

BALTIMORE EDUCATION
TRUST FOR YOUNG MEN,
INC.,

Appellant,

v.

BALTIMORE CITY BOARD
OF SCHOOL
COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-38

OPINION

INTRODUCTION

Baltimore Education Trust for Young Men (“Appellant”), the charter operator of Banneker Blake Academy for Science and Arts (“Banneker”), appeals the decision of the Baltimore City Board of School Commissioners (“local board”) not to renew Banneker’s school charter based on its failure to meet renewal conditions. We referred the matter to the Office of Administrative Hearings (“OAH”) where an Administrative Law Judge (“ALJ”) issued a Proposed Decision recommending that the State Board uphold the non-renewal decision. Appellant filed exceptions to the ALJ’S Proposed Decision and the local board responded. This memo addresses Appellant’s exceptions.

FACTUAL BACKGROUND

The full factual background is set forth in the ALJ’s Proposed Decision at pp. 5 – 27. We have set forth some of the essential facts below for purposes of reviewing the exceptions.

Banneker serves students from the 6th grade through 8th grade. Appellant received its initial charter to operate Banneker for a three-year period from July 1, 2015 to June 30, 2018. Appellant underwent the charter renewal process during the 2017-2018 school year.

The Baltimore City Public Schools (“BCPS”) Office of New Initiatives (“ONI”) evaluated the charter school for renewal. The three key areas of review were: (1) Academic Success (50%); (2) School Climate (25%); and (3) Financial Management and Governance Practices (25%). Here are the results: ¹

¹ For Category 1 – Academic Success, a “Highly Effective” rating is scoring in the 80th percentile or above; an “Effective” rating is in the 65th to 79th percentile; a “Developing” rating is in the 50th to 64th percentile; and a “not Effective” rating is below the 50th percentile.

Category 1: Is the School an Academic Success?		
Topic	Standard	Rating
Absolute Student Achievement	PARCC scale score Math (grades 6-8) ELA (grades 6-8) (69 th percentile of economic disadvantage group for math and ELA)	Effective Effective
Student Achievement Trend	PARCC mean scale score Math (grades 6-8) ELA (grades 6-8)	N/A N/A
Student Achievement Growth	PARCC median student growth Math (grades 6-8) (81 st percentile) ELA (grades 6-8)(84 th percentile)	Highly Effective Highly Effective
SER, Highly Effective Instruction	Extent to which school leadership supports highly effective instruction and teachers plan and deliver highly effective instruction and establish a classroom environment where teaching and learning can occur	Developing
Fidelity to Charter	Extent to which school has implemented its mission, delivered high quality programming, gathered data, addressed challenges evident in the data	Developing
Overall Rating	Academics	Effective

Category 2: Does the School have a Strong Climate?		
Topic	Standard	Rating
SER Score, Talented People	How school selects, evaluates and retains effective teachers.	Effective
Vision and Engagement	SER score	Developing
Parent, Staff, Student Satisfaction	Staff survey Student survey Parent survey	Developing Effective Not Effective
Cohort Retention	Cohort retention rating	N/A
Attendance, Chronic Absence	School has implemented effective strategies to keep student attendance high and chronic absences low, or led to significant decrease in chronic absence	Effective
Suspensions	School has implemented effective strategies that keep suspension low or led to a significant decrease	Effective

Programming for Students with Disabilities	School has shown trajectory of growth, is aware of its data and responsibilities, does not have gaps or had decreased gaps in data related to performance, consistently implemented processes, interventions, and strategies to support student outcomes	Not Effective
Climate Overall Rating	Climate	Developing

Category 3: Has the School Followed Sufficient Financial Management and Governance Practices?		
Topic	Standard	Rating
Audit Content, Internal Control	Extent to which the school's independent auditor reports offer unqualified opinions and no management points, statement of cash flow and ratio of assets to liabilities indicate the operator has strong performance on short term liquidity measures	Does Not Meet Expectations (Two years of audits showed negative net assets and insufficient cash reserves)
Operator Capacity	Extent to which school has operated effectively, consistently met state, federal district reporting requirements and obligation, no Notice of Concern or Reprimand	Not Effective (Violation of Title I spending rules; failure to fully spend Title I and Title II grants; violations of Human Capital and Special Education policies and other district requirements)
Strategic Leadership/Governance	Extent to which school establishes goals that guide practices to meet student needs, allocates resources to address student achievement, and has an operator that provides stewardship and oversight of the school	Developing
Overall Rating	Governance/Financial Management	Not Effective

(Exceptions, Ex. J at 10 –13).

Although Banneker received an effective rating in the 50% measure of academic achievement area,² BCPS had concerns related to the other 50% measure, specifically special education services, operations, financial management, and facility acquisition. Based on these findings, on February 13, 2018, the local board voted to renew Appellant's charter contract to

² Although BCPS gave Banneker an overall Effective rating in academics, according to MSDE data, in 2017, only 5.6% of all students at Banneker who took the PARCC exam scored as proficient or above in ELA 6-8 and less than 5% scored as proficient or above in math 6-8. In 2018, only 5.1% of all students scored as proficient or above in ELA 6-8 and less than 5% scored as proficient or above in math 6-8. In both years, less than 5% of special education students scored as proficient or above in both ELA and math 6-8.

operate Banneker for one year until June 30, 2019, with conditions related to the areas of concern. (*Id.* at 9). The local board advised that Appellant’s failure to meet any of the following conditions could lead to termination of the charter contract:

- Address Office of Special Education Monitoring and Compliance (“OSEMC”) audit findings; new findings substantiated by OSEMC or the Office of Special Education; and/or deliver and make progress on the school’s plan and processes to meet the needs of students with disabilities as well as students with 504 plans, based on either a review conducted by the Office of Special Education and/or by a consultant approved by the CEO/Designee;
- Create a plan and/or address challenges in the operations of the school identified and detailed in renewal and/or meet the requirements or deadline established in the plan as determined by the CEO/Designee with all issues requiring full resolution by October 1, 2018; the plan must include SMART goals for substantially improving the financial health of the school and operator, and clear separation of roles and responsibilities of the operating Board, the school leader and the executive director/board liaison of the operator; and/or the school must not violate any Applicable Requirements as determined by the CEO/Designee; and
- Develop an approvable action plan that addresses each of the concerns by July 30, 2018; such action plan must address procurement of a permanent facility including financing, renovating/readying facility for use by the school, securing permanent leadership for the school, and providing professional development for each sector of the school – teaching staff, school leadership and the operating board; the plan must contain SMART Goals approved by the CEO/Designee and must result in changes in practices that demonstrate or show a trajectory towards effectiveness as determined by the CEO/Designee.

(*Id.* at 2).

During September to October 2018, BCPS conducted further evaluation of Banneker to determine if the conditions for renewal had been met. BCPS determined that Appellant did not meet the conditions for renewal in the areas of special education and operational practices, and only partially met conditions for acquisition of a permanent facility and financial management. Based on these findings, on November 13, 2018, the local board voted not to renew the Appellant’s charter school contract. (*Id.* at 4).

Special Education and 504

The most serious concerns raised by BCPS were in the area of special education practices. Banneker demonstrated an ongoing pattern of non-compliance in providing special education and 504 services to students. BCPS determined that the school failed to fully address OSEMC audit findings from May 2018 which resulted in the need for individualized education program (“IEP”) meetings for students as a result of special education violations. BCPS found that the school did not have special educator service schedules in place for a significant portion

of the 2018-2019 school year. This meant that there was no way to confirm that special education students had been receiving services in accordance with their IEP's. In a follow-up visit in August 2018, OSEMC substantiated new findings that required the school to conduct IEP meetings for all currently enrolled students with IEPs, which resulted in an award of hundreds of hours in compensatory educational services for some students. In addition, BCPS found that some teachers did not receive their students' 504 plans until late October, which meant they were not providing the required services to their students. Due to deficiencies in the special education practices, BCPS provided extensive support to Banneker to try to help the school correct the problems and fulfill its responsibilities under the special education law. (*Id.* at 4-5).

Operational Practices

BCPS also found deficiencies in Appellant's operational practices. It found that Appellant had violated the applicable collective bargaining agreement ("CBA") by having operator staff perform functions that were reserved for employees in CBA positions. BCPS further found that these practices led to violations of the Family Educational Rights and Privacy Act ("FERPA") because unqualified operator employees had access to confidential student data. There were also concerns with regard to violations of BCPS policy and State requirements for accurate grade reporting. *Id.*

Permanent Facility

BCPS found that the Appellant had only partially met the requirement related to its acquisition of a permanent facility. At the time of the review, the Appellant had identified a potential facility in negotiation with the Archdiocese of Baltimore and had reported an anonymous benefactor to assist with the acquisition costs. BCPS, however, had requested a renovation plan for the new facility that was not provided. Appellant also initially did not show BCPS that it had funds set aside for the renovation of the facility as required, but later did provide a revised budget. *Id.*

Financial Management

BCPS also found that Appellant had only partially met the renewal condition for financial management. Appellant was able to maintain three months of operating budget in the bank in June and August 2018 as required, but was slightly below for July. Despite this, BCPS still had concerns about financial viability due to low enrollment, which meant a decrease in funding to the school. BCPS noted that Banneker has not been able to meet its contractual minimum enrollment level in the four years of its existence. (*Id.* at 6).

On December 13, 2018, Appellant appealed the local board's non-renewal decision to the State Board. We transmitted the case to OAH for review by an ALJ. The ALJ conducted a hearing on June 25 and 26, 2019. On August 12, 2019, the ALJ issued a Proposed Decision recommending that the State Board affirm the local board. Appellant filed exceptions to the ALJ's proposed decision and the local board responded.

Oral argument on the exceptions was held on September 22, 2020.

STANDARD OF REVIEW

For decisions of the local board involving a local policy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A; *See also Northwood Appold Community Academy Pub. Charter Sch. v. Baltimore City Bd. of Sch. Comm'rs.*, MSBE Op. No. 14-04 (2014).

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.06E.

The State Board transferred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

Appellant has filed exceptions to the ALJ's Proposed Decision. We address the exceptions below.

Special Education and Section 504

There are two primary special education issues addressed by the ALJ: (1) general compliance with IDEA requirements; and (2) the placement of special education students in self-contained classrooms segregated from the general education population. There is one section 504 issue.

Appellant takes exception with the ALJ's determination that Banneker had problems with special education compliance under the Individual with Disabilities Education Act ("IDEA"). This was a significant basis for the local board's non-renewal of the charter. The record supports the findings related to special education non-compliance. For example, Banneker had problems convening timely IEP meetings, complying with IEPs and maintaining the required documentation to demonstrate that it had provided special education services to its students. BCPS had to order Banneker to convene IEP meetings for all of its special education students and ultimately grant compensatory educations for its failures. Appellant was aware that failure to comply with the special education renewal conditions alone could result in termination of the charter, as set forth in the charter renewal agreement. (Appellant Ex. 5).

Appellant's response to Banneker's special education deficiencies is that special education compliance is ultimately the responsibility of the school system and, thus, BCPS bore some or all of the responsibility for the violations. While there is no doubt that BCPS has responsibility under the special education law to ensure that students in its jurisdiction are receiving special education services in compliance with IDEA, it was the Appellant who had the

responsibility to actually implement those special education services at Banneker. BCPS provided regular assistance and direction to Banneker to help get it into compliance, but the compliance issues continued despite this assistance.

Appellant takes exception to the ALJ's discussion regarding Banneker's placement of two special education classrooms at opposite ends of the second floor hallway segregated from their non-disabled peers. (Exceptions at 10-13). On October 9, 2018, Mr. Guild recommended that Banneker immediately move the classrooms to integrate them more with the general education classrooms. (Exceptions, Ex. P). The ALJ acknowledged that Ms. Parfait, Banneker's principal, moved the classrooms as requested. In the Proposed Decision, the ALJ discussed the fact that Ms. Parfait had intended to move the students to a single consolidated classroom in an integrated area of the building because it was difficult to transition the students and they would elope from the classrooms, but that the room was not ready at the beginning of the school year. She consolidated the students into one classroom once it was ready. Although the student to teacher ratio remained the same, BCPS questioned whether it was best practice to have so many students on three different grade levels in one space. (Proposed Decision at 17-18, 38).

Appellant essentially argues that the entire discussion about the classrooms should be disregarded because BCPS did not take issue with the relocation and consolidation in the October 22, 2018 Site Visit Report. (Exceptions, Ex. Q). We do not place much weight on this issue given that BCPS did not flag it as an issue during the October 22 site visit, but the fact remains that it did occur. The ALJ recognized that Banneker had complied with the directive to move the classrooms, but discussed the situation in terms of it raising concerns regarding Banneker's consideration for the needs of the students in its decision-making. (Proposed Decision at 38).

Appellant also takes exception to that ALJ's statement that "teachers did not have the [504] plans at the start of the school year and therefore could not give students the accommodations they were due." Appellant points out that there was testimony and evidence that 504 plans were available to teachers in electronic format within the first week of the school year. (Exceptions at 12-13). While this may show that it was generally the case that the 504 plans were available electronically, it does not negate the ALJ's finding that at least two resource room teachers did not sign for their students' section 504 plans until October 22, 2018. (Proposed Decision at 19).

Financial Stability

Appellant argues that the ALJ went beyond the scope of the local board's reasoning for denying Banneker's charter with respect to Banneker's financial stability. In discussing Banneker's financial stability, the ALJ explained that for financial stability purposes, BCPS wanted Banneker to have three months of operating cash in the bank. The ALJ noted that Banneker met this requirement by September 2018, but that its satisfaction of the requirement was tempered by the fact that Banneker had to eliminate programs in order to do so, and that Carl Frank Stokes, Co-Founder of Banneker, and Benjamin Dubose, Chief Financial Officer, were not collecting salaries. (Proposed Decision at 40). Appellant argues that BCPS did not impose any conditions on how Banneker was to meet the three month requirement, thus it was not "improper" for Banneker to eliminate programs or have some employees not collect a salary to do so. (Exceptions at 10). The ALJ did not state that it was "improper" or a violation of a condition imposed by BCPS. She simply noted what took place financially. Moreover, the fact remains that BCPS had concerns regarding the fiscal viability of the school due to low

enrollment, regardless of the reason for it, and the ALJ recognized this as an issue. (Proposed Decision at 40). The local board cannot turn a blind eye to existing facts that impact the finances of a charter school. If it does so, it runs the risk of abdicating its responsibility to the students and public school community to require its charter schools to demonstrate fiscal viability. *See Possibility Stem Preparatory Academy Charter Sch. v. Prince George's Bd. of Educ.*, MSBE Op. No. 11-43 (2011).

Family Educational Rights and Privacy Act

The Appellant maintains that the ALJ erred in finding that Banneker violated FERPA in the ALJ's discussion of Robert Allen, an employee of Appellant, and his participation in IEP meetings. (Proposed Decision at 41). The ALJ found that Mr. Allen attended an IEP meeting during the 2018-2019 school year during which the IEP team would have discussed education records in Mr. Allen's presence, thereby violating FERPA's privacy requirements because Mr. Allen was not in an instructional position. *Id.* Appellant argues that the meeting referenced by the ALJ was actually a transition meeting, not an IEP meeting, and that no FERPA violation occurred because no individual student information was discussed in Mr. Allen's presence. (Exceptions at 4). Appellant also takes exception to the finding that Mr. Allen was not an individual with authorized access to student records.

FERPA is a federal law that protects the privacy of students' education records. *See* 20 USC 1232g; 34 CFR Part 99. It generally bars a school system from releasing personally identifiable information from education records without prior consent for the disclosure, except in certain circumstances enumerated in the law. One of the circumstances in which disclosure without prior consent is permitted is if the individual to whom the record is disclosed is a "school official whom the agency or institution has determined to have legitimate educational interests." 34 CFR. §99.31(a)(1)(A). While FERPA guidance indicates that a school official may include a wide array of individuals as the Appellant points out, it is still up to the local school system to designate who may constitute a school official within its jurisdiction. Further, even if the individual is a school official, that individual must have a legitimate need to access the information contained in the education record. *Id.*

As to whether Mr. Allen attended an IEP meeting at which individual student information was disclosed, there is evidence in the record to support this conclusion. We acknowledge the ALJ's Finding of Fact ("FOF") #101 in which she states that Mr. Allen attended a transition meeting at which individual student information was not disclosed. (Proposed Decision at 23). Although the ALJ made no specific factual finding regarding an IEP meeting attended by Mr. Allen, it is not entirely clear that the IEP meeting referenced by the ALJ in the discussion section of the Proposed Decision was a mix up with the transition meeting referenced in FOF #101. The record contains testimony by Mr. Guild, an Education Specialist from BCPS, that Mr. Allen attended at least two IEP meetings, which were separate from the transition meeting, and that he discussed specific student IEP information with Mr. Allen. (Reply to Exceptions, Ex. 1).

Furthermore, with regard to the ALJ's determination that Mr. Allen was not an instructional employee entitled to access student records, the record discloses that there was a disagreement between the parties regarding the role served by Mr. Allen at Banneker. Appellant maintained that Mr. Allen served in a leadership role at the school and was assigned to issues surrounding school climate and culture. (Exceptions at 5). Ms. Alvarez, Executive Director of the Office of New Initiatives, testified that Mr. Allen was not a certified teacher or administrator and could be a substitute, coach or mentor. (Exceptions, Ex. F). Regardless of whether Mr.

Allen's position qualified him as a "school official" under FERPA, Appellant presented no evidence demonstrating that he had legitimate educational interests in individual student IEP information under FERPA.

Issue Regarding Robert Douglas

The ALJ found that Robert Douglas was a temporary, substitute teacher at Banneker who was advising and coaching teachers on their performance and serving as a testing coordinator without proper qualifications. (Proposed Decision at 24). The ALJ determined that "Mr. Douglas' role at Banneker suggested an unacceptable lack of leadership over its personnel." (*Id.* at 41).

Appellant argues that the ALJ ignored the testimony of Mr. Stokes who testified that Mr. Douglas was a substitute teacher, a resource officer, and did not administer any student State tests. (Exceptions, Ex. D). Yet, as Appellant acknowledges, there was conflicting testimony from Tia Grasque, District Human Resources Personnel, that Mr. Douglas was holding himself out as a testing coordinator and was advising and coaching teachers. (Exceptions, Ex. H). BCPS was concerned that he was administering the PAARC testing without proper credentials. *Id.* As the finder of fact, it is the ALJ's job to sort through conflicting evidence and reach factual conclusions based on the weight the ALJ assigns to that evidence. *Hoover v. Montgomery County Bd. of Educ.*, MSBE Op. No. 19-03; *Karp v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-39 (2015). It is not necessary for the ALJ to cite to every piece of evidence or testimony given in a decision. Thus, the ALJ did not err in relying on Ms. Grasque's testimony in making this determination.

Appellant also maintains that the ALJ failed to acknowledge Banneker's cure to the alleged issues with respect to Mr. Douglas. There was no need for the ALJ to acknowledge this given that the fact that the issue existed in the first place demonstrated a flaw in Appellant's operations.

School Building

The Appellant maintains that the ALJ erred in citing lack of a permanent school building as a basis for the non-renewal. It argues that Banneker is in a "catch 22" or a "what comes first, the chicken or the egg?" position with regard to the facility issue, similar to a new charter school applicant seeking a school facility. (Exceptions at 6-8).

The ALJ's Proposed Decision contains some discussion of Banneker's attempt to secure a permanent school building. The ALJ recognized that Banneker presented evidence that it has a letter of intent to purchase a building from the Archdiocese of Baltimore, but that Banneker cannot move forward until the charter renewal is approved. The ALJ noted that Banneker was aware when it started the school that it was only leasing the building from BCPS while BCPS did not have a need for the building, and that it needed to find a permanent facility. There is no evidence in the record that Banneker made any effort to do so until BCPS advised Banneker that it was taking back the building to use for another purpose. The ALJ further noted that the Archdiocese building needs renovation and to fund the renovation Banneker had to terminate certain school programs, which the ALJ found to suggest a financial instability. The ALJ also found that, as a result of the necessary renovation, Banneker would not be able to occupy the Archdiocese building under the timeline set forth by the school system. (Proposed Decision at 39).

The State Board cases on the denial of charter school applications have highlighted the difficulty encountered by charter school applicants in securing a school building. The State Board recently stated that “[f]acility issues are perhaps the most bedeviling for charter schools. As this Board has recognized, charter school applicants can be in a ‘catch-22 situation regarding acquisition or leasing a facility.’” *Watershed Pub. Charter Sch., Inc. v. Baltimore County Bd. of Educ.*, MSBE Op. No. 18-31 (2018) (quoting *Chesapeake Pub. Charter Sch. v. St. Mary’s County Bd. of Educ.*, MSBE Op. No. 05-23 (2005)). In *Chesapeake* the local board denied the charter school application because of the “lack of an identified facility,” but the State Board overturned the decision because all other components of the charter application were deemed acceptable. The *Watershed* decision provided guidance to local boards, directing them to grant contingent approval if the charter school application is sufficient in all other areas and the charter school assures the local board that it can meet the timeline the local board establishes to secure a facility and renovate it, if necessary, to open on a date certain. *Watershed*, supra.

While we recognize that a charter school nearing the end of a charter agreement may have difficulty securing a facility absent approval of the charter contract renewal, in this case neither the local board nor the ALJ found that Banneker’s lack of a permanent facility alone was a basis to non-renew the charter contract. Rather, the ALJ found there were a variety of other issues supporting the nonrenewal, most significantly the special education compliance issue. The ALJ did not err by pointing out that Banneker had several years to secure a permanent facility but had not made the effort until BCPS advised that it was reclaiming its building, which happened to be close to the time that the charter needed to be renewed, and that there were issues related to renovation of the Archdiocese building.

Collective Bargaining Agreement Compliance

The issue concerning compliance with the applicable collective bargaining agreement (“CBA”) has to do with complaints from two Banneker employees who alleged unpaid wages from the school. The ALJ found that the record was devoid of any evidence that Banneker failed to pay the two employees in accordance with the CBA. (Proposed Decision at 39-40). Appellant acknowledges that the ALJ correctly found that Banneker did not violate the CBA, but requests that the State Board modify the decision to note that the two employees who purportedly complained about their alleged unpaid wages were not employees covered by the CBA because they were summer employees. The ALJ never specifically found that the two employees were covered by the CBA so there is no need to modify the Proposed Decision on this point. It is sufficient that the ALJ did not find evidence of a violation of the CBA.

CONCLUSION

In our view, the record supports the conclusions reached by the ALJ, and Appellant’s exceptions to not require a different result.³ We do not find that the local board acted in an illegal, unreasonable, or arbitrary manner in deciding not to renew Appellant’s charter based on

³ This Board has growing concerns with the local board’s nonrenewal of charters for a number of charter schools with tremendous support in the community. Charter schools in Baltimore City and throughout the State serve an important function in the education of our youth and should be embraced by our school systems. We urge the local board to review carefully its policies and processes for deciding requests for charter school renewal to help ensure fairness. We will be scrutinizing future appeals of these matters very carefully.

its failure to meet renewal conditions. We adopt the ALJ's Proposed Decision, except to the extent specified in this Opinion.

Signatures on File:

Clarence C. Crawford
President

Jean C. Halle
Vice-President

Gail H. Bates

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle D. Greene

Rose Maria Li

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Warner I. Sumpter

Holly C. Wilcox

Dissent:

Shawn D. Bartley

October 27, 2020