

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

Virtual Preparatory Academy of PA	:	
Cyber Charter School,	:	
 Petitioner,	:	
	:	CAB Docket No. 2020-03
v.	:	
	:	
Pennsylvania Department of Education,	:	
 Respondent	:	

OPINION

In accordance with the Charter School Law¹ (“CSL”), this matter comes before the Pennsylvania State Charter School Appeal Board (“CAB”) on the appeal by Virtual Preparatory Academy of PA Cyber Charter School (“Virtual Prep”) from a November 30, 2020, decision of the Department of Education (“Department”) denying Virtual Prep’s September 30, 2020, revised application (“Revised Application”) for a charter to open a cyber charter school in Pennsylvania.

BACKGROUND AND PROCEDURAL HISTORY

On October 1, 2019, Virtual Prep submitted an application to establish a cyber charter school (“Application”). On November 19, 2019, the Department held a public hearing regarding the Application. On January 27, 2020, the Department issued a written denial of the Application. On October 1, 2020, Virtual Prep filed a Revised Application (“Revised Application”) with the Department. A hearing was conducted on the Revised Application by the Department via Zoom on November 5, 2020. After the Revised Application was denied, Virtual Prep appealed to CAB. The Department filed an answer to the appeal.

¹ Act of June 19, 1997 (P.L. 225, No. 22), *as amended*, 24 P.S. §§ 17-1701-A – 17-1751-A.

By stipulation, the parties agreed to a small augmentation of the record. Specifically, they submitted the affidavit of Richard Flynn, Board President for the Board of Trustees of Virtual Prep, regarding the resignation of Board member Rick Saccone. In addition, by order of May 27, 2021, Virtual Prep was granted leave to file an amended appeal that essentially augmented its legal arguments. A briefing schedule issued, and after an extension of that schedule, all briefs were timely filed.

FINDINGS OF FACT

1. On October 1, 2019, Virtual Prep submitted an application to establish a cyber charter school (“Application”). *See* “Background” of Department Decision issued November 30, 2020.
2. On November 19, 2019, the Department held a public hearing regarding the Application. *See* “Background” of Department Decision issued November 30, 2020.
3. On January 27, 2020, the Department issued a written denial of the Application. *See* “Background” of Department Decision issued November 30, 2020.
4. On October 1, 2020, Virtual Prep filed a Revised Application with the Department. Case file.
5. On November 5, 2020, a hearing was held on the Revised Application. Case file.
6. In its Revised Application, Virtual Prep identified its mission as “to provide K-12 students with an innovative college preparatory cyber school grounded in strong academics, character education, and service-learning. Through compelling inquiry-based, project-based service-learning, and peer interaction, the Virtual Preparatory Academy of Pennsylvania will instill in all students an intellectual curiosity and a sense of their unique purpose and strengths.” Revised Application, p. 5.
7. The Department issued a decision denying the Revised Application on November 20, 2020.
8. In its decision, the Department cited to the numerous deficiencies under the CSL. Department Decision issued November 30, 2020.
9. The Department stated that the Revised Application evidenced a lack of evidence of sustainable support. Department Decision issued November 30, 2020.

10. The Department stated that the Revised Application evidenced a lack of capability to provide comprehensive learning experiences in that Virtual Prep did not adequately demonstrate insurability, necessary financial support, and planning and is not sufficiently independent from its education service provider. Department Decision issued November 30, 2020.
11. The Department stated that the Revised Application evidenced unmet standards under 22 Pa. Code Ch. 4 in that Virtual Prep's curriculum is incomplete, it inadequately outlines staffing and professional development plans and has proposed inadequate practices for vulnerable student populations. Department Decision issued November 30, 2020.
12. The Department stated that the Revised Application evidenced unmet requirements of Section 1747-A of the CSL in that it does not include a complete curriculum, provides insufficient evidence of community involvement in school planning, does not include a proposed faculty and professional development plan, does not demonstrate capacity for the delivery of continuing professional education and does not provide evidence of how it will provide adequate liability and other appropriate insurance. Department Decision issued November 30, 2020.
13. The Department stated that the Revised Application lacked evidence that Virtual Prep would be a model to other public schools. Department Decision issued November 30, 2020.
14. On December 28, 2020, Virtual Prep filed an Appeal of the denial of the Revised Application with CAB. Case file.
15. On January 13, 2021, the Department filed an Answer to the Appeal. Case file.
16. On May 10, 2021, Virtual Prep filed a Motion for Leave to File an Amended Appeal. Case file.

17. On May 27, 2021, an Order was issued granting the Motion for Leave to File an Amended Appeal. Case file.
18. On June 1, 2021, the Department filed an Answer to the Motion for Leave to File an Amended Appeal. Case file.
19. On June 17, 2021, the parties filed a Joint Stipulation and Exhibit (“Affidavit of Richard B. Flynn”). Case file.
20. On July 1, 2021, a briefing schedule was issued. Case file.
21. On July 9, 2021, the Department moved for an extension of time to file its brief. Case file.
22. By order of July 12, 2021, the extension was granted. Case file.
23. On September 2, 2021, both parties timely filed their principal briefs and the Department also filed proposed findings of fact and conclusions of law. Case file.
24. On September 17, 2021, both parties timely filed their response briefs. Case file.
25. On April 22, 2022, the record was certified by the undersigned to CAB. Case file.
26. On July 12, 2022, CAB voted unanimously to deny the appeal, with the Secretary of Education recusing because the matter involved an appeal from a decision of the Department of Education, itself.
27. There are no teachers as members of the founding coalition of Virtual Prep. Revised Application, p. 3.
28. No member of the public spoke in support of the Revised Application at the hearing.
Passim.
29. There were 765 unchallenged signatures on petitions in support of the Revised Application. Revised Application Appendix D.

30. In the Revised Application, Virtual Prep submitted a description of the insurance policies that it intends to obtain and included insurance in its budget. Revised Application, p. 84-85 and Appendix M.
31. In calculating its per pupil rate, Virtual Prep used a blended rate of \$10,500 per pupil for general instruction and an incremental rate of \$18,000 for special education students. Revised Application, Appendix M, p.1.
32. In calculating its per pupil rate, Virtual Prep used unexplained internal benchmarks and applied a discount rate to them. NT 182.
33. There is a disparity between the regular and special education rates employed to estimate revenue and the budget narrative. *See* November 30, 2020, Decision of Department, Table 1, p. 4.
34. There is a conflict regarding federal revenues for disadvantaged students with Virtual Prep having assumed a federal contribution of \$225 per student in its Revised Application but stating at the hearing that it estimated that federal revenue as \$450 per student. *Compare* Revised Application, Appendix M, p.1; *with* NT 183.
35. Virtual Prep has no revenues from any loans other than a possible start-up loan of nearly \$200,000 from Accel and has no available revenues from fundraising. NT 190; *see also* Revised Application, Appendix M, p. 6, Appendix L, p. 11.
36. There is no indication that Virtual Prep has any available working capital or reserve for unexpected situations. NT 202-203.
37. Based on Virtual Prep's estimated per pupil rates for regular and special education, the total proposed fees payable to the service provider are equal to almost half of the estimated

regular education tuition and 40.2% of the proposed special education tuition rate. *See* November 30, 2020, Decision of Department, Table 2, p. 8.

38. The service provider agreement allows for the service provider to maintain what is essentially censorship control over Virtual Prep’s public relations initiatives. Revised Application, Appendix L.
39. The service provider agreement provision allows the service provider to terminate the agreement due to changes in funding formulae and state appropriations and places the risk entirely on Virtual Prep. Revised Application, Appendix L.
40. The Revised Application provides curricula in English Language Arts and Mathematics for grades K through 5. Revised Application, Appendix A.
41. For these same subjects, the Revised Application provides only course syllabi for the higher grades. Revised Application, Appendix A.
42. Staffing numbers are inconsistent; the Revised Application identifies a staffing total of 28.5, which is different from the 27.5 number claimed at the hearing. *See* NT 191-192.
43. Brian Gill, Ph.D., J.D. stated that he could not opine that Virtual Prep would provide the “substantial and robust synchronous instruction” between teachers and students needed to maintain student engagement and promote learning. Ex. 11.
44. There is no grading policy for English learners. *See generally* Revised Application.
45. There is no detail in the Revised Application on state-required criteria for transitioning English learners from English learner status to former English learner status. *See generally* Revised Application.
46. There is no curriculum for English language development instruction in the Revised Application. *See* NT 96.

47. In support of its projections for economically disadvantaged learners, Virtual Prep relied on an average from Accel schools outside Pennsylvania; an unsourced, undated national average; and a six-year-old Pennsylvania average. Revised Application, p. 69; NT 184.
48. Virtual Prep’s projected adjusted cohort graduation rates (“ACGR”) are *below* the latest reported statewide average rates. *See* Revised Application, p. 11 *and compare* 2020 graduation rate statistics on the Department’s official website at www.education.pa.gov/DataAndReporting/CohortGradRate/Pages

CONCLUSIONS OF LAW

1. CAB has jurisdiction in this matter. Section 1746-A of the CSL, 24 P.S. § 17-1746-A.
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 – 17-1751- A.
3. Virtual Prep was given notice and an opportunity to be heard in conformity with the CSL and notions of due process case file.
4. Virtual Prep did not meet its burden to show evidence of sustainable support.
5. Virtual Prep did meet its burden to show capability to provide comprehensive learning experiences to students only to the extent it demonstrated insurability, but did not otherwise meet its burden to show capability to provide comprehensive learning experiences to students.
6. Virtual Prep did not meet its burden to show that it met the standards under 22 Pa. Code Ch. 4 regarding curriculum.
7. Virtual Prep did not meet its burden to show that it met requirements of Section 1747-A regarding a complete curriculum, evidence of community involvement in school planning, a proposed faculty and professional development plan, capacity for the delivery of continuing professional education, and how it will provide adequate liability and other appropriate insurance.
8. Virtual Prep did not meet its burden to show that it would be a model to other public schools.

DISCUSSION

A. STANDARD OF REVIEW/BURDEN OF PROOF

CAB must apply a *de novo* standard of review when entertaining appeals from a denial of a charter school's application; such review requires CAB to give "appropriate consideration" to the findings of the district board, (or here, the Department) while making an independent determination as to the merits of the charter application. *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172, 1180 (Pa. 2002). CAB must independently review the record in accordance with the requirements of the CSL. *Id.*, 812 A.2d at 1179-1180.

The degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is the lowest degree of proof recognized in civil judicial proceedings, *Lansberry, supra*, 578 A.2d at 602, citing *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950), and is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the proponent's case must weigh slightly more than the opposing evidence. *Se-Ling Hosiery*, 70 A.2d at 856. Accordingly, the record in this matter is reviewed to determine if the evidence which the Virtual Prep produced at the hearing meets its burden of proving that its Revised Application satisfies all the requirements enumerated in the CSL at Section 1717-A(e)(2), 24 P.S. § 17-1717-A(e)(2), thus, warranting the grant of the Revised Application.

B. PURPOSE OF THE CSL

Section 1702-A of the CSL, 24 P.S. § 17-1702-A, sets forth the intent of the General

Assembly in enacting the CSL, explaining that it is:

to provide opportunities for teachers, parents, pupils and community members to establish and maintain schools that operate independently from the existing school district structure as a method to accomplish all of the following:

- (1) Improve pupil learning.
- (2) Increase learning opportunities for all pupils.
- (3) Encourage the use of different and innovative teaching methods.
- (4) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
- (5) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
- (6) Hold the schools established under this act accountable for meeting measurable academic standards and provide the school with a method to establish accountability systems.

24 P.S. § 17-1702-A.

C. GROUNDS FOR EVALUATION OF AN APPLICATION

A cyber charter school application must be evaluated based on these criteria:

- (i) The demonstrated, sustainable support for the cyber charter school plan by teachers, parents or guardians, and students.
- (ii) The capability of the cyber charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students under the charter.
- (iii) The extent to which the programs outlined in the application will enable students to meet the academic standards under 22 Pa. Code Ch. 4 (relating to academic standards and assessment) or subsequent regulations promulgated to replace 22 Pa. Code Ch. 4.

(iv) The extent to which the application meets the requirements of section 1747-A.

(v) The extent to which the cyber charter school may serve as a model for other public schools.

Section 1745-A(f)(1) of the CSL, 24 P.S. § 17-1745-A(f)(1).

Section 1719-A of the CSL, 24 P.S. § 17-1719-A, requires that charter school applications address, *inter alia*, the following issues:

(5) The mission and education goals of the charter school, the curriculum to be offered and the methods of assessing whether students are meeting educational goals.

...

(8) Information on the manner in which community groups will be involved in the charter school planning process.

...

(13) The proposed faculty and a professional development plan for the faculty of a charter school.

...

(17) How the charter school will provide adequate liability and other appropriate insurance for the charter school, its employees and the board of trustees of the charter school.

Finally, because Virtual Prep concerns a **cyber** charter school application, it is also subject to the requirements of Section 1747-A of the CSL, 24 P.S. 1747-A, which pertinently provides:

In addition to the provisions of section 1719-A, an application to establish a cyber charter school shall also include the following:

(1) The curriculum to be offered and how it meets the requirements of 22 Pa. Code Ch. 4 (relating to academic standards and assessment), or subsequent regulations promulgated to replace 22 Pa. Code Ch. 4.

D. ANALYSIS OF GROUNDS FOR DENIAL FOR THIS CASE

1. Evidence of Sustainable Support

The CSL requires a charter school application to demonstrate “sustainable support for the charter school plan by teachers, parents, other community members and students.” Sustainable support is “support sufficient to sustain and maintain the proposed charter school as an on-going

entity.” *Brackbill v. Ron Brown Charter Sch.*, 777 A.2d 131 (Pa. Cmwlth. 2001). Sustainable support is not measured by individual categories; rather it is measured in the aggregate. *Carbondale Area Sch. Dist. V. Fell Charter Sch.*, 829 A.2d 400 (Pa. Cmwlth. 2003).

The Department criticizes the founding coalition of Virtual Prep and states that two of Virtual Prep’s members are familiar with Virtual Prep’s proposed education service provider, Accel, which is its for-profit managing partner. Virtual Prep counters that the fact that board members have familiarity with an education service provider does not preclude a finding of sustainable support. It points out that the two members of the founding coalition who apparently caused concern with the Department are not employees or representatives of education service provider Accel; rather, they are parents of students who attended other cyber charter schools and who are familiar with the work of the education service provider in that context. It also relies heavily on the fact that a member of its founding coalition is a relative of the founder of Alex’s Lemonade Stand, a well-known local organization devoted to a charitable public mission.

While CAB sees no issue in coalition members having familiarity with a for-profit managing partner, what is concerning is that they have limited insight into the working of a cyber charter school beyond their experiences as parents.

The Department next criticizes Virtual Prep’s claim that it will help initiate parent and student groups *upon launching the school*. Specifically, the Department questions why such groups are not presently involved. Virtual Prep responds that nothing in the CSL requires the creation of parent and student groups at any time.

While it is true that the CSL does not *require* a demonstration of present involvement, that lack is a relevant factor when considering the question of sustainable support because it touches on whether there is sufficient support to sustain and maintain the school as an on-going entity.

The Department further asserts that there are no teachers and educators as members of the founding coalition. Again, while this is not expressly required, it is still a factor for CAB to consider in assessing sustainable support.

Turning the numbers here, the Department also takes issue with 151 of the petitions in support of the Revised Application on the bases that they are illegible, incomplete or signed by persons living outside Pennsylvania. Further, the Department notes that it received ten letters in opposition to the Revised Application, and four people spoke in opposition to it at the hearing.

Virtual Prep responds that even without the 151 signatures in issue, it had 765 other signatures on the petition. It notes, too, that an applicant can demonstrate sustainable support through the use of unverified petitions. (*Montour School Dist. v. Propel Charter School-Montour*, 889 A.2d 682, 687 (Pa. Cmwlth. Ct. 2006)). Virtual Prep asserts further that the degree of opposition is not relevant to determining whether the applicant provides sufficient evidence of demonstrated, sustainable support. *See In Re: Phoenix Academy Charter School*, Docket No. CAB 1999-10, p. 24. It also explains that most of the negative public comments centered on the financial impact of the Applicant and contends that the CSL does not provide that financial impact should be a basis upon which an application should be evaluated. It asserts, rather, that the legislature intended the criteria for evaluation to be educational in nature, and therefore, evaluating an application on the basis of financial considerations is improper. *In Re: Fell Charter School Appeal from Denial of Charter School Application by Carbondale Area School District*, Docket No. CAB 2001-9, p. 7.

The number of signatures for which the Department has no objection certainly is an indication of sustainable support. However, this does not end the matter. Telling from CAB's perspective is that at the November 5, 2020 hearing, four individuals spoke in opposition to the

Revised Application, while *no one* spoke in support of it. Although, as noted above, the degree of *opposition* is not relevant to determining whether an applicant provides sufficient evidence of demonstrated, sustainable support, the *absence* of demonstrable support is. In CAB’s view, the fact that Virtual Prep did not present a single teacher, parent, student, or other community member witness in support of its Revised Application (noting the hearing was held via videoconference so that travel was not even necessary) is a strong indication that there is little in the way of serious community support. This, coupled with the fact that no educator is a member of the founding coalition, leads CAB to conclude that overall sustainable support was not established. However, even were CAB to conclude that this factor has been established, other significant shortcomings, as discussed below, militate against granting the charter.

2. Capability to Provide Comprehensive Learning Experiences

a. Insurability

The Department argues that Virtual Prep did not provide Certificates or Requests for Proposals for liability insurance. Virtual Prep responds that this is not required by the CSL, citing *Carbondale* 829 A.2d at 410, and that it submitted a description of the insurance policies that it intends to obtain, which is sufficient.² The Department acknowledges the holding in *Carbondale* says this, but goes on to argue: “While this approach may have been acceptable in the early days of the Charter School Law, history has shown that courts’ interpretation of financial responsibility/liability has morphed to reflect the needs of those [the Department] serves.” Reply Brief, p. 2. It explains that in the case where a charter school ultimately ceases to exist, a student attendee of that school’s right to a free appropriate public education (“FAPE”) continues and must

² The November 30, 2020 opinion noted that while Virtual Prep indicated that Accel and its affiliates would be additional insureds, at the hearing it could not say if the budget is inclusive of those costs. NT 213.

be met by the State Educational Agency. In addition to this financial responsibility, it explains further that when a charter school fails to provide FAPE to a student and it is later determined that the student is owed compensatory education, the entity responsible for providing that compensatory education is generally also responsible for attorneys' fees. *See* 20 U.S.C. § 1415(i)(3)(B). Given that charter schools can and do fail, the Department asserts that the CSL should be interpreted to require an applicant charter school to provide more than a simple sentence of intent to procure insurance. Reply Brief, p. 3.

In *Carbondale*, the Commonwealth Court stated:

The District argues that Fell did not provide enough detail in its Application regarding adequate liability and other appropriate insurance for the charter school.

We disagree.

Section 1719–A(17) of the CSL, 24 P.S. § 17–1719–A(17), requires the application to indicate “[h]ow the charter school will provide adequate liability and other appropriate insurance for the charter school, its employees and the board of trustees of the charter school.” The District argues that Fell should have provided insurance quotes or descriptions of insurance policies in order to comply with the statute. However, CAB disagreed and pointed out that “[o]n pages 96 and 97 of the Application, Fell provided the types and amounts of insurance coverage it intends to obtain. While Fell could have provided a more comprehensive description of its insurance coverage plans, this is not required by the law, and Fell has provided sufficient information.” (CAB Opinion at 27.) Again, we agree with the CAB that there is substantial evidence to support the finding that Fell complied with this statutory requirement.

Carbondale, 829 A.2d at 410. That decision is binding on CAB and, accordingly, Virtual Prep has met this criterion.

b. Necessary financial support and planning

The Department asserts that Virtual Prep’s Application fails to demonstrate necessary financial support. In particular, it finds fault with (i) the per-pupil rates used by Virtual Prep; (ii) federal revenues; (iii) a loan from the service provider or undisclosed party; (iv) salary

assumptions; (v) the facilities; and (vi) whether the budget reflects all anticipated operated expenditures. Of particular note, in the November 30, 2020, decision is the observation that based on Virtual Prep's own estimate it would have an operating surplus of only 0.7% (\$46,000). Department Decision issued on November 30, 2020, p. 5. Virtual Prep contends that at the application phase, the budget plan need only be detailed enough for the chartering authority, or CAB on appeal, to determine that the applicant can provide a comprehensive learning experience for students. It cites *Insight PA Cyber Charter Sch. v. Dep't. of Educ.*, 162 A.3d 591, 611 (Pa. Cmwlth. Ct. 2017). ("A financial plan only has to show that it has considered the budgeting issues and that based on reasonable assumptions, it will have necessary funds to operate the school it proposes."). It maintains that the Department mischaracterizes the law by looking to evaluate whether calculations for specific line items are reasonable, rather than looking at the financial plan as a whole.

Virtual Prep's financial plan does not indicate that it has considered the budgeting issues, nor is it based on reasonable assumptions, and thus, does not meet the standard set forth in *Insight PA*. First, in calculating its per pupil rate, Virtual Prep used internal benchmarks, and applied a discount rate to them. There was no explanation regarding from where these internal benchmarks emanated or why it was proposed that they be discounted. Second, there is a disparity between the regular and special education rates employed to estimate revenue and the budget narrative. For example, for 2021-2022, despite discussion of a "blended rate" of \$10,500 for a regular education pupil, Virtual Prep appears to have *actually* used an estimate of \$11,440. For Special Education students for that same year, despite a blended rate of \$18,000 it calculated \$18,144. See Table 1 p. 4 of November 30, 2020, Department Decision.

There is also a conflict regarding federal revenues for disadvantaged students with Virtual Prep having assumed a federal contribution of \$225 per student in its Revised Application (Appendix M, p.1.), but at the hearing estimating that federal revenue as \$450 per student. NT 183.

Next, as a contingency plan, Virtual Prep intends to rely on a start-up loan from Accel or some other party. The budget contains no indicia, however, of any money being held in reserve and it relies for surplus monies only upon enrollment, which as the Department's adjudication properly notes, "can be volatile." There is no indication that Virtual Prep has any available working capital or reserve for unexpected situations. In addition, regarding the loan, its duration is also unclear, nor is there any mention of expenditures for Accel.

Also of concern is the financial picture for the faculty and staff. In its Revised Application Virtual Prep indicates its salary assumptions were based on "Pennsylvania-specific market research," (Appendix M, p. 2) but at the hearing it was pointed out that other sources were also used, such as benchmarks for virtual schools and feedback from the board and Charter Choices. NT 192-193. Charter Choices is another outside provider that focuses on business services, such as budget review and federal reporting requirements. *See* Revised Application, Appendix R. Moreover, detail was lacking as to how salaries were actually estimated. Relatedly, while the budget narrative indicates at one point that salaries will increase by 2.5% annually (Revised Application, Appendix M., p. 2) in other places the budget narrative is inconsistent on this point. For example, the contracted business manager position reflects only a 2.0 % increase and other positions reflect a rate greater than 2.5% between 2022 and 2023. Further, it is not explained why, despite that annual increase, bonuses are also budgeted. Also concerning, is that there is no documentary evidence to support certain quoted pension plan amounts.

Regarding facilities management, although Virtual Prep is a cyber school, it also intends have a brick-and-mortar facility of approximately 4,400 square feet. However, most employees will work from home. NT 207. Missing is detail that would help determine whether the proposed space will be adequate or indeed even overly large for those who would be working there. Further, Virtual Prep indicated at the hearing that janitorial services and management company costs were not in the budget. NT 209-211. Given these numerous deficiencies, CAB concludes that Virtual Prep did not demonstrate necessary financial support and planning.

c. Independence from education service providers

The Department asserts that Virtual Prep's Revised Application fails to demonstrate sufficient independence from its proposed education service provider, Accel. For example, as mentioned above, the school's proposed budget includes a total advance of almost \$200,000 from Accel for the start-up year. Based on the school's estimated per pupil rates for regular and special education, the total proposed fees payable to the service provider are equal to almost half of the estimated regular education tuition and 40.2% of the proposed special education tuition rate, sharply reducing available revenues for remaining school expenditures. The Department also indicates that the Revised Application evidences reliance on Charter Choices. It contends that it is unclear how Virtual Prep will evaluate either Accel or Charter Choices. It further notes that while a CEO is listed on Accel's service agreement, such a position does not even exist on the proposed staffing plan until 2024-2025. (At the hearing, Virtual Prep asserted that the principal would fill this role initially.) NT 143-144, 152, 231. Next, the Department points out that under its terms the provider agreement allows Accel to terminate the contract immediately for various reasons, including any policy action by the Board of Trustees that would increase financial risk, but Virtual Prep must give thirty days' notice to correct an alleged breach before it can terminate. Further,

the Department contends that portions of the agreement allowing for consultation with the service provider could be viewed as undermining the independence of the Board of Trustees regarding the management of the school.

Virtual Prep counters that the Department fails to explain how or why a startup loan of nearly \$200,000 from Accel would fail to provide comprehensive learning experiences to students, and that the agreement with the service provider is “subject to additional feedback from the authorizers.” It also asserts, citing, *Insight*, that the parties are free to negotiate whatever terms they want in the agreement, provided they do not violate the School Code and that the terms here evidence that Virtual Prep will be sufficiently independent from Accel.

CAB disagrees. While Virtual Prep can contract management and administrative roles to for profit entities, its Board of Trustees must maintain real and substantial authority of both the educational decision-making and the school staff. *West Chester Area School District v. Collegium School*, 760 A.2d 452, 468 (Pa. Cmwlth. 2000), *aff’d per curium*, 812 A.2d 1172 (Pa. 2002). As such, contracting does not excuse Virtual Prep from the need to be independent of and not overly reliant upon service providers, nor does it abrogate Virtual Prep’s responsibility to maintain control by defining roles and responsibilities and providing checks on provider conduct. Under *West Chester* matters for which is should retain control are “budgeting, curriculum, and operating procedures.” *Id.*

Further, while it is certainly true that Virtual Prep is not prevented by the CSL from acquiring a startup loan from Accel if it wishes, here, that loan is *the only capital* it demonstrates that it can obtain. There is no indication of any other loan sources or even that any fundraising pool exists. The level of dependency on Accel here is thus of great concern to CAB.

There are also other indicia of a disturbing overreliance, on Accel, in particular. For example, one provision in the provider agreement (*see* Revised Application, Appendix L) allows Accel to maintain what is essentially censorship control over Virtual Prep’s public relations initiatives, usurping the Board of Trustees’ authority.³ Another provision allows Accel to terminate the agreement due to changes in funding formulae and state appropriations and places the risk *entirely* on Virtual Prep, rather than spreading the risk between it and the provider. *Id.* There is no explanation for why this is a fiscally sound position for Virtual Prep. All these factors in total establish a lack of independence from Accel.⁴

3. Standards Under 22 Pa. Code Ch. 4

a. Completeness of curriculum

³ Virtual Prep’s response to this is:

The Board of Trustees ultimately retains power as evidenced by the language “Service Provider is under no obligation to implement any Public Relations initiatives promoted by the Board” Certified Record, Revised Application, Appendix L at 4-5 (emphasis added). Although it may not seem the most efficient or practical, the Board may utilize another provider or itself to conduct public relations that the Service Provider chooses not to engage in.

Brief at 27. It certainly is *not* practical or efficient and, as such, is an unpersuasive rationale to counter its defense of this term.

⁴ Another provision, which is an assignment clause in the agreement, allows the provider to reassign its contractual obligations to “its Affiliates or in connection with a merger, acquisition, asset sale or corporate reorganization.” While the Department asserts this assignment could occur without approval of or even input from the Board, which could curtail its authority to oversee provision of services and performance evaluation, CAB agrees that this argument ignores the prior sentence that “Neither Party may assign this Agreement without the prior written consent of the other Party (which consent shall not be unreasonably withheld).” Thus, CAB is not troubled by that provision.

The Department argues that Virtual Prep’s Application fails to provide curricula⁵ in all subject areas, inadequately outlines required staffing and professional development plans, and proposes inadequate and inappropriate practices for vulnerable student populations. It notes that the Revised Application provides curricula in English Language Arts and Mathematics for grades K through 5, with just course syllabi rounding out the higher grades. *See Revised Application Appendix A.* Further, it asserts that there are no curricula, just syllabi, for Social Studies and career and elective courses. Virtual Prep asserts that there is nothing in the CSL that requires evidence of curricula be submitted in a particular form, which is true. It also maintains, however, that there are sufficient details in the portion of the Revised Application titled syllabi and contends its submission is adequate.

CAB strongly disagrees that curriculum details are sufficient. While review of the Revised Application is the best evidence of this, to try to illustrate, the Revised Application, Appendix A A.5 pp. 194 -205, contains a detailed curriculum for 4th grade Language Arts, including “Units,” broken down by “Lesson” and “Objectives” for each lesson. By comparison, for 4th Grade Social Studies, there is only a two-page submission which consists of two paragraphs, each about seven sentences in length giving a general course description for each semester. This is followed by a list of materials needed, a note that the duration of the course is two semesters, a list of technology skills needed, *e.g.*, ability to email, and a list of “Major Concepts.” For the first semester, these Major Concepts are: Topography, Geography, Native Americans, Research Skills, State history/geography and Colonial History. *See Revised Application Appx. A D.5 pp. 28-29.*

⁵ Curriculum is defined as: “[a] series of planned instruction aligned with the academic standards in each subject that is coordinated and articulated and implemented in a manner designed to result in the achievement at the proficient level by all students.” 22 Pa. Code §4.3

In CAB's view, there is no way this scant amount of information meets the requirement in Section 1719-A of the CSL that the application include "the curriculum to be offered and how it meets the requirements of 22 Pa Code Ch.4." It is clear that 22 Pa. Code 4.21(e)(5) (regarding elementary education primary and intermediate levels) requires "planned instruction" aligned with academic standards for social studies in "civics and government, economics, geography and history." *Planned instruction is defined as* "Instruction offered by a school entity based upon a written plan to enable students to achieve the academic standards under § 4.12 (relating to academic standards) and any additional academic standards as determined by the school entity." 22 Pa. Code § 4.3. *Academic standard is defined as* "What a student should know and be able to do at a specified grade level." *Id.* Here there is virtually no information with regard to 4th grade Social Studies provided in the Revised Application that could even be used to evaluate whether academic standards would be met. While 4th grade Social Studies is used as an exemplar here, the same holds true for the other areas where general syllabi are being offered in lieu of an actual curriculum.

In addition, CAB credits the evidence submitted at the hearing, in Ex. 11, which is a letter from Brian Gill, Ph.D., J.D. who has studied the performance of charter schools for two decades. When asked after reviewing Virtual Prep's' Revised Application to opine on whether he could conclude that that there was convincing evidence therein that it would provide "robust synchronous instructional interaction between teachers and students" needed to maintain student engagement and promote learning, Dr. Gill indicated he could not so opine. His position that a *cyber* charter school, in particular, provides significantly less synchronous instruction time with teachers, resulting in difficulty keeping students engaged, is also credited. *Id.* Here the Revised Application had minimal evidence of synchronous student/teacher learning experiences. This is a major defect

exacerbated by the fact that Virtual Prep’s own witnesses *admitted* that the biggest “disciplinary” problem for a cyber charter school is keeping students engaged. NT 118.

b. Staffing and professional development plans

The Department asserts that there is no proposed faculty, and that teacher professional development and induction plans are minimal. It also notes that the Revised Application identifies a staffing total that is different from the number claimed at the hearing. *See* NT 191-192. Further, it contends that there is no explanation in the Revised Application for how Virtual Prep will identify specific student needs prior to the opening of the school, let alone how such needs would guide developmental planning. NT 88-91. Also lacking is any meaningful plan for professional development. Virtual Prep counters that the CSL does not require that the development plan for teachers be a separate manual, rather it merely needs to be a general program of training and can be interspersed throughout the application. (Citing *In Re: Appeal of Phoenix Academy Charter School*, Docket No. CAB 1999-10, pp. 22-23.) It asserts that its plans are interspersed throughout the Revised Application here. It also argues that the staff will be provided with child-find training and compliance progress updates in order to document information received regarding special education evaluation requests; how to interpret screening results; intervention processes and results; and compliance with the Pennsylvania Special Education Evaluation Timelines. It states it will provide eighty hours of professional development prior to the beginning of the school and then ongoing development thereafter. Additionally, the entire staff will receive professional development for positive behavior support and seclusion and restraints.

CAB is not persuaded by Virtual Prep’s arguments. It is concerning that not only are staffing numbers inconsistent (the Revised Application identifies a staffing total of 28.5 that is different from the 27.5 number claimed at the hearing, *see* NT 191-192), but the statistics do not

separate student/teacher ratios by grade or even by general versus special education. This makes it impossible to assess whether the proposed staffing plan, at least beyond year one, for which some numbers were provided, matches enrollment projections. There is also no detail on how the number of proposed support staff personnel was determined. Also highly significant, Virtual Prep does not explain how it will determine student needs *prior to opening of the school* or how professional development plans would dovetail with those needs. NT 88-91. Finally, the Revised Application does not set forth how the school will assure the delivery of continuing professional education, a requirement under 22 Pa. Code §49.17(a).⁶

⁶ This provision provides:

(a) As required under § 4.13(a) (relating to strategic plans), a school entity shall submit to the Secretary for approval a 3-year professional education plan every 3 years in accordance with the professional education guidelines established by the Secretary and section 1205.1 of the act (24 P.S. § 12-1205.1). A school entity shall make its professional education plan available for public inspection and comment for a minimum of 28 days prior to approval of the plan by the school entity's governing board and submission of the plan to the Secretary.

(1) A school entity shall develop a continuing professional education plan, which includes options for professional development including, but not limited to, activities such as the following:

- (i) Graduate level coursework.
- (ii) Obtaining a professionally related master's degree.
- (iii) Department-approved in-service courses.
- (iv) Curriculum development work.
- (v) Attendance at professional conferences.

(2) The continuing professional education plan must define terms used including, but not limited to, the following:

- (i) Professionally related graduate level coursework.
- (ii) Professionally related master's degree.
- (iii) Curriculum development work.
- (iv) Professional conferences.

c. Practices for vulnerable student populations

(3) The continuing professional education plan shall be developed as specified in section 1205.1 of the act. The plan must describe the persons who developed the plan and how the persons were selected.

(4) The continuing professional education plan submitted to the Secretary shall be approved by both the professional education committee and the board of the school entity.

(5) The Secretary will promulgate guidelines which include a process for amending approved continuing professional education plans in accordance with the requirements for initial preparation of the plans. The guidelines will also outline allowable activities for credit earned under sections 1205.1 and 1205.2 of the act (24 P. S. §§ 12-1205.1 and 1205.2) after July 1, 2006.

(6) The continuing professional education plan must include a section which describes how the professional education needs of the school entity, including those of diverse learners, and its professional employees are to be met through implementation of the plan. The plan must describe how professional development activities will improve language and literacy acquisition for all students, including the provision of training in structured literacy for professional employees who hold instructional certificates in Early Childhood, Elementary/Middle, Special Education PK--12, English as a second language and Reading Specialists. The plan must contribute to closing achievement gaps among students, and improve professional employees knowledge of professional ethics and culturally relevant and sustaining education.

(7) The continuing professional education plan must include a description of how the school entity will offer all professional employees opportunities to participate in continuing education focused on teaching diverse learners in inclusive settings.

(8) A school district that contracts with a community provider to operate a prekindergarten program shall address in the school district's professional education plan how the school district will offer professional education opportunities to teachers in the community provider's prekindergarten program.

The Department points out that there is also no grading policy for English learners, no detail on state-required criteria for transitioning English learners from English Learner status to former English learner status, or a curriculum for English language development instruction. It also points to inaccuracies in the way Virtual Prep profiled the student demographic characteristics. Virtual Prep responds that it is working to find the best content to provide for them and will finalize its delivery of content to these students prior to launching the school. *See* NT 96-98.

Cyber charter schools are required to “provide a program for each student whose dominant language is not English for the purpose of facilitating the student’s achievement of English proficiency and the academic standards under § 4.12 (relating to academic standards). Programs under this section shall include appropriate bilingual-bicultural or English as a second language (ESL) instruction.” 22 Pa. Code § 4.26. However, Virtual Prep in its Revised Application, fails to include a grading policy for English learners, detail on state-required criteria for transitioning English learners from English Learner status to former English learner, or a curriculum for English language development instruction. At the hearing, it was clear that Virtual Prep has no definite plans regarding this important and underserved population. *See* NT 93-103.

Virtual Prep’s lack of planning to support vulnerable populations is also evident in its profile of student demographic characteristics. *See Revised Application*, p. 69. In support of its projections for economically disadvantaged learners, it relies on an average from Accel schools *outside Pennsylvania*; an unsourced, undated national average; and a six-year-old Pennsylvania average. *Id.* Also of concern, it concedes that its budget estimates for these students’ needs is low.

NT 35, 181.⁷ As such, Virtual Prep’s Revised Application does not adequately address issues concerning vulnerable student populations.

4. Requirements of Section 1747-A of the CSL

The Department contends, as set forth above, that Virtual Prep fails to (a) include a complete curriculum and one that meets the requirement of 22 Pa Code Chapter 4, (b) provide evidence of community involvement in school planning, including a proposed faculty and the professional development plan, (c) demonstrate capacity for the delivery of continuing professional education, and (d) provide evidence of how it will provide adequate liability and other appropriate insurance.

Because these issues have already been discussed in the context of Section 1719-A and 22 Pa. Code Chapter 4, above, there is no need to restate those discussions.

5. Evidence that Virtual Prep would be a Model to Other Public Schools

The Department asserts that under the Elementary and Secondary Education Act (“ESEA”) and the Every Student Succeeds Act (“ESSA”), states were required to design and implement systems for holding schools accountable for student outcomes, with particular focus on narrowing outcome gaps for historically underserved populations. *See* 20 U.S.C. §6311. It then explains that Pennsylvania’s cyber charter schools have fallen short in this area. “In Fall 2019, Pennsylvania completed the first round of ESSA-required accountability determinations, resulting in school improvement designations for 14 of 14 cyber charter schools currently in operation. Ten of these schools carry CSI designations, indicating that the school is among the very lowest performing in

⁷ Greg Bianco, Treasurer of Virtual Prep stated, “So we may have budgeted for 12.5 percent for special education, but we are fully aware that the special education rate in the Commonwealth is approaching 20 percent. But for budget purposes only, as a conservative guideline, we wanted to indicate a conservative measure for budget purposes only regarding the breakdown between general ed and special ed.”

the state, while the remaining four exhibit low performance among historically underserved student groups.” Brief, p. 13. It explains further that relative to graduation rate, Virtual Prep outlines projected four-year and five-year adjusted cohort graduation rates (“ACGR”) that are substantially below the latest reported (*i.e.*, school year 2018-19) statewide average rates. To summarize:

Statewide average 4 years 86.5%	Virtual Prep 4-year projections 70%, 75%, 80%
Statewide average 5 years 88.9%	Virtual Prep 5-year projections 80%, 84%

Regarding English language achievement targets, the Department points out that 32% of the students will fail to reach proficiency even after two years. While Mathematics predictions were revised upward by Virtual Prep, the Department points out that there is little evidence to support the change. Concerning AP courses, the Department asserts “[i]t is concerning that an applicant whose mission includes an ‘innovative college preparatory’ program would need until 2025 to achieve the same level of AP participation that the state as a whole reported during the most recent U.S. Civil Rights Data Collection (15.4 percent) in 2015-16.” Brief, p. 15.

Virtual Prep responds that although its projected ACGRs fall below the current statewide average, they exceed the current ACGRs of other *cyber charter* schools. Thus, they would serve as a model for other *cyber charter* public schools. It also notes that while it predicts 32% of students will fail to reach proficiency in English language arts, the State Assessment Measures for English Language Arts indicates 31% of students will fail to reach proficiency in the same year. It offers as the reason for the change in Mathematics targets that the increase is due to a delay in grade level expansion. Finally, it contends that it is inappropriate to evaluate Virtual Prep’s Application on the performance of charter schools in other states.

The Department responds that granting a charter for a cyber charter school that reasonably calculates its graduation rates to fall well below the statewide average would contravene the legislative intent of the CSL to improve pupil learning or increase learning opportunities for all pupils. Further, it points out that although Virtual Prep argues that its projected graduation rates would have the school outperforming ten of the fourteen existing cyber charter schools in the Commonwealth, the statutory evaluation is to be based upon “the extent to which the cyber charter school may serve as a model for other *public schools*.” It notes that Section 1745-A(f)(1)(v) of the CSL, 24 P.S. § 17- 1745-A(f)(1)(v), does not limit the evaluation exclusively to other *cyber* charter public schools. Additionally, it asserts that when comparing Virtual Prep’s projected graduation rates to other public schools, the projections fall well below the respective statewide average.

CAB is not impressed with or persuaded by the notion that Virtual Prep can serve as model for other *cyber* charter public schools when its projected ACGR is *below* the latest reported (*i.e.*, school year 2018-19) statewide average rates. While it may be on the top end of *cyber* charter schools, whose performances seems to be lackluster at best, this is of no moment because, as noted by the Department, the proper statutory comparison of a model school is to “other public schools,” not merely other *cyber* charter schools. “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” Section 1921(b) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921. Accordingly Virtual Prep’s argument is rejected.

CONCLUSION

Based on the findings of fact and conclusions of law set forth, and as discussed in this opinion, CAB has determined that Virtual Prep has not met the requirements of the CSL. Thus, the decision of the Department will be upheld, and an appropriate Order follows.

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

Virtual Preparatory Academy of PA	:	
Cyber Charter School,	:	
 Petitioner,	:	
	:	CAB Docket No. 2020-03
v.	:	
	:	
Pennsylvania Department of Education,	:	
 Respondent	:	

ORDER

NOW, this 1st day of September 2022, based on the foregoing findings of fact, conclusions of law, Opinion and vote of this Board⁸, the appeal of Virtual Preparatory Academy of Pennsylvania Cyber Charter School is **DENIED**.

For the State Charter School Appeal Board



Chairperson

⁸ At the Board's meeting of July 12, 2022, the Board voted 4 to 0 to deny the appeal.

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Date of Mailing:

9/2/2022