

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

PENN HILLS CHARTER SCHOOL OF ENTREPRENEURSHIP	:	
Appellant	:	Docket No. CAB 2015-02
	:	
v.	:	
	:	Appeal from the March 23, 2015
PENN HILLS SCHOOL DISTRICT	:	Decision of the Penn Hills
Appellee	:	School District

OPINION

BACKGROUND and PROCEDURAL HISTORY

This matter comes before the Pennsylvania State Charter School Appeal Board (hereinafter “CAB”) pursuant to the Charter School Law, Act of June 19, 1997, P.L. 225, No. 22, *as amended*, 24 P.S. § 17-1701-A *et. seq.* (hereinafter “CSL”) on appeal by Penn Hills Charter School of Entrepreneurship (hereinafter the “Charter School”) from the March 23, 2015 Findings and Decision by the Board of School Directors of the Penn Hills School District (hereinafter “School Board”) which denied the Charter School’s January 30, 2015 request to amend its April 26, 2011 Charter by permitting its expansion to a second facility.

The April 26, 2011 Charter envisioned that the Charter School would serve grades K-8, beginning at the elementary level with grades K-3, during the 2011-2012 school year. Subsequently, the Charter School was anticipated to grow one grade per year. Under that scenario, the Charter proposed that the Charter School would serve grades K-6 during the 2014-2015 school year. By letter dated January 30, 2015, the Charter School requested an amendment to its Charter seeking to operate a second facility for grades 3-6, at 10700 Frankstown Road, Penn Hills, Pennsylvania 15235, beginning with the 2015-2016 school year (hereinafter the

“Proposed Facility”). Under the amendment, the Charter School proposed that grades K-2 would continue to be located at the Charter School’s present location for the 2015-2016 school year. Beginning with the 2016-2017 school year, the Proposed Facility would be used for grades K-7, with the Charter School’s present location being vacated upon the expiration of its lease. Thereafter, the Proposed Facility would be used for grades K-8 with an anticipated enrollment of approximately 612 students.

The School District conducted a public hearing on February 23, 2015 to address the Charter School’s amendment application. The Penn Hills Board of School Directors thereafter voted to deny the Charter School’s amendment request on March 23, 2015, and by letter dated April 16, 2015 informed the Charter School of its decision and provided the Charter School with its Findings and Decision.

On April 21, 2015, the Charter School filed a Petition for Appeal challenging the School District’s denial of the Charter School’s request to amend its original Charter. On April 30, 2015, the CAB appointed Hearing Officer Marc A. Moyer, Esquire, who held a prehearing conference to establish a schedule for the filing of briefs by the parties and determine whether any procedural issues needed to be addressed. On May 8, 2015, the School District filed an Answer to the Charter School’s Petition for Appeal. Pursuant to a June 2, 2015 Order of the Hearing Officer, the parties agreed to resolve this matter without an administrative hearing and filed a Joint Stipulation of Facts and Exhibits on or about June 15, 2015. The Charter School additionally filed its Brief in support of its appeal that same date. The School District, thereafter, filed its Brief in opposition to the Charter School’s appeal on or about July 15, 2015.

The record was certified on July 17, 2015. Oral argument on the Charter School's appeal was held before the CAB on September 1, 2015. For the reasons set forth below, the CAB holds that the School District's denial of the Charter School's proposed amendment was not proper.

FINDINGS OF FACT

1. The Penn Hills Charter School of Entrepreneurship (hereinafter the "Charter School") is a duly organized public school established and operating under a charter in the Commonwealth of Pennsylvania with its current administrative offices and educational facility located at 200 Penn School Drive, Verona, Pennsylvania 15147. (Official Notice-Department records¹; Joint Stipulation (hereinafter "J.S."), ¶ 4)

¹ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania, Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained:

"Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A. 2d at 994 n. 6.

2. The Penn Hills School District (hereinafter the "School District") is the chartering district for the Charter School with administrative offices located at 260 Aster Street, Pittsburgh, Pennsylvania 15235. (Official Notice-Department records; J.S., ¶ 5).
3. On November 10, 2010, the Charter School submitted an application to the School District for the purpose of operating a charter school. (R.R. 1-404, 470, 522).
4. The Charter School was granted a Charter to operate a public school known as Penn Hills Charter School of Entrepreneurship on April 26, 2011. (R.R. 470, 522).
5. By letter to the School District dated January 30, 2015, the Charter School requested an amendment to its Charter seeking to operate in a second facility located at 10700 Frankstown Road, Penn Hills, Pennsylvania 15235 for the 2015-2016 school year; and after all renovations were completed at that facility, to use only that facility to accommodate its entire student population. (R.R. 405-449; J.S., ¶ 6).
6. On or about February 13, 2015, the School District notified the Charter School that the School District would review the Charter School's presentation concerning its amendment request at the School District's public meeting on February 23, 2015. (R.R. 450; J.S., ¶ 7).
7. The School District held a public hearing on February 23, 2015 to consider the Charter School's amendment request. (R.R. 451-481; J.S., ¶ 8).
8. The School Board voted to deny the Charter School's amendment request on March 23, 2015. (R.R. 518-521; J.S., ¶ 9).
9. The School District notified the Charter School of its denial of the Charter School's amendment request by way of letter dated April 16, 2015. (R.R. 521; J.S., ¶ 10).

10. The Penn Hills School District Board of Directors voted to deny the Charter School's request to amend its April 26, 2011 Charter in order to permit its operation at an additional facility, citing "several concerns and deficiencies about [the Charter School's] ability to maintain and manage the proposed rapid expansion...". Specifically, the School Board found that the Charter School: (1) failed in its ability to adequately educate a larger population of students per its proposed amendment, and failed to be able to address the education needs of its past and present student population; (2) was deficient in serving its projected enrollment for the 2013-2014 school year, and has failed to demonstrate its capacity to maintain and serve the proposed projected enrollment set forth in the proposed amendment; (3) failed to produce current student rosters as required by its Charter; (4) failed to maintain its record management on-site as required by its Charter; (5) failed to achieve student enrollment benchmarks and projections anticipated by the Charter; (6) failed to accurately maintain and calculate accurate student tuition payments; (7) improperly billed Penn Hills School District higher tuition rates for specially designed instruction based upon expired Individualized Education Programs; (8) failed to develop, maintain and implement current Individualized Education Programs; (9) failed to achieve adequate academic proficiency in accordance with Pennsylvania Department of Education standards and in accordance with its Charter; and (10) is currently under a Department of Education Corrective Action Plan setting forth thirty-one (31) areas of needed improvement.

(R.R. 522-528).

11. On April 21, 2015, the Charter School timely filed a Petition for Appeal to the Pennsylvania Charter School Appeal Board. (Official Notice-Department records; R.R., ¶ 517-520; J.S. ¶ 11).
12. The Charter School's November 2, 2010 Charter Application projected enrollment at the charter school to be as follows:
1st year: 252; 2nd year: 324; 3rd year: 396; 4th year: 468; 5th year: 540; 6th year: 612. (R.R. 124; J.S. ¶ 12).
13. Prior to the Charter School commencing operations and consistent with the Charter School's Charter, the School District sold the existing facility to a subsidiary of the Charter School's management company. (J.S. ¶ 14).
14. The facility at which the Charter School currently operates has a maximum capacity of 400 students. (J.S. ¶ 16).
15. The Charter School's Charter envisioned that the Charter School would continue to add additional grade levels until it offered kindergarten through eighth grade. (R.R. 124-125; J.S. ¶ 17).
16. The facility at which the Charter School currently operates cannot accommodate the Charter School's projected enrollment set forth in its Charter. (R.R. 473, 477; J.S. ¶ 18).
17. The Charter School entered into a Letter of Intent on November 12, 2014 to lease the property located at 10700 Frankstown Road, Penn Hills, Pennsylvania. (R.R. 410-414; J.S. ¶ 19).
18. The School District previously owned the Proposed Facility and operated it as Hebron Elementary School from 1953-1983. (R.R. 405-406, 471; J.S. ¶ 20).

19. Hebron Elementary School's operational capacity was approximately 900 students in grades kindergarten through grade six. (R.R. 471; J.S. ¶ 21).
20. A portion of the Proposed Facility began being leased for use as office space and as executive suites in 1986, and is currently in use. (R.R. 471; J.S. ¶ 22).
21. The School District entered into a lease to utilize 8,775 square feet of the Proposed Facility for use as an alternative school from 2004 through 2014. (R.R. 471; J.S. ¶¶ 23, 24).

CONCLUSIONS OF LAW

1. The CAB has jurisdiction of this matter. 24 P.S. § 17-1729-A.; *Discovery Charter School v. School District of Philadelphia*, 111 A.3d 248 (Pa. Cmwlth. 2015); *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012).
2. The CSL governs the charter application/approval process, the revocation/renewal of charters, the amendment of charters and the operation of charter schools in Pennsylvania. 24 P.S. § 17-1701-A *et. seq.*; *Discovery Charter School v. School District of Philadelphia*, 111 A.3d 248 (Pa. Cmwlth. 2015); *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012).
3. The intent of the General Assembly in enacting the CSL was, *inter alia*, to establish and maintain schools that improve pupil learning, to increase learning opportunities for all pupils, and to hold charter schools accountable for meeting measurable academic standards. 24 P.S. § 17-1701-A; *New Hope Academy Charter School v. School District of the City of York*, 89 A.3d 731 (Pa. Cmwlth. 2014); *McKeesport Area School District v. Propel Charter School McKeesport*, 888 A.2d 912 (Pa. Cmwlth. 2005).

4. The criteria to be applied by the School Board under the CSL for denying a charter school amendment is that which is applicable to a decision to revoke or to not renew a charter under Section 17-1729-A of the CSL. *Discovery Charter School v. School District of Philadelphia*, 111 A.3d 248 (Pa. Cmwlth. 2015); *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012).
5. The School Board may choose to not renew or revoke the charter of a charter school based on any of the following criteria:
 - a. One or more material violations of any of the conditions, standards or procedures contained in the written charter signed pursuant to section 1720-A;
 - b. Failure to meet the requirements for student performance set forth in 22 Pa.Code Ch.5 (relating to curriculum) or subsequent regulations promulgated to replace 22 Pa.Code Ch.5 or failure to meet any performance standard set forth in the written charter signed pursuant to Section 1716-A;
 - c. Failure to meet generally accepted standards of fiscal management or audit requirements;
 - d. Violation of provisions of this article;
 - e. Violation of any provision of law from which the charter school has not been exempted, including Federal laws and regulations governing children with disabilities;
 - f. The charter school has been convicted of fraud.

24 P.S. § 17-1729-A(a).

6. In determining whether the School Board's denial of the Charter School's request to amend its Charter was appropriate, the CAB shall give due consideration to the findings

of the local board of school directors and will specifically articulate reasons for agreeing or disagreeing with the board. 24 P.S. § 17-1729-A(d); *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172, 1180 (Pa. 2002).

7. In determining whether the School Board's denial of the Charter School's request to amend its Charter was appropriate, the CAB may consider the Charter School plan, annual reports, student performance and employee and community support for the Charter School. 24 P.S. § 17-1729-A(d).
8. Because the statutory standards for the CAB's review of charter amendment decisions are the same as those for the review of charter nonrenewals and denials, the CAB shall make a *de novo* review of the School Board's determination to not permit the requested amendment to the Charter School's Charter. 24 P.S. § 17-1717-A(i)(6); *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172, 1180 (Pa. 2002).
9. The record fails to establish by a preponderance of the evidence that the Charter School has materially violated the terms of its written Charter by failing to maintain accurate student attendance logs on its premises or by failing to maintain accurate records pertaining to student tuition payments, in accordance with the terms of its Charter. 24 P.S. § 17-1729-A(a)(1); 24 P.S. § 17-1702-A(6).
10. The record fails establish by a preponderance of the evidence that the Charter School has materially violated the terms of its written Charter by failing to maintain current Individualized Education Plans for each student, or that the Charter School violated its Charter by inappropriately claiming higher reimbursement rates for specially designed instruction. 24 P.S. § 17-1729-A(a)(1); 24 P.S. § 17-1702-A(6).

11. Following an independent review of the record before the CAB and after due consideration to the findings of the School Board, the CAB finds that the School District's denial of the Charter School's amendment request is not supported by the evidence of record. 24 P.S. § 17-1729-A.

DISCUSSION

I. Scope and Standard of Review

In the event a charter school states in its charter application that it will be located at a particular location, then that provision becomes part of the school's charter. If the school changes its location during the term of the charter without amending its charter, it is subject to closure under 17-1729-A(a)(1) of the CSL. *Northside Urban Pathways Charter School*, 56 A.3d 80, 86-87 (Pa. Cmwlth. 2012). Should a charter school seek to operate at a second location during the pendency of its charter, it may request to amend its charter so as to permit it to operate at the second location. *Id.* The CAB's appellate review of a school district's denial of an application to amend a charter is to be conducted in the same manner as its review of a decision to revoke or not renew a charter under 24 P.S. §§ 17-1729-A of the CSL. *Discovery Charter School v. School District of Philadelphia*, 111 A.2d 248, 252-253 (Pa. Cmwlth. 2015) (citing *Northside Urban Pathways Charter School*, 56 A.3d 80, 85-87 (Pa. Cmwlth. 2012)).

A school district is obligated to issue a charter if the applicant satisfies the criteria in the CSL and, once issued, the charter school has a protected property interest in its charter. *Foreman v. Chester-Upland School District*, 941 A.2d 108 (Pa. Cmwlth. 2008). Any adverse governmental decision with respect to the denial of an amendment to a charter must be subject to

review. *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80, 84 (Pa. Cmwlth. 2012).

The CAB applies a *de novo* scope of review when entertaining appeals from a school board's denial of a charter school amendment. See, e.g., *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172 (Pa. Cmwlth. 2002). The CSL requires the CAB to "give 'appropriate consideration' to the findings of the School board while making an independent determination as to the merits of the charter school application." *Id.* at 1180. Since the scope of review for an appeal from the nonrenewal of a charter school's charter is the same as that for the nonrenewal and termination of a charter (compare 24 P.S. § 17-1717-A(i)(6) with 24 P.S. § 17-1729-A(a)), the review in this matter is *de novo*. Accordingly, the CAB is required to independently review the School Board's findings supporting its denial of the Charter School's request to amend its Charter in light of the record while giving "due consideration" to the findings, and then specifically articulate its reasons for agreeing or disagreeing with those findings. 24 P.S. § 17-1729-A(d).

II. Burden of Proof

The degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates that 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, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1949). In the present matter, the Penn Hills School District Board of Directors voted to deny the Charter School's request to amend its April 26, 2011 Charter to permit its

operation at an additional Second Facility, citing “several concerns and deficiencies about [the Charter School’s] ability to maintain and manage the proposed rapid expansion...”. Specifically, the School Board found that the Charter School: (1) failed in its ability to adequately educate a larger population of students as per its proposed amendment, and failed to be able to address the education needs of its past and present student population; (2) was deficient in serving its projected enrollment for the 2013-2014 school year, and has failed to demonstrate its capacity to maintain and serve the proposed projected enrollment set forth in the proposed amendment; (3) failed to produce current student rosters as required by its Charter; (4) failed to maintain its record management on-site as required by its Charter; (5) failed to achieve student enrollment benchmarks and projections anticipated by the Charter; (6) failed to accurately maintain and calculate accurate student tuition payments; (7) improperly billed Penn Hills School District higher tuition rates for specially designed instruction based upon expired Individualized Education Programs; (8) failed to develop, maintain and implement current Individualized Education Programs; (9) failed to achieve adequate academic proficiency in accordance with Pennsylvania Department of Education standards and in accordance with its Charter; and (10) is currently under a Department of Education Corrective Action Plan setting forth thirty-one (31) areas of needed improvement.

III. Analysis

The Certified Record (hereinafter “R.R.”) before the CAB is comprised of the following: (1) Penn Hills Charter School of Entrepreneurship Charter Application of November 10, 2010 (R.R. 1-404); (2) January 30, 2015, correspondence and Exhibits from the Charter School to the School Board requesting an amendment to its April 26, 2011, Charter (R.R. 405-450); (3) February 13, 2015 correspondence from the School Board to the Charter School acknowledging

the School Board's receipt of the Charter amendment request (R.R. 450); (4) Minutes from the School Board's February 23, 2015, Public Voting Meeting (R.R. 451-469); (5) Transcript of the February 23, 2015 School Board Public Voting Meeting addressing the Charter School's amendment request (N.T. 470-481); (6) Charter School Power Point presentation to the School Board addressing the Charter School's amendment request (R.R. 483-492); (7) Minutes from the School Board's March 23, 2015, Public Voting Meeting (R.R. 493-508); (8) April 16, 2015 correspondence from the School Board to the Charter School announcing the School Board's denial of the Charter School's request to amend its Charter (R.R. 509); (9) School Board's Findings and Decision (R.R. 510-516); and (10) Charter School April 21, 2015 Petition for Appeal and cover letter (R.R. 517-528). The Charter School's January 30, 2015 request for an amendment to its Charter contained several exhibits which included a list of anticipated areas of cooperation between the School Board and the Charter School (R.R. 409), a Non-Binding Letter of Intent for the lease of the Second Facility at 10700 Frankstown Road, Penn Hills, PA 15235, a Construction Schedule (R.R. 448), design drawings of the Second Facility (R.R. 416-417, 428), cost projections (R.R. 430-434, 442-447), and a scope of work for the Second Facility (R.R. 435-436).

The current appeal arises from a fundamental difference between the parties involving their interpretation of the requirements of the CSL in terms of the criteria to be evaluated when considering the Charter School's request to amend its existing Charter so as to permit the Charter School to operate from the Proposed Facility. Notwithstanding this difference, recent decisions by the Pennsylvania Commonwealth Court have unequivocally found that the School Board's review of the Charter School's request for an amendment was to be conducted "in the same manner it would review a decision revoking or not renewing a charter." *Discovery Charter*

School v. School District of Philadelphia, 111 A.3d 248 (Pa. Cmwlth. 2015); *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012).

The Pennsylvania General Assembly enacted the CSL to provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system. It was the intent of the Legislature that charter schools improve pupil learning, increase learning opportunities for all students and offer diverse and innovative educational techniques while operating independently of the traditional public school system. See, e.g., 24 P.S. § 17-1702-A. Additionally, the General Assembly intended to hold charter schools “accountable for meeting measurable academic standards,” in order to assure that these schools were accomplishing the goals of the CSL. 24 P.S. § 17-1702-A(6). The charter school application is rigorous as the intent of the CSL is to improve educational opportunities for students. See, generally, 24 P.S. §§ 17-1719-A, 17-1702-A. When a charter is granted by a local board of school directors, the charter school is required to comply with the terms and conditions of the charter, as well as the information contained in the charter school application, which is incorporated into the charter. 24 P.S. §§ 17-1720-A, 17-1729-A(a)(1).

Consistent with the legislative purpose of the CSL, Section 1729-A(a) of the Act sets forth the causes for nonrenewal or termination of a charter by a school district. Those causes include:

- (1) One or more material violations of any of the conditions, standards or procedures contained in the written charter signed pursuant to section 1720-A.;
- (2) Failure to meet the requirements for student performance set forth in 22 Pa.Code Ch.5 (relating to curriculum) or subsequent regulations promulgated to replace 22 Pa.Code

Ch.5 or failure to meet any performance standard set forth in the written charter signed pursuant to Section 1716-A;

- (3) Failure to meet generally accepted standards of fiscal management or audit requirements;
- (4) Violation of provisions of this article;
- (5) Violation of any provision of law from which the charter school has not been exempted, including Federal laws and regulations governing children with disabilities;
- (6) The charter school has been convicted of fraud.

See, 24 P.S. § 17-1729-A(a).

Notwithstanding the Pennsylvania Commonwealth Court's findings in *Discovery Charter School* and *Northside Urban Pathways Charter School* that charter amendments be evaluated in the context of 24 P.S. § 17-1729-A(a), the Commonwealth Court in *Montessori Regional Charter School v. Millcreek Township School District*, 55 A.3d 196 (Pa. Cmwlth. 2012) specifically stated that school districts may not treat an amendment application in the same manner as an application for a new charter by forcing the school to "jump through many unnecessary hoops" because it would effectively foreclose the use of an amendment as a vehicle to expand a charter school's physical operation. *Id.* at 201. See, also, *Lehigh Valley Dual Language Charter School v. Bethlehem Area School District*, 97 A.3d 401, 405 (Pa. Cmwlth. 2014). Citing to *Montessori Regional Charter School* and *Northside Urban Pathways Charter School*, *infra.*, the Court in *Lehigh Valley Dual Language Charter School* found that "a charter school may amend the **material details** contained within its original charter, including changing

a charter school's location or adding a second location of a charter school." *Id.* at 406. (emphasis added).

Against this backdrop, the Charter School in this case contends that the School Board exceeded its permissible scope of its review by requiring information from the Charter School beyond that which is required under the CSL for consideration of a charter amendment limited exclusively to a request for a second location. Instead, the Charter School contends that "the Charter School Law simply demands a charter applicant provide: 'A description of an address of the physical facility in which the charter school will be located and the ownership thereof and any lease arrangements.'" (Charter School Brief, p. 8; R.R. 470-481).

In this case, the School Board's denial of the Charter School's request to amend its Charter was based upon concerns other than those specifically addressing the Proposed Facility, in accordance with several of the criteria set forth in 24 P.S. §1729-A(a)(1). Upon providing the School Board "due consideration" of its findings in accordance with the CSL, and upon consideration of the underlying purpose and intent of the CSL to hold the schools established under CSL accountable for meeting measurable academic standards and established accountability systems, CAB finds that the School Board considered the factors articulated in the School Board's Findings and Decision to be material aspects of the Charter School's Charter and, therefore, subject to review under the CSL. See, *Northside Urban Pathways Charter School*, 56 A.3d at 83-87 (interpreting Charter School Law to permit charter amendments and Board review of amendment denials despite lack of specific amendment provision in order to fulfill purposes of Charter School Law and Public School Code). More specifically, the School Board properly exercised its discretion and responsibilities under the CSL by evaluating the Charter School's requested amendment in the context of the criteria articulated at 24 P.S. §17-

1729-A(a)(1), pursuant to the directives established by the Pennsylvania Commonwealth Court in *Discovery Charter School* and *Northside Urban Pathways Charter School*, *infra*.

Having established that the School Board appropriately evaluated the Charter School's requested amendment in the context of 24 P.S. §17-1729-A, the CAB's inquiry necessarily turns to a determination of whether the Certified Record supports the School Board's denial of the Charter School's requested amendment. The CAB finds that the School Board properly denied the Charter School's amendment based upon its independent review of the Certified Record and its official notice of Department of Education records.

A principal portion of the record developed in this case consists of the Charter School's Application which was necessarily incorporated into the School's Charter (R.R 1-404). Other material portions of the record consist of the documents presented to the School Board pertaining to the Proposed Facility which, in unto themselves, adequately describe the physical aspects of the facility and its lease for the purpose of granting a charter if considered independently as part of an initial application for a charter. In particular, the CSL requires an applicant to provide "[a] description of and address of the physical facility in which the charter school will be located and the ownership thereof and any lease agreements. 24 P.S. §17-1719-A(11). Further, a charter school may be located on "space provided on a privately owned site, in a public building or in any other suitable location." 24 P.S. §17-1722-A(a). A charter school facility must comply only with the public school regulations that concern health or safety of students. 24 P.S. §17-1722-A(b). See, also, *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012); *Carbondale Area School District v. Fell Charter School*, 400, 408 (Pa. Cmwlth. 2003); R.R. 409-449).

Although the School Board was permitted by the CSL to consider factors other than the physical aspects of the facility for the reasons set forth above, the Transcript from the February 23, 2015 public meeting before the School Board fails to set forth any competent evidence to support the conclusions the School Board derived from those proceedings which formed the basis for its denial of the Charter School's request to amend its Charter. In particular, the record demonstrates that the School Board failed to produce any documents or sworn testimony pertaining to the majority of the concerns articulated in its Findings and Decision. Instead, the totality of the School Board's involvement at the public meeting consisted of members of the School Board and the Acting Superintendent directing questions and comments to representatives of the Charter School, primarily through its solicitor and/or the President of the Charter School's Board of Directors. (R.R. 472-481).²

² Acting Superintendent Nancy Hines, Ph.D., and various School Board members questioned Charter School representatives extensively about the Charter School's current and projected enrollment and student-teacher ratios, to which the Charter School Representatives responded by providing the student census, student-teacher ratios, and by testifying that the Charter School is currently at its maximum capacity in all grade levels based on its existing space and square footage. (R.R. 472-473, 476-477). Dr. Hines additionally commented that personnel from the School District were purportedly unable to obtain student rosters when they visited the Charter School or in response to requests for the rosters by email. (R.R. 473). Dr. Hines also addressed the requirement under its Charter that the Charter School retain attendance logs at the School and recounted information purportedly told to the School District's representatives during their visit to the Charter School regarding its inability to produce such records. (R.R. 473-474). Dr. Hines similarly commented on the Charter School's purported academic performance during the school year 2013-2014, in comparison to the academic performance of three of the District's elementary schools. (R.R. 475). Dr. Hines also questioned the Charter School representatives about information purportedly reflected in an audit of the Charter School conducted by the School District which revealed alleged discrepancies with tuition payments to the Charter School, and the Charter School's purported failure to maintain current Individualized Education Plans for twenty (20) of its students. (R.R. 473-474). However, the School Board did not elicit testimony from the District's representatives to whom the information was purportedly told during their visit, or testimony from the author of the audit. Nor did the School Board introduce the audit into the record. (R.R. 473-475).

Aside from providing enrollment figures and student-teacher ratios in response to the School Board's questions and comments, the Charter School provided no substantive evidence addressing the grounds upon which the School Board denied the Charter School's request for an amendment to its Charter. (R.R. 474). Instead, the majority of the purported information upon which the School Board based its Findings and Decision consisted of the factual predicates upon which the School Board's questions were based. On their face however, the assertions of "fact" underlying many of the School Board's questions were unsubstantiated by any corroborating evidence of record but, instead, constituted hearsay, or hearsay within hearsay and, therefore, do not establish credible evidence upon which the School Board can rely for the purpose of denying the Charter School's amendment request.

"Hearsay" is defined as a statement, other than one made by a declarant while testifying at a trial or hearing, offered into evidence to prove the truth of the matter asserted. Pa.R.E. 801(c). Although the Commonwealth's Administrative Agency Law states that "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings" and that "all relevant evidence of reasonably probative value may be received," the courts of this Commonwealth have consistently held that the "hearsay rule is not a mere technical rule of evidence, but a fundamental rule of law which ought to be followed by agencies when facts crucial to the issue are sought to be placed on the record and an objection is made thereto." *Gibson v. Workers' Compensation Appeal Board*, 861 A.2d 938, 947 (Pa. 2004) (citing *A.Y. v. Allegheny Co. Children & Youth Svcs.*, 641 A.2d 1148, 1151 (Pa. 1994)). *See, also*, 2 Pa.C.S.A. § 505.

Indeed, Commonwealth courts addressing hearsay issues have declined to treat hearsay as competent evidence supporting administrative findings except within the narrow limits of the

“legal residuum” rule of *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976). See also, *Shapiro v. State Board of Accountancy*, 856 A.2d 864, 872 (Pa. Cmwlth. 2004), appeal denied, 872 A.2d 174 (Pa. 2005) (hearsay to which no objection has been made cannot serve as the basis for a finding of fact unless it is corroborated by competent evidence in the record). In *Walker*, the Commonwealth Court held that hearsay will be given its natural probative effect and may support a finding if: (1) it was received without objection; and (2) it is corroborated by competent evidence otherwise found in the record. *Id.* In situations where there is hearsay within hearsay, each part of the combined statements must conform to an exception to the hearsay rule in order to be considered reliable and, therefore, admissible. See, e.g., *Com. v. Galloway*, 448 A.2d 568, 575 (Pa. Super. 1982); Pa. R.E. 805. Such exceptions have not been established in this case.

Further, the Pennsylvania Supreme Court has found that witness testimony and/or evidence must be based upon the witness having first-hand knowledge of the subject on which he/she is testifying for that testimony/evidence to be admissible. *Gibson v. Workers’ Compensation Appeal Board*, 861 A.2d 938, 947 (Pa. 2004). Because neither Dr. Hines nor the School Board members conducting the audit of the Charter School visited the Charter School or spoke with the individuals to whom they referred in their questions, their references to the “facts” upon which their questions were based are inadmissible as substantive evidence for the purpose of supporting the School District’s denial of the Charter School’s amendment request.

Nevertheless, Paragraphs 2 and 3 of the School Board’s Findings and Decision are based upon undisputed Charter School enrollment figures, and the enrollment figures set forth in the School Charter were appropriately made part of the record. However, the enrollment figures set forth in the Charter represent projected class size. As set forth in the Charter, “Actual class size

will vary according to actual enrollment.” (R.R. 124). Although the projected enrollment figures in the Charter are less than actual enrollment, the CAB is not inclined to find that a material breach of the School’s Charter exists so as to uphold the School District’s denial of the Charter School’s request for a second facility based upon the Charter School’s actual enrollment being somewhat less than anticipated so early in its existence.

To the extent the CAB may take official notice of Department of Education records with respect to the Corrective Action Plan cited in Paragraph 10 of the School Board’s Findings and Decision, the record fails to identify the deficiencies giving rise to the improvements cited in the Plan, the degree to which the Charter School has complied with the Plan, or how the purported deficiencies would negatively impact upon the Charter School’s ability to operate at a second location. Once again, the CAB is not inclined to uphold the School District’s denial of the Charter School’s amendment request based merely upon the Charter School being subject to a Corrective Action Plan, without additional substantive evidence addressing the underlying deficiencies giving rise to the Plan and/or the Charter School’s efforts to address those deficiencies.

In determining whether the School Board’s denial of the Charter School’s request to amend its Charter was appropriate, the CAB may consider the Charter School plan, annual reports, and student performance in addition to the record. 24 P.S. § 17-1729-A(d). Upon taking official notice of information pertaining to the Charter School’s academic performance upon which the School District relied when deciding upon the Charter School’s amendment request, the CAB does not find that the Charter School has experienced a sufficient level or duration of under-performance to warrant a denial of the Charter School’s application to add a second location to its Charter. Section 17-1729-A(a)(2) of the CSL permits a school district to deny

renewal of a charter school's charter for “[f]ailure to meet the requirements for student performance set forth in 22 Pa.Code Ch. 5 (relating to curriculum) or subsequent regulations promulgated to replace 22 Pa.Code Ch. 5...”. 24 P.S. § 17-1729-A(a)(2). “Chapter 4 of Title 22 of the Pennsylvania Code sets forth the PSSA as the measure of student and school performance and sets standards of performance to be measured by the PSSA, including proficiency. 22 Pa.Code §§ 4.2, 4.51(a), (b), (e).” *New Hope Academy Charter School v. School District of City of York*, 89 A.3d 731, 737 (Pa.Cmwlth.2014). “The Chapter 4 regulations also provide that the PSSA is designed to measure ‘student and school performance consistent with the No Child Left Behind Act’.” 22 Pa.Code § 4.51(a)(1).” *Id.* “The No Child Left Behind Act requirements that Chapter 4 references, including proficiency as the measure for AYP . . . are set forth in 22 Pa.Code Chapter 403, 22 Pa.Code §§ 403.1–403.3.” *Id.* “Proficiency as measured by PSSA test scores is therefore a Chapter 4 student performance requirement.” *Id.*

The Pennsylvania Commonwealth Court has held that a “**consistently low** percentage of students scoring proficient or better on the PSSA constitutes a failure to satisfy Chapter 4 student performance requirements and is a valid ground for nonrenewal of a school's charter , . . where the charter school's proficiency rates are lower than those of its school district's schools as a whole and no clear pattern of significant improvement in its PSSA results is shown.” *Id.*; *Ronald H. Brown Charter School v. Harrisburg City School District*, 928 A.2d 1145, 1152–53 (Pa.Cmwlth. 2007) (emphasis added). For that reason, the Commonwealth Court has specifically held that it is “within the [CAB's] prerogative to rely on PSSA results” when determining whether a school has shown improvement in its students' performance. *Ronald H. Brown Charter School*, 928 A.2d at 1153.

Moreover, with regard to whether the PSSA tests can be used to measure its students' performance, the Charter School's own Charter application stated: "The Penn Hills Charter School of Entrepreneurship will make every effort to ensure 100% testing participation in all state-required assessment, alternate assessments and any additional assessments the state of Pennsylvania might develop and administer in the future." (R.R. 19). The CAB interprets this statement as establishing a goal of meeting the requirements for student performance set forth in the Department's Regulations.

As to whether the Charter School was making adequate performance progress, the CAB finds the absence of a sufficiently consistent pattern of low performance by the Charter School under 22 Pa.Code Ch. 4³, or The No Child Left Behind Act, 22 Pa.Code, Chapter 403, 22 Pa.Code §§ 403.1–403.3, to warrant the denial of the Charter School's amendment request. Indeed, the School Board's offer of proof at the February 23, 2015 public meeting in support of its decision consisted entirely of the Charter School's performance milestones for the single school year 2013-2014, the second academic year of its existence. (R.R. 475) (compare, *Career Connections Charter High School v. School District of Pittsburgh*, 91 A.3d 736, 741-42 (Pa.Cmwlth. 2014) and *New Hope Academy Charter School v. School District of City of York*, *infra*, where denials of renewal were not based on Academic Yearly Performance for a particular year but, instead, were based on low proficiency rates over the course of several years). Moreover, the Charter School exceeded the level of proficiency demonstrated by one of three elementary schools in the School District. Because no substantial evidence exists that the Charter School has consistently failed to meet state proficiency standards as measured by PSSA scores, the CAB declines to find that the School District appropriately denied the Charter School's amendment request pursuant to 24 P.S. § 17-1729-A(a)(2), on that particular ground.

³ Chapter 4 has replaced 22 Pa.Code Ch.5. *See, Sugar Valley Rural Charter School*, CAB Docket No. 2004-04.

CONCLUSION

Upon giving due consideration to the findings of the School Board, the Evidentiary Record, records of the Department of Education and the requirements of Charter School Law, the CAB finds that the School District's denial of the Charter School's request for the amendment of its Charter to permit its operation at the Second Facility was not proper. Accordingly, we make the following:


COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
STATE CHARTER SCHOOL APPEAL BOARD

PENN HILLS CHARTER SCHOOL :
OF ENTREPRENEURSHIP :
Appellant : Docket No. CAB 2015-02
v. :
PENN HILLS SCHOOL DISTRICT : Appeal from the March 23, 2015
Appellee : Decision of the Penn Hills
School District

ORDER

AND NOW, this 25th day of September, 2015, based upon the foregoing and the vote of this Board⁴, the appeal of Penn Hills Charter School of Entrepreneurship is **GRANTED**.

For the State Charter School Appeal Board


Pedro A. Rivera, Chair
and Secretary of Education

Chelsea Dice, Esquire
BRUCE E. DICE & ASSOCIATES
787 Pine Valley Drive, Suite E
Pittsburgh, PA 15239

Joshua E. Pollack, Esquire
LATSHA DAVIS & McKENNA, P.C.
350 Eagleview Boulevard, Suite 100
Exton, PA 19431

Susan Hosler, Docket Clerk
State Charter Appeal Board, Office of Chief Counsel
Pennsylvania Department of Education
333 Market Street, 9th Floor
Harrisburg, PA 17126-0333

Date Mailed: 9/28/15

⁴ At its September 1, 2015 meeting, the Board granted the appeal of the Charter School from the denial of its amendment request to the School District to move into a new facility during the 2015-16 school year by a vote of 7 to 0.