvania Department of Education
Office of Chief Counsel
333 Market Street, 9th Floor
Harrisburg, PA 17126-0333



David W. Volkman
Executive Deputy Secretary

Date: June 14, 2019