

MONOCACY MONTESSORI COMMUNITIES, INC., BEFORE THE
Appellant MARYLAND
v. STATE BOARD
FREDERICK COUNTY BOARD OF OF EDUCATION
EDUCATION, Opinion No. 08-23
Appellee

OPINION

INTRODUCTION

The charter school applicant, Monocacy Montessori Communities, Inc. (MMCI),¹ acting on behalf of EACH! Public Charter School (EACH!)², has appealed the denial of the charter school application for EACH!. The Frederick County Board of Education (local board) has filed a Motion for Summary Affirmance. MMCI has filed a Reply to the Motion for Summary Affirmance.

FACTUAL BACKGROUND

On May 1, 2007, MMCI submitted a concept proposal for the establishment of EACH! Public Charter School to FCPS for review and feedback.³ EACH! proposed an all girls school in downtown Frederick comprised of 360 students in grades 7 through 12, with a “curriculum emphasizing math, science, and critical-needs foreign languages (Arabic, Chinese, Russian).” (Attachment 1, Local Board’s Ex. 1, p.1).

The Superintendent identified a review team to provide feedback to MMCI. The review

¹MMCI is a Maryland non-profit that creates, develops, and operates charter schools. MMCI is the founder of Maryland’s first Public Charter School, Monocacy Valley Montessori Public Charter School. (Attachment 1, Local Board’s Ex. 1, p.3).

²EACH! stands for Educational Alternative Communities Happen!

³The purpose of the concept proposal is to provide a charter school applicant the opportunity to receive preliminary feedback prior to submitting its application. (Attachment 13, Local Board’s Ex. 5, Policy 440.3(C)(1)).

team consisted of 13 individuals from various units within the school system, as well as union and PTA representatives. The review team provided a detailed feedback document to MMCI and the local board for the board's June 13, 2007 Planning Session. At the planning session, MMCI was provided an opportunity for discussion and feedback on the proposal for approximately one hour. (Motion, p.2).

Thereafter, MMCI received a final feedback document that included additional board feedback and questions. (Attachment 2, Local Board's Ex. 2). The document provided feedback in the following areas: (1) information regarding founding group; (2) general vision, mission and identified focus of the school; (3) general educational program goals and objectives; (4) population to be served; (5) verification of general support for such a school; (6) general governance structure; and (7) general plan for location of a facility. (*Id.*).

Appellant submitted the charter school application for EACH! on July 27, 2007. (Attachment 4, MMCI's Ex. 11). The application stated the following vision for the school:

A small, nurturing community school in downtown Frederick for 360 girls in 7th through 12th grades, EACH! will encourage students to develop a wider world vision through a curriculum emphasizing math, science and three critical-needs foreign languages, Arabic, Chinese and Russian. Visual and performing arts will be integral to our program, permeating the curriculum in each subject, at every level.

(Attachment 4, MMCI's Ex. 11, p.1).

An evaluation team comprised of various school system personnel conducted a technical review of the application.⁴ The team assessed the application based on the criteria set forth in Frederick County Public Schools Regulation 400-84 on Public Charter Schools. (Attachment 13, Local Board's Ex. 5). Regulation 400-84 identifies 58 criteria that must be addressed in a charter school application. The criteria are grouped into the following general categories: executive summary, educational programs and services, special populations, student outcomes, student admission procedures, staffing plan, management plan, facilities plan, financial plan, community

⁴The evaluation team consisted of the following personnel: Executive Director of Facilities Services, Associate Superintendent - Secondary, Executive Director of Legal Services, Director of Research, Development and Evaluation, Executive Director of Fiscal Services, Director of Student Services, Instruction Director/Charter School Liaison, Executive Director of Human Resources, Executive Director of Human Resources, Executive Director of Communication Services, Associate Superintendent- Elementary, Director of Special Education and Psychological Services, and Associate Superintendent - Curriculum. (Motion, p.3).

support, assurance and waivers. Each of these general categories is also broken down into sub-categories.

Dr. Michele Krantz, Instructional Director/Charter School Liaison for FCPS, provided feedback to the Appellant upon completion of technical review by the evaluation team. The feedback, in the form of an e-mail, listed several deficiencies with the application and requested missing information. Requested items included a description of the curriculum, resumes of the founding group members, clarification on the role of the Advisory Board and its relationship to the MMCI Board of trustees, and a description of the administrative practices that will be used to manage the school. (Attachment 5, Local Board's Ex. 6).

Appellant met with the Superintendent and members of the evaluation team on October 2, 2007 for a question and answer session.

On October 15, 2007, Dr. Krantz presented a final evaluation of the charter school application to the Superintendent. Out of the 58 areas, the evaluation team concluded that 19 did not meet the necessary criteria. A written explanation was provided for each deficient area. Here is a summary of those deficiencies:

Executive Summary

- Overview of the needs to be addressed by the public charter school
 - Cited FCPS research data regarding female performance and academic achievement is incomplete.
 - The expanded data comparison by gender shows that females actually outperform males in most academic areas.

- Brief description of the program to be implemented, including any specific focus of the program
 - Applicant indicates that EACH! plans to implement the International Baccalaureate Middle Years Program (IB-MYP), but formal approval for the program has not been received. The application included no alternative plan if approval is not granted.
 - The high school program lacks strategic focus beyond basic course offerings.
 - There are no clear programs that specifically identify how a heightened emphasis on math and science is occurring through the curriculum or community.

Educational Programs and Services

- Curriculum and instructional methods to be employed
 - No approved curriculum is cited or described. Application indicates that teachers and staff will create the written curriculum

during the summer before school opens.

- Social studies teachers will not receive the same staffing or planning time as core teachers because they will be used as attendance monitors at various morning sites while contracted service providers deliver instruction.
- No information provided as to how HSA government standards and indicators will be taught to sophomore students as part of integrated social studies approach.
- Lack of multiple opportunities for advanced coursework.

- Appropriate Technology, Libraries and Other Media Available

- School plans to use the services of a public library rather than offer a library media program at the school as required by COMAR.
- It is unclear whether appropriate computer technology will be available to support the proposed program.

Special Populations

- Provision for Students With Disabilities (IDEA and Section 504) to be Included in the Educational Program

- Description of special education does not reflect the full continuum of services required by law
- Changes in placement to alternative settings are only an option if certain criteria are met
- Application does not accurately address the requirements of Section 504

Student Outcomes

- Educational outcomes to be Achieved

- Applicant plans to offer the IB-MYP program but not the IB diploma program. Students desiring to pursue the IB program in high school would have to transfer to Urbana High School.
- Technology education requirements are proposed to be taught in a three-week unit. No details were given to indicate that this program will meet Maryland's requirement that students take a one credit course aligned to Maryland's Technology Education Standards, or that students will have opportunities to select advanced technology electives.

Student Admission Procedures

- Procedures for Recruitment of Students

- There is no aggressive recruitment plan to target the black and Hispanic student population in order to reach EACH!'s goal of

having a larger proportion of black and Hispanic students than a typical Frederick County School.

- The program requirements for Arabic, Chinese, and Russian language study, coupled with an International Baccalaureate focus, may have an unintended consequence of discouraging parents of students with disabilities, students who are struggling academically or students representing underachieving minority groups from applying.

Staffing Plan

- Job Descriptions for All Staff
 - There are problems with the job descriptions for the Executive Director, Director of Instruction and classroom teacher.
- Projected Staffing Needs
 - Staffing plan does not appear to be sufficient to support a full complement of middle and high school courses.
 - Teachers of core academic subjects must meet NCLB highly qualified requirements.
- Details of any additional contracts Needed to Provide Staff Services
 - No contract proposals were made available to determine whether the contract services listed in the operating budget are viable options.
- Access to and Knowledge of FCTA, FASSE, and FCASA Negotiated Agreements
 - Application requires multiple waivers. The number and type of waivers indicate major departures from FCPS contractual commitments with the Unions.
 - It is unclear how various staff will follow EACH! guidelines when all charter school staff are FCPS employees who must follow FCPS guidelines.

Management Plan

- Organizational Chart for the Charter School
 - The organizational chart places students and parents at the same organizational level as the Director of Instruction which raises questions regarding the authorized decision maker for instructional practices and curriculum.
 - The multiple layers of governance have the potential to create a complex structure for decision making.

Facilities Plan

- Planning and Zoning
 - The Applicant must seek approval from the City of Frederick for use of the property to modify the zoning for its use. This is a multi-step process that requires time and there is no guarantee that the approval will be granted.
 - The applicant provides no alternative site plan if zoning is denied.

- Building Site Plan and Floor Plan
 - The urban setting for the building poses unique challenges that are difficult to overcome.
 - Student drop off and pick up, FCPS special education bus transportation, and student and faculty parking cannot be easily accommodated by the site.
 - there are no formal leases or agreements for off street parking and student drop off.
 - Application contains a sketch of the four levels of the building without specifying the locations of classrooms and support functions, thus it is difficult to evaluate the size and functionality of the individual spaces.

- Building Gross and Net Square Footages
 - The building is not large enough for a dedicated space for the academic and support spaces normally provided in a public middle or high school.

- Building Current and Proposed Space Use
 - The applicant proposes usage of nearby public buildings, such as the C. Burr Artz Library, the Weinberg Center, the Maryland Ensemble Theater, and the Frederick Armory, to implement its program.
 - The application does not include a detailed floor plan concerning how the academic and support spaces will be provided in the building. (i.e. where are the science labs, art rooms, and other specialized spaces located)

- Proposed Site Redevelopment, New Construction or Renovation and Estimated Costs
 - Under the terms of the lease, the applicant is required to make improvements to the building, yet there is no estimate for the cost of the improvements.

Financial Plan

- Annual Operating Budget for Duration of the Charter Agreement
 - A list of specific needs and expected costs has not been developed, particularly in the areas of materials of instruction, textbooks, other instructional supplies, and fringe benefits. Thus, it is difficult to determine whether those aspects of the budget are adequate.
 - The allocated amounts seem insufficient to implement the program as described.
- Annual Capital Budget for Duration of the Charter Agreement
 - No capital budget was provided.

The evaluation team recommended denial of the application. (Attachment 6c, Local Board's Ex. 10).

The Superintendent did an independent review of the application prior to making a final recommendation to the local board. The Superintendent ultimately recommended that the charter school application be denied. She submitted a detailed recommendation to the local board at its October 24 meeting, which states in part:

The EACH! Charter School application is clearly an effort to provide a creative educational approach. However, serious concerns remain regarding the:

- Lack of specificity of the curriculum or instructional program to be offered
- Absence of an explicit, viable plan to recruit underperforming and minority students
- Dependency on the granting of a significant number of waiver requests
- Substantive unresolved facility issues
- Absence of details to evaluate the adequacy of the staffing plan and operating budget
- Absence of a capital budget
- Offering an educational program that does not target an identified need among our female student population.

The local board did not vote on the Superintendent's recommendation at the October 24 meeting. Instead, it scheduled an opportunity for MMCI to make an oral presentation to the local board at its November 14, 2007 meeting.

On November 14, MMCI had the chance to present to the local board at a planning

session and at a board meeting for approximately four hours of presentation and response time. After discussion, the local board voted 6-1 to deny approval of the application. The local board President sent MMCI a denial letter stating the following:

For the reasons set forth in the Superintendent's submitted documentation, in addition to specific reasons provided by the Board at its meeting, your application was denied.

In summary, the Board presented eight reasons for its denial:

1. A single gender school that did not provide for open enrollment for the excluded gender
2. Lack of a clear, cohesive curricular and instructional plan
3. Number and significance of waivers requested
4. Unclear expression of goals and objectives
5. Lack of evidence demonstrating a critical need for a math/science program for female students in Frederick County
6. Unresolved facility issues
7. Unsubstantiated budget projections to fully equip the science program
8. Absence of a viable plan to recruit under-performing and minority students

(Attachment 12, Local Board's Ex. 13).

This appeal to the State Board followed.

STANDARD OF REVIEW

In charter school application denial cases, 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).

LEGAL ANALYSIS

MMCI argues that the local board's decision was arbitrary, unreasonable or illegal. Those arguments fall into two general categories: (1) problems related to the charter school evaluation and decision-making process; and (2) problems with the local board's assessment of the substance of the application. We will address each of the arguments below.

Charter School Application Evaluation and Decision-Making Process

1. *Evaluation Criteria*

MMCI argues that the local board utilized a vague and subjective evaluation tool which lacked analytical components.

FCPS has developed an evaluation instrument which is modeled after the Maryland State Department of Education's *Maryland Public Charter Schools Model Policy and Resource Guide*. (Attachment 14, Local Board's Ex. 14). It contains eleven categories. (Attachment 13, Local Board's Ex. 5). Each category is rated as exceeds criteria, meets criteria, or does not meet criteria. (Attachment 6b, Local Board's Ex. 10).

Dr. Krantz, Instructional Director/Charter School Liaison for FCPS, provided an explanation to MMCI that further defined the rating factors. In a June 28, 2007 e-mail to MMCI, Dr. Krantz stated as follows:

The Application Evaluation Form that is used by members of the Evaluation Team is attached and it has three categories: Exceeds Criteria; Meets Criteria; Does Not Meet Criteria. Following is a general definition of each category with examples:

Exceeds Criteria

Goes beyond the established FCPS standard, expectation or practice.

Examples:

B.3 Average student to teacher ratio for FCPS is 22:1. Applicant plans to have a student to teacher ratio of 15:1.

D.2 FCPS provides report cards quarterly. Applicant plans to provide monthly reports of student performance and progress.

Meets Criteria

Meets the established FCPS standard, expectation or practice.

Examples:

B.3 Average student to teacher ratio is similar to all other FCPS schools.

D.2 Applicant plans to report student performance and progress quarterly.

Does Not Meet Criteria

Does not meet the established FCPS standard, expectation or practice.

Examples:

B.3 Applicant plans to have a student to teacher ratio of 30:1.

D.2 Applicant plans to report student performance and progress twice a year.

(Attachment 3, Local Board's Ex. 15).

The State Board has previously reviewed claims regarding the sufficiency of the analytical tools used by local boards to evaluate charter school applications. In *Chesapeake Public Charter v. St. Mary's*, MSBE Opinion No. 05-23 (2005), the charter school applicant argued that the local board used vague evaluation criteria in reviewing its application. Like the evaluation instrument in this case, the evaluation instrument used by St. Mary's County Public Schools was also modeled after the sample checklist in MSDE's *Maryland Public Charter Schools Model Policy and Resource Guide*. The State Board upheld the local board's decision to deny the application finding that, based on the school system's charter school guidance documents and feedback from the school system, the applicant had received specific guidance regarding what was necessary to include in its application. The State Board also found that there is no legal requirement that a school system use a numerical rating scale in the evaluation process, and further, that if no numerical scoring rubric is used, an analytical key is unnecessary.

Like *Chesapeake Public Charter*, the FCPS documents indicate the specific components that must be contained in the charter school application. FCPS also fully explained its evaluation system to MMCI. In addition, detailed feedback was provided to MMCI prior to its submission of the application. There is no law that requires FCPS to use a numerical rating scale. Contrary to MMCI's claims, the evaluation process employed by FCPS was clearly expressed to MMCI with understandable analytical components.

As for MMCI's claim regarding subjectivity in the evaluation process, this precise issue was discussed by the State Board in *Piscataway Creek Montessori Communities, Inc. v. Prince George's County Board of Education*, MSBE Opinion No.07-21. The State Board noted that, as with any evaluation process, there will always be some level of subjectivity when it comes to deciding what is sufficient to meet the stated standards. Such subjectivity is inevitable because each member of the evaluation team brings his or her own professional and practical work experiences to the process. In *Piscataway*, the State Board held that the existence of some level of subjectivity in the evaluation process does not render the entire process arbitrary, unreasonable or illegal. The same holds true in this case.

2. *Local Board's Explanation of Denial of Charter*

MMCI maintains that the local board violated its own policy by failing to provide a sufficient explanation of its decision to deny the charter. Frederick Board Policy 440.3(C)(5) provides that the local board "shall . . . provide a detailed written recommendation with rationale for its decision for approval or denial of the application." MMCI claims that the local board's November 15, 2007 denial letter fails to satisfy this standard.

The local board's denial letter states as follows, in pertinent part:

For the reasons set forth in the Superintendent's submitted documentation, in addition to specific reasons provided by the Board at its meeting, your application was denied.

(Attachment 12, Local Board's Ex. 13).

Although, as MMCI argues, this language does not specifically state that the Superintendent's documentation is "incorporated by reference into its decision," such language is not necessary. It is clear that the local board relied on the reasons set forth in the Superintendent's documentation for its denial of the application.⁵ We, therefore, look to that documentation for further explanation of the local board's decision.

We believe that the documentation the Superintendent provided to the local board contain a high level of detail about the deficiencies in the application. The Superintendent's submitted documentation is comprised of several parts. Part III of the documentation is a 12 page document entitled "Detailed Explanation Provided by the Evaluation Team for Areas Not Meeting Criteria." For each area found deficient, the evaluation team provided a comprehensive explanation. (Attachment 6c, Local Board's Ex. 10, p.11). Each section of the document provides a similar level of detail.

There is additional explanation of the deficiencies in other parts of the documentation as well. Part IV of the documentation is the Superintendent's Recommendation contains further explanation of deficiencies in the application. Part V is Staff Review of EACH! Waiver Request which includes specific feedback on the waivers.

The local board's denial letter points to eight specific deficiency areas in the application. It references the Superintendent's documentation which provides a high level of specificity of the deficiencies in these areas. Given the totality of this documentation, we find no merit to MMCI's claim that the local board failed to provide a detailed written rationale of its denial, as required by local policy.

Substance of the Application

The local board listed several factors as a basis for the denial of MMCI's application. As set forth herein, we do not find that each and every factor served as a valid basis for denying the

⁵MMCI also takes issue with the fact that the local board does not give the date of the meeting referenced in the letter. It is obvious, however, that the meeting referred to is the November 14, 2007 meeting of the local board where MMCI made an oral presentation, and where the application was discussed and voted upon by the local board.

application. Nevertheless, we have found that the remaining factors do demonstrate deficiencies within the charter school application and provide a sufficient basis for the denial. We explain below.

1. *Single Sex Charter School*

As one of the bases for denial of the charter school application was that a “single gender school that did not provide for open enrollment for the excluded gender.” (Attachment 12, Local Board’s Ex. 13). Concerns about the legality of approving a public charter school for a single gender were also raised by various board members at the local board’s November 14, 2007 meeting. (Attachment 9; Local Board’s Ex. 12, pp. 5, 17-18). In addition, the Superintendent’s Response to the materials submitted by MMCI reflected concerns about this issue. (Attachment 8, Local Board’s Ex. 19). MMCI maintains that any such concerns by the local board render its decision illegal in light of the Title IX federal regulations concerning single sex public education.

The permissibility of single sex charter schools has not previously been addressed by this Board, but the Department has informally advised the charter school community that, in the Department’s view, single sex schools were not allowed because of the open enrollment requirement in federal and State charter school law. Counsel to MSDE concurred in that view.

We have reviewed the applicable federal law which governs this issue and conclude now that single sex charter schools are permissible in Maryland if the federal requirements are satisfied.

Title IX is a federal law that promotes equality and prevents discrimination in all public education programs that receive federal funding. *See* 20 U.S.C. § 1681(a). Under Title IX regulations, school districts are permitted to offer single sex schools. 34 C.F.R. §106.34(c)(1). If a local school system offers a single sex school, Title IX requires the system to provide students of the excluded sex a substantially equal single-sex school or coeducational school.⁶ 34 C.F.R. §106.34(b)(2). Factors considered in determining whether schools are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty. 34 C.F.R. §106.34(c)(3).

The requirements of Title IX and its implementing regulations apply to all public schools

⁶The old regulations required school districts that offered a single sex school to offer a substantially equal single sex school to the excluded sex. The amended regulations provide more flexibility.

in Maryland.⁷ Because public charter schools are public schools, 20 U.S.C. § 7221i(1); Md. Code Ann., Educ. §9-102, Title IX applies to them as well. We conclude, therefore, that because Title IX allows single sex schools, single sex public charter schools are permissible in Maryland. We confirmed that conclusion with the Charter School Program Director for the U.S. Department of Education (USDE), who explained that USDE did not consider the open enrollment requirement in federal charter school law as trumping Title IX and single sex schools. We adopt that position today, even in light of the open enrollment requirement in Maryland’s charter school law.

Because we find that single sex charter schools are permissible in Maryland if the federal requirements are satisfied, the local board’s issue with single gender charter schools is not a valid reason for denial of the application. We must consider, therefore, whether absent that reason for denial, the local board’s decision to deny the application continues to be *prima facie* correct. Therefore, we review the other reasons the local board gave for denial of the application to determine if the decision of the local board is arbitrary, capricious or illegal.

Critical Need

MMCI submitted an application to establish an all girls charter school with a curriculum emphasizing math and science. A good portion of the application discusses the need in Frederick County for a single sex charter school focusing on these areas, and cites several national research studies and FCPS data regarding female achievement. (Attachment 4, MMCI’s Ex. 11, p. 4). In its decision, the local board stated that the application lacked evidence demonstrating a critical need for a math and science program for female students in Frederick County. This was because the evaluation team found that MMCI presented only a portion of the research regarding single sex classrooms, both in the national research data and the FCPS data. We take no formal position on the validity of the data MMCI provided because we find, as set forth below, that the application contained deficiencies in other areas sufficient to require denial.

Curriculum

As we stated in our recent decision, *Friends of the Bay Arts and Science Public Charter School v. Calvert County*, MSBOE 08-21, “The foundation of a successful learning program is a strong, integrated curriculum aligned to the Voluntary State Curriculum.” *Id.* at 9. At the time it submitted the application, MMCI did not include any curriculum, despite the fact that it was a necessary component of the application. The absence of a curriculum was the topic of much discussion throughout the review process. The Superintendent remarked in her evaluation:

Although the application describes broad standards for curriculum and indicates that the curriculum will incorporate Maryland’s

⁷Maryland public schools receive federal funding.

Voluntary State Curriculum (VSC) no actual curriculum was provided for review. An addendum to the application provided after the technical review stated that the staff would write the curriculum before school begins. During the interview with the applicant, the applicant verified that the curriculum would be written by the teachers shortly after they were hired in the spring and summer before school begins in August. We believe it is unrealistic to assume that teachers can create curriculum for the 44 academic courses listed, as well as create evaluation tools in such a short time period. The curriculum and assessments tools are essential so that teachers know what it is they are to teach and the ambiguity around this issue is of serious concerns.

Without the curriculum, it is not possible to determine if students will be given the opportunity to learn the body of knowledge that all students must learn to be successful learners as measured by the Maryland MSA and HSA.

....

Critically important to a successful charter school application is the specific demonstration that the school will provide the students a rigorous program that will prepare them to be successful on Maryland performance measures and meet all graduation requirements. Without specific information related to the curriculum and the level of coursework, the applicant did not provide this assurance in the application.

(Attachment 6d, Local Board's Ex. 10, p.24).

In her submission to the local board at its November 14, 2007 meeting, the Superintendent pointed out that MMCI stated for the first time in an October 24 submission that EACH! would use the FCPS Essential Curriculum. She explained:

The curriculum plan differs between the application, the interview and the response provided by the applicant on October 24. The submitted application did not indicate that the FCPS Essential Curriculum would be utilized. A September addendum to the application provided after the Technical review stated that the staff would write the curriculum before school begins. During the interview with the applicant on October 2, 2007, the applicant verified that the curriculum would be written by the teachers shortly after they were hired in the spring and summer before school begins in August. The information submitted by the

applicant on October 24 regarding the use of outside contract providers to deliver instruction states: “Upon approval of the Charter, these entities will undertake to create a detailed curriculum.” In addition, the submitted application stated, “The IB-MYP framework is a *philosophy* of education, not a predefined curriculum.”

MMCI believes that it is being penalized for making changes to the charter school curriculum. MMCI did not, however, make “changes” to its original curriculum. It submitted no curriculum in its application. It identified the FCPS Essential Curriculum at the last moment. The Superintendent, however, did not have a problem with the FCPS Essential Curriculum in and of itself. Rather, the issue was how the FCPS Essential Curriculum aligned with the goals, vision and intent of EACH! To have the FCPS curriculum identified as the program of instruction for the school at the last hour reflects an insufficient understanding of the critical importance of the curriculum to the total charter school endeavor. It is the core and basis for all the teaching and learning that will go on in the school. We echo here the statements of the Superintendent:

There remains a lack of a clear, cohesive curricular and instructional plan. In addition, a strategic focus beyond basic course offerings is not apparent at the high school level and it is not clear as to how EACH! will create a path for girls to pursue higher-level math and sciences without opportunities for high level coursework in math and science at EACH!

The on-going modifications to the original application raise concerns and confusion about the clear intent of the applicant with regard to delivery of instruction.

(Attachment 8, Local Board’s Ex. 19, p.5-6).

We think the local board was reasonable and justified in finding a deficiency on the curriculum issue.

Waivers

MMCI sought a total of 16 waivers involving local board policy, regulation, and State law. (Attachment 6e, Local Board’s Ex. 10). The local board expressed concerns over the number and significance of the waivers requested. It is not necessarily the number of waiver requests that is problematic. It is the type of waivers that MMCI sought. The waiver requests pertaining to staffing are, we believe, a basis for denying the application. (Attachments 6e & 12, Local Board’s Exs. 10 & 13). Those are based on the desire of the Appellant to hire all staff without involvement of the local board. The waivers requested were:

- EACH! will recruit, select and hire all teacher personnel.
- EACH! will appoint and remove their teachers.
- MMCI will nominate for appointment all administration staff, teachers and clerical personnel.
- EACH! will employ a Director of Instruction who will hold an appropriate Maryland teacher's certificate.

(Attachment 6e, Local Board's Ex. 10, p.3-4).

To obtain independent hiring authority would require a waiver of Education Article § 9-108 which states:

- (a) Employees of a public charter school:
 - (1) Are public school employees, as defined in §§ 6-401(d) and 6-501(f) of this article;
 - (2) Are employees of a public school employer, as defined in §§ 6-401(e) and 6-501(g) of this article, in the county in which the public charter school is located; and
 - (3) Shall have the rights granted under Title 6, Subtitles 4 and 5 of this article.
- (b) If a collective bargaining agreement under Title 6, Subtitle 4 or Subtitle 5 of this article is already in existence in the county where a public charter school located, the employee organization and the public charter school may mutually agree to negotiate amendments to the existing agreement to address the needs of the particular public charter school.

The State Board has original jurisdiction over waiver applications concerning state law. *See, Patterson Park Public Charter School v. Baltimore Teachers Union*, 399 Md. 174, 203-204 (2007).

In our view, the local board reasonably believed that the requested waivers would not be granted. Specifically, charter schools are governed by Title 9 of the Education Article. Under Education Article §9-108, employees of a public charter school are public school employees employed by the local board. They are granted the same collective bargaining rights as any other public school employer. The Court of Appeals of Maryland has ruled that these provisions cannot be waived. *Id.* at 200. As that Court explained, if Title 9's provisions could be waived, it would "render the entire Title nugatory, a result which conflicts with the canons of statutory interpretation." *Id.*

MMCI made it clear that these staffing waivers were a necessary part of the plan for EACH! In a document submitted to the local board on October 24, MMCI responded to the staff feedback on the waiver requests, stating that the “charter school must have the final say over who is hired if the creative and unique educational program it proposes is to be meaningfully implemented” and that “EACH! must retain the necessary control of its faculty and staff to insure the continued health of the organization.” (Attachment 7, Local Board’s Ex. 16, p.17). Based on MMCI’s strong conviction that the granting of these waivers was vital to the success EACH!, the local board’s reasonably considered such waiver requests problematic because the waiver requests could not legally be granted.

Facility

MMCI proposed to lease a building known as the Pythian Castle at 20 North Court Street in the City of Frederick as the permanent site for EACH! The site was previously used as commercial office space and is not properly zoned for use as a school.

In its decision, the local board stated that there were unresolved facility issues. A review of the Superintendent’s report discloses looming issues related to zoning, inadequate square footage, lack of parking, traffic flow barriers, and costs of renovation. The Superintendent stated:

The current zoning of the building would not allow for a school and there is no guarantee that the city would grant an exception. The process to gain an exception and then the processing of a site plan and related building permits would take many months at the very least.

The gross square footage of the building is substantially less than what is provided in other schools. There is not enough space to provide dedicated space for the entire academic and support spaces normally provided in a public school. The academic program is dependent on use of other public buildings including the public library, armory and arts center. The Board would have to agree to students leaving the school on a daily basis for various classes and for use of a library.

The application does not provide the layout and specific locations of classrooms and support areas such as science labs, art rooms, technology education labs and language labs. During the interview the applicant indicated that a more detailed sketch was in process but not currently available.

Parking and arrival and dismissal present serious concerns, as any

temporary stopping of traffic for this purpose would not be permitted by the city. The applicant recognized this issue during the interview and indicated she was seeking alternatives such as off-site shuttles.

It is not realistic to assume zoning approval, the facility appears to be an inadequate space to provide a program for 360 students, parking is a major concern as is dropping off and picking up students. There is no detailed capital budget or costs listed for renovation of this facility other than \$75,000 listed in the operating budget under Instructional Supplies/Other. We believe this is grossly insufficient funding to renovate the building.

(Attachment 6d, Local Board's Ex. 10, p.25).

Given the concerns about the facility, MMCI identified an interim location for use by EACH! if the necessary zoning changes were not acquired in a timely fashion. MMCI proposes use of the former school site for St. John's the Evangelist Catholic Church which it states is already appropriately zoned for use as a public charter school. (Attachment 7, Local Board's Ex. 16, p. 12). MMCI claims that although this information was made available to the school system at its October 2, 2007 interview, the local board did not conduct a meaningful review of this alternative site, thus rendering its decision arbitrary.

With regard to the permanent facility, the Superintendent pointed out the serious matters concerning EACH!'s ability to operate, many of which are beyond the charter school's ability to control. On those issues, the local board's concerns seem justified. We find no mention of the interim facility in the materials submitted by the local board, the Superintendent or staff, other than a question at the local board's November 14 planning session about whether religious icons would be removed from the walls of the school. (Attachment 9, Local Board's Ex. 12, p.4). On the other hand, while MMCI claims that the interim site, which served as a parochial school, is properly zoned for EACH!'s use, MMCI provides no other information on how this site satisfies facility requirements or meets the needs of the charter school as proposed. Although MMCI maintains that the local board did not ask for detail on the interim facility, it is the charter school applicant's responsibility to provide the necessary information to the school system to show that the facility meets the necessary requirements.

Budget

The local board stated in its denial that there were insufficient budget projections to fully equip the science program. (Attachment 12, Local Board's Ex. 13). During the local board's November 14 meeting, one board member pointed out that the charter school needed to supply a total science curriculum for six grades that encompass everything from physics to chemistry. (Attachment 9, Local Board's Ex. 12). MMCI allocated \$10,000 in EACH!'s FY 09 operating

budget for texts, whereas the evaluation committee estimated that the cost of providing math, English, and science textbooks for students in grades 7-10 to be \$65,000. (Attachment 6d, Local Board's Ex. 10, p.26). MMCI disclosed during an interview that the specific lists of needs or expected costs for textbooks, materials of instruction, equipment, and start-up costs had not been developed.

MMCI has submitted information to the State Board stating that all of the local board's budgetary concerns are now mooted based on a \$550,000 allocation of federal funds which will be granted to MMCI for development of the EACH! Public Charter School once its application is approved.⁸ Contrary to MMCI's view, we do not believe that the budget issue is mooted by this allocation. The issue raised by the local board is not just that the charter school have the money to operate the school, rather, the charter school must develop a realistic and justified budget in order to appropriately plan how to spend its funds. In order for the issue to be mooted, MMCI must make realistic and substantiated budget projections in its operating budget in the area of Materials of Instruction, Textbooks, Equipment and start-up capital costs.

Recruitment of Under Performing and Minority Students

In denying the application, the local board noted the absence of a viable plan to recruit under-performing and minority students. This concern arose out a statement in the application that "EACH! will have larger proportions of black and Hispanic students than the typical Frederick County school." (Attachment 4, MMCI's Ex. 11, p. 34). The Evaluation Committee reasonably concluded that this goal could not be attained without an aggressive recruitment plan that targets these populations. Because MMCI provided no such plan, the Evaluation Committee was not confident that MMCI could achieve this goal. (Attachment 6c, Local Board's Ex. 10, p.13).

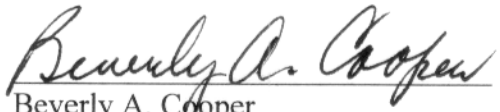
CONCLUSION

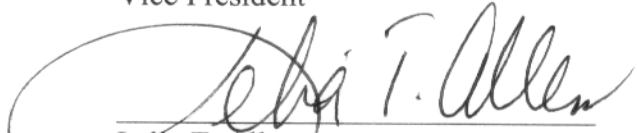
We find that the local board's decision was not arbitrary, unreasonable or illegal. Even with the elimination of factors pertaining to the permissibility of single sex charter schools and the data issue concerning the critical need for math and science classes for girls, we find that a reasoning mind could come to the conclusion that the local board reached to deny the charter school application. Accordingly, we affirm the decision of the local board.

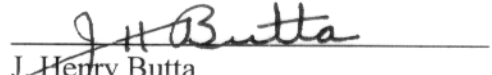


Dunbar Brooks
President

⁸MSDE's Office of School Innovations advised MMCI of this grant by letter dated January 30, 2008.

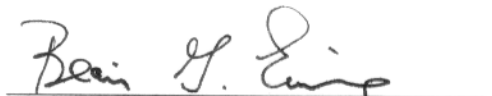

Beverly A. Cooper
Vice President

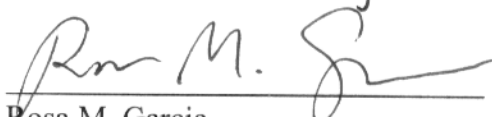

Lelia T. Allen



J. Henry Butta

Charlene M. Dukes


Mary Kay Finan


Blair G. Ewing


Rosa M. Garcia


Richard L. Goodall


Karabelle Pizzigati

DISSENT

I respectfully and strongly dissent from the decision of the majority of this Board to affirm the Frederick County Board of Education's denial of the charter school application. Instead it should remand the case to the local board for reconsideration in light of the fact that counsel to this Board advised us that a single-gender charter school is not illegal and therefore cannot be a basis for denying the application. My dissent is based upon a fundamental understanding of the State Board's authority when reviewing a decision of a local board upon appeal: We are not to substitute our judgment for that of the members of the local board. The majority view of this Board to affirm the local board's decision is in effect removing the decision from the local board.

MMCI proposed the establishment of an all-girls school in downtown Frederick for grades 7-12 with a "curriculum emphasizing math, science and critical-needs foreign languages (Arabic, Chinese and Russian)." My dissent primarily is based upon one critical issue and to a lesser degree other considerations by the local board. The critical issue is this: the legality of a public charter school for a single-gender.

A proposed all girls' school is at the heart of what the proposed charter school is about. It is apparent from the record that this fact was a major consideration, if not a determinative consideration, in evaluating the merits of MMCI's charter school application, as evidenced by the record in this case. First, the letter dated November 1, 2007 from the president of the local board to Ms. Angela Phillips of MMCI is focused on the single-gender issue. It raises the issue of whether a single-gender school was legally permissible and asks MMCI to demonstrate the basis for its legality. Second, at the local board's November 14, 2007 meeting, the local board raised specific concerns about the legality of approving a public charter school for a single-gender. Indeed, four of the seven board members who voted on the charter application, asked questions of the November 14th meeting regarding the legality of a single-gender school (Mrs. Crook, Mrs. Smith, Mrs. Mansfield and Ms. Groth). Third, the letter from Board President Groth to Ms. Angela Phillips summarizing the local board's reasons for denying MMCI's application included as number one on the list out of eight items that "a single-gender school that did not provide for open enrollment for the excluded gender." So the record it is clear that a single-gender school was a very significant consideration and even perhaps a determinative one¹ in denying the application, although we as a State Board are not in a position to be able to know to what extent that single factor led to the denial of the application.

Counsel to the State Board has advised us that a single-gender charter school is not illegal, and therefore could not legally have been the basis for denying the application for this public charter school. This legal conclusion is a sufficient basis in and of itself to require this

¹ State Board members are not in a position to know what was in the minds of the individual Frederick County Board of Education members when they voted on November 14th.

Board to remand this case to the local Board for reconsideration in light of the law.

The first is that there are at least two other considerations for remanding this case to the local board. The local board stated that there was a lack of evidence demonstrating a critical need for a math/science program for female students in Frederick County, but the information the local board drew upon used does not support this position. It is well known that the issue of male/female performance in the math and science area is a matter of widespread public debate as well as concern. Regardless of gender, there has been a general decline of interest in these critical areas of education in the United States relative to other countries in the world. The Evaluation Team for the charter application stated that “although nationally females appear to perform at lower levels than males in mathematics and science, this is not the case in Frederick County as evidenced by the data below.” The reviewers then proceeded to list the “areas where girls outperform or perform at the same level as their male counterparts.” It listed 16 areas. However, only 3 of the 16 had anything directly to do exclusively with math or science. The remaining 13 included such items as SAT scores in writing, graduation rates, drop-out rates, participation in the SAT’s, the number of AP tests taken. And even when one looks at the detailed back-up to these findings, one finds some different conclusions which are not mentioned. Although slightly more girls are enrolled in pre-calculus and trigonometry, significantly more boys are enrolled in calculus. Further, a larger number of boys are enrolled in physics than girls and boys far out exceed the number of girls, enrolled in advanced coursework, AP Calculus, AP Physics, and AP Computer Science. Boys’ performance on the SAT’s in mathematics far exceeds that of girls. So it is fair to say that in fact the Frederick County data show a genuine gap between boys and girls in performance in mathematics and enrollment in the more advanced science and mathematics. In other words, a statement that females perform at a higher level in mathematics and science is not the case in Frederick County as evidenced by their own data. The conclusion asserted by Evaluation Team was flat out wrong.

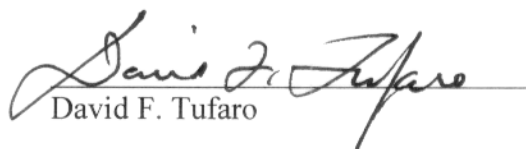
The local board also stated that one of the reasons for denial of the application was the number and significance of the waivers requested. The evaluation of the application acknowledges that the waivers sought were legal and the Maryland State Charter Law provides for the right of charter applicants to seek waivers. It is therefore improper to use as a basis for denial of a charter school application that the applicant is seeking waivers. To do so would be a denial of the charter school applicant’s rights under State law.

In conclusion, there are three clear reasons that the local board gave for denying the applications that have no basis in law or fact. First, and the most critical, is that a single-gender school is legal. Second, there is evidence demonstrating a basis for a need for a math/science program for female students in Frederick County. Third, the number of waivers requested cannot be the basis for denial.

It is my view that each of those reasons for denial was an error of law and that those errors were not harmless errors. It is readily apparent to me that it is not beyond a reasonable doubt that the legal error committed concerning the single-gender school would not have affected

the outcome of this case. I believe that the errors influenced the outcome of the case and therefore those errors were not harmless errors, but rather prejudicial, requiring a remand.

We as a State Board cannot know or presume to know what weight the individual board members gave to any of the items that they stated as the reasons for denying the applications, nor is it our job to do so. And it happens that the legality of a single-gender charter school is at the very heart of this charter school application, and that issue having been taken away, at a minimum, requires that we as a State Board remand this case to the local board for reconsideration. And the fact that 4 out of the 7 board members raised the issue of the legality of a single-gender school at its public hearing on November 14th is sufficient in and of itself to require a remanding, since if this was a decisive issue for these 4 individuals, then the application would have been approved instead of denied. In affirming the decision of the local board, the State Board is substituting its own judgment for that of the local board, something which we as a State Board are bound not to do. The local board members should be required to review the application again in light of the legal ruling of this Board on the single gender charter school issue and the facts described in this dissent and then decide the merits of this charter school application.


David F. Tufaro

April 30, 2008