

**In The
Supreme Court of Pennsylvania**

No. 16 EAP 2016

**DISCOVERY CHARTER SCHOOL,
*Appellee***

v.

**THE SCHOOL DISTRICT OF PHILADELPHIA AND SCHOOL
REFORM COMMISSION,
*Appellants***

**Appeal from the March 10, 2015
Order of the Commonwealth Court of Pennsylvania,
No. 673 C.D. 2014, Reversing the April 16, 2014 Order of the State
Charter School Appeal Board, No. CAB 2013-06, Quashing Discovery
Charter School's Attempted Appeal from the Inaction of the School
District of Philadelphia's School Reform Commission on Discovery
Charter School's Request for Amendment of Its Charter**

**BRIEF OF AMICUS CURIAE
PENNSYLVANIA SCHOOL BOARDS ASSOCIATION**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. STATEMENT OF INTEREST OF AMICUS CURAIE	1
II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS	2
III. SUMMARY OF ARGUMENT.....	2
IV. ARGUMENT	4
A. THE CSL PROVIDES THE COMPREHENSIVE PROCEDURE FOR ESTABLISHING THE PROVISIONS OF A LEGALLY BINDING CHARTER AGREEMENT IN ORDER TO ASSURE THAT CHARTER SCHOOLS MEET FUNDAMENTAL STANDARDS OF QUALITY AND VIABILITY IN ACCORDANCE WITH LEGISLATIVE INTENT; COMMONWEALTH COURT ERRED WHEN IT CREATED AN EXTRA-LEGISLATIVE SCHEME FOR AMENDING CHARTERS THAT IS NOT FOUND IN THE CSL.....	5
B. ASSUMING ARGUENDO THAT DENIAL OF CHARTER AMENDMENTS ARE SUBJECT TO REVIEW, COMMONWEALTH COURT ERRED IN INVESTING THE CAB WITH JURISDICTION OVER A DENIAL OF A CHARTER AMENDMENT OR THE FAILURE TO ACT ON A CHARTER AMENDMENT IN AN UNSPECIFIED PERIOD OF TIME	12
V. CONCLUSION	16
VI. CERTIFICATIONS	17

TABLE OF AUTHORITIES

Cases	Page
<i>Burger v. School Directors of McGuffey School District</i> , 839 A.2d 1055 (Pa. 2003).....	15
<i>Discovery Charter School v. School District of Philadelphia</i> , 111 A.3d 248 (Pa. Cmwlth. 2015).....	7, 9, 14
<i>Graystone Academy Charter School v. Coatesville Area School District</i> , 99 A.3d 125 (Pa. Cmwlth. 2014)	8, 10
<i>Lehigh Valley Dual Language Charter School v. Bethlehem Area School District</i> , 97 A. 3d 401.....	6
<i>Montessori Regional Charter School v. Millcreek Township School District</i> , 55 A.3d 196, 201 (Pa. Cmwlth. 2012).....	10
<i>Mosaica Academy Charter School v. Department of Education</i> , 572 Pa. 191, 813 A.2d 813 (2002).....	16
<i>Northside Urban Pathways Charter School v. Charter School Appeal Board</i> , 56 A.3d 80 (Pa. Cmwlth. 2012).....	15
<i>McKeesport Hospital v. Pennsylvania State Board of Medicine</i> , 539 Pa. 384, 652 A.2d 827, (1995).....	16
<i>The School District of Philadelphia v. Department of Education</i> , 625 Pa. 418, 92 A. 3d 746, (2014).....	7

Statutes

2 Pa. C.S.A. §101.....	15
24 P.S. §2-211.....	15
24 P.S. § 17-1702-A.....	12
24 P.S. § 17-1714-A.....	13
24 P.S. § 17-1717-A.....	6, 15
24 P.S. § 17-1719-A.....	7
24 P.S. § 17-1719-A(5).....	10

24 P.S. §17-1720-A	7, 15
24 P.S. §17-1720-A(a).....	7
24 P.S. §17-1729-A.....	8
24 P.S. § 17-1729-A (a)(1)	8
24 P.S. § 17-1729-A(c).....	15
24 P.S. §17-1729-A (1).....	15

Rules

Pa. R.A.P. 531.....	2
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VII. STATEMENT OF INTEREST OF AMICUS CURAIE

The Pennsylvania School Boards Association (“PSBA”) is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational technical schools and community colleges, and the members of the boards of directors of those public school entities. PSBA organized in 1895 as the nation’s first school boards association. It provides its members with an array of advocacy training, and other services aimed at promoting excellence in public school governance. The efforts of PSBA in assisting public school entities by promoting the interests of effective and efficient public school governance, also benefit taxpayers and further the general public interest in the thorough and efficient public education of youth.

As amicus curiae, PSBA endeavors to assist state and federal courts in selected cases presenting important legal issues of statewide or national significance, by offering benefit of PSBA’s statewide and national perspective, experience and analysis relative to the legal, policy, management, liability, fiscal, ethical and other considerations, ramifications and consequences that should inform any resolution of the particular disputed issues in such cases. For decades, PSBA’s informed insight, thorough research and careful legal analysis have made the Association a respected and valued participant in state and federal appellate proceedings involving public schools. PSBA files this brief pursuant to Pa. R.A.P. 531 to offer this Honorable Court PSBA’s perspective on how the result of this case might impact local school districts across the Commonwealth. This case involves the propriety of engrafting an amendment

procedure into the Charter School Law including investing *de novo* review in the State Charter School Appeal Board.

II. STATEMENT OF CONCURRENCE IN PRELIMINARY MATTERS

Your *Amicus Curiae*, PSBA, concurs in such statements that are made by Appellants, The School District of Philadelphia and School Reform Commission regarding the Statement of Jurisdiction, the Order in Question, Statement of the Scope and Standard of Review, the Statement of the Questions Involved and the Statement of the Case.

III. SUMMARY OF ARGUMENT

The Commonwealth Court's decision should be reversed. The Charter School Law ("CSL") establishes a comprehensive procedure for review of a charter application, whereby a charter school must provide detailed information on a wide variety of factors establishing a road map for the charter school's program and governance. The provisions of the application must be incorporated into a legally binding charter. One or more material violations of this binding agreement may be the basis for revocation or nonrenewal of the charter by the chartering school district.

In a series of decisions, leading up to this case, Commonwealth Court legislated a charter amendment and appeal process not found in the CSL. In doing this, the Court acted contrary to the explicit, comprehensive scheme created by the Legislature for the establishment, running and oversight of charter schools.

Here, Commonwealth Court extended its court-created legislative scheme, holding that if a charter school requests an amendment and the chartering district does not act on the request, within an unspecified period of time, the failure to act constitutes an appealable deemed denial. This completely divests the chartering school district of its oversight responsibilities. Instead of having to submit to a rigorous review and hearing on criteria considered fundamental to granting an initial charter, the court tipped the balance of accountability established by the CSL and established a standard of review which favors approval of virtually any requested amendment, regardless of how material or ambitious the change. By tying review to the standards applied in reviewing a charter nonrenewal or revocation, the Court directed the state Charter School Appeal Board (“CAB”) to generally grant charters’ requests for amendments, absent a finding the charter school is performing so poorly its charter could be revoked or non-renewed. Thus, a sort of “Peter Principle” approach to amendments has been formally adopted by the Court, whereby a charter that is not failing in its current performance is presumed to be capable of operating at more than twice its current enrollment or capable of adding an elementary school to what has thus far been a secondary school program, without undergoing rigorous review of its capacity for success or whether this is a worthwhile amendment consistent with the charter’s stated mission and education goals and with the legislative intent of the CSL. This is a

dangerous, slippery slope, particularly with regard to material changes such as the expansion contemplated here.

In addition, this court created scheme confers jurisdiction over appeals of amendment denials or deemed denials in the CAB. Given the CAB's *de novo* authority to review those decisions over which it has jurisdiction, the result is to permit the CAB to second guess a chartering district's decision not to consent to an amendment of a legally binding agreement. If charter schools do have a property interest in materially amending their charters, the chartering district should be able to require them to provide the information required in an initial charter application. The chartering district alone should have authority to review and act on this request, after which a resultant adverse adjudication would be appealable to the appropriate Court of Common pleas pursuant to Local Agency Law.

IV. ARGUMENT

In an effort to address perceived deficiencies in the CSL, Commonwealth Court has issued a series of opinions over the past four years that transform charters from legally binding agreements derived from a comprehensive application and review process to a document which one party has a *pro forma* right to amend on virtually any basis and to secure a *de novo* review by the CAB of any denial, based on the standards for revocation or nonrenewal of a charter. In this case, the Court extended its amendment procedure to treat a failure to act on an

amendment request as a deemed denial which may be appealed to the CAB without prior review or action by the chartering school district. Not only is this procedure completely absent from the CSL, it applies none of the standards established by the Legislature for adoption of a charter, regardless of the nature of the requested amendment.

A. THE CSL PROVIDES THE COMPREHENSIVE PROCEDURE FOR ESTABLISHING THE PROVISIONS OF A LEGALLY BINDING CHARTER AGREEMENT IN ORDER TO ASSURE THAT CHARTER SCHOOLS MEET FUNDAMENTAL STANDARDS OF QUALITY AND VIABILITY IN ACCORDANCE WITH LEGISLATIVE INTENT; COMMONWEALTH COURT ERRED WHEN IT CREATED AN EXTRA-LEGISLATIVE SCHEME FOR AMENDING CHARTERS THAT IS NOT FOUND IN THE CSL.

In its most recent case addressing the “right” of a charter school to secure amendments to its legally binding charter prior to this case, Commonwealth Court held:

... 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.

Lehigh Valley Dual Language Charter School v. Bethlehem Area School District, 97 A.3d 401, 406 (Pa. Cmwlth. 2014) (emphasis supplied). The Court reasoned that in carrying out the legislative intent of the CSL to provide an alternative public education option to families, it is obligated to ensure the law does not become too “unwieldy.” *Id.* at 408. The result is instead to undo the protections and balance the Legislature incorporated into the CSL to ensure accountability. 24 P.S. §§ 17-

1717-A, 17-1719-A. This creates an unlegislated pathway for charter schools to virtually unilaterally rewrite the material provisions of a legally binding charter agreement with little or no supporting information.

Here, Discovery Charter School seeks to relocate and expand its enrollment by over 70%, from its present cap of 620 students to 1050 students. The Court recognized the CSL “... does not expressly address charter amendments” but went on to say it has held “that charter schools have the right under the Charter School Law to seek amendments of their charters.” *Discovery Charter School v. School District of Philadelphia*, 111 A.3rd 248, 252 (Pa. Cmwlth. 2015).

The CSL establishes a detailed and rigorous process for securing a charter from the local school district where a charter school will be located. The application must include specific information in seventeen areas including the grades or ages the school will serve, the school’s mission and education goals; curriculum and methods to assess whether students are meeting goals; its financial plan; its physical location; and other matters relating to personnel, students and specified requirements of the Public School Code. 24 P.S. § 17-1719-A. A written charter must contain the provisions of the charter application and be signed by the boards of the chartering district and the charter school. 24 P.S. § 17-1720-A. The CSL provides that a charter, “...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 (a). Cf. *The School District of Philadelphia v. Department of Education*, 625 Pa. 418, 92 A. 3d 746, (2014) (Charter school was bound by a valid provision in its executed charter and was not entitled to disregard this based on a subsequent amendment to the CSL.)

A chartering school district has the power to revoke or not renew a charter for the reasons set out in Section 1729-A of the CSL. 24 P.S. §17-1729-A. First among the bases for revocation or nonrenewal is, “One or more material violations of any of the conditions, standards or procedures contained in the [executed] written charter...” 24 P.S. § 17-1729-A (a)(1). However, in this case, these standards are eclipsed by an amendment procedure developed solely through Commonwealth Court’s decisions and found nowhere in the CSL. Charter schools may not unilaterally operate outside their legally binding charters. See, *Graystone Academy Charter School v. Coatesville Area School District*, 99 A.3d 125 (Pa. Cmwlth. 2014) (Argument that deviations from charter relating to curriculum, length of school year, failure to establish library and failure to implement innovative educational programming were known to the chartering district did not relieve charter school from securing formal approval from the chartering district which has accountability over the charter school); *Career Connections Charter High School v. School District of Pittsburgh*, 91 A.3d 736 (Pa. Cmwlth. 2014) (Court upheld revocation of a charter where the charter school failed to secure

amendments from the chartering school district to lower the student performance standards set out in the charter, dispense with the innovative scheduling and year round calendar provided for in its charter and to change its planned interdisciplinary curriculum to interdisciplinary activities).

However, in the case *sub judice* and those leading up to it, once a charter school requests an amendment to its charter, all bets are off. Instead of complying with the charter that was fully vetted by the chartering district, a charter school may simply request a material amendment to its charter and is entitled to approval from the CAB, so long as it does not meet one of the bases for nonrenewal or revocation. *Discovery Charter School v. School District of Philadelphia*, 111 A.3d 248, 253 (Pa. Cmwlth. 2015). This operates to undermine and potentially thwart a chartering school district's statutory right to revoke or non-renew a charter for material violations. There is nothing in the CSL which stands for the court's apparent proposition that on Tuesday, a charter school may face revocation for material violations of its legally binding charter unless, on Monday, it had already filed a request to materially amend its charter. This is the next logical progression in the sequence of Commonwealth Court's revision to the CSL which makes it far too easy for charter schools to secure amendments: Once a request is made, according to Commonwealth Court, a material amendment must be granted on the basis of little or no information to the chartering school district because, for example, the

charter school has a “property right to operate a charter school capable of accommodating all of its current and prospective pupils,” *Montessori Regional Charter School v. Millcreek Township School District*, 55 A.3d 196, 201 (Pa. Cmwlth. 2012). Thus, a charter school facing a nonrenewal for failure to meet student performance standards set forth in its legally binding charter could request an amendment that dumbs down its “methods of assessing whether students are meeting educational goals” and stands a good chance of securing this amendment. 24 P.S. § 17-1719-A(5).

In *Graystone Academy Charter School v. Coatesville Area School District*, 99 A 3rd 125 (Pa. Cmwlth. 2014), the legally binding charter included a “measurable goal that 85% of students who attend the Charter School for five years will achieve grade-level proficiency as measured by the state assessments in math, science, reading and social studies.” *Id.* at 139. In fact, at the time it sought renewal of its charter, the students in the group that attended Graystone for five years had achieved less than half of this annual measurable goal in each tested subject area. The Court rejected Graystone’s argument that this provision in its legally binding charter should not carry weight because it represents merely a goal, not a mandate. Under the CSL, Graystone was required to provide measurements for student performance in its charter application, in part to demonstrate an “essential CSL purpose ... to ‘[i]mprove pupil learning.’” *Id.* The charter school application is

automatically made a part of the written charter, a binding legal agreement. Setting aside the fact that in this case Graystone’s performance was also deficient under Pennsylvania Department of Education (“PDE”) regulations, which provides an independent basis for revocation or nonrenewal of a charter, what if Graystone met the standards in the PDE regulations but still fell far short of its ambitious measurable goal meant to differentiate it from public school districts in its attendance area. Suppose it had requested an amendment to reduce this goal to something closer to its actual performance but acceptable under PDE standards. Under the reasoning of Commonwealth Court’s amendment cases at issue here, the same Court which noted it would be an absurd implementation of the CSL to permit a charter school to “immediately deviate from any of the items set forth in the charter application” if its application was not expressly incorporated into its written charter would likely have decided this issue differently. Even though Graystone’s initial charter was granted after a comprehensive review process to include ambitious measurable goals for improved pupil learning, it could, without offering meaningful support of its position, request an amendment to the stated goal in its original charter and secure review from CAB pursuant to a standard which favors amendments. In this manner, charter schools can water down their original charters and subvert the legislative intent of the CSL.

The Legislature provided that charters are legally binding agreements and material violations constitute grounds for revocation or nonrenewal. By rewriting the CSL to require chartering school districts or the CAB to approve material charter amendments without subjecting them to rigorous review comparable to that required to secure an initial charter, Commonwealth Court has undermined rather than furthered the legislative intent of the CSL articulated in 24 P.S. § 17-1702-A.¹ It has decided that charter schools have a free pass once their initial charters are granted unless they are failing. There is no accountability unless the implementation of the unvetted amendment is unsuccessful and results in grounds for revocation or nonrenewal.

The Legislature considers material violations of a charter sufficiently serious to warrant a charter nonrenewal or revocation. Although it enumerates the powers of charter schools in 24 P.S. § 17-1714-A, the Legislature did not provide that charter

¹ It is the intent of the General Assembly, in enacting this article, to provide opportunities for teachers, parents, pupils and community members to establish and maintain schools that operate independently from the existing school district structure as a method to accomplish all of the following:

- (1) Improve pupil learning.
 - (2) Increase learning opportunities for all pupils.
 - (3) Encourage the use of different and innovative teaching methods.
 - (4) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
 - (5) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
 - (6) Hold the schools established under this act accountable for meeting measurable academic standards and provide the school with a method to establish accountability systems.
- 24 P.S. 17-1702-A.

schools could amend the written charter agreement over the objections of the chartering school district. Indeed, a charter school has the authority only to carry out enumerated duties and those duties “**necessary to fulfill its charter** and which are not inconsistent with this article.” *Id.* Certainly, as noted by the School District of Philadelphia, school districts may adopt policies or implement practices which facilitate a charter school’s request for one or more amendments pursuant to a review and negotiated agreement. However, the Legislature chose not to establish an amendment process in its comprehensive scheme. Commonwealth Court, on its own initiative, has. This Court should find that there is no statutory right to an amendment of a charter.

B. ASSUMING ARGUENDO THAT DENIAL OF CHARTER AMENDMENTS ARE SUBJECT TO REVIEW, COMMONWEALTH COURT ERRED IN INVESTING THE CAB WITH JURISDICTION OVER A DENIAL OF A CHARTER AMENDMENT OR THE FAILURE TO ACT ON A CHARTER AMENDMENT IN AN UNSPECIFIED PERIOD OF TIME

Commonwealth Court held in this case that the chartering district’s decision to defer action on Discovery Charter School’s requested amendment “constitutes a denial of the amendment and that [the CAB] therefore erred in concluding it lacked jurisdiction.” *Discovery*, 111 A.3d at 254. In finding that a failure to act in an unspecified time constitutes a deemed denial of an amendment appealable to the CAB, the Court extended its already erroneous premise that the CAB has

jurisdiction over any issues relating to a denial or deemed denial of a charter amendment. Further, it divested the chartering school district of its right to rely on a legally binding agreement absent an amendment. Assuming the denial of an amendment is subject to some kind of review, there is no basis in the CSL to create a “deemed denial” of an amendment based on a vague standard as to when amendments should be considered. It is particularly troublesome that the court vested the CAB with this judicially created authority to review a requested amendment based on no substantive review and final decision from the chartering school district.

The CSL creates detailed procedures and criteria for securing a charter, renewal or nonrenewal and revocation. It expressly invests the CAB with the power to hear appeals in only three circumstances: If a school board denies a charter application, the reasons for denial must be specified and the applicant may either submit a revised application for further consideration or bring an appeal to the CAB, provided it secures sufficient legal support for an appeal. An applicant may also appeal a deemed denial when the chartering school district fails to act within the timeframes set under the CSL for public hearings or a final decision. In this circumstance, the application is submitted to the CAB and it has authority to

review and grant or deny the charter application. Lastly, the CAB has jurisdiction over appeals of nonrenewal or revocation of charters. 24 P.S. § 17-1717-A.²

Commonwealth Courts' reiterated rationale for judicially vesting jurisdiction in the CAB rests on a concept that the CAB has necessarily implied authority to hear appeals on requested amendments because the CSL gave the CAB jurisdiction over the specified actions or inactions of chartering school districts as expressly outlined in 24 P.S. § 17-1717-A. *Northside Urban Pathways Charter School v. Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012). However, it applied the concept of necessary implication far too broadly. Implied grants of power must stem from an express statutory authority. *Burger v. School Directors of McGuffey School District*, 839 A.2d 1055 (Pa. 2003), cited in support of this holding, merely states that Section 211 of the Public School Code, 24 P.S. §2-211, vests school districts with the necessary powers to carry out the provisions of the Public School Code. It does not state that where the school code is completely silent on a topic and a court thinks it should have addressed it, it may write the whole new issue into the law. The implication must spring from something and

² A written charter is a legally binding agreement executed by the chartering school board and the charter school for an initial term of three to five years with the opportunity to renew the agreement for five year terms. 24 P.S. § 17-1720-A. During the term of a charter or at the end of the term, the chartering school board may revoke or refuse to renew the charter for cause, including, "One or more material violations of any of the conditions, standards or procedures contained in the written charter signed pursuant to section 1720-A." 24 P.S. § 17-1729-A (1). A school board must provide notice of the specific reasons for a nonrenewal or revocation and a hearing prior to taking action. 24 P.S. §17-1729(c).

must be necessary to carry out essential functions of the entity. *See McKeesport Hospital v. Pennsylvania State Board of Medicine*, 539 Pa. 384, 388-89, 652 A.2d 827, 829-30 (1995).

The CAB is vested with specific power to review specific school board decisions and the deemed denial of an initial charter. This jurisdiction does not extend to review of requests to amend a charter. In considering whether to judicially impose a right to appeal the grant of a charter into the CSL, this court noted:

The CSL simply does not provide for an appeal from a local board of directors' decision to *grant* a charter. Upon examination of the CSL in its entirety, we agree with the Commonwealth Court that the Legislature's omission in this regard was deliberate. We decline to recognize an appeal procedure when the Legislature did not see fit to create one.

Mosaica Academy Charter School v. Department of Education, 572 Pa. 191, 813 A.2d 813, 819 (2002).

This does not leave a charter school without recourse if in fact denial of an amendment request meets the definition of an adjudication under the Local Agency Law, which provides for a court review of:

Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

2 Pa. C.S.A. §§ 101, 752.³

The Legislature did not provide for the review of the denial of an amendment to a legally binding charter, which your amicus asserts was a deliberate omission. This Honorable Court should decline to recognize an appeal procedure vesting jurisdiction in the CAB which was not created in the CSL. The Local Agency Law sufficiently protects any due process rights the charter school may have in an amendment to a charter.

V. CONCLUSION

For the reasons set forth in this brief, as well as for the reasons set forth in the briefs filed by the School District of Philadelphia and its School Reform Commission, PSBA respectfully requests that this Honorable Court issue an order which reverses the order of Commonwealth Court.

Respectfully Submitted,

DATE: July 7, 2016

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³ Key to this, of course is whether Commonwealth Court is correct in its decisions holding a charter school has a property interest in its charter which extends to a property interest in amending a charter. *See, Northside Urban Pathways Charter School v. Charter School Appeal Board*, 56 A.3d 80 (Pa. Cmwlth. 2012).

CERTIFICATIONS

This 7th day of July, 2016, I certify that:

Electronic filing. The electronic version of this brief that is filed through the Court’s PACFILE web portal is an accurate and complete representation of the paper version of this document that is being filed by appellants.

Service. I served a true and correct copy of this brief through the Court’s PACFILE system on the following counsel of record, which services satisfies Rule 121 of the Pennsylvania Rules of Appellate Procedure:

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