

WATERSHED PUBLIC
CHARTER SCHOOL, INC.,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-31

OPINION

INTRODUCTION

The Baltimore County Board of Education (“local board”) denied the charter school application of Watershed Public Charter School, Inc. (“WPCS”). The Charter School has appealed that denial.

FACTUAL BACKGROUND

Ultimately WPCS plans to serve grades K-8 in the Northwest area of Baltimore County. With a projected Fall 2019 opening, WPCS intends to begin its first year with grades K-3 and two classrooms per grade, and to add another grade each year, so that the school is K-8 by the year 2024 with a projected enrollment of 372 students.

WPCS plans to establish and operate a charter school in two phases. First, it intends to rent a temporary space that is a former or existing school to begin operations in the Fall of 2019. Meanwhile, it is working with NeighborSpace of Baltimore County, Inc., a qualified land trust, to secure land for a permanent facility.

In accordance with the Baltimore County Public Schools’ (“BCPS”) Public Charter Schools Rule 1600, WPCS submitted a Letter of Intent to apply for a charter school on May 1, 2017, two years preceding the proposed starting date of the school. *See* BCPS’ Rule 1600, at page 1, III(A)(2) (Appeal, Exh. d). WPCS submitted its complete, 500-page application to BCPS on January 2, 2018. (Appeal, Exh. E.). On January 30, 2018, BCPS notified WPCS that its application was technically complete.

The BCPS charter school review committee (“Committee”) interviewed members of WPCS on March 26, 2018. On April 9, 2018, the Committee asked WPCS a series of follow-up questions relating to its plan for a budget and facility. On April 17, 2018, WPCS provided BCPS with responses and a revised budget. *See* Watershed Responses to Follow-Up Interview Questions (Appeal, Exh. F); 4/17/18 Revised Budget (Appeal, Exh. G).

The local board held a meeting on May 8, 2018.¹ Three members of the Committee, Dr. Mary Boswell-McComas, Dr. Rendard Adams, and Ms. Megan Shay, presented the WPCS proposal to the Board. Mr. Whit Tantleff, Director of Budget and Reporting for BCPS, also presented to the Board. At the May 8, 2018 meeting, the Committee informed the Board that it had to vote to approve or deny a charter for WPCS by its May 22, 2018 meeting. The Committee further informed the Board that it planned to meet with WPCS on May 10, 2018 to address additional questions. Board Member-at-Large Ann Miller, Board Chair Edward J. Gillis, and Third Council District Board Member Kathleen S. Causey noted that the Board had little time to review the proposal and formulate further questions for WPCS before voting on May 22, 2018.

On May 10, 2018, the Committee met with WPCS about its proposed facilities. The Committee told WPCS that they believed it was impossible to renovate a building in less than 18 to 24 months and that they wanted WPCS to have a facility and contingent financing in place before they would recommend approving the charter application. *See* Affidavit of Jessie Lehson, President, WPCS Founding Board, ¶10 (Appeal, Exh. I). WPCS told the Committee that it had identified several potential facilities, but it needed the Board to approve the charter before it could move forward with finalizing plans and financing for a facility. *Id.* at ¶10.

On May 11, 2018, Stephanie Simms, Director of Operations for the Maryland Alliance of Public Charter Schools (“MAPCS”) emailed a letter to Whit Tantleff and BCPS Charter Liaison, John Billingslea, explaining that WPCS’s timeline and facility financing plans were on par with other schools at the same stage, and that it could not undergo the process of securing a building until it had approval from the Board. *See* Letter from MAPCS (Appeal, Exh. I).

On May 14, 2018, WPCS delivered a revised budget, with assumptions on square footage, utilities and renovation costs broken out per the BCPS budget office’s request. *See* 5/14/18 Revised Budget (Appeal, Exh. K). WPCS also submitted a budget narrative and answers to the Committee’s questions on the issues of a proposed facility and budget. *See* WPCS’ Budget Narrative and Respones, 5/14/18 (Appeal, Exh. L). WPCS explained that it had reached out to banks and organizations that issue charter-specific loans, bonds, and lease guarantees, but “the feedback has been consistent – without a charter approval, they aren’t ready to talk to us.” *Id.* at unnumbered page 1. WPCS futher explained that it planned to use funds from a \$900,000 grant for startup charter schools from the Maryland State Department of Education (“MSDE”). *Id.* It also detailed information about how it planned to finance renovation costs for its initial temporary space. *Id.* at unnumbered pages 1, 3-5.

On May 16, 2018, the Committee’s recommendation to deny WPCS’ charter based on facility and budget was posted to BCPS’ BoardDocs website. (Motion for Summary Affirmance at 746).

On May 17, 2018, WPCS submitted a letter from Allan D. Arbogast of The Children’s Guild explaining that WPCS’s projected start date was reasonable and that its facility to operating budget was less than 15%, which is below the industry average. *See* Letter from The Children’s Guild (Appeal, Exh. M). WPCS also submitted a letter from a prospective lender, Charter Schools Development Corporation (“CSDC”), explaining that they wanted to work with WPCS but approval of its charter was a prerequisite to financing. (Appeal, Exh. N). Also on May

¹ Video of the May 8, 2018 BCPS Board of Education meeting is available at: <https://vimeo.com/268826793>.

17, 2018, WPCS submitted an update to the Committee explaining the challenges it would face in terms of financing and locating a facility if the Board did not approve its charter. *See* WPCS’s 5/17/18 Financing and Facility Update (Appeal Exh. O).

On May 21, 2018, Jessie Lehson emailed John Billingslea and Whit Tantleff to update them on the MSDE charter grant application, which had been released that day. *See* 5/12/18 email from Jessie Lehson to BCPS (Appeal, Exh. P). The application stated that an eligible applicant receiving a grant could use funds for “[c]arrying out necessary renovations to ensure that a new school building complies with applicable statutes and regulations, and minor facilities repairs (excluding construction).” (Appeal, Exh. Q at 13). Ms. Lehson believed that the availability of grant funds for renovations could reduce the amount of funds WPCS would need to renovate a temporary facility. *See* 5/12/18 email from Jessie Lehson to BCPS. (Appeal, Exh. P).

The Board met on May 22, 2018 to vote on WPCS’s charter application.² The Interim Superintendent recommended that the Board deny the charter application. Dr. Howell-McComas told the Board that “BCPS is open to innovative and inquiry-based learning opportunities, and we recognize the passion and vision of the Watershed members.” However, the Interim Superintendent recommended that the Board “deny the Watershed Public Charter School application based on budget and facilities, specifically how facility impacts budget at this point.” The Interim Superintendent’s full Recommendation stated:

Superintendent’s Recommendation

As provided by Board Policy 1600, “the Superintendent shall review completed applications submitted in accordance with established deadlines and forward them with a recommendation to the Board for its consideration.”

Upon review of the application and consideration of the subsequent documentation received, staff recommends that the Board not approve the application to open Watershed Public Charter School in the fall of 2019 based on budget and facilities. While the Watershed Public Charter School Group proposed a plan to fundraise and obtain loans to support facilities acquisition and start-up, there is currently no clear commitment of funds.

Specifically, the Office of Budget estimates that Watershed’s revised budget includes a funding deficit FY19 and FY20 and also includes \$168,000 in fundraising during FY19 and FY 20 and a \$200,000 loan in FY19. This deficit exists because Watershed’s budget reflects loan payments as revenue instead of expenses. Watershed has stated that the loan will cover their projected capital renovation expenses of \$300,000 on a leased facility, however, depending on the exact facility obtained, this amount of funding may or may not be sufficient. Again, there is currently no clear commitment of funds.

² Video of the May 22, 2018 Board meeting is available at: <https://vimeo.com/271692016>

With respect to facilities, the statute permits a local board of education the ability to grant contingent approval based upon “the suitability of the facility secured by the public charter school.” Watershed has been unable to provide specific information pertaining to any proposed facility it plans to acquire. Without an identified facility, the potential scope of required renovations to bring the facility to suitable educational standards cannot be precisely estimated.

Motion for Summary Affirmance at 757.

After receiving the recommendation, several Board members noted their frustration with the insufficient time they had to review the WPCS proposal. Six board members voted to deny the charter application. Several members stated on the record that the basis for their vote to deny the application was insufficient time to properly review the application. Three members voted to approve the application contingent upon WPCS finding an appropriate facility. However, the Board needed seven votes for a majority. That left the student Board member who had not been present for all of the discussion to cast the deciding vote. The Board sent someone to find the student who had already left the board meeting. When the student came back to the room, she voted to deny the application. *See* Local Board Meeting Minutes, 5/22/18 (Appeal, Exh. R). This appeal ensued.

STANDARD OF REVIEW

This case concerns the interpretation of Md. Code, Educ. §9-104 as it applies to contingent approval of the charter school application. In such a case, the State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05E; *see also* *Frederick Classical*, 454 Md. at 371-77.

LEGAL ANALYSIS

The local board denied this charter based on a recommendation of the Interim Superintendent that focused on two perceived inadequacies in the charter school application involving facility and budget. We address the facility issue first.

Facility

Facility issues are perhaps the most bedeviling for charter schools. As this Board has recognized, charter school applicants can be in a “catch-22 situation regarding acquisition or leasing a facility.” *Chesapeake Public Charter Sch. v. St. Mary’s County Bd. of Educ.*, MSBE Op. No. 05-23(2005) at 7-8. In that case, the key reason the local board denied the application was the lack of an identified facility. *Id.* at 7. Yet securing a facility was dependent on approval of the charter. All other components of the application were deemed acceptable. We reversed the local board’s denial and directed the charter school and the local board to work together to identify an acceptable facility within six months. *Id.* at 8.

Three years after the decision in the St. Mary's County case, the lack of a facility was again presented as one reason, among many others, for denial of a charter school application. *Friends of the Bay Arts and Science Public Charter School v. Calvert County Bd. of Educ.*, MSBE Op. No. 08-21 (2008). In that case, the State Board said:

Identifying and obtaining a viable facility to house a charter school is emblematic of the phrase "what comes first, the chicken or the egg?" Time and again this Board has heard from charter schools how difficult it is to make binding commitments to purchase or lease property for a charter school absent an approved charter agreement. *See, e.g., Chesapeake Public Charter School v. St. Mary's County Bd. of Educ.*, MSBE Op. No. 05-23. That difficulty is understandable. Also understandable is the local board's concern that a solid facility plan is necessary prior to approval of a charter. *See, e.g., Piscataway Creek Montessori Communities, Inc. v. Prince George's County Bd. of Educ.*, MSBE Op. No. 07-21.

Id. at 9.

The Board noted that the charter applicant had purchased property on which it planned to build its school. In that regard, the State Board concluded that "Friends has made progress in this area such that it should not be a stumbling block to approval. But, Friends wishes to open in a temporary location before the new school building is complete. It is not clear from the record (as far as we can tell) whether Friends has identified a temporary location for the school. The existence of a viable temporary location is a valid concern of the local board sufficient to raise questions about that part of the Facility Plan." *Id.* In the end, the State Board affirmed the local board's denial of the charter, not necessarily because of the lack of a temporary facility, but because of serious concerns about the sufficiency of the curriculum proposed. *Id.* at 14.

One year earlier, the Board addressed a facility issue in *Piscataway Creek Montessori Committee v. Prince George's County Bd. of Educ.*, MSBE Op. NO. 07-21 (2007). The State Board affirmed the local board's denial of the application based, in part, on the facility issues stating:

The... application states that if there has been no facility identified, the applicant must describe plans and timelines for doing so and the applicant must also inform PGCPs within 10 days of identifying a facility. Piscataway has not identified a site for its proposed charter school. Following interviews with the applicant, PCGPS apparently has concerns whether Piscataway fully understood the process required for finding and developing a school within the time frame allotted for opening for 2007-2008. The local board asserts that during the interview process with Piscataway's representatives, PGCPs expected that the applicant would be able to demonstrate sufficient understanding of the process required for planning and design of a proposed facility, construction phases and, most importantly, timely obtaining use and occupancy permits.

The Evaluation Committee rated this category as marginal. We have reviewed the applicant's response to this requirement and conclude that it was incomplete in several areas. From the information in the application we conclude that the applicant appears to lack an understanding of the process of locating and opening a facility as well as the potential cost associated with acquiring a facility. We note that the timeline was somewhat unrealistic with too short a window to complete activities. Moreover, we believe that applicant could have given more detail about its financial options than to say, "that it has explored many financing options."

Id. at 9.

With that precedent in mind, we turn to the case before us. As WPCS explains, it is in the "catch 22" position. It could only obtain financing for renovation of the temporary facility upon charter approval. Likewise, approval of funding for a permanent facility would require approval of the charter. But, the local board denied approval of the charter for failure to have a facility plan and financing in place.

Because of the difficulty facility acquisition presents prior to charter approval, in 2015 the General Assembly amended the charter school law to allow a chartering authority to approve an application to operate a charter school contingent upon the charter school's ability to meet timelines the local board establishes for securing a facility and final approval by the local board regarding suitability of the facility secured by the charter school. Md. Ed. Art. §9-104(a)(6).

This Board has not addressed the facility issue and the contingency approval issue since the decisions cited above were issued. In light of what we have learned over the years, we believe it is time to revisit the issue particularly in light of the 2015 amendment to the charter school law.

The law specifically allows a local board to approve a charter school application contingent on resolution of the facility issues. The local board correctly points out that the law is permissive, not mandatory. Yet, the law presents a solution to the chicken and egg dilemma and a way out of the catch-22. It is our view that *sound education policy* governing charter schools in Maryland should be built on a rational approach to solving difficult problems. The facility problem is indeed the most difficult one. The law presents a rational approach to solving the problem.

Therefore, we direct local boards, as a matter of sound education policy, when they are reviewing charter school applications, to grant contingent approval if the charter school application is sufficient in all the other areas and the charter school assures the local board that it can meet the timeline the local board establishes to secure a facility and renovate it, if necessary, to open on a date certain. The local board shall develop that timeline in collaboration with the charter school. The timeline must be a reasonable one, given all the financing issues and facility location circumstances relevant within the school system.

If the charter school successfully meets the timeline for securing a facility, the local board retains final approval of the suitability of the facility. The local board's final approval process should be expeditious, fair and reasonable. It is our view that the facility issues should not be a permanent roadblock to the ultimate approval of a charter school.

Of course if the charter school cannot secure a suitable facility, the contingent approval can be revoked and the local board can deny the charter school application.

Applying these rules in the case at hand, the local board and the charter school should establish a reasonable timeline by which the charter school will secure a temporary facility and renovate it, if necessary. If they cannot agree on a timeline, based on the facts before us, it is our view that a timeline of 18-24 months for securing and renovating a temporary facility would be appropriate. The local board should also work with the charter school to establish a reasonable timeline for securing a permanent facility.

Budget Issues

As reflected in the filings of both parties, there was much back and forth between the charter school and the Committee on budget issues. Most of those issues were entwined with facility and renovation cost issues. The local board argues that the charter school's answers to the Committee's questions were too vague and thus, "the cost of renovations could not be determined due to the lack of a facility." See Motion for Summary Affirmance at 9-11. Indeed, the Interim Superintendent's recommendation stated:


While [WPCS] proposes a plan to fundraise and obtain loans to support facilities acquisition and start-up, there is currently no clear commitment of funds. With respect to facilities, the statute permits a local board of education the ability to grant contingent approval based upon "the suitability of the facility secured by the public charter school." Watershed has been unable to provide specific information pertaining to any proposed facility it plans to acquire. Without an identified facility, the potential scope of required renovations to bring the facility to suitable educational standards cannot be precisely estimated.

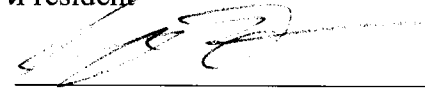
It is our view, if the central budget reason for denying the application is commitment of financing and the cost for facility renovation or acquisition, the local board merely circles back to the chicken and egg problem we discussed in the context of securing a facility. Facility renovation cost and financing is one part of the facility acquisition issue. If a charter school application can be approved contingent on securing a suitable facility, the cost and the funding issues related to facility acquisition will be either addressed sufficiently during that process or, if not, the local board retains the authority to deny the application because the contingency has not been met.³ The lack of a commitment for financing of the facility and a specific cost estimate should not be a roadblock to contingent approval.

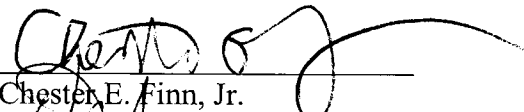
³ There were other budget issues raised unrelated to the facility issue but they were not central to the reasons for denying this charter. Therefore, we do not address them here. In addition, the charter school raises other issues about

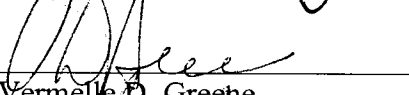
CONCLUSION

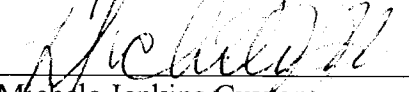
For all the reasons stated herein, we reverse the local board's decision as arbitrary and unreasonable because it is contrary to sound education policy affecting charter schools in Maryland and direct the local board to grant contingent approval of the charter pursuant to Md. Code, Educ. §9-104(d).



Justin M. Hartings
President


Stephanie R. Iszard
Vice-President


Chester E. Finn, Jr.



Vermelle D. Greehe



Michele Jenkins Guyton

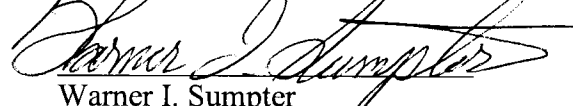

Jean C. Halle


Rose Maria Li


Joan Mele-McCarthy


Michael Phillips


David Steiner


Warner I. Sumpter

September 25, 2018

the timeliness of BCPS' review process, flaws in the review process and problems with the local board's vote. Because we reverse the local board's decision, we do not address these other arguments.