

IMAGINE HARFORD, LLC.

Appellant

v.

HARFORD COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-03

OPINION

INTRODUCTION

Imagine Harford, LLC (Imagine Harford) has appealed the Harford County Board of Education's denial of its charter school application for the establishment of Imagine Bayshore Public Charter School. The Harford County Board of Education (local board) has filed a Motion to Dismiss or for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal. Appellant has responded.

FACTUAL BACKGROUND

Imagine Harford is a limited liability non-profit company organized and existing under the laws of the State of Maryland. (Appeal, p.1). Imagine Harford submitted its first application to establish a public charter school in Harford County to the local board on September 27, 2006. The local board denied the application on January 22, 2007. (*Id.*).

On October 25, 2007, Imagine-Harford submitted a second application to establish a public charter school. The application proposed a school serving kindergarten through the eighth grade with a holistic approach to educating students, emphasizing the positive effects of health and nutrition on the students' overall well being. Appellant projected enrollment at approximately 424 students upon opening for the 2009-2010 school year, increasing to 732 students for the 2013-2014 school year. (Appeal, Exh. B).

In its application, Appellant proposed to contract with Imagine Schools Non-Profit, Inc. (Imagine Non-Profit) for the provision of management and various other services to the charter school. Imagine Non-Profit is a non-profit charter school operator that partners with local non-profits to develop, open, maintain, and operate public charter schools. It has operated Maryland public charter schools in Baltimore City, Baltimore County, and Prince George's County. Appellant's budget reflected that it would pay Imagine Non-Profit a monthly fee in the amount of \$46,000 for its various services. (*See* Appeal, Exh. B at p. 305, Line Item "Imagine Schools Indirect Costs"). The fee equaled approximately 12% of the Appellant's monthly revenue.

The superintendent's Charter School Review Committee (the Committee) performed a substantive review of the charter school application. On January 7, 2008, the Committee met with the Appellant and its representatives and discussed various aspects of the application. Thereafter, the Appellant submitted additional documents and a waiver request in order to institute a dress code at the school. The Committee met again on January 15, 2008 to further discuss and review the application, including the additional materials the Appellant submitted. (Appeal, Exh. C).

The Committee recommended that the superintendent deny Appellant's application based on the reasons set forth in a February 11, 2008 Informational Report. Although the Committee found that the curriculum, program, and academic standards sections were well articulated, and that the curriculum was unique, it identified six areas of deficiency. Those areas were Management/Governing Board; Local/Community Involvement; Procurement Plan; Contracted Services for Custodial Services, Facility Maintenance and Technical Support; Technology Plan; and Budget. With regard to the budget, the Informational Report stated as follows:

The annual budget presented at Appendix I reflects that substantial amounts of funds will be paid by Applicant to Imagine Nonprofit for administrative and support services as well as financing. These amounts are excessive in the judgment of the Superintendent's Committee and do not represent efficient use of public funds either in a regular or charter school model. For example:

- a. A development allocation fee of \$30,000 annually for 20 years is to be paid by the Applicant to Imagine Nonprofit. This totals \$600,000.
- b. An indirect cost allocation of 12% of the per pupil funding provided by funding authorities is to be paid by the Applicant to Imagine Nonprofit for administrative services. These administrative services would be in addition to and/or duplicative of, at least in part, administrative services provided by HCPS Central Office, e.g. payroll, personnel management, procurement and staff development.
- c. Fixed expenses of facility lease - debt service at \$840,000; development allocation fee repayment \$30,000; and indirect cost allocation of \$559,680 represents 27.53% of the proposed \$5,194,000 budget. Even if the

facility lease - debt service cost is removed,
11.35% of the budget is committed to
administration/fixed expenses before any
fund allocations for teaching staff and
materials of instruction are committed.

Based on the reasons set forth in the February 11, 2008 Informational Report, the superintendent, Jacqueline Haas, recommended that the local board deny the application.

The local board considered the application at its public business meeting on February 11, 2008. The local board voted to provide Appellant an opportunity to submit supplementary information to address the identified deficiencies. The local board deferred a ruling on the application until its April 14, 2008 board meeting. (Appeal, Exh. F).

Appellant submitted the supplemental information in support of its application on March 3, 2008. After further review, the Committee found that the Appellant had sufficiently addressed the deficiencies regarding the management governing board; local community involvement; its procurement plan; contracted services for custodial services and maintenance of the charter school facility; and technical support. Although the Committee found that there were still problems with Appellant's revised technology plan, it did not find those problems to be a material deficiency. (Appeal, Exh. F).

The Committee, however, still found deficiencies with regard to the proposed budget. The April 14, 2008 Informational Report¹ stated the following:

The Committee continues to judge the funds allocated in the Applicant's proposed budget to pay Imagine Non-Profit for the provision of these services as excessive and/or unnecessary in many respects. Many of the services proposed to be provided by Imagine Non-Profit are related to Imagine Non-Profit (sic) overall corporate development; duplicate services that HCPS can and should provide; related to the startup of the charter school prior to its opening or services that Imagine Non-Profit cannot provide.

The Committee then elaborated on the areas of concern which included services for teacher and staff recruitment; support management; compliance related needs; professional development supervision; school development; lease administration and facility/equipment procurement;

¹The record in this case includes two Informational Reports dated April 14, 2008. One is clearly an unfinished draft that contains no recommended action and appears to have been sent to the Appellant in error. That one was prepared on April 3, 2008. (Appeal, Exh. E). We rely on the completed April 14, 2008 Informational Report prepared on April 10, 2008 which contains the superintendent's recommendation that the application be denied. (Appeal, Exh. F).

general administration; financial assistance; legal assistance; contingency support for financial, situational, new school startup and personnel needs; and governance. (Appeal, Exh. F).

The local board considered the application at its April 14, 2008 public meeting. During that meeting, Patrick Spicer, counsel for the local board, indicated that the 12% administrative fee “was the crux of the issue based on HCPS review and current law” and that the other issues were “close enough that they are not material.” (Response to Appeal, Exh. R-3a, p.4).

On April 14, 2008, the local board voted to deny Imagine Harford’s 2nd application. Dr. Haas advised Appellant of the decision by letter dated April 17, 2008. In that letter, Dr. Haas stated that the basis for the local board’s action was contained in the Informational Report that was submitted at the April 14 board meeting. (Response to Appeal, Exh. R-4). That letter was addressed to the wrong post office box and Appellant did not receive it. On April 11, 2008, however, the superintendent had sent Imagine Harford a copy of the Informational Report via e-mail. Imagine Harford received the e-mail. (Appeal, p.2).

This appeal followed.

STANDARD OF REVIEW

In appeals involving a local board’s denial of a charter school application, this Board uses the standard of review for cases and controversies involving the rules and regulations of the local board. Under that standard, the decision of the local board is considered *prima facie* correct and the State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05(A).

Appellant advocates that the State Board use its independent judgment on the record before it in reviewing this case because the local board denied the application based on the fee to be charged by a charter school operator, which Appellant claims is not a matter of local policy, rule or regulation. The standard of review applied to a local board’s denial of a charter school application, however, is well grounded in State Board precedent. See *Monocacy Montessori Communities v. Frederick County Bd. of Educ.*, MSBE Op. No. 08-23; *Somerset Advocates for Education v. Somerset County Bd. of Educ.*, MSBE Op. No. 07-39. The cases cited by the Appellant to support its argument are cases involving the explanation and interpretation of State statutes involving commensurate funding for charter schools and the status of charter school employees. See *Lincoln Public Charter School v. Prince Georges County Bd. of Educ.*, MSBE Revised Op. No. 05-18; *Patterson Park Public Charter School v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Revised Op. No. 05-19. Such cases are subject to the independent judgment standard. COMAR 13A.01.05.05E. Because this case does not involve the explanation or interpretation of State law or regulation, the cited cases by Appellant are inapplicable here.

Under the charter school statute this Board has the authority either to affirm the decision of the local board or reverse the decision. If the State Board reverses the decision, it “may direct the county board to grant a charter and shall mediate with the county board and the applicant to implement the charter.” Md. Educ. Code Ann. §9-104(b).

ANALYSIS

As grounds for the appeal, Appellant raises the following issues:

- (1) The local board failed to provide a written decision explaining the basis for denial of the application;
- (2) The local board failed to use a scoring rubric or set criterion in evaluating the application; and
- (3) It was unreasonable for the local board to deny the charter school application based on the fee to be paid to Imagine Non-Profit.

We will address each of these arguments in turn.

We will also address the local board's claim that the appeal should be denied based on alleged improper actions of the Regional Director for Imagine Non-Profit, who was previously employed by the Maryland State Department of Education (MSDE) as Director of the Office of School Innovations.

1. Lack of Written Decision Denying the Application

Appellant maintains that its application should be approved because the local board failed to provide written notice of the denial of the October 25, 2007 application. It cites *Imagine Belair Edison Charter School v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 06-16, to support its argument requiring written notice from a local board. This case is inapposite on this point as it does not support this proposition.

The State Board has recognized that there is no specific legal requirement in the Maryland charter school statute that requires a local board to render a decision on a charter school application in writing. The State Board has held, however, that in fairness to the applicants and members of the public, a local board must provide in addition to its decision approving or denying a charter application, an explanation or rationale for its decision. *Columbia Public Charter School v. Howard County Bd. of Educ.*, MSBE Op. No. 05-31. If a local board chooses to give its decision orally, it must include the rationale for its decision at the public meeting. See *Chesapeake Public Charter School v. St. Mary's County Bd. of Educ.*, MSBE Opinion No. 05-23.

In this case, the local board provided the Appellant notice of its April 14, 2008 action denying the charter school application by letter dated April 17, 2008 addressed to Patrick Crain, Appellant's authorized representative. That letter included the April 14, 2008 Informational Report that served as the basis for the denial. That letter was addressed to the wrong post office box.

Despite the mix up with the letter, Appellant received notice of the local board's decision and rationale for the denial. On April 11, 2008, prior to the local board's meeting, the superintendent e-mailed the April 14, 2008 Informational Report to Mr. Crain. (Appeal, p.2). In addition, Mr. Crain and other representatives for the Appellant were present at the local board's meeting at the time the Informational Report and superintendent's recommendation were presented to the local board, and at the time the local board voted to accept the superintendent's recommendation to deny the application. In fact, Mr. Crain addressed the board at that meeting regarding the application just prior to the vote. (Response to Appeal, Exh. R-3a, pp. 3-5). Based on these circumstances, the Appellant received notice of the local board's decision and the basis for that decision.

2. Failure to Use a Scoring Rubric or Set Criterion in Evaluating the Application

Appellant maintains that the local board failed to use a scoring rubric or set criterion in considering the application. (Appeal, pp. 4, 13). Although the school system did not provide Appellant with a scoring rubric or evaluation instrument, this argument lacks merit as we explain below.

First, the State Board has held that a local board is not required to use a scoring rubric in the application evaluation process. *Monocacy Montessori Communities v. Frederick County Bd. of Educ.*, MSBE Op. No. 08-23.

Second, as the State Board explained in *Somerset Advocates for Education v. Somerset County Bd. of Educ.*, MSBE Op. No. 07-39 at 8:

[T]his Board looks at the evaluation process as a whole to determine if the process itself was so unfair that it resulted in an arbitrary decision. Although pieces of the whole process may be imperfect, imperfection does not necessarily mean the process is arbitrary.

As for this case, as part of its charter school application process, Harford County Public Schools (HCPS) provided applicants with an Application Checklist which sets forth in great detail the following minimum components that the application must contain.

(Appeal, Exh. A, pp.100 – 104, Public Charter Schools Administrative Procedures).

Neither the Application Checklist nor the HCPS charter school policy provide an explanation of how the application will be evaluated. They merely state that the superintendent's

Public Charter School Advisory Committee will review the application and submit a recommendation to the superintendent. (*Id.*; Opposition to Motion, Exh. I). Nonetheless, when we look at the evaluation process as a whole in this case, we cannot conclude that the Appellant failed to understand the criteria upon which the school system was basing its evaluation.

An evaluation committee, consisting of senior executive level individuals and the superintendent, reviewed the application. The Committee and superintendent met with Appellant's representatives on January 7, 2008 to discuss the application. Thereafter, Appellant submitted additional information in support of its application.

The Committee reviewed all the materials and identified specific problems and deficiencies which were set forth in writing in a February 11, 2008 Informational Report that was provided to the Appellant. Included in that report was a section on the proposed budget, noting the high cost of the fee to be paid Imagine Non-Profit for services which the committee viewed as additional to and/or duplicative of the administrative services provided by HCPS, and not an efficient use of public funds. (Appeal, Exh. C, pp. 8 – 9). The Committee recommended that the application be denied. The superintendent in turn recommended that the local board deny the application. Despite this recommendation, the local board provided Appellant the opportunity to submit additional supplementary material to address the identified deficiencies. The Appellant did so and various deficiencies were thereby resolved, except for the fee issue. Based on the record, we find that the process was a fair one.

3. Imagine Non-Profit's Fee as Basis for Denial

The local board reviewed the application and denied it for reasons relating to budget, specifically the fee to be paid to Imagine Non-Profit by the Appellant for various services. The local board maintains that: (1) Appellant failed to explain how the \$46,640.00 monthly fee was calculated or if any hourly rates were charged by Imagine Non-Profit for its services; and (2) that several of the services to be provided by Imagine Non-Profit were unnecessary or unjustified. Thus, the primary issue in this case is whether it was arbitrary, unreasonable, or illegal for the local board to deny Appellant's application based on the superintendent's recommendation that the fee to be paid Imagine Non-Profit was not sufficiently explained or that it reflected unnecessary services.

Calculation of Fee

The local board maintains that Appellant never explained how the fee \$46,640 monthly management fee was calculated and how Imagine Non-Profit determined that 12% of Appellant's monthly revenue was an appropriate amount to charge Appellant for its services.

There is no question that Appellant provided no quantitative data to support the fee rate such as an analysis of the expected number of hours to be allocated to the Appellant and the hourly rate of people involved in the work. Instead, Appellant argued that the local board lacked authority to review the charter school budget and that the 12% fee was appropriate for various

reasons such as the past performance of Imagine Non-Profit charter schools; implicit approval of the fee by the State Board and the courts; and other charter organizations charging higher fees.

This concern about understanding the fees to be charged by consultants and other contractors for the provision of various operational services is not a new one. In *UMOJA Academy v. Baltimore City Bd. of School Comm'rs*, MSBE Op. No. 06-14, the State Board held that charter school applicants must reveal to the chartering authority the financial and operational arrangements with educational management organizations or consultants due to the implications such arrangements can have on the daily financial operations of a school. The Board stated that the chartering authority must have a solid understanding of the arrangement and the way it will affect the school. *Id.* In the case at hand, the local board could not reach a solid understanding based on the information submitted by Appellant.

Concerning Appellant's claim that the local board lacked authority to review the sufficiency of the charter school's budget, we disagree. The State Board has recognized the authority of a local board to review the budget of a charter school applicant. *Monocacy Montessori Communities, Inc. v. Frederick County Bd. of Educ.*, MSBE Op. No. 08-23 at pp. 18 – 19. The role of the local board as authorizer of the charter is to be sure that the charter school's budget is reasonable and correct. In that regard, HCPS has included a section on finances in its charter school application, which requests submission of the charter school's budget as well as other financial information. (HCPS Charter School Application).

Appellant also asserts that because other local boards have approved the 12% fee without question, the fee must be reasonable. We do not agree. The State Board is not privy to all the facts and circumstances of those cases. There may be a variety of reasons why those jurisdictions accepted the fee or did not question it. The fact that other jurisdictions may have accepted the same fee, does not preclude the local board in this case from determining that the 12% fee is unreasonable.

For these reasons, we believe that it was neither arbitrary nor unreasonable for the local board to deny Appellant's charter school application for failure to explain how Imagine Non-Profit arrived at the 12% management fee.

Is the Fee Unnecessary or Unjustified

As stated in the Informational Report, the local board also denied the application because it found some management services that Imagine Non-Profit would provide to the charter school were unnecessary or unjustified because those services: (1) are provided by the HCPS central office; (2) are not needed by the charter school; or (3) constitute startup services for which the school system does not reimburse a charter school.

The local board found that some of the services were services to be provided by the local school system as part of its central office function to be paid out of the 2% central administration fee allowed in the *City Neighbors* case. The local board has stated that these services will include certain data and reporting functions, legal advice, and human resource services. (Appeal,

Exh. F; Response to Appeal; Motion for Summary Affirmance). While these functions may be applicable to some of the charter school's needs, Appellant has explained and we agree that the services to be provided by Imagine Non-Profit go beyond the central office functions to be provided by HCPS.

The local board also deemed that some services were not needed by the charter school. Yet, in our view, having considered the arguments on both sides, we believe that the Appellant has provided logical explanations for why those services are necessary for the charter school. (*See Appeal*, pp. 6-10).

The local board also found that some of the services were for charter school startup. It maintains that startup costs are onetime costs that are incurred prior to the opening of the charter school and should not be included within the charter school's operational budget for payment with HCPS funds.

Startup costs for a charter school can be significant. Those costs might include site preparation, lease-related costs, and construction costs.

Charter school applicants can receive \$550,000 in federal development grants over the course of three years that can be used for a variety of startup activities. Because the startup for a charter school is so costly, the federal grant inevitably does not cover the entire cost. The money must come from somewhere otherwise charter schools would never come into existence. While some charter schools are able to get some money from fundraising activities, there is nothing in the charter school law that requires private fundraising for startup. It seems reasonable, therefore, that some of the school system funds will be used by charter schools to assist with their startup activities.

4. Local Board's Allegations of Improper Conduct By Regional Director

The local board alleges that the Regional Director for Imagine Non-Profit acted improperly for the benefit of Appellant based on knowledge gained from his prior position at MSDE as Director of the Office of School Innovations, where he provided advice on charter school issues to local school systems and charter school applicants. The local board maintains that the Appellant should be equitably estopped from benefitting from the alleged improper actions. The local board alleges that such actions constitute a violation of the State ethics law pertaining to post state employment activities, §15-504(d)(1) of the State Government Article, Annotated Code of Maryland.

While this appeal was pending, the State Ethics Commission dismissed the ethics complaint against the Regional Director filed by the local board. Also, with regard to any alleged State ethics law violation, the State Board does not have jurisdiction to rule on such matters. Rather, only the State Ethics Commission has jurisdiction to find that an individual has violated the State ethics law. Both the Appellant and the local board acknowledge this in their filings.

The Ethics Commission has ruled here. That is the end of the matter for us. The local board should have withdrawn forthwith its allegations against the Regional Director that are set forth in its brief herein.

CONCLUSION

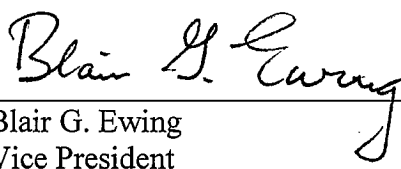
We affirm the decision of the local board on one ground alone - that it was not arbitrary, unreasonable, or illegal for the local board to deny the application on the ground that there was no quantitative explanation as to how the Appellant arrived at the \$46,640 per month management fee.

We reverse the local board on all other grounds put forth for denial of the application and we offer the following guidance. First, reasonable start-up costs can be paid from the "commensurate funding" the charter school receives from the local board. Second, reasonable charges for administrative services, beyond the services provided by the central office at 2% of the budget, may be included in a management fee.

We note that this applicant has moved a long way through the charter school application process and we would hope the local board does not require them to begin at square one. That would be inefficient for both parties and would prolong students' access to this charter school.


Accordingly, we affirm the decision of the local board on the issue of the quantitative explanation of the management fee. We reverse on all other grounds.



James H. DeGraffenreidt, Jr.
President

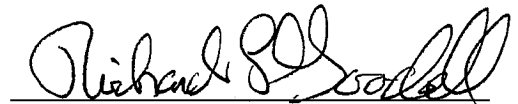

Blair G. Ewing
Vice President

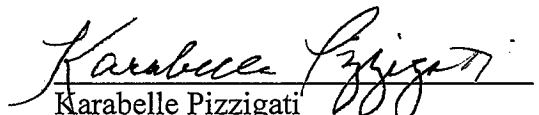

Dunbar Brooks



Charlene M. Dukes

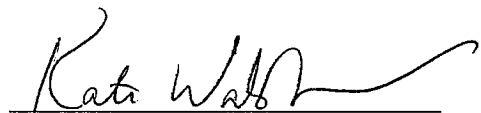

Mary Kay Finan


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January 27, 2009