MARYLAND EASTERN SHORE CHARTER SCHOOL ALLIANCE,

Appellant

v.

DORCHESTER COUNTY BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-36

OPINION

The Maryland Eastern Shore Charter School Alliance ("MESCSA") has appealed the decision of the Dorchester County Board of Education (local board) to deny its application for a charter school. The local board filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant has responded and the local board replied.[1]

FACTUAL BACKGROUND

Appellant originally filed an application to create a charter school called Dorchester Preparatory Public Charter School ("Dorchester Prep") in Dorchester County in September 2012. Dorchester County Board Policy 390.4 governs the charter school application process and the local board has published a Charter School Application packet to assist applicants. (Motion, Exs. 1, 2). The local board denied the application on December 28, 2012 and sent a letter to Appellant outlining the reasons for the denial. Appellant did not appeal this denial decision.

At the request of Appellant, on March 12, 2013, the school system provided additional details on the application's deficiencies. (Appeal, Ex. 2). A meeting to discuss these deficiencies took place on April 22, 2013. (Appeal, Ex. 3). Appellant requested monthly meetings with school system staff to address shortcomings in the application, but the request was denied and staff provided responses to questions through emails.

Appellant filed a new application for the creation of Dorchester Prep on September 3, 2013. It is this second application that is the focus of this current appeal. The application proposed serving approximately 152 students in sixth through eighth grades beginning in the 2013-14 school year. Dr. Lorenzo Hughes, Assistant Superintendent for Instruction, served as a liaison to Appellant during the review process and convened a review committee of approximately 21 members to consider the application. Two members of the review committee met with William Akridge, founder and director of MESCSA, for an hour on December 11,

[1] Appellant argues that a Motion for Summary Affirmance is not appropriate because there are material facts in dispute. Appellant does not, however, cite any specific facts and we conclude that the parties' disagreement is a legal, rather than a factual, one.

2013.

The Superintendent sent a letter to the local board on December 13, 2013 outlining his denial recommendation. The Superintendent stated that "much of the application" was sufficient but that there were "several significant portions" that were deficient. Specifically, the Superintendent listed problems with the application's statement of need; the school's organizational viability; the educational leadership and human resources planning; the school's governance structure; and the school's academic viability.

On December 19, 2013, the local board received public comments, most negative, on the application from about 18 people.[2] The public commenters voiced concerns that the charter school did not offer new ideas not already in place in the public schools; that the school would not be able to effectively target underperforming students; that the school's discipline policy was too strict; that the school would stretch the school system's resources; and that Appellant implied that children in the community were part of generations of failure. (Motion, Ex. 14).

The local board voted to deny the application and sent a letter to Appellant on January 2, 2014 informing it of the reasons for the decision. In the letter, the board stated that it found the Superintendent's recommendations were a sufficient reason to deny the application. In addition, the local board noted that there was "strenuous opposition" to the charter school during the board's public comment period. The board stated that this was "especially concerning considering many of the comments were made by individuals who identify with the demographic which the charter school sought to serve." The board also observed that some individuals who signed Appellant's petition for a charter school indicated that they were unaware they were signing a petition.[3] The board noted that specific concerns were raised during the meeting about a lack of community support for the school and the potential adverse effects the school could have on the overall budget priorities of the school system. (Appeal, Ex. 1).

This appeal to the State Board followed.

STANDARD OF REVIEW

This is an appeal of a decision of a local board to deny a charter school application. Such a decision is one involving a local policy or controversy and dispute regarding the rules and regulations of the local board. Accordingly, the local board's decision must "be considered *prima facie* correct" and upheld unless the Appellant proves that the local board's decision was arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.05.05; *Kitzmiller Charter School Initiative, Inc. v. Garrett County Bd. of Educ.*, MSBE Op. No. 13-52 (2013).

LEGAL ANALYSIS

Appellant argues that it complied with all of the requirements for a charter and challenges

[2] The local board heard public comments from another six people at its November 21, 2013 meeting. Several spoke in favor of the charter school. (Reply, Ex. 3).

[3] Appellant denies that it misrepresented the nature of its petition to anyone who signed it.

the local board's decision to deny its application. Appellant contends that the school system failed to offer pre-filing technical assistance and did not offer Appellant the post-filing opportunity to cure deficiencies in the application. Additionally, Appellant disputes many of the local board's conclusions about the quality of the application itself.

Pre-filing technical assistance

Several of Appellant's complaints can be characterized as a failure to provide technical assistance to Appellant during the pre-application filing phase. We consider that period to run approximately from April 2013, when the school system met with Appellant to discuss its prior application, to September 3, 2013, when Appellant submitted its second application. Appellant argues that it received "short and vague" answers during an April 2013 meeting to discuss the application. Appellant states that its request for monthly meetings was denied and that the school system was slow in providing it with a full list of problems identified in its prior application. As a result, Appellant claims this lack of assistance negatively impacted its second application.

The local board responds by noting that Dr. Hughes, the head of the review committee, made himself available to Appellant in person and through email. The board states that Dr. Hughes sent a detailed letter on March 12, 2013, listing deficiencies in Appellant's prior application. This was followed by an April 2013 meeting in which Appellant sought clarification on the deficiencies from Dr. Hughes, who responded by offering suggestions on how to improve the application. (Appeal, Ex. 3). Dr. Hughes also responded to various questions posed by Appellant through email in the time leading up to the second submission. (Motion, Ex. 10).

Local board Charter School Policy 390.4 requires that the Superintendent or a designee "make available to a Charter school applicant advice, technical assistance, and consultation throughout the charter school application process." These services are provided so that the applicant can "ensure that all components of the application have been completed and are addressed." (Motion, Ex. 1). We have said the following about technical assistance:

> 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 the opportunity to cure deficiencies is a matter of sound educational policy.

Global Gardens Public Charter School v. Montgomery County Bd. of Educ., MSBE Op. No. 11-01 (2011).

As the local board noted, Dr. Hughes met with Appellant for two hours in April 2013 to discuss problems with Appellant's prior application. During this meeting, Dr. Hughes answered questions posed by Appellant but indicated that staff did not have the time to engage in monthly meetings. He also stated that he would not provide piecemeal approval by signing off on

individual parts of Appellant's application. Dr. Hughes suggested that Appellant contact the Maryland Charter School Network for additional assistance.

"We recognize that local school systems do not have the resources to assist every applicant to correct the deficiencies in the application. That is the job of the applicant." *Frederick Outdoor Discovery Charter School v. Bd. of Educ. of Frederick County*, MSBE Op. No. 13-14 (2013). After reviewing the record, we believe the school system provided a reasonable amount of assistance prior to Appellant's submission of its second application. The record shows that Dr. Hughes met with Appellant in-person once and later answered questions posed to him through email. Besides declining to hold monthly meetings, the record does not indicate that Dr. Hughes refused assistance. Although in-person monthly meetings may have helped Appellant better craft its application, monthly meetings were not mandatory.

We also find no merit to the claim that the local board was slow to point out deficiencies in Appellant's prior application. Before the first application was even formally considered by the local board, Dr. Hughes sent Appellant a list of nearly 80 questions that were not addressed in the application. The local board later provided Appellant with two letters detailing deficiencies in the first application, one in December 2012, the other in March 2013. This was followed by the in-person meeting in April 2013. This provided Appellant with ample time to correct the deficiencies prior to submitting a new, second application in September 2013.

Post-filing assistance

Appellant argues that the school system violated its own charter school procedures because neither the local board nor the review committee interviewed the Appellant and provided it the post-filing opportunity to cure deficiencies once its second application was submitted.[4]

The county's Charter School Application packet states the following:

> Applicants will be interviewed by the Board of Education and/or a review committee. These interviews will be conducted by Dorchester County Board of Education staff and will be based upon the questions reviewers raised about an application. Applicant groups should be prepared to answer questions regarding all parts of the application.

(Motion, Ex. 2).

Appellant explains that its December 2013 meeting with two review committee members did not amount to an interview as contemplated by the local board's procedure because the

[4] Appellant also notes that the review committee never provided its list of members and did not allow Appellant to contact the members directly. Appellant's request for the names and direct contact information of the 21 review committee members was not a reasonable demand given that Dr. Hughes was designated as their liaison. In addition, Appellant argues that the school system promised that it would not raise any "new" deficiencies that were not already identified in a March 12, 2013 letter. A review of the record confirms only that Dr. Hughes promised that the standards for reviewing applications would not change, not that new deficiencies would not be identified.

review committee did not ask the Appellant any questions. Rather, committee members asked Appellant if it had questions for them. In addition, the local board failed to ask Appellant any questions when it later heard a presentation from Appellant.

In response, the local board argues that an interview did take place because Appellant was given the opportunity to meet with Dr. Hughes and another review committee member to "add to or clarify" anything in the application. In addition, the local board maintains that Appellant's argument is flawed because it "presumes that questions *must* be asked when the protocol merely states that applicants should be prepared to answer questions."

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 v. Shaughnessy*, 347 U.S. 260 (1954)). It applies to regulations that "affect individual rights and obligations" or "confer important procedural benefits upon an individual." *Pollack v. Patuxent Institution Bd. of Rev.*, 274 Md. 463, 503 (2003). In order to strike down an agency's decision under *Accardi*, a complainant must show that he or she was prejudiced by the agency's failure to follow its rules, regulations, or procedures. *Id.* at 504.

Thus, the first inquiry is whether or not the school system followed its own procedures as outlined in the Charter School Application packet. In our view, it did not. Applicants are told that they "will be interviewed," the interviews "will be conducted" by school system staff, and applicants "should be prepared to answer questions."

By definition, an interview is "a formal face-to-face meeting, esp. one arranged for the assessment of the qualifications of an applicant, as for employment or admission." The American Heritage Dictionary 672 (2nd College Ed. 1985). A formal face-to-face meeting that does not involve an exchange of information between both sides would not meet the definition of an interview. In this case, the local board's suggestion that questions are optional or that the applicant is the one expected to ask questions does not reflect the policy as written.[5]

Having found that the local board did not follow its own procedures, we must now determine whether Appellant has demonstrated prejudice as a result. Appellant argues that many of the deficiencies in its application could have been addressed through questions from the local board or school staff. Appellant maintains that the failure of the review committee and local board to ask questions showed an indifference or resistance to the application.

We conclude that the school system's silence prejudiced Appellant. Dr. Hughes knew of the problems in the second application at the time of the December 2013 meeting. Indeed, on appeal the local board has offered many substantive critiques of the application and a reasoned defense of its decision. The local board indicates that problems in the first application had not been adequately addressed in the second application. But rather than notify Appellant of these deficiencies at the time and offer Appellant an opportunity to address the concerns, Dr. Hughes and the local board remained silent. Appellant is entitled to a fair process, not one in which it must read the minds of the application's reviewers and conclude that there are problems. The

[5] We do disagree, however, with Appellant's argument that the *entire* local board or review committee be present for the interview.

opportunity to cure deficiencies is one component of a fair application process and a matter of sound educational policy. *See Global Gardens*, MSBE Op. No. 11-01. We agree with the local board that a charter school is not guaranteed approval, and perhaps Appellant would not have been able to address the local board's concerns in a satisfactory manner. But Appellant should have at least been made aware of the concerns and been given the opportunity to address the deficiencies. An exchange of information between the parties is vital to a fair approval process. On remand, Appellant should be allowed the opportunity for an interview and the chance to address deficiencies in its application.[6]

Deficiencies in the application

Because we conclude that the school system failed to follow its procedures in reviewing Appellant's second application, we need not discuss the deficiencies, or Appellant's response to them, in detail. We wish, however, to highlight two areas of concern.

The first was the local board's focus on innovation. While providing "innovative learning opportunities" is the goal of charter schools, we have previously cautioned local boards not to confuse innovative opportunities with "unique" ones. "'Unique' means 'distinctively characteristic' or 'without a like or equal' and 'innovative' means having the quality of being new. *See* Merriam-Webster On-Line Dictionary. A charter school, to be approved, need not be unique in the school system." *Global Gardens,* MSBE Op. No. 11-01.

The second troubling point was the local board's mention of public comments about "the potential adverse effects of the charter school on the overall operating budget priorities of the school system." We remind the local board that reviewing charter school applications is not a matter of "us v. them." *See Frederick Outdoor Discovery*, MSBE Op. No. 13-14. When a charter school serves students in the county, the funding for those students is not lost to the local board. *Id.* We have recognized that commensurate funding for charter schools is not a "zero-sum game on either side of the ledger," but we caution against viewing the process as one where money is taken away from local schools. *Id.* To the extent that members of the public were under a contrary misapprehension, the local board should have provided clarity. Because the local board mentioned these public comments in passing, we are not convinced that this served as a primary rationale for the denial. Even so, the language in the letter about "the potential adverse effects of the charter school on the overall operating budget priorities of the school system" was inappropriate.

CONCLUSION

For all these reasons, we reverse and remand the decision of the local board

ABSENT

Charlene M. Dukes
President

[6] We realize that Appellant may wish to submit a new application rather than have its prior application reconsidered. Either way, the school system should ensure that Appellant receives a meaningful interview involving the exchange of information and the opportunity to cure deficiencies in its application prior to the local board's final decision.

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

S. James Gates, Jr.

Larry Giammo

Luisa Montero-Diaz

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

July 22, 2014