

MBEF COLLEGE AND
CAREER ACADEMIES, INC.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 23-25

OPINION

INTRODUCTION

The Appellant, MBEF College and Career Academies, Inc., filed this appeal of the July 20, 2023, decision of the Montgomery County Board of Education (“local board”) to deny Appellant’s application to open a charter school for grades 6-12 starting in the 2024-2025 school year.¹ The local board responded to the appeal maintaining that its decision is not arbitrary, unreasonable, or illegal. Appellant filed a response, and the local board filed a reply.

FACTUAL BACKGROUND

This is the third time the Appellant has challenged the local board’s denial of a charter application with the State Board. In the first case, the local superintendent (“Superintendent”) recommended conditional approval of the charter application subject to certain financing contingencies. *See M.E.C.C.A. Business Learning Institute v. Montgomery County Bd. of Educ.*, MSBE Order No. 22-06 at 3 (2022). The local board, however, declined to award the charter because, among other reasons, the Appellant had not presented “firm” evidence of financing commitments from banks. Although the State Board referred the case to the Office of Administrative Hearings (“OAH”) to resolve other disputes of fact concerning the budget documents, we advised that because “financial institutions will not provide firm commitments for financing prior to the award of the charter,” requiring “firm” commitments for financing prior to the award of the charter established a complete barrier to approval of most, if not all, charter schools. *Id.* at 7. Such a requirement was, in our view, unreasonable. The State Board did not resolve the case on the merits because the Appellant withdrew the appeal while the matter was at OAH.

In the second case, the Appellant applied again for approval to open a charter school, and the Superintendent also recommended conditional approval of the charter subject to certain financial contingencies related to attaining, furnishing, and renovating a building by July 1, 2023. The Superintendent asked that the local board approve the application to operate a public

¹ The Appellant proposes to open the Mentoring By Example College and Career Academy (“M.E.C.C.A.”) Business Learning Institute for the Gaithersburg area designed as a college preparatory and vocational school for middle and high school students with a business education theme, with grades being phased in over time.

charter school, beginning in the 2024-2025 school year, “contingent upon M.E.C.A Business Learning Institute demonstrating, by July 1, 2023, its ability to meet the financial requirements, and any state, federal, or local laws associated with attaining and renovating a building suitable for use as a public school in Maryland.” However, on July 26, 2022, the local board voted to deny the charter due to concerns that the proposed charter school would not be “financially sustainable if its enrollment did not track expectations set forth in the Appellant’s April 1, 2022, application.” The local board’s concerns about enrollment appeared to rest on a lack of solid enrollment commitments, related to the charter school’s ability to provide transportation, decline in the economy, and the existence of “similar” schools in Montgomery County. *MBEF College and Career Academies, Inc. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 23-03(2023).

In that case, we reversed the local board’s denial of the charter application, finding that the local board had not presented a reasonable, articulated basis for its decision. The local board’s failure to issue a written decision and to instead rely on its discussion at the board meeting contributed to its undoing in that the discussion failed to contain facts to support denial of the application and was more based on speculation that was conclusory in nature. *Id.* Thus, in our opinion, issued on January 24, 2023, we remanded the case to the local board directing it “to award contingent approval of the charter beginning with the 2024-2025 school year on the condition that Appellant demonstrate, by July 1, 2023, its ability to meet the financial requirements, and any state, federal or local laws associated with attaining and renovating a building suitable for use as a public school in Maryland.” *Id.*

After the remand from the State Board, various meetings and communications took place between the Appellant and school system staff.

At some point after the State Board’s January 24, 2023, remand, the Appellant began exploring the possibility of leasing an unutilized MCPS school building as its facility. A building in Bethesda, the Radnor Center, was identified as being available on a temporary basis for use by the Appellant for up to two years. (Appeal, Exs. OO, YY). The Appellant’s new facility plan was to lease the Radnor Center location for two years to serve grades six and seven in school year 2024-2025, and grades six through eight in school year 2025-2026. Thereafter, the school would relocate to a permanent facility in the Gaithersburg area as planned in the charter application. (Appeal, Ex. A, Attach. D). Because MCPS Policy DNA, *Management of Board of Education Property*, requires short-term leases to be awarded through the competitive bid process, Appellant sought a waiver of the competitive bid requirement to speed up the leasing process.

Although the State Board issued its remand decision directing the local board to grant contingent approval of the charter on January 24, 2023, it was not until May 11, 2023, that local board President, Karla Silvestre, issued a letter to the Appellant granting contingent approval of the Appellant’s spring 2022 application to open a new charter school beginning with the 2024-2025 school year. (Appeal, Ex. A, Attach. A). The letter granting approval was contingent on the Appellant demonstrating the following:

- On or before July 1, 2023, its ability to meet the financial requirements necessary to support a facility for the proposed charter school consistent with the mandates of state and federal law and the conditions set forth in the Appellant’s spring 2022 application, which shall include evidence of

sufficient funding for acquisition costs, start-up costs and the purchase of furniture and equipment (i.e., property development agreement, loan commitment documentation, or binding letter of intent/memorandum/understanding, from funding sources as appropriate for property acquisition); and

- So that the Appellant’s admissions and enrollment process aligns with the existing middle school choice process, on or before September 15, 2023, secure a school site, through a fully executed lease or purchase agreement, that the Appellant demonstrates can be made accessible to all incoming students for the start of the 2024-2025 school year; and demonstrate that the start-up expenses for accomplishing said tasks as well as loan or other financing repayment plans, if applicable, are included as part of the Appellant’s operational budget or other verifiable income source.

Id.

In a May 26, 2023, email, MCPS staff advised the Appellant that given that the Radnor Center property was only available on a temporary basis and was not located within the Gaithersburg area, which was the desired location outlined in the charter school application, the Appellant would have to review its transportation plan and associated costs to ensure that it could meet the needs of transporting students to the new location. Staff also advised that the Appellant needed to create a transition plan to include how to mitigate the impact of the facility move on the school community, a facility acquisition plan for the new facility, a modified transportation plan, and a moving plan. (Appeal, Ex. YY).

On June 6, 2023, the local board granted the Appellant’s request for waiver in Resolution No. 279-23, Charter School Application for Waiver from Policy DNA, Management of Board of Education Property. (Appeal, Ex. A., Attach. B). The approval stated as follows:

[P]rior to obtaining the Board's approval of a lease of a MCPS facility, [Appellant] must submit a facilities plan as required in Board Policy CFB, *Public Charter Schools*, as well as a facility transition plan including, but not limited to; how to mitigate the impact, on M.E.C.C.A.’s community, of the revised location and a subsequent change in location shortly after starting the program; an acquisition plan for the permanent facility; a modified transportation plan, and other factors related to enrolling students in a temporary location.

Id.

Meanwhile, the record discloses that before and after the May 2023 contingent approval, the Appellant was working diligently to acquire the necessary financing for the charter school. The record discloses the following:

- On March 3, 2023, the Appellant and Highmark School Development, LLC² (“Highmark”) signed a Letter of Understanding (“LOU”) demonstrating their intent “in initiating discussions concerning entering into a transaction to locate and acquire or lease real property . . . suitable for the development of a public charter school facility . . . and to develop and construct or renovate the Facility.” (Appeal, Ex. J). Highmark agreed to “commence good faith negotiations regarding the business terms of the Transaction” and enter into an agreement and term sheet memorializing the terms within 120 days of the LOU. *Id.*
- On March 23, 2023, the Maryland State Department of Education finalized the Appellant’s Maryland Charter Schools Program startup grant in the amount of \$900,000 for the performance period from April 1, 2023, to September 30, 2024. (Appeal, Ex. A, Attach. D).
- On June 7, 2023, the Appellant received a Letter of Interest from the Enterprise Community Loan Fund, Inc. indicating interest in funding facilities renovation project with estimated scope of up to \$1.2 million dollars for a charter school facility tenant improvement loan for up to 5 years with an additional 5-year option. The letter states that it is not a commitment to lend, but rather a demonstration of “willingness to further examine all aspects of the proposed transaction....” *Id.*
- On June 14, 2023, M&T Bank approved the Appellant’s Business Credit Card Application for a \$35,000 limit, and on June 22, 2023, approved a Line of Credit for \$50,000 with a standard rate of Prime +3.5%. *Id.*
- On June 22, 2023, the Montgomery County Government approved the Appellant for a MOVE Grant in the amount of \$18,184. (Appeal, Ex. RRR).
- On June 30, 2023, the Appellant received a term sheet from Charter Schools Development Corporation for a facility loan for improvements for the Century Boulevard facility for a loan amount up to \$1,500,000. The term sheet states that it is not a commitment letter and is to be used for further discussion toward formal underwriting.” (Appeal, Ex. A, Attach. D).

On or about June 18, 2023, the Appellant shared a draft of its interim location facility plan with MCPS staff. (Appeal, Ex. NNN). MCPS provided feedback on the plan at a meeting on June 23, 2023. (Appeal, Ex. A). On June 30, the Appellant submitted a revised facility plan which included information on the transition plan for its change in school location from a temporary facility in Bethesda to a permanent one in Gaithersburg. (Appeal, Ex., VVV).

After the July 1 deadline for Appellant to meet the contingencies, the Superintendent recommended that the local board deny the Appellant’s charter school application. In a memorandum to the local board, the Superintendent stated that the Appellant “has not met the criteria for obtaining the Board’s approval of a lease of a MCPS facility for school years one and

² Highmark is a real estate development firm that works with charter school to help develop facility solutions, assisting with facility development tasks, including financing. (Appeal, Ex. T).

two of the proposed charter” and the Appellant “cannot meet the financial requirement for acquiring a permanent facility,” thus the Appellant “has failed to demonstrate that it has ‘the ability to meet the financial requirements of attaining and renovating a building suitable for use as a public school in Maryland.’” (Appeal, Ex. A).

As to the proposed permanent facility, the Superintendent stated:

[T]he facility plan states that a vacant property, Century 21, which comprises 20010, 20020, and 20030 Century Boulevard in Germantown is being negotiated for use by MBLI. These three office buildings require significant costly renovations for the approximately 93,000 square feet of space to be converted into a school facility. M.B.E.F. has allocated \$150,000 for renovations that will be phased in as the program increases. However, M.B.E.F. did not provide an actual plan or feasibility study for the necessary renovations of the three buildings proposed for the MBLI campus for school years three and beyond, that would meet program requirements to execute material elements of the charter school’s education program (classrooms, technology, special purpose spaces, etc.); therefore, MCPS utilized current market trends with MCPS contractors and a recent comparable charter school facility renovation estimate of office space in Frederick County, as general guidance in estimating a budget to renovate the three proposed buildings. The MCPS cost estimate for design and renovation of the proposed facilities within a reasonable time frame and reflective of current market conditions, is approximately \$22,897,944 as compared to the M.B.E.F. Proposal of \$150,000 for a difference of \$22,747,944 (Attachment D). Based on the allocation of funds for the necessary design and renovations provided in the facility plan, M.B.E.F. has not demonstrated that \$150,000 is adequate to renovate the space in Germantown to meet MCPS program requirements for a secondary school facility.

Id. The Superintendent found that the Appellant could not support its position that the proposed facility may be used to serve students for school years three and beyond. *Id.* at 4. The Superintendent also found the financial plan for the permanent facility to be deficient as follows:

As detailed in the Review and Recommendation of M.E.C.C.A. Business Learning Institute Permanent Location Plan (Attachment E) the total funding cited by M.B.E.F. to support its permanent facility plan for the MBLI charter school is sorely insufficient to meet the financial requirements necessary to renovate the three proposed buildings in time for their utilization as a school starting in Year three. Moreover, the proposed budget does not include debt service for any of the proposed financing including the above referenced \$1,200,000 loan or the \$1,500,000 loan. Based on our calculations, if the loans were approved based on the terms listed on the letters of support, the borrower’s payments will be an estimated \$163,500 and \$156,792 per year for 5 years, respectively. Additionally, since the loans are amortized over a 10-year and 15-year period, but matured

at 60-months, the loans will have an estimated final balloon payment of \$700,000 and \$1.15 million at year five. The current MBLI Operating Financial Projections document (Attachment A of the M.B.E.F. Facility Plan), does not reflect a repayment plan for these loans in their 6-year plan.

Id. at 4. The Superintendent further noted operational deficiencies, stating:

Next, the budgeted operating financial projection for post-opening of the school facility, as outlined by M.B.E.F. in its facility plan, makes it unclear if they are aligned with the necessary expenses to successfully staff and fund the school (Attachment E). The Operating Financial Projections document included in the facility plan breaks down the budget differently than in the original Charter School application; therefore, a crosswalk between the documents to identify changes to the budget is not feasible. For example, the revised budget document does not include the full-time equivalent of the position salaries listed or organize budgeted funds within state categories. As a result, it is uncertain what positions the salaries listed are supporting and if the estimated budgeted amount is sufficient.

Id.

The Superintendent also explained that the budgeted operating financial projection for post-opening of the school facility as outlined in the facility plan, makes it unclear if it is aligned with the necessary expenses to successfully staff and fund the school. The Operating Financial Projections document included in the facility plan breaks down the budget differently than in the original charter school application, thus a comparison between the documents to identify changes to the budget is not feasible. *Id.*

On July 17, 2023, the Superintendent provided the Appellant a copy of her memo to the local board. (Appeal, Ex. XXX).

On July 20, 2023, the local board denied the Appellant's application to operate a charter school. The resolution identifies the following bases for the denial:

- Lack of clarity concerning the steps the Appellant will take to mitigate the impact on student enrollment that may result from the distance between the interim location and the proposed service area, which is more reflective of the demographic population the school is designed to serve;
- Lack of evidence demonstrating that families in the community that the school primarily intends to serve (Gaithersburg) would be willing to attend the school in the interim location;
- The Appellant did not provide an acquisition plan for a permanent facility to include a cost estimate for design and renovation or the proposed facilities. The MCPS cost estimate for design and renovation is approximately \$22,897,944 as compared to the Appellant's budget of \$150,000 for renovations. A difference of \$22,747,944; and
- While the proposed financing is inadequate, the budget does not include debt service for any of the proposed financing which will be an estimated \$163,500 and

\$156,792 per year for five years, respectively. Additionally, the loans will have an estimated final balloon payment of \$700,000 and \$1.5 million at year five. There is no demonstration of the Appellant's ability to meet such financial obligations.

(Appeal, Ex. A).

This appeal to the State Board followed.

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.

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.

LEGAL ANALYSIS

Now before this Board for a third time, this case represents the myriad of difficulties encountered by charter school applicants concerning facilities and related financing. There are also complicating factors present here that developed after we remanded the case to the local board on January 24, 2023. The first is the local board's failure to grant contingent approval of the charter until May 11, 2023, and failure to execute a contingent charter agreement. The second is the Appellant's decision to use a temporary facility in the Bethesda area for two years and then move the school to a permanent facility in the Gaithersburg area.

The *Maryland Public Charter Schools Model Policy and Resource Guide* envisions a two-step chartering system approach. *City Neighbors Charter Sch. v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 05-17 (2005). The first step consists of the application development, submission, and review process. *Id.* Once the application has been approved, the second step is completion of a charter agreement which is a legally binding contract that explains in detail the responsibilities of all parties involved in the operation of the charter school. The thoroughness of the application process should pave the way for the incorporation of the approved application into the body of the charter school agreement with the need for minimal additional negotiation in completing the charter agreement. *Id.*

As to the first step, we recognize that the local board ultimately issued contingent approval of the charter application. However, that did not occur until May 11, almost four months after the remand decision. The local board's failure to issue contingent approval prior to that time compromised the Appellant's ability to move forward with facility and financing arrangements and prejudiced the Appellant in meeting the July 1 contingency deadline set by the State Board. Moreover, once the local board did finally issue contingent approval on May 11, it thereafter introduced new contingencies on May 26 without recognizing that the Appellant now had less than two months to meet its deadline. That is less than half the amount of time that the Appellant would have had if the local board had timely complied with our directive. In our view, the local board should have provided the Appellant additional time to meet the contingencies given the late approval and new additions. The local board gave no reasonable explanation as to

why it waited almost four months to act upon our remand or why it did not grant the Appellant additional time to address the new contingencies. We find its failure to do so was arbitrary and unreasonable.

As to the second step, the Appellant maintains that the local board's failure to execute a contingent charter agreement within 30 days of receipt of the State Board's remand decision violates our directive and amounts to arbitrary, unreasonable, and illegal action. However, even if we and the Appellant presumed that the local board would execute a contingent charter agreement within a reasonable time after the January 24, 2023 decision, we did not explicitly include such directive language in the decision. Our decision states only that we "direct [the local board] to award contingent approval of the charter" There is nothing directing the local board to take the next step of executing a contingent charter agreement.

Based on our finding above, we must examine the difficult question of whether the State Board should, at this time, expressly direct the local board to approve the contingent charter application and execute a charter agreement by a date certain. Without the local board approving the application with contingencies and executing a contingent charter agreement, the Appellant continues to face the proverbial chicken and egg problem faced by charter school applicants concerning the school facilities and related financing issues that we have highlighted in numerous cases. As we stated in *Watershed Public Charter Sch., Inc. v. Baltimore County Bd. of Educ.*, MSBE Op. No. 18-31 (2018),

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

Watershed at 7 (footnote omitted). In the case before us, the facility renovation cost and financing are central issues.

The Appellant maintains that it cannot meet the local board's contingencies without an executed charter agreement to present to financial institutions. The local board argues that it would be extraordinary relief for the State Board to direct the local board to execute the charter agreement without the Appellant first having satisfied the local financial and legal contingencies associated with the plan to use MCPS property on an interim basis for the first two school years, and then relocate to a commercial property as a permanent facility for years three and four.

In *The DaVinci Collaborative, Inc. v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 21-05 (2021), we explained the reluctance of the State Board to direct approval of a charter based on its review of the merits of a charter school application given the complexities in replicating the evaluation process, and we stated our belief that the local board is best suited to

ensure completion of the evaluation process. Nevertheless, the case before us, and Appellant's two prior appeals to the State Board demonstrate that sometimes extraordinary relief is necessary to remedy the local board's repeated reluctance to give applicants a chance to demonstrate the viability of a charter school.

An approved application and executed charter agreement is only a foundational step towards opening a charter school. There is no guarantee the Appellant will satisfy the local board's contingencies upon the approved application and executed charter agreement, but it gives the Appellant a chance to do so. The local board's commitment to initial approval is needed for the Appellant to exit the chicken and egg problem and set about establishing a charter school. However, both the local board and the Appellant should recognize that after a charter agreement is executed, the Appellant's journey to opening a charter school is not complete. The Appellant must resolve its facility issue and the related cost and financing issues, including facility acquisition and renovation. If the Appellant still has not satisfied those contingencies, then the charter agreement will have no effect. Simply put, if the contingencies are not satisfied, the charter school will not open.

In this third appeal to the State Board, we again expect the local board to give the Appellant a fair opportunity to meet the local board's facility and financial contingencies to open a charter school. To give the Appellant that opportunity, as set forth in Educ. Art. § 9-104(d)(3), we again direct the local board to approve the charter application with contingencies and execute a contingent charter agreement with the Appellant within 30 days of this opinion. We further direct the local board to extend the period for the Appellant to meet the local board's contingencies, until at least March 1, 2024. Based on the record before us, this provides the Appellant a reasonable period to leverage the charter agreement to secure commitments to meet the contingencies, especially with the hybrid facility plan it has proposed. What is reasonable will depend on the circumstances.

We do not agree with the Appellant that the local board erred by requiring the Appellant to address matters related to the change in the facility plan to use a temporary facility for two years and then move to a permanent location in the Gaithersburg area as originally planned in the charter application. The State Board's remand decision does not speak to the issue because the Appellant made the decision to use this hybrid facility approach after the remand was issued. Appellant makes much of the State Board's use of the indefinite article "a" in its directive that the Appellant demonstrate "its ability to meet the financial requirements, and any state, federal or local laws associated with attaining and renovating a building suitable for use as a public school," arguing that the use of "a" indicates that the State Board meant that the Appellant needed to secure one building without specifying which building it had to be. (Response at 4). That language, however, concerned the facility plan as it existed at the time. The circumstances have changed.

Notwithstanding the local board approving the application with contingencies and executing a charter agreement with the Appellant, the financial viability of a charter school does not exist in a vacuum. It is directly tied to facility sustainability. As we recognized in the initial appeal, *M.E.C.C.A.*, MSBE Order No. 22-06 at 7 (2022), the sustainability of a charter school must be assessed over several years until full enrollment and the applicant must present a reasonable plan showing how charter school operations will be sustained over that course of

time, filling the budget gaps with sufficient funding in a fiscally responsible way. Thus, with such a significant alteration to the facility plan, it was within the local board's discretion on remand to evaluate whether the hybrid approach of a temporary school in Bethesda for two years and then a facility in Gaithersburg thereafter could meet legal and fiscal requirements. It is difficult, however, to know exactly how the delayed response of the local board in granting contingent approval impacted the Appellant on this front but given the appearance of unfairness here we find that the Appellant is entitled to more time to address the contingencies related to the hybrid facility issue.

We remind the local board that in considering the Appellant's facility transition plan it cannot require the Appellant to present evidence of actual enrollment commitments. As we stated in the previous appeal in this case, and above, expecting firm commitments from a bank for financing before an award of a charter presents an almost insurmountable barrier to approval. Likewise, expecting an applicant to provide firm commitments for enrollment prior to the award of a charter presents a similarly insurmountable barrier to approval.

CONCLUSION

For all these reasons, we reverse the local board's decision denying the Appellant's application to operate a charter school. Pursuant to Md. Code Ann., Educ § 9-104(d), we remand the matter to the local board and direct the board to grant contingent approval of the Appellant's charter application and execute a contingent charter agreement consistent with our decision. We further direct the local board to extend the period for the Appellant to meet the contingencies until at least March 1, 2024. The charter agreement shall be executed within 30 days of the date of this decision. We further direct the parties to work together so that the Appellant can correct the deficiencies identified by the local board.³

Signatures on File:

Clarence C. Crawford
President

Joshua L. Michael
Vice-President

Susan J. Getty

Monica Goldson

Nick Greer

³ We recognize that at this juncture that it is unlikely that the Appellant will be able to open the charter school prior to the 2025-2026 school year.

Rachel McCusker

Joan Mele-McCarthy

Warner I. Sumpter

Holly Wilcox

Absent:

Shawn D. Bartley

Chuen-Chin Bianca Chang

Samir Paul

Dissent:

Irma E. Johnson

October 24, 2023