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43 MAP 2015

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEHIGH VALLEY DUAL LANGUAGE CHARTER SCHOOL	:	
v.	:	No. 43 MAP 2015
STATE CHARTER SCHOOL APPEAL BOARD **Bethlehem Area School District, Intervenor**	:	
Appeal of: Bethlehem Area School District, Intervenor	:	

BRIEF FILED ON BEHALF OF BETHLEHEM AREA SCHOOL DISTRICT, INTERVENOR/APPELLANT

Appeal from the September 10, 2014 Order of the Commonwealth Court of Pennsylvania, No. 2010 C.D. 2013, Denying the Application for Reargument from the July 22, 2014 Order of the Commonwealth Court of Pennsylvania, No. 2010 C.D. 2013, Reversing the October 23, 2013 Order of the State Charter Appeal Board, No. CAB 2013-07, Quashing the Appeal by Lehigh Valley Dual Language Charter School from the Denial by Bethlehem Area School District of Lehigh Valley Dual Language Charter School's Request to Amend its Charter and Expand its Operations to Second Location

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CONSTITUTION AND STATUTORY PROVISIONS

OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this appeal from the Pennsylvania Commonwealth Court pursuant to the provisions of the Act of July 9, 1986, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 724(a) and pursuant to Pa. R.A.P. 1122.

II. ORDER OR OTHER DETERMINATION IN QUESTION

A. The Commonwealth Court's July 22, 2014 Order states as follows:

> Now, July 22, 2014, the Order of the State Charter School Appeal Board (CAB) entered in the above-captioned matter is hereby REVERSED, and this matter is REMANDED to the CAB to review the Bethlehem Area School District's decision for denying Lehigh Valley Dual Language Charter School's amendment request as it would review a school district's decision to revoke or to not renew a charter under Section 1729-A(d) of the Act of March 10, 1949, P.L. 30, added by Section 1 of the Act of June 19, 1997, P.L. 225, as amended, 24 P.S. § 17-1729-A(d).
>
> Jurisdiction Relinquished.
>
> Renée Cohn Jubelirer, Judge

B. The Commonwealth Court's September 10, 2014 Order states as follows:

> NOW, September 10, 2014, having considered respondent's application for reargument, *en banc*, and petitioner's answer in opposition thereto, the application is denied.
>
> Dan Pellegrini,
> President Judge

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The issues raised in this appeal involve the interpretation of the Charter School Laws and, therefore, the Court's scope of review is plenary. See *West Chester Area School District v. Collegium Charter School, et al.,* 571 Pa. 503, 514 812 A.2d 1172, 1178 (Pa. 2002). The Court's standard of review is *de novo.* See *The School District of Philadelphia v. Department of Education,* 92 A.3d 746, 750 (Pa. 2014).

IV. STATEMENT OF QUESTIONS INVOLVED

1. Does the Panel's Majority's Opinion and Order present issues of first impression to the extent that it permits a charter school to open a second location by amending its charter and/or confers CAB with jurisdiction to hear a charter school's appeal from any and all denials to amend a charter school's charter?

   Suggested answer: Yes

2. Has the Majority's Opinion and Order departed from accepted judicial practices or abused its discretion when it misapplied the rules of statutory construction and/or relied on dicta?

   Suggested answer: Yes

V. STATEMENT OF THE CASE

On August 12, 2013, the Board of Directors (hereafter "Board") for the School District denied Lehigh Valley Dual Language Charter School's (hereafter "Charter School") request to amend its charter to operate in more than one location. See Reproduced Record (hereafter "RR"), p. 10a. The Charter School

appealed the Board's decision to the Charter Appeal Board (hereafter "CAB") on or about August 16, 2013. See RR p. 8a.

The School District filed a Motion, with a supporting brief, to Quash the Charter School's Appeal. See RR p.p. 41a-46a. In said filings, the School District argued that the Charter School's appeal should be quashed for the following reasons:

1. CAB lacked jurisdiction since the appeal was from the Board's denial of an initial application for a charter and the Charter School had failed to comply with the procedural requirement set forth in 24 P.S. § 17-1717-A; and

2. The Charter School Laws, specifically 24 P.S. § 17-1722-A(d) prohibit charter schools, excepting those in Philadelphia, from operating in more than one location. See RR p.p. 42a-45a.

The Charter School filed a brief in opposition to the School District's Motion to Quash. See RR p.p. 47a-52a. CAB heard oral argument on the School District's Motion to Quash and, in a unanimous Opinion and Order, dated October 23, 2013, granted the School District's Motion to Quash. See Appendix, CAB's Opinion and Order, Exhibit 1, p.p. 1-5, RR p.p. 63a-67a.

In its Opinion, CAB cited 1 Pa. C.S. § 1921(a) to support its conclusion that the General Assembly did not authorize a charter school, excepting those that operate in Philadelphia, from operating in more than one location. See Appendix,

CAB's Opinion and Order, Exhibit 1, p. 2, RR p. 64a. CAB reasoned that the rules of statutory construction not only required that the specific provisions in a law must control over the general provisions, but that every statute must be construed to give effect to its provisions. See Appendix, CAB's Opinion and Order, Exhibit 1, p. 2, RR p. 64a. CAB further noted that 24 P.S. § 17-1722-A(d) stated the following:

> Notwithstanding any other provision of this act, a school district of the first class, may, in its discretion, permit a charter school to operate a school at more than one location. See Appendix, CAB's Opinion and Order, Exhibit 1, p. 2, RR p. 64a.

Given this statutory language, CAB concluded that only schools in Philadelphia could operate in more than one location. Otherwise, there would be no need for the statute. In so holding, CAB rejected the Charter School's argument that the Commonwealth Court's holding in *Montessori Regional Charter School v. MillCreek Township School District,* 55 A.3d 196 (Pa. Cmwlth. 2012) was binding. CAB noted the *Montessori* Court only examined whether or not the charter school had included sufficient information relating to its proposed location in its amendment request. See Appendix, CAB's Opinion and Order, Exhibit 1, p. 3, RR p. 65a. The substantive issue, whether or not a charter school could operate in more than one location, was not raised by the parties in the *Montessori* case. See Appendix, CAB's Opinion and Order, Exhibit 1, p. 3, RR p. 65a.

The Charter School filed a timely Petition for Review with the Commonwealth Court. After filing briefs and holding oral argument, the Commonwealth Court, in a 2-1 decision (hereafter "Majority"), held that a charter school, operating outside of a first class school district, could open a second location. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.p. 6-20, RR p.p. 121a-139a, 97 A.3d 401 (Pa. Cmwlth 2014). The Majority also held that CAB was to review the Charter School's request to amend its charter pursuant to the statutory provisions applicable to CAB appeals relating to the revocation or non-renewal of a charter; more specifically, pursuant to 24 P.S. § 17-1729-A(d). See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 19, RR p. 134a and 97 A.3d at 409.

The Majority, relying on *Northside Urban Pathways Charter Sch. v. State Charter Sch. App. Bd,* 56 A.3d 80 (Pa. Cmwlth 2012) *appeal denied* 621 Pa. 685, 76 A.3d 540 (2013), reversed CAB's Opinion and Order and conferred CAB with jurisdiction to hear the Charter School's appeal. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.p. 10-11, RR p.p. 125a-126a, 97 A.3d at 406. In fact, the Majority cited its *Northside* decision to confer CAB with jurisdiction to hear, "every significant decision that could be made by a school district with respect to a charter school." See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 11, RR. p. 126a and 97 A.3d at 404.

The Majority also cited *Northside* to affirm a charter school's ability to change its charter through an amendment. The Majority specifically concluded that, without an ability to amend its charter, the charter school would be very limited. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 11, RR p. 126a; 97 A.3d at 404. While the Majority acknowledged that charters are legally binding instruments, it noted that, "legally binding instruments such as licenses and contracts are capable of amendment. ..." *Id.* at 405, see Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 12, RR p. 127a.

The Majority also reaffirmed its holdings in *Montessori* to the extent that the Court held that CAB had jurisdiction to hear charter amendment denials. The *Montessori* decision, as noted by the Majority, reversed CAB's decision in which it found that, since the Charter School Laws were silent on the subject of charter amendments, it did not have jurisdiction. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 13, RR p. 128a. The Majority reasoned that, if a charter school could not amend its charter, it would be forced to "jump through many unnecessary hoops..." See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 13, RR p. 128a; 97 A.3d at 405. While the Majority specifically noted that the *Montessori* case never addressed whether or not a charter school could operate out of more than one location under the Charter School Laws, the Majority nonetheless concluded that its prior decisions in

Northside and *Montessori*, "...appeared to resolve the question of whether a charter school may add a second location via charter amendment under the Law." See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.15, RR p. 130a; 97 A.3d at 406.

The Majority ultimately analyzed the relevant statutory provision relating to second locations of charter schools. In so doing, the Majority held that 24 P.S. § 17-1722-A was explicitly permissive and required interpretation to determine the General Assembly's intent. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.p. 16-17, RR p.p. 131a-132a; 97 A.3d 407-408. The Majority cited its prior decisions in *Northside* and *Montessori* for the following proposition: the Charter School Laws should not be rendered unwieldy since the General Assembly's intent in passing the Charter School Laws was to ensure that students and parents were provided with alternatives to the schools in their district. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 17, RR p. 132a; 97 A.3d at 405 . Thus, the Majority held that 24 P.S. § 17-1722-A(d) did not prohibit charter schools, which operated outside of Philadelphia, from amending the terms of its charter to operate in a second location. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 17, RR p. 132a; 97 A.3d at 406. The Majority further held that CAB should review a school district's decision to deny a charter amendment as it would review a decision that revoked or

non-renewed a charter pursuant to the statutory provisions of 24 P.S. § 17-1729-A(d). See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 18, RR p. 133a and 135a; 97 A.3d at 409.

President Judge Pellegrini issued a Dissenting Opinion in which he concluded that the Charter School Laws only permit a charter school in Philadelphia from operating in more than one location. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.p. 21-24, RR p. 136a-139a; 97 A.3d at 409-10 (Pellegrini, J., dissenting). The Dissent chastised the Majority for relying on unexpressed dicta or holding from its previous decision in *Montessori:* the *Montessori* decision did not address the substantive issue of whether or not a charter school could operate at more than one location and, therefore, did not act as precedent on this particular issue. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 22, RR p. 137a; 97 A.3d at 409. In concluding that only one location is permitted under one charter, the Dissent analyzed the statutory provisions relating to the creation of either a single district charter school, pursuant to 24 P.S. § 17-1717-A or a multi-district regional charter school pursuant to 24 P.S. § 17-1718-A(a). Additionally, the Dissent cited the statutory provision relating to the contents of a charter school application, more specifically, 24 P.S. § 17-1719-A(11). See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p.p. 22-23, RR p.p. 137a-138a, 97 A.3d at 409.

Ultimately, this Dissent concluded that only one statutory provision, that being 24 P.S. §17-1722-A(d), addressed the issue of whether or not a charter school could operate out of more than one location. This statutory provision provided as follows:

> Notwithstanding any other provision of this act, a school district of the first class may, in its discretion, permit a charter school to operate its school at more than one location. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 23 RR p. 138a, 97 A.3d 409.

The Dissenting Opinion concluded that the statutory provision was clear and that the express exclusion of one thing implies the exclusion of another and that any omission by the legislature was deliberate. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 23, RR p. 138a and 97 A.3d 409. In a footnote, President Judge Pellegrini affirmed his prior dissent in *Northside*, in which he opined that CAB lacked jurisdiction to hear appeals from a school district's denial of an amendment request since the General Assembly did not confer CAB with this jurisdiction. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 23, RR p. 138a; 97 A.3d at 410 n.2.

The School District filed an Application for Reconsideration, which was denied by the Commonwealth Court. Subsequently, the School District filed a timely Petition for Allowance of Appeal which was granted, in part, by this Honorable Court on May 6, 2015. See Appendix, Supreme Court's Order, dated

May 6, 2015, Exhibit 3, p.p. 25-26, RR 217a-218a. The issues of whether or not a charter school, operating outside of Philadelphia, can open a second location; whether or not a charter school can amend its charter, whether or not CAB has jurisdiction to hear a charter school's appeal from any amendment denials and whether or not the Commonwealth Court's Majority and Order has departed from accepted judicial practices or abused its discretion when it misapplied the rules of statutory construction and/or relied on dicta, are presently pending before this Honorable Court for resolution.

VI. SUMMARY OF ARGUMENT

The Commonwealth Court has misapplied the rules of statutory construction and/or improperly relied on dicta when it held the following: (1) all charter schools can operate in more than one location; (2) charter schools may seek an amendment to a charter; (3) CAB has jurisdiction to hear appeals from a school district's denial of an amendment request and (4) CAB is to use the same criteria utilized in a school district's decision to revoke or to not renew a charter. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2 p.p. 6-20, RR p.p. 121a-139a, 97 A.3d at 401-409. The Commonwealth Court's holdings misapplies and/or ignores the rules of statutory construction. The rules of statutory construction require that statutes be construed to give effect to all of its provisions and that the letter of a statute is not to be disregarded under the pretext of pursuing its spirit.

See 1 Pa. C.S. § 1921(a) and (b). It is uncontroverted that, until 2008, the Charter School Laws were silent as to whether or not any charter school could operate in more than one location. The Legislature, in 2008, changed the Charter School Laws to include the following, specific provision: charter schools, operating in a first class, may operate at more than one location. See 24 P.S. § 17-1722-A(d) also see Act No. 2008-61 of July 9, 2008, P.L. 846, No. 61, § 12. It is also uncontested that CAB held, in a unanimous decision, that charter schools, excepting those that operate in Philadelphia, could not operate in a second location. See Appendix, CAB's Opinion and Order, Exhibit 1, p. 5, RR p. 67a. Nonetheless, the Commonwealth Court, in holding that charter schools can operate in more than one location, ignored CAB's opinion: in direct contravention of this Court's holding in *Banfield v. Cortez,* 110 A.3d 155, 174 (Pa. 2015).

The Commonwealth Court has also misapplied 1 Pa. C.S. § 1921 (a) and (b) when it provided charter schools with the right to seek amendments to their respective charters. It is uncontroverted that the Charter School Laws do not permit a charter school to amend its charter. See 24 P.S. § 17-1701, *et seq.* Notwithstanding this, the Commonwealth Court has held, citing public policy reasons, that charter schools are allowed to amend their respective charters. See Appendix, Commonwealth Court Opinions and Order, Exhibit 2, p. 17, RR p. 132a and 97 A.3d at 408. The Commonwealth Court has, by giving charter schools the

right to seek amendments to their respective charters, created rights which were not contemplated by the Legislature. Therefore, the Commonwealth Court has exceeded its authority by conferring rights which were clearly not conferred and/or contemplated by the Legislature.

Alternatively, the Commonwealth Court misapplied and/or ignored the rules of statutory construction when it held that CAB had jurisdiction to hear denials from an amendment request and that said denials should be reviewed pursuant to the same statutory provisions applying to revocation and non-renewal proceedings. The Charter School Laws clearly and unequivocally confer CAB with appellate jurisdiction to the following three areas: (1) appeals from a local school district's denial of an application to establish a charter school, 24 P.S. § 17-1717-A(i); (2) appeals from a deemed denial, 24 P.S. § 17-1717-A(g) and (3) appeals from a school district's revocation or non-renewal of a charter, 24 P.S. § 17-1717-A(d). Local agency laws, however, provide a forum for a charter school to challenge a school district's decision. A charter school can appeal an adverse decision to the local county Court of Common Pleas. See 2 Pa. C.S. § 752.

In holding that CAB had jurisdiction to hear appeals from amendment requests, the Commonwealth Court cited CAB's implied authority as a basis for awarding jurisdiction. See Appendix, Commonwealth Court Opinions and Order, Exhibit 2, p. 11, RR p. 126a, 97 A.3d at 404, citing *Northside Urban Pathways,*

A.3d at 83. In conferring CAB with jurisdiction, the Commonwealth Court committed error by failing to find, pursuant to the rules of statutory construction, that the Legislature's omission was deliberate. See *Commonwealth v. Ostosky,* 909 A.2d 1224, 1229 n. 7 (Pa. 2009). The Commonwealth Court also failed to give deference to CAB, which originally held that it did not have jurisdiction to hear amendment appeals. See *Banfield v. Cortez,* A.3d at 174.

Lastly, the Commonwealth Court misapplied and/or ignored the rules of statutory construction when it ordered CAB to review the School District's denial of the Charter School's amendment request pursuant to the same statutory provisions relating to the non-renewal or denial of a charter. See Appendix, Commonwealth Court Opinions and Order, Exhibit 2, p.p. 18-19, RR p.p. 134a-135a and 97 A.3d at 408-409. The Commonwealth Court, in failing to adopt the same criteria applicable to charter school applications, failed to follow the procedure delineated within *Yellow Cab Company of Pittsburgh v. Pennsylvania Public Utility Commission,* 105 Pa. Cmwlth. 513, 524 A.2d 1069 (1987), the case cited by the *Northside* Court to explain why a charter or contract could be amended. The Commonwealth Court should, at minimum, have directed CAB to review a charter school's amendment pursuant to 24 P.S. §17-1717-A: a process that is future oriented as opposed to imposing a retrospective analysis applied to

the termination of charters. Accordingly, the Commonwealth Court should be reversed.

VII. LEGAL ARGUMENT

1. The Supreme Court has never addressed the following issues: whether or not the Charter School Laws permit a charter school, operating outside of Philadelphia, to operate at a second location; whether or not a charter school can amend its charter; whether or not CAB has jurisdiction to hear an appeal from a school district's denial of an amendment request and the standards to be utilized when reviewing a school district's denial of a requested amendment.

This Honorable Court has yet to review Commonwealth Court cases which have held as follows: (1) the Charter School Laws permit charter schools, operating outside of Philadelphia, to open more than one location; (2) Charter Schools may amend their charters; (3) CAB has jurisdiction to hear any and all appeals from the denial of a school district's amendment request; and (4) the standards to be utilized when reviewing a school district's denial of a requested amendment. See *Northside*, supra, *Montessori*, id., and *Discovery Charter Sch. v. School Dist. of Philadelphia,* 111 A.3d 248 (Pa. Cmwlth 2015), Petition for Allowance of Appeal filed, no. 193 EAL 2015 (April 9, 2015).

2. The Commonwealth Court departed from accepted judicial practices and/or abused its discretion when it misapplied the rules of statutory construction and/or relied on dicta.

An overriding principle of statutory interpretation, as previously noted by this Court, is as follows: a Court must listen attentively both to what a statute says,

as well as what it does not say.[1] See *Pennsylvania Med. Soc'y v. Department of Public Welfare*, 614 Pa. 574, 600, 39 A.3d 267, 283 (2012) citing *Piper Group Inc. v. Bedminster Twp. Bd. of Supervisors*, 612 Pa. 282, 30 A.3d 1083, 1092 (2011).

The Majority, however, along with the Commonwealth Court's holdings in *Montessori* and *Northside*, have ignored and/or misapplied the rules of statutory construction and engaged in judicial activism by expanding the Charter School Laws. This activism has resulted in the following holdings by the Commonwealth Court:

1. Any charter school, operating anywhere within the Commonwealth, may seek to open a second location;

2. Charter schools may amend their charters;

3. Any and all appeals from the denial of a charter school's request to amend its charter shall be heard by CAB and

4. CAB is to review the school district's denial from a charter school's amendment request pursuant to the same statutory provisions applying to a review of school district's decision to revoke or to not renew a charter.

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[1] The Pennsylvania Constitution is clear in providing for a separation of powers. Article III, Section I of the Pennsylvania Constitution provides as follows: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." See Pa Const., Article III, Section I. This fundamental principle has been repeated in the Statutory Construction Act. This Act, in relevant part, provides as follows:

> a. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> b. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. See 1 Pa. C.S. § 1921(a) and (b).

The Majority, as detailed below, departs from the rules of statutory construction, case law and has improperly relied on dicta to expand the rights of charter schools.

A. WITH ONLY ONE EXCEPTION, THERE IS NO PROVISION OF LAW AUTHORIZING A CHARTER SCHOOL TO OPERATE A SCHOOL AT MORE THAN ONE LOCATION.

According to the Charter School Laws, a charter school is established when its application is approved by the local board of school directors of a school district. See 24 P.S. § 17-1717-A. The contents of said application must include a "description of and address of the physical facility in which the charter school will be located." See 24 P.S. § 17-1719-A(11). Further, the Charter School Laws explain that a charter school "may be located in an existing public school building, in part of an existing public school building, in a space provided on a privately owned site, in a public building or in any other suitable location." 24 P.S. § 17-1722-A(a). With one exception, *infra*, the Charter School Law does not authorize the operation of more than one location. 24 P.S. § 17-1722-A provides as follows:

> (d) Notwithstanding any other provision of this act, a school district the first class,[2] may in its discretion, permit a charter school to operate its school at more than one location.[3]

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[2] Under 24 P.S.§ 2-202, a school district that include at least one million residents is a "school district of the first class."

[3] Of note, 24 P.S. § 17-1722-A was amended in 2008 to include this provision. See Act No. 2008-61 of July 9, 2008, P.L. 846, No. 61, § 12.

When quashing the Charter School's appeal, CAB aptly noted: "If the General Assembly had intended all charter schools to be allowed to operate at more than one location, section 1722-A(d) would be superfluous." See Appendix, CAB's Opinion and Order, Exhibit 1, p. 2, RR p. 64a.

Here, the Majority held that "there is no statutory prohibition against a charter school located outside a school district of the first class seeking to expand into a second location via an amendment to its charter." See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 18, RR p. 133a and 97 A.3d at 408. The Majority, disregarding the letter of the law under the pretext of pursing its spirit, cites its *Northside* decision to support a conclusion that the Legislature intended the Charter School Laws to ensure alternatives to parents and students and, therefore, charter schools should be able to operate in more than one location. See Appendix, Commonwealth Court's Opinions and Order, Exhibit 2, p. 17, RR p. 132a; 97 A.3d at 407.

The Rules of Statutory Construction, however, compel a plain reading of the Charter School Laws. See 1 Pa. C. S. § 1921(b)("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.") The plain language of the Charter School Laws, *supra*, provides no authority for charter schools to operate a separate school facility. The creation of an exception for first-class districts confirms that this

omission was deliberate. See *Commonwealth v. Ostosky*, 909 A.2d 1224, 1229, 1229 n. 7 (Pa. 2009)(explaining that, under the statutory construction doctrine *expression unius est exclusio alterius*, omissions should be construed as deliberate: "*Expressio unius est exclusion alterius* is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.") The Majority, in concluding that the Charter School may operate a school at more than one location, does not properly rely on a plain reading of the Charter School Laws, notwithstanding the statute's clear and unambiguous language.

The Majority, in its holding, has not only ignored the rules of statutory construction, but has also failed to give deference to CAB in its interpretation of its statutory authority. See *Banfield v. Cortez,* A.3d at 174. As noted by this Court, a court shall not disturb an administrative agency's discretion in interpreting the underlying legislation absent fraud, bad faith, abuse of discretion or clear, arbitrary action. *Banfield v. Cortez*, A.3d at 174. Here, the Majority, perceiving ambiguity in the Charter School Laws, gave no consideration to the interpretation of CAB, the administrative agency empowered to oversee the establishment of charter schools. See 24 P.S. § 17-1717-A(i) (which unanimously held that charter schools, operating outside of Philadelphia, could not operate in more than one location. See Appendix, CAB's Opinion and Order, Exhibit 1, p.p. 2-5, RR p.p. 116a-119a.)

The Charter School Laws do not authorize charter schools to operate at more than one location. The Legislature's creation, in 2008, of an exception only confirms this analysis. Accordingly, the Majority's statutory analysis is erroneous and must be reversed.

B. THE CHARTER SCHOOL LAWS DO NOT PERMIT A CHARTER SCHOOL TO AMEND ITS CHARTER.

The Charter School Laws do not permit a charter school to amend its charter. The Charter School Laws detail specific criteria for the local school board to evaluate charter applications, renewals, and revocations. See 24 P.S. §§17-1717-A, 17-1718-A, 17-1719-A and 17-1729-A. By contrast, the Charter School Laws are silent when it comes to amendments. See 24 P.S. § 17-1701, *et seq.* The fact that the Charter School Laws omit any reference to an ability to amend a charter must, pursuant to the rules of statutory construction, result in one conclusion: the General Assembly never intended for amendments to be taken as of right or privilege.

The Charter School Law binds both parties to the terms of the charter. When a charter application is approved, a written charter must be developed "which shall contain the provisions of the charter application and shall be legally binding on both the local board of school directors of a school district and the charter school's board of trustees." 24 P.S. § 17-1720-A. Moreover, 24 P.S. § 17-1720-A provides

that "...the charter shall be binding for a period no less than three (3) nor no more than five (5) years..."

While the Majority, 97 A.3d at 405, cites *Montessori* and *Northside Urban Pathways*, 56 A.3d at 85-87, to support its position that a charter school can amend its charter, it is noteworthy that the *Northside Urban Pathways* Court acknowledged that the Charter School Laws were silent as to whether or not a charter could be amended. *Id.* at 84 and See Appendix, Commonwealth Court Opinions and Order, Exhibit 2 p. 15, RR p. 130a and A.3d 403-410. Nonetheless, the *Northside Urban Pathways* Court finds that charters, like contracts or licenses, must be able to be amended. See *Northside Urban Pathways* citing *Yellow Cab Company of Pittsburgh v. Pennsylvania Public Utility Commission,* 105 Pa. Cmwlth. 513, 524 A.2d 1069.[4] The Commonwealth Court, in so holding, suggests that all contracts, public or private, are subject to one party demanding an amendment. This conclusion not only belies the tenets of contract law, but also ignores the rules of statutory construction. See The Legal Argument set forth in Section A of this brief, p.p. 16-18, for a full analysis of statutory interpretation, which is hereby incorporated herein as if it has been set forth at length. In reaching this conclusion, the Majority has suspended the rules of statutory construction and concluded, due to "public policy" reasons; a charter amendment must be permitted.

[4] In referring to charters as contracts, the Majority ignores the Commonwealth Court's holding in *Foreman, v. Chester-Upland School District,* 941 A.2d 108 (Pa. Cmwlth. 2008) to the extent said decision treated charters as permits or licenses and not as contracts.

The Majority stated that, if a charter school could not amend its charter, a charter school would have to "jump through many unnecessary hoops." See Appendix, Commonwealth Court Opinion and Order, Exhibit 2, p. 13, RR p. 128a and 97 A.3d at 405. However, the Majority does not consider the following public policy issue: what is the purpose of negotiating a charter for a specific term if only one party, the charter school, has the ability to change its terms. The underlying charter becomes meaningless: a charter school can negotiate terms and then, seek an amendment to void said negotiated term(s). The Majority, succinctly, has failed to apply the rules of statutory construction, exceeded its authority and created a right, the right for a charter school to seek an amendment to its charter which was not contemplated by the General Assembly. See Pa. C.S. § 1921(a) and (b). The Legislature has never conferred charter schools with the right to amend a charter and, therefore, the Commonwealth Court decision must be reversed.

C. CAB LACKS APPELLATE JURISDICTION TO HEAR APPEALS FROM A CHARTER SCHOOL'S DENIAL TO AMEND ITS CHARTER.

The Charter School Laws confers CAB with appellate jurisdiction, limited to the following three areas: (1) appeals from the local school district's denial an application to establish a charter school, 24 P.S. § 17-1717-A(i); (2) appeals from a deemed denial, where a local school district has failed to timely act upon a charter school application, 24 P.S. § 17-1717-A(g) and (3) appeals from the local school

district's revocation or non-renewal of a charter, 24 P.S. § 17-1717-A(d).[5] An appeal from the School District's decision to deny a charter amendment does not fall within any of the above-stated areas. Thus, CAB lacks authority to consider any such appeals. See 24 P.S. § 17-1721-A(b)(requiring CAB to "meet as needed to fulfill the purposes provided in this subsection").

Nonetheless, the Commonwealth Court has held that CAB has jurisdiction to hear amendment appeals under its implied authority. See Appendix, Commonwealth Court Opinions and Order, Exhibit 2, p. 11, RR, p. 126a and 97 A.3d at 404, citing *Northside Urban Pathways*, A.3d at 83. In finding that CAB has implied authority, the Commonwealth Court has failed to apply the underlying principle that applies to the rules of statutory construction. See *Commonwealth v. Ostosky*, A.2d at 1229 n. 7 (Pa. 2009)(explaining that, under the statutory construction doctrine *expression unius est exclusio alterius*, omissions should be construed as deliberate: "*Expressio unius est exclusion alterius* is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.") Also, see the Legal Argument set forth in Section A of this brief, p.p. 16-18 for a full analysis of statutory interpretation, which is hereby incorporated herein as if it had been set forth at length.

[5] The School District is not conceding that a charter school can amend its charter and/or that a school district's denial of an amendment request results in an appealable adjudication to CAB. The argument set forth in this section constitutes an alternative argument should this Court rule that charter schools can amend their respective charters.

Moreover, CAB, itself, held that it did not have jurisdiction to hear amendment appeals. See *Northside*, 56 A.3d at 82-83. The Commonwealth Court gives no deference to CAB and its position in this jurisdictional issue. The Commonwealth Court does not conclude that CAB's interpretation is based upon fraud, bad faith, abuse of discretion or clear, arbitrary action as required by *Banfield v. Cortez,* supra at A.3d 174. The Commonwealth Court has failed to provide this deference, as required by this Honorable Court, to CAB.

The Local Agency Laws provide a forum for the Charter School to challenge the School District's decision. See 2 Pa. C. S. §§ 551-555, 751-754; See *also Baker v. Com., Pennsylvania Human Relations Comm'n*, 489 A.2d 1354, 1356 (Pa. 1985). From the determination of a local agency, such as a school district,[6] Local Agency Laws permit an appeal to the local county court of common pleas. *See* 2 Pa. C. S. § 752. Here, because, pursuant to Charter School Law, CAB lacks jurisdiction to consider the denial of a request to amend, the Charter School's appeal of the School District's decision must be taken to the county court of common pleas. See 2 Pa. C. S. §§ 101, 752; See *also* 42 Pa. C. S. 933 (a)(2); See *also* RR p. 138a, 97 A.3d at 410 n. 2; and See *Northside*, 56 A.3d at 90-91 (Pellegrini, P.J., dissenting).

[6] A school district is a local agency. See 2 Pa. C.S. § 101 (defining "local agency"); see *also* *Rike v. Com., Sec'y of Educ.*, 494 A. 2d 1388 (Pa. 1985).

Accordingly, the Commonwealth Court has misapplied the rules of statutory construction when it conferred CAB with the jurisdiction to hear amendment appeals.

D. CAB'S SHOULD USE THE STANDARDS APPLICABLE TO NEW CHARTERS WHEN REVIEWING A DENIAL OF A CHARTER AMENDMENT.

The Majority erred when it concluded that a charter school's amendment request should be reviewed by CAB pursuant to the standards applicable when CAB is reviewing a school district's decision to revoke or to not renew a charter. See Appendix, Commonwealth Court's Opinion and Order, Exhibit 2, p. 19, RR 134a and 97 A.3d 409.[7] This conclusion departs from the system or scheme clearly contemplated by the General Assembly. More specifically, the Charter School Laws detail specific information that a charter applicant must submit before a school district can evaluate an application. See 24 P.S. §§ 17-1717-A, 17-1719-A and 24 P.S. § 17-1720-A. A request to amend a charter should follow the same criteria used to review an initial application. This standard of review makes sense, follows the procedure delineated within *Yellow Cab Company of Pittsburgh v. Pennsylvania Public Utility Commission,* Pa. Cmwlth. 513 A.2d 1069: the case cited by the *Northside* Court to explain why a charter or contract could be amended. The *Yellow Cab Company of Pittsburgh* decision required the taxi

[7] The School District is not conceding that a charter school can amend its charter and/or that a school district's denial of an amendment request results in an appealable adjudication to CAB. The argument set forth in this section constitutes an alternative argument should this Court rule that charter schools can amend their respective charters.

company, when seeking an amendment, to follow the evidentiary criteria used to decide motor common carrier applications. See *Yellow Cab Company of Pittsburgh, id.*, at Pa. Cmwlth. 516 A.3d 1070. Using the *Yellow Cab Company* holding, the Majority should have directed CAB to review a charter school's amendment pursuant to 24 P.S. § 17-1717-A. Instead, CAB is constrained to review an amendment request in the identical manner in which it reviews a termination of a charter. See 24 P.S. § 17-1729-A(d). In sharp contrast, the criteria prescribed by the General Assembly pursuant to 24 P.S. §17-1717-A offer a more comprehensive, detailed analysis that is aimed at evaluating a charter school's future as opposed to its past. This difference between the two statutory sections makes sense: the decision to terminate a charter involves a different analysis than a decision to deny the initial application of a charter school. In effect, the Commonwealth Court had limited CAB's ability to comprehensively review a charter school's amendment request which is more akin to an application for a new charter than it is to a decision to terminate a charter. At minimum, amendment requests should follow the same evidentiary criteria used to decide an initial application. See *Yellow Cab Company,* 516 A.3d 1070. Accordingly, the Commonwealth Court's holding, that amendment requests are to be reviewed under the same standards of non-renewal or termination of a charter, should be reversed.

VIII. CONCLUSION

For the reasons set forth in this brief, as well as for the reasons set forth in the briefs filed by the *amici curiae*, the Bethlehem Area School District respectfully requests that this Honorable Court issue an order which reverses the Commonwealth Court and holds that only charter schools in Philadelphia can operate in more than one location and that charter schools may not amend their charters. Alternatively, it is respectfully requested that this Honorable Court reverse the Commonwealth Court and hold that denials from charter school applications be reviewed under the same standards applicable to new charter school applications and that any and all amendment denials be heard by the local county Court of Common Pleas.

Respectfully submitted,
King, Spry, Herman, Freund & Faul, LLC

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Date: June 16, 2015

CERTIFICATION

I certify that the length of this brief, as defined in Pa.R.A.P. 2135(a)(1) and 2135(d) is 7,314 words.

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Date: June 16, 2015

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEHIGH VALLEY DUAL LANGUAGE CHARTER SCHOOL	:	
v.	:	No. 43 MAP 2015
STATE CHARTER SCHOOL APPEAL BOARD BETHLEHEM AREA SCHOOL DISTRICT,	:	
PETITION OF: BETHLEHEM AREA SCHOOL DISTRICT, Intervenor	:	

PROOF OF SERVICE

I hereby certify that two true and correct copies of the Reproduced Record and Appellant/Intervenor's Brief were served upon the person(s) listed below on this 16th day of June, 2015, by First Class Mail, Postage Pre-Paid, which service satisfies the requirements of Pa. R.A.P. 121:

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I understand that all statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

Respectfully submitted,

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Date: June 16, 2015

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APPENDIX

EXHIBIT 1

COMMONWEALTH OF PENNSYLVANIA
STATE CHARTER SCHOOL APPEAL BOARD

Lehigh Valley Dual Language Charter School	:	
v.	:	
	:	**Docket No. 2013-07**
Bethlehem Area School District	:	

DECISION ON MOTION TO QUASH

On August 19, 2013, the Charter School Appeal Board ("CAB") received a Notice of Appeal filed by the Lehigh Valley Dual Charter School ("Lehigh Valley") appealing the denial by the Bethlehem Area School District ("Bethlehem") of its request to amend its charter and expand its operation to an additional location.[1] On September 17, 2013, the District filed a Motion to Quash the Appeal. The parties were directed to and did file briefs regarding the Motion to Quash, and the Motion was argued before CAB on October 15, 2013.

The issue raised by Bethlehem's Motion to Quash is whether the Charter School Law ("CSL") allows a charter school to open a second location. Bethlehem argues that the CSL only authorizes first class school districts to permit charter schools to open second locations. Because Bethlehem is not a first class school district, it argues that it lacks authority to permit Lehigh Valley to operate out of two locations, and that CAB does as well. On the other hand, Lehigh Valley argues that it may seek amendment of its original charter to open a second location.

[1] Currently, Lehigh Valley operates a K-7 school. The amendment, if granted, would have permitted the charter school to operate separate elementary and middle schools at two separate locations. *See* Notice of Appeal, Exhibit A.

The CSL requires that an application include "[a] description of and address of the physical facility in which the charter school will be located and the ownership thereof and any lease arrangements." 24 P.S. § 17-1719-A(11). There is no explicit provision allowing a charter school to open a second location, except when authorized by first class school districts. Section 1722-A(d) states that "[n]otwithstanding any other provision of this act, a school district of the first class may, in its discretion, permit a charter school to operate its school at more than one location." 24 P.S. § 17-1722-A(d).

Thus, the General Assembly specifically allowed a first class school district to permit a charter school to operate its school at more than one location. However, the General Assembly did not provide a similar, corresponding provision for other classes of school districts. The Rules of Statutory Construction provide that specific provisions in a law control the general, and every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa.C.S. §§ 1933; 1921(a). Therefore, the fact that the General Assembly specifically permitted charter schools authorized by first class school districts to operate a second location, but did not provide a specific provision allowing other charter schools to operate a second location, must be given meaning. It is CAB's conclusion that the General Assembly intended only to permit charter schools authorized by first class school districts to operate at more than one location. If the General Assembly had intended all charter schools to be allowed to operate at more than one location, section 1722-A(d) would be superfluous.

We note that, as argued by Lehigh Valley, the Commonwealth Court did permit a charter school to open a second location via an amendment in *Montessori Regional Charter*

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School v. Millcreek Township School District, 55 A.3d 196 (Pa. Cmwlth. 2012).[2] However, the majority opinion contains no discussion of whether the CSL allows a charter school to open a second location. Instead, the Court only examined whether the charter school included sufficient information related to the location, as required by the CSL, in its amendment request. *Id.* at 200-01; *see also* 24 P.S. § 17-1719-A(11) (requiring a charter school application to contain a description of and address of the physical facility and ownership and any lease arrangements). Most significantly, this issue was not raised by the school district in this case. *See* Brief of Millcreek Township School District and School District of the City of Erie, Docket No. 354 CD 2011, 2011 WL 10795494, filed June 16, 2011. Generally, the Commonwealth Court cannot raise issues *sua sponte* on appeal, but must limit itself to issues preserved in appellant's brief. Pa. R.A.P. 2116 (stating that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby"); *see also Barr v. City and County of Philadelphia*, 653 A.2d 1374 (Pa.Cmwlth.1995) (*rev'd on other grounds*). As such, the outcome of the *Montessori* case is not binding on this Board because the issue was not raised by the parties and the Commonwealth Court appropriately did not raise the issue *sua sponte*.[3]

[2] While the *en banc* majority opinion did not discuss this issue, President Judge Pellegrini, in his dissent, stated that the Charter School Law does not allow a charter school to open a second location via an amendment. The one exception is that first class school districts may permit charter schools to open a second location. *Montessori Regional Charter School*, 55 A.3d. at 196, 203-06 (Pellegrini, P.J., concurring and dissenting).

[3] In *Northside Urban Pathways Charter School v. CAB*, a charter school attempted to make significant changes to its charter via an amendment to, among other things, add an additional facility. *Northside Urban Pathways Charter School v. CAB*, 56 A.3d 80 (Pa. Cmwlth. 2012). However, the Commonwealth Court decided the case on procedural grounds and remanded the case back to CAB to determine the case on the merits.

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Based upon the above, in consideration of the pleadings filed herein and of the argument of counsel presented at the CAB meeting, CAB voted to grant the Motion to Quash and orders the following:

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COMMONWEALTH OF PENNSYLVANIA
STATE CHARTER SCHOOL APPEAL BOARD

Lehigh Valley Dual Language Charter School	:	
	:	
v.	:	
	:	Docket No. 2013-07
Bethlehem Area School District	:	
	:	

ORDER

AND NOW, this 23rd day of OCTOBER, 2013, based upon the foregoing and the vote of this Board[4], it is hereby ordered that the Motion to Quash filed by Bethlehem Area School District is GRANTED; and Lehigh Valley Dual Charter School's appeal is DISMISSED.

For the State Charter School Appeal Board

Carolyn Dumaresq
Chair

Date Mailed: 10/24/13

[4] At the Board's meeting of October 15, 2013, the appeal was granted by a vote of 6 to 0 with members Barker, Dumaresq, Lawrence, Magnotto, Munger and Yanyanin voting.

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EXHIBIT 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lehigh Valley Dual Language Charter School, Petitioner	:	
v.	:	No. 2010 C.D. 2013
Bethlehem Area School District, Respondent	:	Argued: May 13, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION BY
JUDGE COHN JUBELIRER

FILED: July 22, 2014

Lehigh Valley Dual Language Charter School (Charter School) petitions for review of the October 15, 2013 Order of the State Charter School Appeal Board (CAB) that granted the Motion to Quash (Motion) of the Bethlehem Area School District (District) and dismissed Charter School's appeal from the District's denial of Charter School's request to amend its charter (Charter) to expand its existing operations to a second location. The CAB concluded that Charter School's appeal should be dismissed because, pursuant to the Charter School Law[1] (Law), Charter School is not permitted to operate two locations under the same Charter. However,

[1] Act of March 10, 1949, P.L. 30, added by Section 1 of the Act of June 19, 1997, P.L. 225, as amended, 24 P.S. §§ 17-1701-A – 17-1751-A.

we agree with Charter School that the CAB's conclusion that Charter School could not open a second location by amending its Charter is not in accordance with this Court's decisions in Montessori Regional Charter School v. Millcreek Township School District, 55 A.3d 196 (Pa. Cmwlth. 2012) (en banc) and Northside Urban Pathways Charter School v. State Charter School Appeal Board (Pittsburgh Public School District), 56 A.3d 80 (Pa. Cmwlth. 2012) (en banc), and, therefore, we reverse.

I. Background

The facts in this matter are not in dispute. Charter School currently operates a kindergarten through seventh grade school at a single location in Bethlehem, Pennsylvania pursuant to its Charter, which was issued by the District. In the Spring of 2013, Charter School and the District began discussing the renewal of the Charter. Both Charter School and the District agree that, during this period, there were discussions in which Charter School expressed its desire to open a second location for its fifth through seventh grade students. Charter School indicated that it wanted to add the second location because its present location lacked the "space to maintain [its] current student population" and to provide those "students a true middle school experience that is not possible in the elementary building." (An Administrative Evaluation and Recommendation of the Charter School Renewal Application of the Lehigh Valley Dual Language Charter School at 5, R.R. at 5a.) On March 18, 2013, the District's School Board (School Board) renewed the Charter for five years; there was nothing in the renewal addressing a second location. Thereafter, on or about June 5, 2013, Charter School officially advised the District and the School Board that it intended to expand into the second location and sought to amend the Charter accordingly. On June 24, 2013, Charter

School administrators met with the District's superintendent and assistant superintendent regarding the requested second location. Charter School entered into a lease agreement for its second location on July 1, 2013.

Charter School presented its proposed expansion to the School Board's Curriculum Committee on July 22, 2013 and, by letter dated August 9, 2013, Charter School advised the District of its position that there was nothing in the Law that prohibited it from operating at two locations. (Letter from Counsel for Charter School to District's Counsel (August 9, 2013), R.R. at 15a.) The School Board held a meeting on August 12, 2013 and voted to deny the amendment to the Charter because: (1) Section 1722-A of the Law, 24 P.S. § 17-1722-A, prohibits a charter school from operating out of more than one location; (2) the Charter prohibits Charter School from operating its school at a facility other than that listed in the Charter absent written consent from the District; and (3) of concerns regarding Charter School's educational achievement.

II. Appeal to the CAB

Charter School appealed the District's denial of its amendment to the CAB, asserting that the Law does not prohibit it from operating in two locations, the District was estopped from raising any issues regarding educational concerns because such concerns were not raised during the Charter renewal process, and any educational concerns are irrelevant to whether Charter School can amend its Charter to open a second location. (Charter School's Appeal, R.R. at 16a-21a.) The District filed its Motion, arguing that: (1) because its denial of the amendment was essentially the denial of a new charter for the proposed second location, Charter School had to obtain a certain number of signatures before appealing the

denial under the Law and did not;[2] and (2) the Law prohibits, with one exception not applicable here, charter schools from operating out of two locations under the same charter. (District's Motion, R.R. at 22a; District's Brief in Support of Motion to Quash Appeal (District's Brief in Support), R.R. at 23a-26a.)

After both parties filed briefs, the CAB held a hearing during which it heard argument on the Motion. In their briefs and during the argument before the CAB, Charter School and District argued whether the Law, and this Court's decision in Montessori, permitted Charter School to operate a second campus by amending its original Charter. (Hr'g Tr. at 7-12, R.R. at 40a-45a; District's Brief in Support, R.R. at 23a-26a; Charter School's Brief in Opposition to District's Motion to Quash (Charter School's Brief in Opposition), R.R. at 28a-32a.) Charter School mentioned, in its argument to the CAB, that the question of whether the Law, Montessori, and/or Northside Urban Pathways had decided whether a charter school can, by amendment to its charter, obtain permission to operate a second location, went to the merits and "would be addressed at this body at a future date" if the appeal was permitted to go forward. (Hr'g Tr. at 12, R.R. at 45a.)

At the end of the hearing, the CAB voted to grant the Motion and dismiss Charter School's appeal on the grounds that "[t]here is nothing in the [Law] that supports the position that a charter school can open a second location via an amendment to its original charter." (Hr'g Tr. at 13, R.R. at 46a.) The CAB relied

[2] Section 1717-A(h)(2), (5) of the Law requires that, before a charter school can appeal the denial of an *original charter* to the CAB, the charter school must obtain a certain number of signatures from those residing in the school district in which the charter school would be located and that a court of common pleas has to certify that the charter school complied with the signature requirement. 24 P.S. § 17-1717-A(h)(2), (5).

upon the concurring and dissenting opinion in Montessori to support its holding that the Law did not permit Charter School to open a second location by amending its Charter. (CAB Decision at 3 n.2 (citing Montessori, 55 A.3d at 203-06 (Pellegrini, P.J., concurring and dissenting).) The CAB further held that it was not bound by the majority in Montessori because the issue was not raised by the parties or addressed by this Court. (Hr'g Tr. at 13-14, R.R. at 46a-47a; CAB Decision at 3.) Charter School now petitions this Court for review.[3]

III. Appeal to this Court

This Court addressed the issue of whether a charter school can amend its existing charter to change the material terms contained therein, including the addition of a second location or school, in the companion cases of Northside Urban Pathways and Montessori. These cases also involved the question of what entity had jurisdiction to consider appeals from the denial of amendment requests, the CAB or a court of common pleas. Northside Urban Pathways and Montessori were argued on the same day before the same en banc panel, and the opinions were issued on the same day.

In Northside Urban Pathways, a charter school sought to amend its charter, which originally authorized it to operate a school for grades six through twelve, to open a second school that included kindergarten through grade five. Northside Urban Pathways, 56 A.3d at 82. The school district denied the amendment

[3] This Court's review of an order of the CAB is "limited to a determination of whether constitutional rights were violated, errors of law committed or whether the decision is not supported by substantial evidence." Community Service Leadership Development Charter School v. Pittsburgh School District, 34 A.3d 919, 924 n.7 (Pa. Cmwlth. 2012).

application, indicating that because of the significance of the proposed changes the charter school was going to have to submit a new charter school application. Id. The charter school appealed to the CAB, but the CAB dismissed, on the school district's motion, for lack of jurisdiction. Id. at 82-83. The charter school appealed to our Court, arguing that the CAB erred in dismissing its appeal because the CAB had implied authority under the Law to consider the appeal from the denial of a proposed amendment of a charter. Id. at 83. This Court agreed and held that the CAB did have jurisdiction to consider such appeals under its implied authority to consider adverse decisions of local school boards to ensure review of "every significant decision that could be made by a school district with respect to a charter school." Id. at 85. Further, we affirmed the validity of a charter school changing the material terms of its charter through amendment under the Law, explaining:

> A charter school's application, which is ultimately incorporated into the terms of the charter, is a very detailed document . . . . *Inevitably, though, these details will have to be adjusted during the life of a school. Northside provides one instructive example. If a charter school states in its charter application that it will be located in a particular building, then that provision becomes part of the school's charter.* If the school changes its location during the term of the charter without amending its charter, it is subject to closure under Section 1729-A(a)(1) of the . . . Law, 24 P.S. § 17-1729-A(a)(1). *However, a charter school may not have any choice but to change its location.*
>
> . . . .
>
> [T]o hold, as [the school district] suggests, that charters cannot be amended as a matter of law runs contrary to the legislature's intent to offer parents and students a charter school alternative to the schools in their district.
>
> . . . .
>
> Further, as has been pointed out by the Department of Education, a single school cannot have two charters that expire on different days. This makes sense. *To deny the possibility of a charter amendment would be very limiting upon the charter school. It would*

> *be bound to every item in its charter, such as school building location. To move to a new school building would require the charter school to set up a second corporation, obtain new funding, and form a new administration. This would make the . . . Law unwieldy. It would also place the [c]harter [s]chool in a Catch-22 because the Department of Education has decreed that a single school cannot have two charters.*

Id. at 85-87 (emphasis added). We acknowledged that charters are legally binding documents, but noted that "legally binding instruments such as licenses and contracts are capable of amendment, even with respect to material terms" and that the consequence of not permitting a charter school to amend its original charter would mean that charter schools could not make the "fundamental decision to amend the charter to allow the school to continue to operate." Id. at 86 & n.9. Accordingly, this Court reversed the CAB's decision and directed the CAB to review the charter school's amendment request to expand its grade levels and open a new location "in the same manner it would review a decision revoking or not renewing a charter." Id. at 87.

In Montessori a regional charter school sought to renew and amend its charter to permit it to open a second charter school facility to increase its enrollment capacity. Montessori, 55 A.3d at 198-99. After requesting additional information regarding the proposed second facility, the school districts approved the renewal, but one school district denied the requested amendment and the second school district deferred its decision pending the charter school's submission of additional information associated with a new charter. Id. at 199. The charter school appealed the school districts' decisions to the CAB and to the court of common pleas (trial court). Id. The CAB denied the appeal on the grounds that the Law was silent on the subject of charter amendments and, therefore, it did not have jurisdiction over charter amendments. The trial court held that it had

jurisdiction to consider the appeal, noting that the CAB had declined to act on the appeal. Id. at 199-200. The trial court: rejected the school districts' arguments that the request to expand into a new building should be considered a new application and not an amendment; held that the school districts arbitrarily and unreasonably denied/deferred action on the amendment; and directed the school districts to approve the amendment. Id. at 200. The school districts appealed to this Court. In affirming the trial court's order, we held that the trial court had jurisdiction, although such appeals would be heard by the CAB in the future, and that the trial court did not err in holding that the school districts' decisions were adjudications and were arbitrary and capricious. Id. at 200-03 & n.6. We specifically stated that the school districts could not treat the amendment application the same as an application for a new charter, which by forcing the school to "jump through many unnecessary hoops, it effectively foreclosed the use of an amendment as a vehicle to expand [the charter school's] physical operation." Id. at 201. Our opinion cited Northside Urban Pathways for "a complete discussion of why a charter is an amendable license." Id. at 201 n.8.

The school district in Northside Urban Pathways had asserted, *inter alia*, that a charter school could not, as a matter of law, amend its existing charter to open an additional school at a new location. Northside Urban Pathways, 56 A.3d at 86. This argument became the basis of President Judge Pellegrini's minority opinions in both Northside Urban Pathways and Montessori, in which he disagreed with the majorities' interpretation of the Law as permitting charter amendments. Id., 56 A.3d at 88, 90 (Pellegrini, P.J., dissenting); Montessori, 55 A.3d at 204 (Pellegrini, P.J., concurring and dissenting). He specifically disagreed that the Law could be interpreted to "authorize a charter school to amend its charter to create another

separate school at another location without first submitting a charter application for such a facility." Northside Urban Pathways, 56 A.3d at 87; see also Montessori, 55 A.3d at 204. The minority opinions further noted that, pursuant to Section 1722-A(d) of the Law, "[t]he only district that can allow a charter school to operate at more than one location under one charter is the School District of Philadelphia," which is the only first class school district in the state. Northside Urban Pathways, 56 A.3d at 90 n.12 (citing 24 P.S. § 17-1722-A(d)); Montessori, 55 A.3d at 206 n.9 (same).[4]

The parties and the CAB focus their analysis on the majority and minority opinions in Montessori because, in that case, our Court's holding did permit a charter amendment to add a second charter school facility in Erie for existing students. While the District is correct that the majority opinion in Montessori did not analyze the issue of whether a charter school could have more than one location under the Law, which was not raised by the school districts in that case, this Court was clearly aware of the issue as it was set forth in the concurring and dissenting opinion. The majority opinions in both Montessori and its companion, Northside Urban Pathways, did not adopt the position of the minority opinions, which would have interpreted the Law as not permitting charter amendments, and

[4] President Judge Pellegrini also disagreed that the CAB had jurisdiction over the denial of amendment requests because the Law specifically set forth the matters that fell within the CAB's jurisdiction, which did not include amendment requests. Northside Urban Pathways, 56 A.3d at 90-91 (Pellegrini, P.J., dissenting). He would have held that such denials would be appealable to a court of common pleas under Section 752 of the Local Agency Law, 2 Pa. C.S. § 752, Northside Urban Pathways, 56 A.3d at 91, and, therefore, he concurred with Montessori's holding that the court of common pleas had jurisdiction over the school districts' denial of the charter school's amendment request, Montessori, 55 A.3d at 203-04 (Pellegrini, P.J., concurring and dissenting).

specifically charter amendments related to operating at more than one facility. Accordingly, based on Northside Urban Pathways and Montessori, a charter school may amend the material details contained within its original charter, including changing a charter school's location or adding a second location of a charter school.[5] Northside Urban Pathways, 56 A.3d at 85-87 & n.9; Montessori, 55 A.3d at 201.[6]

Thus, Northside Urban Pathways and Montessori appeared to resolve the question of whether a charter school may add a second location via a charter amendment under the Law. However, the District nonetheless argues that, as referenced by the minority opinions in Northside Urban Pathways and Montessori, there is a section of the Law which it believes prohibits the addition of a second location by Charter School—Section 1722-A(d). Because the majority opinions in those cases did not explicitly discuss the effect of Section 1722-A(d), we will directly address this question now.

Section 1722-A(d) provides that, "[n]otwithstanding any other provision of this [Law], a school district of the first class may, in its discretion, permit a charter

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[5] We note that Charter School is not seeking to expand, as the charter school did in Northside Urban Pathways, the grade levels it educates; it is only requesting to add a second location to which it will move its students in grades five through seven.

[6] We recently reiterated that a charter school may change the material terms in its charter via an amendment and that the failure to do so before implementing such changes may result in the closure of the school. Career Connections Charter High School v. School District of Pittsburgh, 91 A.3d 736, 743-44 (Pa. Cmwlth. 2014) (citing Northside Urban Pathways and stating, in an appeal from the non-renewal of a charter, that "[i]n order to change [the] terms [of the charter], [the charter school] was required to amend its charter" and "[b]ecause it changed [the terms of its charter] without doing so, [the charter school was] subject to closure").

school to operate its school at more than one location." 24 P.S. § 17-1722-A(d). District's argument is that, since the legislature specifically authorized Philadelphia School District, the only first class school district, to permit charter schools to operate at more than one location, the legislature intended that no other school districts could do so. The District also contends that proposed amendments to the Law would delete the phrase "in school districts of the first class" in Section 1722-A(d), which necessarily means that non-first class school districts do not presently have the authority to approve a charter school's request to operate at multiple locations. See Meier v. Maleski, 670 A.2d 755, 759 (Pa. Cmwlth. 1996) (stating "[a] change in the language of the statute ordinarily indicates a change in legislative intent"). Charter School, on the other hand, points out that the Law does not prohibit a charter school located outside of Philadelphia from operating at more than one location and that the Law contains numerous special provisions relating to the operation of charter schools in Philadelphia, of which this is only one.[7]

Thus, the question is whether a provision of the Law which is explicitly permissive is also impliedly prohibitive: does the authorization of one school district operate to prohibit all other school districts. Resolution of this question

[7] See Section 1720-A(b)(1)-(3), 24 P.S. § 17-1720-A(b)(1)-(3) (authorizing school districts of the first class to renew a charter for a period of one year if the school determines that there is insufficient data regarding the charter school's academic performance to assess that performance); Section 1726-A(a.1) of the Law, 24 P.S. § 17-1726-A(a.1) (requiring school districts of the first class to provide certain transportation in addition to what is required by non-first class school districts); Section 1726-(A)(d) of the Law, 24 P.S. § 17-1726-A(d) (mandating school districts of the first class to provide a copy of their transportation policy to the Department of Education); and Section 1729-A(a.1) of the Law, 24 P.S. § 17-1729-A(a.1) (permitting school districts of the first class to place specific conditions on the renewal of a charter for a charter school in corrective action status).

requires interpretation of the section to ascertain the legislative intent. This Court, in Northside Urban Pathways, recognized the importance of ensuring that the Law is not rendered unwieldy and that the General Assembly's intent in passing the Law is to ensure that students and parents are provided with charter school alternatives to the schools in their district. Northside Urban Pathways, 56 A.3d at 86-87. Both Northside Urban Pathways and Montessori further recognized the benefit and practicality of permitting charter schools to amend their charters to account for a charter school's changing circumstances, including changing or adding locations. The reasoning in Northside Urban Pathways and Montessori lead, inescapably, to the conclusion that the permissive authorization in Section 1722-A(d) does not prohibit a charter school located outside Philadelphia from seeking to add a second location, by amending its existing charter, when the charter school's circumstances so require. We note that, at argument, Charter School stated that it could not find one building that was large enough to safely house its students. The District's reliance on the proposed legislative amendments is misplaced as those amendments are merely *proposed*, and, as Charter School notes, equally could demonstrate the General Assembly's intent to resolve any ambiguity that resulted from the minority opinions in Northside Urban Pathways and Montessori. Accordingly, we decline to rely upon Section 1722-A(d), a *permissive* special provision associated only with the one school district of the first class in the Commonwealth, to prohibit the ability of all other charter schools in other school districts to amend the terms of their existing charters to allow the charter schools to make the "fundamental decision[s]" that would "allow the school to continue to operate," such as adding a second location for existing students. Id. at 86.

In summary, we conclude that there is no statutory prohibition against a charter school located outside a school district of the first class seeking to expand into a second location via an amendment to its charter. Accordingly, the CAB erred in holding that Charter School could not, as a matter of law, amend its Charter to add a second location.[8] Thus, as we did in Northside Urban Pathways, we reverse the CAB's Order, and we remand this matter to the CAB for it to review the District's decision not to allow amendment of the Charter as it would review a decision revoking or not renewing a charter under Section 1729-A(d) of the Law, 24 P.S. § 17-1729-A(d).

IV. Conclusion

Because of our disposition of Charter School's main argument, we need not reach the other arguments it raised on appeal. Charter School had also argued that: (1) the CAB's Order was invalid because the *acting* Secretary of Education participated as a member of the CAB; and (2) the CAB violated Charter School's due process rights by deciding the merits of Charter School's appeal instead of deciding only the procedural issued raised in the District's Motion. Were we to have reached these issues, we would not have found them meritorious. Charter School also argued that the District either waived its objections or is equitably estopped from asserting any challenge to Charter School's request to amend its Charter to operate at a second location. However, because of our conclusion that Charter School can, by amendment, seek to open a new location for Charter School's fifth through seventh grade students, we will not address the issue of

[8] Because Charter School could seek to add the second location by amending its Charter, the denial of the request to amend was not the denial of an application for a new charter and it was unnecessary for Charter School to obtain the number of signatures required by Section 1717-A(h)(2), (5) of the Law.

whether the District waived its objections to this second location. The District provided reasons, in addition to its belief that such an expansion is not permitted by amendment under the Law, for its denial of Charter School's request; therefore, we are remanding this matter to the CAB for it to review the District's "decision in the same manner it would review a decision revoking or not renewing a charter." Northside Urban Pathways, 56 A.3d at 87. As part of that review, the CAB will necessarily have to consider the questions of whether the District waived its objection to the second location and whether the District's additional reason for denying the amendment was irrelevant.

For the foregoing reasons, we reverse the Order of the CAB dismissing Charter School's appeal, and we remand this matter for the CAB to review the District's decision for denying Charter School's amendment request as it would review a school district's decision to revoke or to not renew a charter under Section 1729-A(d) of the Law, 24 P.S. § 17-1729-A(d).

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lehigh Valley Dual Language Charter School, Petitioner	:	
v.	:	No. 2010 C.D. 2013
Bethlehem Area School District, Respondent	:	

ORDER

NOW, July 22, 2014, the Order of the State Charter School Appeal Board (CAB) entered in the above-captioned matter is hereby **REVERSED**, and this matter is **REMANDED** to the CAB to review the Bethlehem Area School District's decision for denying Lehigh Valley Dual Language Charter School's amendment request as it would review a school district's decision to revoke or to not renew a charter under Section 1729-A(d) of the Act of March 10, 1949, P.L. 30, added by Section 1 of the Act of June 19, 1997, P.L. 225, as amended, 24 P.S. § 17-1729-A(d).

Jurisdiction relinquished.

Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, Judge

Certified from the Record

JUL 22 2014

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lehigh Valley Dual Language Charter School, Petitioner	:	
v.	:	No. 2010 C.D. 2013
Bethlehem Area School District, Respondent	:	Argued: May 13, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

DISSENTING OPINION
BY PRESIDENT JUDGE PELLEGRINI

FILED: July 22, 2014

Because the Charter School Law (Law)[1] only permits an application for a charter school and not a charter school district, except in Philadelphia, I would hold that the State Charter Appeal Board (CAB) properly granted the Bethlehem Area School District's (School District) motion to quash and properly dismissed the Lehigh Valley Dual Language Charter School's (Charter School) appeal. Accordingly, I respectfully dissent.

As the majority recounts, the issue in this case is a simple one – may a charter school board operate two or more schools under one charter. In finding

[1] Act of March 10, 1949, P.L. 30, added by Section 1 of the Act of June 19, 1997, P.L. 225, *as amended*, 24 P.S. §§17-1701-A – 17-1751-A.

that a charter school board can operate a school at more than one location, the majority does not rely on any provision of the Law or analysis of the Law. Instead, it conjures up some sort of unexpressed dicta or holding from our decision in *Montessori Regional Charter School v. Millcreek Township School District*, 55 A.3d 196 (Pa. Cmwlth. 2012), stating:

> While the District is correct that the majority opinion in *Montessori* did not analyze the issue of whether a charter school could have more than one location under the Law, which was not raised by the school districts in that case, this Court was clearly aware of the issue as it was set forth in the concurring and dissenting opinion. The majority opinion[] in *Montessori* ... did not adopt the position of the minority opinion[], which would have interpreted the Law as not permitting charter amendments, and specifically charter amendments related to operating at more than one facility....

Majority Opinion, slip op. at 9-10. The majority opinion in *Montessori* said *nothing* about whether a charter school could operate at more than one location and, as such, it necessarily stands for *nothing* as precedent on that issue.

In analyzing the Law, it is clear that only one location is permitted under one charter. The Law provides that a charter school may only be created by application to establish either a single district charter school under Section 1717-A of the Law, 24 P.S. §17-1717-A, or a multi-district regional charter school under Section 1718-A(a), 24 P.S. §17-1718-A(a). Section 1719-A(11) of the Law, 24 P.S. §17-1719-A(11), states that an application to establish a charter school must indicate the address and a description of the physical facility in which the charter school will be located. There is simply no provision in the Law authorizing a

charter school to create a separate charter school facility with one exception that confirms this analysis.

Section 1722-A(d) of the Law, 24 P.S. §17-1722-A(d), states that "[n]otwithstanding any other provision of this act, a school district of the first class may, in its discretion, permit a charter school to operate its school at more than one location." In turn, Section 202, 24 P.S. §2-202, states, in relevant part, that "[e]ach school district having a population of one million (1,000,000) or more, shall be a school district of the first class." Because the School District is not a first class school district, the General Assembly did not grant it the power to permit the Charter School to operate at more than one location or facility. *See Veterans of Foreign Wars Post 1989 v. Indiana County Board of Assessment Appeals*, 954 A.2d 100, 106 (Pa. Cmwlth. 2008) ("The maxim *expressio unius est exclusio alterius* holds that the express inclusion of one thing implies the exclusion of another; this means that any omission by the legislature was deliberate.") (citations omitted).[2]

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[2] I would also affirm the CAB's quashing of the appeal for the reason set forth in my dissent in *Northside Urban Pathways Charter School v. State Charter School Appeal Board*, 56 A.3d 80, 90-91 (Pa. Cmwlth. 2012) (Pellegrini, P.J., dissenting): that the CAB's jurisdiction is limited to appeals from a school district's denial of a charter school application under Sections 1717-A(i)(1) and 1718-A(c), 24 P.S. §§17-1717-A(i)(1), 17-1718-A(c); appeals from a school district's deemed denial of an application, under Section 1717-A(g), 24 P.S. §17-1717-A(g); and appeals from a school district's revocation or nonrenewal of a charter under Section 1729-A(d), 24 P.S. §17-1729-A(d). Because the General Assembly did not confer upon the CAB the power to consider the denial of a charter amendment request, such an appeal of a local agency adjudication is properly lodged in the court of common pleas of the county in which the school district is located. Sections 101 and 752 of the Local Agency Law, 2 Pa. C.S. §§101, 752; Section 933(a)(2) of the Judicial Code, 42 Pa. C.S. §933(a)(2).

Accordingly, unlike the majority, I would affirm the CAB.

Dan Pellegrini

DAN PELLEGRINI, President Judge

EXHIBIT 3

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEHIGH VALLEY DUAL LANGUAGE CHARTER SCHOOL	: No. 756 MAL 2014
v.	: Petition for Allowance of Appeal from the Order of the Commonwealth Court
STATE CHARTER SCHOOL APPEAL BOARD	
BETHLEHEM AREA SCHOOL DISTRICT, Intervenor	
PETITION OF: BETHLEHEM AREA SCHOOL DISTRICT, Intervenor	

ORDER

PER CURIAM

AND NOW, this 6th day of May, 2015, the Petition for Allowance of Appeal is **GRANTED**, **LIMITED TO** the issues set forth below. Allocatur is **DENIED** as to all remaining issues. The issues, as stated by Petitioner, are:

(1) Whether or not the Panel's Majority Opinion and Order presents issues of first impression to the extent that it permits a charter school to open a second location by amending its charter and/or confers CAB with jurisdiction to hear a charter school's appeal from any and all denials to amend a charter school's charter?

(2) Whether or not the Majority's Opinion and Order has departed from accepted judicial practices or abused its discretion when it misapplied the rules of statutory construction and/or relied on dicta?