

IN THE SUPREME COURT OF PENNSYLVANIA

DISCOVERY CHARTER SCHOOL,

Appellee,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
AND SCHOOL REFORM COMMISSION,

Appellants.

THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON 03/10/2015 AT NO. 673 C.D. 2014 REVERSING
AND REMANDING THE ORDER ENTERED ON 04/16/2014 OF THE
STATE CHARTER SCHOOL APPEAL BOARD AT NO. CAB 2013-06

**BRIEF *AMICUS CURIAE* OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLEE DISCOVERY CHARTER SCHOOL**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt foundation organized for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for citizens committed to limited government, private property rights, individual freedom, and free enterprise. PLF supports school choice programs across the country because they empower parents to select schools that best fit the needs of their children.

To that end, PLF has participated in the United States Supreme Court in cases involving kindergarten through 12th grade (K-12) education reform, including *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (tuition tax credit); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Ohio voucher programs); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (state and federal school aid programs). PLF has also participated in state court cases involving education reform and school choice, including *Taxpayers for Public Educ. v. Douglas Cty. Sch. Dist.*, 2015 WL 3948220 (Colo. June 29, 2015) (scholarship program); *California Charter Schools Ass'n v. Los Angeles Unified Sch. Dist.*, 345 P.3d 911 (Cal. 2015) (charter school facilities); *Duncan v. State*, 102 A.3d 913 (N.H. 2014) (tax credit scholarship program); *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc.*, 748 S.E.2d 884 (Ga. 2013) (charter school funding); *Meredith v. Pence*, 984 N.E.2d 1213

(Ind. 2013) (school voucher program); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (school voucher program); and *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (opportunity scholarship program).

INTRODUCTION

Discovery Charter School (Discovery) is a successful Philadelphia school that serves grades K-8. *See Discovery Charter Sch. v. Sch. Dist. of Philadelphia*, 111 A.3d 248, 250 (Pa. Commw. Ct. 2015). In light of its academic success, Discovery has amassed a waiting list of 1,448 hopeful students. *Id.* In 2012, in order to accommodate some of the students on its waiting list, Discovery asked the School District of Philadelphia (School District) for permission to amend its charter to increase enrollment by 430 students over a four-year period. *Id.* at 250-51. Instead, the School District offered Discovery a charter renewal for five years at its current enrollment level. The School District's governing body, the School Reform Commission (Commission), decided not to vote on any enrollment expansions for Philadelphia charter schools for the 2013-14 school year. *Id.* at 251. Because Discovery did not sign the School District's proposed charter renewal, the Commission has not taken any formal action on Discovery's charter amendment request for increased enrollment. *Id.* Discovery appealed to the State Charter School Appeal Board (Appeal Board), and asserted that the Commission's failure to act

functions as a denial of the amendment request. *Id.* at 252. The Appeal Board held that failure to act on charter amendments is not final action, and therefore it lacked jurisdiction to review the appeal. *Id.* The Commonwealth Court reversed. *Id.* at 249.

This Court should affirm. The School District's decision not to act on Discovery's amendment request is the same as a decision to reject that request. If Pennsylvania school districts can thwart charter school expansion with pocket vetoes, such deliberate inaction will frustrate the purpose of Pennsylvania's Charter School Law and stifle growth of charter schools in the state.

Charter school expansion provides parents with additional options for educating their children. 24 P.S. § 17-1702-A. But successful charter schools cannot grow to meet enrollment demand if they cannot amend their charters. That is precisely the case here. The School District, which refused to act on Discovery's request to increase its enrollment, is seeking to have it both ways. It wants to stop Discovery from growing (by not approving the amendment), and immunize its decision to do so (by not rejecting it). 111 A.3d at 251. This Court should not tolerate this sleight of hand.

Pennsylvania school districts routinely act with hostility toward the creation and growth of charter schools, and undermine the competitive dynamic adopted by the Legislature. This case is just the latest example. Because of school district hostility

and intransigence, charter schools regularly rely on the Appeal Board and Pennsylvania courts to vindicate the purpose of the Charter School Law. Review by the Appeal Board is thus necessary to ensure that the School District, which cannot act to stifle charter school growth, cannot accomplish the same invidious end by failing to act.

ARGUMENT

I

THE PURPOSE AND INTENT OF THE CHARTER SCHOOL LAW IS STYMIED IF THE SCHOOL DISTRICT MAY REFUSE TO ACT ON CHARTER AMENDMENTS WITHOUT THE APPEAL BOARD'S OVERSIGHT

Pennsylvania's Charter School Law allows charter schools to "operate independently from the existing school district" to improve learning, increase learning opportunities, encourage innovation in education, create new opportunities for teachers, expand educational choices in public education for students and parents, and hold schools accountable to academic standards. 24 P.S. § 17-1702-A. To enforce the independence of charter schools, the Charter School Law "expressly vests the [Appeal Board] with jurisdiction over every significant decision [made by a local school district] involving a charter school." *Northside Urban Pathways Charter Sch. v. State Charter Sch. Appeal Bd.*, 56 A.3d 80, 85 (Pa. Commw. Ct. 2012). Charter school independence is necessary to ensure they meet the legislative purpose of

expanding educational choices and innovative programs for schoolchildren. *See id.* The Appeal Board's oversight prevents school districts from flouting that intent by restricting charter school growth. *Id.*

Charter amendments are a crucial component of expanding educational choices, because they provide a means for successful charter schools to grow. Charter agreements contain detailed information on the school's curriculum, location, enrollment, grade levels served, and admissions policy. 24 P.S. §§ 17-1719-A, 17-1720-A(a). It is inevitable that adjustments to these details will be required. *Northside*, 56 A.3d at 86. For example, a school may need to relocate to find a more suitable location, or to change its curriculum to meet changing state academic standards, or to implement a more innovative educational program. *See id.* As a result, charter amendments are necessary to allow charter schools to carry out the intent of the Legislature by adapting to changing conditions and continuing to provide quality educational options.

Because of the significance of charter amendments to the purpose of the Charter School Law, the Commonwealth Court has consistently recognized that amendments are needed to further the purpose of the Charter School Law. *See Northside*, 56 A.3d at 85-87; *Lehigh Valley Dual Language Charter Sch. v. Bethlehem Area Sch. Dist.*, 97 A.3d 401, 408 (Pa. Commw. Ct. 2014); *Discovery*, 111 A.3d at 252-53. Therefore,

if the Appeal Board is to maintain jurisdiction over every “significant decision” involving charter schools, it must also have the authority to oversee school district decisions on proposed charter amendments. *See id.* Indeed, “[t]o say that a charter amendment can be done, but only on the non-reviewable grace of a school district, would give school districts a veto power that is inconsistent with the overall purpose of the Charter School Law.” *Northside*, 56 A.3d at 86-87.

Discovery is an exemplary school that fulfills the purpose of the Charter School Law. For the past three years, Discovery met Adequate Yearly Progress (AYP) academic performance standards. *Discovery*, 111 A.3d at 250. Discovery students also performed highly in proficiency assessments, exceeding the average for the School District in Reading and Math. *Id.*

Due to Discovery’s academic success, enrollment demand far exceeds the enrollment limit for its charter. *See id.* To accommodate increased demand for its successful educational program, Discovery acquired land to construct a new, larger school, and requested an amendment to its charter with the School District to gradually increase its enrollment limit.¹ *Id.* at 251. The School District refused to formally act on Discovery’s amendment request even though it informally informed

¹ Discovery’s request to increase its enrollment limit is modest in relation to student demand: were Discovery’s request granted, the waiting list would be reduced by only about thirty percent.

Discovery that a decision had been made that would result in a denial of the request.

Id. By refusing to rule on Discovery’s amendment request—which would unquestionably trigger review by the Appeal Board—the School District seeks to prevent Discovery’s expansion while evading review. However, Pennsylvania law recognizes that when the government refuses to act and leaves a party with no other forum to assert its rights, that refusal to act is appealable. *Montessori Regional Charter Sch. v. Millcreek Township Sch. Dist.*, 55 A.3d 196, 201 (Pa. Commw. Ct. 2012).

Without oversight of the Appeal Board, the School District has free rein to stop schools that seek to improve their curriculum and increase enrollment. The School District’s refusal to act has adverse consequences for hundreds of Philadelphia children denied the educational opportunities the Legislature made available to them with the Charter School Law. This result contradicts the intent of the Legislature in enacting the Charter School Law and should not be tolerated by this Court.

II

REVIEW OF SCHOOL DISTRICT INACTION ON CHARTER AMENDMENTS IS NECESSARY BECAUSE SCHOOL DISTRICTS ARE NOTORIOUSLY HOSTILE TO CHARTER SCHOOLS AND SEEK TO AVOID COMPETITION BY BLOCKING THEIR GROWTH

Public school districts often oppose the creation and growth of charter schools. *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452, 461 (Pa. Commw. Ct. 2000), *aff'd*, 571 Pa. 503, 812 A.2d 1172 (2002) (“the legislative history [of the Charter School Law] contains frequent references to the bias of local school boards against charter schools.”). Not wanting to compete with charter schools, public school districts opposed the enactment of the Charter School Law. *See* Brief of Appellee Collegium Charter School at 1, *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452 (Pa. Commw. Ct. 2000) (No. 89 MAP 2001). School districts attempted to undermine the Charter School Law after it was enacted, *see id.* at 3, and continue to do so today.

A. Pennsylvania School Districts Are Notoriously Hostile to Charter Schools

There are numerous examples in Pennsylvania of school districts taking actions to oppose charter schools. In *West Chester*, a prospective charter school applied for a charter in which it planned to implement an innovative, interdisciplinary curriculum,

maintain a longer school year and school day, hold full-day kindergarten, provide foreign language instruction for all students, and establish multiple academic accountability measures. 812 A.2d at 1174-75. The school district denied the application for three reasons. First, teachers from traditional public schools were opposed to it. Second, the district viewed the curriculum benefits as “speculative.” Third, the charter school would divert resources away from existing district schools. *Id.* at 1175.

The Appeal Board disagreed with the school district’s findings and found that the charter school demonstrated ample support from the community, and would further the purpose of the Charter School Law by serving as a model school due to its innovative curriculum and schedule. *Id.* at 1176. The Commonwealth Court and this Court affirmed the Appeal Board’s findings and held that the Appeal Board properly conducted *de novo* review of the school district’s decision. *Id.* at 1177, 1179-81.

In *Northside*, a Pittsburgh charter school for grades six through twelve requested an amendment to its charter to add grades kindergarten through five. 56 A.3d at 82. The charter school determined that many incoming sixth graders suffered from serious learning gaps that required significant resources to remediate. *Id.* If the charter school could prevent the learning gaps before they occur, the school would be able to use the reclaimed resources to develop more rigorous academic

programs for its high school students. *Id.* But the school district denied the amendment request, demanding the charter school submit a burdensome new charter application, and the Appeal Board dismissed the charter school's appeal, claiming it lacked jurisdiction over appeals of denials of charter amendments. 56 A.3d at 82-83.

The charter school appealed the Appeal Board's dismissal to the Commonwealth Court, which remanded the case to the Appeal Board for a full review of the school district's denial of the charter school's amendment request. *Id.* at 87. In so holding, the Commonwealth Court affirmed that the Charter School Law vests the Appeal Board with jurisdiction over major decisions involving charter schools, and that outright amendment denials are reviewable. *Id.* at 85-87.

In *Montessori*, a successful regional charter school with a substantial waiting list requested a charter renewal and amendment to increase its enrollment and temporarily use a second location while it constructed a new facility to replace its existing, outdated facility. 55 A.3d at 198-99. With little explanation, the governing school districts did not grant the charter amendment, and treated the amendment as an application for a new charter—resulting in a much lengthier, more complicated process. *Id.* at 199. The charter school appealed the school districts' decisions to the Appeal Board—which dismissed the appeal claiming it had no jurisdiction—and then to a Pennsylvania trial court. *Id.* The trial court held that it had jurisdiction and

reversed the school districts' decisions to treat the amendment request as a new application and to unreasonably deny and defer the amendment applications.² *Id.* at 200.

On appeal to the Commonwealth Court, the school districts argued that the proposed temporary location was inadequate and that their actions were proper because the charter school did not provide sufficient information about the location. 55 A.3d at 201-02. The court disagreed, held the charter school had provided more information than required by the Charter School Law, and affirmed the trial court. *Id.* at 203.

In *Lehigh Valley*, a Bethlehem kindergarten through seventh grade charter school requested a charter amendment to allow it to move its fifth through seventh grade students to a new facility to allow those students to have a “true middle school experience that is not possible in the elementary building.” 97 A.3d at 402. The school district denied the amendment, claiming the Charter School Law prohibits charter schools from operating out of multiple locations, and disingenuously

² *Montessori* and *Northside* were companion cases decided in the Commonwealth Court on the same day in 2012. The court in *Montessori* noted that “the trial court’s decision to exercise jurisdiction over *Montessori*’s appeal was proper under the Local Agency Law” because the only other tribunal that could hear the appeal—the Appeal Board—had declined jurisdiction. 55 A.3d at 200-01.

expressing concerns about the school's academic achievements.³ *Id.* at 402-03. The Appeal Board affirmed the school district's decision and dismissed the charter school's appeal. *Id.* at 403. On subsequent appeal, the Commonwealth Court reversed and remanded to the Appeal Board, holding that the Charter School Law allows charter schools to operate out of multiple locations to help further the purpose of the Charter School Law to provide sufficient alternative educational options for students and parents. *Id.* at 407-08.

As the above examples show, it is commonplace in Pennsylvania for school districts to oppose growth of charter schools by denying or refusing to act on charter amendments, and by insisting on unnecessarily burdensome procedures before amendments will be considered. In each case cited above, the appellate court held in favor of the charter school and in favor of Appeal Board jurisdiction over school district decisions impacting charter schools. *See W. Chester*, 812 A.2d at 1177, 1179-81; *Northside*, 56 A.3d at 87; *Montessori*, 55 A.3d at 198; *Lehigh Valley*, 97 A.3d at 402. This case should have the same result. Because of the history of open hostility toward charter schools, it is necessary for this Court to recognize that school district inaction on charter amendments is reviewable.

³ These concerns were disingenuous because the school district granted the school a five-year charter renewal—without expressing any concerns—five months before denying the amendment. 97 A.3d at 402-03.

B. Without Judicial Review, School Districts Will Undermine Legislatively Mandated Competition in Public Education

One of the driving forces behind the push for charter schools in Pennsylvania was parental dissatisfaction with existing public schools. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 Penn. St. L. Rev. 43, 43-44 (2004). That dissatisfaction was effectively an indictment of the schools and the teachers, and in response, much of the opposition to charter schools comes from “self-serving and protective” entrenched interests (i.e. school boards and teachers’ unions) at the expense of children. *Id.* at 44 n.5. For example, some school districts divert resources that could be used to improve educational programs and attract talented educators to run television advertisements to persuade parents to keep their children in district-run schools. *See* Daveen Rae Kurutz, *Hard-hit Districts Push Back Against Charter Schools*, Tribune-Review (Jan. 17, 2013).⁴

School districts also have financial reasons to oppose charter school growth because the Charter School Law places primary responsibility for funding charter schools on the school district(s) within which the charter school will operate. 24 P.S. § 17-1725-A; *see also* James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2075-76 (2002). The theory behind such a

⁴ <http://triblive.com/news/allegheeny/3253758-74/charter-schools-districts>.

funding system is that tax dollars for educating a child should follow the child to the school the child attends. National Alliance for Public Charter Schools, *Facts About Charters: How are Public Charter Schools Funded?*⁵ Thus, a district school should not receive funds for a child it doesn't educate. In contrast, the School District argues that this funding system is not so clear cut, and is an improper expense for the School District. Appellants' Br. at 11-12 n.9; *see also* Gunjan Banerji, *Philadelphia School District's Charter Decision Opens Can of Worms for Pennsylvania Legislature*, Debtwire (Feb. 22, 2016) ("Mainstream school districts will continue to target charters . . . [as] a highly visible target for cost savings.")⁶ Regardless of the school districts' opposition, the Legislature established a public policy that funding follows the student. 24 P.S. § 17-1725-A. The districts may not vindictively deny charter schools' expansion requests by means of a pocket veto so as to undermine this established policy.

It is evident why the Legislature created the Appeal Board to provide oversight of any significant decisions made by school districts that affect charter schools: out

⁵ <http://www.publiccharters.org/get-the-facts/public-charter-schools/faqs/>.

⁶ <http://www.debtwire.com/info/2016/02/22/philadelphia-school-districts-charter-decision-opens-can-worms-pennsylvania-legislature/>.

of their own rational self-interest in avoiding competition, school districts will oppose the creation and growth of charter schools any way they can.

CONCLUSION

This Court should hold that the School District's and the Commission's failure to act on Discovery's charter amendment is reviewable by the Appeal Board, and affirm the court below.

DATED: September 2, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE complies with Pennsylvania Rule of Appellant Procedure 2135 because it contains 3,097 words, excluding the parts of the brief exempted.

DATED: September 2, 2016.

s/ MARK E. JAKUBIK

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, Mark E. Jakubik electronically filed the foregoing BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE with the Deputy Prothonotary for the Pennsylvania Supreme Court using the PACFile system.

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