

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

CATALYST ACADEMY CHARTER SCHOOL :

v.

SCHOOL DISTRICT OF PITTSBURGH :

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CAB Docket No. 2018-03

OPINION

This matter comes before the Pennsylvania State Charter School Appeal Board [hereinafter CAB] on an appeal by the Catalyst Academy Charter School [hereinafter Catalyst or Charter School] from the denial of a grant of its charter by the School District of Pittsburgh [hereinafter School District].

PROCEDURAL HISTORY

Catalyst submitted its application to the School District for approval of a new charter school on November 15, 2017. (R. 3191a).¹ Catalyst seeks to open a K-8 school focused on children and families who are in “underserved neighborhoods in the East End” of the City of Pittsburgh. “Most families in these neighborhoods are African-American, and many are economically disadvantaged.” (R. 0015a). Catalyst proposes to open grades K-1 in year one, adding one grade per year through year 5 of its charter. If opened as planned in 2019-2020, grade 8 could be added in 2026-2027. (R. 0006a, 0066a).

The School District held two advertised public hearings at which Catalyst presented its application to the School Board, one on December 18, 2017 and one on February 5, 2018. (R.

¹References to the Record refer to the Certified Record as filed with CAB by the School District. Exhibits delineate those admitted before the School District [HO ___] and those marked by the CAB hearing officer [CAB HO ___].

3194a, 3373a). The School District Review Team [hereinafter Review Team], consisting of staff with expertise in various areas, evaluated Catalyst's application and presented its findings to the Board on February 5th. (R. 3374a-3482a). The Review Team found that Catalyst's application generally met the criteria from the Charter School Law, Act of June 19, 1997, P.L. 225, No. 22, 24 P.S. §§17-1701-A *et seq.* [hereinafter CSL], but found exceptions to some of the criteria which it discussed with the Board. (R. 3399a, 3430a).

The Review Team found Catalyst had sustainable support but noted curricular deficiencies in the areas of social studies, special education and math which it believed diminished the proposed charter school's ability to provide comprehensive learning experiences. The Review Team also found exceptions under Section 1719-A of the CSL such as the presence of religious symbols on the proposed building site, doubt about the number of teaching personnel in the budget, and questions about the governance structure. (R. 3374a - 3392a).

The School District held additional advertised public meetings for the purpose of public comment on January 22, 2018 and February 19, 2018. (R. 3257a, 3549a). At these meetings, 31 individuals spoke in opposition to the Catalyst application or charter schools generally, and 10 individuals spoke in favor of Catalyst or charter schools generally. CEO Brian D. Smith and several Catalyst Board members spoke in favor of Catalyst at the February 19th public meeting. (R. 3258a-3372a, 3350a-3709a).

Catalyst provided 57 letters of community support with its application and added 5 letters after the February 5th public hearing. (R. 1104a-1166a, 3492a-3496a). Catalyst also provided one-hundred-seventy-three (173) letters of family or community interest with its application (R. 1172a-1334a), and it supplied five (5) letters of family or community interest to be added to the record after the February 5, 2018 public hearing. (R. 3497a-3501a.)

The Review Team later provided to the Board additional information consisting of a program comparison chart comparing the Catalyst proposed offerings to other schools in or near the School District to be made part of the record. (R. 3773a - 3779a).

The Board voted at an advertised legislative meeting held on February 21, 2018 to deny Catalyst's application. (R. 3718a, 3735a). The Board issued a written decision containing its findings and reasons for the denial on February 27, 2018. (R. 3751a-3779a). Catalyst filed a timely appeal of the denial which was certified to CAB by the Allegheny County Court of Common Pleas on June 12, 2018. (R. 3991a).

CAB appointed a Hearing Officer by letter dated July 12, 2018 (CAB HO-3). The parties submitted a Joint Stipulation to Supplement the Record, and the Hearing Officer found the requested supplemental materials² to be relevant to the matter. (CAB HO- 8). Brian D. Smith's PA Criminal Record Check, PA Child Abuse History Certification, and Federal Criminal History Record Information were marked collectively as CAB HO-6. Correspondence dated December 13, 2017 with attachments between Alan T. Shuckrow, Esquire, and Jocelyn P. Kramer, Esquire, regarding Respondent's Public Hearing Procedure was marked collectively as CAB HO-7.

The Hearing Officer issued an August 23, 2018 Order setting a briefing schedule. (CAB HO-4). Briefing was concluded on December 7, 2018. On December 28, 2018, the Hearing Officer certified the Record. CAB heard argument on this matter on January 22, 2019. A vote was initially taken at the February 24, 2019 CAB meeting in which five members of the current six-member Board participated resulting in a vote of 3 to 2 in favor of granting Catalyst's appeal.

² At oral argument before CAB on January 22, 2019, counsel for the School District referenced five individual letters of protest submitted between January 14, 2019 and January 22, 2019 pursuant to 1 Pa Code § 35.23 and asked that they be reviewed and considered by CAB. Catalyst objected. (January 22, 2019 Transcript, pp. 19-20). In accordance with 1 Pa Code § 35.24 the letters will not be considered part of the record before CAB.

Prior to the issuance of this Opinion and Order, CAB determined that the February 24, 2019 vote was not actionable because it was not supported by a majority of the sitting members.³

Accordingly, a revote was taken on May 21, 2019 with all members of the six-member Board voting, resulting in an actionable vote of 4 to 2 in favor of granting Catalyst's appeal.

FINDINGS OF FACT

1. Catalyst Academy Charter School is a Pennsylvania nonprofit corporation having its registered office located at 6401 Penn Avenue, 3rd Floor, Pittsburgh, Pennsylvania 15206. (R. 1373a-1374a).

2. The School District of Pittsburgh is a School District of the First Class-A, organized and existing under the laws of the Commonwealth of Pennsylvania having its administrative office located at 341 South Bellefield Avenue, Pittsburgh, Pennsylvania 15203. (CAB HO-1 ¶2; CAB HO-2 ¶2).

3. Catalyst submitted to the Board of the District an application to establish a charter school on November 15, 2017. (R. 3191a).

4. Catalyst's application of more than 3,000 pages consisted of six binders including thirty-eight appendices. The draft Student Code of Conduct is contained in Appendix 17. (R. 1335a-1363a). Curriculum, assessments and financial plans comprise the bulk of the remainder of Catalyst's application. (R. 0001a-1335a; 1364a-3190a).

5. The proposed location of the school is 327 North Negley Avenue, Pittsburgh, Pennsylvania 15206, in the East Liberty neighborhood in the East End of Pittsburgh. (R. 0006a).

³ At the May 21, 2019 meeting, CAB also heard and decided a Petition for Administrative Relief filed by Catalyst seeking to stay the revote and asking CAB to issue the Opinion and Order based upon the vote of February 24, 2019. CAB denied Catalyst's Petition and proceeded to vote on the matter which is the subject of this Opinion and Order.

The building is the site of a former synagogue that has “religious symbols and figures carved in stone insets on the front of the building facing Negley Avenue, and Stars of David around the frieze of the former synagogue.” (R. 3382a).

6. The same site was previously used by the Urban Academy Charter School which received a charter from the District in 1998. (R. 3443a, 3382a). Urban Academy Charter School may not have been required to comply with the CSL although no evidence of this is contained in the Record.

7. Catalyst seeks to open a K-8 school. It proposes to open with grades K-1 in year one of operation; and it plans to add one grade per year through year five of its charter, bringing it to a K-5 school in year 2023-2024. If opened as planned in 2019-2020, grade 8 would be added in 2026-2027. (R. 0006a, 0066a). Total expected maximum enrollment would be 648. (R. 0066a).

8. As stated in its application, the purpose of Catalyst “requires providing a high-quality K-8 public school for children and families who are underserved by existing education options. We will be based in East Liberty but intend to serve families in underserved neighborhoods throughout the East End, including the Hill District, Garfield, Larimer, East Liberty, Lincoln-Larimer, Homewood and East Hills. Most families in these neighborhoods are African-American, and many are economically disadvantaged.” (R. 0015a).

9. Catalyst provided fifty-seven (57) letters of community support with its application (R. 1104a-1166a), and it supplied five (5) letters of community support to be added to the record after the February 5, 2018 public hearing. (R. 3492a-3496a.)

10. Catalyst provided one-hundred-seventy-three (173) letters of family or community interest with its application (R. 1172a-1334a), and it supplied five (5) letters of

family or community interest to be added to the record after the February 5, 2018 public hearing. (R. 3497a-3501a.)

11. An advertised special public hearing was held on Catalyst's application on December 18, 2017. (R. 3194a). Correspondence sent by the District's Director of Charter Schools, Lisa Augustin, to Catalyst's CEO Brian Smith outlined the procedures to be followed at this December 18th hearing. (R. 3192a-3193a).

12. Catalyst CEO Smith gave his presentation on December 18th. Including Smith, eighteen individuals testified in support of Catalyst. Six individuals testified against Catalyst or against charter schools generally. One individual was unsure of her position. (R.3195a-3254a).

13. A second advertised public hearing was held on Catalyst's application on February 5, 2018. (R. 3373a). Correspondence sent by the District's Director of Charter Schools, Lisa Augustin, to Catalyst's CEO Smith outlined the procedures to be followed at the February 5th hearing. (R. 3255a-3256a).

14. At the February 5th hearing, Catalyst was given another opportunity to present its application to the Board. This was followed by a presentation given by the District's Review Team, consisting of District staff with expertise in the areas of Finance, Curriculum, Administration, Assessment, Facilities and Students with Exceptionalities. Board members then had the opportunity to ask questions or make comments. (R. 3220a, 3429a-3430a, 3374a-3482a).

15. At least one public hearing compliant with the Sunshine Act, 65 Pa.C.S. §§ 701-716, was held pursuant to Section 1717-A of the CSL, 24 P.S. §§17-1701-A(d).

16. The Review Team evaluated Catalyst's application based on the nine criteria in a scoring checklist drawn from the CSL. As summarized by Ms. Augustin, Director of Charter

Schools, the Review Team found that the application “did primarily meet the criteria from the check list. There are exceptions to each of the—some of the criteria, and I will just call out the exceptions so as to not read each of these to you.” (R. 3399a, 3430a).

17. The Review Team found Catalyst had sustainable support. (R. 3400a).

18. The Review Team found some curricular deficiencies in Catalyst’s application that may diminish its ability to provide comprehensive learning experiences. (R. 3374a-3381a; 3390a). Those curricular deficiencies were in the areas of social studies, special education, and math. (R. 3402a, 3376a-3378a, 3390a, 3469a).

19. The Review Team found Catalyst’s application considered the required elements in Section 1719-A of the CSL and conformed to the legislative intent in Section 1702-A of the CSL, with a few exceptions. (R. 3401a). The exceptions found under Section 1719-A were the presence of religious symbols on the building, doubt about the number of teaching personnel in the budget, and questions about the governance structure. (R. 3382a- 3383a, 3402a, 3476a-3377a).

20. The Review Team found Catalyst’s application may serve as a model for other public schools; however, there are programs/offerings that have been determined to exist already in the District. (R. 3401a; 3773a-3779a).

21. The District held additional public meetings for the purpose of public comment on any items of interest to the District including the Catalyst application. These meetings were advertised and held on January 22, 2018 and February 19, 2018. (R. 3257a, 3549a).

22. At the January 22nd meeting, twenty individuals offered public comment. Eleven people spoke about topics other than Catalyst; nine people spoke about the Catalyst application.

Of those nine, eight were opposed to the Catalyst application or against charter schools generally, and one person was unsure of her position. (R. 3258a-3372a).

23. At the February 19th meeting, forty-four individuals offered public comment. Eleven people spoke about topics other than Catalyst; thirty-three people spoke about the Catalyst application. Of those thirty-three, seven spoke in favor of Catalyst's application and three were in favor of charter schools generally. All seven people speaking in favor of Catalyst were directly affiliated with the organization. Twenty-three persons spoke in opposition to Catalyst's application. (R. 3550a-3709a).

24. As part of its review of Catalyst's application, the School District provided additional information consisting of a comparison chart and asked that it be made part of the record. This was provided to both the Board and to Catalyst, but Catalyst had no opportunity to rebut the comparison chart. The Comparison Chart was not received by Catalyst until after the February 21st vote. The Chart was enclosed in a February 20, 2018 letter to CEO Smith. (R. 3532a-3548a; 3710a-3717a).

25. The Board voted at an advertised legislative meeting held on February 21, 2018 to deny Catalyst's application. (R. 3718a-3748a). The Board's vote was approved in the form of a formal Resolution. (R. 3749a-3750a).

26. The Board issued a detailed written decision containing the reasons for the School District's denial of the Catalyst application on February 27, 2018. (R. 3751a-3779a).

27. Catalyst timely appealed the School District's denial which was certified by the Allegheny County Court of Common Pleas and is now before CAB. (R. 3780a-3991a).

28. The Charter School proved that it has demonstrated, sustainable support for its charter school plan. (R. 1172a-1334a, 3400a, 3497a-3501a).

29. The Charter School's application is sufficient to show that it has the capability, in terms of support and planning, to provide comprehensive learning experiences to its students. (R. 1432a-1439a).

30. The Charter School has submitted a sufficiently complete description of its educational program, including a general description of its curriculum, supported by guides for all subject areas, including social studies, special education, and math. (R. 3402a, 3376a-3378a, 3390a, 3469a).

31. The Charter School's application conforms to the legislative intent outlined in the CSL.

32. The Charter School's application is sufficient to show that it may serve as a model for other public schools.

33. CAB accepts the findings of the Review Team that Catalyst's application considered the required elements in Section 1719-A of the CSL. (R. 3401a).

34. Although there may be programs and offerings which duplicate some programs and offerings which already exist in the School District or other charter schools, those programs and offerings proposed by Catalyst may serve as a model for other public schools and are sufficiently unique to warrant approval. (R. 3401a).

35. The proposed site has "religious symbols and figures carved in stone insets on the front of the building facing Negley Avenue, and Stars of David around the frieze of the former synagogue." (R. 3382a).

36. Catalyst confirmed in correspondence submitted as part of the Record to the School District prior to the vote on the Application that it would "fully comply with all laws applicable to its use of the proposed facility and to the extent necessary will cover up religious

symbols.” (R. 3491a).

37. The record contains neither a desegregation order from a state or federal court or a desegregation plan prescribed by the Pennsylvania Human Relations Commission.

CONCLUSIONS OF LAW

1. CAB has jurisdiction in this matter. 24 P.S. §17-1717-A(f) and.(i)(1).
2. The CSL governs the application process, the approval process, the revocation and renewal of charters, and the operation of charter schools in Pennsylvania. 24 P.S. §17-1701-
A et seq.
3. The School District complied with all procedural requirements of the CSL in denying the Application.
4. The School District committed no due process violations in the conduct of its consideration of the Catalyst application.
5. CAB has the authority under the CSL to agree or disagree with the findings of the School District based upon its “de novo” review of the certified record. 24 P.S. § 17-1717-
A(i)(6); West Chester Area School District v. Collegium Charter School, 571 Pa. 503, 516-17, 812 A.2d 1172, 1180 (Pa. 2002).
6. The Charter School has the burden of proving that all of the enumerated requirements for the contents of a charter school application were satisfied, including:
 - (i) The demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students, including comments received at the public hearing under subsection (d).

- (ii) The capability of the charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the adopted charter.
- (iii) The extent to which the application considers the information requested in Section 1719-A and conforms to the legislative intent outlined in Section 1720-A.
- (iv) The extent to which the charter school may serve as a model for other public schools.

24 P.S. § 17-1717-A(e)(2). (Footnotes omitted).

7. The MOU attached to the denial decision is neither a desegregation plan nor a desegregation order from a state or federal court.

8. The School District has shown no violation of Section 17-1730-A of the CSL.

9. The School District has shown no violation of Section 17-1719-A of the CSL sufficient to warrant the denial of the application.

10. The Charter School met its burden of proving the requirements necessary for the approval of a charter school application.

DISCUSSION

I. Standard of Review

CAB which must apply a *de novo* standard of review when entertaining appeals from a district's denial of a charter's application; such review requires CAB to give "appropriate consideration" to the findings of the district board, while making an independent determination as to the merits of the charter application. *West Chester Area School District v. Collegium Charter School*, 571 Pa. 503, 516-17, 812 A.2d 1172, 1180 (Pa. 2002). While giving due consideration to the vote of the School Board, CAB must independently review the record in accordance with the requirements of the CSL. *Id.* at 1178, n.9.

Section 1717-A(e)(2) of CSL provides that a charter school application is to be evaluated based on the following criteria:

- (i) The demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students, including comments received at the public hearing held under subsection (d).
- (ii) The capability of the charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the adopted charter.
- (iii) The extent to which the application considers the information requested in section 1719-A and conforms to the legislative intent outlined in section 1702-A.
- (iv) The extent to which the charter school may serve as a model for other public schools.

24 P.S. §1717-A(e)(2). (Footnotes omitted).

II. Due Process

A preliminary legal issue to be decided in this case is the requirement under the CSL for a “hearing” and what that hearing must entail. When a new application is reviewed, at least one public hearing pursuant to the Sunshine Act, 65 Pa.C.S. §§ 701-716, must be held under Section 1717-A of the CSL: the CSL “does not establish what must occur at the public hearing, except that it be held consistent with the Sunshine Act.” *In Re: Education InnovationsLAB Charter School*, CAB Docket No. 2007-01 at 7.

In contrast to the provisions of Section 1717-A, the provisions of Section 1729-A, which govern nonrenewal or termination of a charter, require a public hearing; but this hearing must be held in accordance with the Local Agency Law. 24 P.S. § 17-1729-A(c). Section 1729-A(c) also requires that in the case of a nonrenewal or termination hearing, the Board is to present

evidence and provide the charter school reasonable opportunity to offer testimony before taking final action at a meeting held pursuant to the Sunshine Act. *Education InnovationsLAB* at 7.

CAB held in *Education InnovationsLAB*: “. . . the CSL does not specifically designate that a public hearing held with regard to a charter school’s *application* is subject to the Local Agency Law.” *Education InnovationsLAB* at 7 (emphasis added). “Therefore, the School District did not have to provide the Charter School with an opportunity to examine and cross-examine the Review Team’s presentation of its findings and recommendations.” *Education InnovationsLAB* at 8.

Catalyst contends that it was denied due process because: (1) it was not permitted to cross-examine or otherwise question the School District witnesses from the Review Team; and (2) because additional evidence collected outside of the two properly advertised hearings was allowed into the Record and used by the School Board to deny the application, namely a certain Comparison Chart (R. 3773a-3779a) and a Memorandum of Understanding between the School District and the Pennsylvania Human Relations Commission regarding school desegregation [hereinafter MOU] (R. 3757a-3772a).

Catalyst’s due process issues involve what constitutes a fair opportunity to be heard. While a standard notice was published in the Pittsburgh Post-Gazette regarding the January 22 and February 19 meetings, there was no indication that either public meeting would take comment on Catalyst’s Application. (R. 3257a, 3718a). These notices differed from the notices published for the December 18 and February 5 Hearings. The notice published for the December 18 Hearing stated that “[i]mmediately follow (*sic*) are two Special Public Hearings. The purpose of the first special public hearing is to accept public comment on the Catalyst Academy Charter School application.” (R. 3194a). The notice published for the February 5th meeting clearly

designated, in all capital letters, that this was a “NOTICE OF PUBLIC HEARINGS REGARDING CHARTER SCHOOL APPLICATIONS.” (R. 3373a).

As Catalyst argues and as the parties stipulate, the December 18 and February 5 Hearings were scheduled and designed to be the only hearings for Catalyst, and that was consistently conveyed by the District. (*see* CAB HO-7). Catalyst asks that information and comment from the other hearings be excluded from consideration because it contends that it violates key due process principles of notice and opportunity to be heard.

The inclusion of the Comparison Chart and the MOU are also a source of contention. The Comparison Chart was not received by Catalyst until after the February 21st vote. The Chart was enclosed in a February 20, 2018 letter to CEO Smith. (R. 3710a-3717a). The Board references and relies on the MOU in the Denial even though there was no discussion or even mention of the MOU during any public hearing or during the vote by the Board.⁴

The Pennsylvania Supreme Court has held that “[d]ue process principles apply to quasi-judicial or administrative proceedings.” *Pa. Bankers Ass’n v. Pa. Dept. of Banking*, 956 A.2d 956, 965 (Pa. 2008), citing *Kowenhoven v. County of Allegheny*, 587 Pa. 545, 901 A.2d 1003 (Pa. 2006). A local school board acts in a quasi-judicial capacity when it renders a decision on a charter school application. *See, e.g., School District of Phila. v. Independence Charter School*, 774 A.2d 798 (Pa. Cmwlth. Ct. 2001). Regarding the requirements of due process, “it is fundamental that the key principles underpinning due process include the requirements of notice and an opportunity to be heard.” *Pa. Bankers Ass’n*, 956 A.2d at 965, citing *Fiore v. Bd. of Fin. & Revenue*, 534 Pa. 511, 516, 633 A.2d 1111, 1114 (Pa. 1993). Catalyst relies on fundamental due process requirements mentioned in these cases to buttress its arguments that an opportunity

⁴ The Resolution denying the Application specifically mentions the MOU, even though no MOU reference can be found in the February 21, 2018 transcript. The MOU was attached to the February 27, 2018 Notice of Denial and Detailed Findings. (R. 3757a-3772a).

for cross-examination was required and that to have denied it this opportunity renders flawed the decision below to deny the charter.

In this appeal, the District held two public hearings (December 18, 2017 and February 5, 2018) on Catalyst's application. These public hearings were advertised pursuant to the Sunshine Act and were open to the public. CAB can discern no language in the CSL which would necessitate that all of the meetings of the Board comply with Sunshine Act requirements. At least one is sufficient.

While it might have been advisable for the School District to have provided the Comparison Chart and the MOU to Catalyst before it made its decision, CAB sees no reason to revisit the due process issue by essentially reversing *In Re: Education InnovationsLAB Charter School, supra*. That case and its well-reasoned conclusions are determinative here. Catalyst's due process rights were not violated by the School District based upon these facts.

III. Failure to demonstrate sustainable support

CSL Section 1717-A(e)(2)(i) provides that an application is to be evaluated based on the "demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students, including comments received at the public hearing" 24 P.S. §17-1717-A(e)(2)(i). "Sustainable support" has been defined by CAB as "support sufficient to sustain and maintain a charter school as an ongoing entity." *In Re: Washington Classical Charter School*, CAB Docket No. 2012-05 at 12 (citing *In Re: Bear Creek Community Charter School*, CAB Docket No. 2003-3). It "has described the required demonstrated sustainable support as an 'inherent variable' depending on the size of the proposed school, the community and other factors." *In Re: Washington Classical Charter School*, CAB Docket No. 2012-05 at 14 (citing *Environmental Charter School*, CAB Docket No. 1999-14).

The School Board Resolution found “some evidence of support” but noted the opposition testimony. (R. 3749a). The Notice of Denial and Detailed Findings included this basis for the denial of the application. (R. 3751a-3779a).

Sustainable support may be measured in the aggregate and not individual categories. Form letters and pre-enrollment forms have been held to be sufficient evidence of support. *McKeesport Area School District v. Propel Charter School McKeesport*, 888 A.2d 912, 916-917 (Pa. Cmwlth. Ct. 2005). Petitions need not be verified. *Brackbill v. Ron Brown Charter School*, 777 A.2d 131, 137 (Pa. Cmwlth. Ct. 2001); *See also, Carbondale Area School District v. Fell Charter School*, 829 A.2d 400, 406 (Pa. Cmwlth. Ct. 2003); *School District of Pittsburgh v. Provident Charter School for Children with Dyslexia*, 134 A.3d 128, 140 (Pa. Cmwlth. Ct. 2016).

The concept of sustainable support has previously been addressed by CAB in the case of *In Re: Appeal of Phoenix Academy Charter School*, CAB Docket No. 1999-10. The Phoenix Academy Charter School application was denied by the Phoenixville Area School District, and the denial was upheld, ultimately because the charter school failed to locate a suitable facility prior to the Board’s vote on its application. The School District argues here that CAB should reconsider its position in the *Phoenix Academy* decision.

CAB found that the Phoenix Academy Charter School did have sustainable support and discussed several aspects of the CSL, which was relatively new at the time of the 1999 decision:

In arriving at this conclusion, the CAB notes several aspects of the Charter Law. First, it is the degree of support for the proposed charter school plan, not the size or vociferousness of the opposition, that is relevant. The applicant must demonstrate “sustainable support” for the charter school plan. The CAB concludes that the term “sustainable support” means support sufficient to sustain and maintain the proposed charter school as an on-going entity. . . .

The record here shows that 60 families pre-registered for Phoenix Academy. At the public hearing, at least three members of the public, spoke in favor of the charter, while no one can be identified as speaking against it. Newspaper articles, letters to the editor, and editorials expressed a reasonable degree of support. In this case the CAB concludes that Phoenix Academy has presented a reasonable amount of support for the charter school plan, which is sufficient to satisfy the Charter Law's criteria.

Phoenix Academy at 24.

Neither in *Phoenix Academy*, nor in any of the other Commonwealth Court cases where sustainable support is analyzed or discussed, has CAB or the Court reviewed an application or an appeal where any individuals testified on record at the public hearing in *opposition* to the charter school at issue. No one testified against the charter in *Phoenix*, nor do the decisions in *Carbondale*, *McKeesport*, *Provident* or *Brackbill* include any reference to opposition testimony in their decisions or analysis of sustainable support.

The District argues that this case presents an opportunity for CAB to reconsider the position stated in *dicta* in *Phoenix Academy*, and to review the role of testimony in opposition to the Catalyst application received at several public hearings. Specifically, the opposition testimony received in this case was significant: 38 opponents⁵ from varied groups comprising parents, teachers and community members. Catalyst argues that those who spoke against Catalyst were merely speaking generalized anti-charter rhetoric, not necessarily opposition to this particular school's application.

The quality and quantity of testimony against Catalyst caused the Board to doubt the sustainable demonstrated support for the school in the very areas of the City from which it intended to draw support. However, we conclude that the number of advocates for Catalyst who

⁵ There is some dispute about the exact number who opposed Catalyst specifically. However, the School District does agree that Catalyst supplied 173 letters of family or community interest with its application and an additional 5 after the February 5th hearing.

provided written support or who spoke in favor of the application satisfy the burden of showing “demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students” required by the CSL.

IV. Violation of Section 17-1715-A(5) of the CSL for failure to remediate display of religious objects and symbols on school premises

Section 17-1715-A(5) includes a prohibition on religious objects and symbols:

“... nor shall it display religious objects and symbols on the premises of the charter school.”

According to the Review Team, the proposed site has “religious symbols and figures carved in stone insets on the front of the building facing Negley Avenue, and Stars of David around the frieze of the former synagogue.” (R. 3382a). Catalyst does not deny this. The School District argues that Catalyst’s promise to remove or cover these objects at some point in the future is not sufficient to remedy what it believes is a clear violation of the CSL. Yet, it should be noted that the same site was previously used by the Urban Academy Charter School which received a charter from the District in 1998.⁶

Catalyst confirmed in correspondence submitted as part of the Record to the District prior to the vote on the Application that it would “fully comply with all laws applicable to its use of the proposed facility and to the extent necessary will cover up religious symbols.” (R. 3491a).

In *School District of the City of York v. Lincoln-Edison Charter School*, 772 A.2d 1045 (Pa. Cmwlth. Ct. 2001), the Commonwealth Court held that a finalized management agreement, and not merely a model agreement with a promise to adopt a finalized version, was required before a charter could be granted. The Court remanded the matter to CAB on the basis that a promise by the applicant to complete a required part of its application was not sufficient. The Court stated, “it is necessary to have a finalized version of the agreement to review because it is

⁶ Urban Academy Charter School may not have been required to comply with the CSL, although no evidence of this is contained in the Record.

impossible to determine whether the charter application comports with the requirements of the Law when integral parts of the application are not finalized.” 772 A.2d at 1050.

On the other hand, Catalyst argues that the law on this issue is well settled before CAB, based upon *In re: Baden Academy Charter School*, CAB Docket No. 2011-03, a later CAB case which cited numerous prior Board decisions holding that “a detailed facility plan which addresses all issues with the facility is not required under the Charter School Law.” *Id.* at 8 (citations omitted). CAB in *Baden Academy* concluded that all the CSL requires is a description of the site in general terms, with a clear indication that steps will be taken to address any known issues. *Id.* In the case of Catalyst, the Application indicated that the school was working “to renovate and lease the school facility.” (R. 0126a, R. 3190a). Catalyst retained East End Development Partners, LP to conduct the renovations and lease the facility; in turn, East End Development Partners, LP had a letter of intent on the property itself, pending approval of the Application. However, at the time of the Application, Walnut Capital had site control over the proposed facility. This is similar to the situation described in *Baden Academy*:

Here, Baden has indicated that the religious symbols have been, or will be, removed. Removal of those symbols is akin to renovating the facility or making it ADA-compliant. Once the charter is approved and Baden executes the lease, it must address these issues in order to operate a charter school in the facility. The district thus erred in denying the Application on this basis.

Baden Academy at 9.

Just as in *Baden Academy*, post-approval, Catalyst must either remove or cover the religious symbols in order to operate its charter school at the proposed site. However, the School District cannot use the mere presence of religious symbols on the proposed building to deny the charter at the application stage.

V. **Violation of Section 17-1730-A of the CSL by further segregating the targeted neighborhoods of the East End of the City in violation of an MOU in place between the District and the PHRC**

Although not discussed at any public hearing and specifically not mentioned by any Board member at the February 21, 2018 vote on the Application, the Denial letter (R. 3751a–3779a) included reference to the MOU and attached the MOU in support of the denial. (R. 3757a–3772a). According to the School District, Catalyst’s targeted student enrollment of underachieving African American students from the East End neighborhoods of Pittsburgh will create a primarily minority elementary school in that area in violation of the terms of the MOU. The School District also argues that the exclusionary disciplinary policy Catalyst plans to implement in its school will have the effect of suspending and expelling students of color at a disproportionate rate which will also violate the MOU.

Section 17-1730-A of the CSL directs that: “[t]he local board of school directors of a school district which is operating under a desegregation plan approved by the Pennsylvania Human Relations Commission or a desegregation order by a Federal or State court shall not approve a charter school application if such charter school would place the school district in noncompliance with its desegregation order.” 24 P.S. § 17-1730-A. The rejection of an application in these circumstances is mandatory. A “desegregation plan approved by the PHRC” is not defined in the CSL, and the Courts have not decided any cases under this Section.

CAB has previously held that concerns regarding segregation can only be used as a basis for denial when, pursuant to § 17-1730-A, there is either a desegregation order from a state or federal court or a desegregation plan prescribed by the PHRC. *See, In Re: Propel Charter School – Sunrise*, CAB Docket No. 2009-03, at 10; *see also, In Re: Young Scholars of Western PA Charter School*, CAB Docket No. 2010-03 at 5.

According to applicable rules of statutory construction: “In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa.C.S. §1922(1). Further, under the rules of strict and liberal construction of statutes, there are classes of statutes that are to be strictly construed, such as penal and tax statutes, but the CSL is not among them. Therefore, applicable to this Section, “All other provisions of a statute shall be liberally construed to effect their objects and to promote justice.” 1 Pa.C.S. §1928(c). One of the objectives of the CSL is “to establish and maintain schools that operate independently from the existing school district structure.” 24 P.S. § 17-1702-A.

By its terms, the MOU is a result of a complaint filed with the PHRC in 1992 against the Pittsburgh School District by Advocates for African American Students alleging the District unlawfully discriminated against African American students with respect to suspension and discipline, grades, programs and achievement. (R. 3757a). By entering into this MOU and continuing to allow the PHRC to monitor its 73 terms of settlement, the District and the PHRC agreed to avoid protracted litigation by having the PHRC continue to monitor the District’s compliance, at least through August 30, 2020. (R. 3757a).

Since 1996, the PHRC, by action of the Legislature in 43 P.S. §958.2, is not permitted to enforce a “desegregation plan” or “desegregation order” that mandates desegregation through school attendance or busing. The MOU is in place because the School District “is still being monitored by the PHRC for racial equity.”

Specifically, in relevant part,

(b) Neither the Pennsylvania Human Relations Commission nor any local human relations commission nor any court, as part of its

review of any commission or local commission action or any complaint filed pursuant to this act, shall impose upon the Commonwealth, any school district or other school entity, or any governing body, officer or employe of any of the foregoing, any requirement that pupils be assigned to attend any public school other than the school of appropriate grade level that the pupil qualifies to attend closest to the student's home and shall not impose any other obligation or responsibility with respect to pupil school assignment or pupil transportation related to pupil assignment

43 P.S. § 958.2(b).

Given that “desegregation plans,” as typically defined by mandated plans for attendance or busing have not been enforceable by the PHRC since 1996, legislation is not to be interpreted to achieve an absurd or unreasonable result. Because legislation should be interpreted liberally to affect their objects and achieve justice, the School District argues that the MOU in this case should be included in the definition of “desegregation plan” referenced in Section 17-1730-A of the CSL.

In *Environmental Charter School*, CAB Docket No. 2016-01 at 24, CAB opted not to issue a ruling as to the definition of a desegregation plan, stating that there was no indication that current demographic statistics would be a reliable forecast of future demographics. Catalyst points out that the District provided no evidence that Catalyst would attract the same audience as the Environmental Charter School. The only evidence of “segregation” or “desegregation” in the case of Catalyst is the proposed location in what Catalyst describes as a predominately African American community.⁷ (R. 0015a). Similar to the demographic statistics in *Environmental Charter School*, the District has provided no evidence to support a correlation between the proposed location of Catalyst and a violation of the MOU. If anything, the complaining party prompting the MOU, Advocates for African American Students, might welcome a charter school

⁷ In the record, there is no actual evidence of the racial composition of these neighborhoods.

opportunity such as Catalyst proposes, which would provide another educational opportunity to African American students. Without evidence in this record, CAB declines to conclude that the School District has shown a violation of Section 17-1730-A of the CSL.

Catalyst's proposed disciplinary policies are not discriminatory, nor will they violate the MOU, says Catalyst. Catalyst's proposed disciplinary policies do seem to align well with the MOU's section entitled "Equity in Discipline." (R. 3763a-3764a). Catalyst has pledged in its Application that it "is committed to avoiding suspension and expulsion as consequences when possible unless required by state law." (R. 0072a).

Without evidence of a specific violation of the MOU, it was error to utilize this basis for denying the charter.

VI. The mission and educational goal of the Charter School, the curriculum to be offered, and the method of assessing whether students are meeting educational goals

The CSL states that a charter school application must include a description of the curriculum to be provided by the school. 24 P.S. §17-1719-A(5). CAB has described curriculum as "essentially a roadmap to the school's operation, goals, teaching strategies and learning methodology." *Thurgood Marshall Academy Charter School v. Wilkinsburg School District*, CAB No. 2001-5, at 11.

The Review Team thoroughly examined Catalyst's proposed curriculum (R. 3374a-3381a, 3390a) and generally approved the teaching strategies and learning methodology. In its brief, the School District states that it is "not suggesting lack of a detailed curriculum is a basis for its decision to deny." (CAB HO-10, p. 21). CAB's own review finds nothing in the many documents submitted by Catalyst to cause concern that its description of curriculum is deficient.

VII. Failure to serve as a model for other schools

The CSL requires a chartering district to consider the "extent to which the charter school may serve as a model for other public schools." 24 P.S. §17-1717-A(e)(2)(iv). As this Board has previously noted, the "purpose of the [CSL] is to *encourage* the use of innovative methods, not to exclude charter applicants whose proposed methods may not be as innovative or as different as the school district believes they should be." *In Re: Appeal of Denial of Charter for City College Prep Charter School*, CAB No. 2006-1 at 7 (quoting *Sugar Valley Rural Charter School*, CAB No.1999-4) (emphasis in original).

The Commonwealth Court has upheld the standards adopted by this Board for determining if an applicant can serve as a model. *Montour School District v. Propel Charter School – Montour*, 889 A.2d 682, 688 (Pa. Cmwlth. 2006). In response to a school district's argument on appeal that the curriculum proposed by an applicant was not innovative and that the school therefore could not serve as a model, the Commonwealth Court held in *Montour* that: "Propel offers a learning environment that is unique and different from that in the District's public schools." *Id.* The court highlighted the differences between the education plan of the applicant and that of the school district, including the number of days of instruction and the hours of instruction. *Id.* The Court went on to say that "[w]hile there may be similarities between Propel and the existing public schools, similarities, alone, are insufficient to support a finding of noncompliance with the CSL when there is substantial evidence of uniqueness." *Id.*

CAB must conclude that Catalyst has presented "evidence of uniqueness." For example, the following Catalyst features do appear to be innovative: "Catalyst Expeditions"; arts education four times a week; science or engineering five times a week, beginning in Kindergarten with computer science one day a week; 30 minutes a day of community time; and a

4Cs framework, which is a focus on communication, critical thinking, creativity and collaboration. (R.0010a-0011a; R. 0020a-0033a; R. 0080a; R. 0093a-0095a; R. 1092a-1100a). These alone should be sufficient, if properly implemented, to serve as a “model for other public schools.”

VIII. Failure to provide comprehensive learning experiences

Section 17-1702-A(2) of the CSL addresses legislative intent that applicants demonstrate that their schools will “increase learning opportunities for all pupils.” Catalyst’s application, according to the School District, did not meet this requirement because it failed to provide a clearly defined alternative curriculum for students with disabilities who qualify for the Pennsylvania Alternate System of Assessment (PASA) exam. Students with disabilities may not be excluded from learning opportunities within charter schools. The Review Team found some deficiencies in the social studies curriculum and special education curriculum which warrant scrutiny under Section 17-1702-A(2).

With respect to social studies, the Review Team found much of the curriculum to be complete for grades K-8 but found a deficiency in the assessments as follows: “The assessments, in particular, the formative assessments’ alignments to standards and objectives of the units of study are not clear. They are listed in the Social Studies Curriculum overview as ‘Daily/Weekly Exit Tickets.’ There is no clarity on how these are developed, how they are intended to be used, or how the timeliness of feedback to students will impact teaching and learning in real time. Further development of this is recommended to actualize a continuous loop of feedback and response to intervention to serve all students.” (R. 3390a).

Catalyst contends social studies is not a subject of the state assessment, but it has been included in its Application and remains an academic subject required to be taught in a comprehensive manner. It concedes that alternative curriculum is required for special education students who qualify to take the PASA exam in place of the PSSA exam in grades 3 through 8. The Special Education Program Officer on the Review Team explained at the February 19, 2018 hearing that “There is not an alternative curriculum identified that is aligned with the PASA standards.”

Without citation to any authority, the School District claims that it is not enough for Catalyst to identify and design individualized alternative instruction models to allow a student to make meaningful progress toward his/her IEP goals, but rather that Catalyst “must have an alternative curriculum already in place.” The Charter School says that it went beyond the basic requirements in its Application regarding special education, and it clearly indicated that it would offer the PASA. (R. 0116a).

Catalyst points out that the “reward” for providing a detailed application is the resulting denial by the School District which argues that Catalyst must also include a detailed alternative curriculum for those students taking the PASA. CAB agrees that the very concept of individualized instruction is to create a plan based upon the specific needs of the student. If a student meets the criteria to take the PASA, such student will require an *individualized* alternative curriculum which Catalyst has indicated it will provide at the required time.

IX. Failure to consider all information required by Section 17-1719-A of the CSL

Although some staff and trustees are identified in the application, clearances for staff who will have direct contact with children were not provided with the original application, and the

School District contends that this deficiency is a violation of Section 17-1719-A(15) (report of criminal history record) and (16) (official clearance statement). However, the clearances for CEO Brian Smith were provided later (as CAB HO-6) and accepted into the record by CAB's hearing officer. (CAB HO-8). Catalyst remedied this major deficiency with respect to the CEO. It is expected that the required criminal history records and official clearance statements will be provided when staff who have direct contact with children are actually hired.

A potentially more significant criticism from the School District may be that Catalyst's application fails to identify appropriate procedures which will be used when suspending or expelling students as required by Section 17-1719-A(7). The School District contends that the processes proposed by Catalyst's draft student discipline policy facially comply with Section 1318 of the School Code, but when implemented as written, they could have the effect of disproportionately excluding students of color because they penalize low levels of behavior.

Catalyst's draft discipline policy is included in its application in Appendix 17. (R. 1335a-1352a). The Code of Conduct describes behaviors for students in grades K-2 and in grades 3-8, as Level 1 through Level 6 infractions, with Level 1 infractions being the least serious and Level 6 being the most serious. Each Level of infraction has increasingly serious consequences or results, up to and including suspension and expulsion.

Included on the Level 1 infractions subject to discipline are dress code infractions, gum, missing homework and missing required classroom materials. Consequences required in the Code range from teacher correction, call or note home or teacher discretion. For the older grades minus one on the reward system is mandated.

Included on Level 2 infractions are behaviors such as walking at an unprofessional pace, items stored incorrectly, posture problems, tapping/drumming/humming, out of seat without

permission, and writing on self. Consequences include required teacher correction, required reduction in effort score, and other possible consequences.

Included on Level 3 infractions are talking back/arguing about a correction, disrespectful response to a teacher (*e.g.*, eye-rolling, huffing, tssk-ing etc.), not following explicit group directions, not following explicit individual directions, note (writing, passing or actively receiving), public display of anger (slamming books or door), showing public disappointment when not called upon. Consequences include required teacher correction, classroom consequence, and call home.

Level 4 infractions include insubordination (walking away, refusing to follow directions), damaging a referral after receiving it (ripping/wadding/defacing) and cell phone. Consequences include required written referral, required reduced effort score and other consequences. Written referrals lead to the alert system on which interventions last for 5-20 days and lead to suspensions and expulsions. Higher level infractions lead to suspensions and expulsions for students in all grades, including those in grades K-2.

The School District argues that this discipline policy will impede its ability to reduce disproportionate suspensions of students of color in violation of the MOU. Yet, CAB credits the testimony of CEO Brian Smith on this issue. (R. 3465a). In addition, a “restorative practices” can be found in its written discipline philosophy. (R. 1336a.)

The School District also contends that many of these behaviors warranting discipline under Catalyst’s policy are typical behaviors for young students and students with disabilities and should not be used as a basis for punitive discipline. According to the School District, imposing discipline on this basis may also constitute discrimination on the basis of disability and be a violation of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the

Rehabilitation Act. Again, these School District criticisms are pure conjecture and are not substantiated by anything in the writings of the Catalyst application.

All disciplinary procedures require the use of discretion. CAB refuses to assume, as the School District apparently does, that no discretion will be used when dealing with young students or students with disabilities.

X. Failure to conform to the legislative intent of the CSL contained in Section 17-1702-A of the CSL

The School District found that Catalyst failed to satisfy the intent of the CSL in three specific areas: increasing learning opportunities for all pupils, providing parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system, and encouraging the use of different and innovative teaching methods.

The School District provided additional information consisting of a Comparison Chart which it made part of the record but which was not provided to Catalyst until after the vote to deny its application. (R. 3773a-3779a). This chart listed each aspect of the application Catalyst identified as innovative and compared those aspects to programs available in the District, at Environmental Charter School, and at Urban Academy Charter School. These two charter schools were chosen for comparison because of their proximity to Catalyst's proposed location. The School District says it should be allowed to evaluate Catalyst's program offerings by comparing them to existing programs for the specific purpose of determining whether or not Catalyst will offer expanded educational opportunities. Catalyst says that the Comparison Chart is faulty and that it had no opportunity to rebut any aspect of the chart.

Even after considering the information in the disputed Comparison Chart, CAB is satisfied that Catalyst has shown sufficient language in its application to conclude that it has

sound intentions to increase learning opportunities for all pupils, to provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system, and to encourage the use of different and innovative teaching methods. This charter school should be given an opportunity to show that it has the capability of meeting those intentions.

CONCLUSION

The record contains compelling evidence to support the conclusion that Catalyst has met all of the requirements of the CSL. Therefore, CAB makes the following Order:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
STATE CHARTER SCHOOL APPEAL BOARD

CATALYST ACADEMY CHARTER SCHOOL :

v. :

CAB Docket No. 2018-03

SCHOOL DISTRICT OF PITTSBURGH :

ORDER

AND NOW this 15th day of JULY, 2019, based upon a thorough review of the testimony and other evidence of record and the vote of this Board,⁸ Catalyst's appeal is GRANTED.

The School District is directed to issue a charter in accordance with the Charter School Law.

For the State Charter School Appeal Board



Pedro A. Rivera,
Chair

Date of mailing: 7/15/19

⁸ At the Board's meeting of May 21, 2019, Catalyst appeal was granted by a vote of 4 to 2 which included participation of all sitting board members.