

THE DAVINCI  
COLLABORATIVE, LTD.,

Appellant,

v.

BALTIMORE CITY  
BOARD OF SCHOOL  
COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-05

## OPINION

### INTRODUCTION

The DaVinci Collaborative, Ltd. (“DVC”) appeals the decision of the Baltimore City Board of School Commissioners (“local board”) denying its application to establish a charter school. We referred the matter to the Office of Administrative Hearings (“OAH”) where an Administrative Law Judge (“ALJ”) issued a Proposed Decision finding that the local board’s decision resulted from unlawful procedure and recommending that the State Board remand the matter to the local board to collaborate with DVC towards curing the deficits in its application. DVC and the local board both filed Exceptions to the ALJ’S Proposed Decision and each party responded.

### FACTUAL BACKGROUND

The full factual background is set forth in the ALJ’s Proposed Decision at pp. 4 – 9. We have set forth some essential facts below for purposes of reviewing the exceptions.

This appeal concerns DVC’s application to establish a charter school in Baltimore City featuring a project-based year-round high school. DVC’s first application for a charter school was denied by the local board in 2017. Thereafter, DVC submitted a second application, denied by the local board on June 12, 2018. DVC appealed that denial to the State Board.

On October 23, 2018, the State Board reversed the local board’s decision finding that the decision “lack[ed] the rationale to support the denial,” that its process “was not fair and open,” and that the local board “did not find fatal flaws in the program DVC proposed to implement but merely sought further explanation to questions posed.” *The DaVinci Collaborative, Ltd. v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 18-34 (“*DVC I*”). The State Board identified the matters requiring further explanation by posing six questions:

- (1) How DVC would implement a “complex curriculum” in terms of teacher resources;
- (2) How various elements would work to form a coherent curriculum;
- (3) How tensions between different approaches would be resolved;
- (4) How DVC would prepare teachers and students to use a “blended approach”;
- (5) How it would recruit ESOL certified teachers; and

(6) How teachers would develop and monitor personalized learning plans?

The State Board remanded the case to the local board for it “to provide timely opportunity to [DVC] to answer the six questions posed in the final decision and to reconsider its decision in light of those answers.” *Id.*

By letter to the local board dated October 30, 2018, DVC responded to the questions.

Mr. Roberts, from the Office of New Initiatives (“ONI”), advised DVC representatives that ONI would be presenting an update on the appeal at the local board’s November 13, 2108 meeting, but that the local board would defer voting on the application until its meeting on December 11, 2018. Ms. Alvarez, Executive Director of ONI, presented the update on the application to the local board at the November 13, 2018 meeting.

At the November 13 meeting, DVC representatives requested and received the opportunity to address the local board. They answered questions from local board members, but objected to the questions about location, teacher planning time, and scheduling. DVC representatives maintained that such questions were outside of the scope of the six questions set forth in the State Board’s decision. The local board did not vote on the application at the meeting, but scheduled the vote to take place at its December 11, 2018 meeting.

The day prior to the local board’s December 11, 2018 meeting, Ms. Alvarez spoke with DVC’s representative by phone and advised that the CEO would be recommending denial of the application. Ms. Alvarez followed this up with an email that same day.

At the December 11, 2018 meeting, members of the local board asked questions of the DVC representatives. The local board gave DVC three days to submit supplemental detailed responses to its questions. The local board did not vote on the application.

On December 14, 2018, DVC submitted a 30-page document addressing concerns raised by the local board at the meeting. There was no further substantive discussion between DVC and the school system after submission of the document, despite DVC’s requests.

The CEO issued a written recommendation to the local board to deny DVC’s application immediately before the local board’s January 8, 2019 meeting. The local board did not allot time for DVC to make a presentation to the board at the meeting, but board members asked questions of the DVC representative, to which he responded. The local board voted to deny the application. On February 7, 2019, the local board issued a written denial of DVC’s application. The denial addressed some deficiencies not previously raised with DVC’s representatives between the local board’s December 2018 and January 2019 meetings.

On February 7, 2019, DVC appealed the local board’s decision denying its charter application to the State Board. We transmitted the case to OAH for review by an ALJ. The ALJ conducted eight days of hearing on various days from August 2019 through January 2020.

On May 20, 2020, the ALJ issued a Proposed Decision finding that the local board did not engage in a fair process. The ALJ recommended that the State Board reverse the local board and remand the case for the local board to collaborate with DVC towards curing the deficits in its application, including the deficits cited in the February 7, 2019 denial letter. The ALJ stated:

The collaborative process, mandated by the Local Board rules, the State Board’s decision in this remand, and discussed in the litany of

its prior cases, was lacking, and it required more collaborative efforts on Baltimore City's behalf. While [DVC] was given an opportunity for post-remand submissions at various times, there was no collaboration to address their responses, and particularly no opportunity to address specific deficits raised in the denial letter of February 7, 2019.

Such an opportunity for collaboration does not guarantee success—just that a fair process needs to be followed in gathering the material on which a decision can be reached.

(Proposed Decision at 39).

DVC and the local board both filed exceptions to the proposed ALJ's Proposed Decision, and both responded to the exceptions filed by the other party. The parties waived oral argument.

### STANDARD OF REVIEW

For decisions of the local board involving a local policy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A; *See also Northwood Appold Community Academy Pub. Charter Sch. v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 14-04 (2014).

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.01.05.06E.

The State Board transferred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See Md. Code Ann., State Gov't §10-216.*

### LEGAL ANALYSIS

#### *DVC's Motion to Strike the Local Board's Exceptions*

As a preliminary matter, we address DVC's Motion to Strike the local board's exceptions because the board failed to append the relevant portions of the OAH hearing transcript that support its arguments, as required by COMAR 13A.01.05.07(F)(3). The local board has since submitted the hearing transcripts and maintains that the Motion to Strike is now moot. In response, DVC claims its Motion is not moot because it was prejudiced in its ability to fully understand and respond to the exceptions. We find no prejudice to DVC. The local board's exceptions are well explained. DVC was aware of the issues in the case, and provided full and complete responses to the exceptions. We therefore decline to strike the exceptions outright. We address lack of transcript references with regard to specific exceptions concerning the ALJ's factual findings further in this opinion.

### *Application Evaluation Process*

In its exceptions, the local board maintains that the ALJ set forth an unreasonable process that is not predicated on the State Board's prior holdings. We disagree. The Proposed decision sets forth that a fair process includes collaboration, notice of the CEO's recommendation, and time for the charter applicant to respond to the CEO's recommendation and the opportunity to cure the defects. (See Proposed Decision at 24). This process is reasonable and consistent with the *DVC I* remand opinion and prior State Board cases.

We will not repeat here the evolution of the cases and rules contained in *DVC I* and the ALJ's Proposed Decision, however, we reiterate that providing a charter school applicant with meaningful technical assistance by way of substantive feedback and the opportunity to cure deficiencies in the application is a component in a fair evaluation process. (*DVC I* at 6, 8). Further, with regard to when CEO recommendations are made to a local board, in *DVC I* we made very clear that a fair process also includes the opportunity to respond to the CEO's recommendations. We stated as follows:

To the extent that we have been unclear about that in the past, we now provide some clarity – at least one day, before a board votes on a charter school denial, the applicant should be provided with a copy of the CEO's recommendation. At the board meeting, the applicant must be provided with a short, but sufficient time to address the concerns raised in the recommendation. If the applicant had not been provided an opportunity to cure the problems, the local board should direct that such an opportunity be provided forthwith.

*Id.* at 9.

The ALJ correctly found that the local board did not provide DVC with adequate notice of the CEO's January 8, 2019 recommendation to deny the application because the recommendation was not provided at least one day before the board voted. Although the DVC representative answered questions from local board members at the meeting, there was no meaningful opportunity for DVC to address the local board given the insufficient time for DVC to review the recommendation prior to answering the board members' questions. This was critical given that the CEO's January 8, 2018 recommendation raised previously unnoted fatal deficiencies in DVC's application after taking into account DVC's December 14, 2108 supplemental response. Thus, the fact that DVC had the opportunity to address questions raised by local board members at the November and December 2018 meetings and to submit the December 14, 2018 supplemental response does not rectify the lack of notice issue with regard to the January 8, 2019 CEO recommendation.

The ALJ also correctly discerned that DVC did not have the opportunity to cure the deficiencies noted in the CEO's January 8, 2019 recommendation due to the lack of collaboration after the remand. Between the October 30, 2018 submission and the November 13 meeting, there was no communication between DVC and the local board concerning the submission or any other substantive issue. The substantive application topics discussed at the November and December meetings followed the same pattern. Nor was there any communication after DVC's submission of its December 14 supplemental response. There was simply no substantive feedback on the newly identified deficiencies that would allow DVC the

opportunity to cure. As stated by the ALJ, “[b]y taking ONI out of the loop following its meeting on December 11, 2018, by not advising [DVC] of concerns that were raised in the CEO’s recommendation or by the Local Board members at its meeting, or by failing to schedule a meeting to address [DVC’s] responses as Chair Casciani had proposed,” there was no collaboration and the local board ultimately failed to allow [DVC] an opportunity to respond to the CEO’s ultimate recommendation. (Proposed Decision at 36).

The local board explains that each opportunity DVC received to cure deficiencies revealed more flaws because DVC’s subsequent submissions contradicted its own application and prior statements. (Exceptions at 10). The local board states that as things progressed, it became more evident that DVC did not have a clear understanding of the heavy lift that it would take to carry out its multi-faceted proposal. Citing *Frederick Outdoor Discovery Charter Sch. v. Bd. of Educ. of Frederick County*, MSBE Op. No 13-14(2013), the local board argues that an applicant cannot be allowed an unlimited time frame to cure flaws in its application and that it is not the duty of the board to hand hold the applicant until its application is granted or to allow a never-ending series of final changes to address its flaws.

In *Frederick Outdoor Discovery*, we recognized that “school systems do not have the resources to assist every applicant to correct the deficiencies in the application” and that “that is the job of the applicant.” We further noted that if the full explanation of deficiencies comes late in the review process and if the deficiencies are major, they might not be correctible in time, in which case resubmission of the application is likely the more appropriate way to proceed. (*Id.* at 7-8). We do not here find otherwise. However, this case is different from *Frederick Outdoor Discovery*. Here, DVC did not have the benefit of notice of the newly noted deficiencies, any substantive feedback regarding the new deficiencies or the opportunity to respond prior to the local board’s January 8, 2019 vote. Further, there was simply no collaboration during the post-remand period. Collaboration, through meaningful technical assistance, is what was required here. We do not envision a never-ending process, just a fair one.

#### *Accardi Doctrine*

The local board takes exception to the ALJ’s determination that it violated the *Accardi* Doctrine. The *Accardi* Doctrine requires that a government agency “scrupulously observe rules, regulations, or procedures which it has established.” *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). In order to strike down an agency’s decision under *Accardi*, the complainant must demonstrate it was prejudiced by the agency’s failure to follow its rules, regulations, or procedures. *Pollack v. Patuxent*, 374 Md. 463, 504 (2003).

In finding an *Accardi* violation, the ALJ relied upon the local board’s Administrative Procedure IHB-RA(II.A.4) which states:

The CEO or designee shall make available to a public charter applicant advice, technical assistance, and consultation throughout the application process. The applicant may use these services in order to help ensure that all components of the application have been completed and are addressed. It is the responsibility of the applicant to complete the application.

(DVC Ex. 3 at 9). It is this provision that the local board failed to comply with post-remand as discussed by the ALJ, which resulted in prejudice to DVC in that it did not receive the benefit of

any guidance or substantive feedback to its post-remand submission. Moreover, even if there were no *Accardi* violation, the local board still failed to engage in a fair post-remand process as envisioned by prior State Board decisions and the *DVC I* remand opinion.

*Does Proposed Decision Exceed Scope of Remand?*

The local board maintains that the Proposed Decision went beyond the scope of the *DVC I* remand opinion in that it incorrectly identified the issue presented in the case as “whether the Local Board fulfilled its obligation to [DVC] to collaborate after the remand.” (Exceptions at 5). The ALJ understood that if the local board failed to follow the proper process it would once again render the local board’s decision denying the charter application arbitrary, unreasonable or illegal. (*See* Proposed Decision at 3). Thus, there was no reason to address the substance of the application denial. As explained above, once the local board had additional questions and concerns and identified new deficiencies based on DVC’s response to the six questions, it was required to engage in the collaborative process. Thus, it was not improper for the ALJ to frame the issue in this manner. Nor, for this same reason, was it improper for the ALJ to focus the Proposed Decision on the procedural aspects of the evaluations process as the local board claims.

The local board also claims that the Proposed Decision goes beyond the scope of the remand because the ALJ made findings of fact regarding the pre-remand process and discussed the pre-remand process at length, and also discussed the pre-remand role of ONI and the Advisory Board. The ALJ made many such findings and addressed these matters to set forth the full panoply of the interactions of the parties. The ALJ’s inclusion of the pre-remand process in the Proposed Decision it is not erroneous and provides a better understanding of the record. The Proposed Decision includes significant findings of fact and discussion regarding the post-remand process, and the ALJ’s ultimate conclusion focuses only on the post-remand facts.

*Exceptions to Factual Findings*

The local board takes exception to several of the ALJ’s factual findings, which we discuss in turn below:

Finding of fact 20, which states that “[a]fter reviewing [DVC’s] application and meeting with its representative, the Advisory Board recommended that [DVC’s] second application be approved.” (Proposed Decision at 5). The local board states that two of the seven members of the Advisory Board recommended denial of DVC’s application, and that those were the only two members who had educational background and direct experience with implementing curriculum in school. (Exceptions at 17). The local board argues that the disagreement of these two Advisory Board members is important because a major flaw in DVC’s application is that it does not represent a model that can be implemented with fidelity as proposed. *Id.* This does not negate the fact that the factual finding is correct. Moreover, the local board had provided no citation to the record to support its assertion.

Finding of fact 24 which states that DVC operator and co-founder “Ms. Luce was not permitted to address the Local Board to respond to the CEO’s recommendation for denial” at the local board’s June 12, 2018 meeting. (Proposed Decision at 6). The local board states that Ms. Luce was not barred from speaking at the meeting, but rather she was late to sign up for public comment and the ten allotted slots were already filled. (Exceptions at 17-18). Without addressing the wisdom of the local board’s requirement that a charter applicant must sign up for

public comment in order to respond to the CEO's recommendation, the factual finding is not wrong. Again, we note there is no citation to the record to support the local board's assertion.

Finding of fact 29, which states that "[t]hose six questions [the questions set forth in the State Board's Remand Order] were specifically raised by Angela Alvarez at the Local Board meeting held on June 12, 2018." (Proposed Decision at 7). The local board, relying on the meeting transcript, states that that Ms. Alvarez did not pose the six questions that the State Board included in the *DVC I* remand opinion; she addressed the concerns encapsulated in the questions. (Exceptions at 18). We recognize that the local board is correct that Ms. Alvarez addressed concerns encapsulated in the questions but she did not specifically raise the questions themselves. (DVC Ex. 13, 6/12/18, T.186-197). However, the difference is not material and is of no consequence to our decision in this case.

Finding of fact 39, which states that "[a]t the December 11, 2018, meeting, members of the Local Board asked more questions of [DVC] representatives. The Local Board gave [DVC] three days to submit supplemental detailed questions to its responses. The vote was continued until the Local Board's next meeting on January 8, 2019." (Proposed Decision at 8). The local board states that, at the meeting, DVC expressed its opinion that it did not believe additional material was needed and only agreed to submit the material at the local board's insistence. Specifically, the local board requested a more detailed professional development plan in order to understand if DVC was prepared to implement its curriculum with fidelity. (Exceptions at 18). While it is true that the DVC representative indicated the belief that the six questions did not necessitate the submission of a more detailed professional development plan (DVC Ex. 17, 12/11/18, T.112-113), this has no bearing on the accuracy of the factual finding.

Finding of fact 45 which states that the "[DVC] representative did not have sufficient time to respond to the CEO's recommendation and no time was allotted for DVC representatives to make any presentation at the Local Board's meeting on January 9, 2019." (Proposed Decision at 9). The local board states that this is incorrect in that the DVC representative was asked questions by the local board members, to which he responded. (Exceptions at 19). While there can be no dispute that a DVC representative spoke in response to questions from board members at the January 8, 2019 meeting prior to the local board's vote on the charter application, the local board Chair specifically stated he was not allowing a presentation from DVC and that there would be questions only. (DVC Ex. 22, 1/8/19, T.134-135). Furthermore, this factual finding is premised on the fact that DVC did not receive the CEO's recommendation issued January 8, 2018 at least one day before the meeting, which did not give DVC sufficient time to respond.

The local board takes exception to what it refers to as two missing findings of fact between findings number 35 and 36. (Exceptions at 19). First, it maintains that the ALJ should have found that DVC requested an expedited vote on remand and wanted it to occur at the November 2018 meeting. The local board provides no record citation for this assertion and we will not sift through the record to determine its accuracy for inclusion in the factual findings. Second, the local board states that DVC addressed the local board at the November 13, 2018 board meeting, which supports the conclusion that the local board engaged DVC in an extensive post-remand collaborative process. The ALJ captures the fact that DVC addressed the local board at the November 13 meeting in finding of fact 33. To the extent that the local board argues this demonstrates a collaborative process, we have already addressed the collaborative process above and found that the ALJ was correct in his determinations.

*Did Local Board Exceed the Remand Directives?*

In its exceptions, DVC maintains that the local board exceeded the directives of the *DVC I* remand opinion by finding new flaws in DVC's application. (DVC Exceptions at 3-4). In *DVC I*, the State Board remanded the case to the local board for it "to provide timely opportunity to [DVC] to answer the six questions posed in the final decision and to reconsider its decision in light of those answers." DVC submitted its October 30, 2018 response to the six questions. Instead of satisfying the local board, the submission evoked additional questions and concerns. The remand did not limit the local board's ability to find flaws in its reconsideration of its decision.

*Remedy*

The ALJ proposes that the State Board remand the case to the local board "to collaborate with [DVC] towards curing the defects in its application, including the deficits cited in [the local board's] February 7, 2019 letter, in a manner consistent with [his] proposed decision." (Proposed Decision at 41). DVC requests that the State Board decline the remand and instead order the local board to issue DVC a five-year charter to operate the school.

If we reverse the decision of the local board, we must remand the matter to the local board. Education Art. §9-104(d)(3). On remand, we may direct the local board to grant a charter and may, if necessary, mediate with the local board and the applicant to implement the charter. *Id.* In *DVC I*, we noted that implicit in the law is the option, if appropriate, "to direct an expedited re-review in conformance with the rules set forth in our opinion."

In *DVC I*, we explained the State Board's reluctance to direct approval of a charter based on its own review of the merits of a charter school application given the complexities in replicating the evaluation process. DVC believes that the local board cannot provide a fair process given the history of the case and the board's failed opportunities to provide a fair process thus far. Although we understand that concern, we continue to believe that the local board is best suited to ensure completion of the evaluation process based on the directives in this and the Proposed Decision. Given the particular circumstances of this case, this includes providing collaboration by having school system representatives address with DVC the deficiencies raised in the CEO's January 8, 2019 recommendation, and allowing DVC time to submit a written response in order to cure the deficiencies.

CONCLUSION

The record supports the findings and conclusions reached by the ALJ, and the parties' exceptions do not require a different result. We adopt the ALJ's Proposed Decision, except to the extent specified in this Opinion, and reverse the local board's decision as arbitrary and unreasonable. We remand the case to the local board to allow DVC the opportunity to have a discussion with school system representatives regarding the new deficiencies raised in the CEO's January 8, 2019 recommendation; to allow DVC to submit a written response to those deficiencies; and for the local board to reconsider its decision based on the discussion and written responses.

Signatures on File:

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Clarence C. Crawford  
President

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Jean C. Halle  
Vice-President

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Shawn D. Bartley

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Gail H. Bates

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Charles R. Dashiell, Jr.

---

Susan J. Getty

---

Rose Maria Li

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Rachel McCusker

---

Joan Mele-McCarthy

---

Lori Morrow

---

Warner I. Sumpter

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Holly C. Wilcox

Absent:  
Vermelle D. Greene

February 23, 2021

**THE DAVINCI COLLABORATIVE,  
LTD.,**

**APPELLANT**

**v.**

**BALTIMORE CITY BOARD OF  
SCHOOL COMMISSIONERS**

**\* BEFORE MARC NACHMAN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\* OAH No.: MSDE-BE-12-19-08519  
\***

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On or about March 22, 2017, The DaVinci Collaborative, Ltd. (DaVinci), submitted an initial application to establish a public charter high school with the Baltimore City Board of School Commissioners (Local Board).<sup>1</sup> On or about March 20, 2018, DaVinci submitted a subsequent application to the Local Board, which is the subject of this appeal.

In June 2018, the Local Board again denied DaVinci's application and DaVinci appealed the decision to the Maryland State Board of Education (State Board or MSBE). On October 23, 2018, the State Board reversed the Local Board's decision because it found that Baltimore City's process was "arbitrary and unreasonable" or illegal and remanded the matter to the Local Board to reconsider its decision in light of six questions derived from the Local Board's review of

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<sup>1</sup> The Local Board was ultimately responsible for making the decision to deny DaVinci's charter application. However, approval process involved other Baltimore City Public School System offices and officials. Generally, these individuals or entities will be referenced collectively as "Baltimore City," unless it is more appropriate to identify a specific office or official.

DaVinci's application. The Local Board held meetings to consider the application on November 13 and December 11, 2018, and at its meeting on January 8, 2019, the Local Board once again denied DaVinci's application.<sup>2</sup> DaVinci appealed the Local Board's decision after the remand, again claiming that the process was arbitrary and unreasonable.

On March 13, 2019, Maryland State Department of Education transmitted the case to the Office of Administrative Hearings (OAH) to conduct a hearing and issue proposed Findings of Fact, Conclusions of Law, and Recommendations. Code of Maryland Regulations (COMAR) 13A.01.05.07A.

The Local Board filed a Memorandum in Response to DaVinci's appeal,<sup>3</sup> which, although not captioned as a motion to dismiss or for summary decision of affirmance, sought as relief that "its decision to deny [DaVinci's] charter application is affirmed because said decision was not arbitrary, unreasonable, or illegal." DaVinci filed a response.<sup>4</sup> At the pre-hearing conference, both parties sought a ruling on the Local Board's motion prior to the hearing on the merits which was scheduled to start on August 8, 2019. No oral argument was offered. Accordingly, I treated the pleading as a motion for summary decision. COMAR 28.02.01.12D. I denied the motion for summary decision in a written order dated June 10, 2019.

On August 8, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. The hearing continued on the following dates: August 9, 23, and 29, 2019; September 25, 2019; and January 21-23, 2020.<sup>5</sup> I held the record open for the parties to submit post hearing briefs.

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<sup>2</sup> Two letters contained the Local Board's decision – one dated February 7 and the other February 21, 2019. Both were substantially the same except for the signatures. See DVC Exs. 24 and 25. The appeal date seemed to flow from receipt of the first-dated letter.

<sup>3</sup> The Board's memorandum appears to be part of the transmittal and is not dated.

<sup>4</sup> The certificate of services indicates its service on the State Board and the Local Board on February 7, 2019.

<sup>5</sup> Several continuances were necessary as a result of counsel's and the ALJ's sudden illnesses, which prevented the hearing from taking place on multiple dates. Each continuance was granted, good cause having been shown, and the parties agreed to new hearing dates.

DaVinci filed its post hearing brief on February 24, 2020. The Board filed a post hearing brief the same date. DaVinci filed a rebuttal brief on March 6, 2020.

Amanda Costley, Esquire, represents the Local Board. Patricia Hennessy, Esquire, Conrad O'Brien, P.C., represents DaVinci.

The procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the State Board's hearing regulations, and OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 13A.01.05; COMAR 28.02.01.

### **ISSUE**

Is the decision of the Baltimore City Board of School Commissioners to deny the charter application of DaVinci illegal, arbitrary or unreasonable?

### **SUMMARY OF THE EVIDENCE**

#### ***Exhibits***

An exhibit list of admitted evidence is attached to this proposed decision.

#### ***Testimony***

DaVinci presented the following witnesses, all of whom are DaVinci Board members: Sierra Boney; Helen Luce; Dominic Joseph Smith; and Travis Henschen.

The Local Board presented the following witnesses, all of whom were employed by Baltimore City: Laura Ohanian, Director of Differentiated Learning; Dawn Shirey, Director of 21st Century Learning; and, Angela Alvarez, Executive Director, Office of New Initiatives (ONI).

## PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. Helen Luce and Travis Henschen incorporated DaVinci in order to file an application with Baltimore City to operate a charter high school.
2. Ms. Luce and Mr. Henschen are both educators who developed the DaVinci charter school program to feature personalized project-based learning in a year-round school, with each student monitored by a teacher/mentor in weekly advisory sessions. The school would start in the ninth grade, adding a grade every year until it became a four-year high school.
3. In order to operate a charter school in Baltimore City, charter applications are filed with the Baltimore City Office of New Initiatives (ONI), which reviews new charter applications and monitors existing charter schools.
4. Angela Alvarez is the Director of ONI.
5. Charter applications must address the organization and operation of the charter school, meeting requirements for an academic plan, school culture and climate, governance, facilities, as well as other features of its program.
6. ONI reviews each charter application for technical completeness against a checklist of requirements.
7. Once an applicant passes the technical review, applicants are interviewed by the New and Charter Schools Advisory Board (Advisory Board).
8. The Advisory Board is comprised of volunteers from the community appointed by the Baltimore City's Chief Executive Officer (CEO), who at all relevant times was Dr. Sonja Brookins Santelises
9. The Advisory Board reviews the charter school's application and asks charter representatives questions about their proposed program. The members of the Advisory Board

then complete a scoring rubric for each applicant and submits its recommendation to ONI, which in turn provides its recommendations to the CEO.

10. The Local Board also has work sessions with charter applicants where it may question the applicants.

11. The CEO is not bound by the Advisory Board's recommendations.

12. The CEO makes a recommendation to the Local Board to vote to either approve or reject the charter school application. ONI presents the CEO's recommendation to the Local Board.

13. The Local Board votes on charter school applications at one of their monthly public meetings

14. DaVinci passed ONI's technical review and again met with the Advisory Board.

15. DaVinci's initial application was denied by the Local Board in 2017.

16. During the summer of 2017, DaVinci representatives met with ONI representatives, who encouraged them to file a second application.

17. Subsequently, DaVinci submitted a second application on March 20, 2018.

18. DaVinci's second application was more detailed and over 500 pages long.

19. DaVinci's second application passed ONI's technical review.

20. After reviewing DaVinci's application and meeting with its representative, the Advisory Board recommended that DaVinci's second application be approved.

21. DaVinci representatives made a presentation to the Local Board in a work session on May 22, 2018. The Local Board members asked the representatives about DaVinci's ability to provide arts and physical education, its internship plan, changes from the previous years' application, and its proposed facility.

22. On June 6, 2018, Trevor Roberts, from ONI, asked additional questions about educating English-language learner (ELL). On the following day, Da Vinci sent Mr. Roberts a five-page letter in response to ONI's request.

23. On June 11, 2018, Ms. Alvarez and Mr. Roberts telephoned DaVinci's representatives and advised that the application would not be recommended for approval, citing concerns about teaching special education students, the complexity of its model, and the lack of a need for another high school in Baltimore City.

24. On the following day, June 12, 2018, the Local Board met to consider charter school applications at its monthly meeting. Ms. Luce was not permitted to address the Local Board to respond to the CEO's recommendation for denial.

25. Ms. Alvarez presented the CEO's recommendation, praising the program for strengths, but citing deficiencies in the program, namely, the complexity of the curriculum, the inability to properly staff its teaching positions, and Baltimore City's lack of need for another high school.

26. The Local Board subsequently voted to deny DaVinci's application to open a charter school. The explanation for the denial was contained in a one-and-a-half page letter sent to DaVinci signed by Dr. Santelises.

27. On July 11, 2018, DaVinci appealed the Local Board's decision to the State Board, which, in its written opinion issued October 23, 2018, called the Local Board's review "cursory," because it "lack[ed] the rationale to support the denial" and its process "was not fair and open," and the Local Board "did not find fatal flaws in the program DaVinci proposed to implement but merely sought further explanations to questions posed."

28. The State Board reversed the decision made by the Local Board to deny DaVinci's application to establish a public charter school in Baltimore City, and remanded the decision on the

application back to the Local Board with instructions to answer six specific questions regarding its application:

1. How it would implement a “complex curriculum” in terms of teacher resources;
2. How various elements would work to form a coherent curriculum;
3. How tensions between different approaches would be resolved;
4. How it would prepare teachers and students to use a “blended approach;”
5. How it would recruit ESOL<sup>6</sup> certified teachers;
6. How teachers would develop and monitor personalized learning plans.

29. Those six questions were specifically raised by Angela Alvarez at the Local Board meeting held on June 12, 2018.

30. Post-remand, in a letter it sent to the Local Board on October 30, 2018, DaVinci responded to the six questions.

31. ONI’s Mr. Roberts told DaVinci’s representative that ONI would present an update to the Local Board at its meeting on November 13, 2018, regarding DaVinci’s State Board appeal, but that the Local Board would defer voting on the application until its December 11, 2018 meeting.

32. At the Local Board meeting on November 13, 2018, Ms. Alvarez presented an update on the application.

33. DaVinci representatives asked for and were granted an opportunity to address the Local Board at its November 13, 2018 meeting. DaVinci raised objections to questions dealing with location, teacher planning time, and scheduling, all of which it contended were outside the narrow scope of the State Board’s six questions which were the subject of the remand.

34. DaVinci representatives answered questions at the meeting from Local Board members. No vote was taken, but a vote was scheduled for the subsequent meeting of the Local Board on December 11, 2018, ostensibly to allow the Local Board additional time to review DaVinci’s October 30, 2018, supplement to the application.

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<sup>6</sup> English as a Second Language.

35. Between the two meetings, Baltimore City did not communicate any of its concerns to DaVinci, despite DaVinci having submitted its October 30, 2018 letter and answered questions from the Local Board members.

36. The day before the Local Board's December 11, 2018, meeting, Ms. Alvarez telephoned DaVinci's representative and advised that the CEO would again be recommending that the Local Board deny DaVinci's application; this advice was followed up with an email.

37. Ms. Alvarez did not respond to DaVinci's representative's specific questions about the recommendation.

38. At the December 11, 2018 meeting, Ms. Alvarez presented the CEO's recommendation to the Local Board, discussing flaws in DaVinci's application and supplemental materials.

39. At the December 11, 2018 meeting, members of the Local Board asked more questions of DaVinci representatives. The Local Board gave DaVinci three days to submit supplemental detailed responses to its questions. The vote was continued until the Local Board's next meeting on January 8, 2019.

40. At the December 11, 2018 meeting, Cheryl Casciani, who chairs the Local Board, directed no further comment from Ms. Alvarez or ONI, and intimated that the Local Board might hold an additional meeting to meet with DaVinci's representatives.

41. Although Local Board Chair Casciani's suggested that there be an additional meeting to address the application, no such meeting was scheduled.

42. On December 14, 2018, DaVinci submitted additional documentation to the Local Board. The thirty-page response addressed concerns raised by the Local Board at its meeting held three days earlier.

43. After DaVinci's December 14, 2018 response, DaVinci representatives had no further substantive contact from the Local Board, the CEO, ONI, or any other Baltimore City staff person. No further discussion was scheduled, despite DaVinci's requests.

44. In a written recommendation immediately before the Local Board's meeting on January 8, 2019, the CEO again recommended that the application be denied.

45. DaVinci representative did not have sufficient time to respond to the CEO's recommendation and no time was allotted for Davinci representatives to make any presentation at the Local Board's meeting on January 8, 2019.

46. At its meeting on January 8, 2019, the Local Board denied DaVinci's application.

47. A subsequent web posting by the Local Board referenced "fatal flaws" and "new flaws" apparent in DaVinci's supplemental responses.

48. The Local Board issued a written denial of DaVinci's application on February 7, 2019. That letter addressed some deficits not previously raised with DaVinci representatives between the Local Board's meetings in December 2018 and January 2019.

## DISCUSSION

### **I. Legal authority for Public Charter Schools in Maryland**

The Court of Appeals in *Monarch Academy Baltimore Campus, Inc. v. Baltimore. City Bd. of Sch. Comm'rs*, 457 Md. 1, 15 (2017), explained the legal authority for establishing and running public charter schools in Maryland:

Charter schools are a statutorily created alternative to traditional public schools that are "in the nature of semi-autonomous public schools," operating "under a contract with a State or local school board." "The contract, or charter [agreement], defines how the school will be structured, staffed, managed, and funded, what programs will be offered, and how the school will operate and account for its activities." In Maryland, charter schools are governed by the Maryland Public Charter School Program, which "sets forth a process for establishing new charter schools as well as monitoring, oversight, and accountability standards for charter schools once they are established." The purpose of the Charter School Program is to "establish an alternative means within the existing public school system in order to provide

innovative learning opportunities and creative educational approaches to improve the education of students.”

*See also, Lincoln Charter Pub. Sch., Inc. v. Prince George’s Cty. Bd. of Educ.*, No. 05-18, at 5 (Md. State Bd. of Educ. May 26, 2005) (“[A] charter agreement . . . is a legally binding contract that explains in detail the responsibilities of all parties involved in the operation of the public charter school.”). Section 9-103 of the Education Article provides that “[t]he public chartering authority for the granting of a charter shall be a county board of education.” A “‘public charter school’ means a public school that... [o]perates under the supervision of the public chartering authority from which its charter is granted and in accordance with its charter....” Md. Code Ann., Educ. § 9-102(11).

Section 9-104 of the Education Article sets forth the application and review procedure and provides that an application may be submitted to a county board by certain individuals. Md. Code Ann., Educ. § 9-104(a)(2). There is no dispute in this matter regarding any of the foregoing criteria.

A charter school appeal to the State Board is “an appeal from a decision of a local board involving a ‘local policy or controversy and dispute regarding the rules and regulations of the local board.’”<sup>7</sup> *Possibility Stem Preparatory Acad. Charter Sch. v. Prince Georges’ Cty. Bd. of Educ.*, No. 11-43, at 5 (Md. State Bd. of Educ. Sept. 27, 2011).

## **II. Standard of Review**

In cases challenging denials of charter school applications, the appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(D). To prove an assertion or a claim by a preponderance of the evidence, the party must prove that it is “more likely so

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<sup>7</sup> Pursuant to COMAR 13A.01.05.07A(1)(c), the State Board shall transfer an appeal to the OAH for review by an administrative law judge where the State Board finds that a genuine dispute of material fact exists.

than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

The issue is whether the Local Board’s decision to deny DaVinci’s charter application was illegal, arbitrary or unreasonable. COMAR 13A.01.05.06 A. The State Board may not substitute its judgment for that of the local board unless the decision is “arbitrary, unreasonable or illegal.” *See also, Humanitarian Outreach Development Group v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 10-43; *UMOJA Academy v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 06-14, citing, *Potomac Charter Sch. v. Prince George’s Cty. Bd. of Educ.*, MSBE Op. No. 05-08.

A decision may be illegal if it: is unconstitutional; exceeds statutory authority or jurisdictional boundaries; misconstrued the law; results from unlawful procedures; is an abuse of discretion; or is affected by errors of law. COMAR 13A.01.05.06 . Illegality is a threshold question. If the Local Board’s decision is not illegal, the remaining question is whether its decision is arbitrary or unreasonable, meaning that it is contrary to sound educational policy or that a reasoning mind could not have reasonably reached the conclusion that the local board reached. COMAR 13A.01.05.06B.

For the reasons expressed below, I recommend a finding that the Local Board’s decision was illegal because it resulted from an unlawful procedure. COMAR 13A.01.05.06C(4).

### III. **Position of the Parties**

DaVinci presented a number of areas of contention, substantially focusing on the process for reviewing its application after the State Board’s remand. DaVinci asserts that the post-remand process was illegal. DaVinci contends that the Local Board failed to engage in meaningful collaboration after the reversal and remand, arbitrarily setting the bar too high for one particular applicant to open a charter school.

Da Vinci also argues that Baltimore City's denial of the application nullifies the role of the Advisory Board, and the review process in which it participated. During the initial 2018 review process, DaVinci was interviewed by the Advisory Board which recommended approval.

Post-remand, DaVinci contends that Baltimore City engaged additional staff who never participated in the initial review, but whose the opinions were given substantial weight. These persons did not have any person-to-person interaction with the DaVinci team. DaVinci further argues there was no meaningful collaboration or engagement post-remand; the opportunities to present supplemental information and to speak at Local Board meetings does not rise to meaningful collaboration. DaVinci cited several cases as examples of meaningful and valuable collaboration which they claim was lacking in the manner in which Baltimore City conducted its charter school review and approval process.

DaVinci further argues Baltimore City engaged in a de novo review of the application outside the scope of the remand, and that review was absent of any process akin to the initial review. By way of example, the January 2019 denial memo was on the Local Board's website before sharing it with the DaVinci team – which DaVinci claims is an example of the illegal nature of the post-remand process. Further, DaVinci argues that the opinion of the additional staff was given weight in the areas of instructional approach and complexity of integrating various educational models, which led to a misunderstanding of professional development requirements and the target population the charter school wishes to service.

To the contrary, Baltimore City asserts that DaVinci had multiple opportunities to present and explain its charter application, but it lacked a thorough and proper professional development plan to implement the proposed educational approaches. The Advisory Board is meant to advise the CEO, and it is not the role of the Advisory Board to provide feedback to the applicant.

Additionally, it is an undue burden for the Local Board to engage in private meetings for the explanation of charter school applications.

Baltimore City indicates that post-remand responses cannot be viewed in a vacuum, as the supplements are extensions of the original application. The entire application must be clear and without contradictions. Baltimore City spent significant time discussing how DaVinci failed to present a sufficient professional development plan to support the implementation of new educational approaches and strategies with fidelity. Further, Baltimore City indicates that DaVinci failed to describe instructional strategies for English Language Learners (ELL), and in particular, that DaVinci did not have a viable plan to recruit ELL teachers. With the school's planned demographic, the teachers would not be prepared to educate the target population it was seeking. Baltimore City acknowledged that DaVinci presented a very strong, research based model, but did not adequately show how they would successfully implement the models. Baltimore City asserts that the professional development plan presented was insufficient to lift each approach individually, and impossible to implement all in the first year of operation.

#### **IV. DaVinci's first charter school application (2017)**

DaVinci submitted an initial application to Baltimore City to operate a charter school on or about March 22, 2017.

During the application review process in 2017, DaVinci had no communication with ONI or anyone from Baltimore City between the Advisory Board's meeting and the Local Board's vote, other than the day before the vote was taken. (Tr. pp. 73:14 to 74:2). The only opportunity that DaVinci had to address ONI's concerns was at the Local Board meeting, and even then, they were not able to address concerns of which they were not made aware. (Tr. pp. 74:6 to 75:1). The full reason for the denial recommendation was contained in Dr. Santelises' July 11, 2017, letter to DaVinci received twenty-nine days after the Local Board Meeting, which contained the

reasons stated by Ms. Alvarez in her presentation at the local Board's meeting. (Tr. pp. 79:5 to 80:5; DVC Ex. 5). The initial application was not approved, but DaVinci was encouraged to submit a second application, which it did on or about March 20, 2018. (DVC Ex. 1).<sup>8</sup>

#### **V. DaVinci's second charter school application (2018)**

After the Local Board's denial of the 2017 application, but before the filing of the 2018 application, DaVinci representatives met with Ms. Alvarez and two other individuals - Stephanie Simms, who was affiliated with the Maryland Charter School Network, and Erika Brockman, who was on the Advisory Panel - to discuss a new application. Ms. Luce recalled two meetings. (Tr. pp. 80:24 to 82:4).

The 2018 application process started the same way as the 2017 process. As part of the application review process, Ms. Luce submitted a letter of intent to file a charter application with ONI, giving a general overview of its charter school concept. The difference between the early days of first and second application process, according to Ms. Luce, was that in 2018 DaVinci was given more notice prior to their Advisory Board interview. (Tr. pp. 96:18 to 97:5).

Between the first and second application, DaVinci contacted Big Picture Learning and Summit Learning. (Tr. pp. 86:24 to 87:22). Big Picture Learning was identified as a resource and model for personalized learning and internship program, offering mentorship and professional development presentations. (Tr. pp. 90:9 to 92:2). Summit Learning designed and shared their online learning platform which provide not only the school's curriculum, but also a computer-based means of tracking each student's progress, accessible to the teacher, student and the student's family: The Summit curriculum would provide modifications for disabled, ELL, and gifted students. Summit Learning's program is research-based and aligns with the State's Common Core standard. (Tr. p. 100:12 to 100:16).

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<sup>8</sup> Ms. Alvarez confirmed this encouragement. (Tr. p. 1429:5 to 1429:17).

DaVinci filed its full application in March 2018, the narrative part of which was limited to 75 pages; however, there were “close to 500 pages” in supplemental information.<sup>9</sup> (DVC Ex. 1). Letter of support from community members were also submitted to Baltimore City. (DVC Ex. 2).

#### **VI. The second application was denied.**

On June 12, 2018, the Local Board met and rejected DaVinci’s second application. In her letter of July 10, 2018 (DVC Ex. 14), Dr. Santelises, Baltimore City’s CEO, wrote Ms. Luce a one-and-a-half page decision letter on behalf of the Local Board, advising her of the reasons for the Local Board’s rejection of DaVinci’s application. The letter gave the following rationale, couched by the introductory words “...specifically, some of the concerns about your application include...” Four bullet-pointed paragraphs followed.

The letter<sup>10</sup> also listed the elements of the academic plan that were being integrated: “project-based learning, arts integration, sheltered instruction, sheltered instruction observation protocol, and online elements...” The Local Board determined, however, that the application did not “adequately explain how such a complex curriculum would be implemented,” citing deficiencies in “teacher resources such as professional development, ongoing training and planning time for each component,” and questioned “how the various elements would work to form a coherent curriculum, or how tensions between the different approaches would be resolved” if found to be in conflict. In essence, the Local Board expressed concerns over professional development and planning time, how the various approaches would “form a coherent curriculum,” and how to resolve possible conflicts between those approaches.

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<sup>9</sup> Because regulations limiting the application to 75 page allowed appendices, the application contained multiple appendices.

<sup>10</sup> Dr. Santelises’ letter constituted “the written decision of the [Local Board] on June 12, 2018 [the date of the vote] to reject your application...” DVC Ex. 14. Although the length of the letter is not dispositive of its completeness, the State Board nevertheless found it to be cursory.

The second bullet point recognized DaVinci's reliance on "online tools which would effectively create a blended learning program," but questioned the adequacy in preparing teachers and students for that manner of instruction.

The third bullet point stated that the teacher recruitment plan did not "adequately address how it would recruit dually-certified teachers," finding that the plan "requires teachers dually certified in ESOL" and math and science, which "are particularly hard to hire areas."

The fourth bullet stated that application "does not adequately explain how teachers [would] develop and monitor personalized learning plans for 500 students."

The letter also stated that the Local Board provided the "applicant with the opportunity to "meet with staff and members of the Advisory Board" to provide additional insight into the process, scheduling such meetings through the ONI.

DaVinci was also advised of its appeal rights to the State Board. This appeal ensued.

## **VII. Local school boards must collaborate with charter applicants**

The State Board's decision to remand DaVinci's 2018 application to the Local Board relied on its prior decisions requiring the local school boards to collaborate with charter applicants, which it found lacking in the present case.

DaVinci cites *Monocacy Montessori Communities, Inc. v. Frederick Co. Bd. of Educ.*, MSBE Op. No. 08-23 (April 30, 2008) as an example of a fair process with substantive feedback and face-to-face meetings with the superintendent and review team, and more time to answer questions and make a presentation than DaVinci was allowed. *Monocacy*, pp. 1-2. DaVinci cited three other State Board cases with similarly generous communication and feedback opportunities. For example, in *Frederick Outdoor Discovery Charter School, v Bd. of Educ. of Frederick Co.*, MSBE Op. 12-15, (pp. 7-8), "over 25 emails" were exchanged between the parties, and there were three full meetings with the school staff and the local board members.

The State Board found that this constituted “meaningful technical assistance” even though the meetings were not with school staff evaluating the application.

In its prior decision, the Board opined that, although face-to-face meetings between applicants and school staff are the “gold standard.” if such meetings are not required in the local school system’s policies and procedures, their absence is not dispositive, so long as there is “meaningful technical assistance...providing the applicant substantive feedback on the deficiencies of the application and an opportunity to cure those deficiencies.” State Bd. Dec. p. 6.

In *Global Garden Public Charter Sch. v. Montgomery Co. Bd. of Educ.*, MSDE Op. No. 11-01, the State Board provided clarity regarding the level of assistance the local school board must provide. The State Board opined:

It is our view that providing a charter school applicant with meaningful technical assistance, substantive feedback, and the opportunity to cure deficiencies in the application is one component in a fair application process. Providing meaningful technical assistance, substantive application feedback, and an opportunity to cure deficiencies is a matter of sound educational policy.

*Id.* at 10. In *Global Garden I*<sup>11</sup> the State Board also noted, “[w]e are more aware now of the dialogue and collaboration needed between applicants and the local school systems during the application process to achieve the goal of having viable charter schools in Maryland.” *Id.*<sup>12</sup> The State Board engaged in a lengthy analysis of the local board’s application evaluation process, ultimately determining that the local board failed to provide a legally sufficient rationale for the charter school application denial, and remanded the matter.

In *Md. Eastern Shore Charter School Alliance v. Dorchester Co. Bd. of Educ.*, MSDE Op. No. 14-36, the State Board reiterated its opinion in *Global Garden I* regarding the need to

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<sup>11</sup> Global Garden Public Charter School appealed a second denial of application by the local school board, and a subsequent opinion was rendered in *Global Garden Public Charter Sch. v. Montgomery Co. Bd. of Educ.*, MSDE Op. No. 11-42.

<sup>12</sup> The inclusion of the word “now” in the opinion shows the evolution of the State Board’s expectations for local boards’ reviews of charter school applications.

provide meaningful technical assistance in the charter school application process at the pre-filing and post-filing stages. The State Board determined Dorchester County Board of Education met the requirement of *Global Garden I* in the pre-filing stages, but did not in the post-filing stage. In finding that the local board did not follow its own procedures to allow an applicant to add or clarify the contents of the application, the State Board found the applicant was prejudiced. “The opportunity to cure deficiencies is one component of a fair application process in a matter of sound educational policy.” *Id.* at 6, referencing *Global Gardens I*.

In *Global Garden Public Charter Sch. v. Montgomery Co. Bd. of Educ.*, MSDE Op. No. 11-42 (“*Global Garden II*”), the State Board discussed the need for meaningful technical assistance articulated in *Global Garden I*, even after remand. The State Board reiterated its position on collaboration. “We note that through our decision in the prior case we hoped to provide for the guidance for MCPS and other school systems regarding our view of the collaborative process we now envision in the charter school application process.” *Global Gardens II* at 6. The State Board then quoted from the first decision, *supra*.<sup>13</sup>

It is therefore reasonable to expect that the collaboration and meaningful technical assistance the State Board expects between a charter school applicant and a local board continue throughout the application process, inclusive of post-remand determinations.

#### **VIII. The State Board’s analysis of the Local Board’s process required this remand.**

In its decision of October 23, 2018 in this case (“State Board Dec.”), the State Board determined that the process by which the Local Board rejected DaVinci’s charter application was unfair, citing the need for DaVinci to be timely advised of the deficiencies in its application

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<sup>13</sup> *But see, Global Gardens II, Id.* at 7. The State Board also noted “that the local board offered to provide Global Garden with additional technical assistance and to extend the filing deadline for the next round of charter school application review so that Global Garden could revise its application. Moreover, Global Garden already had the benefit of the explanation of the deficiencies identified by the local board in its April 21, 2011 decision and detailed through the local board’s submission to the State Board in the prior case.”

and given an opportunity to cure (or at least address) those deficiencies. Citing its earlier decision in *Ben Carson Charter Sch. v. Harford Cty. Bd. Of Educ.*, MSBE Op. No. 05-26 at 5, the State Board declared that “[t]hose are the basic requirements of due process, and we reiterate them today.” State Board Dec., p. 6.

In addition to the lack of transparency in not providing the Advisory Board’s rubric to DaVinci’s representatives,<sup>14</sup> the State Board questioned the lack of meaningful technical assistance provided to DaVinci by the CEO (or, in essence, ONI which communicated with the Advisory Board on the CEO’s behalf and presented her recommendation to the Local Board). Specifically, even though the Advisory Board recommended approval of the application, their comments were not shared with DaVinci’s representatives. This deficit was borne out by questions raised at the May 22, 2018, work session, that did not address the CEO’s criticism of the application’s approach to ELL students that the State Board. State Board Dec., p. 8. The “substantive feedback” required by the State Board in its earlier decision was lacking. *Id.*

Accordingly, the State Board found the Local Board’s decision to be the result of an “arbitrary and unreasonable process.” The State Board found the Local Board’s decision to be “cursory,” lacking “the rationale to support the denial” precluding the review process from being “fair and open.” State Board Dec., p. 10. After the CEO recommended to the Local Board that DaVinci’s application be denied, the State Board declared that DaVinci should have been given an opportunity to respond to the local board to challenge that recommendation, which would have been “more in keeping with the concept of fairness.” State Board Dec., p. 9.

The State Board found that “given our review of the evaluation and decision process in this case we conclude that the process was not a fair one.” State Board Dec., p. 10. That would

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<sup>14</sup> The State Board’s decision also addressed the need to share the evaluation criteria with the charter school applicant, whether embodied in a rubric or not. State Board Dec., p. 8. The rubric had been provided, albeit in belatedly. DVC Exs. 8 and 9.

allow for the re-initiation of the evaluation process, which would require “meaningful” technical assistance and substantive feedback contemplated in the administrative regulations and articulated in *Global Garden I*. State Board Dec., p. 8.

The Board set out a three-part process in keeping with its past pronouncements regarding local boards’ decisions on charter school applications:<sup>15</sup>

- Providing the applicant a copy of the CEO’s recommendation “at least one day” before the local board’s vote;
- Allowing the applicant a “short, but sufficient” time to address the recommendation before the local board prior to a vote; and
- Providing the applicant with an opportunity to “cure the problems...forthwith,” if the applicant has not been previously provided an opportunity to do so.

The State Board found that the Local Board’s process prior to issuing its decision on DaVinci’s 2018 application failed to satisfy these requirements; the State Board declared it to be an unfair process.

In deciding on an appropriate remedy for what it considered the Local Board’s “[a]rbitrary and [u]nreasonable [p]rocess,” the State Board declined to review DaVinci’s application on its own, and further declined to either grant the charter or mediate between the parties towards that end. Instead, the State Board determined that it could “direct an expedited re-review [of the application] in conformance with the rules set forth in [this] opinion.” The Board explained what it intended the process to include:

As a general rule, the evaluation process involves several school system staff, and, as in this case, an Advisory Committee. Each brings specific expertise to the table. A synergy evolves in the review as those persons interview and interact with the charter school applicants. Evaluation criteria are applied and discussed.

State Board Dec., p. 11.

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<sup>15</sup> I do not find that these specific steps were mandated, as the State Board presented them to provide “some clarity” in the application and approval process. By referencing “some” clarity, I find that the State Board did not mandate an exact process, but rather suggested an outline of the process to be followed to promote fairness.

Accordingly, the State Board ordered a remand to the Local Board to provide DaVinci with a “timely opportunity” to answer the six questions from its final decision and to “reconsider its decision in light of those answers” as follows:

- (1) how it would implement a “complex curriculum” in terms of teacher resources;
- (2) how various elements would work to form a coherent curriculum;
- (3) how tensions between different approaches would be resolved;
- (4) how it would prepare teachers and students to use a “blended approach”;
- (5) how it would recruit ESOL certified teachers;
- (6) how teachers would develop and monitor personalized learning plans?

The question presented in this case is whether the Local Board fulfilled its obligation to DaVinci to collaborate after the remand. If not, the Local Board’s review of DaVinci’s charter application was again the product of an arbitrary and unreasonable process.

**IX. Baltimore City Administrative Regulations relating to the consideration of charter applications and the approval process**

**A. Baltimore City’s review process**

The Baltimore City Administrative Regulations govern charter school applications (DVC Ex. 3) (Administrative Regulations IHB-RA, Public Charter schools). These regulations concern new applications, as well as the operations and monitoring of charter schools and termination and non-renewal of charters (once approved). The Administrative Regulations are to promote “a uniform process and approach to the implementation of the public charter school program and City Schools.” (DVC Ex. 3, Section I).

In section II (Guidelines), paragraph 3 of subsection A, Baltimore City’s CEO (Dr. Sonja Brookins Santelises at all relevant times), makes recommendations to the Local Board regarding charter school applications:

Applications will be reviewed and a recommendation shall be made to the Board. The [CEO] will make the recommendations to the Board<sup>16</sup> for the approval or denial of each public charter school application. The Board shall render a written decision within 120 days of receipt.

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<sup>16</sup> In the context of this process, this reference to the “Board” is the to the Local Board, and not he Advisory Board referenced in the first section of the regulation. (DVC. Ex. 3).

The outlined procedure gives the Local Board the final say in the application process, but only after recommendations for approval or denial of the application from the CEO.

Under section II, paragraph 4, the CEO, or her designee

... shall make available to the public charter school applicant advice technical assistance and *consultation throughout the application process*. The applicant may use the services in order to help ensure that all components of the application have been completed and are addressed. It is the responsibility of the applicant to complete the application.

DVC Ex. 3 (emphasis added).

As Ms. Alvarez testified, the applicant is responsible for completing the application, which is consistent with the last sentence of the cited regulation. DaVinci contends that the regulation permits an applicant to seek “technical assistance or consultation” on all issues that come up, acknowledging, however, that Baltimore City “can’t write the application for us.” (Tr. pp. 66:25 to 67:13). The question remains, however, what assistance (e.g., “advice, technical assistance and consultation”) is required and what is the extent of that assistance (e.g., the meaning of “*throughout the application process*”) under the Administrative Regulations, in light of the process specified in the State Board’s decisions.

#### **B. The *Accardi* Doctrine**

As the cited Administrative Regulations determine how the school system processes charter school applications, the resulting inquiry is whether an applicant can challenge the Local Board’s decision if the established procedure is not followed. This inquiry is prompted by the “*Accardi* Doctrine,” first declared in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)” “It is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force.” *See also*, *Hopkins v. Md. Inmate Grievance Comm’n*, 40 Md. App. 329, 335 (1978). In *Pollack v. Pautuxent Institution Bd. of Rev.*, 374 Md. 463 (2003), the Court of

Appeals noted that, although Maryland appellate courts had adopted the *Accardi* doctrine, a complainant in Maryland “must also show prejudice to have the agency action invalidated.” *Pollack*, 374 Md. at 469.

The State Board found the *Accardi* doctrine applicable to charter school matters in *Md. Eastern Shore Charter Sc. Alliance v. Dorchester Cty. Bd. of Educ.*, MSDE Op. No. 14-36. The State Board explained:

The *Accardi* doctrine requires that a government agency “scrupulously observe rules, regulations, or procedures which it has established.” *Global Gardens*, MSBE Op. No. 11-01 (citing *Accardi* [citation omitted]). It applies to regulations that “affect individual rights and obligations” or “confer important procedural benefits upon an individual.” *Pollack* [274 Md. at 503]. In order to strike down an agency’s decision under *Accardi*, a complaint must show that he or she was prejudiced by the agencies failure to follow its own rules, regulations, or procedures. *Id.* at 504.

Applying *Accardi*, a two-part analysis is necessary. The first inquiry is whether the local board failed to follow its own rules. If the answer that question is in the affirmative, the second part of the inquiry is whether the applicant was prejudiced by the breach.

In response to the first test of *Accardi*, DaVinci asserts that, by failing to collaborate with it post-remand, the Local Board failed to follow its own rules by not providing the “advice technical assistance and *consultation throughout the application process*” required by the Administrative Regulations. (DVC Ex. 3, sect. II, para. 4).

In response to the second test, DaVinci asserts that the Administrative Regulations were for the benefit of applicants, and it was prejudiced by the local board’s failure to follow its own rules, set forth in Administrative Regulations, cited above.<sup>17</sup> DaVinci supports these arguments

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<sup>17</sup> Maryland’s appellate courts have held specifically that the *Accardi* Doctrine only applies when the rule or policy at issue is meant to confer a procedural benefit on the one affected by the rule or policy. *Pollock* 374 Md. at 503 – 04 (2002); *Hopkins v. Md. Inmate Grievance Comm’n.*, 40 Md. App. 329, 337 - 38 (1978). Moreover, the affected person must also show the failure of the agency to adhere to its statutory, regulatory or policy mandates caused prejudice to him or her. See e.g., *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 469 – 70 (1991). The principal exception to *Accardi* is that the principle “does not apply to an agency’s departure from procedural rules adopted for the orderly transaction of agency business.” *Pollock*, 374 Md. at 478. The procedural rules, interpreted below by the State Board to promote collaboration, were established to benefit the applicants. The *Accardi* Doctrine, therefore, applies.

by further asserting that Baltimore City's failure to follow its own rules resulted in the remedy crafted by the State Board.

The Local Board disagrees, as it contends that its review was proper under the regulation, and that there was no prejudice, as DaVinci had ample opportunities to present its case for charter approval. These matters will be determined below.

#### **X. Post-Remand Engagement**

The State Board issued its Remand Order on October 23, 2018, reversing and remanding the review of DaVinci's charter school application back to the Local Board, with instructions to reconsider the application after DaVinci responded to six areas of inquiry. As discussed above, the State Board's decision set forth the three-part process to be followed after its remand to the Local Board to effectuate this review: notice, time to respond to the CEO's recommendations, and opportunity to "cure." The post-remand timeline as earlier described is generally uncontested.

Ms. Alvarez testified that this is the first time that Baltimore City had to deal with a remand of a charter school application decision, so the process was unfamiliar and untested. (Tr. pp. 1451:20 to 1451:24). Regardless of the novelty of this situation, how Baltimore City processed DaVinci's application after the remand needs to be tested against the processes outlined in the State Board's remand order.

##### **A. Notice of the CEO's recommendation**

In its decision, the State Board directed that DaVinci be given "at least" one day's written notice of the CEO's recommendations before the Local Board's vote. The day before the penultimate meeting regarding DaVinci's application before the Local Board on December 11, 2018 (during which no vote was taken, as it was continued to the Local Board's meeting of January 8, 2019), Ms. Alvarez telephoned DaVinci's representative advising that the CEO was

again recommending denial of the application; this was then followed up by a letter.<sup>18</sup> Although the CEO's recommendations were given within the time prescribed by the Local Board prior to its meeting on December 11, 2018, no such notice was provided before the ultimate vote on January 8, 2019; this is significant because the final recommendation took into account the contents of DaVinci's last supplement of December 14, 2018 (DVC. Ex. 18). Although it might be contended that the notice of the CEO's December 10, 2018 recommendation would be more than timely for a January 2019 vote, DaVinci's additional detailed responses to the Local Board's questions contained in its letter of December 14, 2018, were not addressed in any matter, let alone a collaborative one.

The CEO's ultimate recommendation before the Local Board's meeting of January 8, 2019, was dated on the same day as the hearing. Accordingly, DaVinci had no opportunity to respond to the CEO's ultimate negative recommendation before the Local Board meeting where the vote was taken. This timing is important because DaVinci had no time to respond to the final recommendation, which was the purpose of the State Board's one day's notice requirement, which was one of the reasons that the State Board's reversed the Local Board's earlier decision.<sup>19</sup> For those reason, notice of the CEO's final recommendation before the ultimate vote was not timely provided.

#### **B. Time to respond to the CEO's recommendations.**

On October 30, 2018, soon after the State Board's remand, DaVinci provided additional information to the Local Board responding to the six questions referenced in its order (DVC Ex.

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<sup>18</sup> At the December 11, 2018 meeting (when no final vote was taken), much was made of this time limit set by the State Board, with Local Board Chair Casciani suggesting that they wait 23 minutes before taking their vote to accomplish the State Board's full 24-hour notice requirement to avoid a "technical violation" ("Let's be reasonable. If we pause for 23 minutes, we will meet the letter of the law which would be a lovely thing to do." (DVC Ex. 17, p. 98-99). She later apologized, with a nod to the State Board's requirement: "...so State of Maryland, if you're watching, we're trying to do this by the spirit of what we're all trying to do here. Okay? So forget the 24-hour thing. Twenty-three minutes, that was silly. My bad." DVC Ex. 17, p. 131.

<sup>19</sup> The purpose of the notice requirement is further discussed below with reference to allowing time for DaVinci to respond to inquiries and have an opportunity to "cure" deficits contained in the CEO's recommendation.

15). In the ensuing week, there was additional communication by electronic mail between the parties, evidencing Baltimore City received DaVinci's post-remand submission (DVC Ex. 20). In her email, Ms. Alvarez indicated that DaVinci's response would be discussed at the Local Board's meeting on November 13, 2018, although neither ONI nor the Advisory Board (nor any other Baltimore City staff member) discussed any substantive issues contained in that submission with any DaVinci representative.

At the Local Board's November 2018 meeting, DaVinci's representative gave a brief general presentation, seeming to rely on the detailed response in its submission of October 30, 2018. (DVC Ex. 15).<sup>20</sup> After DaVinci's presentation, Ms. Alvarez offered to allow DaVinci the opportunity to provide additional information: "If the[Local] Board has additional questions that are not resolved tonight, then we would go back to them to get that information to help you make [an] informed decision because you vote on December 11<sup>th</sup>." DVC. Ex. 16, p. 235.<sup>21</sup> Members of the Local Board then asked questions of the DaVinci representatives. (DVC Ex. 16, pp. 235-281)<sup>22</sup>. No vote was taken.

Subsequently, at the Local Board's meeting on December 11, 2018, Ms. Alvarez summarized the CEO's December 10<sup>th</sup> recommendation to the Local Board to deny DaVinci's application, which was credited to the work of ONI staff, John Newbauer (coordinator of world

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<sup>20</sup> This brevity was a reasonable calculation in light of the Local Board's four-minute time limitation imposed on DaVinci's presentation. (DVC. Ex. 16, pp. 227-228).

<sup>21</sup> The transcript pages were numbered in two places. The referenced page numbers came from the pagination at the bottom of each transcript page.

<sup>22</sup> The time taken by the Local Board members' questions and DaVinci's answers was not deducible from the transcript, it seemed significantly more extensive than the four minutes initially allotted for DaVinci's presentation. The scope of those questions were broad. DaVinci representatives answered the Local Board member's questions about: the need that DaVinci is meeting and its physical location and student composition (DVC Ex. 16, pp. 235-237 241-248, 279-281); ESOL teacher recruitment (DVC Ex. 16, pp. 237-241, 242-); academic programming including Summit (DVC Ex. 16 pp. 249-251, 271-273); advisory groups (DVC Ex. 16 pp. 251-253); internships and Big Picture Learning (DVC Ex. 16 pp. 254-25, 268-260); student choice (DVC Ex. 16, pp. 256-257); community engagement (DVC Ex. 16, pp. 261-263); diversity and community involvement (DVC Ex. 16 pp. 263-265); teacher recruitment (DVC Ex. 16, pp. 265); special education and ELL students (DVC Ex. 16 pp. 267-269); professional development (DVC Ex. 16, pp. 270, 273-277); and complexity and expense (DVC Ex. 16, pp. 277-279).

languages), Maria Villamor (ESOL coordinator), and two witnesses at the present hearing, Dawn Shirey and Laura Ohanion, discussed below. (DVC Ex. 17). Ms. Alvarez reiterated the CEO's response to the six questions raised by the State Board in its decision of October 23, 2018, supporting the CEO's recommendation to again deny DaVinci's application. Those topics included: 1) implementation of the "complex curriculum;" 2) proposed, professional development; 3) approaching tensions that might arise between the educational approaches; 4) implementation of the "blended approach" to students; 5) recruitment of ESOL teachers; and 6) the development and monitoring of personalized learning plans. (DVC Ex. 17, pp. 72-94). These responses matched the State Board's six questions, above.

Although only four minutes was allotted for DaVinci to make its presentation at that meeting, the Local Board members again asked additional questions, which DaVinci representatives answered.<sup>23</sup>

During the meetings of the Local Board in November and December 2018, and after each meeting, DaVinci was given an opportunity to address the questions raised by the Local Board members; in addition to its oral responses at those meetings, its letter dated December 14, 2018, addressed the points in the CEO's denial recommendation. (DVC. Ex. 18). This step satisfies the second of the State Board's directions: DaVinci be given a "short, but sufficient" time to address the recommendation before the local board prior to a vote – *up to that point in time*.

Until then, DaVinci had the opportunity to respond to the CEO's pre-December 2018 recommendations; however, there was no communication returned from Baltimore City after the penultimate meeting. Moreover, there was absolutely no time to respond to the CEO's

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<sup>23</sup> These areas included: staffing and professional development (DVC Ex. 17, pp 101- 103, 106-107, 111, 119-121, 126-128); teacher recruiting (DVC Ex. 17, pp. 103-104, 110); development and monitoring of personalized learning plans (DVC Ex. 17, pp. 104-105); and coordination of the different learning approaches (DVC Ex. 17, pp. 107-111).

recommendation presented at the Local Board's meeting on January 8, 2019, leaving no time to "cure" any such defects

### **C. Opportunity to "cure the problems"**

The third of the State Board's directions that DaVinci be given an opportunity to "cure the problems...forthwith," if the applicant has not been previously provided an opportunity to do so. Because there was no meaningful collaboration, DaVinci did not have the opportunity to cure deficiencies raised in the CEO's denial recommendation.

#### **1. ONI role in collaboration after its initial review**

Ms. Alvarez testified about the process of collaboration, which seemed at odds with the State Board's understanding of both pre- and post-remand collaboration.

JUDGE: ...What is your belief based on what you do in your office as to what collaboration is required of your office vis-a-vis applicants?

[Ms. Alvarez]: Yeah. So our job is to make sure that they understand the process, they understand the questions, that we, you know, encourage them to look at a different application. We encourage them to talk to people who have gone through the process. We encourage them to, you know, partner with people who have, you know, been successful in opening and we look at similar models. We talk about -- we kind of go into what the standard is for -- in general, like, what the standard for approval of applicants. *We answer all sorts of questions about, you know, certain requirements or certain things that they -- like, specific questions that come up.* We give them context. We point them to places where they can find information that would help them in writing their application, a particular website, or other sources.

*We're generally available and approach people. Call us, make appointments, and so we'll get applications. We try to make sure that we are not answering questions for applicants or writing their application or serving as their expert for writing the application. We can't participate in that way. So our purpose is give clarity around the question, like technical things so that they have a fair shot, and answering questions about the process, and things like that.*

(Tr. pp. 1468:3 to 1469:3)(emphasis added). The collaboration about which Ms. Alvarez speaks goes to technical questions. Although she testified that anyone could contact ONI, requests for clarification – not specifically related to the process, but rather to the content of an application<sup>24</sup> – were not answered. Ms. Alvarez did not consider communicating about the content of the application to be part of the necessary collaboration.

JUDGE: So for example, assuming that I find that you say are too many approaches, would that be something you say to the applicant, you know, I think you may have a few many -- you may have a few approaches. Can you narrow it down? Is that something that you would say?

[Ms. Alvarez]: No. Because people are coming forward with their model --

JUDGE: So --

[Ms. Alvarez]: -- and so we're expecting that they actually understand and have a workable plan for how things could come together.

JUDGE: So they wouldn't know that that was actually the final say so?

[Ms. Alvarez]: Yeah. They would not know -- they would not know that directly. But should know that if they're coming and saying they're ready to open a school, you should know whether or not your approaches work together and can create a plan that demonstrates that they work together.

(Tr. p. 1470:1 to 1470:18). Ms. Alvarez testified that her office does not provide content assistance so that it can assess the expertise and knowledge of the applicant. (Tr. pp. 1150:18 to 1151:7). ONI's philosophy is contrary to the State Board's decisions on the need for collaboration during the evaluation process.

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<sup>24</sup> This presents another example of the need to collaborate to address a problem. Although the "tension" between approaches was referenced in the Local Board's decision and in the State Board's remand order, the nature of the "tension" was not apparent in the record until the last day of testimony when Ms. Alvarez expanded on the rationale described in the final denial letter of February 7, 2019. (DVC. Ex. 19). She testified about conflicts on the online platforms – specifically identifying Summit, Aleks (Adaptive Math program, Assessment and Learning in Knowledge Space), Arts Everywhere. (Tr. pp. 1197:23 to 1199:1). This is yet another example of a perceived deficit that could have been addressed had there been a more comprehensive collaborative effort supported in the State Board's prior decisions.

## 2. Involvement of the Advisory Board after its initial interviews

Subsection II B of the Administrative Regulations discussed the role of the Advisory Board in soliciting and approving new applications for charter schools, as well as overseeing and monitoring existing charter schools and negotiating existing charter school contracts. The three relevant provisions are the stated responsibilities of the Advisory Board:

- a. Communicating with the CEO about public charter schools;
- b. Overseeing the process of issuing the charter application/Request for Proposals soliciting applications/proposals in order to make recommendations about potential charter schools to the CEO;
- ...
- e. Advocating on behalf of public charter schools, including making policy recommendations.

(DVC Ex 3). The Advisory Board members are appointed by the CEO subject to guidelines that are not material to this decision.<sup>25</sup> *Global Garden I* required the local board to provide meaningful technical assistance in the charter school application process at the pre-filing and post-filing stages; Baltimore City provided the former but not the latter, which was unacceptable to the State Board. Under section II, paragraph 4 of the Administrative Regulations, the CEO, or her designee's assistance is available "*throughout the application process.*" The State Board recognized the "...specific expertise" and "synergy in the review as those persons interview and interact with the charter school applicants." The CEO's consultation with members of her staff, whether or not on the advisory Board, without discussing their concerns with DaVinci representatives, is not the collaboration which was specifically mandated by the State Board to

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<sup>25</sup> The parties recognize that the Advisory Board was comprised of stakeholders that had an interest in the implementation of charter schools. Ms. Alvarez testified that the Advisory Board was meant to advise the CEO, and not the charter applicants. (Tr. pp. 1150:18 to 1151:7). This position is contrary to the State Board's position that an advisory board could give "meaningful...substantive application feedback" to a charter applicant, *Global Garden I*, at 10. Even if the Advisory Board were not tasked with this duty, Baltimore City should have provide such assistance, but they did not.

take place after the remand in this case, and it certainly prejudiced DaVinci representatives, who were expecting some degree of guidance and response to their detailed submissions.

### **3. The role of other Baltimore City employees**

Mr. Henschen testified that he was asked questions by Ms. Perkins-Cohen, a Baltimore City employee, at the Local Board's meeting in December 2018. Mr. Henschen testified that prior to that meeting, he had no previous interactions with Ms. Perkins-Cohen and was unaware of her role in the process, as she did not serve on the technical review committee or the advisory committee that previously asked questions. (Tr. pp. 712:18-25; 713). Mr. Smith also testified to being asked questions by Ms. Perkins-Cohen regarding SIOP and English language learners. (Tr. p. 262:1-16). Additionally, Ms. Luce testified that Dawn Shirey and Laura Ohanion, two Baltimore City employees, were present at the December 11, 2018 meeting, although she also has no prior interaction with either person. (Tr. p. 360).

Ms. Ohanion and Ms. Shirey were Baltimore City employees who communicated with either ONI or the CEO about the application, but had no direct contact with DaVinci representatives to respond to their concerns or questions. They advised ONI and the CEO about certain aspects of the application and post-remand submissions, but never communicated those concerns to DaVinci representatives and solicited their responses. Their concerns were present in the denial letter of February 7, 2019 (DVC. Ex. 14); but their concerns were not communicated to or discussed with DaVinci's representatives after the Local Board's December 2018 meeting.<sup>26</sup> Although it was clear from their testimony that both witnesses had concerns about aspects of the post-remand submission, these questions were not presented to DaVinci so that they could attempt to cure the deficits they raised.

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<sup>26</sup> This letter closely tracks the CEO's review of DaVinci's Supplemental Response dated January 8, 2019, which was the same date as the Local Board's meeting.

Ms. Ohanian testified that she did not question the DaVinci representatives, but instead deferred to Ms. Alvarez at ONI to do so. (Tr. p. 1020:10 to 1020:25). Ms. Alvarez did not address those concerns with DaVinci representatives. Ms. Shirey was also not part of the “collaborative process” prior to the State Board’s remand, had not communicated with any DaVinci representative, nor has she had any training to review charter school applications. (Tr. pp. 1352:24 to 1353:4 and 1353:5 to 1353:21). She was present, however at some of the Local Board meetings, but did not ask any questions of any DaVinci representatives. (Tr. pp. 1353:22 to 1354:6). Ms. Ohanian and Ms. Shirey testified on behalf of the Local Board at OAH hearing, which was the first opportunity that DaVinci representatives heard directly from either of them about their concerns.

#### **4. Questions from the Local Board**

At the OAH hearing, several DaVinci witnesses testified about their communications with representatives from Baltimore City or the Local Board after the October 2018 remand, which is material to whether there was collaboration. Helen Luce, Dominic Smith, and Travis Henschen all testified that they were present at the Local Board meeting on November 13, 2018 and had contributed information related to issues articulated in the remand decision of the State Board. The Local Board questioned DaVinci representatives about the topics listed in detail above. However, between the October 30<sup>th</sup> submission and the November 13<sup>th</sup> meeting, no representative from DaVinci had any communication with the Local Board or Baltimore City staff concerning that submissions or any other substantive issues. Neither the CEO, ONI nor the Local Board made any request for clarification for additional information (Tr. 343). The topics discussed at the Local Board meeting of December 11, 2018 followed the same pattern. Again,

there was no communication from the school system between that meeting and the following meeting on December 11, 2018.<sup>27</sup>

Nor was there any opportunity for DaVinci to cure any of these deficiencies after the Local Board's meeting where Ms. Alvarez read the CEO's recommendation to deny the application. During the Local Board's meeting of December 11, 2018, a DaVinci representative<sup>28</sup> complained about the lack of opportunity to address Baltimore City's perceived deficits in its program prior to the meeting:

If we had been asked, and this is where I really feel that this was a kind of "gotcha" for us, if somebody had contacted us two weeks ago and said, in the way you did before the actual application review, somebody had, Ms. Alvarez contacted us and said we need more information on how you're going to work with English language Learners. We happily presented that detailed plan.

If you, she, anyone had called us anytime before yesterday and said, can you explain through your professional development plan, how you are going to use teacher resources, we would have been more than happy to do that. But, nobody asked us that and this question did not address specifically professional development. It just had a general question about how you would implemented. So that's what we answered and, again, we would be happy to respond to all of these comments had we've been given adequate notice.

DVC Ex. 17, p. 113.

The DaVinci representative stated that she made notes during the meeting, intimating that DaVinci wanted an opportunity to further address the questions raised. Accordingly, at the conclusion of the meeting, recognizing the breadth of both Ms. Alvarez's presentation to the

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<sup>27</sup> The email correspondence between ONI and DaVinci representatives from November 7 through 14, 2018, addressed the process of DaVinci's submissions rather than the substance of the Local Board's vote. Ms. Alvarez did not seek any additional information from DaVinci representatives or comment on their submissions or the substance of the issues presented.

<sup>28</sup> Sometimes the witnesses were not identified in the Local Board meeting transcripts by name. Although Ms., Luce testified that she made these statements, the transcript did not identify her. Nevertheless, I still attribute these comments to DaVinci representatives.

Local Board and the questions posed by its members, Local Board Chair Casciani proposed the next step of the process:

Having said that, there's a lot of stuff in here that I'm kind of curious, like Commissioner Richardson. If you say, we're caught now in a he said, she said, he said, kind of thing and that's not right. I really want to know what you think an[d] I, personally, agree with Ms. Perkins - Cohen. I think there's a definitely implied need for some deeper response on professional development because 4 of the six questions we understood to include references to what professional development would be. Shame on the state [sic] for not being more clear.

So, what I'd like to propose, you don't have to explain anymore. You're good tonight. Really. I would like to propose that we are not going to vote on this tonight. We would like to give you a chance to respond.

I am not, I don't have the authority to tell Miss Alvarez what to do, ever. That's her job. *But what I would like to suggest that this is not a task for Ms. Alvarez anymore.* We have heard what she thinks. It's not just her. She draws on a lot of resources, as she referenced.

This is now back in your hands, pour forth. Respond to our response to your six questions. Okay?

DVC Ex. 17, pp. 127 and 128 (emphasis added). The Local Board's questions sought additional information from DaVinci about certain aspects of its application and supplemental submissions, to which DaVinci promised to respond within the week. It did so by its submission of December 14, 2018. (DVC Ex. 18).

But Davinci received no communication from Baltimore City or the Local Board after its meeting of December 11, 2018. Local Board Chair Casciani's promised that the Local Board would review the submissions after its meeting of December 11, 2018, instead of ONI. She also promised a meeting which never occurred. Nor was there any further review to which Davinci was aware. Even after DaVinci submitted its December 14, 2018 responses to the Local Board's questions, concerns still existed which were not presented to DaVinci representatives denying them the opportunity to cure any deficits, leading to the CEO's final recommendation, and the Local Board's subsequent rejection of DaVinci's application.

## 5. Analysis of the opportunity to cure

The State Board's prior holdings addressed the need for collaboration between school systems and charter applicants, because the evaluation process requires time and synergy between the applicant and the school system:

As a general rule, the evaluation process involves several school system staff, and, as in this case, an Advisory Committee. Each brings specific expertise to the table. A synergy evolves in the review as those persons interview and interact with the charter school applicants. Evaluation criteria are applied and discussed. The process takes several months before a recommendation is made to the local board. This Board cannot replicate that evaluation process, and thus, the State Board has been reluctant to undertake that task.

State Board Dec., p. 11. DaVinci representatives were asked questions by the Local Board along the way and DaVinci responded in writing and in detail, but without any response from the Local Board or Baltimore City staff. The result of this one way communication is that, although DaVinci responded to the Local Board's questions, it did not know what the school system's response was, and without that timely knowledge, they had no means to respond to adequately address the Local Board's concerns. Instead, the day before the vote, DaVinci was given the bad news by telephone with no time to negotiate a solution or, in the State Board's vernacular, "cure the problems...forthwith,"<sup>29</sup> eschewing the interaction which the State Board indicated was a necessary element of the post-remand process.<sup>30</sup>

After questions were asked at Local Board meetings, Davinci was given an opportunity to respond in writing. Yet after their responses were painstakingly prepared and sent, there was no direct communication from "the CEO or [her] designee" and certainly no further involvement by

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<sup>29</sup> I also considered the balance of that mandate - if the applicant has not been "previously provided an opportunity to do so." New objections arose regarding the subsequent submissions of October 30 and December 14, 2018, and none were addressed by the CEO or her designee in the manner that the State Board required or stated in the previously cited Administrative Regulations.

<sup>30</sup> Although Ms. Alvarez testified that charter applicants generally do not present at Local Board meetings where a vote is taken (Tr. p. 1172:11 to 1172:22), there is no preclusion from seeking clarification - i.e., collaboration - before the meeting.

the Local Board or Advisory Board to address or seek clarification of those responses and assist the applicant to attempt to cure any deficiencies. By taking ONI out of the loop following its meeting on December 11, 2018, by not advising DaVinci of concerns that were raised in the CEO's recommendation or by the Local Board members at its meeting, or by failing to schedule a meeting to address DaVinci's responses as Chair Casciani had proposed, the Local Board failed to allow DaVinci an opportunity to respond to the CEO's ultimate recommendation.<sup>31</sup> There was no collaboration, as described in the State Board's prior decisions or mandated in the present one.

Accordingly, the post-remand process was "illegal" because it resulted from an unlawful procedure – the State Board mandated a level of assistance, cooperation and opportunity to "cure" that the Local Board failed to afford DaVinci post remand. COMAR 13A.01.05.06C(4). The State Board required that there be a fair interaction between the school system and DaVinci, allowing DaVinci a fair opportunity to address concerns stated in the CEO's recommendation prior to the Local Board's meeting. DaVinci received no meaningful technical assistance from Baltimore City or the Local Board due to their lack of communication. For that reason, I find that the Local Board's decision cannot stand.<sup>32</sup>

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<sup>31</sup> It is questionable, however, whether ONI would respond to any substantive inquiries, considering Ms. Alvarez's understanding of her office's mission not to give substantive advice.

<sup>32</sup> DaVinci's challenge to the Local Board's decision prevails in its claim that the Local Board's decision is illegal because there was a lack of collaboration. The opportunity for collaboration does not, however, guarantee DaVinci's ultimate success. Having prevailed on that issue, if the State Board adopts this proposed decision, the parties would need to collaborate on resolving these issues. The remaining question will then be whether the decision of the Local Board, based on the record after collaboration, is contrary to sound educational policy or that a reasoning mind could not have reasonably reached the conclusion that the Local Board reached. COMAR 13A.01.05.06B. If the State Board does not adopt this decision, the record is complete and the remaining issues can be decided without a hearing.

**XI. Remedy to allow collaboration towards DaVinci to attempt to “cure” unaddressed deficits cited in the final denial letter**

The remedy in this case is to allow DaVinci to get meaningful technical assistance from Baltimore City on the written responses it filed to address the six questions cited in the State Board’s decision. The lack of meaningful technical assistance post-remand was like the lack of meaningful technical assistance which prompted DaVinci to take a successful appeal to the State Board. This deficit was particularly apparent in the deficits identified in the final denial letter of February 7, 2019. Baltimore City must provide “meaningful technical assistance,” and specifically provide feedback on the DaVinci’s responses to the deficiencies identified in the six questions. Although DaVinci had the opportunity to address issues about which it had been made aware by reason of the CEO’s December 10, 2018 telephone call, up through December 14, 2018, it did not have the collaboration – meaningful technical assistance – mandated by the State Board necessary to attempt a “cure.”

Moreover, there are additional reasons stated for the ultimate denial letter that do not appear to have been addressed earlier, and DaVinci had no chance to respond to attempt a “cure” on those issues. DaVinci must have an opportunity to address these concerns through collaboration as well.

For example,<sup>33</sup> with regard to the first bullet point of the final denial letter of February 7, 2019 (DVC Ex. 19), the specific reference to SIOP’s training requirements were referenced from a SIOP training website that had not been previously cited in any communications to DaVinci or specifically raised at the Local Board’s meetings. Similarly, there were questions about Dominic

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<sup>33</sup> These observations are not meant to be a comprehensive listing, but examples of Baltimore City’s areas of concern that were not brought to DaVinci in prior communications that could have been addressed in a collaborative fashion.

Smith's experience and DaVinci's "lack of understanding" which became apparent in the testimony of Baltimore City's witnesses.<sup>34</sup>

The second bullet point concerned Baltimore City's concerns about teaching approaches. At the hearing, DaVinci addressed what it considered Baltimore City's misapprehension regarding "arts integration" as an approach. The letter also questioned which approaches were or were not core, or merely possibilities. These questions could have been clarified if posed directly to DaVinci after its most recent submission, but they were not.

The third bullet point raises integration issues concerning the blended learning platform (previously addressed), but with more detailed concerns which were raised for the first time in the final denial letter (DVC. Ex. 19) One example of this deficit (concerning the ALEKS curriculum) and the need to communicate and collaborate on DaVinci's reliance on that curriculum is more fully discussed above. The first time that these issues were raised in detail and could be addressed by DaVinci was at the OAH hearing.

The fourth bullet point raises practical questions about how teachers would develop and monitor a student's learning plan and how the student would understand and work within a "student choice" educational model. The emphasis of the objection is on professional development, about which DaVinci witnesses testified at length at the hearing. Baltimore City was not given the benefit of what DaVinci's witnesses had to say about those issues prior to the Local Board's denial.

The fifth bullet concern the use of sheltered instruction and need for dually certified teachers. The denial letter (DVC Ex. 19) states that DaVinci's letter raised "additional fatal flaws in the application," stating that DaVinci "does not know the difference between an

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<sup>34</sup> Like many of the following concerns, DaVinci's witnesses addressed these issues at the OAH hearing, but that information was not considered by ONI in any recommendation to the Local Board, and the Local Board was certainly could not have seen any this testimony prior to its January 2019 meeting or its February 2019 denial letter.

instructional approach and an accommodation.” Baltimore City interpreted its interpretation that DaVinci’s perceived failure to understand the difference between an “educational approach” and “accommodation” demonstrates a lack of “necessary basic knowledge” to educate its students. This is yet another example of Baltimore City’s determination that was not specifically addressed before the final report – the level of expertise and knowledge of DaVinci’s founders. Mr. Roberts mentioned this issue in an early telephone call, but it was not reduced to writing prior to the ultimate vote. DaVinci representatives were not asked to address this specific criticism before this letter, and the failure to follow through with the collaboration mandated by the State Board that would allow DaVinci an opportunity to “cure.”

DaVinci may or may not be able to address and “cure” these perceived deficits, but they needed to have been advised of these deficits between December 14, 2018 and January 8, 2019, and then be given the opportunity to attempt a cure.

## **XII. Conclusion**

The collaborative process, mandated by the Local Board’s rules, the State Board’s decision in this remand, and discussed in the litany of its prior cases, was lacking, and it required more collaborative efforts on Baltimore City’s behalf. While DaVinci was given an opportunity for post-remand submissions at various times, there was no collaboration to address their responses, and particularly no opportunity to address specific deficits raised in the denial letter of February 7, 2019.<sup>35</sup>

Such an opportunity for collaboration does not guarantee success – just that a fair process needs to be followed in gathering the material on which a decision can be reached. Accordingly,

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<sup>35</sup> DaVinci contends that the Local Board cannot conduct a de novo review of its application and its submissions. However, during the hearing, Baltimore City identified more areas of concern, leading to the ultimate denial letter of February 7, 2019. Accordingly, I reject the assertion that the review is de novo, but rather it concerns all aspects of the application and Baltimore City’s analysis is not fixed in time, and is informed by Advisory Board interviews and DaVinci’s subsequent submissions and their responses at the Local Board meetings. There are many “moving parts” to the application, which cannot be frozen in time. All aspects of the application are subject to review.

it is not possible or proper for me to decide whether, based on a record that was collected in a manner contrary to the State Board's mandate for collaboration, the Local Board denied the application based on sound educational policy, or if a reasoning mind could not have reasonably reached the conclusion that the Local Board reached. COMAR 13A.01.05.06A, B and C. I can only, at this time, determine that the Local Board's did not give DaVinci a full opportunity to collaborate with it in the application process, and recommend that the Local Board provide that opportunity.<sup>36</sup>

### **PROPOSED CONCLUSION OF LAW**

I conclude as a matter of law that the decision of the Baltimore City Board of School Commissioners to deny the charter application of The DaVinci Collaborative, Ltd., filed on March 20, 2018, is illegal because it results from an unlawful procedure – a failure to fully communicate and collaborate with the applicant, with meaningful technical assistance, as mandated by its Administrative Regulations and the mandate of the Maryland State Board of Education issued as a remand on October 23, 2018. COMAR 13A.01.05.06C(4).

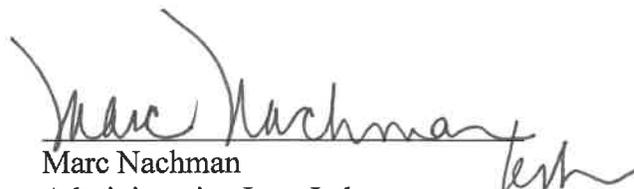
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<sup>36</sup> If the State Board does not adopt this proposed decision and determines that the Local Board's process was not illegal, the record is therefore complete and a decision on whether the Local Board's decision was arbitrary or unreasonable can be made from the present record without further testimony or evidence. But if DaVinci is given an opportunity to collaborate with the Local Board, and if changes are made to the application, or additional material is submitted to Baltimore City in light of those discussions, then the record would be different than that already in evidence. If, after collaboration DaVinci's application is again denied, any newly submitted material would have to be considered in deciding whether the Local Board's denial of DaVinci's charter application was arbitrary or unreasonable because it was contrary to sound educational policy or that a reasoning mind could not have reasonably reached the conclusion that the local board reached. COMAR 13A.01.05.06B.

**PROPOSED ORDER**

I PROPOSE that the matter be remanded to the Baltimore City Board of School Commissioners to collaborate with The DaVinci Collaborative, Ltd., towards curing the deficits in its application, including the deficits cited in its letter of February 7, 2019, in a manner consistent with this proposed decision.

May 20, 2020  
Date Decision Mailed

  
Marc Nachman  
Administrative Law Judge

MN/kdp  
#185997

**NOTICE OF RIGHT TO FILE EXCEPTIONS**

A party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen (15) days of the Proposed Decision; written responses to the exceptions may be filed within fifteen (15) days of the filing of exceptions. COMAR 13A.01.05.07F. Exceptions and responses shall be filed with the Maryland State Department of Education, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. The Office of Administrative Hearings is not a party to any review process.

**Copies Mailed To:**

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**THE DAVINCI COLLABORATIVE,  
LTD.,**

**APPELLANT**

**v.**

**BALTIMORE CITY BOARD OF  
SCHOOL COMMISSIONERS**

**\* BEFORE MARC NACHMAN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\*  
\* OAH No.: MSDE-BE-12-19-08519  
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**\* \* \* \* \***

**EXHIBIT LIST**

I admitted the following exhibits on behalf of DaVinci:

- DVC Ex. 1 Charter Application submitted March 20, 2018
- DVC Ex. 2 DaVinci Community Letters of Support
- DVC Ex 3 Baltimore City Board of School Commissioners' (BCBSC) Board Administrative Regulation IHB-RA
- DVC Ex. 4 Transcript from BCBSC's June 13, 2017 public meeting
- DVC Ex. 5 Decision Letter from BCBSC, July 11, 2017
- DVC Ex. 6 2018 Charter School Application and Guidelines
- DVC Ex. 7 Guidance for Reviewers of New Charter School Application, BCBSC, 2017-2018
- DVC Ex. 8 Interview Score Sheet and Notes, Charter School Applicants Interviews 2018
- DVC Ex. 9 DaVinci Interview Outline, dated April 15, 2018
- DVC Ex. 10 Work Session Agenda: New Charter Applications, May 24, 2018
- DVC Ex. 11 Inquiry from the Local Board to DVC, June 6, 2018
- DVC Ex. 12 DaVinci Supplement to Charter Application of Baltimore City Public Schools, June 7, 2018
- DVC Ex. 13 Baltimore City Board of School Commissioners Public Board Meeting Transcript from June 12, 2018
- DVC Ex. 14 Decision Letter from BCBSC, July 10, 2018

- DVC Ex. 15 DaVinci Letter and Responses to Questions Outlined in State Board Opinion, dated October 30, 2018
- DVC Ex. 16 Baltimore City Board of School Commissioners Public Board Meeting Transcript from November 13, 2018
- DVC Ex. 17 Baltimore City Board of School Commissioners Public Board Meeting Transcript from December 11, 2018
- DVC Ex. 18 DaVinci Supplemental Responses, dated December 14, 2018
- DVC Ex. 19 Decision Letter from Christian Grant, Esq. Board Executive Officer to Helene Luce, February 21, 2019
- DVC Ex. 20 E-Mail correspondence between DaVinci and the Baltimore City Public School District, November 7-14, 2018
- DVC Ex. 21 Charter School Application Report, The DaVinci Collaborative
- DVC Ex. 22 Baltimore City Board of School Commissioners Public Board Meeting Transcript from January 8, 2019
- DVC Ex. 23 Baltimore City Public School District's Chief Executive Officer's Review of DaVinci's Supplemental Responses, January 8, 2019
- DVC Ex. 24 Letter from Dr. Sonja B. Santelises, Ed. D., Baltimore City Public Schools, Chief Executive Officer, Helene Luce, February 7, 2019
- DVC Ex. 25 E-Mail from Trevor Roberts to Helene Luce, with attached Notice also dated February 21, 2019 (Letter from Christian Grant, Esq. Board Executive Officer to Helene Luce), February 21, 2019
- DVC Ex. 26 Memorandum from Angela Alvarez and Trevor Roberts to Dr. Sonja B. Santelises, CEO, May 11, 2018

I admitted the following exhibits on behalf of the Local Board:

- Local Board Ex. 1 2018 Charter Application Update, Presentation to BCBSC, November 13, 2018
- Local Board Ex. 2 2018 Charter Application Update, Presentation to BCBSC, December 11, 2018