

**COMMONWEALTH OF PENNSYLVANIA  
STATE CHARTER SCHOOL APPEAL BOARD**

**In Re: Lincoln-Edison Charter School** :  
**Appeal from Denial of Charter by the** : **Docket No. CAB 2000-11-A**  
**School District of the City of York** :

**OPINION ON REMAND**

**Background**

The Lincoln-Edison Charter School (Lincoln) appealed to the State Charter School Appeal Board (Board) in May of 2000. On July 28, 2000, the Board granted Lincoln-Edison's appeal and the Secretary of Education subsequently issued a charter and Lincoln-Edison commenced operation. The School District of the City of York (the "District") timely appealed the Board's decision to the Commonwealth Court of Pennsylvania at No. 1886 C.D. 2000. The Court, by Order dated April 30, 2001, vacated the July 28, 2000 order of the State Charter School Appeal Board<sup>1</sup> and remanded the case to the Board for a hearing on whether the charter application should be granted on the basis of Lincoln-Edison's final management agreement (the "Agreement") with Edison Schools, Inc. ("Edison").

One of the issues raised in the original appeal to this Board was the sufficiency of the control retained by Lincoln's board of trustees over Edison, the management company that they had selected to operate and administer the charter school. At the time of the hearing on the appeal, the charter school had only presented a model management agreement for this Board's review and consideration. Testimony was presented at argument that the agreement had

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<sup>1</sup> Subsequently, upon application of Lincoln-Edison, the Court stayed its vacation of the Board's grant of the appeal and charter until July 15, 2001 in order to allow the Board time to consider the final application and render a determination.

undergone some changes during negotiations between the parties and that further refinements were expected in that negotiations were not completed. Nonetheless, the Board relied on the model agreement and the representations made at hearing in reaching its decision to grant the appeal. The Court held this was an error because "... it is impossible to determine whether the charter application comports with the requirements of the [Charter School] Law when integral parts of the application [here the management agreement] are not finalized." School District of the City of York v. Lincoln-Edison Charter School , No. 1886 C.D. 2000 (filed April 30, 2001) slip op. at 8. Further, the Court stated that the Board had erred in granting the charter because "...review of a charter application cannot be had until the essential components of the application, such as a management agreement, are before the Board ..." Id. Thus, the Court remanded the case to this Board for a review of the Agreement to ensure that the Agreement and its terms are in compliance with the Charter School Law.

The remand proceedings before the Board commenced with Lincoln's filing of the Agreement between the charter school and Edison on May 10, 2001. Thereafter, the school district filed a brief with the Board on May 25, 2001, along with a Petition for Clarification<sup>2</sup> and a Motion for Recusal<sup>3</sup>. Lincoln filed a reply brief on June 6, 2001. A hearing was held before the Board on June 13, 2001 and the Board met again on July 5, 2001 to decide the matter.

### **Findings of Fact**

1. Edison is subject at all times to the oversight and approval of Lincoln. (Section 1.2)<sup>4</sup>.

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<sup>2</sup> The school district's petition asked the Board to clarify its earlier decision and determine whether Lincoln-Edison, as a conversion charter school was required to enter into a lease with the school district and pay rent. The Board considered this Petition to be an application for rehearing under 1 Pa. Code §35.241 and thus dismissed it as being untimely filed by a vote of 4-0-1, with Acting Secretary Zogby abstaining.

<sup>3</sup> The Motion for Recusal filed with the Board was denied as improvidently filed. Acting Secretary Zogby subsequently refused to recuse himself from consideration of the matter on remand.

<sup>4</sup> Section references are to the Agreement.

2. Edison is to provide management and administrative services to implement and operate its educational program, and must obtain the approval of Lincoln for any substantial modifications to the Edison Design. (Section 4.1).
3. Edison may adopt and enforce rules, regulations and procedures for the day-to-day operation of the charter school, subject to the approval and continuing oversight of Lincoln. Lincoln shall not unreasonably withhold its approval. (Section 4.6).
4. Edison receives almost all the funds received by the charter school and pays the expenses of operating the charter school as detailed in the budgets approved by Lincoln. (Section 6.2).
5. If costs to operate the charter school exceed the funds provided to Edison by Lincoln, then Edison will use its own funds to cover any excess costs. (Section 6.2).
6. If the financial performance of the charter school exceeds the targets set by Edison, 50% of the savings will be reserved for program enhancements at the charter school. (Section 6.2).
7. Lincoln must approve annual projected budgets submitted by Edison, and Lincoln must approve any material changes to the approved budgeted expenditures. (Section 6.3).
8. Edison shall receive any excess of funds received by the charter school pursuant to Section 6.1 over expenditures as compensation for providing educational and management services. (Section 6.4).
9. All charter school personnel, except for the Business Services Manager, are Lincoln employees. (Section 7.1; N.T. at 41).<sup>5</sup>

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<sup>5</sup> N.T. refers to Notes of Testimony at the June 13, 2001 hearing before the Charter School Appeal Board.

10. Lincoln authorized that its employees would be compensated according to Edison's compensation policies, which may include performance-based incentives and Edison stock options. The levels of compensation shall be provided in the annual budget submitted to Lincoln for approval. (Section 7.3).
11. Lincoln adopted Edison's employment policies and any material modification to these policies must be approved by Lincoln. (Section 7.6).
12. Lincoln has the right to terminate the Agreement if Edison fails to make reasonable progress toward student achievement, provided Edison is allowed one academic year to remedy any such failures. (Section 11.1(a)(1)).
13. Lincoln has the right to terminate the Agreement if Edison substantially breaches any material terms and conditions and fails to remedy the breach within 90 days. (Section 11.1(a)(2)).
14. Edison has the right to terminate the Agreement if Lincoln fails to adopt reasonable personnel, curriculum, program or similar recommendations by Edison that Edison reasonably determines to be necessary to implement its program. (Section 11.2(a)(1)).
15. Edison has the right to terminate the Agreement if Lincoln substantially breaches any material terms and conditions and fails to remedy the breach within 90 days. (Section 11.2(a)(2)).
16. Lincoln has the right, upon termination of the Agreement, to purchase the property and equipment provided by Edison in the charter school and in the homes of the charter school's students. If Lincoln does not purchase the property or equipment,

Edison may remove it and restore the buildings to the condition that existed prior to such removal. (Section 11.4(a)).

17. Upon termination of the Agreement, Lincoln shall pay Edison for building fixtures, improvements and alterations provided by Edison if Lincoln contracts with a different educational management company. (Section 11.4(b)).

### **Discussion**

When the Board approved Lincoln's appeal on July 28, 2000, it found that the model agreement was satisfactory and provided Lincoln with ultimate control over the charter school. The Board must now determine whether the Agreement executed between Lincoln and Edison in any way diminishes Lincoln's authority over the operations of the charter school.

The District cites a number of specific provisions in the Agreement between Lincoln and Edison that the District believes evidence that Lincoln does not have ultimate control over the operation of the charter school. For the reasons set forth below, the Board disagrees with the District's assessment of the Agreement and finds that a charter should be granted to Lincoln.

The District first argues that because Edison is provided almost all the revenues received by Lincoln, pays the expenses of operating the charter school and then retains any excess of those revenues over expenses as its compensation, Edison has an incentive to cut corners and not provide what has been promised. (Sections 6.2, 6.4). This position is speculative, not factual. Moreover, under the Agreement, Lincoln has the right to terminate the Agreement if Edison does not make reasonable progress toward student academic achievement or if Edison substantially breaches any material terms and conditions of the Agreement. (Section 11.1a.1-2). Therefore, the District is merely speculating that because Edison is able to retain revenues that exceed expenses Edison will cut corners and not provide what has been promised. If Edison attempts to

cut corners and there is a resulting breach of the Agreement or lack of reasonable academic progress, Lincoln can terminate the Agreement. This is evidence of Lincoln's control, not the contrary as suggested by the District.

The District agrees that the Agreement requires that Lincoln approve the budget proposed by Edison and any material changes to the budget. (Section 6.3). The District also agrees that Lincoln must approve any substantial changes to the educational program promised by Edison. (Section 4.1). However, the District argues that Edison can make an "end-run" around these provisions because of a 50/50 Sharing Plan set forth in Section 6.3. The Board disagrees.

Lincoln must approve the budget presented to it by Edison. (Section 6.3). The vice-president of the Lincoln Board testified at the hearing before the Board that Edison had proposed a budget to Lincoln for next school year. (N.T. at 42). However, Lincoln revised the proposed budget, which provided less revenue to Edison than was originally projected. (N.T. at 42). She also testified that under the 50/50 plan, Edison cannot make budget cuts and change educational programs without approval by the Lincoln Board. (N.T. 45).

The District cites a portion of Section 6.2 of the Agreement, relating to the 50/50 Sharing Plan, in an attempt to prove that Edison can implement material budget cuts and substantial changes in the educational program without Lincoln's approval. It is noteworthy that the District deleted a sentence from its citation of Section 6.2, which provides that "[i]f such costs exceed the funds remitted to Edison, Edison shall use its own funds to cover such excess costs." In essence, Section 6.2 provides that Edison shall pay the costs of operating the charter school as detailed in its budget. If the costs exceed the funds provided, Edison will use its own funds to cover any excess costs. Conversely, if the funds available exceed the costs, and a certain projected profit is realized, then the 50/50 Sharing Plan will be implemented and Edison reserves 50% of the

savings to be spent on program enhancements for the charter school. The Board has carefully reviewed the Agreement and can find no language supporting the District's position that Edison can make substantial changes to the educational program and implement material budget cuts without Lincoln's approval. Thus, this argument is rejected.

The District agrees that the Agreement requires approval by Lincoln of any rules, regulations and procedures adopted by Edison for the day-to-day operations of the charter school. (Section 4.5). However, the District argues that language in the Agreement that Lincoln cannot unreasonably withhold their approval of such rules, regulations and procedures means Edison can trigger the dispute resolution process or the termination process if Lincoln does not agree with all of Edison's rules, regulations and procedures. (Section 4.6). Requiring Lincoln to not unreasonably withhold its approval of rules, regulations and procedures adopted by Edison for day-to-day management of the charter school does not evidence that Lincoln does not have ultimate control over the charter school. It would not make sense if Lincoln was allowed to unreasonably withhold its approval of rules, regulations and procedures Edison adopted to run the charter school. Lincoln hired Edison to operate the charter school and provide educational services. Since Edison is instituting its educational program in the charter school, it must have some level of comfort that Lincoln will allow it to do its job without Lincoln unreasonably withholding its approval of rules, regulations and procedures Edison believes it needs to efficiently and effectively implement the educational program it was hired to provide.

Next, the District argues that Lincoln's right to terminate Edison is an illusory remedy. The Agreement allows Lincoln to terminate the Agreement if the school fails to make reasonable progress toward student academic achievement (Section 11.1(a)(1)) and Lincoln can measure success on the basis of student achievement and parent and student satisfaction. (Section 4.8).

The fact that the Agreement does not require students to meet certain scores on the Pennsylvania System of School Assessment (“PSSA”) does not mean the right to terminate the Agreement is illusory. Nor does the fact Edison would be given at least one academic year to remedy any such failures render Lincoln’s right to terminate illusory. (Section 11.1(a)(1)).

Interestingly, the District makes note of the fact a school district can be placed on the Education Empowerment list if its students fail to meet certain PSSA scores as an argument that Edison should be required to produce certain scores on the PSSA to prove it is providing reasonable academic achievement. What the District fails to state about placement on the Education Empowerment list is that a school district is provided up to three years to improve its scores before being taken over by the state. Therefore, the fact that Edison has a year to remedy any failure to provide reasonable academic achievement is not evidence that Lincoln’s right to terminate the Agreement is illusory. Likewise, the Board disagrees with the District’s position that allowing Edison ninety days to remedy a breach of the material terms and conditions of the Agreement causes Lincoln’s right to terminate the Agreement to be illusory. (Section 11.1(a)(2)). The District failed to note that the Agreement provides the same ninety day remedial period to Lincoln. (Section 11.2(a)(2)).

Finally, the District argues that Lincoln’s right to terminate the Agreement is illusory because Lincoln would have to pay for building fixtures, improvements and alterations made by Edison if Lincoln terminates the contract with Edison and hires another management company. (Section 11.4(b)). Lincoln would also be permitted to purchase property and equipment provided by Edison, which is located in the charter school and in students’ homes, or allow Edison to remove such property and equipment. (Section 11.4(a)). In contrast, the District failed

to note that if Edison removes the property and equipment from the school, it must restore the buildings to their original condition as they existed prior to removal. (Section 11.4(a)).

These provisions of the Agreement do not make Lincoln's right to terminate illusory. If Edison has provided equipment, property, fixtures, improvements and alterations to provide its educational services, then it should be compensated for this property, or be permitted to remove it, if it will no longer be providing its services to Lincoln. Another management company with which Lincoln may negotiate an agreement to provide educational and management services would have to decide what property and equipment it needed to provide its services. It is not unreasonable that a new management company would have to provide property and equipment it needed to provide its services to Lincoln. It would be unreasonable to expect that Edison would simply leave property and equipment it purchased or leased for the use of another management company that would be providing competitive services.

The District next argues that Lincoln employees are not really Lincoln employees. Under the Agreement, Lincoln has "final decision-making authority regarding the hiring of all staff members and must grant prior approval of the employment and/or dismissal of all staff members." (Section 7.1). The fact that Lincoln decided to use Edison's compensation policies, which may include incentives and stock options, does not mean the charter school employees are employees of Edison. (Section 7.1). The fact Edison pays the costs of salaries, fringe benefits and employment taxes on behalf of Lincoln does not make the employees Edison employees. (Section 7.4). The fact Lincoln adopted Edison's Human Resources and Benefits Guide does not make the employees Edison employees. (Section 7.6). Lincoln should not have to rewrite employment policies, guidelines, benefits, etc. if it found that Edison's policies, guidelines,

benefits, etc. were suitable for Lincoln employees, particularly since Lincoln must approve any material modification to employment policies. (Section 7.6).

Therefore, the Board finds that employees are Lincoln employees, not Edison employees. In addition, the fact that Edison may terminate the Agreement if Lincoln fails to adopt reasonable personnel, curriculum, program or similar recommendations of Edison that Edison determines is necessary for implementation of its program does not undermine the requirement that Lincoln must approve the hiring and firing of employees. As stated previously, since Edison was hired to provide management and education services, it is only reasonable that it be allowed to implement its program, and any unreasonable withholding of Lincoln's approval of Edison's recommendations could prevent Edison from implementing the program it was hired to provide.

Based on the Board's review of the Agreement and analysis of the District's and Lincoln's arguments concerning the Agreement, the Board finds that the Agreement evidences that Lincoln has ultimate control of the charter school and should be granted a charter.

