

SB #21-97

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE GREATER BRUNSWICK : DECISION
REGIONAL CHARTER SCHOOL, :
MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, January 31, 1997

Decision on motion by the State Board of Education, March 4, 1997

For the Appellant Highland Park Board of Education, Apruzzese, McDermott,
Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent, Andrew C. Fisk, pro se

For the Milltown Board of Education, Borrus, Goldin, Foley, Vignuolo, Hyman
& Stahl (Anthony B. Vignuolo, Esq., of Counsel)

By letter dated January 31, 1997, the Commissioner of Education notified the Greater Brunswick Regional Charter School ("Charter School") that he was approving its application for establishment of a charter school for the 1997-98 academic year, contingent on receipt of outstanding documentation which had not been included in its application.¹ In a statement of reasons dated February 27, 1997, the Commissioner stressed that the following strengths had contributed to his approval of the application:

¹ The enclosed list required the following documentation: Certificate of Occupancy, Annual Fire Inspection Certificate, Health Inspection Certificate, By-laws, Contracts, Certificate of Incorporation. The

the mission defined by the broad theme of child-directed learning, a high degree of parental and community involvement, and educational goals encompassing intellectual development, socio-economic growth, community relationships and civic responsibility.

On February 25, 1997, the Highland Park Board of Education challenged the Commissioner's determination by filing a notice of appeal to the State Board as provided in N.J.S.A. 18A:36A-4(d). On March 3, 1997, Andrew C. Fisk filed a motion to dismiss the appeal and for emergency relief on behalf of the Charter School. By letter decision, the State Board denied the motion on March 4. On March 5, the Highland Park Board filed arguments in support of its appeal. On March 7, the Milltown Board of Education filed a motion to intervene and arguments in support of the appeal. On March 10, Mr. Fisk filed a response on behalf of the Charter School, and a Deputy Attorney General representing the Commissioner filed an application to participate and a brief in response to the arguments supporting the appeal. On March 19, the Highland Park Board filed additional arguments in support of its appeal. On March 20, the Deputy Attorney General representing the Commissioner and the Charter School filed additional arguments in response. On March 21, the New Brunswick Board filed a motion to participate and arguments in support of its position.

In view of the importance of the issues raised by these appeals and the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to consider all of the documents that have been filed in this matter. In addition, we have reviewed the record provided to us on behalf of the Commissioner.

record does not include any indication of the date by which the documentation was to be provided or

After careful consideration of this matter under the terms of the pertinent statutes and for the reasons that follow, we are compelled to reverse the Commissioner's determination to approve the grant of a charter to the Greater Brunswick Regional Charter School for the 1997-98 school year.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational reform and improve student achievement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff

make any provision for review and evaluation of these submissions.

responsibilities and proposed qualifications, 9) a description of procedures to ensure parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The district board has 60 days from receipt of the application to forward a recommendation thereon to the Commissioner. Id. The Commissioner has the final authority to grant or reject a charter application, id., but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). As previously indicated, the legislation requires the State Board to render a decision within 30 days of receipt of the appeal. Finally, a charter school may not have an enrollment in excess of 500 students or greater than 25% of the student body “of the school district in which the charter school is established,” whichever is less. N.J.S.A. 18A:36A-4(e).

Initially, we reject the contention that the Commissioner did not have the authority to approve a charter school application in the absence of the adoption of implementing regulations by the State Board of Education. However, in the absence of regulations, we must consider the appropriateness of the Commissioner’s approval in this case solely under the terms of the pertinent statute.

The record indicates that the Greater Brunswick Regional Charter School filed a "Preliminary Application" on August 29, 1996. The record includes four checklists noting a lack of student focus, a lack of measurable goals and objectives, and the fact that no financial plan had been submitted. The Department provided a "Preliminary Review Feedback" to the Charter School in September 1996, indicating that Part I of the application was incomplete in that projected enrollment, location and founders were required. The preliminary feedback also indicated that the application was inadequate in the following areas: educational mission, goals and objectives, founders and partnerships, governance structure, educational program, student assessment, admission policy and criteria, student discipline, at-risk and disabled students, school staff, community involvement, facility, financial plan and transportation.

On October 15, 1996, the Charter School submitted its "Final Application." The record indicates that it was assessed by two reviewers. The first reviewer identified the following areas as inadequate: academic and non-academic goals and objectives, no identification of the school district in which the school would be located, a board of trustees had not been chosen, partnerships to enhance student achievement, the admission process, including a plan to attract students, and foster diversity, student discipline and expulsion policy, at-risk and disabled students, proposed qualifications for teachers and certificates, facility, financial plan and transportation. The first reviewer also questioned whether there was a well rounded group of founders and whether this was a valid application in that the proposal involved multiple school districts.

The second reviewer rated the following areas as inadequate: identification of schools where the children of the parent founders attended, partnerships, whether there was a well-rounded group of founders, information on trustees and how the board would be chosen, admission policy and criteria, student discipline and expulsion policy, no facility, financial plan, and transportation. The second reviewer commented that the application needed revisions and that there should be a careful review for compliance with the charter law because the Charter School was not associated with any one school district.

A separate budget review found that the overall financial plan was inadequate, that resident and non-resident enrollment projections were needed, and that the school districts involved had not been identified. The budget reviewer commented that it was necessary for the applicant to identify a district of residence for the school and to provide a cash flow analysis.

A tally sheet dated November 7, 1996 summarized the following areas as inadequate: description of founders, admission policy and criteria, financial plan, transportation, and documentation. There was also a note on the tally sheet questioning whether this was a valid application. In addition, the tally sheet included the comment that the revisions that had been submitted still did not address the financial concerns, that there was no cash flow analysis, and that the applicant had not designated a district of residence. Nonetheless, a recommendation was made to approve the application conditional on receipt of necessary documentation and further revisions.

The Charter School was provided with a “Final Review Feedback” form by the Department on November 26, 1996 and permitted to revise its application by the submission of addenda.²

During November, the Charter School submitted additional material, including an endorsement letter from the Urban Ecology Program at Rutgers. Additionally, the record includes a letter from the Charter School dated November 3, 1996 indicating that it had decided to revise its enrollment distribution from K through 4 to K through 6.

On December 5, the Charter School submitted an “Addendum Application.” The “Addendum Application” included a revised financial plan and introduced the term “region of residence,” noting that it was doing so “in light of the AG’s ruling.” On December 6, the Charter School submitted a “programmatic addendum to final application” addressing curriculum delivery for grades 7 through 9.³

Although the record does not include an assessment of the December 5 “Addendum Application,” the Charter School submitted another addendum to the financial plan at the request of the Department on December 17, 1996. This submission includes revenue projections on the basis of a projected first year enrollment of 100 students in grades K through 6. Additionally, while the Charter School identified four districts in its submission from it had determined its projected enrollment, it stated in the same document that it planned to appeal to the

² We note that none of the charter school applications on appeal to the State Board which were rejected by the Commissioner were provided with a “Final Review Feedback” by the Department or given the opportunity to amend their applications.

³ We note that the Charter School indicated in its application that it intended to add a new grade to the school each year.

Commissioner “to require the resident school district (New Brunswick) to provide the full 100% of the T&E amount for each student.”

In a letter to the Commissioner dated December 12, the Milltown Board raised nineteen questions relating to approval of the Charter School. On December 13, the Highland Park Board indicated that it could not recommend approval without answers to the questions it raised. On December 13, the Edison Board indicated that it had voted not to endorse the application, noting the “unclear relationship between the Red Oak Charter School and the Federalist Center” as one of the reasons. On November 19, the New Brunswick Board indicated that it supported the concept of the school, but was concerned about the financial impact.

As set forth above, the Commissioner approved the grant of a charter on January 31, 1997.

As a preliminary matter, we observe that the “Final Application” submitted by the Charter School on October 15, as embodied in the reviews, did not include adequate educational goals, did not provide adequate methods of assessing student performance or curriculum, or provide an adequate description of staff responsibilities. In addition, the financial plan was found to be inadequate. In our view, that “Final Application” did not satisfy the requirements of N.J.S.A. 18A:36A-5. For example, the application did not include a proposed governance structure. Nor is there any indication that the applicant provided any description or address for a physical facility, and there was no school calendar or school day schedule. These deficiencies are not de minimis. To the contrary, without the information required by the statute, and as

evidenced by the Department's continuing requests for revisions and corrections, an adequate assessment of the Charter School's proposal could not be made.

Even if we consider the addenda provided by the Charter School, the application still fails to meet minimal statutory standards. For example, nowhere in the record is there any "description of, and address for, the physical facility in which the charter school will be located," as required by N.J.S.A. 18A:36A-5(j). Without such information, it is impossible to assess with any confidence the sufficiency of the Charter School's financial plan. Moreover, the applicant has never even identified the district in which the Charter School would be located. Nor can it be determined without such information whether the school would be situated in a "suitable location," as required by N.J.S.A. 18A:36A-10.

These failures are not minor. Without the information required by the statute, it is impossible to insure that the Charter School's financial plan is adequate or to assess the impact on the district boards involved in this appeal. Moreover, without a district of residence, the statute cannot be properly implemented, and the statute does not make any provision for establishing a multi-district charter school. In this respect, we cannot ignore that the enrollment limitation of N.J.S.A. 18A:36A-4(e) is determined by the student body "of the school district in which the charter school is established." Similarly, N.J.S.A. 18A:36A-8 provides that "[p]reference for enrollment in a charter school shall be given to students who reside in the school district in which the charter school is located," and, pursuant to N.J.S.A. 18A:36A-13, students who reside "in the school district in which the charter school is located" must be provided transportation

on the same terms as students attending the district's schools, while any entitlement of non-resident students is to be determined by regulations.

Under these circumstances, and given the fact that the record provided to us does not include any final or comprehensive evaluation of the Charter School's submissions to date, we cannot affirm the Commissioner's grant of the charter at this time. In reaching this conclusion, we have been mindful of our responsibilities for assuring that the children attending charter schools, as well as those in the affected public school districts, are provided with a constitutionally adequate education. E.g., Robinson v. Cahill, 62 N.J. 473 (1973). See N.J.S.A. 18A:4-10. We would not be discharging those responsibilities in this case if we were to affirm the grant of the charter on the basis of the record before us. Nor would we be furthering the purpose of the Charter School Program Act by approving this grant. However, we stress that our determination herein is limited to the 1997-98 school year and is without prejudice to the Charter School's ability to apply for a charter for any subsequent school year.

Robert A. Woodruff, Maud Dahme, Jean Alexander, Margaret M. Bennett, Ronald K. Butcher, Wendel E. Daniels and Thomas P. McGough join in the opinion of the State Board.

March 26, 1997

Date of mailing _____

Anne S. Dillman, S. David Brandt, Orlando Edriera, Daniel P. Moroney, and Corinne M. Mullen dissenting:

On Wednesday, March 26, 1997, the State Board of Education voted 7-5 to reject its Legal Committee's recommendation to affirm the Commissioner of Education's approval of the Greater Brunswick Regional Charter School. The board also rejected by a vote of 6-5-1 its Legal Committee's recommendation to affirm the Commissioner's approval of the Red Bank Charter School.

We the undersigned board members wish to file this dissenting opinion because the State Board had less than one day to consider the written recommendations of the Legal Committee, and the reasons offered by board members for rejecting both the recommendations of its legal Committee and the Commissioner's decisions are factually erroneous and legally infirm.

The Charter School statute (N.J.S.A. 18A:36A) adopted on December 11, 1995, and signed into law by Governor Whitman on January 11, 1996, clearly intended that charter schools would be implemented in or before the 1997-98 school year. In this regard, the statute authorizes the Commissioner of Education to establish charter schools "...during the 48 months following the effective date of this act (8A:36A-3b)," and it states that "that this act shall take effect immediately (18A:36A-19)."

It is also clear that the authors of the statute intended that the Commissioner of Education's judgment would be the ultimate criterion for approving or disapproving the applications of individual charter schools. The statute states at 18A:36A-3 that "A charter school shall be a public school operated under a charter granted by the

Commissioner ..." and at 8A:36A-4(c), "The Commissioner shall have final authority to grant or reject a charter application."

Further, it is clear that the process used by the Commissioner in exercising this statutorily assigned responsibility was reasonable.

The following are our positions on the each of the major issues raised by board members to explain why they voted to reject the recommendation of the Legal Committee that the Commissioner's approval of the two schools be affirmed.

Application Booklet

It was indicated that the provisions in the Commissioner's charter schools application booklet were not identical to those in the statute. However, the provisions of any law as complex as the charter school statute require interpretation, and the Commissioner's method of developing such interpretations in carrying out his statutorily assigned responsibility to implement the charter school law was extraordinarily thorough.

The Commissioner developed and published a charter school application booklet (copy attached) in order to interpret specific provisions of the statute and to guide prospective charter school sponsors in the preparation of their applications. To begin this task, the Commissioner appointed a committee of Department of Education staff members, each of whom possesses expertise in a relevant area. The committee's membership included a former staff member of the State Assembly who assisted in writing that body's version of the law. The committee studied the statute and prepared an initial draft of the application booklet.

The Commissioner then met with the legislative authors of the statute, Senator John Ewing, and Assemblymen Joseph Doria and John Rocco, to review the initial draft that the committee had prepared. The purpose of this meeting was to assure that each interpretation contained in the application booklet was fully consistent with the provisions of the statute and with the underlying legislative intent. Several changes were made in the application booklet as a result of this meeting.

The Commissioner then shared the booklet with the major state education associations that had followed the progress of the legislation before its enactment, and he met with representatives of those associations to obtain their comments and suggestions. A nationally recognized expert on charter schools, who had also consulted during the preparation of the statute, was asked to review the booklet to identify any important issues that might have been overlooked. At the Commissioner's direction, Department of Education staff also shared the booklet with prospective charter school applicants to determine whether it communicated instructions clearly and would, therefore, elicit the proper information.

Through this process the application booklet was continually refined and then shared a final time with the legislative authors to assure the consistency of its interpretations with the literal provisions of the statute and the underlying legislative intent. The authors affirmed that the booklet was consistent with the statute in all aspects. A copy of the final booklet was forwarded to the sponsors upon its publication. (See attached letter dated June 26, 1996.) Further, State Board of Education members received a copy of the final application, as well, on the same date. Board members were informed that the booklet "...was developed with input from the legislative

sponsors, major education associations, prospective charter school applicants, field representatives, and key department staff (see attached memo dated June 26, 1996).

Evaluation Process

It was indicated that the evaluation process was invalid because it applied different standards and procedures to different applications. It was stated that some charter school applicants had numerous opportunities to amend their applications while others did not. This conclusion is incorrect for the following reasons.

First, the statute specifically empowers the Commissioner to evaluate the charter school applications and it does not constrain the Commissioner with respect to the process that he may use in evaluating applications. Under those circumstances, the State Board would exceed its role if it were to substitute its evaluation preferences for those of the Commissioner.

Second, the process that the Commissioner chose to use is reasonable. In order to obtain approval in time to open in September 1997, prospective charter school applicants were required to submit their applications by October 15, 1997. However, the statute is clear in its intent that the state play more than a passive role of simply receiving and evaluating applications. The act states that "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)."

To affect this public policy and to address the fact that the charter school initiative is new and innovative, a voluntary deadline of September 1, 1996 was set for

any applicant who wanted to submit a draft application early in order to obtain the review and advice of those Department of Education staff who are responsible for providing technical assistance in the creation of charter schools.

The opportunity for voluntary early submission was equally available to all prospective applicants. Twenty-eight preliminary applications were submitted, including those of the Greater Brunswick and Red Bank Charter Schools. In each case, the department's technical assistance staff provided appropriate advice without the Commissioner's involvement. All applicants then had the opportunity to revise their plans before meeting the final submission date.

As stated above, the Greater Brunswick and Red Bank Charter School sponsors took advantage of the opportunity for assistance based on voluntary early submission, which was available to all prospective applicants, and like all others who did so, they were able to revise their plans accordingly before the final deadline for formal submission. Therefore, it is inaccurate to suggest that these applicants were somehow accorded an unfair advantage.

Following the first round of review of the thirty-seven applications submitted by October 15, 1996, eighteen were identified as demonstrating sufficient potential to be strong charter schools to warrant a second round of technical assistance. During this second round of technical assistance, all applicants submitted addenda upon the request of department reviewers. Eight of the eighteen applicants under consideration submitted three addenda, including the Red Bank and Greater Brunswick Regional Charter Schools.

The above notwithstanding, the matter before the board did not require a determination as to whether some charter school applicants were treated "more fairly" than other applicants. It is only to determine whether there was any violation of statute in the evaluation of the Greater Brunswick and Red Bank applications. Clearly there was not.

Incomplete Documentation

It was indicated that the two applicants had been granted charters without submitting all of the documentation required by the statute. In particular, they did not identify the location of their facilities.

During the development of the application booklet, it was determined that certain documentation could not be obtained by the applicants until they received their charters from the Commissioner. In particular, while the statute requires applicants to provide the addresses of their facilities, charter schools would be unable to contract for facilities until they were approved to exist.

This would place the applicants in a "catch-22" situation of simultaneously being unable to obtain documents until they were approved to exist and being unable to obtain approval without submitting the documents. Therefore, the process was designed to base evaluation and approval on the quality of each applicant's substantive educational and financial plans, and to grant such approval contingent on the submission of any outstanding documentation prior to implementation.

This method of addressing the submission of certain documentation was established at the outset after discussion with the legislative sponsors, and it was

communicated clearly and consistently throughout the process. The application booklet states on page 5 that, "Commissioner's approval can be conditional in instances such as if the applicant has yet to acquire facilities or to provide documentation of teachers yet to be hired." On page 20 of the charter schools application in the section which specifies required information regarding facilities it states, "If you do not have a facility, describe your present options for designating a school facility." Further, the letter of approval given to each applicant states "When the approval of charter schools for 1997-98 was announced on January 14, 1997, that approval was contingent upon receipt of outstanding documentation not included in your application. A list of this required documentation is enclosed." (See attached copy of letter dated January 31, 1997.) In the section of the application which deals with Questions and Answers, the following question is raised (page 5 of Appendix C): "Can a charter school be approved if a facility has not yet been acquired?" The answer provided: "Yes. The charter would be granted conditionally on the basis that the school would be housed in an approved facility." Finally, the charter certificate states on its face that "Approval is contingent upon receipt of the necessary documentation listed in Section 19 of the New Jersey Charter Schools Application."

"Region of Residence"

It was stated that because the Greater Brunswick Charter School is designed to serve a region that encompasses four school districts, it is ineligible for approval since the statute does not specifically provide for the creation of multi-district charter schools. To address this lack of clarity, the Commissioner, exercising his statutorily assigned

responsibility to implement the law, defined the "region of residence" of students to be served by a charter school to include contiguous district boards of education as well as single district boards. This definition was developed in consultation with counsel, and it was presented to the legislative authors of the statute to determine its consistency with legislative intent. The definition was applied consistently in the review of the current applications, and it was incorporated in regulations that the Commissioner has proposed that the State Board adopt to guide consideration of applications in future years.

Enrollment

It was argued that the Red Bank Charter School application should not have been approved because the Red Bank School District's enrollment is too small to absorb the loss of students who would enroll in the charter school. This argument is statutorily erroneous since, as approved, the Red Bank Charter School's maximum enrollment is well within the limits imposed by the statute.

Regulations

It was argued that in the absence of regulations approved by the State Board, the Commissioner was bound to adhere to the literal language of the statute. However, the statute does not preclude the Commissioner from interpreting or implementing its provisions until after the enactment of rules. In addition, the Commissioner exercised his authority to do so only after consulting with the authors of the statute to verify legislative intent.

For these reasons, we the undersigned members of the State Board of Education hereby advance the dissenting opinion that the Commissioner of Education's approval of the Greater Brunswick and Red Bank Charter Schools was consistent with the literal provisions of the statute and based on reasonable interpretations of statutory language that were affirmed by the authors of the legislation.

Perhaps more importantly, charter schools are an important innovation that has the potential to provide the children they serve with an improved education, as well as the potential to stimulate improvements in the broader system of public education. As the statute states, "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)." At the very heart of the charter school initiative is the concept of flexibility in implementation. Further, by authorizing the creation of charter schools over an initial four-year period, the statute recognizes that the initiative is an exploration, one which is intended through flexible implementation to generate refinements over time.

Given the educational significance of the initiative and the fact that it is intended to be a flexible exploration, we believe that it is inappropriate to block implementation of the new charter school initiative without clear and compelling evidence of a major impropriety or a blatant and direct violation of statute.

April 2, 1997

Date of mailing _____

