

LINCOLN PUBLIC CHARTER SCHOOL, INC.,

Appellant

v.

PRINCE GEORGE'S COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-30

OPINION

Lincoln Public Charter School ("Lincoln") filed this appeal challenging the decision of the Prince George's County Board of Education ("local board") to deny it the opportunity to open for the 2006-2007 school year. The local board filed a Motion for Summary Affirmance, arguing that its decision was not arbitrary, unreasonable or illegal given the status of Lincoln's implementation of the tasks contained in local board's Timeline for Charter Schools. Lincoln has filed a Reply to the local board's Motion.

On July 27, Lincoln notified the State Board that even if it were to find in Lincoln's favor, given the late date, Lincoln would have difficulty opening the school in time for the start of 2006-2007 school year. Nevertheless, Lincoln requested that the appeal proceed. Lincoln requested that the State Board grant approval of a charter agreement at this time for the school to open for the 2007-2008 school year. Oral argument was heard on August 29, 2006.

Factual Background

The facts and issues in this case are nearly identical to those presented in *Imagine-Foundations Charter School v. Prince George's County Board of Education*, MSBE Opinion #06-27.

On September 10, 2004, Lincoln submitted its application to the local board to operate a charter school in Prince George's County. On January 7, 2005, following the school system's review process, the local board granted conditional approval of Lincoln's application contingent upon certain issues being resolved through the negotiation process. Meetings between Lincoln and the school system were held in January 2005, but failed to result in any agreement on outstanding issues, including per pupil funding and status of employees. (Hangey Affidavit, ¶¶ 2 – 6.)

Thereafter, Lincoln filed an appeal to the State Board on the issues of commensurate funding and the status of charter school employees. This Board issued *Lincoln Public Charter School v. Prince George's County Board of Education*, Opinion No. 05-18 (May 26, 2005)(Revised), which sets forth a formula for determining commensurate funding to charter

schools. The local board filed an appeal of the State Board's decision with the Circuit Court for Prince George's County, which reversed this Board's decision. Lincoln then filed an appeal with the Court of Special Appeals, which heard oral argument on the matter on September 14, 2006.

In January 2006, at Lincoln's request, the school system agreed to reopen the Lincoln charter agreement negotiations.¹ Although Lincoln's appeal was pending, the parties continued to meet to attempt to reach agreement.

On February 22, Scott Hangey, Director of the New Schools and Charter School Office, distributed a draft Timeline document via e-mail to all charter schools whose applications had been conditionally approved by the local board. (Local Board Motion, Exh.2). Mr. Hangey stated that he anticipated that a finalized version would be distributed the following Tuesday, but that "[r]ather than delaying your receipt of this document, I am sending you a DRAFT so that you can have a perspective on the opening process." (*Id.* (Emphasis in original).) A final version of the Timeline document was distributed on March 9. The local board describes the purpose of the Timeline document as follows:

This Timeline document was developed by the school system and intended to be used by the school system and the charter applicants to manage and facilitate opening for all charter schools in the County. The activity items in the Timeline document covered all areas for opening of charter schools, including, but not limited to, facilities, budget submission, educational specifications, student enrollment, assignment and lottery process, charter school staffing, technology requirements, and creation of website information for charter schools opening for the 2006-2007 school year.

(Local Board Motion at p.24.). Indeed, the Timeline document sets forth 161 tasks that the school system has decided are required to be completed by a certain date in order to open a charter school.

After distribution of the Timeline document, the school system asked Lincoln to accept the proposed final contract language, which would be forwarded to the local board for review and approval. Lincoln declined because of its concerns regarding the contract language on a variety of issues. The school system advised Lincoln that it would present all other charter school contracts to the local board for review and approval for opening the 2006-2007 school year. At the March 23 local board meeting, the local board accepted and approved the school system's

¹Negotiations of the charter school agreements for Imagine-Foundations Public Charter School and Lincoln were held at the same time, between the same parties. It is not clear whether the two schools are owned by the same company, but they are both represented by Richard Daniels, Esq., and Paul Faber, Director of School Development for Imagine-Foundations, negotiated for both with the school system. (*See, e.g.*, Local Board Motion, Exhs. 5 – 7.)

recommendation to approve the charter school contracts for three other charter school applicants. (Local Board Motion at pp. 6 – 7.)

After the March 23 meeting, the school system continued to meet with Lincoln. By April 2006, Lincoln’s representatives indicated that the contract language accepted by the other charter school applicants was acceptable, except for language involving risk management and insurance coverage.² On April 11 and 12, Lincoln inquired if its contract would be placed before the local board for approval. (Appeal, Exh. D.)

On April 28, Roger Thomas, legal counsel for the school system, verbally advised Lincoln that the school system did not anticipate being in a position to present the contracts for approval at the next local board meeting without final contract language. (Local Board Motion at 9, Exh. 7; Appeal, Exh. D.) Lincoln states that, on this call, when asked about the status of the insurance language that had held up the contract, Mr. Thomas’ response was “oh that part is OK.” (Appeal, Exh. D.) However, no final contract language was accepted or approved after this call.

Also on April 28, Lincoln requested the opportunity to meet with the school system to demonstrate its progress on the Timeline tasks and its ability to meet further Timeline requirements. (Appeal, Exh. D.) The parties met on May 4, and additional information was requested by Mr. Hangey, and provided, by May 10. (Local Board Motion at p. 10, Exh. 8; Appeal, Exh. D.)

Following this meeting and review of all the documentation that Lincoln submitted, Mr. Hangey compared the activity items required under the Timeline document, the due dates and status of each item. In addition to the fact that the charter school agreement had not been finalized and approved by the local board, Mr. Hangey determined that 22 of the 28 tasks required to be completed by May 4 had not been completed or begun by Lincoln. (Local Board Motion at pp. 11 – 15; Hangey Affidavit at ¶¶ 27 – 30.) Lincoln argues, however, that it had in fact completed or begun many of those 22 tasks identified by Mr. Hangey. (Appeal, Exh. E.)

Mr. Hangey further determined that 18 of the 22 additional tasks to be completed by June 1 were not or could not be completed by Lincoln. (Local Board Motion at pp. 15 – 18; Hangey Affidavit at ¶¶ 31 – 33.)

²In particular, Lincoln did not want to be bound to the requirement that it “shall not compromise, settle, negotiate, or otherwise effect any disposition of potential claims asserted against it without the School System’s prior written approval.” (Local Board Motion, Exh. 3, Template Contract Agreement, ¶ 23.) Lincoln wanted the school system to provide an exception in those instances where the claims would not be defended, covered or indemnified under the school system’s Risk Management Funds and Bylaws and Procedures. (Local Board Motion at p. 8, Exh. 5.)

Based on these observations, the school system determined that Lincoln would not be prepared to make a successful opening for the start of the 2006-2007 school year. Lincoln challenges this conclusion and asserts that it would have been capable of opening for the 2006-2007 school year. (Appeal at p. 4 – 5.)

Lincoln states that on May 11, 2006, during a phone conference with Paul Faber, Roger Thomas, and Scott Hangey, the school system offered to recommend that the local board approve a final charter agreement if Lincoln agreed to withdraw its commensurate funding appeal. Lincoln asked the school system to put the terms of this arrangement in writing. (Appeal at p. 3, Exh. D; *see also* Hangey Affidavit, ¶11.) There is no evidence that any such document was ever executed.

The school system notified Lincoln by letter on May 12 that it would not present a recommendation to the local board for contract approval to open for the 2006-2007 school year. (Appeal, Exh. B.) At its May 18 meeting, the local board accepted the school system's recommendation by adopting Resolution #9, which states in part:

[T]he Board of Education of Prince George's County hereby ... agrees that a contract will not be approved for the Imagine and Lincoln Public Charter Schools to open for the 2006-2007 school year because of the requirements of the timeline document and the management process to ensure successful opening, but they will be invited and encouraged to participate for the 2007-2008 school year in accordance with the approved timelines for program implementation.

(Local Board Motion, Exh. 10.) Lincoln was notified of the local board's decision by letter on May 26, 2006. (Appeal, Exh. C.)

This appeal followed.

The local board has filed a Motion for Summary Affirmance arguing that its decision was not arbitrary, unreasonable or illegal.

On July 27, 2006, counsel for Lincoln wrote to the Board and explained that Lincoln would not be able to open at the start of the 2006 – 2007 school year given the August 29 oral argument date before the State Board. Lincoln requested that this Board order the local board to enter into a charter school agreement now for the 2007-2008 school year.

Oral argument on the issues was held on August 29, 2006.

Standard of Review

This case involves a challenge to the local board's decision to deny approval for Lincoln to open its charter school for the 2006-2007 school year. It is appealable pursuant to Maryland Code Annotated, Education Article §9-104(b). The decision is one "involving a local policy or a controversy and dispute regarding the rules and regulations of the local board." COMAR 13A.01.05.05(A). As such, the standard of review is that the decision "shall be considered *prima facie* correct . . . [T]he State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal." *Id.*; *Potomac Charter School v. Prince George's County Board of Education*, MSBE Opinion No. 05-08 (Mar. 11, 2005).

A decision is considered arbitrary or unreasonable if it is "contrary to sound educational policy or if a reasoning mind could not have reasonably reached" the decision. COMAR 13A.01.05.05B(1), (2). A decision is illegal if it is unconstitutional; exceeds statutory or jurisdictional boundaries; misconstrues the law; results from unlawful procedures; is an abuse of discretion; or is affected by errors of law. COMAR 13A.01.05.05(C).

Analysis

Mootness

The local board decided not to approve the charter because Lincoln was not prepared to open in the fall of 2006. Lincoln has abandoned its previous position that it could open in the fall of 2006. Because the original controversy about opening in time for the start of the 2006-2007 school year no longer exists, the mootness doctrine would usually apply, and the case would be dismissed.

This is not the usual case. The charter school approval process is a long one. If an applicant is disapproved, by the time the issues are ready for argument on appeal before this Board, the new school year is looming. If this Board were to reverse a local board's disapproval decision, time is short for contract negotiation and for the charter school to prepare to open.

It is not only this Board's difficulty in conducting a timely review, it is also that the issues presented in cases like this occur frequently. As the Court of Special Appeals has stated, "if the matter involved is likely to recur frequently and its recurrence will involve a relationship between the government and its citizens, or a duty of government and upon any recurrence, the same difficulty . . . is likely again to prevent a [timely] decision," there is justification for deciding the issues raised by a question which has become moot. *Alberts v. Department of Health and Mental Hygiene*, 166 Md. App. 726, 744 (2006). In addition, the Court of Special Appeals has explained that when it is important to establish rules for future conduct in a case, the mootness doctrine need not be applied. *Id.* We are particularly concerned that there will be delays in the upcoming 2007-2008 review process which will again cause this charter school agreement to be as

unapprovable as it is today. Therefore, for all those reasons, it is our view that this case remains ripe for review. We address the issues below.

Substantive Issues

The gravamen of Lincoln's appeal is that the contract negotiation/approval process was so flawed that the resulting decision of the local board was arbitrary, unreasonable or illegal.

As we recently explained in *Imagine Foundations v. Prince George's County Public School System*, MSBE Opinion 06-27, since 2003, when the Public Charter School statute was enacted, this Board has heard at least twelve appeals - - 10 of which have involved challenges to the processes that the various school systems have used either to approve the application or to negotiate the final charter school agreement. We take this opportunity, therefore, to review some of the principles announced in those cases.

First, this Board has explained that there is a two-step chartering process. At the first step, the school system examines all aspects of the applicant's program and operation. If the application is approvable, the second step is the completion of a charter agreement that explains in detail the responsibilities of all parties involved in the operation of the public charter school. *See, e.g., Lincoln Charter Public School v. Prince Georges' County Board of Education*, MSBE Opinion No. 05-18 (Revised).

This Board has explained that school systems by statute have 120 days to issue a final local board decision on the charter school application. That statutory requirement for a timely decision at the first step of the process does not mean, however, that the second step of the process - - approving the charter agreement - - can proceed at a leisurely pace. Indeed, this Board has stated that charter agreements "must be completed within 30 calendar days from the date of the decision approving the charter application." *Id.* at 5.

To accomplish that task within 30 days requires that the 120 day application review process be thorough and complete. This Board advised school systems early on that "[t]he thoroughness of the application process should pave the way for the incorporation of the approved application into the body of the charter school agreement with the need for minimal negotiation in completing the charter agreement." *Id.* at 5.

That holding remains particularly appropriate today, three years into the charter school approval process. This case demonstrates why.

First, Lincoln did not receive full and complete information. The Timeline was not given to Lincoln and the other applicants until February 22, 2006. Further, that document was merely a draft which was not finalized until March 9, 2006. Moreover, it was never adopted or approved by the local board.

At oral argument, counsel for the local board explained that the Timeline would become binding on the applicants because it would become a part of the contract. A contract, however, is not signed until the end of the chartering process which could be May or June, a mere few months before the start of school. The deadline for meeting the first task on the Timeline was February 24, 2006, however. Counsel explained at oral argument that the Timeline established guidelines, not deadlines. While it may be that the Timeline was intended to establish flexible expectations for finalizing the charter agreement in order for a charter school to open, it appears to us that PGCPs treated the Timeline document as a deadline document. It is this Board's opinion that for clarity and fairness in the process, the school system should inform charter school applicants of the purpose of the Timeline and whether or not there are immutable deadlines within it.

Consistently, this Board has encouraged school systems to make the charter school application and approval process as fair and transparent as possible. *See Imagine Belair Edison Charter School v. Baltimore City Board of School Commissioners*, MSBE Opinion No. 06-16; *Potomac Charter School v. Prince George's County Board of Education*, MSBE Opinion No. 05-08. Full and timely disclosure of all expectations will go a long way to achieving that goal.

The proposed contract language was of particular importance in this case because a final charter agreement would be required for Lincoln to comply with most of the Timeline tasks. We note that on March 14, 2006, the school system asked Lincoln to accept the proposed contract language for presentation to the Board on March 23, 2006. (Appeal, Exh. D).

This Board has recently stated that school systems should negotiate contract provisions fairly. "They should not be presented as an edict under which the charter school must live without complaint." *Monocacy Montessori Communities, Inc. v. Frederick County Board of Education*, MSBE Opinion 06-17. In this case, the contract language appears to have been presented as an edict. When Lincoln declined to accept the contract "as is" because it had proposed changes in the insurance clause language, the school system advised Lincoln that its contract would not be presented at the March 23, 2006 meeting of the local board.

Negotiations over an insurance clause in the proposed contract caused a major delay in the process. It was not until April 28, 2006 that the school system informed Lincoln that the insurance language that Lincoln originally proposed was acceptable to the school system. Yet, even the agreement on the contract language did not lead to a recommendation to the local board for final contract approval.

We reiterate, this Board has often stated that the negotiations process must be a fair one. Here, weeks after the local board's approval of other charter school contracts at its March 23, 2006 meeting, the school system advised Lincoln that it "did not anticipate" making additional recommendations to the local board for final contract approvals to open in the fall. It appears, therefore, that the school system set March 23, 2006 as the deadline by which a contract needed to have been presented to and approved by the local board.

However, this deadline was never clearly communicated to Lincoln. It is not a part of the Timeline document. Moreover, the school system continued to negotiate and meet with Lincoln as late as early May regarding the charter school agreement and Lincoln's progress on the Timeline tasks. The school system asserted that Lincoln should have known that its contract would not be approved for a fall opening since it was not presented with the other charter school applicants at the March 23, 2006 meeting. We find this rationale unpersuasive.

It is our opinion that deadlines for action are important to move a process forward. A deadline must be announced, however, if it is to be useful and enforceable. The school system did not announce a specific deadline by which a contract must have been finally negotiated and approved by the local board in order for the charter school to proceed to opening; yet it enforced such a deadline. This, too, we find was a serious flaw in the process.

The failure to provide the critical information to applicants at the first step of the approval process and the failure to announce a critical deadline at the second step leads us to conclude that the flaws in the approval process resulted in an arbitrary and illegal decision by the local board. That decision was an abuse of discretion and contrary to sound educational policy.

There is another aspect of this appeal that raises serious concerns. Lincoln asserts that the school system asked it to drop its commensurate funding appeal as a pre-condition to gaining a recommendation from school system staff for contract approval by the local board. (Appeal at p. 3, Exh. D.) Indeed, the local board asserts in its Motion that it was the "school system's understanding and belief that no final contract with Lincoln would be recommended for approval by the County Board unless Lincoln dismissed its appeal." (Local Board Motion at p.5; Hangey Affidavit, ¶11.)


We, as a Board, cannot and do not condone that conduct on the part of the school system or the local board. When a school system uses the pendency of an appeal as a ground for denying a charter, it compromises the integrity of what should be an open process to assess the substance and merits of a charter school applicant. Moreover, the requirement that a charter school applicant drop its appeal on the commensurate funding issue, particularly when this applicant agreed to accept a lower funding level until the appeal was resolved, places the applicant in an almost untenable position. We find the school system's refusal to recommend approval of the charter unless Lincoln dropped its appeal so distorted the process that the local board's decision not to approve the charter agreement was arbitrary, unreasonable and illegal. We consider such actions to be an abuse of authority and discretion, and we take this opportunity to reprimand the local school system.

We, therefore, reverse the decision of the local board. We will not, however, grant Lincoln's request to order the local board to enter into a charter agreement now for the 2007-2008 school year. The local board is in the best position to evaluate Lincoln's progress on all the tasks necessary to open a charter school. Lincoln, however, should not be required to start at step one of the process.


Lincoln has passed step one of the process and received conditional approval. In step two, the local board and the school system staff must develop a reasonable set of actions that Lincoln must accomplish, including facility approval, within a reasonable time period so that opening the school in the fall of 2007 is doable. We believe it would be reasonable, if the local board is satisfied with Lincoln's performance, that the local board would sign a final charter agreement by December 30, 2006. That gives the parties three months to resolve their issues. We expect that they will do so amicably and expeditiously. If, however, the local board decides not to sign a charter agreement with Lincoln, the December 30, 2006 date provides sufficient time for appeal.

CONCLUSION


Based on the evidence presented, we reverse the local board's decision and remand this case to the local board for an expedited review to decide by December 30, 2006 whether Lincoln can manage a timely charter school opening for the 2007-2008 school year.




Edward L. Root
President



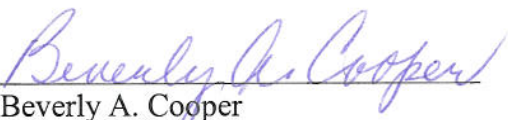
Dunbar Brooks
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Lelia T. Allen



J. Henry Butta



Beverly A. Cooper



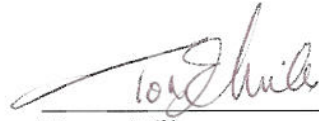
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September 26, 2006