IN THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
CHARTER SCHOOL APPEAL BOARD

In Re:		
SOUDERTON CHARTER SCHOOL COLLABORATIVE	:	
Appeal from Denial of	:	
Charter School Application by	:	Docket No. CAB 1999-2
Souderton Area School District	:	

Synopsis

The Souderton Area School District ("School District") denied the application of the Souderton Charter School Collaborative (the "Collaborative") on a number of grounds. Based upon the Findings of Fact, Conclusions of Law and Discussion hereinafter, we conclude that the denial was improper. In some instances, the bases for denial were not criteria upon which the legislature intended an applicant to be judged. In other instances, the district rejected evidence presented by the applicant but did not provide any evidence to contradict the applicant's evidence.

The Charter School Law provides a guide for reviewing a charter school application and for reviewing a district's process in evaluating the application. This decision reviews the evidence presented by the parties in relationship to the criteria upon which the application was denied. We assume that if the denial does not specifically mention the inadequacy of the applicant in meeting a requirement, the School District has agreed that the applicant has met that requirement.

In addressing the appeal of this matter, the School District lodged various procedural objections to the Collaborative's appeal in a Motion to Dismiss. We have decided these objections contrary to the School District, and have set forth our findings separately as to the procedural objections, and our substantive determination.

Findings of Fact - Procedural Issues

1. The Collaborative filed an application with the School District to form a Charter School and the application was denied on December 18, 1997. (Exh. 1A, 1E).

2. On July 1, 1999, the Collaborative filed an appeal of that decision to the Charter School Appeal Board ("CAB"), and the CAB appointed Michael C. Barrett, Esquire, as the Hearing Examiner to conduct a hearing, if necessary, and to certify the record of proceedings to the CAB. (Exh. 2)

3. On July 9, 1999, the School District filed an Answer, New Matter and Motion to Dismiss the Collaborative's appeal, along with a supporting Memorandum of Law, alleging the following deficiencies:

a. the appeal was untimely;
b. service of the appeal via express mail, and the certificate of service attached to the appeal, did not comply with the General Rules of Administrative Practice and Procedure;
c. the appeal, which was dated June 30, 1999, was improvident in that the statute provides for appeals on or after July 1, 1999;
d. the appeal was deficient in that it failed to allege any substantive facts relied upon, and was not upon a form developed by the Pennsylvania Department of Education;
e. the adoption of the General Rules of Administrative Practice and Procedure by the Board violated the Sunshine Law; and
f. the appointment of a Hearing Examiner was an invalid delegation of the CAB's authority.

(Exh 4)

4. On July 26, 1999, the Collaborative filed its Reply to New Matter along with a supporting Memorandum of Law. (Exh. 6)

Conclusions of Law - Procedural Issues

1. The Charter School Law, Act of June 19, 1997, P.L. 225, No. 22, 24 P.S. §17-1701-A *et seq.*, (the "Charter Law") governs the application and approval processes and operation of charter schools in Pennsylvania.

2. The Collaborative's appeal was timely filed, and properly served upon the CAB.

3. The General Rules of Administrative Practice and Procedure apply to all administrative actions before executive agencies unless contrary rules are adopted.

4. The CAB has not adopted any rules of procedure contrary to the General Rules of Administrative Practice and Procedure.

5. The CAB's action in appointing a Hearing Examiner was in accordance with the General Rules of Administrative Practice and Procedure.

6. The Collaborative's appeal was timely filed, and is not deficient in any manner necessitating its dismissal.

Discussion - Procedural Issues

The School District's attack on the appeal filed in this matter fails on every front. While procedures put in place for the handling of legal matters should be followed, the School District has not alleged any viable deficiencies on the part of the Collaborative.

a. Filing and Service

The School District raises numerous allegations relating to the manner, form or timing of the appeal filed by the Collaborative in this case. Under the Charter Law, an appeal may not be taken from the decision of a local school board until July 1, 1999. In

addition, the CAB is to review the certified record of an appeal within thirty (30) days of the notice of acceptance of the appeal.

The School District argues that the CAB accepted the Collaborative's appeal on February 17, 1999 but did not review the record within thirty (30) days thereof, and therefore, the CAB has no jurisdiction over the appeal. The School District also argues that the Collaborative's Petition for Appeal dated June 30, 1999 was improvident even though it was received by the CAB on July 1, 1999.

The School District's arguments lack merit. First, the CAB could not accept appeals until July 1, 1999, and therefore, the February 17, 1999 letter from counsel was simply to indicate that he had received the decree from the Court of Common Pleas that the petition filed with the Court was sufficient. 17-1717-A(i)(5). The CAB could not have accepted an appeal on February 17, 1999, and therefore, the thirty (30) day time period in which the CAB had to meet to review the certified record did not begin to run at that time. Only after the CAB members were sworn in on July 1, 1999 could the CAB accept appeals, which is when the Collaborative's appeal was accepted.

Notwithstanding that the School District argues that the CAB accepted the appeal prior to July 1, 1999, and therefore, had to meet and review the certified record within thirty (30) days of February 17, 1999, the School District then argues that the Petition to Appeal was filed too early because it was dated June 30, 1999. This argument lacks merit. It is obvious from the date stamp on the face of the Petition for Appeal that while dated June 30, the document was received by the Pennsylvania Department of Education on July 1, 1999. The General Rules of Administrative Practice and Procedure, addressing service of documents, provide that the "date of receipt at the office of the agency and not

the deposit in the mails is determinative." 1 Pa. Code §31.11. Therefore, the Collaborative's appeal was not filed prematurely.

The School District also argues that the Charter Law does not allow school board decisions made prior to July 1, 1999 to be brought before the CAB on July 1, 1999. The CAB does not agree with the School District's position. The Charter Law merely provides that an appeal may not be taken from a decision of a local school board until July 1, 1999. 24 P.S. §17-1717-A(f). There is no provision in the Charter Law that prohibits the CAB from accepting an appeal, on or after July 1, 1999, of any local school board decision made prior to July 1, 1999. The Charter Law does not provide any time frame within which an appeal must be filed by the charter applicant. The Charter Law only requires that in order to be eligible to appeal a denial of a charter, the applicant must obtain a certain amount of signatures within sixty (60) days of the denial. The Charter Law provides no further requirements about when the appeal must be filed with the CAB.

Similarly, the argument that service by express mail is not proper service is lacking in any authority. The General Rules of Administrative Practice and Procedure, again cited in respondent's own motion, require that pleadings be served by mail or in person; there is no authority cited for the proposition that 'express mail' is not 'mail,' nor is the CAB aware of any such distinction. The appeal was properly served.

The only reference to a form to be developed by the Pennsylvania Department of Education is found in 24 P.S. §17-1717-A(i)(3), in reference to the petition filed with the Court of Common Pleas. There is no other directive in the Charter Law regarding creation of a form to be used in filing an appeal with the CAB.

Based on all of the above, the School District's procedural challenges to the Collaborative's appeal are dismissed. The filing of the appeal was timely and proper.

b. Procedure

The School District complains that the appeal must be dismissed because the Collaborative failed to allege any particular facts that would merit favorable consideration of its appeal. As a procedural contention, this too must be rejected. While true that the Collaborative has not alleged any new, additional or contrary facts, or disputed the School District's determination with a high degree of particularity, this does not bar the CAB from determining whether the *findings or conclusions* of the School District are supported by the evidence already of record. Given the CAB's explicit statutory authority to agree or disagree with the findings of the School District (although "due consideration" of those findings is required), there is no requirement on the part of the Collaborative to specifically challenge each and every finding of fact or conclusion set forth by the School District. *See* 24 P.S. §17-1717-A(i)(6).

The School District also contends that the adoption of the General Rules of Administrative Practice and Procedure by the CAB violates the Sunshine Act, and that the appointment of a hearing examiner in accordance with those rules constitutes an impermissible delegation of the Board's authority. These contentions, as with those previously enumerated, lack any viability.

First, the General Rules of Administrative Practice and Procedure are applicable to all proceedings before Commonwealth agencies, with two exceptions - 1) when the applicable governing statute sets forth inconsistent rules on the same subject; or 2) when the agency has promulgated inconsistent regulations on the same subject. 1 Pa.Code

§31.1. Neither of these exceptions apply in this case. The alleged violation of the Sunshine Act need not even be addressed, for in the absence of the Board's action adopting the rules, the same rules would nonetheless apply.

Second, the General Rules of Administrative Practice and Procedure specifically provide for the appointment of hearing examiners for the purpose of developing a record of proceedings and allows for the appointment of "examiners" when evidence is to be taken in a proceeding. 1 Pa.Code §35.185. The Charter Law specifically provides for supplementation of the record, which may involve the taking of additional evidence, 24 P.S. §17-1717-A(i)(6). Finally, the CAB has not delegated any of its decision-making authority to the hearing examiner; rather, the hearing examiner's role is simply that of certifying the record to the CAB, while the CAB retains its obligation under the Charter Law to decide this matter. For all these reasons, the CAB disagrees with the School District's procedural objections and denies the School District's Motion to Dismiss.

Findings of Fact - Substantive Issues

7. The findings of fact numbered 1-6 above, are incorporated herein by reference as if set forth in full.

8. The Collaborative proposes to operate a program that encompasses kindergarten through 5th grade in the first year of operation, expanding to include one grade per year of operation until the program includes all twelve grades. (Exh. 1A).

9. The Collaborative proposes to develop an Individual Educational Plan for each student, implementing a self directed approach to education in which the children will be included in determining the content and direction of their education, and which

will rely heavily upon parent and community based participation in the learning process. (Exh. 1A).

10. The charter school application is complete, including the provision of the necessary financial information. (Exh. 1A).

11. The Collaborative received and presented letters of intent from the parents of one hundred and one (101) children, who were interested in having their children attend the Collaborative. (Exh .1A, 1D).

12. At the public hearing before the school board, parents of several pre-school age children testified of their desire to send their children to the Charter School in the future. (Exh. 1D).

13. On December 18, 1997, the School District denied the Collaborative's application for a Charter School and filed a written determination that contained 70 separate enumerated findings, which can be grouped in the following categories of concern:

a. The proposed curriculum (Findings 1-13);
b. The demonstrated sustainable support from teachers, parents and community members (Findings 14 - 23);
c. The financial statement filed by the Collaborative (Findings 24 - 36);
d. The facility as proposed by the Collaborative (Findings 37 - 48);
e. The "capabilities" of the Collaborative (Findings 49 - 52);
f. The extent to which the Charter School would serve as a model for other public schools (Findings 53 - 54);
g. The governance of the Collaborative (Findings 55 - 69); and
h. A general determination that the Collaborative's proposal did not meet the legislative intent of the Act because of the concerns enumerated in the first 69 findings (Finding 70).

(Exh. 1E).

Conclusions of Law- Substantive Issues

7. The Conclusions of Law set forth at numbers 1-6 above, are incorporated herein by reference as if set forth in full.

8. The Charter School Law, Act of June 19, 1997, P.L. 225, No. 22, 24 P.S. §17-1701-A *et seq.*, governs the application and approval processes and operation of charter schools in Pennsylvania.

9. One of the goals of the General Assembly in providing for the creation of charter schools, as stated in the Charter Law's expression of legislative intent, was to "[e]ncourage the use of different and innovative teaching methods." 24 P.S. §17-1702-A(3).

10. The program described in the Collaborative's application materials and in its testimony before the School District is clearly different than the School District's program and it meets the intent of the legislature.

11. In rejecting the application because of its disagreement with the proposed curriculum based upon what amounts to philosophical differences, the School District acted arbitrarily because the Charter Law encourages such differences.

12. Regarding community involvement, the Charter Law provides that: (a) the charter school's application and comments received at the school board hearing(s) on the application shall provide "demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students" 24 P.S. §17-1717-A(e)(2); (b) the application shall include information on the manner in which community groups will be involved in the charter school planning process 24 P.S. §1719-A(8); and (c) the

charter school develop and implement strategies for meaningful parent and community involvement. 24 P.S. §17-1715-A(2).

13. The Collaborative's application, in conjunction with the testimony and letters presented at the public hearing, satisfied the Charter Law's criteria regarding community support and involvement.

14. The School District, in rejecting the application because of its imposition of an arbitrary and unsubstantiated numerical formula for determining the adequacy of the number of supporters, acted arbitrarily and in contravention of the Charter Law.

15. Concerning finances, the Charter Law requires only that the application contain limited information; thus, if the application includes this information, it is in this respect proper and approvable. 24 P.S. §17-1719-A(9)&(17).

16. The School District's rejection of the application for financial reasons was contrary to the Charter Law and unsupported by any evidence on the record below; thus, this ground for rejection of the application was also arbitrary.

17. One of the four specific criteria against which a charter application must be measured is "the extent to which the charter school may serve as a model to other public schools." 24 P.S. §17-1717-A(e)(2)(iv).

18. Unrebutted testimony of the School District's employees demonstrated that several characteristics of the proposed charter school program were already adopted and implemented in other public schools within the district. There is therefore, no reason apparent from the record why the Collaborative's program could not be adopted as a whole within other public schools.

19. The School District, in rejecting the application because of disagreement with demographic information included in the application, acted arbitrarily in that the demographic information was clearly beyond the scope of sections 1702-A and 1717-A(e)(2); moreover, even assuming that the applicant's projection of an increasing school population was wrong, growth projections are irrelevant to the Board's consideration of and action upon a charter school application.

Discussion - Substantive Issues

a. Curriculum

The School District has raised numerous objections to the proposed curriculum in the Collaborative's application, which can be categorized into three main areas of concern:

1. the School District already includes elements of the proposal in their schools;
2. the School District's existing educational program is adequate; and
3. the new or novel aspects of the Collaborative's program will not work.

The Collaborative proposes to implement a curriculum in which the students would assist in directing their educational program, in a small, nurturing environment in which parents and other community members would participate in an important and active teaching role. This methodology is plainly different from that currently in place in the School District. The fact that some individual aspects of this proposed curriculum exist in the School District's current program does not negate the novelty of the Collaborative's program, which must be judged as a whole, not as individual elements.

b. Support

To determine whether the charter school has shown sustainable support, the CAB notes several aspects of the Charter Law. First, it is the degree of support <u>for</u> 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 second aspect of this requirement is that the indicia of support are to be measured in the aggregate rather than by individual categories. The listing of "teachers, parents, other community members and students" indicates the groups from which valid support can be demonstrated. Certain percentages of support in each of the four categories are not required. Failure to demonstrate strong support in any one category is not necessarily fatal to an application. However, a reasonable amount of support in the aggregate must be demonstrated.

The Collaborative, in their application and at the public hearing, presented clear evidence of public support for the Charter School, through the testimony of parents who indicated a present intent to place their child in the Charter School, as well as parents of pre-school age children who voiced a desire to do so in the future. There were more children desirous of enrollment in the Charter School than there were vacancies.

On the other hand, the School District attempted, through the utilization of a completely speculative numerical formula based upon the total population of the school district, to suggest that the demonstrated support for the school was insufficient. There is no percentage or minimum threshold found in the Charter Law to justify the School District's action. There was sufficient support expressed to more than fill the Charter School during its first year of operation, and demonstrated support for the coming years as well.

The school board also relied upon the lack of any demonstrated support from teachers within the school district. While factually correct, teacher support is merely one element of the statutorily identified groups from which support may be shown. As stated above, failure to show strong support in any one area is not fatal to the application. There was testimony, albeit of a hearsay nature, adduced at the public hearing of at least one unidentified teacher's support.

In total, the School District's denial of the application for a lack of demonstrated, sustainable support is arbitrary and not supported by the evidence in this case.

c. Finances

Generally, the Charter Law does not provide for denial of a charter school application for financial reasons. Although a district is not limited to the criteria listed in Section 17-1717-A, the criteria are generally educational in nature. Thus, this Board considers it improper to use financial criteria alone as a basis for evaluating a charter school application.

The Charter Law only requires that certain financial information be included in the application. 24 P.S. §17-1719-A. For the School District to engage in speculative concerns regarding possible funding shortfalls, or the effect of a greater then normal percentage of children enrolled with special needs without any evidence is arbitrary.

d. Facility

The School District also expressed concerns regarding the proposed facility. The Charter Law provides that a charter school facility is exempt from public school facility regulations except those pertaining to health or safety of the students. 24 P.S. §17-1722-A(b).

The Collaborative's proposal called for leasing temporary space in a strip mall as a provisional measure until a permanent facility could be built. The proposed facility provided for two classrooms of approximately 650 square feet. There was discussion at the public hearing regarding the fact that these classrooms were smaller than those recommended by the Department of Education. Additionally, the school board representative who evaluated the facility plan characterized the classrooms as "minimally acceptable," given the smaller class sizes proposed by the Collaborative. However, there was no testimony that the class sizes created any health or safety concerns for the students.

There was also discussion about problems with access to the facility by buses and concerns regarding the proposed play area for the temporary facility. However, there is a letter in the certified record from the property management company that it could provide rear access to park land for recreational needs and rear access for buses so they would have easier ingress and egress to the property.

It must be noted that the plan incorporating these elements is, today, more than two years out of date. It is questionable whether, at this point in time, the Collaborative will be able to simply go back to the proposed facility and pick up where it left off. However, the CAB is to review the decision of the local board of directors on the record certified by the local board and evidence of a facility was presented to the School District in the Collaborative's application and this facility was available at the time of School Board action on the application. Therefore, the Collaborative's application was acceptable at the time it was submitted and acted upon, and thus does not constitute a

basis for the denial of the appeal. However, the Collaborative obviously must have a facility before it can begin operating.

The CAB wants to make clear that this case is factually distinguishable from that of the Phoenix Academy appeal, which was denied for failure to provide a facility. See, Appeal of Phoenix Academy Charter School, CAB-1999-10. In the Phoenix Academy appeal, Phoenix Academy had not provided any information regarding a facility prior to the school district voting on the charter application. Failure to provide any such information prior to the school district's vote was the basis for the CAB affirming the school district's denial of the charter.

In this case, unlike the Phoenix Academy appeal, the Collaborative provided information about a facility prior to the School District's vote on the application. We find that the Collaborative provided enough information about the proposed facility to meet the requirements of the Charter Law.

e. Capabilities of the Collaborative

The concerns raised by the School District regarding the capability of the Collaborative contain little, if any, substance. For example, the School District's Finding of Fact #50 criticizes the Collaborative for amending their application to supply additional financial information, when the amendment was in direct response to the School District's request for additional information. Additionally, the Collaborative is criticized as a whole for not having a proven track record of "establishing any form of school." Finding of Fact #52. The CAB notes that there is no requirement in the Charter Law that an applicant for a charter must show a proven track record of establishing a school.

f. Service as a model for other public schools

Simply put, there is no evidence whatsoever in the record of this case to form a determination that the Collaborative's school could not serve as a model for other public schools. It is clear from a reading of the School District's determination that this conclusion is based upon the School District's overall dispute with the Collaborative's application, for all the other reasons set forth *infra*, and not any specific determination. At worst, this action is arbitrary; at best, it rises or falls based upon the determination of the School District's substantive objections. Given the CAB's determination of those other objections, these must also be dismissed.

g. Governance of the Collaborative

The criticisms contained in this section of the School District's determination are equally trivial. For example, the School District's Finding of Fact #55 criticizes the Collaborative for amending its by-laws to include reference to the applicability of the state's Sunshine Law, even though the amendment was made in response to direction by the School District's counsel that it do so. First, the Collaborative did as was requested, and then was criticized for complying. Second, while as a matter of draftsmanship it does no harm to include such a reference, it is not a matter of any great import. The Sunshine Law would apply with equal force and effect to the Charter School Board's activities, whether the by-laws reference it or not.

Next, a concern is raised regarding the relationship between Diane Ormsby, a proposed teacher at the charter school and member of the Collaborative's Core Planning Team, and her sister, Wendy Ormsby. Wendy Ormsby is one of the founding members of the Collaborative and coordinator of the program. Neither individual is anywhere

identified as a member of the Board of Trustees; however, the School District engages in a fanciful surmise that *if* Wendy Ormsby were to become a member of the Board of Trustees, then there *might* be a problem under the State Ethics Act (although what, exactly, the problem would be is not explained, other than the mere existence of a family relationship). Such speculation is not a legitimate basis upon which to judge a charter school application. Similarly, the School District's concern that the Collaborative's by-laws provide no definition of 'full age' ("each trustee shall be an individual of full age") is just as petty. None of these criticisms merit serious consideration as a basis for denial of the application and they are rejected.

ORDER

AND NOW, this _____day of December, 1999 based upon the foregoing and the vote of this Board:

(1) the July 1, 1999 appeal of Souderton Charter School Collaborative is affirmed and the Souderton Area School District's December 18, 1997 decision denying the charter application is reversed and the Board of School Directors of the district is hereby directed to grant the application and sign the Collaborative's charter pursuant to 24 P.S. § 17-1720-A[1];and,

(2) the School District's Motion to Dismiss is denied.[2]

In addition, prior to opening the charter school, the Collaborative shall provide the School District and the CAB with information regarding the facility to be used for the charter school.

For the State Charter School Appeal Board.

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Eugene W. Hickok
Chairman

[1] At the Board's November 16, 1999 meeting, the appeal was granted by a vote of 5-1 with members Shipula, Reeves, Ford-Williams, Melnick and Hickok voting to grant the appeal and member Aliota voting to deny the appeal.

[2] At the Board's November 16, 1999 meeting, the School District's Motion to Dismiss the appeal was denied by a vote of 5-1, with members Shipula, Reeves, Ford-Williams, Melnick and Hickok voting to deny the Motion and member Aliota voting to grant the Motion.