

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

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| Gillingham Charter School, | : | |
| Petitioner | : | |
| | : | |
| v. | : | CAB Docket No. 2016-11 |
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| Pottsville Area School District, | : | |
| Respondent | : | |

OPINION

In accordance with 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”), this matter comes before the Pennsylvania State Charter School Appeal Board (hereinafter “CAB”) on appeal by Gillingham Charter School (hereinafter “Gillingham” or “Charter School”) from a July 6, 2016, Resolution (hereinafter “Nonrenewal Resolution”) of the Board of School Directors (hereinafter “School Board”) of the Pottsville Area School District (hereinafter “School District,” “PASD” or “Pottsville”), which denied Gillingham’s charter renewal request.

Pottsville denied Gillingham’s original charter application in 2009. After submitting a revised charter application in 2010, Pottsville again denied Gillingham a charter and Gillingham appealed to CAB. On June 15, 2011, CAB granted the appeal of Gillingham and directed Pottsville to issue Gillingham a charter pursuant to Section 1720 of the CSL, 24 P.S. §17-1720-A. *See Gillingham Charter School v. Pottsville Area School District*, CAB Docket No. 2010-7.

Gillingham began to operate as a public charter school during the 2011-2012 school year, with approximately 175 students in kindergarten through 9th grade. Each school year thereafter, Gillingham added an additional grade, so that by the 2014-2015 school year, it enrolled students

from kindergarten through 12th grade. During the 2015-2016 school year, Gillingham served approximately 240 students, only 77 of whom (approximately 1/3) resided within the PASD.

In 2015, Gillingham submitted a timely application to renew its charter to Pottsville. In response to the School District's requests related to its charter renewal application, Gillingham provided the School District with voluminous records (over 6000 pages). On December 2, 2015, the School Board adopted a Resolution (hereinafter "Notice of Nonrenewal") recommending fifteen (15) grounds for nonrenewal of Gillingham's charter.

Public hearings were held over twelve (12) days from April 18, 2016 through May 23, 2016, after which the record remained open for thirty (30) days for public comment. On June 28, 2016, the School District's Hearing Officer issued a Report and Recommendation that the School District not renew Gillingham's Charter, but dismissed three (3) of the fifteen (15) grounds cited for nonrenewal as not being proved. On July 6, 2016, the School Board adopted without change the Hearing Officer's Report, Findings of Fact and Conclusions of Law, and the reasons for the decision and voted to deny Gillingham's request for charter renewal in its Nonrenewal Resolution.

Gillingham timely appealed the School Board's decision of nonrenewal to CAB on August 4, 2016. CAB assigned a hearing officer to preside over all procedural matters in this appeal. After conducting a conference call with counsel for the parties, the hearing officer issued orders regarding the filing of motions to supplement the record. Both parties timely filed such motions with supporting briefs, responsive exhibits to the opposing party's submissions, briefs in opposition and reply briefs. On March 15, 2017, the hearing officer denied both parties' motions to supplement the record.

Thereafter, the parties timely filed briefs in support of their respective positions on the merits of this appeal and a Joint Stipulation of Facts. The parties presented their arguments to CAB on July 25, 2017. For the reasons set forth below, CAB holds that the School Board's nonrenewal of Gillingham's Charter was improper under the CSL, 24 P.S. §17-1729-A.

FINDINGS OF FACT

Background

1. Gillingham is a Pennsylvania nonprofit corporation with the place of business at 915 Howard Avenue, Pottsville, PA. (N.T. 1550.)¹
2. In 2009, Gillingham submitted a charter application to the School District, which was denied. (N.T. 452, 1041-1042; GCS Ex. 1.)
3. In June 2010, Gillingham submitted a revised charter application to the School District, which the School Board voted to deny on July 21, 2010. (N.T. 1041-1043, 1108-1109; GCS Ex. 1.)

¹ "N.T. ___" refers to the Notes of Testimony from the pages of the transcripts of the various hearing dates from April 18, 2016 through May 23, 2016. The Notes of Testimony began on April 18, 2016 at page 1 and continued sequentially through the hearing date of May 19, 2016. The Notes of Testimony of May 23, 2016, the last day of the public hearings, then began again at page 1. Any citation to testimony from the May 23, 2016 hearing date will be referenced as "N.T. 5/23/16 at [page number]". The Exhibits filed in the hearing before the School District will be identified as follows: Exhibits offered and admitted into the record below by the School District's Hearing Officer as "HO Ex. ___;" by the School District as "SD Ex. ___;" by Gillingham as "GCS Ex. ___." The Joint Stipulation of Facts filed by the parties before CAB on April 19, 2017, will be identified as "Joint Stipulation ¶[___]."

The Certified Record filed by the School District in this case was not Bates stamped. The attorneys for Gillingham consecutively Bates stamped the Certified Record filed by the School District, stating that since many exhibits contained multiple nonnumbered pages, it was impossible to provide clear citations to the Certified Record based only on the exhibit numbers. Gillingham provided an electronic copy of the Certified Record with the corresponding Bates stamped numbers to each counsel, the hearing officer and the docket clerk when it filed its brief on the merits herein. In this Opinion, when necessary for clarity, reference will be made to the Bates stamped page numbers in a given multiple, nonnumbered paged exhibit. The document will be identified by its exhibit letter or number, as identified in the record as certified by the School district, followed by the Bates stamped page number, e.g., "GCS Ex. __, Bates stamped, p. ____."

4. By Order dated June 15, 2011, CAB granted the appeal of Gillingham and directed the School District to issue a charter to Gillingham. (N.T. 1108-1109; Official Notice - *Gillingham Charter School v. Pottsville Area School District*, CAB Docket No. 2010-7.)

5. The PASD then issued a charter to Gillingham for a term of five (5) years beginning on July 1, 2011 and ending on June 30, 2016. (GCS Ex. 2.)

6. Gillingham began to operate as a public charter school during the 2011-2012 school year, with approximately 175 students in kindergarten through 9th grade. (Joint Stipulation ¶ 1.)

7. Each school year thereafter, Gillingham added an additional grade, so that by the 2014-2015 school year, it enrolled students from kindergarten through 12th grade. (Joint Stipulation ¶ 2.)

8. Gillingham submitted a timely application to renew its Charter to the School District. (Joint Stipulation ¶ 3; N.T. 6-7; GCS Ex. 5.)

9. The administration of the School District reviewed Gillingham's charter renewal application. (Joint Stipulation ¶ 4.)

10. Gillingham provided over 6,000 pages of documents in response to requests from the School District in connection with its charter renewal application. (N.T. 1110, 1175, 1181-1182; GCS Exs. 3-8.)

11. The School District's investigation included, but was not limited to, a review of the special education records of students who attended Gillingham, but later returned to the School District; an on-site visit of Gillingham, including asking questions of staff and observing classrooms; a review of answers provided by Gillingham to questions submitted by the School District; a review of information obtainable from public websites, including the Pennsylvania Department of Education (hereinafter "PDE") and information available from Gillingham's files;

and a review of records received from Gillingham. (N.T. 108-109, 368-369, 624, 964, 1183-1184.)

12. As part of its investigation, the School District requested access to Gillingham students' special education records and unlimited on-site access to both the records and the special education students by an expert the School District had hired to conduct said review, Andrew M. Klein (hereinafter "Klein"). Gillingham denied the request believing that the Family Educational Rights and Privacy Act of 1974 (hereinafter "FERPA"), 20 U.S.C. §1232g, prohibited Gillingham from giving said access. (N.T. 1113, 1180.)

13. Klein had worked for the School District in the past and had previously recommended to the School District that it report Gillingham to PDE for alleged special education violations. (GCS Ex. 64.)

14. In September 2015, Gillingham suggested that it and the School District jointly contact PDE for guidance with regard to the School District's request for special education records and an on-site visit in light of the prohibitions in FERPA; however, the School District did not accept this offer. (GCS Ex. 9; N.T. 1180-1181.)

15. Gillingham contacted PDE for guidance, in light of FERPA, regarding the School District's request to review students' special education records and access its students, and Gillingham received and followed PDE's guidance with respect thereto. (N.T. 1181.)

16. On November 16, 2015, the School District filed a complaint in the Court of Common Pleas of Schuylkill County and sought an Injunction to allow its expert, Klein, to access Gillingham's special education students and students' records as part of the School District's evaluation of Gillingham's charter renewal request. (SD Exs. 29, 30.)

17. On December 2, 2015, while the litigation was pending in the Court of Common Pleas of Schuylkill County, the School Board adopted a Resolution (hereinafter “Notice of Nonrenewal”) in which it recommended nonrenewal of Gillingham’s Charter on fifteen (15) grounds and established a public hearing date subject to rescheduling.² (SD Ex. 2; Joint Stipulation ¶ 5.)

² The fifteen (15) grounds asserted in the School Board’s Notice of Nonrenewal were as follows:

1. For the 2011-12 school year, the Charter School’s PSSA proficiency scores have been consistently lower than the state targets and the School District’s scores.
2. For the 2012-13 and 2013-14 school years, the Charter School’s PSSA Proficiency scores and Keystone Proficiency scores have been consistently lower than the State targets and the School District’s scores.
3. For the 2014-15 school year, the Charter School’s growth ratings in the areas of PSSA Reading, PSSA Math, Keystone Algebra One and Keystone Literature did not meet the standard for Pennsylvania Academic Growth.
4. For the 2014-15 school year, the Charter School’s achievement levels for the percentage of students who are proficient and advanced were below the School District’s scores, as well as the state scores.
5. The Charter School’s School Performance Profile Academic Score (“SPP”) issued by PDE was 67.3 out of 107 for the 2012-13 school year, 60.9 out of 107 for the 2013-14 school year and 48.4 out of 107 for the 2014-15 school year. The Charter School’s SPP scores are below the School District’s average SPP scores for each respective year. The state’s required satisfactory score of 70 has not been met by the Charter School in any of the reporting years.
6. The Charter School failed to meet the 100% highly qualified teacher (HQT) requirement during the term of the Charter, as required by the No Child Left Behind Act as reported in the School Report Cards prepared by PDE. In the 2012-2013 school year, only 85 percent of the core academic classes taught at the Charter School were taught by highly qualified teachers. In the 2013-2014 school year, only 74% of the core academic classes taught at the Charter School were taught by highly qualified teachers.
7. The Charter School failed to meet its legal obligations to special needs students applicable under Federal and State Law including, without limitation, the IDEA, Section 504 of the Rehabilitation Act of 1973, and Chapter 711 of the State Board of Education regulations in that the Charter School has failed to provide services and/or document the services provided as required by law.
8. The Charter School has failed to comply with its representation to parents and students and guidance issued by the Pennsylvania Department of Education in that the Charter School has failed to timely inform the School District of residence when a student has accrued three or more days of unexcused absences.
9. The Charter School has failed to comply with Section 504 of the Rehabilitation Act of 1973, the Pennsylvania Human Relations Act, 24 P.S. §17-1723-A(b)(1), and/or guidance issued by the Pennsylvania Department of Education by disenrolling students who are hospitalized and/or placed in inpatient rehabilitative facilities.

18. On January 12, 2016, the Court of Common Pleas of Schuylkill County did not issue an injunction, but rather, ordered that the School District's expert was permitted to access only the educational records of special education students whose parents consented to the access in writing.³ (N.T. 192, 1115; SD Ex. 31.)

19. In March 2016, several months after the School Board adopted its Notice of Nonrenewal, Klein reviewed the special educational records of those students whose parents consented to the review. (N.T. 291, 299, SD Exs. 2 and 27.)

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10. The Charter School's auditor found, after completing its FY2014 audit, that the Charter School did not obtain required child abuse clearances, FBI background checks and criminal history checks.
 11. The Charter School's auditor found, after completing its FY2014 audit, that all personnel files did not contain a completed form I-9 Employment Eligibility Verification.
 12. The Charter School lacks proper fiscal internal controls including, but not limited to, the following examples: payment of sales tax, purchasing of fresh flowers, and/or cash purchases at yard sales for which management cannot provide adequate documentation.
 13. The Charter School has failed to meet generally accepted standards of fiscal management and/or audit requirements in that the Charter School, throughout the term of its Charter, has failed to maintain accurate proof of residency records, billed the School District for students who do not reside within the School District, billed for students who attend the School District, incorrectly noted withdrawal dates, incorrectly noted start enrollment dates, incorrectly classified students as regular education or special education and/or supplied incomplete enrollment forms.
 14. The Charter School, throughout the terms of its Charter, has failed to comply with Section 1724-A of the Charter School Law in that every employee of the Charter School has not been provided the same health care benefits as the employee would be provided if the employee were an employee of the School District.
 15. The Charter School, throughout the terms of its Charter, has failed to comply with the Ethics Act in that Statements of Financial Interest were not completed as required by law.

SD Ex. 2.

³Specifically, the January 12, 2016 Order (1) directed the School District and Gillingham jointly to prepare a letter to send to the parents/guardians of Gillingham's students who received special education and/or Section 504 plan services/accommodations which asked the parents/guardians if they would consent to the examination of their children's records by an independent special education expert for the purpose of an audit to see if the students' plans complied with the law; (2) directed Gillingham to provide the School District with the names and addresses of the parents/guardians of its special education students; and (3) directed the School District to pay for the costs of the mailing. (SD Ex. 31, Bates stamped, pp. 3307-3308.)

20. Public hearings on the Notice of Nonrenewal were held over twelve (12) days from April 18, 2016 through May 23, 2016 after which the record remained open for thirty (30) days for public comment.⁴ (Joint Stipulation ¶¶ 6, 7.)

21. On June 28, 2016, the School District's Hearing Officer issued a Report recommending that Gillingham's Charter not be renewed on the following grounds:

- (1) Gillingham committed one or more material violations of conditions, standards or procedures contained in the written charter. 24 P.S. §17-1729-A(a)(1).
- (2) Gillingham failed 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 and failed to meet performance standards set forth in its written charter. 24 P.S. §17-1729-A(a)(2).
- (3) Gillingham violated provisions of the CSL. 24 P.S. §17-1729-A(a)(4).
- (4) Gillingham violated provisions of law from which it has not been exempted, including federal laws and regulations governing children with disabilities. 24 P.S. §17-1729-A(a)(5).

(Joint Stipulation ¶ 8; Hearing Officer Report and Recommendation, Conclusions of Law ¶¶ 1, 2, 4, 5 on p. 71.)⁵

22. The School District's Hearing Officer dismissed three (3) of the fifteen (15) grounds cited for nonrenewal as not having been proved. Specifically, the School District's Hearing Officer found: (1) that the School District had not proved that Gillingham failed to meet generally accepted standards of fiscal management or audit requirements, as alleged in grounds Nos. 12 and 13 of the Notice of Nonrenewal; and (2) that the School District failed to sustain ground No. 11 of the Notice of Nonrenewal since the I-9 Forms not found by the auditors during the FY2014 Audit were subsequently located and produced by Gillingham. (Hearing Officer

⁴ The comments from the public were admitted into the record by the School District's Hearing Officer as HO Ex. 9, Bates stamped, pp. 36-140.

⁵ The Report and Recommendation of the School District's Hearing Officer is identified as Document "C" in the record certified from the School District before CAB, Bates stamped, pp. 2561-2632.

Report and Recommendation, pp. 67-69; Conclusion of Law ¶ 3 on p. 71; Proposed Finding of Fact ¶ 309 on p. 46 and p. 62, n. 7.)

23. The School District's Hearing Officer did not give any weight to the testimony of any students or parents during the hearing, or to the exhibits or comments from any students or parents submitted during the public comment period following the public hearing, stating that he believed that the testimony and comments were not based on empirical data or on any performance standard in state law or in the Charter. (Hearing Officer Report and Recommendation, pp. 7-8, ¶¶ 21-25.)

24. On July 6, 2016, the School Board passed a Nonrenewal Resolution in which it adopted the Hearing Officer's Report, Findings of Fact and Conclusions of Law, and the reasons for the decision and voted to deny Gillingham's request for charter renewal.⁶ (Joint Stipulation ¶ 9.)

25. On or about August 4, 2016, Gillingham timely appealed to CAB the School Board's Nonrenewal Resolution. (Joint Stipulation ¶ 10.)

26. On August 26, 2016, the School District filed a timely Answer to Gillingham's Appeal. (Joint Stipulation ¶ 11.)

27. CAB assigned a hearing officer to preside over all procedural matters in this appeal. After conducting a conference call with counsel for the parties, the hearing officer issued Orders regarding the filing of motions to supplement the record. Both parties timely filed motions to supplement the record along with supporting briefs, responsive exhibits to the opposing party's submissions, briefs in opposition and reply briefs. (Official Notice, CAB Docket; Joint Stipulation ¶¶ 12-15.)

⁶ The Nonrenewal Resolution is identified as Document "D" in the record certified from the School District and Bates stamped, pp. 2634-2635.

28. On November 10, 2016, the School District, through correspondence from its counsel, stated: (1) that it had accepted the Hearing Officer's Findings of Facts Nos. 310-335 (Discussion, Section D and Conclusion of Law ¶ 3, found on pp. 46-51, 67-69, 71, respectively); (2) that insufficient evidence was presented to conclude that fiscal mismanagement had occurred during the term of Gillingham's Charter; and (3) that it was no longer pursuing the issue of fiscal mismanagement, detailed in paragraphs 12 and 13 of the School Board's December 2, 2015 Notice of Nonrenewal, on appeal.⁷ (Official Notice, CAB Docket.)

29. On March 15, 2017, the hearing officer denied both parties' motions to supplement the record and set a briefing schedule on the merits. (Official Notice, CAB Docket; Joint Stipulation ¶ 15.)

30. Neither party filed Exceptions to the March 15, 2017 Order denying the Motions to Supplement the Record. (Official Notice, CAB Docket.)

31. Thereafter, the parties timely filed briefs in support of their respective positions on the merits of this appeal and a Joint Stipulation of Facts. (Official Notice, CAB Docket.)

32. On July 25, 2017, CAB heard argument from the parties regarding this appeal. (Official Notice.)

I-9 Employment Eligibility Verification Forms

33. During Gillingham's audit for fiscal year ending June 30, 2014, in a review of fifteen (15) employee files, the auditor found that six (6) employee files did not contain the I-9

⁷ Since no issue of fiscal mismanagement is before CAB, those grounds for nonrenewal of the charter will not be discussed further in this Opinion.

However, despite the fact that the School Board adopted the decision of the Hearing Officer *in toto*, the School District continues to pursue on appeal the ground for nonrenewal asserted in paragraph 11, *i.e.*, that I-9 Employment Eligibility Verification Forms were missing from some personnel files, asserting that the missing forms meant that Gillingham failed to comply with a law from which it was not exempted justifying nonrenewal of Gillingham's charter. *See* School District's Brief, filed 5/19/17, pp. 22-23. This ground for nonrenewal is discussed, *infra*.

Employment Eligibility Verification Form and four (4) contained incomplete I-9 Forms. (N.T. 961-962; SD Ex. 28.)

34. Sometime after Gillingham was notified by the auditor about the missing/incomplete I-9 Forms, Gillingham's Director of Organizational Development, Rachel Bensinger (hereinafter "Bensinger"), who was not hired until after the audit was completed, reviewed the fifteen (15) personnel files. (N.T. 2129-2142, 2148-2151; GCS Ex. 77.)

35. The personnel files were disorganized and unstructured when Bensinger reviewed them; however, when she organized them, she found the missing and correctly completed I-9 Forms in those personnel files. (N.T. 2148-2151.)

36. The School District's Hearing Officer concluded that since all of the I-9 Employment Eligibility Verification Forms were subsequently located, there was insufficient evidence to support this ground for nonrenewal of the charter. (Hearing Officer Report and Recommendation, p. 62, n. 7.)

37. Bensinger performed an internal audit of Gillingham's personnel files for the 2015-2016 school year, and each of the personnel files contained the required I-9 Employment Eligibility Verification Forms. (N.T. 2142-2144.)

Child Abuse Clearances, FBI Background and Criminal History Checks

38. During Gillingham's audit for fiscal year ending June 30, 2014, in a review of fifteen (15) employee files, the auditor found that three (3) of the employee files did not contain the required child abuse certificates and criminal history background checks, and two (2) of those three (3) employee files did not contain the required FBI background checks. (SD Ex. 28.)

39. After Gillingham was notified by the auditor of the missing clearances and background checks, Bensinger reviewed the personnel files of those employees identified by the auditor. (N.T. 2149-2150.)

40. Bensinger located the required clearance certificates and background checks for one (1) of the employees, Robert Woodcock, in the file. (N.T. 2137-2138, 2148-2151; GCS Ex. 77, Bates stamped, pp. 12778, 12780-12782.)

41. Bensinger testified that one of the persons whose personnel file was missing the required background clearances and checks, Kristy Nork, worked for Gillingham only one (1) day, April 6, 2014. (N.T. 2128-2130; GCS Ex. 77, Bates stamped, pp. 12763, 12795-12796.)

42. Bensinger testified that the other employee whose file was missing the required background checks and clearances, Elizabeth Beecroft⁸, was employed for less than 90 days. (N.T. 2131-2132; GCS Ex. 77, Bates stamped, pp. 12763, 12791-12794.)

43. Bensinger performed an internal audit of Gillingham's personnel files for the 2015-2016 school year, and each of the personnel files contained all required child abuse certificates, criminal history background checks and FBI background checks. (N.T. 2142-2144.)

Reporting of Truancy

44. Since its inception as a charter school, Gillingham has sent "Absence Alert Letters" home to parents or guardians of students who have accumulated three (3) or more unexcused absences. (N.T. 2178-2185; SD Ex. 53; GCS Ex. 73.)

45. Gillingham has an attendance policy that is included in its student/parent handbook which has changed over the years. (N.T. 2172-2173, 2203-2204; GCS Ex. 72.)

⁸ Throughout the various filings in this matter, this person has been referred to as "Beecroft," including by the auditor. The testimony of Bensinger is that Gillingham never employed anyone named "Beecroft," rather according to its records, they had an employee named "Beecroft." (N.T. 2131; GCS Ex. 77, Bates stamped, pp. 12791-12794.) Therefore, the employee will be referred to as "Beecroft" in this Opinion.

46. Gillingham is located in Schuylkill County which has issued its own Administrative Rules for the Processing of Truancy Citations & Referrals to Juvenile Court (hereinafter “County’s Truancy Rules”), and these Rules were provided to Gillingham by Schuylkill County Children and Youth Services. (N.T. 2173-2174; GCS Ex. 71.)

47. From the inception of its charter, Gillingham used its own attendance policies and/or Schuylkill County’s procedures for pursuing truancy. If a student had one (1) unexcused absence, Gillingham contacted the parent/guardian and then tried to schedule a face-to-face meeting in order to give the parent/guardian the County’s Truancy Rules. Gillingham also prepared, or participated in the preparation of Truancy Elimination Plans⁹, as appropriate. Also, if a student had three (3) or more unexcused absences in a month, the student would be referred to Schuylkill County Children and Youth pursuant to the County’s Truancy Rules. (N.T. 2172-2185; GCS Ex. 71.)

48. Throughout the operation of Gillingham’s charter, PASD never made a request for Gillingham to report truant students directly to it until March 24, 2015 when the School District’s Director of Attendance emailed Gillingham stating:

Upon further review of the BEC, we realize we are responsible for reviewing the attendance of our resident students attending your school. Due to this fact, could we have the attendance of all Pottsville residents (and St. Clair High School residents) sent to us on a regular basis?

(GCS Ex. 74, Bates stamped, p. 12727.)

49. Gillingham responded that it would provide the School District with that information and took steps to do so. (GCS Ex. 74, Bates stamped, pp. 12727-12728.)

⁹ A Truancy Elimination Plan was created by Gillingham, in collaboration with a parent/guardian, and as necessary Schuylkill County Children and Youth Services, in order to address the issues causing truancy with the aim of helping overcome those issues so that the child would be present in school. (N.T. 2183-2184.)

50. On August 20, 2015, the Board of Trustees of Gillingham adopted the attendance policy that is included in the 2015-2016 student/parent handbook which stated that Gillingham was to report three (3) days of unexcused absences to the child's school district of residence. (N.T. 2172-2173, 2203-2204; GCS Ex. 72.)

51. Thereafter, Gillingham began providing the School District with its "Absence Alert Letters" for those students residing in the School District who had three (3) or more unexcused absences. (SD Ex. 54; GCS Exs. 73-74.)

52. The Basic Education Circular ("BEC") issued by PDE regarding charter schools states that it "is meant to serve as a *guide* for charter schools, school districts, parents and students." (Official Notice - BEC Charter Schools 24 P.S. §17-1701-A, issued October 1, 2004, p. 1, *emphasis supplied*.)

Highly Qualified Teachers

53. The CSL requires that at least seventy-five per cent (75%) of a charter school's professional staff hold appropriate state certification. 24 P.S. §17-1724-A.

54. As of February 2007, Pennsylvania's definition of "Highly Qualified Teacher" was one who: (1) holds a bachelor's degree; (2) holds a valid Pennsylvania teaching certificate; and (3) demonstrates subject matter competency for the core content area they teach. (Official Notice – www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf)

55. In recognizing that the CSL required only 75% of charter school teachers to be certified and thus 25% can be noncertified, PDE further provided that in order to be highly qualified, all teachers of core content subjects at all grade levels, whether or not they hold certification, must:

(1) hold a bachelor's degree; and (2) demonstrate subject matter competence in each core content area and grade level at which they teach. (Official Notice – www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf)

56. Before it was amended, the No Child Left Behind Act of 2001 (hereinafter “NCLB”) also provided that charter school teachers had to hold at least a bachelor's degree and demonstrate competency in the core content areas in which they teach. (22 Pa. Code §403.2; Official Notice – Certification and Staffing Policy Guidelines (hereinafter “CSPG”) No. 24, p. 1 (November 1, 2015); www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf; 20 U.S.C.A. §7801 (23).)

57. Pursuant to the NCLB, Gillingham annually notified the parents/guardians of its students as to the professional certifications and qualifications of its teachers. (GCS Ex. 56.)

58. Appropriate certification required to qualify an individual for assignments is determined by PDE through a position description and course content that lists specific duties to be performed/filled. (Official Notice – CSPG No. 24, p. 1 (November 1, 2015); CSPG No. 1 (August 1, 2015).)

59. Beginning with the 2016-2017 school year, the Every Student Succeeds Act (hereinafter “ESSA”) eliminated the definition of “highly qualified” under the NCLB and eliminated the requirement that special education teachers be “highly qualified,” leaving teacher certification and qualification decisions to the state. (Official Notice – Every Student Succeeds Act (Pub.L.No. 114-95 (Dec. 10, 2015) 129 Stat. 1802, 20 U.S.C.A. §7801.)

60. Currently, all teachers teaching in a program supported with Title I funding, which includes Gillingham, must meet appropriate state certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification. (Official Notice – Elementary and Secondary Education Act of 1965, §1111(g)(2)(J), as amended by the ESSA.)

Public Official and Ethics Act

61. The Public Officials and Employees Ethics Law (hereinafter “Ethics Act”), 65 Pa.C.S. §1101, *et seq.*, requires public officials to file Statements of Financial Interest by May 1 of each year. (65 Pa.C.S. §1104(a).)

62. Pursuant to the Ethics Act, the Trustees and administrator of a charter school are considered public officials and are required to file Statements of Financial Interest. (24 P.S. §§17-1715-A(11) and (12).)

63. While there were minor filing errors on twenty-two (22) of the Statements of Financial Interest forms filed over the course of five (5) years, there is no evidence of record that members of Gillingham’s Board of Trustees refused to comply with the Ethics Act, that these errors rose to the level of a serious violation or that these errors should be imputed to Gillingham. (Official Notice-Certified Record; SD Ex. 42.)

Special Education Services and Accommodations to Children with Disabilities Under Federal and State Law

64. Pursuant to the CSL, charter schools are to comply with Federal laws and regulations governing children with disabilities. (24 P.S. §17-1729-A(a)(5).)

65. Charter schools are responsible to provide a Free Appropriate Public Education (hereinafter “FAPE”) to all enrolled students with disabilities and may contract with the school district, intermediate unit or provider to provide those services. (22 Pa. Code §§711.2, 711.3.)

66. PDE is responsible to supervise and ensure that charter schools are providing a FAPE to a child with disability in compliance with the Individuals with Disabilities Education Act (hereinafter “IDEA”), 20 U.S.C. §1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973 (hereinafter “Section 504”), 29 U.S.C. §701 *et seq.*; and/or the Pennsylvania Human Relations Act (hereinafter “PHRA”), 43 P.S. §951 *et seq.*, which supervision by PDE includes the charter school participating in compliance monitoring, providing information to PDE and completing any corrective action required by PDE. (22 Pa. Code §711.4.)

67. When Gillingham began its initial operation in the 2011-2012 school year, the Schuylkill County Intermediate Unit 29 (hereinafter “Schuylkill IU 29”) refused to provide any special education services to students at Gillingham. (N.T. 462-463, 1197-1198; GCS Ex. 60; SD Ex. 23, Bates stamped, p. 3250.)

68. On November 16, 2011, in response to PDE contacting it regarding providing services, Schuylkill IU 29 contacted Gillingham to state that it would be available to provide special education services to Local Education Agencies (hereinafter “LEAs”) within its service area. (GCS Ex. 60.)

69. Gillingham has only had a limited number of special education complaints filed with PDE against it, none of which were due process complaints; rather, all were complaints filed by an employee of the School District, Kelly Brennan (hereinafter “Brennan”), Director of Special Education for the School District. (N.T. 365, 1130, 1193; SD Exs. 23, 24, 25; GCS Exs. 62, 64.)

70. PDE investigated three (3) complaints¹⁰ filed by Brennan in the 2011-2012 school year, and found with regard to two of those complaints that Schuylkill IU 29 had refused to provide

¹⁰ Brennan’s complaints were filed with PDE on September 23, 2011, September 27, 2011 and December 15, 2011. Some of the allegations of the complaints were found to be without merit. Any allegations in the complaints that were found to have merit were corrected by Gillingham to the satisfaction of PDE. (GCS Ex. 62.)

special education services to Gillingham's students and with regard to all three complaints, to the extent it was required, Gillingham took all required corrective action. (GCS Ex. 62.)

71. Klein was hired by the School District in May 2012 as a consultant for the School District regarding special education matters; and during that time, the School District would have Klein review Gillingham's provision of special education services. At the time of the public hearing, Klein had been a consultant for the School District for four (4) years. (N.T. 187-189; GCS Ex. 64.)

72. Brennan filed two additional complaints with PDE against Gillingham during the 2012-2013 school year.¹¹ PDE concluded that no corrective action was required on one of the complaints. For the other complaint, PDE directed Gillingham to provide compensatory education services in response to one of the allegations, which Gillingham did; but for the other allegation, no corrective action was required. (GCS Ex. 62, Bates stamped, pp. 11941-11943, 11952-11955, 11959.)

73. On or about October 9, 2012, Brennan wrote to PDE alleging approximately thirteen (13) special education violations against Gillingham. (GCS Ex. 64.)

74. Brennan stated in her October 9, 2012 letter to PDE, that Klein, the School District's consultant since May 2012, urged Brennan to notify PDE about the "grave concerns" about Gillingham's special education services listing thirteen (13) complaints. (GCS Ex. 64; N.T. 188-189.)

75. In response to Brennan's October 9, 2012 letter, PDE conducted an investigation of Gillingham, which included an on-site visit on December 3 and 4, 2012, and a special education

¹¹ The complaints were filed on October 22, 2012 and November 7, 2012. (GCS Ex. 62.)

audit by a four (4) person PDE team in order to review Gillingham's special education processes for compliance with the law. (GCS Ex. 65, Bates stamped, p. 12529.)

76. PDE issued its Report in response to Brennan's October 9, 2012 complaints on December 17, 2012. (GCS Ex. 65.)

77. PDE's December 17, 2012 Report addressed each of the allegations contained in Brennan's October 9, 2012 letter and found that all of her allegations were without merit, none required corrective action, and that Gillingham was in compliance with federal and state special education laws/regulations. (GCS Ex. 65, Bates stamped, pp. 12528-12543.)

78. Thereafter, Brennan did not file any complaints with PDE regarding Gillingham's special education services during the 2013-2014, 2014-2015, or 2015-2016 school years. (N.T. 468.)

79. PDE has not issued any type of corrective action to Gillingham in response to any specific complaint since it responded to Brennan's November 7, 2012 complaints. (GCS Ex. 62.)

80. In November 2015, the School District contracted with Klein to "review student records for the purpose of evaluating the request for charter renewal submitted by Gillingham...." (N.T. 101-104; SD Ex. 27 and SD Ex. 30, Bates stamped, p. 3303.)

81. In March 2016, after receiving the consent of some students' parents/guardians pursuant to the January 12, 2016, Schuylkill County Court Order, Klein reviewed the educational records of twenty-five (25) students as part of the School District's investigation into Gillingham's renewal request. Eighteen (18) of those students attended Gillingham, and seven (7) of those students had transferred back to the School District. (N.T. 113; SD Ex. 27.)

82. In preparing his expert report for the School District regarding Gillingham's special education services, Klein did not conduct any classroom observations and did not speak with

teachers or school staff, but rather, only reviewed the records in the files of those twenty-five (25) special education students. (SD Ex. 27, Bates stamped, p. 3268-3269.)

83. During the public hearing in this case and following his expert testimony, Klein was cross-examined about testimony that he had provided under oath in a prior proceeding.¹² Klein admitted that his prior testimony was accurately reflected in Gillingham's Exhibit 125. (N.T. 5/23/17 at 10-14.)

84. In the prior proceeding in response to questions by counsel, Klein testified under oath:

Q Tell us what the difficulties are in trying to determine whether a child has received a free and appropriate education by looking at a series of records.

A The review of records is a procedural matter and it is a very valid way of beginning to gain some understanding of how a student has progressed or has not progressed over time. **Obviously records don't and cannot tell the entire story.** First of all, both as a Special Education director and as a hearing officer, and now as a witness, one always wonders whether you're seeing the entire record. To the extent that in my experience when we asked for a record sometimes it's the central office record and it might be the classroom teacher's record. Other— but we know that guidance counselors have records, nurses have records, psychologists have records. There are many repositories of records in a district. **So, if you're reviewing records there's always a question whether you're really seeing the entire record.**

The Other problem that can occur with records is there can be just record-keeping difficulties or errors or documents sometimes get purged or destroyed for a number of reasons from year to year. **The review of records may not necessarily give you what's happening for the child substantively. So, unless you observe what's happening and conduct staff interviews and administrative interviews – the record gives you a beginning place, it gives you a start, but it cannot substantively tell you whether a child is receiving an appropriate education or not without further exploration.**

Q And in your however many years as a hearing officer, have you seen cases where a child did receive a free and appropriate education despite the fact that the records presented at the hearing don't necessarily reflect all the services that were given to the child?

A Numerous times. Numerous times.
....

¹² Klein's prior testimony was during the public hearing held on June 3, 2010, before the Pocono Mountain School District Board of Directors. (GCS Ex. 125.)

Q ... If you had reviewed the same records and noticed that something was missing could you draw the conclusion that a child had not received a free and appropriate education?

A It's impossible to draw that conclusion.
....

Q ... In describing your opinion about the general Special Education program and the overall review of it, what I took your testimony to mean,...is that,...looking at the documents is one thing,...but, ideally, you may want to interview folks, you may want to observe classrooms, you may want to look at a number of different variables before you render an opinion or conclusion. Is that basically the gist of your testimony?

A Well, I think it's the gist of it, but I'm not negating the value of document review. It's a starting point, **but a determination of whether a child received substantive benefit from their program cannot be determined just on document review, there are further inquiries that need to be held.**

(GCS Ex. 125, Bates stamped, pp. 18019-18121, 018132 (*emphasis supplied*); *see also* N.T. 5/23/17 at 10-14.)

85. Despite his prior testimony and based on only a record review, Klein concluded that eleven (11) of the twenty-five (25) students whose records he reviewed, Students A-K, were denied a FAPE. (SD Ex. 27.)

86. During the 2014-2015 school year, approximately seventy-two (72) of Gillingham's then current students were eligible for special education and related services, or covered under Section 504 and twenty-five (25) of those were residents of the School District. (N.T. 107, 1172-1173.)

87. Gillingham retained Brenda Fishman (hereinafter "Fishman"), a former special education supervisor for the Philadelphia School District, a former peer monitor within the PDE Bureau of Special Education and an expert in special education, as a consultant regarding the special education services it provided. (N.T. 1590-1601, GCS Ex. 99.)

88. Fishman credibly testified that in her expert opinion and based on her professional experience, a determination of whether a student was denied a FAPE cannot be made solely upon a review of records. (N.T. 1617-1618, 1639.)

89. Fishman reviewed the report prepared by Klein and all of the special education records for the students listed in the report, Students A-K, and testified that in her expert opinion it could not be determined, based only on the records, if any of the students had experienced any harm that would amount to the denial of a FAPE. (N.T. 1614, 1617-1640.)

90. Fishman testified that, while procedural errors could result in the denial of a FAPE, based on her review of the records in this case and in her expert opinion, the next step would need to be further inquiry to determine what actually happened before a conclusion could be reached that a child was denied a FAPE. (N.T. 1614, 1617-1640.)

91. In the 2013-2014 and 2014-2015 school years, Gillingham underwent extensive auditing by PDE, known as cyclical monitoring, which occurs every three (3) years. (N.T. 1246.)

92. PDE's cyclical monitoring includes, *inter alia*, on-site monitoring by a PDE team, a comprehensive review of Gillingham's special education records, teacher interviews, classroom observations of special education students, parent surveys, development of action plans to improve services, and teacher and staff professional training. (N.T. 1246-1252; GCS Ex. 66.)

93. On July 30, 2015, PDE issued its Report in which it found Gillingham in compliance with its special education obligations under the law, and declared Gillingham "clear of errors." (N.T. 1252, 1613; GCS Ex. 66.)

94. On September 1, 2015, the Deputy Secretary of PDE sent Gillingham a letter in which he stated that Gillingham "meets the requirements and purposes of the IDEA" and "meets

requirements of Part B of the IDEA.” Further, he commended Gillingham for the “hard work being done to deliver high quality programs to students with disabilities.”¹³ (GCS Ex. 68.)

95. One year prior Gillingham had received a similar letter dated September 23, 2014 from the Acting Deputy Secretary stating that Gillingham “meets requirements of Part B of the IDEA” and commended Gillingham for the programs it was delivering to students with disabilities. (GCS Ex. 69.)

96. On September 9, 2014, the U.S. Department of Education (hereinafter “USDOE”) issued a Charter Schools Program Monitoring Report to Gillingham in which it noted the challenging relationship Gillingham had with the PASD since the School District did not seem to be “in mutual agreement” on Gillingham’s educational goals. (GCS Ex. 70, and Bates stamped, p. 12612.)

97. The USDOE Report also noted that there were no areas of concern with regard to Gillingham’s compliance with Section 504 of the Rehabilitation Act of 1973 and Part B of the IDEA. (GCS Ex. 70, Bates stamped, p. 12616-12617.)

Disenrolling a Student Who was Hospitalized and/or Placed in Inpatient Rehabilitative Facilities

98. Student K attended Gillingham in the 2014-2015 school year. (GCS Ex. 124.)

99. Following a Reevaluation Report dated January 16, 2015, Student K was found eligible for special education. (GCS Ex. 124.)

100. At some point, Student K possessed marijuana at Gillingham; and as a result, subsequently, Student K was placed at Schuylkill Learning Academy (hereinafter “SLA”) for an

¹³ “Meets requirements” is the highest category of achievement. The remaining categories are “needs assistance,” “needs intervention” or “needs substantial intervention.” (GCS Ex. 68.)

interim forty-five (45) day alternative placement, with parent approval, as permitted by law. (N.T. 406-407; GCS Ex. 124, Bates stamped pp. 17806-17810.)

101. During the interim alternative placement at SLA, on May 5, 2015, Student K's family moved him to the Gaudenzia Chamber Hills Adolescent Program (hereinafter "Gaudenzia"), an inpatient drug and alcohol facility located in the Central Dauphin School District. (N.T. 408; GCS Ex. 124.)

102. On May 28, 2015, while Student K was still in Gaudenzia, Barbara DeFont, Assistant Director of Attendance for the School District, directed Gillingham to "remove [Student K] from your roles (sic) using the last day of 5/6/15." (GCS Ex. 84, Bates stamped, p. 14480.)

103. Student K was disenrolled from Gillingham because of the School District's mandate to Gillingham. (GCS Ex. 84, Bates stamped, p. 14480.)

Health Care Coverage for its Employees

104. The CSL requires that every employee of a charter school "be provided the same health care benefits as the employee would be provided if he or she were an employee of the local district." 24 P.S. §17-1724-A(d).

105. At or near the commencement of Gillingham's charter in 2011, Robert McIntyre (hereinafter "McIntyre"), the health insurance broker for Gillingham, contacted representatives of the School District to find out about the School District's health care coverage in order to get a baseline template concerning what health care benefits were provided to its employees by the School District so that Gillingham could provide the same health care benefits. (N.T. 2036-2039.)

106. The School District's representative put McIntyre in touch with the School District's broker who was handling the School District's benefits through a healthcare consortium to which the School District belonged. (N.T. 2037-2038.)

107. McIntyre had communications with the representatives of the School District's healthcare consortium, and he received from them a copy of the description of the dental plan and three (3) medical plans offered by the School District to its employees. (N.T. 2037-2039; GCS Exs. 86 and 126.)

108. McIntyre then went out onto the open market to search for a health insurance plan for Gillingham that "would match up with those offered by the School District." (N.T. 2039.)

109. Based on its number of employees, Gillingham was required to obtain a "small group" health insurance plan, *i.e.*, a plan for employers with less than 50 employees, from one of the health insurance carriers providing insurance in the geographical area where Gillingham is located. (N.T. 2039-2040; GCS Exs. 87 and 88.)

110. Both the market and the size of the employer are relevant in determining what health care plans are available to an employer. (N.T. 2040.)

111. The School District never sent written correspondence to Gillingham that it could or had to join the School District's health insurance plan. (N.T. 1060.)

112. During Gillingham's five-year charter term, the School District belonged to the healthcare consortium with approximately four (4) or more other school districts, but no charter schools were members. (N.T. 1055-1056, 2263-2264; GCS Ex. 126.)

113. At the commencement of Gillingham's charter, the School District, through the aforementioned healthcare consortium, provided to its employees three (3) insurance plans: (1) a traditional indemnity plan through Capital Blue Cross offered by the health care consortium; (2) a PPO Option 1 Plan through Capital Blue Cross; and (3) a PPO Alternative Option 1 Plan. (N.T. 971-975, 2039-2040, 2245-2246, 2271-2272; SD Exs. 40, 80; GCS Exs. 86, 126.)

114. Gillingham modeled its initial Capital Blue Cross and its current Geisinger Health Insurance Plans after the PPO Alternative Option 1 Plan provided to McIntyre by the School District in July 2011. (N.T. 2045-2046, 2055-2057; GCS Ex. 94.)

115. The healthcare benefits provided by Gillingham to its employees are the same classes of coverage as in the School District's plan. In particular, Gillingham's healthcare plan provides coverage for singles and families, primary care, OB/GYN care, specialists, physical therapy/occupational therapy, mental health care, radiology, MRI/CAT/PET scans, lab/pathology, inpatient hospitalization, outpatient surgery/care, emergency room, urgent care and prescription drugs (generic, brand, nonformulary and mail order), as does the School District's plan. (N.T. 1039-1040, 2048-2049, 2259-2260; GCS Exs. 85- 94.)

116. The term "benefits" is defined as "health care items or services covered under a health insurance plan." (Official Notice – [ww.healthcare.gov/glossary/benefits/.](http://www.healthcare.gov/glossary/benefits/))

117. Effective January 1, 2016, the School District's Traditional Indemnity Plan was eliminated, and all School District employees were offered only the PPO Option 1 Plan. (N.T. 972.)

118. While deductibles and some of the co-pays and costs of Gillingham's healthcare plan may be higher than the School District's, Gillingham provides lower payroll deductions (approximately \$390 less per year) to its employees than does the healthcare plan now offered by the School District to its employees. (N.T. 2049-2050, 2259; SD Ex. 41; GCS Exs. 85.)

Academic Performance Standards

119. Gillingham's educational program is based upon the Charlotte Mason philosophy and is accredited through the Charlotte Mason Institute. It focuses on relational education or the relationship between students and ideas, people, and the past and present. It includes small class

sizes, nature studies, picture studies, composer studies, and beginning in Kindergarten required instruction in a foreign language and a musical instrument. It focuses on the student and teacher co-learning relationship, the use of natural consequences, the habits of attention and the need to think about ideas not just facts. (N.T. 1156-1162; GCS Ex. 1, Bates stamped, pp. 6382-6383, 6400-6402; GCS Ex. 106.)

120. In the 2015-2016 school year, Gillingham served approximately 240 students, only 77 of whom or thirty-two percent (32%), resided within the PASD. (N.T. 1170-1171, 2172.)

121. Gillingham's remaining student population, approximately two-thirds or sixty-eight percent (68%), did not reside in PASD but resided in approximately 10-12 other school districts including, but not limited to Hazleton Area School District, Mahanoy Area School District, Minersville Area School District, North Schuylkill School District, Panther Valley School District, Pine Grove Area School District, Saint Clair Area School District, Shenandoah Valley School District and Tri-Valley School District. (N.T. 1948; GCS Ex. 49.)

122. In 2011-2012, the School District had students in high school, and therefore high school test scores were included and calculated in the School District's PSSA results while Gillingham did not have students in high school; and thus no high school test scores were included and calculated in Gillingham's PSSA results. (N.T. 565-566, 1170; SD Exs. 62, 63.)

123. In the 2011-2012 school year, 27% of the students at Gillingham who took the PSSA had an IEP while only 17% of students at the School District (10% less) who took the PSSA had an IEP. (GCS Ex. 21.)

124. The percentage of special education students at Gillingham who had an IEP is not reflected in the standardized test results or report for the 2011-2012 school year. (N.T. 650.)

125. In the 2011-2012 school year, Gillingham had a special education student percentage rate of 21.1% which was approximately 6% higher than the state average of 15.2%. (GCS Ex. 17.)

126. Students with IEPs do not score as well on standardized tests as students without IEPs. (N.T. 645.)

127. In the first year that Gillingham operated, 2011-2012, Adequate Yearly Progress (hereinafter “AYP”) was the statewide standardized test accountability system used in Pennsylvania as required by the NCLB; however, after the 2011-2012 school year, AYP was no longer used by PDE to measure student performance. (N.T. 1163-1164, 1894-1895.)

128. From the 2011-2012 school year through the 2015-2016 school year, the standardized test calculations and statewide accountability systems in place in Pennsylvania changed. (N.T. 641-643, 1894-1900.)

129. Beginning with the 2012-2013 school year, Pennsylvania received a waiver from USDOE and began using the School Performance Profile (hereinafter “SPP”) to measure student performance, replacing AYP. (N.T. 1895-1896.)

130. The SPP provides an academic performance score on a scale from zero to 100 for all public schools. The SPP score is derived from a formula that takes a variety of data points into consideration in measuring a school’s academic performance including test scores on the PSSA and Keystone Exams; academic growth through the Pennsylvania Value Added Assessment System (hereinafter “PVAAS”) which accounted for forty percent (40%) of the SPP score; attendance; graduation rates and other academic indicators. (N.T. 1897-1898; Official Notice – www.education.pa.gov/Documents/K-12/AssessmentandAccountability/SchoolPerformanceProfile.)

131. One purpose of providing SPP scores was to insure that students at schools with lower SPP scores would receive necessary supports and services to help improve performance. (N.T. 1963-1964.)

132. The PVAAS is a statistical analysis of the state assessment data, PSSA or Keystone exam scores, which provides progress data, *i.e.*, how a particular group of students is progressing as they move through the educational system, to add to the achievement data, and it utilizes the Average Growth Index (hereinafter “AGI”) to assess growth at different levels.¹⁴ (Official Notice - <https://pvaas.sas.com>.)

133. PVAAS measures academic growth of a group of students, *i.e.*, how much a school has influenced the group’s test scores, by measuring the same group of students from one year to the next. (N.T. 1903.)

134. Even though PVAAS constituted 40% of a school’s SPP score during the 2012-2013 school year, a school could ask to have its PVAAS scores excluded from its SPP. (N.T. 1897-1898, 1902.)

135. In the 2012-2013 school year, some schools did have their PVAAS included in their SPP score, but some did not; however, in the 2013-2014 school year, PVAAS scores were included in every schools’ SPP score. Therefore, the underlying data upon which the calculation of a school’s 2012-2013 year SPP was based varied from school to school within the 2012-2013 year depending on whether or not a school utilized its PVAAS as part of the SPP; and the underlying data varied from the 2012-2013 to 2013-2014 as well rendering unreliable any comparison of test scores between different schools within the 2012-2013 school year or any comparison of test scores between those two school years. (N.T. 1895, 1897-1898.)

¹⁴ The AGI is a value based on the average growth across grade levels, reflecting growth over time. Official Notice – [www.education.pa.gov/Documents/K-12/AssessmentandAccountability/PVAAS/Additional Resources](http://www.education.pa.gov/Documents/K-12/AssessmentandAccountability/PVAAS/AdditionalResources).

136. The PSSAs were changed in the 2014-2015 school year. As a result, the calculation of the SPP in 2014-2015 varied among schools as well as from the previous 2013-2014 school year making any comparison between school years unreliable. (N.T. 653-654, 657, 1900.)

137. The PVAAS is used to calculate the AGI in order to determine if a student is meeting projected levels of academic growth. (N.T. 1938-1939.)

138. AGI scores varied depending upon which information PDE used for a student from prior school years and what standardized tests were actually administered to the student in prior years. (N.T. 1939-1941.)

139. A negative AGI does not mean that students are experiencing no growth or losing prior growth; rather, it means that students are experiencing less growth than was projected by the formula. (N.T. 1938-1939.)

140. In the 2012-2013 school year, Keystone exams replaced the PSSA in Grade 11; and the Keystone exams were to be more directly aligned with the specific course being tested, e.g., Algebra I, Biology, Literature. (N.T. 577-578, 1927.)

141. In the 2012-2013 school year, Gillingham had no students in 11th grade so no Keystone exams could have been calculated for Gillingham for that year. (N.T. 1955-1956.)

142. During the first two years of the administration of the Keystone exams, 2012-2013 and 2013-2014, eleventh (11th) graders took the Keystone exams regardless of when they took the underlying course, e.g., Algebra I, Biology, etc., which could have been a year or two before taking the Keystone exam. (N.T. 1926-1928.)

143. Starting in 2014-2015, students were permitted to take the Keystone exam for a specific course, e.g., Algebra I, Biology, etc., upon completion of that course; however, the score

for that Keystone exam would not be counted in the student's performance until the student was in Grade 11. Thus, a Keystone exam score for a student in Grade 11 at GCS may reflect results for a course that the student took at a school other than at Gillingham. (N.T. 577-580, 1928.)

144. In the 2012-2013 school year, the percentage of special education students with IEPs at Gillingham who took the required PSSA was 29%, while the percentage at the School District was only 16% (or 13% lower than Gillingham). (GCS Ex. 21.)

145. In the 2013-2014 school year, the percentage of special education students with IEPs at Gillingham who took the required PSSA was 30%, while the percentage at the School District was only 17% (or 13% lower than Gillingham). (GCS Ex. 21.)

146. In the 2014-2015 school year, the percentage of special education students with IEPs at Gillingham who took the required PSSA was 34%, while only 18% of the students at the School District who took the state standardized tests had an IEP (or 16% lower than Gillingham). (GCS Ex. 21.)

147. In the 2013-2014 school year, 67.7% of Gillingham's student body was economically disadvantaged. (N.T. 1924; GCS Ex. 28.)

148. In the 2013-2014 school year, Pennsylvania stopped utilizing statewide targets and had school specific targets that year. (N.T. 643.)

149. In 2014-2015, approximately seven (7) of Gillingham's students took the Keystone exam in Algebra, approximately ten (10) took the Keystone exam in English Literature and approximately eleven (11) took the Keystone exam in Biology. (N.T. 1929-1930.)

150. In 2014-2015, over 100 School District students took the Keystone exams in Algebra, in English Literature and in Biology. (N.T. 1930-1931.)

151. The impact that each test score of Gillingham’s students had on Gillingham’s final percentages is significantly higher than the impact of any individual score for students of the School District. (N.T. 645.)

152. As with any system of measurement, there are measurement errors in PVAAS that increase as the sample size decreases. (N.T. 660-661, 1902-1904.)

153. The error rates in the PVAAS for Gillingham would be higher than those for the School District. (N.T. 660-661; 1902-1904.)

154. Gillingham, with approximately 175 students enrolled in 2011-2012, 221 in 2012-2013, and 195 in 2013-2014, had significantly fewer students than the School District, with approximately 1,480 School District students assessed in 2011-2012, 1,456 in 2012-2013, and 1,442 in 2013-2014. (GCS Ex. 28, Bates stamped, p. 10106; GCS Ex. 41, Bates stamped, p. 10267; GCS Ex. 42, Bates stamped, p. 10323; GCS Ex. 43, Bates stamped, p. 10373.)

155. The School District has more students in each of the subcategories identified on the state standardized test score results than Gillingham. (N.T. 661.)

156. Demographics, including the number of special education students and the smaller student body of Gillingham, can have a significant impact on standardized test score results. (N.T. 644-645; GCS Ex. 21.)

157. Stephanie Ziegmont (hereinafter “Ziegmont”), Director of Curriculum and Instruction at the School District, admitted that she had not taken into consideration that most of the children attending Gillingham do not reside in PASD when she analyzed Gillingham scores and compared them to the School District’s scores. (N.T. 650.)

158. Ziegmont admitted that she had not taken into consideration any of Gillingham's demographics, including the number of IEP students, when analyzing and comparing Gillingham to PASD because she has no knowledge of Gillingham's demographics. (N.T. 669-670.)

159. Without taking into account factors such as demographics, the number of IEP students and other factors, Ziegmont admitted that there cannot be a valid comparison of test scores between school entities. (N.T. 645.)

160. Only about one-third (1/3) of Gillingham's total student body, approximately 77 out of 240 students, reside in the PASD. (N.T. 2172.)

161. Gillingham's performance in Pennsylvania's SPP accountability system changed due to several factors, including changes in the statewide standardized tests and accountability systems and the various changes in the methods used by PDE to calculate the SPP score over the course of Gillingham's five-year charter. (N.T. 565, 643, 653, 654, 1894-1898, 1900, 1962-1963.)

162. Given the small number of students tested on Keystone exams at Gillingham (less than eleven (11) students taking a Keystone exam), the failure to include PSSA scores for the 2014-2015 school year would have had a significant impact on the test outcomes, the error rates for the PVAAS, and therefore, on Gillingham's SPP score as compared to the School District (with over 100 students taking a Keystone exam). (N.T. 653-654, 657, 660, 661, 1900.)

163. The following is a chart comparing the SPP building scores for Gillingham to the three (3) schools within the PASD (as opposed to the average for the entire PASD), as well as the SPP building scores for some schools in other sending school districts:

SPP BUILDING SCORES FOR GCS AND SOME SENDING SCHOOLS

| | 2012-2013 | 2013-2014 | 2014-2015 | 2015-2016 ¹⁵ |
|-------------------------|-------------|-------------|-------------|-------------------------|
| Gillingham CS | 67.3 | 60.9 | 48.4 | 43.7 |
| PASD-Clarke Elementary | 74.5 | 80.7 | N/A* | 67.4 |
| PASD-Lengel MS | 63.2 | 69.7 | N/A* | 51.0 |
| PASD-Pottsville Area HS | 72.0 | 78.3 | 73.2 | 74.4 |
| Shenandoah Valley JSHS | 59.1 | 54.7 | 50.0 | 48.2 |
| Hazelton El/MS | 61.7 | 56.5 | N/A | 43.7 |
| Hazelton Area HS | 58.2 | 56.9 | 54.7 | 59.6 |
| West Hazelton El/MS | 66.1 | 65.3 | N/A | 53.8 |
| Mahanoy Area HS | 58.9 | 61.9 | 56.1 | 69.6 |

¹⁵ CAB recognizes that the test or SPP scores for the 2015-2016 school year were not part of, nor form, the basis of nonrenewal in the School Board's Nonrenewal Resolution. However, CAB may take Official Notice of them. 24 P.S. §17-1729-A.

| | | | | |
|-----------------|------|------|-----|------|
| Mahanoy Area MS | 78.6 | 70.3 | N/A | 57.4 |
|-----------------|------|------|-----|------|

(SD Exs. 64, 65, 66, 67, 68; Official Notice – <http://paschoolperformance.org>.)

*Any school that did not have Keystone exam scores in 2014-2015 did not receive a SPP score because the new PSSA exam scores were not included in the SPP calculation that school year. (N.T. 1900.)

164. While the SPP score for Pottsville Area High School remained relatively level between the 2013-2014 and 2015-2016 school years, the SPP score for the School District’s Clarke Elementary dropped 13.3 points and the SPP Score for the School District’s Lengel Middle School dropped 18.7 points, 1.5 points more than Gillingham’s SPP score. (Official Notice – <http://paschoolperformance.org>.)

165. Gillingham’s SPP scores, when compared to schools from some other sending school districts are higher than or equal to the SPP scores of those other schools. SPP scores for some of those schools have also dropped significantly between the 2013-2014 and 2015-2016 school years, *e.g.*, Hazelton El/MS, West Hazelton El/MS, and Mahanoy Area MS. (Official Notice – <http://paschoolperformance.org>.)

166. The following is a chart for 2014-2015 showing that GCS’ AGI was higher than many of its sending school districts, including PASD in PSSA Reading/ELA:

**AGI FOR THE 2014-2015 SCHOOL YEAR FOR GILLINGHAM AND
SOME SENDING SCHOOL DISTRICTS**

| | | |
|----------------------------|--------------|----------------------|
| Keystone Literature | -0.93 | Gillingham CS |
| | -0.93 | North Schuylkill SD |
| | -2.33 | Minersville Area SD |
| | -3.01 | Tamaqua Area SD |
| | -3.67 | Hazelton Area SD |
| | -4.29 | Mahanoy Area SD |

| | | |
|---------------------------|--------------|--------------------------|
| Keystone Algebra I | -1.92 | Gillingham CS |
| | -2.11 | Panther Valley SD |
| | -2.19 | Tamaqua Area SD |
| | -3.34 | Schuylkill Haven Area SD |
| | -3.84 | Mahanoy Area SD |
| | -7.38 | Minersville Area SD |

| | | |
|-------------------------|--------------|---------------------------|
| PSSA Reading/ELA | -1.51 | Gillingham CS |
| | -1.64 | Hazelton Area SD |
| | -2.26 | Panther Valley SD |
| | -2.53 | Tri-Valley SD |
| | -3.05 | Schuylkill Haven Area SD |
| | -4.08 | North Schuylkill SD |
| | -4.25 | Shenandoah Valley SD |
| | -4.86 | Pottsville Area SD |
| | -5.33 | Mahanoy Area SD |

| | | |
|------------------|--------------|----------------------|
| PSSA Math | -2.11 | Gillingham CS |
| | -4.43 | Blue Mountain SD |
| | -5.20 | Mahanoy Area SD |
| | -5.63 | North Schuylkill SD |
| | -5.64 | Tri-Valley SD |
| | -5.68 | Panther Valley SD |
| | -5.76 | Shenandoah Valley SD |

(SD Exs. 73, 74, 75, 76.)

167. The parent and student testimony provided at the hearing was very positive about the learning environment, support, experience and education that students received. The following summarizes some of the testimony of students and parents regarding the education at GCS:

- Parents of a special education student testified they are very satisfied with the services their child is receiving at Gillingham. (*See* N.T. 1294-1319.)
- Two (2) tenth grade students, who were very well-spoken, explained some of their courses and the teaching methods utilized at Gillingham. Both students love learning and want to further their education as a result of attending Gillingham, with one being dual-enrolled in a local community college at the time of the hearing. (*See* N.T. 1796-1827.)
- A well-spoken 11-year-old 5th grade student explained the methodology of narration as a teaching tool to help students remember what they read, explained nature study and its combination with art, explained the study of birds and fossils at Hawk mountain, and discussed Shakespeare and William Blake who are her favorite poets. She testified that she liked to learn at Gillingham because of its relaxed atmosphere. (*See* N.T. 1828-1838.)
- A well-spoken 8th grade student who has attended Gillingham for five (5) years testified about the courses she takes and why she likes attending Gillingham. (*See* N.T. 1850-1857.)
- A parent of a 7th grade student who has an IEP testified about how happy she is having her daughter at Gillingham compared to when she was in a traditional

public school. She testified that at Gillingham her daughter is flourishing, personally and academically, receives one-on-one instruction, likes the atmosphere and the student-teacher relationships. She testified that her daughter comes home smiling instead of crying as she used to do when she was in a traditional public school. (*See* N.T. 2101-2102.)

- A student with an IEP testified that he is very happy with the educational program he is receiving at Gillingham and is very happy to go to school there. (*See* N.T. 2104-2113.)
- A parent testified about why the Charlotte Mason approach is so beneficial to her child in that it teaches life skills, leadership and conflict resolution. She testified that Gillingham is a perfect fit for her daughter, and she would have to move if the school were to close because she would not send her daughter back to a traditional public school. (*See* N.T. 2112-2113.)
- A 12th grade student, who has an IEP, stated that he was not able to succeed in a traditional public school; however, he has progressed through the years at Gillingham. He testified that he is happy with the accommodations he receives and is doing extremely well. He testified that Gillingham is good for students who struggle in the regular public school arena and is good at educating kids who are “not quite main stream.” (*See* N.T. 2116-2120.)

168. The post-hearing written comments received by the Hearing Officer from members of the public were positive and overwhelmingly urged the Hearing Officer to renew Gillingham’s Charter for the sake of the students who attend Gillingham and the parents who

found a positive alternative choice for educating their children. (*See* HO Ex. No. 9 for all public comment.)

CONCLUSIONS OF LAW

1. CAB has jurisdiction of this matter. 24 P.S. §17-1729-A.
2. The CSL governs the charter application/approval process, the revocation/renewal of charters and the operation of charter schools in Pennsylvania. 24 P.S. §17-1701-A, *et seq.*
3. Gillingham is a charter school operating within the Pottsville Area School District. 24 P.S. §17-1701-A *et seq.*
4. 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, to encourage the use of different and innovative teaching methods and to hold charter schools accountable for meeting measurable academic standards. 24 P.S. §17-1701-A.
5. During the term of the charter or at the end of the term of a charter, the local board of school directors of a school district may choose to revoke or not to renew the charter of a charter school based on any of the following:
 - (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.

24 P.S. § 17-1729-A(a).

6. The local board of school directors of a school district must give notice of nonrenewal/revocation of the charter to the governing board of the charter school, which notice must state the grounds for such action with reasonable specificity and must give reasonable notice of the date on which a public hearing concerning the written nonrenewal/revocation will be held. 24 P.S. §17-1729-A(c).

7. The local board of school directors of a school district must conduct a hearing, present evidence in support of the grounds for nonrenewal/revocation stated in its notice and give the charter school reasonable opportunity to offer testimony before taking final action. 24 P.S. §17-1729-A(c).

8. The local board of school directors of a school district must take formal action regarding the nonrenewal/revocation of a charter school at a public meeting pursuant to the act of July 3, 1986 (P.L. 388, No. 84), known as the “Sunshine Act,” after the public has had thirty (30) days to submit comments to the board. All proceedings of the local board pursuant to this subsection are subject to the Local Agency Law, 2 Pa.C.S. Ch.5 Subchapter B. 24 P.S. §17-1729-A(c).

9. The School Board complied with all the procedural requirements of the CSL set forth at Section 17-1729-A(c). 24 P.S. §17-1729-A(c); Findings of Fact ¶¶ 8-24.

10. In determining whether the nonrenewal/revocation of a charter was appropriate, CAB shall review the record made in the proceeding below and may supplement the record at its discretion with information that was previously unavailable. 24 P.S. §17-1729-A(d).

11. In addition to the record, 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).

12. Because the statutory standards for CAB's review of charter nonrenewals are the same as those for the review of charter denials, CAB shall make a *de novo* review of the school board's determination not to renew Gillingham's Charter. *Compare* 24 P.S. §17-1729-A(c) *with* 24 P.S. §17-1717-A(i)(6); *West Chester, supra*, 812 A.2d at 1180.

13. In determining whether a school board's nonrenewal/revocation of a charter is appropriate, CAB shall give due consideration to the findings of the local board of school directors and specifically articulate reasons for agreeing or disagreeing with the board. 24 P.S. §17-1729-A(d); *see also West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172, 1180 (Pa. 2002).

14. The CSL places the burden of proof on the local board of school directors to present substantial evidence to support its reason(s) for nonrenewal of a charter, *i.e.*, evidence of a significant, material or fundamental violation. 24 P.S. §17-1729-A(c); *Renaissance Charter School*, CAB Docket No. 2008-07, p. 3, n.3.

15. The School Board did not meet its statutory obligation of presenting sufficient evidence to substantiate its reasons for nonrenewal of Gillingham's charter under the CSL. 24 P.S. §17-1729-A(c); Findings of Fact Nos. 1-168.

16. The evidence of record fails to establish that Gillingham violated any provision of law from which it has not been exempted. 24 P.S. §17-1729-A(a)(5); Findings of Fact Nos. 33-103.

17. The record fails to establish that Gillingham violated provisions of the CSL with regard to the provision of healthcare coverage to its employees. 24 P.S. §17-1729-A(a)(4); Findings of Fact Nos. 104-118.

18. The record fails to establish that Gillingham failed 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 failed to meet any performance standard set forth in its written charter. 24 P.S. §§17-1729-A(a)(2), 17-1729-A(a)(1); Findings of Fact Nos. 119-168.

19. The record fails to establish that Gillingham committed one or more material violations of any of the conditions, standards or procedures contained in the written charter. 24 P.S. §17-1729-A(a)(1); Findings of Fact Nos. 38-43, 64-103, 119-168.

20. Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board and considering community support for the charter school, CAB finds that the evidence of record does not support the School Board's denial of Gillingham's request to renew its charter. Findings of Fact Nos. 33-168; 24 P.S. §17-1729-A.

DISCUSSION

A. Standard of Review

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* 24 P.S. §17-1702-A. In addition, 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). 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).

Section 1729-A(a) of the CSL sets forth the causes for nonrenewal of a charter by a school district. 24 P.S. §17-1729-A(a). Those causes include:

- (1) One or more material violations of any conditions, standards or procedures contained in the written charter.
- (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.
- (3) Failure to meet generally accepted standards of fiscal management or audit requirements.
- (4) Violation of provisions of [the Charter School Law].
- (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.

24 P.S. §17-1729-A(a). In order to legally nonrenew a charter, a school district must prove that a charter school violated at least one of these provisions.

CAB applies a *de novo* standard of review when entertaining appeals from the denial of a charter school application under Section 1717-A(i)(6). 24 P.S. §1717-A(i)(6); *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172 (Pa. 2002). The CSL requires that CAB “give ‘appropriate consideration’ to the findings of the local school board, while making an independent determination as to the merits of the charter school application.” *West Chester*, 812 A.2d at 1180. Since the standard of review for appeal of the nonrenewal or revocation of a charter school’s charter is the same as review of a denial of a charter school’s

application, *cf.* 24 P.S. §17-1729-A(d) with 24 P.S. §1717-A(i)(6), the review in this appeal is also a *de novo* review.

CAB is required to independently review the findings of the local school board for nonrenewal or revocation of a charter in light of the record while giving “due consideration” to them, and then specifically articulate its reasons for agreeing or disagreeing with those findings. *See* 24 P.S. §17-1729-A(d). In other words, after review, CAB has authority either to adopt or to substitute its own findings and independent judgment for that of the local school board. *West Chester Area School District v. Collegium Charter School*, 760 A.2d 452, 461 (Pa. Cmwlth. 2000), *aff’d*, 812 A.2d 1172 (Pa. 2002).

B. Gillingham Complied with Provisions of the Law from Which It Has Not Been Exempted.

With regard to Section 1729-A(a)(5) of the CSL, the Commonwealth Court has stated:

Section 1729-A(a)(5) of the Charter School Law does not provide that a charter must be revoked or *cannot be renewed* if it is established that a charter school is in violation of the law. It only provides that ‘the local board of school directors may choose to revoke or not to renew the charter’ if it finds that a charter school is in ‘[v]iolation of any provision of law from which the charter school has not been exempted ...’

School District of the City of York v. Lincoln Charter School, 889 A.2d 1286, 1288 (Pa. Cmwlth. 2006)(*emphasis supplied*). The School Board’s decision is not binding on CAB which is required to apply a *de novo* review. *Ibid.* As previously stated, CAB is required to independently review the findings of the local school board for nonrenewal of a charter in light of the record while giving “due consideration” to them, and then to specifically articulate its reasons for agreeing or disagreeing with those findings. 24 P.S. §17-1729-A(d),¹⁶ *see also*

¹⁶ Commonwealth Court stated that CAB “has ‘independent judgment’ to determine whether the violation of law is sufficiently serious to cause the non-renewal of [a school’s] charter, only constrained by the requirement to articulate rational reasons why it did not follow a school district’s decision.” *Lincoln Charter School*, 889 A.2d at 1288.

Truebright Science Academy Charter School v. School District of Philadelphia and School Reform Commission, CAB Docket No. 2013-11, at 15-16.

1. Gillingham Obtained Required I-9 Employment Eligibility Verification Forms.

The School District argues on appeal that Gillingham’s FY 2014 audit revealed that ten (10) of the Charter School’s fifteen (15) personnel files did not contain a completed I-9 Employment Eligibility Verification form, as required by federal law, justifying nonrenewal of Gillingham’s charter.¹⁷ The School District is continuing to pursue this ground on appeal, *see* School District’s 5/19/17 Brief, pp. 12, 22-23, despite the fact that the School District’s Hearing Officer dismissed this ground as not being sustained because Gillingham subsequently found every missing or incomplete I-9 form in the personnel files. *See* Hearing Officer Report and Recommendation, pp. 45-46 ¶¶ 305-309 and p. 62, n. 7. The School Board adopted the Hearing Officer’s Report and Recommendation without change including the conclusion that this charge was not proven. On appeal the School District contends that Gillingham failed to comply with federal law with respect to the way it maintained the I-9 Employment Eligibility Verification forms and thus, its charter must not be renewed. CAB rejects this reasoning.

The evidence of record establishes that after Gillingham was notified by the auditor of the missing/incomplete I-9 forms, Gillingham’s Director of Organizational Development Rachel Bensinger, reviewed the personal files of those ten (10) employees and located all of the missing and/or completed I-9 forms in those files.¹⁸ Gillingham argues that since all of the I-9 forms were subsequently located, this ground cannot constitute a basis for nonrenewal of the charter.¹⁹

¹⁷ CAB rejects the finding by the School Board that Nicolle Hutchinson, Gillingham’s CEO, can establish what Gillingham’s obligations are under federal or state law. *See* Hearing Officer Report and Recommendation, p. 46 ¶ 306. Hutchinson was a fact witness and not competent to render a legal opinion/conclusion.

¹⁸ Bensinger testified that the employee personnel files were very disorganized when the auditor conducted its review and that after being hired subsequent to the audit, she reviewed the personnel files, organized them and found the missing/completed documents in them. (N.T. 2129-2142, 2149-2150; GCS Ex. 77.)

¹⁹ Gillingham also contends that the School District’s continued pursuit of this claim reflects the School District’s

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB agrees with Gillingham and the School Board that this ground for nonrenewal of Gillingham's charter was not sustained in light of the subsequent location of all the missing or incomplete I-9 forms. Further, there is no evidence of record that any I-9 forms were missing before or following the FY 2014 audit. This clearly is not an ongoing problem. Bensinger testified that all the required forms were in the personnel files for the 2015-2016 school year. CAB finds that Gillingham complied with the federal law that requires employers to complete and maintain I-9 Employment Eligibility Forms for its employees. The School District has not sustained this ground and it does not support the nonrenewal of Gillingham's charter.

2. Gillingham Obtained Required Child Abuse Clearances and FBI and Criminal History Background Checks.

The School Board voted against renewing Gillingham's charter because its FY 2014 audit revealed that Gillingham failed to have the required child abuse clearances, FBI background checks and criminal history checks in three (3) employee files. *See* School District's Brief, pp. 12, 22-23. The auditor found that three (3) of fifteen (15) employee files did not contain the required child abuse certificates and criminal history background checks, and two (2) of those three (3) employee files did not contain the required FBI background checks.²⁰ However, after being notified of the missing records, Bensinger reviewed the files and found the required checks and clearances for one (1) of the employees, Woodcock. Thus, the evidence of record establishes that Gillingham had clearances and checks for all but two (2) of its employees.

unreasonableness and animosity towards Gillingham.

²⁰ CAB rejects the finding by the School Board that Nicolle Hutchinson, Gillingham's CEO, can establish what Gillingham's obligations are under federal or state law. *See* Hearing Officer Report and Recommendation, p. 45 ¶ 299. Hutchinson was a fact witness and not competent to render a legal opinion/conclusion.

Gillingham does not dispute that criminal history records, FBI background checks and child abuse clearances are required for all employees who have direct contact with children. *See* Gillingham's 4/19/17 Brief, pp. 13-14, *citing* 24 P.S. §§17-1724-A(i) and (j). Further, the charter school is required to maintain copies of those documents in an applicant's file. 22 Pa. Code §8.2. Gillingham argues, however, that under the Public School Code, 24 P.S. §1-111(i)²¹, it is permitted to provisionally employ an individual for a period not to exceed 90 days, while it is waiting to receive his/her background checks and clearances. Therefore, Gillingham contends that the record does not support a finding that Gillingham failed to comply with the law requiring the obtaining of background checks and clearances or that this matter rises to the level of a serious violation requiring nonrenewal of its charter.

²¹ The Public School Code provides in pertinent part:

§1-111 Criminal History of Employes and Prospective Employes; Conviction of Certain Offenses

....

(i) Notwithstanding subsections (b), (c) and (c.1), and subject to the requirements of subsection (j), administrators, ... after March 31, 2007, may employ any applicants on a provisional basis for a single period not to exceed ninety (90) days, ... provided that all of the following conditions are met:

- (1) the applicant has applied for the information required under subsection (b) and, where applicable, under subsection (c) or (c.1) and the applicant provides a copy of the appropriate completed request forms to the administrator;
- (2) the administrator has no knowledge of information pertaining to the applicant which would disqualify him from employment pursuant to subsection (e) or (f.1);
- (3) the applicant swears or affirms in writing that he is not disqualified from employment pursuant to subsection (e) or (f.1);
- (4) if the information obtained pursuant to subsection (b), (c) or (c.1) reveals that the applicant is disqualified from employment pursuant to subsection (e) or (f.1), the applicant shall be suspended and subject to termination proceedings as provided for by law; and
- (5) the administrator requires that the applicant not be permitted to work alone with children and that the applicant work in the immediate vicinity of a permanent employe.

24 P.S. §1-111(i). *See also*, 23 Pa.C.S. §6344 (m), a similar provision which authorizes provisional employment for employees having contact with children, not to exceed 90 days, for employees who have applied for, but have not yet obtained their required background checks.

While failing to obtain the required background checks and clearances for employees is a serious matter and has justified the nonrenewal of a charter in other cases, it does not do so given the particular facts of this case. The record establishes that one of the two employees, Nork, was employed for only one (1) day at Gillingham. The other employee, Beecroft, was employed only from April 20 through June 20, 2014, or less than 60 days. Thus, based on the time frame of employment, the employment would be considered provisional. The record does not contain facts sufficient to determine if all of the other conditions of Section 1-111(i), 24 P.S. §1-111(i), were met with regard to these two employees, *e.g.*, such as a written affirmation from the employee; conversely, there is no evidence of record that this was not in the file or that either of these two employees were permitted to work alone with children or that either had any contact with children without a permanent employee of Gillingham being with them.

In addition, there is no evidence of record that Gillingham failed on other occasions to comply with the law regarding obtaining the required background checks and clearances. This situation appears to be an aberration rather than a pattern of not complying with the law. There is no evidence of record that Gillingham does not take this requirement seriously.²² Rather, the evidence establishes that failing to have background checks and clearances in an employee's file has occurred only once, with two (2) short-term employees, one of whom worked for only one day and the other for less than 60 days. Finally, the evidence of record establishes that as of the 2015-2016 school year, all required FBI background, child abuse and criminal history checks and clearances were on file for all of Gillingham's employees.

²² While Gillingham admitted that its personnel files were disorganized, it hired Bensinger to address this issue. There is no evidence of record that Bensinger has failed to do so. Since there is no evidence of an ongoing problem, Gillingham appears to have corrected any organizational issues it may have had. There certainly is no evidence of a refusal to or a disregard of its obligations to comply with the law.

For the above-stated reasons and after giving due consideration to the findings of the School Board, CAB finds that the child abuse clearances, FBI background and criminal history checks missing from these two employees' files do not rise to the level of a material violation sufficient to justify the nonrenewal of Gillingham's charter based on the specific facts of this case. CAB finds that Gillingham is in compliance with the laws requiring clearances and background checks. CAB, therefore, rejects this ground as a proper basis for the School Board's decision of nonrenewal of Gillingham's charter.

3. Gillingham Complied with the Compulsory Attendance Law and Reported Truancy.

Students attending public schools, including charter schools, are subject to the compulsory attendance law of Pennsylvania. 24 P.S. §13-1327, 24 P.S. §17-1732-A(a). The purpose of the compulsory attendance law is to improve school attendance and deter truancy. 24 P.S. §13-1325. Charter schools must establish an attendance policy which may differ from the child's resident school district's policy but must conform to the provisions of the compulsory attendance law. 24 P.S. §13-1327.2. When a child is truant, *i.e.*, has three (3) or more unexcused absences, the school, or charter school, in which the child is enrolled must notify, in writing, the person in parental relation with the child who resides in the same household as the child. 24 P.S. §§13-1326, 13-1333. If the child continues to be truant, the procedures to be followed by the school are further set forth in the statute which may include offering an attendance improvement conference to the parent/guardian and child or, if the child is habitually truant, referring the child to the county children and youth agency or filing a citation in the office of the appropriate judge. 24 P.S. §§13-1326, 13-1333, 13-1333.1. There is no provision in the Public School Code, 24 P.S. §§1-101, *et seq.*, or specifically the CSL, 24 P.S. §§17-1701-A, *et seq.*, that requires a charter school to report truant students to the student's local school district of

residence. Thus, CAB finds that Gillingham did not violate any law with regard to reporting truancy.

Nevertheless, the School Board voted to deny Gillingham's request for charter renewal on the ground that Gillingham failed to inform the School District when a resident student had accrued three (3) or more days of unexcused absences. The School District contends that this failure violated guidance on this matter issued by PDE in its BEC for Charter Schools justifying the nonrenewal of Gillingham's charter. The BEC provides: "Charter schools must report to the student's school district of residence when a student has accrued 3 or more days of unexcused absences. It is the responsibility of the school district to enforce the compulsory attendance laws in accordance with the Public School Code." SD Ex. 81, p. 2. However, the BEC provides that it "is meant to serve as a **guide** for charter schools, school districts, parents and students." (Official Notice - BEC 24 P.S. §17-1701-A, Charter Schools, issued October 1, 2004, p. 1. (*Emphasis supplied.*)) PDE states that its BECs provide the Department's "guidance on the implementation of law, regulation and policy." (Official Notice – www.education.pa.gov/Pages/CodesandRegulations/Basic-Education-Circulars.aspx#tab-1.)

Gillingham contends that since there is no state or federal law which requires Gillingham to report trancies to the local school district of a student's residence, failing to do so cannot justify the nonrenewal of its charter. In addition, Gillingham argues that it has consistently complied with the compulsory attendance law by taking action to improve school attendance and deter truancy, as evidenced by the substantial number of letters sent to parents of truant children that the county found in the record. CAB agrees. The evidence of record establishes that since its inception, Gillingham has been following the compulsory attendance law utilizing for that purpose Schuylkill County's Truancy Rules. The steps taken by Gillingham when a student was

truant, as established in the record, were in accord with the compulsory attendance law, *i.e.*, Gillingham notified the parent/guardian about the truancy, offered to hold a conference where it provided the parent/guardian with information and/or the Schuylkill County's Truancy Rules, implemented truancy elimination plans, and referred students to children and youth if the truancy became habitual. There is no evidence of record that Gillingham failed to comply with the compulsory attendance law.

More importantly, the record establishes that the School District never raised this issue with Gillingham, *i.e.*, the manner in which it reported truancy during the first three (3) years of its charter. The School District never requested that Gillingham report truant students to it until March 24, 2015. *See* GCS Ex. 74, Bates stamped, p. 12727. Once Pottsville asked Gillingham to provide it with notice of resident students who had three (3) or more unexcused absences, Gillingham began to do so.²³

Also on August 20, 2015, the Board of Trustees of Gillingham adopted a policy which was incorporated into its student/parent handbook for 2015/2016, which stated in part that Gillingham "is required to report three days of unexcused absences to the child's school district of residence." (N.T. 2172-2173, 2203; GCS Ex. 72.) Gillingham's Board included this requirement in its attendance policy in its handbook the next school year after the School District made its formal request that Gillingham report truant students to the school district of the student's residence. There is no evidence of record that Gillingham failed to comply with that policy with regard to Pottsville after it was adopted. Therefore, CAB also rejects the School

²³ The School District asks that if Gillingham did not know it was required to provide notice of truancy to it, why it suddenly started doing so on September 14, 2015. School District's 5/19/17 Brief, p. 24. The School District is being disingenuous. The record clearly establishes that Gillingham started sending it notifications after the School District asked Gillingham to do so. *See* Findings of Fact Nos. 47-51, *supra*.

Board's finding that Gillingham did not comply with its representation to parents and students per the policy in its student/parent handbook.²⁴

Following an independent review of the record and after giving due consideration to the findings of the School Board, CAB finds that the School District did not present evidence sufficient to establish that Gillingham failed to comply with any law from which it was not exempt related to the reporting of truancy or compulsory attendance. To the extent that the School Board concluded that Gillingham's failure to follow PDE's guidance in the BEC about reporting truancy to a school district of residence justified nonrenewal of Gillingham's charter, CAB disagrees with that finding and concludes that no material violation has been proved. Given the many documents contained in the record establishing that Gillingham pursued matters of unexcused absences and truancy throughout the term of its charter, *see* SD Ex. 53; GCS Exs. 73, 74, the evidence of record establishes that Gillingham has complied with the CSL and the compulsory attendance laws regarding truancy. Based on the foregoing, CAB rejects these grounds as a basis for nonrenewal of Gillingham's charter.

4. Highly Qualified Teacher ("HQT") Requirement of the NCLB.

²⁴ In rebuttal during the hearing, the School District raised one incident which involved a student from a different school district with three or more absences during January through March, 2016. Pottsville claimed that Gillingham failed to notify that district of the truancy. Although the principal in the Schuylkill Haven Area School District testified that she did not receive the notice of truancy (N.T. 5/23/16 at 22-23), *i.e.*, a Parent Alert letter, Gillingham's employee responsible for handling truancy issues and referrals, William Hutchinson, testified that he believed that a notice had been sent to the originating school district because it should have been generated by the automatic notification system that he used for that purpose. (N.T. 5/23/16 at 60-63.) He also testified that he followed his normal procedures of trying to work through and eliminate the truancy issues with the student and family, eventually referring the matter to children and youth services. *Ibid.* Hutchinson also testified that he provided information to the Schuylkill Haven Area High School principal about the actions Gillingham took to address the truancy issue with that student in order to assist the principal as she pursued truancy actions against the student. (N.T. 5/23/16 at 29, 57-64; SD Ex. 87; GCS Exs. 127, 128.) Even assuming for purposes of argument that Gillingham failed to notify the Schuylkill Haven Area School District principal of this instance of truancy, this one incident does not rise to the level of a serious violation of law or of Gillingham's policy sufficient to justify nonrenewal of its charter. This is particularly so given the evidence of record that Gillingham tried to address the truant situation itself and then assisted the principal once she became involved as she also pursued the matter. *Ibid.*

The CSL requires that at least seventy-five per cent (75%) of a charter school's professional staff hold appropriate state certification. 24 P.S. §17-1724-A. There is no evidence in the record that Gillingham violated this requirement of the CSL at any time. The School Board found that Gillingham failed to meet the 100% HQT requirement of the NCLB during two of the years of its charter as reported by the School Report Card for 2012-2013, and 2013-2014, and voted to deny Gillingham's charter renewal request on this ground. (*See generally* Hearing Officer Report and Recommendation, pp. 18-21, 62.) The School Board's findings rest: (1) on the analysis of Gillingham's teachers' qualifications as described by Kelly Brennan, the Director of Special Education for the School District; and (2) on Gillingham's School Report Card which identified that during the 2012-2013 school year 85% of the *course assignments* taught at Gillingham were taught by HQTs, and in the 2013-2014 school year 74% of the *course assignments* were taught by HQTs. (*See* SD Ex. 58, Bates stamped, p. 5927; SD Ex. 60, Bates stamped, p. 5998, respectively, (*emphasis supplied*)). The School Board also found that Gillingham misinformed the parents/guardians of its students about the HQT requirements, in particular the definition of HQT when it sent them a letter regarding teacher qualifications as required by the NCLB.

The NCLB, prior to 2015, required that only *core content subjects* be taught by HQTs in public schools. The federal regulations issued pursuant to the NCLB required that all public school teachers be highly qualified in the *core academic subjects* they teach. *See* 34 C.F.R. §200.55(b). However, there was no "highly qualified" requirement for *non-core content* courses pursuant to the NCLB. In addition, the NCLB allowed for some flexibility in applying the highly qualified requirement to teachers in charter schools.²⁵ Since the CSL allowed 25% of a

²⁵*See* Section 9101 (23) of the Elementary and Secondary Education Act of 1965 (20 U.S.C.A. §7801(23)), as amended by the NCLB, 20 U.S.C.A. §7801(23); *see also* 22 Pa. Code §403.2 (incorporating the NCLB's definition.);

charter school's professional staff to be uncertified, under the NCLB, in order to be considered highly qualified, all uncertified charter school core academic teachers were required to "hold at least a bachelor's degree and ... demonstrate competence in the core content areas in which they teach." (Official Notice – www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf.; *see also* Certification and Staffing Policy Guidelines (hereinafter "CSPG") No. 24, p. 1 (November 1, 2015)(setting forth the same definition for uncertified charter school core academic teachers as required by the NCLB.)

Pennsylvania's definition of "highly qualified" pursuant to the NCLB for certified teachers in a charter school was: (1) holding at least a bachelor's degree, (2) holding a valid Pennsylvania teaching certificate and (3) demonstrating subject matter competency for the core content area they teach. *Ibid.* In Gillingham's letter to parents/guardians it stated that the legal definition of highly qualified has three parts; teachers must have a four year college degree, a standard teaching certificate and proof of their knowledge in the subjects they teach. *See* GCS Ex. 56.²⁶ Thus, the definition of highly qualified included in Gillingham's letter is consistent

22 Pa. Code §403.4(a) (which sets forth the NCLB's exemption as applied to charter schools). However, as of December 2015, this definition was rescinded by the ESSA, as discussed, *infra*.

²⁶ It is unclear whether the letter to which the School Board refers was sent during the 2012-2013 or the 2013-2014 school year. However, pursuant to the NCLB which required Title I schools to inform parents of their right to know about the qualification of classroom teachers, Gillingham annually sent letters to all parents/guardians. The part of the letter which the School Board found troubling stated, *inter alia*: "Our goal is to have 100% of our teachers highly qualified by June 2014, despite the fact that Charter school law requires only 75% highly qualified teachers." GCS Ex. 56, Bates stamped, pp. 11833, 11845. There is no evidence of record that Gillingham was trying to mislead parents with respect to the representations made in this letter. The School Board's finding to the contrary is rejected since there is no evidence in the record to support it. Further, Gillingham's representation in the letter regarding the provisions of the CSL was accurate. The CSL requires that at least 75% of a charter school's professional staff hold appropriate State certification. 24 P.S. §17-1724-A(a). Further, pursuant to the NCLB, Gillingham sent the letter and identified teachers and their qualifications. Hutchinson, the CEO of Gillingham, testified that at the time she sent these letters, she believed that the representations therein, including the definition of HQT, were correct as it related to charter schools. (N.T. 1528, 1530.) Finally, the definition used by Gillingham to describe "highly qualified," while different from the definition in the School Report Card, is consistent with the definition used by PDE pursuant to the NCLB, which recognizes that the CSL contains some exemptions for HQTs as it relates to charter schools. *See* 22 Pa. Code §§403.2, 403.4; www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf.

with the definition established by PDE. There was no misrepresentation by Gillingham. The fact that the School Report Card may set forth a different definition of highly qualified does not render Pennsylvania's definition inappropriate or improper for Gillingham to use.

Next, Gillingham points out that the School Report Card, relied upon by the School Board to determine what percentage of teachers were highly qualified, references "course assignments," not "core courses." Therefore, Gillingham argues that because "course assignments" may include more than "core content courses," the School District's reliance on the statistics from the School Report Card is insufficient to establish that Gillingham failed to have HQTs teach its "core content subjects" during the 2012-2013, 2013-2014 or 2014-2015 school years. Rather, at most it demonstrates only that some of Gillingham's teachers may not have been highly qualified in particular course assignments for particular grades. Gillingham argues that this is insufficient evidence upon which to nonrenew its charter. Gillingham asserts that since it met the teacher certification requirements of the CSL, the use of a few teachers who may not yet have attained highly qualified status for certain courses which may not have been core content courses in two of its school years should not constitute a violation of law so serious as to require the nonrenewal of its charter.

Finally, Gillingham points out that on December 10, 2015, the Every Student Succeeds Act (hereinafter "ESSA") (Pub.L.No. 114-95 (Dec. 10, 2015) 129 Stat. 1802, 20 U.S.C.A. §7801, was enacted. It eliminated the NCLB definition of "highly qualified" and even the requirement that special education teachers be "highly qualified." (20 U.S.C.A. §7801.) All teachers teaching in a program supported with Title I funding, which would include Gillingham, now must meet appropriate state certification and licensure requirements including any requirements for certification obtained through alternative routes to certification. (ESEA,

§1111(g)(2)(J), as amended by the ESSA.) Thus, with the passage of the ESSA, the highly qualified requirement of the NCLB was repealed and no longer applies beginning with the 2016-2017 school year. Furthermore, there is no evidence of record that Gillingham ever failed to comply with the CSL requirement that at least 75% of its professional staff members hold appropriate state certification.

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB disagrees with the finding of the School Board that Gillingham failed to meet the 100% HQT requirement during two years of its charter or that Gillingham misrepresented information regarding the definition of, or requirements regarding, HQTs to the parents/guardians. There is no evidence in the record that PDE's Bureau of Teacher Certification and Preparation whose responsibility it is to certify teachers determined that Gillingham's teachers were not appropriately certified or qualified to teach as required by any law that applies to charter schools including the NCLB or the CSL. There is no evidence in the record that Gillingham failed to have highly qualified teachers teaching its core content subjects during 2012-2013, 2013-2014 and 2014-2015 school years. Rather, the record demonstrates only that some of Gillingham's teachers may not have been highly qualified in particular subjects for particular grades. To the extent this could have been considered a violation of a requirement under the NCLB prior to its rescission, it does not rise to the level of a material violation sufficient to justify nonrenewal of Gillingham's charter.

In addition, the School Board relied upon the testimony of Brennan to conclude that Gillingham failed to have 100% HQTs and misrepresented the definition of HQT to parents/guardians. Brennan, however, did not know what "CSPGs" were or whether PDE had

issued separate guidance regarding HQT requirements for charter school teachers.²⁷ (N.T. 499.) Also the School Report Card, which refers to course assignments not core content courses and has a definition of HQT that is different from the definition used by PDE, is not sufficient evidence on which to base a conclusion that Gillingham failed to meet the 100% HQT requirement or misrepresented anything to parents/guardians. CAB concludes that the evidence in the record does not support the conclusion that Gillingham failed to meet the requirements of any law regarding the qualifications and certifications of its teachers. This ground cannot support the School Board's decision to nonrenew the charter, and thus this basis for nonrenewal of Gillingham's charter is rejected.

5. Gillingham Complied with the Ethics Act.

The School Board found that Gillingham, throughout the term of its charter, failed to comply with the Ethics Act, 65 Pa.C.S. §1101, *et seq.*, in that over the course of five years twenty-two (22) Statements of Financial Interest were not adequately completed as required by law, 65 Pa.C.S. §1104, by members of its Board of Trustees. In its brief, the School District admits that failure to comply with the Ethics Act alone does not justify the nonrenewal of Gillingham's charter. School District's 5/19/17 Brief, p. 24. However, it contends that Gillingham's failure to properly file Statements of Financial Interest demonstrates Gillingham's continued "*refusal to submit to state and or federal requirements.*" *Ibid.* (*Emphasis supplied*).

Gillingham argues that the failure of some of the members of Gillingham's Board of Trustees to carry out his or her individual responsibility in the filing of a Statement of Financial

²⁷ Appropriate certification required to qualify an individual for assignments is determined by PDE through a position description and course content that lists specific duties to be performed/filled as outlined in PDE's Certification and Staffing Guidelines ("CSPGs"). Appropriate Certification in Charter Schools is found in CSPG No. 24 (November 1, 2015). (Official Notice - www.education.pa.gov/Documents/Teachers-Administrators/TeacherQuality/CharterSchoolHighlyQualifiedTeacherRequirements.pdf .)

Interest cannot be imputed to Gillingham and should not be used to justify nonrenewal of Gillingham's charter. *Lincoln Charter School*, 889 A.2d at 1288. As Gillingham points out, the errors in the Statement of Financial Interest forms were minor in nature including some forms being improperly dated, one form being unclear as to what specific position an individual held at Gillingham aside from being a public official, three forms failing to disclose the year to which it was applicable, one form lacking the date on the signature line, and one form failing to provide the name of the government entity in which the individual held the position. (*See generally* SD Ex. 42, which contains the Statement of Financial Interest forms.) Gillingham contends that these errors were minor, did not result in any sort of harm, and should not be used as a basis for nonrenewal of its charter.

An Ethics Act violation, standing alone, does not constitute sufficient grounds to nonrenew the charter of a charter school, and the failure of a board member to carry out his or her individual responsibility under the Ethics Act, without more, cannot be imputed to the charter school/corporation itself. *See Lincoln Charter School*, 889 A.2d at 1288. The evidence of record in this case establishes that the errors found in the forms were relatively minor. While there may be instances where violations of the Ethics Act, in conjunction with other serious violations of the law, may justify nonrenewal of a charter, this is not that case. The School District asserts that Gillingham "refuses" to comply with federal and state laws. CAB disagrees and rejects this conclusion, finding no evidence of this in the record. Rather, as discussed throughout this opinion, Gillingham recognizes the need to comply with laws that apply to it and appears to do so. The evidence of record does not show repeated failures by Gillingham to comply with applicable laws or a blatant disregard for compliance therewith. There is no evidence of unreasonable behavior on behalf of Gillingham. Even with respect to the Statements

of Financial Interest, it was not a matter of them not being filed. Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB finds that the errors on the forms filed here do not rise to the level of a serious violation and should not be treated as cumulative or be imputed to Gillingham. This ground is rejected as insufficient to justify nonrenewal of the charter in this case.

6. Gillingham Met Its Legal Obligations to Special Needs Students under Applicable Federal and State Laws in the Provision of Special Education Services to Children with Disabilities.

Pursuant to the CSL, charter schools are required to comply with Federal and state laws and regulations governing children with disabilities. 24 P.S. §17-1729-A(a)(5). In particular, charter schools are responsible to provide a FAPE to all enrolled students with disabilities and may contract with the school district, intermediate unit or provider to provide those services. 22 Pa. Code §§711.2, 711.3. PDE is responsible for supervising and ensuring that charter schools are providing a FAPE to a child with disability in compliance with the IDEA, 20 U.S.C. §1400 *et seq.*, and Section 504, 29 U.S.C. §794, and/or the PHRA, 43 P.S. §951 *et seq.* 22 Pa. Code §711.4. This oversight requires that the charter school participate in regular compliance monitoring, provide information to PDE, and complete any corrective action suggested by PDE. 22 Pa. Code §711.4.

During the 2014-2015 school year, approximately seventy-two (72) of Gillingham's students were eligible for special education and related services, or covered under Section 504; but only twenty-five (25) of those seventy-two (72) were residents of the School District. As part of Gillingham's request for renewal of its charter, the School District sought to evaluate Gillingham's special education services by having its consultant of four (4) years, Klein,²⁸ review students'

²⁸ The School District had hired Klein as a consultant with regard to the provision by Gillingham of special education services as early as May 2012. The School District separately contracted with Klein in November 2015 to review

files.²⁹ After obtaining permission from the parents/guardians of twenty-five (25) special education students, eighteen (18) of whom were attending Gillingham and seven (7) of whom had transferred back to the School District, Klein reviewed those students' records. Based only on a review of those students' records, with no classroom observations or interviews with staff or others, Klein rendered an opinion that eleven (11) of those twenty-five (25) students, identified as Students A-K, had been denied a FAPE.³⁰

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB finds that the evidence of record does not support the School Board's finding that Gillingham failed to meet its obligations to special education students under applicable federal and state laws. First, the evidence of record establishes that Klein was not objective or neutral in rendering his opinion with regard to Gillingham. In fact, Klein had acted as a special education consultant for the School District during his four prior years, even urging Brennan to file complaints with PDE against Gillingham in October 2012. *See* Findings of Fact Nos. 71, 73-77, 80, 83-85, *supra*. Second, Klein did not conduct *any* classroom observations, did not speak with teachers or school staff, did not discuss any students with

Gillingham's special education student records "for the purpose of evaluating the request for charter renewal submitted by the Gillingham Charter School." (SD Ex. 30, Bates stamped, p. 3303.) However, as early as October 2012, Klein had suggested that the School District send a letter to PDE informing PDE of alleged incidents of noncompliance by Gillingham with respect to the provision of special education services. As discussed in this section of the Opinion, all of these allegations were unfounded.

²⁹ Recitations of the procedural background regarding the School District's attempts to gain access to Gillingham's student records for its consultant, Klein, can be found at Findings of Fact Nos. 11-16, 18-19, *supra*. It was not a congenial process. Gillingham sought to protect its records pursuant to FERPA and suggested the parties jointly seek guidance from PDE. The School District rejected this offer and sought access to students and student records by filing a request for injunctive relief in the Court of Common Pleas of Schuylkill County.

³⁰ Three (3) additional students are discussed in the School District's Hearing Officer's Report, Students M, Z and G.S., who were also found to have been denied a FAPE by the Hearing Officer even though Klein had not so found in his expert report. (N.T. 195-197; SD Ex. 27.) Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, and for the reasons set forth in this Opinion as discussed above, the School Board's finding that these students were denied a FAPE is rejected. *See also* Gillingham's April 19, 2017 Brief, pp. 45-51, which sets forth in detail the evidence of record that establishes there was no violation of the special education laws or a failure to provide a FAPE for these students.

Gillingham's special education staff or administration, and in most instances, did not speak with the parent or guardian of the special education students whose records he reviewed in rendering his opinion that Gillingham denied these students a FAPE.³¹

Finally, Gillingham further discredited Klein's opinion and testimony based on Klein's own prior sworn testimony in the Pocono Mountain Charter School case. *See* Findings of Fact Nos. 83-85, *supra*. In his prior sworn testimony, Klein stated that a review of special education records alone was an insufficient basis upon which to determine that a student failed to receive a FAPE, because the reviewer may not be seeing all the relevant records, *i.e.*, records may be stored in other locations or have been inadvertently removed or purged, and without observation of the student and staff interviews, the reviewer cannot determine whether a child actually suffered substantive harm. Klein admitted that he previously testified that the document review was only "a starting point, but a determination of whether a child received substantive benefit from their program cannot be determined just on document review, there are further inquiries that need to be held."³² (N.T. 1570-1573.) Despite Klein's testimony given under oath in a prior case, in this case Klein concluded, based on only his review of the students' records, that eleven (11) students were denied a FAPE.

After reviewing the evidence and giving due consideration to the School Board's findings, CAB rejects the School Board's conclusion that the review of records established that

³¹ Klein testified that he spoke to a few parents, but that those conversations did not inform any of the findings or conclusions in his report. (N.T. 198.)

³² Klein also testified that "it is impossible to draw that conclusion," *i.e.*, that a child was denied a FAPE just because a document was missing from the records, testifying "[o]bviously records don't and cannot tell the entire story." (N.T. 5/23/17 at 10-14; GCS Ex. 125, Bates stamped, pp. 18019-18121; GCS Ex. 125, Bates stamped, pp. 18019-18121.) Despite this, the School District's Hearing Officer adopted Klein's conclusions as his own, stating that from the records alone, he could determine that these students had not received a FAPE while attending Gillingham. *See* Hearing Officer Report and Recommendation ¶¶ 137-207. Based on an independent review of the record before CAB and after giving due consideration to the findings of the School Board, for all the reasons set forth in this section, particularly the findings of Gillingham's compliance with the law in the provision of special education services by PDE and USDOE, CAB rejects the School Board's finding that Gillingham failed to meet its legal obligations to provide services and/or document those services to special needs students applicable under federal and state law.

these students, A-K, M, Z and G.S., were denied a FAPE. In particular, the evidence presented by Gillingham's expert, Brenda Fishman, refutes the School Board's findings. Fishman testified that in order to determine whether a student experienced harm that would amount to a denial of FAPE, a more complete investigation than just a record review must take place.

Fishman reviewed Klein's expert report and the same student files that Klein examined. (N.T. 1699.) During her testimony, Fishman discussed each of the students' files and explained why she disagreed with Klein's conclusions with respect to the specific students' records. (See N.T. 1617-1640, 1694-1697.) Fishman also clarified why relying on the records alone made it difficult to conclude that the students did not receive a FAPE.³³ She testified that while the document review may raise questions, without further investigation, a final conclusion on whether substantive harm occurred was not possible. Fishman explained that procedural violations, even if they could be seen in a document review, do not always amount to substantive harm to a student constituting a denial of FAPE.

The School Board found that Gillingham's charter should not be renewed because Gillingham failed to provide students with a FAPE in violation of federal and state laws including the IDEA, Section 504 and Chapter 711 of the State Board of Education regulations. However, in reaching its conclusion, the School Board not only ignored the problems with Klein's testimony, as discussed above, including Klein's apparent bias against Gillingham, but it rejected Fishman's credible testimony dismissing her position with regard to the record review despite the fact that it

³³ For example, Klein found that the repeating of a goal from one year to the next meant Gillingham failed to comply with the law and denied the student a FAPE. Fishman disagreed testifying that the repeating of a goal from one year to the next may have been as a result of parent participation urging that the goal not be dropped; that while it may be best practices to have progress monitoring done for every student with an IEP, progress monitoring may occur and reports may be made in different forms, *i.e.*, kept by a teacher in the classroom for easy access, broken down in an email explaining it to a parent in words the parent can understand, rather than by data; and finally, that failure to include the progress monitoring data is often viewed as a procedural error to be corrected, not as a violation or denial of FAPE for a student (N.T. 1633, 1667, 1689, 1690-1693, 1698-1699.)

was consistent with Klein's prior sworn testimony. CAB disagrees with the School Board's conclusions as set forth in this discussion.

What is more, in reaching its conclusions of noncompliance, the School Board completely failed to acknowledge that Gillingham had been found compliant with federal and state special education laws by both PDE and USDOE on numerous occasions following extensive site monitoring and audits by those agencies.³⁴ The evidence of record establishes that the only special education complaints filed with PDE against Gillingham were submitted by the School District's employee, Brennan.³⁵ Since December 2012, Gillingham has not received any finding of noncompliance in response to any special education complaint filed against it. In fact, on December 17, 2012, PDE issued a Report addressing the thirteen (13) allegations of noncompliance raised by Brennan in her October 9, 2012 letter, a letter which she filed at the urging of Klein. After an extensive on-site investigation and review, PDE found that all of Brennan's allegations were *without merit*, none required corrective action, and that Gillingham was in compliance with both federal and state special education laws/regulations.

In addition, on July 30, 2015, Gillingham received PDE's cyclical monitoring report which showed it was in compliance with its special education obligations. (GCS Ex. 66.)³⁶ Gillingham

³⁴While it is true that Gillingham, in its first two years of operation, had a few instances in which it failed to properly provide special education services to its students, the evidence of record establishes that Gillingham took corrective action and remediated each of those instances. Further, part of Gillingham's difficulty in providing special education services during its first year of operation, 2011-2012, was due to the refusal of Schuylkill IU 29 to provide special education services to Gillingham. Schuylkill IU 29 only did so once PDE contacted it and directed it to do so. Therefore, to the extent there was any violation by Gillingham in the first two years of its charter, its remediation of those violations is sufficient to find that those violations do not rise to the level of a material violation justifying nonrenewal of its charter.

³⁵ With respect to the five (5) complaints filed by Brennan, September 23, 2011, September 27, 2011, December 5, 2011, October 22, 2012, and November 7, 2012, the School Board only noted when there was a finding of noncompliance against Gillingham. The School Board failed to note that with several of those complaints, there were also findings of compliance or that Gillingham took corrective action to the satisfaction of PDE. (GCS Ex. 62, Bates stamped, pp. 11936, 11943, 11953, 11962, 11994, 12011, 12023, 12074, 12091).

³⁶ It is common for PDE to issue citations to a school as part of the cyclical monitoring process, the purpose of which is to improve compliance. (N.T. 1707.) The Report noted twenty-one (21) citations or areas in which it suggested corrective actions be taken by Gillingham. The School Board used these citations as evidence of a

also received correspondence from PDE in September 2014 and again in September 2015, stating that PDE determined that Gillingham “meets requirements,” the highest category of compliance, and was compliant with the requirements of the IDEA. (GCS Exs. 69, 68, respectively.) The U.S. Department of Education (“USDOE”) issued a similar statement to Gillingham, noting that Gillingham’s compliance with the IDEA was not a concern. (GCS Ex. 70.) Further, Gillingham presented evidence that it has not been the subject of any due process complaints by parents since its inception. The School Board never noted that PDE and the USDOE found that Gillingham was in compliance with the special education laws regarding the provision of special education over multiple years of its charter in 2012, 2013, 2014 and 2015. Gillingham was even commended by PDE for its provision of special education services.

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, for the reasons set forth as discussed above, CAB rejects, as unfounded and without any support in the record, the School Board’s finding that Gillingham “consistently and repeatedly violated laws and regulations pertaining to children with disabilities” (*see* Hearing Officer’s Report and Recommendation, p. 63). The School Board’s finding that Gillingham failed to meet its legal obligations to special needs students applicable under federal or state law is not supported by the evidence in the record and does not constitute a valid basis for nonrenewal of Gillingham’s charter. The School Board’s decision to reject Gillingham’s renewal request on this ground was improper.

7. Gillingham Did Not Disenroll a Student who was Hospitalized and/or Placed in Inpatient Rehabilitative Facilities in Violation of the Law.

“pattern of not complying with special education laws and regulations.” *See* Hearing Officer’s Report and Recommendation, p. 63 and ¶¶ 234-255. This was error. Audit findings or suggestions that a charter school remediate certain areas do not rise to the level of material violations, particularly when, as occurred here, those corrective actions are implemented. The School Board never even acknowledged that Gillingham did in fact complete, to the satisfaction of PDE, the corrective action recommended by PDE in the cyclical monitoring report. (*See* GCS Ex. 66.)

The School Board concluded that Gillingham failed to comply with Section 504 of the Rehabilitation Act of 1973, the Pennsylvania Human Relations Act, 24 P.S. §17-1723-A(B)(1), and/or guidance issued by the Pennsylvania Department of Education by disenrolling a student, Student K, after the student was placed in inpatient rehabilitative facilities. Student K attended Gillingham. After bringing marijuana to Gillingham, Student K was placed at SLA for an interim forty-five (45) day placement, with parent approval, as permitted by law. During the interim placement, Student K's parents sent him to the Gaudenzia, an inpatient drug and alcohol facility located in the Central Dauphin School District. The Board incorrectly found that Gillingham disenrolled Student K in violation of the law.

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB finds that the School Board's findings were in error. The evidence of record establishes that the School District directed Gillingham to remove Student K from its attendance rolls. On May 28, 2015, Barbara DeFont, Assistant Director of Attendance for the School District, emailed Gillingham and directed it to "remove him from your roles (sic) using the last day of 5/6/15." *See* GCS Ex. 84, Bates stamped, p. 14480. In reaching its conclusion that Gillingham violated state and federal law by improperly disenrolling student K, the School Board completely ignored the evidence of record that the School District ordered student K to be disenrolled, not Gillingham. The School Board's attempt to close Gillingham for an action that the School District ordered Gillingham to take is rejected as improper and without any support in the record. Therefore, CAB rejects the finding of the School Board that Gillingham failed to comply with Section 504, the PHRA or the CSL and/or the guidance issued by PDE by disenrolling students who are hospitalized and/or placed in inpatient rehabilitative facilities. On the contrary,

CAB finds that Gillingham did not disenroll any student in violation of the law, and the School Board's reliance on this ground to deny Gillingham's renewal request was improper.

C. Gillingham Complied with the Provisions of the CSL with Regard to Providing Health Care Benefits to its Employees.

The CSL provides that every employee of a charter school “shall be provided the same health care benefits as the employe would be provided if he or she were an employe of the local district.” 24 P.S. §17-1724-A(d).³⁷ The evidence of record establishes that prior to opening, Gillingham's health insurance broker, Robert McIntyre, contacted the School District to find out about the School District's health care plan. After numerous communications with School District representatives, including those who handled the insurance benefits for the multidistrict healthcare consortium to which the School District belonged, McIntyre received information about the dental and three (3) medical plans offered by the School District. The School District, through the aforementioned healthcare consortium, provided to its employees three (3) insurance plans: (1) a traditional indemnity plan through Capital Blue Cross offered by the health care consortium; (2) a PPO Option 1 Plan through Capital Blue Cross; and (3) a PPO Alternative Option 1 Plan. Gillingham modeled its initial Capital Blue Cross and its current Geisinger Health Insurance Plans after the PPO Alternative Option 1 Plan provided to McIntyre and offered by the School District to its employees in July 2011.³⁸ McIntyre testified that his purpose was to assure that *all of the same areas of healthcare coverage* that the School District

³⁷The CSL also provides that the “local board of school directors may require a charter school to provide the same terms and conditions with regard to health insurance as the collective bargaining agreement of the school district to include employee contributions to the district's health benefits plan. The charter school shall make any required employer's contribution to the district's health plan to an insurer, a local board of school directors or a contractual representative of school employees, whichever is appropriate to provide the required coverage.” *Ibid.* The School District never required Gillingham to join the School District's health insurance plan. (N.T. 1060.)

³⁸Prior to the charter renewal hearings, Gillingham was never told that the PPO Alternative Option 1 Plan on which it based its coverage was no longer being offered to School District employees. Effective January 1, 2016, the School District's Traditional Indemnity Plan was eliminated, and all School District employees were offered only the PPO Option 1 Plan.

offered its employees were provided to Gillingham's employees.³⁹ In the current plan Gillingham's deductibles and co-pays are higher than some of the School District's, but Gillingham has lower payroll deductions, approximately \$390 less per year, than does the School District's current plan.

The School Board found that neither the CSL nor applicable case law provided a definition for the phrase "same health care benefits." The School Board found that although Gillingham's health care plan did provide the "same" classes of coverage in every area as the School District's, its health care plan was not the "same" as the School District's because it contained some higher deductible amounts and higher co-pays for certain services. Referencing the Statutory Construction Act, 1 Pa.C.S. §1921(b), the School Board concluded that the CSL did not permit health care coverage to be "similar" because the term "same" is unambiguous. It found that Gillingham had violated Section 17-1724-A(d) of the CSL because its health plan was only similar to, not the same as, the School District's plan. (*See* Hearing Officer Report and Recommendation, pp. 51-54, 66-67.)

Gillingham argues that the statute is unclear as to whether the phrase "same health care benefits" requires that *deductibles* and *patient payments* be "identical" and suggests that when statutory language is not explicit or lacks a definition, one must consider whether the Legislature would have intended "a result that is unreasonable, absurd, or impossible of execution." 1 Pa.C.S. §1922(1). Gillingham argues that to require charter schools to provide deductibles and patient payments that are identical to their chartering districts would create an unreasonable,

³⁹ Gillingham's insurance plan provides the same areas or classes of coverage as in the School District's plan. In particular, Gillingham's healthcare plan provides coverage for singles and families, primary care, OB/GYN care, specialists, physical therapy/occupational therapy, mental health care, radiology, MRI/CAT/PET scans, lab/pathology, inpatient hospitalization, outpatient surgery/care, emergency room, urgent care and prescription drugs (generic, brand, non-formulary and mail order), as does the School District's.

absurd or impossible to execute result. In the case of many charter schools, the number of individuals employed at the charter school is significantly lower than that of the local School District. Gillingham has less than fifty (50) employees. Both the market and the size of the employer are considered in determining what health care plans are available to an employer. Thus, Gillingham argues, an employer with less than fifty (50) employees could not possibly obtain an affordable insurance plan that is identical to the School District's in every respect.

CAB finds that this decision does not turn on the meaning of the word "same," but rather on what is meant by "health care benefits." The School Board determined that the differences in co-pays or deductibles rendered Gillingham's plan in violation of the CSL. However, the term "benefits," with respect to health care plans, is defined as "health care items or services covered under a health insurance plan." (Official Notice – www.healthcare.gov/glossary/benefits/.) The evidence of record establishes that Gillingham's plan provides coverage for the *same health care items or services covered under* the School District's health insurance plan. Given the market and size of the charter school, the reality is that a plan identical to the School District's, *i.e.*, same co-pays, deductibles, etc., is very likely not available to Gillingham. To require charter schools to provide health care plans that are identical in every respect to the local district's plan is an unreasonable burden to place upon charter schools and, if enforced, would most likely result in the closure of many charter schools, an unreasonable and absurd result that the Legislature could not have intended.⁴⁰

⁴⁰ The School Board found that Gillingham violated the CSL due to the variations in the cost of services, not because Gillingham was not providing coverage for the same services. However, there is no evidence of record that Gillingham's employees actually paid more overall for their health care benefits. In making its decision, the School Board did not consider relevant the fact that Gillingham's lower payroll deductions may have impacted or even lowered costs so that its employees may actually have less cost associated with their coverage than School District employees.

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB disagrees with and rejects the School Board's finding that Gillingham, throughout the term of its charter, has failed to comply with the requirements of Section 1724-A(a)(4) of the CSL in the provision of health care benefits to its employees as articulated above. Rather, CAB finds that the evidence of record establishes that Gillingham did provide the same health care benefits to its employees as required by the CSL, 24 P.S. §17-1724-A(a)(4). The nonrenewal of Gillingham's charter on this ground is not supported by the evidence in the record and was improper under the CSL.

D. Academic Performance Requirements of the CSL and the Charter.

The CSL requires charter schools to participate in the requirements of Pennsylvania's State System of Assessment, PSSA, found in Chapter 4⁴¹ of the Pa. Code, *see* 22 Pa. Code §§4.1-4.83; 24 P.S. §§ 17-1715-A(8) and 17-1729-A(a)(2). The purpose of Chapter 4 is "to establish rigorous academic standards and assessments to facilitate the improvement of student achievement and to provide parents and communities a measure by which school performance can be determined." 22 Pa. Code §§4.2; *see also* 24 P.S. §17-1702-A(6). Section 4.51 of Ch. 4 regulations require schools to demonstrate that their students are proficient or better on the PSSA tests every year, pursuant to the mandates of the NCLB. 22 Pa. Code §4.51(a)(1). The General Assembly, consistent with its expression of intent, provided for a basis of nonrenewal of a charter in the event that a charter school failed to meet the requirements for student performance as set forth in Ch. 4 of the State Board of Education regulations. 24 P.S. § 17-1729-A(a)(2).

⁴¹ Chapter 4 has replaced 22 Pa. Code Ch. 5. *See Sugar Valley Rural Charter School*, CAB Docket No, 2004-04, 9.

The School Board denied Gillingham’s renewal request on the grounds that Gillingham failed to meet requirements for school performance and student performance standards set forth in the CSL and its written charter.⁴² In rendering its decision, the School Board relied on the decision of *New Hope Academy Charter School v. School District of City of York*, 809 A.3d 731, 739 (Pa. Cmwlth. 2014), concluding that Gillingham’s charter should not be renewed because its academic scores were consistently lower than the School District’s and showed no pattern of improvement. The School Board compared Gillingham’s academic performance to the proficiency rates and SPP scores of PASD only, even though only one-third (1/3) of Gillingham’s student population comes from PASD. The School District argues on appeal that the comparison between Gillingham and PASD was proper since the School District is the chartering school district and sends the highest number of students (about 77) to Gillingham in the 2015-2016 school year.⁴³ The School District also suggests that for the 2014-2015 school year, Gillingham’s student AGI scores were worse than those of PASD and the other “feeder” schools districts, arguing that demonstrates that Gillingham did not meet Pennsylvania’s standards for academic growth justifying nonrenewal. Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB finds that the nonrenewal of Gillingham’s charter on these grounds was improper and is not supported by the evidence in the record. CAB finds that

⁴²Specifically, in comparing the PSSA and Keystone exam test scores of Gillingham’s students to those of the School District’s students, the School Board found that: (1) except for Gillingham’s scores in Reading/Literature in 2013-2014, Gillingham’s proficiency rates were below state targets; (2) Gillingham’s proficiency rates were below the proficiency rates of the PASD as a whole (the average of the rates of PASD’s three schools); (3) Gillingham’s SPP scores declined from 2012-2013 through 2014-2015; (4) in 2014-2015, Gillingham did not meet the standard for growth in every assessed area; and (5) Gillingham failed to meet a goal set forth in its charter of demonstrating student achievement by meeting AYP targets in 2011-2012, and failed to have test scores increase on average over the term of the charter sufficient to earn AYP. See Hearing Officer’s Report and Recommendation, pp. 58-61.

⁴³ However, two thirds (2/3) of Gillingham’s remaining students (about 163) came from approximately 10-12 other school districts.

the School District has failed to prove Gillingham did not meet the performance standards of the CSL or of its written charter for a variety of reasons, as discussed below.

Over the course of its five-year charter term, Pennsylvania's standardized tests and accountability systems have changed numerous times such that to compare the scores from one year to the next, claiming that Gillingham's academic performance was below standards or has decreased, is inaccurate given the specific facts of this case.⁴⁴ While the School District argued that the same changes applied to all schools so that the comparison between Gillingham and the PASD is valid, CAB believes after reviewing the record that Gillingham is in a unique situation and that the changes in testing as applied to Gillingham did affect it in such a way as to support Gillingham's contention that the comparisons relied upon by the School Board are invalid and insufficient to establish that Gillingham failed to meet the performance standards of the CSL or its charter.

Initially, the School Board found that Gillingham failed to meet the performance standards set forth in its charter because Gillingham failed to make AYP in 2011-2012. However, making AYP was only a goal in Gillingham's charter, and not making AYP in only one year of Gillingham's charter, 2011-2012, does not rise to the level of a material violation of its charter sufficient to justify nonrenewal. Further, the charter contains no other performance goal that can continue to be applied to Gillingham because AYP is no longer used by PDE as a measure of school achievement. Therefore, the evidence of record does not support a finding that Gillingham failed to meet any performance standards set forth in Gillingham's charter. This ground is insufficient to support the School Board's decision to nonrenew Gillingham's charter.

⁴⁴ These changes are set forth in Findings of Fact Nos. 119-162, *supra*, and are incorporated herein as reasons articulated in support of CAB's disagreement with the findings of the School Board. However, they will not be repeated at length in this Discussion, except where necessary to explain further their impact on Gillingham and our analysis thereof.

Next, the evidence of record establishes that Gillingham's proficiency rates did improve over the first three years of its charter, 2011-2012 through 2013-2014, going from 33% to 39% advanced or proficient in Mathematics and going from 52% to 58% advanced or proficient in Reading/Literature.⁴⁵ (See Hearing Officer's Report and Recommendation, p. 60; Chart of Academic Performance.) As for the scores in the school year 2014-2015, several things occurred that negatively impacted them. First, only a very limited number of Gillingham's students took the Keystone exams that year – seven (7) in Algebra, ten (10) in Literature and eleven (11) in Biology – as opposed to over a hundred (100) students each who took each of those categories of Keystone exams in the PASD. Thus, the impact that each test score of Gillingham's students had on Gillingham's final percentages was significantly higher than the impact of any individual score for students of the PASD.

Moreover, the Keystone exams final percentages also did not necessarily reflect courses taken at Gillingham. During the first two years of the administration of the Keystone exams, 2012-2013 and 2013-2014, eleventh (11th) graders took the Keystone exams in 11th grade, regardless of when they took the underlying course, *i.e.*, Algebra I, Biology, etc., which underlying course they could have taken a year or two before taking the Keystone exam on that subject. Starting in 2014-2015, students were permitted to take Keystone exams for a certain course, *i.e.*, Algebra I, Biology, etc., upon completion of that course. However, the score from the exam would not be counted in the student's performance until the student was in Grade 11, regardless of when he/she took the exam. The first year that Gillingham had students in Grade 11 was 2013-2014. Thus, a Keystone exam score in 2014-2015 for a student may reflect results for courses that a student took at a school other than at Gillingham. Therefore, it is impossible to

⁴⁵ While these proficiency rates generally were lower than PASD, a comparison with only PASD is flawed for several reasons and therefore is insufficient to justify nonrenewal in this case, as is discussed, *infra*.

conclude that the decrease in Gillingham's 2014-2015 proficiency scores are a result of Gillingham's failures in educational programming. It may have been the result of courses taken elsewhere or the result of one or two bad test results that negatively skewed the final aggregate results. CAB finds that the evidence of record does not support the School Board's conclusion that Gillingham's 2012-2013⁴⁶ and 2013-2014 PSSA and Keystone proficiency scores justify nonrenewal of the charter.

CAB also finds that the comparison between Gillingham's test scores and SPP school score and the PASD's was an improper way to determine whether Gillingham met student academic performance requirements given the specific facts of this case. The School District's witness, Ziegmont, admitted that demographics significantly impact student performance on standardized tests. Ziegmont also testified that students with IEPs typically do not perform as well on standardized tests as non-IEP students, and students from wealthier school districts tend to perform better on standardized tests. Ziegmont admitted that to compare one school's proficiency ratings against those of another school's without taking into account factors such as demographics, IEP students, etc., will result in an invalid comparison. Ziegmont admitted that she did not know any of Gillingham's demographics; therefore, she did not take them into account when comparing Gillingham's scores to those of PASD.⁴⁷ These demographics are particularly important in this case because of the sizable difference in student population and makeup of Gillingham as compared to

⁴⁶ Gillingham would not have had any Keystone scores for the 2012-2013 school year because it had no 11th grade students until the 2013-2014 school year.

⁴⁷ For example, in the 2011-2012 school year, 27% of the students at Gillingham who took the PSSA had an IEP, while only 17% of students at the School District (10% less) who took the PSSA had an IEP; in the 2012-2013 school year, the rate of special education students with IEPs at Gillingham who took the required PSSA was 29%, while the rate at the School District was only 16% (or 13% lower than Gillingham); in the 2013-2014 school year, 67.7% of Gillingham's student body was economically disadvantaged; in the 2014-2015 school year, the rate of special education students with IEPs at Gillingham who took the required PSSA was 34%, while only 18% of the students at the School District who took the state standardized tests had an IEP (or 16% lower than Gillingham). There are significant differences in the two student populations (Gillingham's and PASD's). Yet the School Board failed to account for these factors in rendering its decision to nonrenew Gillingham's charter.

PASD. Therefore, CAB finds that the School Board's reliance on the comparison of the test results and SPP scores between Gillingham and PASD to justify the nonrenewal of Gillingham's charter was inappropriate due to the significant inequity in the size and demographics of the student populations which were never considered by the School Board. CAB finds that lower proficiency rates for Gillingham as compared to the PASD for the school years 2011-2012, 2012-2013, 2013-2014, and 2014-2015 are not sufficient to establish that Gillingham failed to meet the academic standards of the CSL or its charter.⁴⁸

Turning to the SPP score which PDE instituted beginning in 2012-2013, Gillingham argues that the School Board incorrectly found that 70 is a mandated performance target for SPP scores which must be attained in order to establish appropriate performance. CAB agrees. There is no law or regulation that sets or establishes an SPP score of 70 as a mandatory performance requirement for a charter school to achieve in order to maintain its charter. In addition, in 2014-2015, due to the change in PSSA tests, no PSSA scores were included in the calculation of the SPP score by PDE, so Gillingham's SPP score was based entirely on Keystone exams for that year which, as discussed above, were limited in number and may not reflect courses taught at Gillingham. As a result, the evidence of record does not establish that Gillingham's SPP score means that it is failing in its educational programming. To find that Gillingham's purported failure to meet a target of 70 on its SPP score, or any purported target proficiency score, establishes a violation of the CSL is rejected.

CAB also finds the School Board's reliance upon *New Hope, supra*, to justify a comparison with only the PASD is inapposite in this case. In *New Hope*, the Court found that it was appropriate to compare proficiency scores between the charter school and the chartering school district because

⁴⁸ This is not to say that Gillingham should not work hard to improve its student performance throughout the term of its renewed charter. However, on the evidence of record presented in these particular circumstances, there is insufficient evidence to establish a failure to meet the requirements set forth in 22 Pa. Code Ch. 4 relating to curriculum performance standards.

the charter school students were drawn from the same population as the school district schools. *New Hope*, 89 A.3d at 740. That is not the case here. Rather, students from the PASD comprise only one third (1/3) of Gillingham's student population with about two thirds (2/3) coming from ten (10) to twelve (12) other districts across the county. Thus, it is impossible to determine if the difference in test scores between PASD and Gillingham is a result of Gillingham's academic programs or due to preexisting educational disadvantages, deficiencies or demographics particular to the students from the other districts. Thus, *New Hope* does not require the comparison between proficiency scores for Gillingham and the PASD or require the conclusion that Gillingham has not met the academic performance standards of the CSL.

Also, since only about one third (1/3) of Gillingham's students come from the PASD, if Gillingham's charter were not renewed, two thirds (2/3) of Gillingham's students would not be returned to PASD, but to schools or school districts with proficiency rates that may be lower than Gillingham's in various grades and subject areas and with lower SPP scores than Gillingham's.⁴⁹ Thus, the nonrenewal of Gillingham's charter may send many of its students back to schools that are not achieving any better academic success than Gillingham. This result would fail to satisfy the educational purposes of the CSL. *See New Hope*, 89 A.3d at 740 (recognizing that to what schools students would return if a charter is not renewed is a valid consideration in a renewal/revocation case).

The School Board also found that Gillingham failed to meet PDE's standards for growth, since Gillingham's growth ratings for the 2014-2015 school year were negative and were

⁴⁹ Between the 2013-2014 and 2015-2016 school years, the SPP score for PASD's Clarke Elementary dropped 13.3 points and the SPP Score for the PASD's Lengel Middle School dropped 18.7 points, 1.5 points more than Gillingham's SPP score. Gillingham's SPP scores, when compared to schools from some other sending school districts are higher than or equal to the SPP scores of those other schools. SPP scores for some of those schools have also dropped significantly between the 2013-2014 and 2015-2016 school years, *e.g.*, Hazelton EI/MS, West Hazelton EI/MS, and Mahanoy Area MS. (*See* Finding of Fact No. 163.)

consistently below those of the PASD. CAB rejects this as a ground for not renewing Gillingham's charter for several reasons. First, we have held that AGI is a component of the PVAAS analysis which is one component of the SPP score. Evaluating AGI may help to determine if the school is meeting its growth standards; however, "AGI is not a proper measure of academic performance, in and of itself, upon which a material violation of the CSL or of the charter can be found." *Delaware Valley Charter High School v. School District of Philadelphia and School Reform Commission*, CAB Docket No. 2016-06, p. 34. Second, the School District claims that Gillingham's 2014-2015 AGIs were "consistently below" the PASD's AGIs. This is incorrect. Gillingham's 2014-2015 AGI in PSSA Reading/ELA was -1.51, much higher than PASD's, which was -4.86. (See Findings of Fact No. 166.) Finally, for 2014-2015, the AGI of GCS was higher than at least five (5) to seven (7) of its sending school districts. (*Ibid.*) Thus, to nonrenew Gillingham's charter would result in sending many of its students to school districts that are not showing as much growth as Gillingham. For the reasons set forth above, the School Board's decision to nonrenew Gillingham's charter based on its conclusion that Gillingham failed to meet Pennsylvania's standards for growth is rejected as an improper basis on which the School Board could rely in rendering its decision to nonrenew the charter.

In addition to the analysis of proficiency rates and SPP scores is the evidence presented by parents of students and students of Gillingham. The School Board gave no weight to the testimony, exhibits or public comment of any students or parents submitted at hearing or during the public comment period following the hearing, stating that the testimony and comments were not based on empirical data or on any performance standard in state law or in the Charter. See Hearing Officer Report and Recommendation ¶¶21-25. Gillingham contends that it was error for

the Hearing Officer, and thus the School Board, to completely disregard all parent and student witness testimony. CAB agrees.

Following an independent review of the record before CAB and after giving due consideration to the findings of the School Board, CAB finds that the parent and student testimony is persuasive. The evidence of record establishes that Gillingham presents a distinctive educational program, utilizing unique and innovative teaching methods, to a student body with a high percentage of special education students. Gillingham's overall student body is very small (240) which allows for a learning experience which is particularly beneficial to its students. The testimony of parents and students in support of Gillingham confirm that they are extremely satisfied with the programming being offered and the education being received. This included testimony from parents of some special education students that Klein concluded were denied a FAPE. (*See Findings of Fact No. 167-168.*) These parents testified that they were very satisfied with the special education services their children were receiving. They testified that they sought out Gillingham because of its programs and small class size. Parents testified that their children are flourishing in this small, one-on-one, unique school. The students who testified were very well-spoken and discussed the positive impact the school has had on them, including helping them to love learning. (*See Findings of Fact No. 167-168.*) To nonrenew Gillingham's charter may result in the loss of a school that uses different and innovative teaching methods, provides parents and pupils with expanded choices in the type of educational opportunities that are available within the public school system, provides learning opportunities for pupils that they cannot obtain at the School District schools and provides a safe place for students who cannot make it in the larger, more traditional public school setting. For all of the foregoing reasons, CAB disagrees with and rejects the findings and reasoning of the School Board and concludes that the School District has failed to

establish that Gillingham is not meeting student performance standards in Chapter 4 as required by the CSL or performance standards set forth in its charter. There is insufficient evidence in the record to support this ground for nonrenewal of the charter.

CONCLUSION

After reviewing the record provided to CAB and considering the unique educational program offered by Gillingham; the significant community support for the program as testified to by parents and students who are being positively impacted by having this educational choice available to them and are growing and learning; the charter school's compliance with federal and state laws in the provision of special education services to children with disabilities, including the IDEA, Section 504, the PHRA and Chapter 711 of the State Board of Education regulations; compliance with the compulsory attendance laws; compliance with the CSL with regard to the certification of its teachers; compliance with laws requiring employee child abuse clearances, FBI and criminal history background checks and I-9 Forms and compliance with the CSL in the provision of healthcare benefits to its employees; and giving due consideration to the findings of the School Board, but disagreeing with it for the reasons set forth above, CAB finds that the record does not support the School Board's nonrenewal of Gillingham's Charter. Accordingly, the following Order will issue:

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

| | | |
|---|---|-------------------------------|
| Gillingham Charter School, | : | |
| Petitioner | : | |
| | : | |
| v. | : | CAB Docket No. 2016-11 |
| | : | |
| Pottsville Area School District, | : | |
| Respondent | : | |

ORDER

AND NOW, this 25th day of October 2017, based upon the foregoing and in accordance with the vote of this Board⁵⁰, it is hereby ordered that the appeal of Gillingham Charter School is **GRANTED**; and the nonrenewal decision of the School Board is **REVERSED**. The Pottsville Area School District is directed to grant the renewal of and sign a Charter for Gillingham Charter School pursuant to section 1720 of the Charter School Law, 24 P.S. §17-1720-A.

For the Charter School Appeal Board



Pedro A. Rivera, Chair

Date of Mailing: October 27, 2017

⁵⁰ On September 19, 2017, CAB voted 5-0 to grant Gillingham Charter School’s appeal with members Cook, Munger, Peri, Yanyanin, and Rivera participating in the vote. Member Miller was absent.