

SB #35-06

IN THE MATTER OF THE REFUSAL TO :
GRANT FINAL APPROVAL TO THE : STATE BOARD OF EDUCATION
CHARTER SCHOOL APPLICATION OF : DECISION
THE BENCHMARK ACADEMY CHARTER :
HIGH SCHOOL, ATLANTIC COUNTY. :

Decision by the Acting Commissioner of Education, August 31, 2006

Decision on motion on behalf of the State Board of Education,
September 1, 2006

Order issued by the Appellate Division, September 7, 2006

Remanded by the State Board of Education, September 13, 2006

For the Appellant, McCarter & English, LLP (David C. Apy, Esq., of
Counsel)

For the Respondent, Allison Eck and Sookie Bae, Deputies Attorney
General (Anne Milgram, Acting Attorney General of New Jersey)

On January 13, 2006, the Acting Commissioner of Education granted contingent approval to the proposed Benchmark Academy Charter High School ("Benchmark") to operate a charter school commencing in the 2006-07 school year. In so doing, the Acting Commissioner stressed the proposed school's strong mission, well-developed educational program and innovative educational focus. Regarding the proposed school's financial plan, the Acting Commissioner found that the school's program was supported by financial statements, the budget narrative supported the budget summary,

and cash flow tied to the budget summary, providing an adequate plan. The Acting Commissioner notified the proposed school that a charter would be granted once all required documentation was received and approved.

However, on August 31, 2006, the Acting Commissioner notified the President of the Board of Trustees of the proposed school that, upon review of the documents submitted, she had determined that the proposed school was not in compliance with the Charter School Program Act of 1995, the implementing regulations and the Department of Education's policies and procedures.¹ The Acting Commissioner therefore denied Benchmark's application for a charter, explaining:

During the visit on August 18, 2006, the proposed charter school submitted a revised budget reflecting an enrollment of 138 students. The revenue reflected in the budget could not be confirmed because the students enrolled are from districts outside of the region of residence and an accurate "per pupil amount" could not be calculated with the available information. The budget also assured receipt of \$69,000 of categorical aid revenue, which could not be confirmed with the available information. The categorical aid amounts to \$500 for each enrolled student. Since categorical aid is based on actual student profile/need for special education, bilingual services and/or eligibility for free lunch, it is highly unlikely that the charter school would be eligible for this projected level of categorical aid revenue. It should also be noted that the budget assumes that the approved charter school program could operate with substantially decreased operating expenditures. Expenses that were reduced and/or deleted from the original budget include, but are not limited to: science lab equipment, administrative professional fees, guidance counselor, energy costs, copier, telephone, building maintenance, student computers and pre/post school program. Reductions in these areas could alter the program approved in the charter application.

¹ We note that on August 30, 2006, Benchmark had filed a notice of appeal and an application for emergent relief with the State Board, seeking emergent issuance of a final charter since the Acting Commissioner had not yet acted to grant a final charter to the proposed school.

Further review revealed that the school had not yet received an adequate supply of textbooks, instructional materials, supplies and equipment to meet the needs of students. The staff list which was received on August 17 indicated that the health and physical education teacher lacks certification and that the special education teacher does not have appropriate certification. In addition, the emergent hiring process had not been initiated. As of this date, the school has not submitted emergent hiring forms for all staff members. It was also determined during the August 18 visit, that the school had not passed the fire or sanitary inspections and did not have county approval to operate the facility.

Since the August 18, 2006 site visit, the school has been faxing to the department signed confirmations from parents stating they have decided to transfer their child from their school district to the Benchmark Academy Charter High School. As of August 29, 2006, the department has received parent confirmations totaling 131 students (71 ninth graders and 60 tenth graders); however, 13 students have not been confirmed. At 131 students, the school will not be fiscally viable. Review of the revised budget submitted on August 18, 2006, which was based on 138 students, had an ending fund balance of only \$16,702. A budget with any further reductions in enrollment would cause the school to end in a deficit and any further reductions in expenditures would entail unreasonable projections that would not fully support the approved charter school program.

Acting Commissioner's Letter Decision of August 31, 2006, at 2.

By letter dated August 31, 2006 directed to the Acting Commissioner, Benchmark "formally requested an immediate stay" of the Acting Commissioner's decision from both the Acting Commissioner and the State Board. By letter dated September 1, 2006 from the Director of the Bureau of Controversies and Disputes, Benchmark was advised that no action could be taken by the Acting Commissioner with respect to the request for a stay because a motion conforming to the requirements of N.J.A.C. 6A:3-1.15 had not been filed.

On September 1, 2006, Benchmark filed an emergent application with the Appellate Division seeking a stay of the Acting Commissioner's decision and issuance of a final charter.

On September 1, 2006, the President of the State Board and the Chairperson of the Legal Committee, acting on behalf of the State Board pursuant to their authority under N.J.A.C. 6A:4-3.3,² found that Benchmark's application to the State Board for emergent relief was moot since the Acting Commissioner had issued a decision with respect to final approval for the school on August 31, 2006. In addition, they concluded that no action could be taken with respect to Benchmark's request for a stay of the Acting Commissioner's decision since it had not filed a motion with the Acting Commissioner that complied with the requirements of N.J.A.C. 6A:3-1.15. Thus, Benchmark had not complied with N.J.A.C. 6A:4-2.2, which requires that a motion for a stay of a Commissioner's decision must first be made to the Commissioner. Nor had Benchmark complied with the regulatory requirements set forth in N.J.A.C. 6A:4-2.2(c) by filing a motion with the State Board in accordance with N.J.A.C. 6A:4-1.18.

In an order issued on September 7, 2006, the Hon. Jack L. Lintner, J.A.D., denied Benchmark's emergent application to the Appellate Division for a stay of the Acting Commissioner's decision and for issuance of a final charter. In so doing, Judge Lintner indicated that:

Benchmark must exhaust its administrative remedies by seeking review of the Acting Commissioner's decision by the State Board of Education. Because the school year has just

² Pursuant to N.J.A.C. 6A:4-3.3, "[t]he President of the State Board or, in the President's absence, the chairperson of the Legal Committee is authorized to decide on behalf of the State Board applications for emergency relief made pursuant to N.J.A.C. 6A:4-2.4 unless the determination would constitute the final decision with respect to the controversy."

started, the State Board is directed to expedite Benchmark's appeal by hearing and deciding the issues presented, on or before September 13, 2006.

In accordance with the Judge's order, Benchmark filed a Supplemental Brief with the State Board on September 8, 2006 seeking issuance of a charter. The Deputy Attorney General representing the Acting Commissioner filed a responsive brief on the same date. On September 13, 2006, we remanded the matter to the Acting Commissioner so that she could provide us with additional information regarding Benchmark. We directed that the Acting Commissioner submit the additional information to us by the end of the business day on September 15, 2006, that the matter be reviewed by our Legal Committee at its meeting on September 20, 2006, and that we make a final decision at our regularly scheduled meeting on September 20, 2006.

On September 15, 2006, in response to our remand, the Acting Commissioner provided a certification by the Director of the Office of Vocational-Technical, Career and Innovative Programs, along with attachments. On September 18, Benchmark filed a response to the Acting Commissioner's submission.

After a thorough review of the record and the papers filed on appeal, including the additional information provided by the Acting Commissioner and Benchmark, we reverse the August 31, 2006 determination of the Acting Commissioner. Based upon our review of the materials submitted by the parties, we are satisfied that Benchmark has met the contingencies established in the Acting Commissioner's letter of January 13, 2006 granting it contingent approval to operate a charter school and has demonstrated its capability to operate a charter school in the 2006-07 school year.

In a certification dated August 29, 2006, Ernest Harper, the Director of the proposed school, averred that Benchmark had 138 registered students, of which 127 had transfer statements signed by a parent; Benchmark had submitted a revised budget based on such enrollment showing a surplus of approximately \$73,000; a certificate of occupancy had been issued on August 14, 2006 and the school's facility passed a health inspection on August 28, 2006. In a certification dated September 1, 2006, Harper refuted the Acting Commissioner's statements in her letter decision of August 31, asserting that the Acting Commissioner's concerns about reductions in expenses were unfounded. Harper averred that "each and every purported alleged deficiency is both inaccurate and is belied by the record," specifying that transfer cards remained in the possession of the districts and that the districts had been told to hold student records until the school was close to approval; since August 18, the proposed school had received records for most of the 138 students; the proposed school's budget was based on conservative numbers and assumptions, and revenue would be greater, not less; the proposed school's curriculum had been designed to offer virtual science labs rather than physical labs; the proposed school had located in a different facility than the one identified in its original application, a fact known to the Department, with significantly reduced operating expenses; the decrease in technology expenses resulted from a reduction in costs since the original budget projections; a pre/post school program was no longer necessary since the districts would be providing busing; a large portion of guidance services had been provided and paid for through the use of grant money during the past seven months and therefore had been eliminated from the budget; instructional texts and materials had been ordered, but were being held up by

the Department's failure to release \$110,000 in grant money that had been promised to Benchmark; all inspection reports had been submitted and had been satisfactory; and the teaching certification of the school's health and physical education teacher had been delayed as the result of a paperwork error by the university from which he had graduated.

The information included in the record supports the statements made by Mr. Harper. Nothing in the submissions made on behalf of the Acting Commissioner in response to our remand negates those facts. Based on the record before us, there is no doubt that this charter school is capable of operating consistently with the Charter School Program Act of 1995 and the implementing regulations. The progress report submitted on behalf of Benchmark and the progress report provided by the Acting Commissioner reinforce our conclusion. On the basis of the record, there are no grounds for denying final approval of a charter to Benchmark. In this respect, we find that the current enrollment and budgetary information provided by Benchmark demonstrates that it will be able to operate in a fiscally responsible manner.

Therefore, the State Board of Education reverses the August 31, 2006 determination of the Acting Commissioner and directs issuance of a charter to Benchmark Academy Charter High School.

Kathleen Dietz abstained.

September 20, 2006

Date of mailing _____