

A LEGAL MANDATE THAT AUTHORIZERS CONSIDER FISCAL AND OTHER IMPACTS OF CHARTER SCHOOL EXPANSION

*Susan L. DeJarnatt**

I. INTRODUCTION..... 812

II. THE COST: IN 2016-2017, PENNSYLVANIA SCHOOL DISTRICTS PAID CHARTERS NEARLY \$1.7 BILLION..... 816

III. THE ARGUMENT: DISTRICT AUTHORIZERS CANNOT CONSIDER FINANCIAL IMPACT BECAUSE THE LEGISLATURE ALREADY DECIDED THE COSTS OF CHARTERS WERE WORTH THE BENEFITS..... 821

IV. THE PLAIN LANGUAGE OF THE CHARTER SCHOOL LAW IMPLICITLY REQUIRES AND DOES NOT EXPLICITLY FORBID CONSIDERATION OF FINANCIAL IMPACT 824

 A. *The Plain Language of the Charter School Law* 825

 B. *The Legislative History of the CSL Shows That the Legislature Intended Charters to Supplement and Not Replace Traditional Public Schools*..... 828

V. THE ORIGINS OF THE MYTH: NEWS ACCOUNTS AND CAB DECISIONS 831

 A. *Contemporaneous News Articles Do Not Mention the “No Consideration of Costs” Myth* 832

 B. *CAB Decisions: Buying into the Myth with Little to No Authority* 835

 1. *Not Really On Point: Lack of Standing of Taxpayers in Adjacent Districts to Oppose Charter Applications*..... 835

 2. *Flawed Reasoning to Support the “No Consideration of Costs” Myth* 837

 3. *CAB Decisions That Distort the CSL by Looking Only*

* Professor of Law, Temple University Beasley School of Law. I am grateful for the opportunity to participate in the West Virginia Law Review’s symposium on *Pauley* at 40. This article contributes to the issues raised at the Symposium by examining the impact of charter growth on Pennsylvania’s ability to meet its obligation to provide a thorough and efficient system of public education to its children. I thank the Law Review editors for the invitation and for their editorial assistance. I also thank Peter Schneider, Len Rieser, Barbara Ferman, Paul Socolar, David Lapp, and my Temple colleagues who participated in a very helpful writer’s workshop: Rachel Rebouche, Kathy Stanchi, Kristen Murray, Jaya Ramji-Nogales, Sarah Katz, Jen Lee, Spencer Rand, Bob Schwartz, Jules Epstein, Richard Greenstein, and Jane Baron—for their helpful comments on this project and David Isom, Reference and Faculty Services Librarian and Alex Hamilton for their excellent research assistance.

	at the Listed Factors Instead of the Included but Not Limited to Language	840
4.	<i>Fell Charter and Chester Charter School for the Arts: Directly Buying the “No Consideration of Costs” Myth Despite the Language and History of the CSL.....</i>	842
VI.	COURT INTERPRETATION: NO PRECEDENTIAL APPELLATE DECISION SAYS THAT AUTHORIZERS ARE FORBIDDEN FROM CONSIDERING THE FINANCIAL IMPACT OF CHARTER GROWTH...	845
VII.	CONCLUSION	848

I. INTRODUCTION

Most state constitutions impose a fundamental obligation on the state to provide a “thorough and efficient” system of public education to its residents. Forty years ago, The West Virginia Supreme Court held that this obligation meant that “education is a fundamental constitutional right” in West Virginia.¹ Today states continue to struggle to satisfy this burden while courts too often struggle to interpret what such a system requires. The widespread move towards privatization of public education through charter expansion and vouchers has had a serious financial impact on states’ abilities to provide that system, an impact that is national in scope.² That national problem has a myriad of local variations.³ This Article’s focus is on how that financial impact is felt in Pennsylvania.

Pennsylvania’s Constitution mandates that the Commonwealth provide “for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”⁴ Pennsylvania decided to add charter schools to this system in 1997, a decision that, like all legislation, must be considered in light of this constitutional commitment to public education and to its role in preparing the Commonwealth’s students for their participation in democracy. Pennsylvania spent nearly \$1.7 billion on charter schools in 2016–2017.⁵ Pennsylvania also underfunds its school districts. It ranks 46 out of 50

¹ Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

² California, for example, prohibits charter authorizers from considering the financial impact of charter growth, a prohibition which has seriously undercut school districts’ ability to provide for the needs of the students remaining in the public schools. See GORDON LAFER, BREAKING POINT: THE COSTS OF CHARTER SCHOOLS FOR PUBLIC SCHOOL DISTRICTS, IN THE PUBLIC INTEREST (2018), https://www.inthepublicinterest.org/wp-content/uploads/ITPI_Breaking_Point_May2018_FINAL.pdf.

³ See Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1395–1403 (2018) (reviewing impacts on public education of states’ preferences for school choice).

⁴ PA. CONST. art. III, § 14.

⁵ *Pennsylvania School Data Project*, RES. FOR ACTION, <https://www.researchforaction.org/pa-school-data-project/> (scroll down to the “Data Sets” section)

states for the state contribution to education funding and has the dubious honor of having the largest gap in the country between highly funded districts and poorly-funded ones.⁶

Charter schools cost money and the vast bulk of that money comes directly out of the budgets of Pennsylvania school districts.⁷ Those districts also have the responsibilities of authorizing new charter schools, exercising oversight over existing schools, and determining whether to renew or revoke charters. Many charter school proponents believe that Pennsylvania's Charter School Law⁸ bars school districts from giving any consideration to the financial impact on districts when they authorize or renew charter schools.⁹ This belief conflicts with the plain language of the Charter School Law and its legislative history and is not supported by court decisions. It rests on a few decisions of the Charter Appeals Board ("CAB") which have misinterpreted the language and intent of the Charter School Law. In these few opinions, the CAB has asserted that the cost a new charter imposes on a district is not a factor that the authorizer can consider. Not one opinion from the Pennsylvania appellate courts has held that authorizers are forbidden from any consideration of financial impact.

and select the "State" hyperlink, which is found next to the "Finance" subsection) (last visited Feb. 24, 2019) [hereinafter RFA Data].

⁶ Emma Brown, *Pa. Schools Are the Nation's Most Inequitable. The New Governor Wants to Fix That*, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e_story.html?utm_term=.deca9e248801; *School Funding Shows Fewer State Resources for Classrooms, Widening Inequalities*, THE PUB. INT. LAW CTR., <https://www.pubintl.org/cases-and-projects/new-pa-school-funding-lawsuit-court-filing-shows-decreased-classroom-spending-and-widening-inequalities/> (last visited Feb. 24, 2019); U.S. CENSUS BUREAU, 2016 PUBLIC ELEMENTARY-SECONDARY EDUCATION FINANCE DATA, Summary Table 5, <https://www.census.gov/data/tables/2016/econ/school-finances/secondary-education-finance.html> (last visited Mar. 3, 2019).

⁷ RFA Data, *supra* note 5, (scroll down to "Data Sets" section, select "LEA" hyperlink found next to "Finance" subsection) (explaining that in 2016-2017, the Philadelphia School District paid \$779,382,016 in tuition to charter schools).

⁸ 24 PA. STAT. AND CONS. STAT. ANN. §§ 17-1701-1709 (West 2018).

⁹ See, e.g., PHILA. SCH. ADVOCACY PARTNERS, ONE CITY, TWO SYSTEMS OF SCHOOLS 7 (2014), <https://www.csphiladelphia.org/wp-content/uploads/2015/07/PSAP-Position-Paper-One-City-Two-Systems.pdf> (advocating expansion of "effective schools," whether district or charter, but stressing: "The SRC should approve every charter applicant with the potential to serve high poverty students effectively while staggering the openings of these schools in order to allow time to manage the resulting financial impact (i.e., shed fixed costs)"). Excellent Schools PA filed a lawsuit in April 2018 to enjoin the Philadelphia School District from implementing a policy for evaluating charter schools' requests for amendments of their charters in which it alleged: According to the Policy, the [Charter School Office] will "review" financial impact on the District as an evaluative tool for enrollment increase or change to grade levels. Such a consideration is impermissible under the Charter School Law and controlling case law. . . . "It is well settled in the Commonwealth of Pennsylvania that the District's financial considerations should not be a basis upon which a charter application should be evaluated." First Amended Complaint at 133, *Excellent Sch. Pa. v. Sch. Dist. of Phila.*, No. 01579 (C.P. Phila. Cty. June 25, 2018), ECF No. 180401579.

Balancing the needs and interests of all of the stakeholders in the public education system—students, families, teachers, support staff, administrators, schools (both traditional and charter), tax payers, retirees, and communities—is an enormous challenge. Charter schools are part of that public education system.¹⁰ But requiring school districts to completely ignore the financial impact of their decisions about charter growth cannot be the response to that challenge. Districts would be inappropriately constrained from considering how charter growth could be managed to benefit the entire system. For example, a proposed charter that would ease overcrowding in existing traditional schools might have a positive financial impact on the entire system. Similarly, a charter that is proposed to serve a badly underserved population, for example, children in institutional foster care placement, might also not only meet a need but have a positive financial impact on the system as a whole. Considering financial impact does not inevitably mean denial of all new charters. But it should mean that district authorizers can look at the big picture of how the proposed school affects the existing traditional and charter schools. If charters must be granted and renewed without any consideration of their financial impact on the school system as a whole, Pennsylvania will be even further impaired in its ability to meet its constitutional obligations. Thus, authorizers not only may consider financial impact, they must do so.

The argument against consideration of financial impact fundamentally conflicts with public education's role as a public good that does not exist merely for individual advancement.¹¹ Derek Black has traced the history of the state constitutional provisions, like Pennsylvania's, that obligate every state to provide a system of public education to its children.¹² These provisions, as Black so effectively demonstrates, ground that obligation in a view of education as a public good because education is necessary to citizenship.¹³ The entire community benefits from all of its members being prepared for civic participation.

Our public education systems, though flawed, are intended to reach all children.¹⁴ Proponents of privatization as the key to education reform situate

¹⁰ Whether charters are fully public is sometimes contested, however, especially in charter unionization drives and in transparency fights. See, e.g., Amelia A. DeGory, Note, *The Jurisdictional Difficulties of Defining Charter-School Teachers Unions Under Current Labor Law*, 66 DUKE L.J. 379 (2016); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1178–81 (2013).

¹¹ David F. Labaree, *Public Schools for Private Gain: The Declining American Commitment to Serving the Public Good*, PHI DELTA KAPPAN (Oct. 22, 2018), <http://www.kappanonline.org/labaree-public-schools-private-gain-decline-american-commitment-public-good/>.

¹² Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 793 n.311 (2018).

¹³ *Id.* at 743–48.

¹⁴ Labaree, *supra* note 11; Black, *supra* note 12, at 735.

charters through a much narrower view: that individual parents should choose which school will most suit their individual child and that their individual choice should be valued over all other interests.¹⁵ Certainly parents should have a major voice in their children's education but that voice is not the only one that matters when we consider public education a public good. Preferencing individual choice in a way that undermines the public system as a whole undercuts what benefits all of society.¹⁶ Black urges us to look at the impact of market-based (and other) education reforms on a district and not just a state-wide or even national level in order to fully appreciate how such reforms can affect the democratic goals of the public education system.¹⁷ This article examines one such impact: the misconception that financial costs of charter growth in a district cannot be a factor in the district's decision to authorize new charters. This is not an argument for the total elimination of charter schools; they are part of the landscape and part of the system of public education in Pennsylvania. But the authorizing districts have to consider the needs of all of the stakeholders, including both traditional public schools and existing charters, when those districts make decisions that affect their budgets and their ability to provide an effective education to all of their students.

The charter proponents' argument—that authorizers cannot consider the financial impact of charters—is not new, but it has been heightened in recent years. The argument ignores the conflicts between responsible stewardship of public funds, the state's constitutional obligation to provide a thorough and efficient system of public education, and the demand of some charter proponents that charters be expanded regardless of any costs they impose on the system as a whole. Part II of this article details the costs that districts face as a result of charter expansion. Part III examines the argument against consideration of financial impact. Part IV explores both the language and the legislative history of the Pennsylvania Charter School Law, along with contemporaneous news accounts. Part V traces the origins of the myth through analysis of the decisions of the Charter Appeal Board and court opinions and the state's constitutional

¹⁵ JEANNE ALLEN, *THE NEW OPPORTUNITY AGENDA: A MANIFESTO MOVEMENT AT RISK* 22 (2016) (“The best and quickest path to unleash innovation is to follow a consumer model of organization theory, and ensure that money follows the consumer to the product they want – their school of choice.”); Associated Press, *County GOP Chair: Oklahoma Should Quit Public Education*, NEWSOK (Nov. 29, 2018), <https://newsok.com/article/feed/7535988/oklahoma-lawmaker-education-remains-priority-despite-letter>; Mark Gleason, *Testimony to the Basic Education Funding Commission*, PHILA. SCH. P'SHIP (Nov. 14, 2014), <https://philaschoolpartnership.org/mark-gleasons-testimony-to-the-basic-education-funding-commission/> (“Second, make the basic education formula truly student-based. Money should follow the student.”); James V. Shuls, *Do Charter Schools Take Districts' Money? Only If You Think Children, and the Funding That Comes With Them, Are District Property*, THE 74 MILLION (Sept. 5, 2018), <https://www.the74million.org/article/shuls-do-charter-schools-take-districts-money-only-if-you-think-children-the-funding-that-comes-with-them-are-district-property/>.

¹⁶ See Black, *supra* note 3, at 1359.

¹⁷ *Id.* at 1425–26.

obligations. This Article concludes that not only do the state and local charter authorizers have the right to consider financial impact, they must do so to comply with the constitutional obligations of the state.

II. THE COST: IN 2016-2017, PENNSYLVANIA SCHOOL DISTRICTS PAID CHARTERS NEARLY \$1.7 BILLION

In 2017-2018, Pennsylvania was home to 163 brick-and-mortar charter schools and 15 cyber charters which enrolled approximately 135,000 students.¹⁸ School districts paid charter schools \$1,654,992,896 in 2016-2017.¹⁹ Under the Charter School Law, charter schools receive the per pupil funding of the districts its students reside in.²⁰ For example, out of the total \$2.96 billion in expenditures projected for fiscal year 2018, the School District of Philadelphia projected spending \$894 million on charter schools, not counting transportation costs.²¹ The district is obligated to send those funds to the charter schools out of its own budget.

The most significant financial impact charters have on existing school districts is the stranded costs they impose.²² Stranded costs refer to the districts' inability to completely recoup the loss of tuition money they must send to charters because the departure of a student and her tuition dollars from the district to the charter does not lead to an equal reduction in costs to the district. Charter schools draw students from across the district. In a large district like Philadelphia, the charter students may come from dozens of schools and many may come from non-public schools. Philadelphia cannot simply close down existing schools or reduce existing staff when those losses are spread over numerous schools. If a neighborhood elementary school loses ten students from four grades to a new charter, there is no way for that school to reduce the teaching or administrative staff in response. And the building still has to be heated, to be

¹⁸ *Types of Schools*, PA DEPT. OF EDUC., <https://www.education.pa.gov/Schools/Pages/Types-of-Schools.aspx> (last visited Mar. 1, 2019).

¹⁹ RFA Data, *supra* note 5 (scroll down to the "Data Sets" section and select "LEA" hyperlink found next to "Finance" subsection).

²⁰ 24 PA. STAT. AND CONS. STAT. ANN. § 17-1725-A (West 2018) (The funding is based on the District's spending on K-12 and does not include pre-K, adult education, or other non-K-12 expenses. Cyber charters receive the same funding based on the per pupil expenditures of the student's district of residence as the CSL makes no distinction between bricks and mortar charters and cyber charters in the funding provision.).

²¹ SCH. DIST. OF PHILA., BUDGETING 101: UNDERSTANDING THE DISTRICT'S BUDGET 25 (May 3, 2017), https://www.philasd.org/budget/wp-content/uploads/sites/96/2017/07/Budget101_5.3.17_Final.pdf.

²² DAVID LAPP ET AL., THE FISCAL IMPACT OF CHARTER SCHOOL EXPANSION: CALCULATIONS IN SIX PENNSYLVANIA SCHOOL DISTRICTS, RES. FOR ACTION (Sept. 2017), <https://8rri53pm0cs22jk3vvqna1ub-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/RFA-Fiscal-Impact-of-Charter-Expansion-September-2017.pdf> (The RFA study included six districts from across Pennsylvania. The stranded costs issue affected all six.).

cleaned, to have lights and water. The costs of running the traditional school remain but the funds for the charter students are gone. The Research for Action (“RFA”) study calculates the stranded costs for Philadelphia at \$8,125 per student in the first year of a charter’s operation, declining over five years to between \$4,433 and \$3,803 per student depending on the rate of growth of the charter sector.²³ The stranded costs remain as a drag on the district budget for years and, where approved schools continually expand enrollments, the costs continue.²⁴ In 2017–2018, Philadelphia had approximately 70,000 students enrolled in its 84 charter schools.²⁵ Using RFA’s lowest stranded costs figure from five years out, not including cyber charter students or students who transferred from private school, Philadelphia’s stranded costs in that year totaled at least \$266,210,000 (\$3,803 multiplied by 70,000).²⁶ The bottom line is that the stranded costs are enormous and permanent so a fiscally responsible authorizer would be foolish not to consider how the stranded costs associated with a new charter might impact the district as a whole.

Closing district schools is usually proposed as the solution to this financial cost but such closures have their own costs, financial and otherwise. Scholars are beginning to focus on how closures of neighborhood schools have deprived communities of their anchors,²⁷ how the brunt of closures has fallen on communities of color, and how neighborhood school closures accompanied by intensified policing of the remaining schools has increased students’ early contact with the carceral state and has decreased the overall commitment to the ideal of schools as community institutions.²⁸ In Philadelphia at least, the District

²³ *Id.* at iii. The study notes that it did not calculate the additional financial impact of the tuition loss from charter students who came from private schools, although that calculation would result in a total loss with no savings to the District. Thus, the study’s estimates are conservative. If the private school transfers accounted for only ten percent of Philadelphia’s charter sector, the cost per student would increase by \$1,000. The study further notes that an earlier study by the Boston Consulting Group estimated that 30% of Philadelphia’s charter students come from private schools. *Id.* at 28, n.23.

²⁴ *Id.* at 17.

²⁵ Sch. Dist. of Phila., CHARTER SCH. OFF., <https://www.philasd.org/charterschools/> (last visited Mar. 19, 2019). This figure does not include students enrolled in cyber charters. *Id.*

²⁶ RFA calculated that “On average, the size of the fiscal impact of charter expansion equals 89% of the district’s charter school tuition payments during the first year of charter expansion and 44% of the district’s charter tuition payments during the fifth year of charter expansion.” See Lapp, *supra* note 22, at 29.

²⁷ See generally EVE EWING, GHOSTS IN THE SCHOOLYARD: RACISM AND SCHOOL CLOSINGS ON CHICAGO’S SOUTH SIDE (2018); CARLA SHEDD, UNEQUAL CITY: RACE, SCHOOLS, AND PERCEPTIONS OF INJUSTICE (2015); Ryan Good, *Histories That Root Us: Neighborhood, Place, and the Protest of School Closures in Philadelphia*, 38 URB. GEOGRAPHY 861 (2016); Ryan Good, *Invoking Landscapes of Spatialized Inequality: Race, Class, and Place in Philadelphia’s School Closure Debate*, 39 J. URB. AFF. 358 (2016).

²⁸ Labaree, *supra* note 11.

has yet to realize significant savings from selling former school buildings though it has shed the costs of actually running the closed schools.

In addition, there is no question that running multiple school systems increases the costs to the funder of those systems. This result is logical. Even when an entire school is turned over to private management, there are still duplicative costs for administration and costs for oversight. Charters in Pennsylvania spend a much higher percentage of their funds on administration and principals.²⁹ Charters tend to be heavy on administrators—by design.³⁰ Each charter is its own school district under the Charter School Law (“CSL”), so instead of just a principal, charter schools have a proliferation of CEOs and school leaders of various kinds.³¹ Another side effect of the market approach is that charters and districts feel the need to compete in that market through advertising—which also diverts money from direct education.³²

Pennsylvania’s funding system for special education also encourages the manipulation of special education expenses by some charter operators. The CSL’s formula for special education students incorporates Pennsylvania’s “census-based” approach to distribution of special education funding.³³ Under this approach, “each school district is assumed to serve a special education population equal to 16%” of the district’s average student enrollment.³⁴ The

²⁹ PA. SCH. BDS. ASS’N., PSBA SPECIAL REPORT: CHARTER SCHOOL REVENUES, EXPENDITURES, AND TRANSPARENCY 10, <https://www.psba.org/wp-content/uploads/2016/08/Charter-School-RtK-08172016.pdf> (last visited Apr. 4, 2019).

³⁰ Matt Barnum, *Analysis: Charter Schools Spend More on Administration—But It Might Not Be Bad for Kids*, THE 74 (Mar. 2, 2017), <https://www.the74million.org/article/analysis-charter-schools-spend-more-on-administration-but-it-might-not-be-bad-for-kids/>.

³¹ KIPP Philadelphia, which comprises six schools, lists 32 individuals on its management team, not counting the multiple administrators at each school. KIPP: PHILADELPHIA PUBLIC SCHOOLS, <http://kippphiladelphia.org/about/who-we-are/regional-office/> (last visited Mar. 19, 2019). Charter proponents on occasion claim that charters save money, pointing out that under the CSL, charters get only 80% of the per pupil funding of the authorizing school district. But 80% is not less spending—it simply reflects the difference in K–12 spending compared to the costs the District has for pre-K, adult education, and transportation, which the CSL excludes. The arguments that charters are underfunded or more financially efficient also ignore the substantial outside funding available to charters from pro-privatization foundations like the Walton, Dell, and Gates Foundations. Sally Ho, *Billionaires Fuel US Charter Schools Movement, Shaping State Policy*, PHILANTHROPY NEWS DIG. (July 23, 2018), <https://philanthropynewsdigest.org/news/billionaires-fueling-charter-school-movement-shaping-state-policy>.

³² CATHERINE DIMARTINO & SARAH BUTLER JESSEN, *SELLING SCHOOL: THE MARKETING OF PUBLIC EDUCATION* 70–76 (2018) (noting that the New York charter chain, Success Academy, spends more than \$1,000 per enrolled student on advertising). This pressure to advertise privileges well-resourced charter networks over stand-alone charters and districts that cannot afford to divert money to advertising.

³³ RES. FOR ACTION, CHARTER SCHOOL SPECIAL EDUCATION FUNDING IN PENNSYLVANIA 2–3 (April 2017), <https://8rri53pm0cs22jk3vvqna1ub-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/RFA-Charter-Special-Education-Funding-Memo-April-2017.pdf>.

³⁴ *Id.* at 2.

formula does not measure actual costs or actual numbers of special education students. And the formula does not vary depending on the costs to educate students with different disabilities.³⁵ Thus, the state funding for the school district's special education is calculated based on the 16% presumption, not the actual enrollment numbers. The district's obligation to charters for tuition reimbursement, however, is based on the district's actual per pupil spending on special education. Charters receive one level of funding based on the per pupil cost for non-special education students and the special education rate for all students with the special education designation no matter what the level of disability or the costs to remediate that disability. That higher figure is typically more than double the funding for non-special education students.³⁶

Pennsylvania does not require charter schools to actually spend this extra money on special education. The Special Education Funding Commission and others have shown that, particularly in Philadelphia and Chester-Upland,³⁷ the charter schools have a much higher percentage of students with lower cost needs, leaving students who need the most expensive services in the traditional district schools. The Commission found that 72% of the charter students required less than \$10,000 of additional services while only 2% of charter students cost \$30,000–\$100,000 compared to 10% of the special education students in district schools with those high cost needs. This disparity further distorts the payments to charter schools because the actual district spending goes up to cope with the high cost students, thus increasing the amount on which the charter payments are based—even though the charters do not have the same costs and do not actually have to spend the money on their special education programs.³⁸

³⁵ *Id.* at 3. As the RFA Charter School Special Education Funding study notes, in 2014, a new formula was adopted that divides students into three different costs categories and provides more funding for students with costlier needs. But this new formula applies only to new revenues and covers only about five percent of the total special education funding in Pennsylvania. *Id.* at 2–3.

³⁶ The RFA Charter School Special Education Funding study also shows the tuition calculation for 2015 for the Daniel Boone School District which resulted in a per pupil payment of \$9,866.83 for nonspecial education charter students and \$20,561.12 for special education students. *Id.* at 4.

³⁷ Vince Sullivan, *Judge Oks Chester Upland School District Deal with Charter School*, DAILY TIMES (Oct. 13, 2015), https://www.delcotimes.com/news/judge-oks-chester-upland-school-district-deal-with-charter-school/article_4f147030-a888-5676-b07e-6f72bce7ef87.html.

³⁸ Bruce Baker demonstrated three different aspects of this distortion in operation in his examination of the Chester-Upland District. Bruce Baker, *The Commonwealth Triple-Screw: Special Education Funding & Charter School Payments in Pennsylvania*, SCH. FIN. 1010 BLOG (June 5, 2012), <https://schoolfinance101.wordpress.com/2012/06/05/the-commonwealth-triple-screw-special-education-funding-charter-school-payments-in-pennsylvania/>. First, because of 16% assumption, the state's funding for special education in Chester-Upland does not reflect that the district actually has 22% of its students in the special education category. *Id.* So, the District receives nearly \$2,000,000 less from the state than it would if the state funding was based on reality instead of assumption. *Id.* Second, Chester-Upland's per pupil spending on special education for charter tuition is distorted by the requirement that the figure be based on the number of students being the assumed 16% not the actual 22%, thus artificially increasing the cost per pupil number. *Id.* The total the District spends on special education is divided by the artificial number based on

On the whole, Pennsylvania charter schools educate fewer children with high cost special needs, fewer English language learners, and fewer children in deep poverty. Those kids need greater resources and those who remain in traditional public schools suffer the brunt of the financial impact of charter growth.

Effective oversight is also expensive. The Philadelphia Charter School Office (“CSO”) itself has to be staffed to ensure compliance.³⁹ The CSO is responsible for evaluating applications, for collecting information on existing schools annually, and for processing requests for amendments and renewals.⁴⁰ This cost is not covered by a tax on the charters or any designated funding from the state. The Fiscal Year 2017-2018 Budget projected the costs for salaries for the CSO at \$935,379.⁴¹

Charter appeals and other legal fights are also expensive. Closing a charter school, whether through revocation or non-renewal, can involve a very lengthy process. The saga of the Pocono Mountain Charter School illustrates how much this struggle can cost a school district. Pennsylvania’s Auditor General calculated that the Pocono Mountain School District had to spend \$400,000 to hold the charter school accountable, first voting to revoke its charter in 2010.⁴² The school was finally closed in the summer of 2014 after 16 hearings at the District level, 2 trips to the CAB which ultimately affirmed the revocation decision, and an affirmance of the CAB decision by the Commonwealth Court.⁴³

the 16% figure, not the actual number based on the 22% figure, which thus inflates it. *Id.* Finally, the per pupil figure is treated the same no matter what the student’s disability needs cost. *Id.* 92% of the students at the largest charter school in Chester-Upland have the lowest cost disabilities compared to only 66% of such students in the school district. *Id.* The District’s spending reflects the higher costs of its higher needs students yet it must send the charter the entire per pupil cost, even though the charter’s students’ needs are much less costly. Sullivan, *supra* note 37. The District ran out of money in no small part due to the inflated special education payments it had to make to the charter schools. *Id.*

³⁹ CHARTER SCH. OFF., *supra* note 25.

⁴⁰ *Id.*

⁴¹ SCH. DIST. OF PHILA.: SCH. REFORM COMM’N, FY2017–18 CONSOLIDATED BUDGET 263 (May 2017), https://www.philasd.org/budget/wp-content/uploads/sites/96/2017/07/FY18-Consolidated-SDPBook_FINAL.pdf. This figure does not account for the resources the District’s lawyers must devote to charter oversight and appeals.

⁴² EUGENE DEPASQUALE, PA. DEP’T OF AUDITOR GEN., PA. CHARTER SCH. ACCOUNTABILITY AND TRANSPARENCY: TIME FOR A TUNE-UP 9–10 (May 12, 2014), https://www.paauditor.gov/media/default/reports/RPT_Charter_School_%20Report%20051214_final.pdf [hereinafter DEPASQUALE REPORT].

⁴³ Pocono Mountain Charter Sch., Inc. v. Pocono Mountain Sch. Dist., 88 A.3d 275 (Pa. Commw. Ct. 2014). The school remained open throughout the appeals, though, by the end, it was being run by a court-appointed custodian and had no board of trustees. DEPASQUALE REPORT, *supra* note 42, at 10. Lindsay C. VanAsdalan, *Thackston Charter Will Not Appeal, Board Votes to Dissolve at End of June*, YORK DISPATCH (June 29, 2018, 11:38 AM), <https://www.yorkdispatch.com/story/news/2018/06/29/thackston-charter-not-appeal-votes-dissolve-end-june/744266002/>.

The School District faced an additional financial insult even after the charter school finally closed because the Pennsylvania Department of Education deducted \$87,700.32 from the district's basic education funds to cover the charter school's failure to make required payments to the public employee's retirement fund for its staff. The school district had to fight the deduction all the way up to the Pennsylvania Supreme Court which ultimately found that the District was not liable for the charter school's delinquency.⁴⁴

Cyber charters are also expensive for districts. They are funded in exactly the same way as brick and mortar schools. They get the identical per pupil funding from the districts where their students reside—even though they lack both bricks and mortar. This funding scheme has been criticized widely, including by the Auditor General.⁴⁵ These costs are borne by the districts whose residents choose to enroll in cyber charters even though the district has no power to stop expansion of cyber charters or powers of oversight to ensure they are providing an education to those students.⁴⁶

In short, any decision to authorize a new charter or to expand an existing one imposes significant financial demands on the authorizing district, demands that a responsible steward of public funds must consider. This is true despite the arguments to the contrary raised by some charter proponents.

III. THE ARGUMENT: DISTRICT AUTHORIZERS CANNOT CONSIDER FINANCIAL IMPACT BECAUSE THE LEGISLATURE ALREADY DECIDED THE COSTS OF CHARTERS WERE WORTH THE BENEFITS

Charter proponents in Philadelphia have often argued that the District is in such catastrophic shape and does such a poor job serving its students that charter expansion is imperative and must take place regardless of the costs.⁴⁷ Others have

⁴⁴ *Pocono Mountain Sch. Dist. v. Pa. Dep't of Educ.*, 151 A.3d 129 (Pa. 2016).

⁴⁵ DEPASQUALE REPORT, *supra* note 42, at 23–24.

⁴⁶ Cyber charters are authorized at the state level; oversight and renewal decisions are the province of the state department of education. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1741-A (2018).

⁴⁷ See, e.g., *PSP Statement on Applications for New Charter Schools*, PHILA. SCH. PARTNERSHIP, <https://philaschoolpartnership.org/psp-statement-on-applications-for-new-charter-schools/> (last visited Feb. 21, 2019) (quoting Mark Gleason on the 2015 cycle of applications for new charters: “As the SRC faces tough decisions about how to spend its limited resources in the coming months, I hope the debate will center on what is working for kids and families. We should consider that last year the District spent about \$140 million to operate schools that by any measure fail to meet students’ needs (<40 on the PA School Performance Profile). As the most recent SPP data show, many of the high-quality charter schools applying are doing a much better job than other public schools in educating our city’s poorest students. By allowing these schools to replicate and expand, the SRC can give more students across the city the opportunity to attend an effective school.”); Kristen A. Graham & Martha Woodall, *Turzai Pushes for Many New Phila. Charters*, PHILA. INQUIRER (Jan. 22, 2015), https://www.philly.com/philly/education/20150123_Turzai_touts_new_charters_on_day_Philadelphia

asserted explicitly that financial impact cannot be considered by a district in Pennsylvania when it is making decisions to authorize new charters, or to renew or amend existing ones.⁴⁸ At least one member of the School Reform Commission (“SRC”) accepted this argument and believed the SRC was not able to reject applications based on costs.⁴⁹

One of the most extreme versions of this argument was posited in a lawsuit filed in the spring of 2018 by Excellent Schools PA against the Philadelphia School District and the SRC.⁵⁰ The lawsuit sought injunctive relief to stop the District from implementing a new policy on amendments to existing charters. The policy on charter amendments was adopted by the SRC after months of negotiation and communication with stakeholders⁵¹ and was adopted in response to the Pennsylvania Supreme Court decision, which held that the Charter School Law did not give the CAB jurisdiction to hear appeals where an amendment request had been denied.⁵² The policy would allow material amendments to existing charters under specified conditions and with the approval of the SRC/Board of Education.⁵³

[schools_learn_of_more_money_problems.html](#) (reporting that the State House speaker pushes SRC to approve 27 new charters).

⁴⁸ Kristen A. Graham, *Pressure Builds on SRC to Approve New Charter Schools*, PHILA. INQUIRER, Feb. 17, 2015, at B04 (SRC Commissioner Green says financial impact cannot be considered).

⁴⁹ The SRC ran the Philadelphia School District from 2002 to July 2018 under a state takeover. The SRC took the position that it could not cite financial costs as a reason to deny a charter application. *SRC Denies Six Charters and Approves One with Conditions*, THE PHILA. PUB. SCH. NOTEBOOK (Feb. 22, 2018, 8:49 pm), <http://thenotebook.org/articles/2018/02/22/src-denies-6-charters-approves-one-with-conditions/>.

⁵⁰ First Amended Complaint, *Excellent Sch. Pa. v. Sch. Dist. of Phila.*, No. 01579 (C.P. Phila. Cty. June 25, 2018), ECF No. 180401579 (Docket available at https://fdjefile.phila.gov/efsfjd/zk_fjd_public_qry_03.zp_dktrpt_frames). The First Amended Complaint is on file with author. In it, the plaintiff asserts it is acting on behalf of 44 “like-minded Philadelphia charter schools adversely impacted” by the policy but no schools are identified by name and none signed on as plaintiffs. *Id.* at para. 10.

⁵¹ *Escalating Conflict with District, Pro-Charter Group Sues over Policy*, THE PHILA. PUB. SCH. NOTEBOOK (Apr. 12, 2018), <https://thenotebook.org/articles/2018/04/12/escalating-conflict-with-district-charters-sue-over-policy-406/>.

⁵² *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 306 (Pa. 2017).

⁵³ The Policy, adopted by the SRC on March 22, 2018, defines Material Amendment as: “Material charter amendments – Changes to charter agreements that fundamentally affect a charter school’s mission, governance, organizational structure, location or facility, educational plan or the CSO’s ability to effectively monitor charter school operations and quality. Material charter amendments include: 1. Enrollment expansion of 10% or fewer of the current maximum authorized enrollment or 100 seats, whichever is less (only qualified applicants as defined by eligibility criteria of this policy may be considered for enrollment expansions under this policy); 2. Change to grade levels served; 3. Significant change to mission, or fundamental change to educational plan; 4. Name change of Renaissance charter schools due to business-need or legal requirement; 5. Change in building location or addition of new facility due to business-need, unavailability of current facility and/or emergency; and 6. Change in CMO.” 406. *Charter Amendments*, THE SCH. DIST. OF

The Excellent Schools PA lawsuit raised several arguments, but the one relevant here is the plaintiff's attack on the policy's inclusion of financial impact on the District as one of thirteen listed criteria for evaluation of proposed charter amendments.⁵⁴ The lawsuit asserted that this consideration violates "well-settled" law in Pennsylvania that the "District's financial considerations should not be a basis upon which a charter application should be evaluated."⁵⁵ It cites a CAB decision in support of this argument.⁵⁶

The context of the lawsuit makes clear that its proponents believe that there can be no consideration at all of the costs of charter growth, whether through authorization of new charters or amendments to existing ones. The thrust of the Excellent Schools argument is that charter schools should be able to amend their charters at will, even by expanding the enrollment they agreed to in the original charter. This view renders illusory the notions that a charter is a binding agreement or that the school district needs to be able to plan for charter growth and changes.

Another charter dispute in Philadelphia illustrates the related claim that charter growth is so necessary, it must be allowed despite any impact on the District as a whole. Franklin Towne Charter Middle School's ("FTCMS") application for a charter was granted—but with conditions, including a reduction in the requested enrollment and a requirement that enrollment priority be given to students from two predominantly minority zip codes.⁵⁷ FTCMS has filed an appeal to the CAB, arguing that the conditions amount to a denial of its

PHILA. (Mar. 22, 2018), https://www.philasd.org/src/wp-content/uploads/sites/80/2018/03/406_Charter-Amendments.pdf.

⁵⁴ First Amended Complaint, *supra* note 50, at Exhibit D. The policy notes that these are not the exclusive criteria.

⁵⁵ *Id.* at ¶ 133. According to the Policy, the [Charter School Office] will "review" financial impact on the District as an evaluative tool for enrollment increase or change to grade levels. Such a consideration is impermissible under the Charter School Law and controlling case law . . . "It is well settled in the Commonwealth of Pennsylvania that the District's financial considerations should not be a basis upon which a charter application should be evaluated."

⁵⁶ *In re Fell Charter Sch.* (Docket No. CAB 2001-9), *aff'd*, *Carbondale Area Sch. Dist. v. Fell Charter Sch.*, 829 A.2d 400 (Pa. Commw. Ct. 2003). See *infra* notes 124–129 for analysis of these decisions.

⁵⁷ The existing Franklin Towne charter schools have very high enrollments of white students, especially compared to the demographics of the school district. Franklin Towne Charter Elementary School is 83.9% white and Franklin Towne Charter High School is 68.5% white according to the data available in the School Performance Profiles of the state Department of Education. See *Franklin Towne Charter Elementary School*, FUTURE READY PA INDEX, <https://futurereadypa.org/School/FastFacts?id=207104104172185198058020136134018079053240151105> (last visited Mar. 24, 2019); *Franklin Towne CHS*, FUTURE READY PA INDEX, <https://futurereadypa.org/School/FastFacts?id=143124252157106208086246006037078027175006154159> (last visited Mar. 24, 2019). District Enrollment & Demographics, SY2017-2018, (linked excel spread sheet identifies the District enrollment as 15% white).

application, not a grant.⁵⁸ The appeal detailed several conditions that FTCMS found objectionable, including the reduction of enrollment to 300, down from the 450 requested in the application.⁵⁹ Paragraph 20(b) of the FTCMS Appeal asserts: “As part of the application process charter schools must demonstrate financial viability; reduction of the school’s enrollment from 450 students to 300 students would render the school non-viable as a financial matter.”⁶⁰

Essentially, the Franklin Towne representatives assert that because their schools have good test scores, they should be allowed to expand no matter how that expansion affects the broader community. The FTCMS appeal challenges the District’s ability to continue efforts to promote fiscal responsibility, to reduce conflicts of interest, and to encourage charters to reach out to diverse communities.⁶¹

IV. THE PLAIN LANGUAGE OF THE CHARTER SCHOOL LAW IMPLICITLY REQUIRES AND DOES NOT EXPLICITLY FORBID CONSIDERATION OF FINANCIAL IMPACT

The plain language of the Charter School Law (“CSL”) essentially requires and explicitly does not forbid authorizers from considering financial impact. Where the language of a statute is clear, Pennsylvania requires that the plain language is controlling.⁶² If the statutory language is not explicit, one must

⁵⁸ A copy of the appeal is on file with the author, obtained through a Right to Know request.

⁵⁹ *Id.* ¶ 20.a.

⁶⁰ *Id.* One wonders if the financial viability issue is related to the convoluted leasing arrangements among the various Franklin Towne schools and related for-profit entities. See Greg Windle, *In the Convoluted World of Charter School Real Estate, Franklin Towne Is Both Landlord and Tenant*, THE PHILA. PUB. SCH. NOTEBOOK (Apr. 25, 2018), <http://thenotebook.org/articles/2018/04/25/in-the-sometimes-convoluted-world-of-charter-school-real-estate-franklin-towne-is-both-landlord-and-tenant/>. Other Philadelphia middle school charters have enrollments similar to that proposed in the SRC’s conditions. See, e.g., *KIPP West Philadelphia Preparatory Charter School*, THE SCH. DIST. OF PHILA., <https://www.philasd.org/charterschools/directory/kipp-west-philadelphia-preparatory-charter-school/> (last visited Mar. 1, 2019); *Young Scholars Charter School*, THE SCH. DIST. OF PHILA., <https://www.philasd.org/charterschools/directory/young-scholars-charter-school/> (last visited Mar. 1, 2019). FTCMS also specifically objected to the requirement that it participate in the District’s Charter Performance Framework and that it have insurance in the types and coverage directed by the District.

⁶¹ See Greg Windle, *Franklin Towne to Come Back Before the SRC Thursday in Pursuit of Third School*, THE PHILA. PUB. SCH. NOTEBOOK (Apr. 25, 2018), <http://thenotebook.org/articles/2018/04/25/franklin-towne-set-to-come-back-before-src-thursday-in-pursuit-of-third-school/>.

⁶² Pennsylvania Statutory Construction Act, 1 PA. CONS. STAT. § 1921 (2018). The Act states:

- (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

turn to the intent of the legislature.⁶³ The Pennsylvania Supreme Court has emphasized these principles in its consideration of the Charter School Law.⁶⁴

This section will examine the plain language of the Charter School Law to show that it essentially requires and nowhere forbids school districts from considering whether the financial impact of charter expansion will undercut the district's ability to provide a thorough and efficient education to its students. It will then review the legislative intent as expressed in the legislative history of the CSL's enactment.

A. *The Plain Language of the Charter School Law*

The plain language of the Charter School Law nowhere explicitly bars consideration of cost as a factor for authorizers in evaluating an application to open a new charter school. It implicitly requires such consideration. The plain language of the statute shows that it is premised on an expectation that charter schools will be a supplement to, not a replacement of, the existing system of schools; the statute repeatedly refers to charters as an additional component of the existing school system. The opening section of the CSL states that:

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

-
- (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
 - (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
 - (1) The occasion and necessity for the statute.
 - (2) The circumstances under which it was enacted.
 - (3) The mischief to be remedied.
 - (4) The object to be attained.
 - (5) The former law, if any, including other statutes upon the same or similar subjects.
 - (6) The consequences of a particular interpretation.
 - (7) The contemporaneous legislative history.
 - (8) Legislative and administrative interpretations of such statute.

Id.

⁶³ *Id.*

⁶⁴ *See, e.g.,* Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch., 31 A.3d 657, 663 (Pa. 2011).

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.⁶⁵

This section explicitly envisions that the public school system will continue to exist and that charters are an add-on, not a replacement, of that system.

This legislative intent is incorporated as one of the four factors that authorizers must consider in evaluating new applications.⁶⁶ Another of those four factors is the extent to which the proposed school will be a model for other public schools.⁶⁷ Both of these required factors presume the existence of the public school system. If the fiscal impact of charter expansion significantly harms the existing district, or doesn't "expand opportunities" but, rather, replaces them, then the proposed charter school violates the legislative intent of the CSL.

In addition, the law uses "including but not limited to" language in listing the factors authorizers should consider. The CSL directs authorizers to evaluate applications

based on criteria, **including, but not limited to**, the following: (i) The demonstrated, sustainable support for the charter school plan by teachers, parents, other community members and students, including comments received at the public hearing held under subsection (d). (ii) The capability of the charter school applicant, in terms of support and planning, to provide comprehensive learning experiences to students pursuant to the adopted charter. (iii) The extent to which the application considers the information requested in section 1719-A and conforms to the legislative intent outlined in section 1702-A. (iv) The extent to which the charter school may serve as a model for other public schools.⁶⁸

The "including but not limited to" language means that the list of specific factors is not exclusive.⁶⁹ An applicant can satisfy all of the explicit factors yet

⁶⁵ 24 PA. STAT. AND CONS. STAT. ANN. § 17-1702-A (West 2018) (emphasis added).

⁶⁶ *Id.* § 17-1717-A(e)(2)(iii).

⁶⁷ *Id.* § 17-1717-A(e)(2)(iv).

⁶⁸ *Id.* § 17-1717-A(e)(2) (emphasis added).

⁶⁹ *Dep't of Env'tl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (2014) (explaining that "Turning to the next phrase, it is widely accepted that general expressions such as 'including,' or 'including but not limited to,' that precede a specific list of included items are to be considered as words of enlargement and not limitation. . . . Indeed, such a list of specific items is not meant to be exclusive of all items other than those specifically named.").

still be denied if it violates other provisions of Pennsylvania law. What if a charter applicant wishes to locate in a site inaccessible to families without cars?⁷⁰ What if an applicant is facing non-renewal of existing charters based on financial improprieties?⁷¹ Charter applicants in Philadelphia have comprised a wide range of entities and some have presented flaws not specified in section 1717-A.⁷²

The CSL requires an authorizer to evaluate “the extent to which the [proposed] charter school may serve as a model for other public schools.”⁷³ A proposed charter school cannot be a model if its existence will harm those schools and undercut their capacity to educate their students. A charter is not a model and fails to fulfill the intent of the CSL if it does not equitably serve students facing learning obstacles such as a lack of English proficiency, disabilities, or homelessness; or uses enrollment practices that district schools cannot use; or pushes students out through high suspension rates or other counseling out tactics.

The Charter Appeal Board, as will be discussed below, has on occasion misread section 1717-A as if the listed factors are the only ones to be considered and has sometimes asserted that, under the doctrine of *ejusdem generis*,⁷⁴ that the explicit factors all relate to education so that “non-education” factors like cost are not relevant.⁷⁵ Neither of these conclusions holds up to careful analysis. The listed factors go well beyond curriculum and teacher qualification; they explicitly incorporate the legislative intent language of section 1702-A, which itself envisions the continuation of the existing school system. The listed factors also include the information required under section 1719-A-3, which includes many elements not directly educational in nature such as the governance structure of the proposed school, the involvement of community groups in developing the application, a description of the physical facility including its owner and any

⁷⁰ Benjamin Herold, *Questionable Application Processes at Green Woods, Other Charter Schools*, THE PHILA. PUB. SCH. NOTEBOOK (Sept. 14, 2012), <https://thenotebook.org/articles/2012/09/14/questionable-application-processes-at-green-woods-other-charter-schools/> (detailing problematic admissions barriers, including Green Woods now-abandoned approach of requiring parents to attend a lottery held outside of Philadelphia).

⁷¹ Greg Windle, *First Hearings Held for Nine Proposed New Charters*, THE PHILA. PUB. SCH. NOTEBOOK (Dec. 19, 2017, 6:44 PM), <https://thenotebook.org/articles/2017/12/19/first-hearings-held-for-nine-proposed-new-charters/> (noting that ASPIRA applied for two new charters even though it was facing non-renewal of two existing charters based on financial problems, caused in part by the settlement of sexual harassment suits filed against its CEO).

⁷² See Susan L. DeJarnatt, *Oversight, Charter Schools, and a Thorough and Efficient System of Public Education*, S.C. L. REV. (forthcoming 2019).

⁷³ § 17-1717-A(e)(2)(iv).

⁷⁴ “[T]he axiom that ‘[g]eneral words shall be construed to take their meanings and be restricted by preceding particular words.’ [sic] However, this principle of *ejusdem generis* generally pertains where general words follow the enumeration of particular classes of persons or things.” *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750, 782 n.11 (Pa. 2018) (quoting 1 PA. STAT. AND CONS. STAT. ANN. § 1903(b) (West 2018)).

⁷⁵ See *infra* Part V.B.

lease arrangements, and plans for liability insurance, among other pieces of information. And section 1717-A explicitly directs authorizers to consider factors including, but not limited to, the listed ones.⁷⁶

The CSL thus presumes the existence of traditional school districts that will serve as authorizers and that will be able to learn from and replicate innovations provided by charters. The CSL does not envision granting charters in a way that would inflict serious harm on districts or that would swallow the districts whole and eliminate them.

The CSL also includes a provision that would have the state reimburse districts in part for the costs of the new charters.⁷⁷ The law thus recognized the financial impact charters would impose on districts, even if the legislators did not grasp the full scope of that impact. But this funding has not been authorized since 2011 in the state budget, causing a loss for Philadelphia of \$110 million then and an increasing loss for each succeeding year with that funding.⁷⁸

The plain language of the statute should be sufficient to refute the “no consideration of financial impact” argument. But, because the argument has had such tenacity in Pennsylvania, it is useful to look further to legislative history and court opinions.

B. The Legislative History of the CSL Shows That the Legislature Intended Charters to Supplement and Not Replace Traditional Public Schools

Pennsylvania legislative history tends to be sparse and the Charter School Law is no exception. There are no hearings or committee reports available, just different versions of the legislation and floor comments in the House and Senate Journals.

The key theme of the floor comments on the Charter School Law is that charters will be a supplement to the existing school system which will be improved by the innovative examples charters will provide. The proponents of what became the Charter School Law repeatedly referred to charters as part of the public school system.⁷⁹ They expected the costs to be manageable, not that

⁷⁶ § 17-1717-A(e)(2).

⁷⁷ § 17-1725-A(b), (c).

⁷⁸ Dan Hardy et al., *Corbett Chops Public School Funding*, PHILA. INQUIRER (Mar. 8, 2011), https://www.philly.com/philly/news/breaking/20110308_Corbett_chops_public_school_funding.html; RFA Data, *supra* note 5, at 2–3.

⁷⁹ H.R. 181-41, Sess. of 1997, at 1456 (Pa. 1997) (“I think that it [the bill] is a reasonable approach to efforts that we ought to engage in, that we ought to promote to help school districts create more quality academic program options for their citizens, for their students in the context of the public school system.”); S. 181-38, Sess. of 1997, at 754 (Pa. 1997) (“There has been a great interest, though, in charter schools and in the fact that charter schools can, as a part of the public school system, play a very small but significant role in creating a new kind of niche for parents, for teachers, for learning opportunities for students that can provide a different kind of opportunity

they could present an existential threat to existing school districts.⁸⁰ Most of the proponents just focused on what they saw as the benefits of adding choice to the school system.⁸¹

None of the debates show that the legislators had any real grasp of how expensive this project was going to be before intentionally deciding to require charter growth despite the expense. The one proponent to address the costs implications in any detail, Senator Schwartz, talked about the financial drain that might come from “a few charter schools.”⁸² Senator Piccola, one of the sponsors of the legislation, urged the school districts to look at charters as partners, not adversaries and warned them not to be obstructionist.⁸³ But he never asserted that they are not allowed to consider the cost implications.

for those particular students, and if they work well, to be a source of innovation and creativity within our public school system, and I look forward to that. I think that is worthwhile.”); *Id.* at 756 (“The concept of charter schools is clear. Charter schools will provide the Commonwealth’s parents with a new educational option for their children, an option that is within Pennsylvania’s system of public schools, an option that still maintains high standards of accountability.”); *Id.* at 757 (“Moreover, an effective charter school bill is one which allows charter schools to supplement and not to undermine our public schools. I believe that these themes run clearly throughout the provisions of this charter school bill.”); *Id.* at 758 (“These key points underscore the General Assembly’s objective in approving the charter school legislation. Charter schools are not a panacea for all of the real or perceived shortcomings of our system of public education, and I do not want this to be viewed in any way, shape, or form as an attack upon the system. It is a spoke in the wheel, just as early childhood education is, just as funding is, just as parental involvement is.”); *Id.* at 758 (“We have heard of the process and the merits and the advantages offered by this bill to parents of schoolchildren throughout the Commonwealth as they try to improve public education, and they will be able to do it without undermining the public education system in Pennsylvania.”).

⁸⁰ H.R. 181-41, Sess. of 1997, at 1457 (Pa. 1997) (“[T]his more reasonable compromise provides for some State funding, some State funding to school districts that incur extraordinary costs because of the creation of charter schools and particularly school districts that incur extraordinary obligations to charter schools for new students who are attracted to the public school system, the charter school piece of it, from nonpublic schools.”). Sen. Schwartz, in favor of the legislation, noted that the administration had compromised on the cost concern by agreeing to 7.5 million in new funding to help districts manage the financial burden. S. 181-38, Sess. Of 1997, at 755 (Pa. 1997).

⁸¹ *See, e.g.*, H.R. 181-41, Sess. of 1997, at 1468 (Pa. 1997) (“I intend to vote for SB 123 on concurrence, and I am not voting for it because I think it is needed to replace a failing public school system. . . . We need to raise the bar of achievement in the public school system commensurate with the bar that has been raised in the workplace. That is what this is about. That is what school reform is about. It is not about bashing public schools. Our public school system is great, but it needs to be better because the workplace bar has been raised, and I believe, I believe charter schools can do that in various ways.”). Rep. Battisto made no mention of costs. *See also id.* at 1469, 1470 (comments of Rep. Kirkland and Rep. Perzel). Rep. Sturla expressed concern that the appeals board would overrule local control and proposed an amendment to leave the appeals decision to local school boards as long as there were at least 50 charter schools in the state. *Id.* at 1465. That amendment was defeated without any real discussion.

⁸² S. 181-38, Sess. Of 1997, at 755 (Pa. 1997). Senator Schwartz’s concerns were assuaged by the administration’s offer of \$7.5 million over two years to meet those burdens.

⁸³ *Id.* at 758.

The Charter School Law was signed by Governor Ridge on June 19, 1997. The language of Sections 1702-A and 1717-A has not been amended since enactment.

The CSL has undergone other changes, though none that explicitly address the financial impact issue. The amendment that could have most directly touched on the costs of charters to school districts was the amendment of Section 1723 in 2008 to include the following clause:

Enrollment of students in a charter school or cyber charter school shall not be subject to a cap or otherwise limited by any past or future action of a board of school directors, a board of control established under Article XVII-B, a special board of control established under section 692 or any other governing authority, unless agreed to by the charter school or cyber charter school as part of a written charter pursuant to section 1720-A.⁸⁴

Enrollment has an obvious relationship to costs, but this amendment says nothing about use of financial impact as a criterion for charter expansion. While this amendment seems to be an effort to constrain authorizers from unilaterally imposing enrollment caps on new charters, the only information from the Senate Journal on this language is instructive:

The PRESIDENT: “The Chair recognizes the gentleman from Philadelphia, Senator Hughes.”

Senator HUGHES: “Madam President, would the Majority Leader stand for a very brief moment of interrogation, please?”

Senator PILEGGI: “I will, Madam President.”

The PRESIDENT: “He indicates he will.”

Senator HUGHES: “Madam President, I have two very brief questions. Does the language in Section 1723-A, regarding the number of students enrolled in a charter school, prohibit a schoolboard or any other governing authority from capping student enrollment when the charter school agreement comes up for renewal if the current charter school agreement already contains an enrollment cap?”

Senator PILEGGI: “Madam President, no, it does not. That is not the intent of the language in this bill.”

⁸⁴ 24 PA. STAT. AND CONS. STAT. ANN. § 17-1723-A(d)(1) (West 2018).

Senator HUGHES: “Secondly, Madam President, if the current agreement already contains an enrollment cap, can a school board or any other governing authority be prohibited from capping student enrollment when the charter school agreement is up for renewal?”

Senator PILEGGI: “Again, Madam President, that is not the intent of the legislation.”

Senator HUGHES: “Thank you, Madam President. No more questions.”⁸⁵

This exchange is illuminating in two ways. First, the amendment did not preclude caps entirely; it just required that they be negotiated by the authorizers and the charter applicants.⁸⁶ Second, the exchange supports the argument that existing caps would continue to be effective.⁸⁷ There is no discussion at all of the financial impact either on charters that are unable to expand or on districts that may be financially burdened by uncontrolled charter growth. Enrollment to be sure has a significant cost impact, but enrollment also affects other aspects of a school: what grades it offers, what services will be needed. While this provision now requires negotiations with existing charters about controlling growth, it does not preclude considering fiscal impact on decisions related to the denial of a charter application or to a renewal or revocation decision.

In short, nothing in the legislative history of the CSL directly or indirectly supports the position that authorizers must totally ignore financial impact. The legislators wanted to create an innovative supplement to the existing system. They planned to fund these supplements out of existing school budgets but did not envision that the supplements would harm or reduce educational opportunities within the existing system of public education. They may have underestimated the costs of charters but they never said or implied that authorizers should be forbidden from considering financial impact as a factor in decisions regarding charters.

V. THE ORIGINS OF THE MYTH: NEWS ACCOUNTS AND CAB DECISIONS

So where did this notion come from, if not from the legislative proponents or the law itself? The earliest mentions I can find are from newspaper articles and from decisions by the Charter Appeals Board. This section will

⁸⁵ S. 192-54, Sess. of 2008, at 2429 (Pa. 2008).

⁸⁶ § 17-1723-A(d)(1).

⁸⁷ *See* Sch. Dist. of Phila. v. Dep’t of Educ., 92 A.3d 746 (Pa. 2014) (holding that enrollment caps agreed to before enactment of this provision remained valid and enforceable).

address both of those sources and show that they are, at best, a very shaky foundation for this myth that the CSL forbids consideration of financial impact.

A. Contemporaneous News Articles Do Not Mention the “No Consideration of Costs” Myth

The “no consideration of costs” myth that districts cannot consider costs has obscure origins. The news accounts from the time the CSL was passed do not mention this “rule.”⁸⁸ In an op-ed published in the *New Pittsburgh Courier*, Representative Ron Cowell, then chair of the House Education Committee, praised passage of the CSL. He stressed: “The charter school law is not about privatization or escaping public education Instead the law is intended to enhance public education by allowing the creation of more quality academic options *within* the public school system.” After his praise though he goes on to state:

Finally, there remain problems with funding. Inadequate state funding will likely cause some school boards to reject proposals to establish charter schools which may impact on school district taxes or the resources available to other schools in the district. This is a serious problem with roots in the inadequacy of our entire school finance system. It is a system-wide problem we must address and, in doing so, we can remove funding concerns as an obstacle to the approval of charter schools by local school boards.⁸⁹

Representative Cowell not only thought the law allowed consideration of financial impact, he expected that school district authorizers would deny charters on that exact basis.

Other accounts note concerns about costs but not any statement from supporters or opponents that districts will be unable to consider costs in their authorization decisions. A *Philadelphia Inquirer* article detailing the final debates over the bill mentions the concern opponents had about costs but says nothing about a bar on considering costs.⁹⁰ Another *Inquirer* article about the first authorizations under the new law quotes the Philadelphia School District’s managing director, Clarence Armbrister, as saying: “All things being equal, it may not be in our best financial interests to approve charter schools . . . [b]ut it is the district’s intent to provide a world-class education . . . that overrides any

⁸⁸ Rep. Ron Cowell, *Reasonable Compromise for Charter Schools*, *NEW PITTSBURGH COURIER*, Aug. 16, 1997.

⁸⁹ *Id.*

⁹⁰ Russell E. Eshleman, Jr. & Dale Mezzacappa, *Pa. Senate Passes Charter School Bill*, *PHILA. INQUIRER*, June 12, 1997, at A1, A16.

financial considerations.”⁹¹ The article does not say the District was forbidden from considering financial impact; rather the Armbrister quote shows that the District did consider costs and decided to authorize these four schools despite the costs. The article also notes: “Although the state has allocated millions for the creation of charter schools, district officials said it would not cover the full costs of launching the charters. The additional costs will add to a budget deficit already projected at more than \$140 million in 1998-99.”⁹²

The earliest mention I was able to find with the “can’t consider costs” language was from the Pittsburgh-Post Gazette in 1998 stating that: “Cost is not mentioned in the charter school law’s criteria for judging applications. Pittsburgh officials have interpreted this to mean that the law does not allow cost to be a factor in deciding whether to approve a charter school.”⁹³ Two years later, that interpretation had become more of a blanket statement, an incorrect one, about what the CSL actually said: “However, the state law authorizing charter schools says school districts can’t use financial considerations as reasons to turn down potential charter schools.”⁹⁴ This article did not cite or quote any provision of the CSL in support of this assertion. And there is no such provision.

Another historical note is worth mentioning here. In 2015, the Governor of Pennsylvania did not believe in the “can’t consider costs” myth. In 2015, Philadelphia was forced by the state legislature to consider applications for new charters.⁹⁵ It had not accepted new applications for several years leading up to 2015 though it had converted over 20 existing schools into charters through its Renaissance program during that time.⁹⁶ The SRC had to vote on 39

⁹¹ Richard Jones, *4 Phila. Charters Approved*, PHILA. INQUIRER, (Aug. 22, 1997), at A21, <https://www.newspapers.com/image/177868244>.

⁹² *Id.*

⁹³ Carmen J. Lee, *Charting a Course: School Districts Learning the Lessons of Charter Schools*, PITTSBURGH POST-GAZETTE, Feb. 22, 1998, at B-4.

⁹⁴ Judy Laurinatis, *Charter Schools Seen as Budget Drain: Public Hearing in Penn Hills for First of Three Proposals Raises Money Worries*, PITTSBURGH POST-GAZETTE, Dec. 13, 2000, at E-10.

⁹⁵ In exchange for approval of Philadelphia’s decision to raise money for public schools through a tax on cigarettes, the Pennsylvania legislature required the Philadelphia School District to accept new charter applications, and it eliminated Philadelphia’s exemption from appeals to the CAB. Dan McQuade, *Bill That Approved Cigarette Tax Guarantees More Charter Schools in Philadelphia*, PHILA. MAG. (Sept. 29, 2014, 10:14 AM), <https://www.phillymag.com/news/2014/09/29/bill-approved-cigarette-tax-guarantees-charter-schools-philadelphia/>.

⁹⁶ Kevin McCorry, *SRC Overrules Superintendent Hite, Moves to Convert Three Schools Into Charters*, WHYY (Jan. 21, 2016), <https://whyy.org/articles/src-overrules-superintendent-hite-moves-to-convert-three-schools-into-charters-photos/>.

applications.⁹⁷ Governor Wolf was opposed to charter expansion in Philadelphia on grounds of cost.

Gov. Wolf, sources said, has told the SRC he wants it to approve no new charters because the School District cannot afford them. Asked about the governor's position on charter schools, Wolf's press secretary, Jeffrey Sheridan, wrote in an e-mail: "The Wolf administration believes the SRC must stabilize, not worsen, the district's finances. It cannot spend money it does not have for new charters or other expenses. It is past time we reaffirm our commitment to high quality public education for all children."⁹⁸

The Wolf administration did not subscribe to the myth that financial impact is irrelevant to charter authorization. It is also noteworthy that the overall costs of charter growth were so high that even a proponent of privatization, like Governor Corbett, took steps to protect the Commonwealth, though not the local districts, from the financial impact.⁹⁹

In 2014, the *Post-Gazette* reiterated the assertion that: "[u]nder state law, school districts cannot reject a charter school application based on cost."¹⁰⁰ The CSL contains no language prohibiting consideration of costs. It didn't then and it doesn't now. The prohibition myth does not even appear until 1998 and is not based on the CSL's language or on the debates that accompanied its passage. The origin—the misinterpretation of unnamed Pittsburgh officials—is no basis for the claim that authorizing districts are forbidden from any consideration of how charter growth will financially impact their ability to provide a thorough and efficient system of public education through all of their existing schools, charter and traditional. The purchase of the "no consideration of costs" myth by the Charter Appeals Board is similarly flawed.

⁹⁷ Holly Otterbein, *SRC Approves 5 of 39 New Charter School Applications*, PHILA. MAG. (Feb. 18, 2015, 8:51 PM), <https://www.phillymag.com/news/2015/02/18/src-approves-5-new-charter-schools-philadelphia-update/>.

⁹⁸ Kristen A. Graham, *Pressure is Building to OK Phila. Charters*, PHILA. INQUIRER (Feb. 17, 2015), at B4. This article also quotes then-SRC Chair Bill Green as saying that "only state regulations" could be considered in the authorization decision. *Id.* In contrast, former SRC Commissioner Joe Dworetzky disagreed, writing to the SRC that: "the district cannot afford new charters." *Id.* New charter schools, he said, are "extraordinarily expensive." *Id.* The SRC is obliged to consider the impact of new charter-school seats on current district students, Dworetzky said. *Id.* "That \$7,000-per-student-per-year loss is not a 'paper loss,'" Dworetzky wrote. *Id.* "The district must actually fund it and the only place where most of those funds can come from is by way of further reductions to the instructional services that benefit the remaining students. That isn't fair and it isn't equitable." *Id.*

⁹⁹ *Id.*

¹⁰⁰ Eleanor Chute, *Pittsburgh School Board Rejects Charter School Expansion at Frick Park*, PITTSBURGH POST-GAZETTE (July 23, 2014, 9:11 PM), <https://www.post-gazette.com/news/education/2014/07/23/Pittsburgh-school-board-rejects-charter-school-expansion-at-Frick-Park/stories/201407230220>.

B. CAB Decisions: Buying into the Myth with Little to No Authority

The Charter Appeals Board seems to have bought into the myth but an examination of its decisions reveals little or no analysis and no citations showing support in the law itself. The CSL established an appeals process for applicants whose charters were disapproved by the authorizer or revoked or not renewed.¹⁰¹ The CAB is composed of seven individuals appointed by the Governor and confirmed by the Senate.¹⁰² As of this writing, the CAB has issued opinions in 146 cases, dating back to 1999.¹⁰³ In a handful of those opinions, the CAB has stated that authorizers cannot consider financial impact though its reasoning is unsound and not consistent with the language of the CSL. The following sections analyze these opinions and show how they are either not on point or misinterpret the CSL.

1. Not Really On Point: Lack of Standing of Taxpayers in Adjacent Districts to Oppose Charter Applications

In three cases, the CAB denied petitions to intervene filed by taxpayers residing in school districts adjoining the district where the proposed charter would be located, finding that the taxpayers' claimed harm was too speculative. Although these opinions reject consideration of the financial impact on these particular taxpayers, the key reason for denying intervention was that any financial impact would be too speculative to justify the taxpayers' participation in the proceeding. None of these opinions stated that financial impact was a

¹⁰¹ 24 PA. STAT. AND CONS. STAT. ANN. § 17-1717-A(f) (West 2018). One of the legislative compromises that allowed enactment of the CSL was that the CAB would not hear appeals for two years following enactment. Cowell, *supra* note 88. As a result, many of the early CAB decisions focus on procedural issues, including whether it had jurisdiction over applications that were denied during those first two years. *Keystone Cent. Sch. Dist. v. Pa. Dep't of Educ.*, 799 A.2d 209 (Pa. Commw. Ct. 2002). After the state takeover of Philadelphia under the Distressed Schools Act, the CAB had no jurisdiction over charter decisions in Philadelphia until the 2013 compromise. § 6-696(i)(2)(i).

¹⁰² The seven members of the CAB must include (1) a parent of a school-aged child, (2) a school board member, (3) a certified teacher actively employed in a public school, (4) a faculty member or administrative employee of an institution of higher education, (5) a member of the business community, (6) a member of the State Board of Education, and (7) the State Secretary of Education. There is no requirement that any member be a lawyer. § 17-1721-A(a). The Supreme Court of Pennsylvania noted that "the composition of the CAB supports a finding of de novo review [at the CAB level]. The CAB is not comprised of attorneys capable of conducting a legal examination of the evidence, but rather consists of persons who have a perspective on public education." *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 812 A.2d 1172, 1180 (Pa. 2002).

¹⁰³ *Appeal Board Decisions*, PA DEP'T OF EDUC., https://www.education.pa.gov/K-12/Charter%20Schools/Pages/CAB-Decisions.aspx?&&p_SortBehavior=0&p_FileLeafRef=2012-01%20Graystone%20Academy%20Charter%20School%20epdf&&PageFirstRow=1&View=9064a324-2e37-455c-bd4f-860a994335cc (last visited Mar. 23, 2019).

forbidden consideration. For example, in denying intervention in *In re: Ronald H. Brown Charter School*,¹⁰⁴ the CAB noted:

Petitioners' arguments are based on mere speculation. Even though the School District will be required to pay subsidy money to the Charter School for the resident students attending the Charter School, there is no proof that taxes will be raised more quickly by the School District or that programs will be reduced or eliminated as a result. Additionally, the Legislature knew that school subsidy money would flow from the school districts to the charter schools. Nevertheless, the Legislature did not authorize persons such as Petitioners the right to intervene in the CAB appeal process.¹⁰⁵

In *Ronald Brown*, the School District itself did not raise financial impact as a basis for denial of the charter.¹⁰⁶ It focused its opposition on whether the charter applicant had sufficiently demonstrated community support and the CAB ruled that it had.

In a similar denial of an adjoining district's taxpayer's petition to intervene, the CAB held:

It is only speculation about the numbers, if any, of the Downingtown students who may actually attend Phoenix Academy, and even if students residing in Downingtown attend Phoenix Academy, there is no evidence that taxes will be raised or that there will be a reduction in services in Petitioners' district as a result.¹⁰⁷

This logic was used to deny a petition to intervene in the Collegium Charter School case as well.¹⁰⁸

¹⁰⁴ *In re* Ronald H. Brown Charter Sch., CAB No. 1999-1, 15 (Dec. 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-01%20Ronald%20H.%20Brown%20Charter%20School.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *In re* Appeal of Phoenix Academy Charter Sch., CAB No. 1999-10, 3 (Aug. 27, 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-10%20Phoenix%20Academy%20Charter%20School.pdf>.

¹⁰⁸ *See generally* *In re* Collegium Charter Sch., CAB No. 1999-9 (Aug. 27, 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-09%20Collegium%20Charter%20School.pdf>.

2. Flawed Reasoning to Support the “No Consideration of Costs” Myth

The CAB decisions that buy most directly into the “no consideration of costs” myth rely on flawed reasoning. Essentially the CAB asserts that, by deciding to fund charters through school district budgets, the legislature has already performed a cost/benefit analysis and no further consideration of impact or costs is allowed. For example:

In its Notice of Determination, which delineated the reasons that the KCSD denied the Application, one of the stated reasons for denying the Application was that it would “be wasteful of School District taxpayer monies.” This motivation, to deny a charter because the district would lose money, is contrary to the Charter School Law. By encouraging the creation of charter schools and by explicitly funding charter schools from school district revenues, the legislature intended for districts to give up a portion of their revenues in order to allow charter schools to operate. Conversely, the legislature did not include financial considerations among the criteria upon which a charter school application should be judged. Therefore, it was directly contrary to the intent of the Charter School Law for KCSD to rely upon the loss of revenue or the “waste of taxpayers[sic] monies” as a factor in the analysis of whether to grant a charter. We disagree with KCSD’s findings in this regard, and reject them.¹⁰⁹

In the *Collegium* appeal, the CAB stated that:

The Directors state in finding of fact number fifteen that, because the Legislature imposed funding of charter schools upon the local school district, the local district could inquire into the costs and benefits of the charter school in order to be certain tax dollars were prudently spent. This is a conclusion, not a finding of fact.

In findings of fact numbers sixteen through twenty-two, the Directors continue to set forth conclusions regarding its cost/benefit analysis of a charter school. The Directors speculate that the reduction in costs to the District will be minor in comparison to the increase in costs because it is unlikely the District will be able to reduce staff or facilities but will have less subsidy money for expenditures. We conclude that the District’s

¹⁰⁹ *In re Sugar Valley Rural Charter Sch.*, CAB No. 1999-4, 16–17 (Nov. 1999), <https://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-04%20Sugar%20Valley%20Rural%20Charter%20School.pdf>, *aff’d on other grounds*, *Keystone Cent. Sch. Dist. v. Sugar Valley Concerned Citizens*, 799 A.2d 209 (Pa. Commw. Ct. 2002).

cost/benefit inquiry is not a proper inquiry for the District, nor is it a proper basis upon which to deny a charter, because a cost/benefit analysis has already been performed by the Legislature. When the Legislature passed the Charter Law it knew that the funding mechanism set forth therein required school districts to pay subsidy money to charter schools attended by a school district's resident students. Obviously, by passing the Charter Law with this funding mechanism for charter schools, the Legislature decided that the cost to school districts was outweighed by the benefit of having charter schools. Therefore, the District's cost/benefit analysis is not relevant.¹¹⁰

The CAB included dicta in its decision upholding the denial of a charter in the *In re: Appeal of Phoenix Academy Charter School*¹¹¹ case which tracked the language above:

(6) Detrimental Effects On The Education Of Remaining Phoenixville Students.

Phoenixville's sixth reason is not explicitly set forth in the Charter Law. Phoenixville determined that the "including but not limited to" language of § 17-1717-A (e)(2) authorized Phoenix Academy to be denied a charter because the granting of the charter would have detrimental effects on the education of the remaining students in Phoenixville. In particular, Phoenixville claimed that the district was "uniquely encumbered with four simultaneous and significant strains on its operations. These strains were: (1) the district's teaching staff working without a contract; (2) major building renovations on the high school and middle school to start in July 1999; (3) the recent approval of a \$10,000,000 bond issue; and (4) the relative inexperience of three fourths of the district's central administrators and building administrators in their current positions. According to the District, these reasons collectively, when combined with the teacher disapproval of the application, "create an unacceptable risk to the orderly administration of the District and to the delivery of quality education to those many students who will remain in District schools." March 16 letter denying the application, p. 5.

The disruption and detrimental impact alleged by Phoenixville, is based upon factors that commonly exist in

¹¹⁰ *In re* Collegium Charter Sch., CAB No. 1999-9, 17 (Aug. 27, 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-09%20Collegium%20Charter%20School.pdf>.

¹¹¹ *In re* Appeal of Phoenix Academy Charter Sch., CAB No. 1999-10 (Aug. 27, 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-10%20Phoenix%20Academy%20Charter%20School.pdf>.

school districts and would exist regardless of the granting of a charter. The strains mentioned by Phoenixville seem to be fairly routine operational issues that school districts regularly encounter, and similar to the existence of charter schools, are just a factor of school districts existing and doing business. Additionally, when the General Assembly passed the Charter Law, it knew and understood the potential impact of charter schools on school districts because of the funding mechanism set forth in the Charter Law. However, the General Assembly obviously determined that the benefits of charter schools outweighed the costs. Therefore, these financial reasons set forth by Phoenixville as support for denial of the charter are not appropriate, and Phoenixville's decision is reversed on this factor.¹¹²

The CAB engaged in no analysis of the language of the CSL, the legislative history of the CSL, or of the actual costs imposed by charter expansion in any of these cases. As demonstrated above, the legislature had no real appreciation of the actual costs and its members repeatedly expressed their intent not to undermine the public school system. Those members who were concerned about local costs thought the state would be playing a role in offsetting them. There is no evidence that in creating the funding system, the legislators intended to bar authorizers from exercising any kind of responsible financial stewardship as charter authorizers. As is clear in both the plain language of the CSL and its legislative history, they meant to supplement, not destroy the public education system. By choosing to make the districts responsible for authorization, the legislators had to have intended for the districts to perform that role responsibly. The CAB failed to grapple with these realities.

¹¹² *In re Phoenix Academy*, CAB No. 1999-10 at 26-27; see also *In re Hills Academy Charter Sch.*, CAB No. 1999-12, 19 (Aug. 27, 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-12%20Hills%20Academy%20charter%20School.pdf>. The CAB affirmed denial of the charter application based on lack of community support but proceeded to opine that:

If Hills meets the Charter Law's requirements, it is entitled to a charter, regardless of the financial impact on Penn Hills. The financial impact of a charter school on a school district is irrelevant because when the General Assembly passed the Charter Law, it knew and understood the potential impact of charter schools on school districts due to the funding mechanism set forth in the Charter Law. However, when it enacted the Charter Law, the General Assembly obviously determined that the benefits of charter schools outweigh the costs, and neither Penn Hills nor the CAB has the power to "overrule" that decision. Therefore, the financial impact set forth by Penn Hills as support for denial of the charter is not appropriate.

Id.

3. CAB Decisions That Distort the CSL by Looking Only at the Listed Factors Instead of the Included but Not Limited to Language

The CAB in some decisions also distorts the language of the CSL by looking only to the listed factors or by requiring authorizers to prove that the application fails at least one of them. This interpretation merely pays lip service to or ignores the “included but not limited to language” entirely, thus misreading the CSL. In the *In re: Arts and 3 R’s Inc. d/b/a Helen Murray Charter School for the Arts*¹¹³ appeal, the CAB states that the authorizer “must demonstrate that the application and other information submitted by the charter school applicant is deficient under at least one of the criteria enumerated above.”¹¹⁴ That is not what the CSL says. As discussed above, consideration of the legislative intent, and thus the impact on the system does indeed fall under one of the four listed criteria. But, in addition, the CSL requires the authorizing district to consider those factors along with others that fit under the “following but not limited to” language. The authorizer should not be accepting applications that would have a clear discriminatory impact against students who are English Language Learners or students with IEPs; it should not grant charters to organizations that plan to exclude children from poor families by using access to transportation as a

¹¹³ *In re Arts and 3 R’s Inc. d/b/a Helen Murray Charter Sch. for the Arts*, CAB No. 2005-5, 7 (Sept. 30, 2005), <https://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/2005-05%20Arts%20and%203%20R's%20Inc%20dba%20Helen%20Murray%20Charter%20School.pdf>.

¹¹⁴ *Id.* The CAB cites Bear Creek in support but Bear Creek does not say this; rather, it rejects an authorizer’s comparison of its own budget with the proposed charter budget in finding that the school’s financial plan was unsound. The CAB finds that the CSL does not allow consideration of an applicant’s underestimation of expenses. *In re Bear Creek Cmty. Charter Sch.*, CAB No. 2004-2, 15 (Sept. 4, 2004), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/2004-02%20Bear%20Creek%20Community%20Charter%20School.pdf>. Bear Creek also denies the authorizer the right to consider the poor track record of the EMO proposed by the applicant because the CSL does not allow the authorizer to “substitute its judgment for that of the Charter School concerning its relationship with [the EMO].” *Id.* at 10. This overbroad statement is not consistent with good oversight which the CSL imposes on authorizers. Again, what if an applicant proposed to use a CEO or EMO that had a strong track record of fraud? In 2014, Johnny Patterson applied to open a charter in the Harrisburg School District that he planned to name after June Brown who, at the time, was under federal indictment for 54 counts of wire fraud. See M. Diane McCormick, *Backers Withdraw Plan for Proposed D. June Brown Charter School in Harrisburg*, PA PENNLIVE (Jan. 15, 2014), https://www.pennlive.com/east-shore/index.ssf/2014/01/harrisburg_charter_school_proposal_withdrawn.html. Patterson withdrew the application after issues of plagiarism and fraud arose but the authorizer should certainly have had the right to consider those issues if the application had not been withdrawn. *Id.* To top it off, this entire discussion in *Helen Murray* is dicta because the CAB denied the application based on a lack of demonstrated support.

proxy.¹¹⁵ What if an application was filed by a former operator who has pled guilty to tax fraud arising from his operation of a charter school?¹¹⁶ The CSL did not set out every factor for consideration. Meeting the four listed factors does not guarantee a grant of a charter that is otherwise not in compliance with law and the authorizers are not required to prove non-compliance with one of the listed factors where there are other problems with the application.

The CAB also misreads the *ejusdem generis* analysis. In *In re: Souderton Charter School Collaborative*,¹¹⁷ the school district rejected the application in part based on the inadequacies in the charter applicant's financial plan which, in the authorizer's opinion failed to account for funding shortfalls or for a higher than expected enrollment of students with special needs.¹¹⁸ The CAB found this reasoning speculative and stated that:

Generally, the Charter Law does not provide for denial of a charter school application for financial reasons. Although a district is not limited to the criteria listed in Section 17-1717-A, the criteria are generally educational in nature. Thus, this Board considers it improper to use financial criteria alone as a basis for evaluating a charter school application.¹¹⁹

But the CAB here is referring to concerns about the financial position of the charter school, not about impact on the district. And its reasoning is flawed. Section 17-1717-A itself directs the authorizer to consider “the extent to which the application considers the information requested in Section 1719-A” which itself explicitly includes the proposed school's financial plan.¹²⁰ What if an

¹¹⁵ *Charter School Renewal Recommendations and Charter Amendment Requests*, CHARTER SCH. OFF., SCH. DIST. PHILA. (May 1, 2017), <https://www.philasd.org/src/wp-content/uploads/sites/80/2017/07/Charter-Powerpoint-Presentation-5.1.17.pdf>.

¹¹⁶ This example is hypothetical but it would not be unheard of. In 2017, Commonwealth Education Connections, Inc., applied for a cyber-charter with the Department of Education. Its application, filed by Johnny Patterson, was full of omissions and inaccuracies about the schools CEC purported to operate. Patterson withdrew his application, but the DOE should have denied it based on the serious credibility concerns it presented. A copy of the application and this author's testimony to the DOE is on file with the author. *See Sugar Valley*, CAB No. 1999-4 at 16–17.

¹¹⁷ *In re Souderton Charter Sch. Collaborative*, CAB No. 1999-2 (Dec. 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-02%20Souderton%20Charter%20School%20Collaborative.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 13.

¹²⁰ The section lists 17 different elements and many others are also not “educational in nature.” For example, the governance structure of the proposed school, 24 PA. STAT. AND CONS. STAT. ANN. § 17-1719-A(4) (West 2018); the disciplinary procedures, *Id.* § 1719-A(7); the involvement of community groups, *Id.* § 1719-A(8); procedures for handling parent complaints, *Id.* § 1719-A(10); the physical facility, *Id.* § 1719-A(11); criminal and background checks for staff, *Id.* § 1719-A(15, 16); and insurance, *Id.* § 1719-A(17).

applicant proposed a school structure that was completely untenable financially. For example, the application proposes payment to a CEO of a salary in excess of \$1 million? The authorizer ought to be allowed to consider that type of financial inadequacy on the applicant's part, especially given the relatively high rate of fraud within the charter sector in Pennsylvania.¹²¹

4. *Fell Charter and Chester Charter School for the Arts: Directly Buying the “No Consideration of Costs” Myth Despite the Language and History of the CSL*

Two more CAB decisions merit a close look: *In re: Fell Charter School*¹²² and *In re: Chester Charter School for the Arts*.¹²³ In *Fell*, the CAB lists the 1717-A criteria though it notes these are not the only criteria.¹²⁴ It proceeds to state, without any citation to the CSL, its legislative history, or any court interpretation, a Conclusion of Law: “The Charter School Law does not provide that financial impact should be a basis upon which an application should be evaluated. The legislature intended the criteria for evaluation to be educational in nature, and therefore, evaluating an application on the basis of financial considerations is improper.”¹²⁵

In its analysis, the CAB quotes *In re: Souderton Charter School Collaborative*¹²⁶ for the proposition that “this Board considers the creation of financial criteria for judging a charter school application to be improper.”¹²⁷ But the objection raised in *Souderton* was to the financial structure of the proposed

¹²¹ See DePasquale Report, *supra* note 42. Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37, 49–52 (2012). The saga of Nick Trombetta and the PA Cyber School is illustrative of the problems flowing from lack of oversight. Trombetta, the founder of the school, pled guilty to tax conspiracy resulting from his “misdirection” of \$8 million from the school; Paula Reed Ward, *Cyber Charter Founder Trombetta is Sentenced to 20 Months in Prison*, PITTSBURGH POST-GAZETTE (July 24, 2018, 7:49 PM), <https://www.post-gazette.com/news/crime-courts/2018/07/24/Cyber-Charter-founder-Trombetta-sentenced-20-months-prison-8-million-midland-beaver-county/stories/201807240110>.

¹²² *In re Fell Charter Sch.*, CAB No. 2001-9, 6, 9–10 (May 2, 2002), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/2001-09%20Fell%20Charter%20School.pdf>.

¹²³ *In re Chester Charter Sch. for the Arts*, CAB No. 2012-02 (July 25, 2012), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/2012-02%20Chester%20Charter%20School%20for%20the%20Arts%20v%20ChesterUplandSD.pdf>.

¹²⁴ *In re Fell*, CAB No. 2001-9 at 6, 9–10.

¹²⁵ *Id.* at 7.

¹²⁶ *In re Souderton Charter Sch. Collaborative*, CAB No. 1999-2 (Dec. 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-02%20Souderton%20Charter%20School%20Collaborative.pdf>.

¹²⁷ *In re Fell*, CAB No. 2001-9 at 28.

charter school, not to financial impact on the district.¹²⁸ *Fell* goes on to quote *Sugar Valley* for the proposition that: “the school district’s reliance ‘upon the loss of revenue or the “waste of taxpayers monies” as a factor in the analysis of whether to grant a charter’ was ‘directly contrary to the intent of the Charter School Law.’” (Docket No. CAB 1999- 4), p.16.”¹²⁹ The CAB thus conflates the underlying premise of the CSL’s funding mechanism—that charters would receive tuition from the school district its students reside in—with the much broader notion that there could be no consideration at all of how granting the charter could undercut the authorizing district’s ability to provide education to the students remaining in the district or those in existing charter schools.

In addition, the line of demarcation that the CAB draws between “educational criteria” and “financial impact” ignores how intimately funding and education are connected. The Pennsylvania Supreme Court rejected the argument made in the school funding litigation that the only constitutional obligation the Commonwealth has is to provide buildings with the lights on.¹³⁰ The Court took the constitutional obligation seriously and recognized that the plaintiffs stated a cognizable claim in arguing that Pennsylvania’s poor support for education and the huge disparities between districts violate the Constitution because a thorough and efficient system of public education requires adequate finances in order to provide education. The two are interdependent, not independent.

The CAB’s analysis in the *Chester Charter School for the Arts* is even more suspect.¹³¹ In this decision from 2012, the CAB blandly states that it is “well-settled” that authorizers cannot consider financial impact, citing *Keystone*, which cites *Collegium*. But there are two enormous problems with the CAB’s reliance on *Keystone*. The Commonwealth Court did not cite *Collegium* for the point about financial impact; rather, it cited *Collegium* on the scope of review of CAB decisions.¹³² The only mention in *Keystone* of the financial impact argument is in a footnote to the court’s description of the CAB’s findings of fact that states in full:

¹²⁸ The *Souderton* decision was also wrong on this point as noted above. See *In re Souderton Charter Sch. Collaborative*, CAB No. 1999-2 (Dec. 1999), <http://www.education.pa.gov/K-12/Charter%20Schools/Charter%20Board%20Appeal%20Opinions/1999-02%20Souderton%20Charter%20School%20Collaborative.pdf>.

¹²⁹ The Commonwealth Court’s opinion upholding the CAB decision is utterly silent on this point even though the court reviews the CAB decision on every other criteria individually, and the school proponents presented the argument in their brief. Brief for Appellee at 11, *Carbondale Area Sch. Dist. v. Fell Charter Sch.*, 829 A.2d 400 (Pa. Cmmw. Ct. 2003) (quoting *Keystone Cent. Sch. Dist. v. Sugar Valley Concerned Citizens*, 799 A.2d 209 (Pa. Commw. Ct. 2002)).

¹³⁰ See generally *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414 (Pa. 2017).

¹³¹ *In re Chester Charter*, CAB No. 2012-02.

¹³² *Keystone Cent. Sch. Dist. v. Sugar Valley Concerned Citizens*, 799 A.2d 209, 216 (Pa. Commw. Ct. 2002).

One of the reasons the School Board denied Sugar Valley's application is based on the perceived notion that it would have a negative effect on the taxpayers in the school district. The CAB concluded that it was improper for the School Board to deny Sugar Valley's application, in part, on this basis. We agree. The General Assembly specifically provided that the funding for charter schools shall come from school district revenues. To deny the charter school because it may deplete school district revenues is inconsistent with the purpose of the CSL.¹³³

Additionally, *Collegium* itself upheld the denial of a taxpayer petition to intervene on the grounds that any harm would be too remote to provide a basis for intervention.

Taxpayers' interests, based only on a possibility that taxes and services would be adversely affected, are too remote to provide a basis for intervention. Further, any change in taxes or services in neighboring school districts would be the direct result, not of the charter grant itself, but of those school districts' response to that grant. Accordingly, because Taxpayers have not shown an interest that would be directly affected or bound by the CAB's action in this matter, we conclude that the CAB did not abuse its discretion in denying Taxpayers' petition to intervene under 1 Pa. Code § 35.28(a)(2).¹³⁴

The CAB then rejects any consideration of the dire financial straits of the authorizing district, Chester-Upland, which had been subject to state takeover and was drowning from the financial devastation wrought by having half its students enrolled in charters.¹³⁵ The notion that the legislative choice in 1997 to fund charters through moving tuition money out of districts was the end of any further consideration ignores reality and the stated legislative intent to have charters add to—not supplant or destroy—existing public systems. Indeed, the Pennsylvania appellate courts have not adopted this view.

¹³³ *Id.* at 218 n.14.

¹³⁴ *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452, 467 (Pa. Commw. Ct. 2000), *aff'd*, 812 A.2d 1172 (Pa. 2002).

¹³⁵ The costs of the special education funding led to litigation in 2015 over the District's inability to pay the \$40,000 per student tuition that the formula required for special education students. The parties agreed to reduce that figure to \$27,028.72 per student, still a significant hit to the District. Vince Sullivan, *Judge OKs Chester Upland School District Deal with Charter School*, DAILY TIMES (Oct. 13, 2015), https://www.delcotimes.com/news/judge-oks-chester-upland-school-district-deal-with-charter-school/article_4f147030-a888-5676-b07e-6f72bce7ef87.html.

VI. COURT INTERPRETATION: NO PRECEDENTIAL APPELLATE DECISION SAYS THAT AUTHORIZERS ARE FORBIDDEN FROM CONSIDERING THE FINANCIAL IMPACT OF CHARTER GROWTH

Not a single court decision from the Pennsylvania appellate courts has held that authorizers are forbidden from any consideration of financial impact when they are making charter decisions.

The closest a court has come to supporting this argument is the footnote in *Keystone* that refers only to the legislative choice of the funding mechanism and is a note to the court's listing of the CAB's finding that the school's financial management plan was sound.¹³⁶ *Keystone* decided three issues: First, it determined that an initial tie vote did not preclude the CAB from revoting later on the appeal.¹³⁷ Second, the court held that the charter applicant's appeal to the CAB was not premature, even though it was filed during the two-year moratorium on appeals to the CAB. It ruled that the moratorium just delayed the set-up of the CAB but did not bar the CAB from hearing appeals that were filed during the moratorium.¹³⁸ Finally, the court determined that the CAB had *de novo* review over districts' decisions on authorizing charters.¹³⁹ The footnote that mentioned the funding mechanism is to the court's description of the CAB's fact findings and not to any of the legal analysis.¹⁴⁰ That is hardly a substantial basis for any claim that it is "well-settled" that financial impact cannot be a factor.¹⁴¹

The Pennsylvania Supreme Court has issued five opinions interpreting the Charter School Law.¹⁴² It has consistently adhered to the admonitions of the

¹³⁶ "In addition, the CAB found that Sugar Valley's comprehensive five-year financial management plan was sound and that it was actively pursuing a new facility, and that the application should not have been denied on that basis because Sugar Valley was willing to delay the opening of the school until a proper facility was located." *Keystone*, 799 A.2d at 218.

¹³⁷ *Id.* at 214–15.

¹³⁸ *Id.* at 215–17.

¹³⁹ *Id.* at 217–20.

¹⁴⁰ *Id.* at 218 n.14 The text sentence reads: "In addition, the CAB found that Sugar Valley's comprehensive five-year financial management plan was sound." Note 14 itself states:

One of the reasons the School Board denied Sugar Valley's application is based on the perceived notion that it would have a negative effect on the taxpayers in the school district. The CAB concluded that it was improper for the School Board to deny Sugar Valley's application, in part, on this basis. We agree. The General Assembly specifically provided that the funding for charter schools shall come from school district revenues. To deny the charter school because it may deplete school district revenues is inconsistent with the purpose of the CSL.

Id.

¹⁴¹ None of the Commonwealth Court decisions on appeals from the CAB squarely uphold the "no consideration of costs" argument, even when it was adopted in the underlying CAB decision.

¹⁴² *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304 (Pa. 2017); *Sch. Dist. of Phila. v. Dep't of Educ.*, 92 A.3d 746 (Pa. 2014); *Slippery Rock Area Sch. Dist. v. Pa. Cyber Charter Sch.*, 31 A.3d 657, 667 (Pa. 2011); *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 812

Statutory Construction Act and to the plain language of the CSL in these decisions. It abides by the plain language and has refused to insert procedures or language that is not contained within the CSL, even where the proposed language might be wise or an improvement.¹⁴³ The Supreme Court has not adopted the “no consideration of costs” argument, even when invited to do by the parties’ briefs.¹⁴⁴

There are only three mentions of financial impact in the Court’s *Collegium* decision, none of which supports the argument that it is a forbidden consideration. First, in its description of the history of the case, the Court notes that the School District had said that the choice offered by the charter would come “at the expense of either an increased tax burden on the School District taxpayers or a reduction in services to the existing public school systems.”¹⁴⁵ The

A.2d 1172 (Pa. 2002); *Mosaica Acad. Charter Sch. v. Commonwealth*, Dep’t of Educ., 813 A.2d 813, 818–20 (Pa. 2002). These include *Pocono Mountain Sch. Dist. v. Pa. Dep’t of Educ.*, 151 A.3d 129 (Pa. 2016) (liability of school district for closed charter’s failure to make PSERS payments); *W. Phila. Achievement Charter Sch. v. Sch. Dist. of Phila.*, 132 A.3d 957 (Pa. 2016) (Empowerment Act unconstitutional under non-delegation provisions to extent it purports to exempt SRC from CSL); *Friends of Pa. Leadership Charter Sch. v. Chester Cty. Bd. of Assessment Appeals*, 101 A.3d 66 (Pa. 2014) (retroactive exemption from taxes under CSL violates separation of powers under state constitution); *500 James Hance Ct. v. Pa. Prevailing Wage Appeals Bd.*, 33 A.3d 555 (Pa. 2011) (applicability of prevailing wage regulations to work done under charter school lease); *Zager v. Chester Cmty. Charter Sch.*, 934 A.2d 1227 (Pa. 2007) (charter schools are agencies subject to Pennsylvania’s Right to Know Act).

¹⁴³ See, e.g., *Sch. Dist. of Phila.*, 92 A.3d at 746 (holding that the enrollment cap amendment to the CSL did not invalidate a cap that was in a written charter agreed to by the charter school before the amendment was adopted); *Slippery Rock*, 31 A.3d at 667 (holding that district was not obligated to pay tuition to charter for kindergarten students who were too young to enroll in the district’s kindergarten and noting that its decision was “guided by the recognition that the district’s funding obligation is inextricably linked to its duty to provide a public education”); *W. Chester Area Sch. Dist.*, 812 A.2d at 1187 (holding that the trial court did not abuse its discretion when it held that the CAB had *de novo* review over authorizers’ decisions, that a charter could choose whether to be a regional charter even if it planned to recruit students from multiple districts, and that schools could contract with for-profit managers as long as the school was incorporated as a non-profit); *Mosaica*, 813 A.2d at 818–20 (holding that the School District of Philadelphia had no right to attack the decision of the Bensalem Township School Board to grant a charter to Mosaica, even though the school enrolled 60% of its students from Philadelphia).

¹⁴⁴ See, e.g., Brief for Appellant at 42, *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304 (Pa. 2017) (No. 16 EAP 2016), 2016 WL 8649011. Counsel went on to state:

The financial impact on the District is not a proper basis for denying an enrollment increase. As the Commonwealth Court has recognized in the context of an initial charter application, the “General Assembly specifically provided that the funding for charter schools shall come from school district revenues. To deny the charter school because it may deplete school district revenues is inconsistent with the purpose of the [Charter School Law].”

The brief goes on to argue, rather inconsistently, that “[i]t costs the District less money for children to attend Discovery than it does to educate students in its own schools.” *Id.* at 44.

¹⁴⁵ *W. Chester Area Sch. Dist.*, 812 A.2d at 1175. The Commonwealth Court, similarly, described the history of the District’s decision as including evaluation of the explicit criteria and

Court engaged in no further analysis of this point or even further mention of it. It did not reject this concern as invalid under the CSL. Second, in its discussion of the regional charter issue, the Court expresses sympathy for the “legitimate concerns” that giving the applicant control over the regional charter decision “may result in the non-chartering school district incurring financial obligations to the charter school when it has no control over the decisions being made on behalf of the charter school.”¹⁴⁶ The Court does not say that concern is irrelevant because such costs cannot be considered in evaluating a charter. Rather, it says that the concerns “should be directed to the General Assembly” which has allowed the applicant to make the choice whether or not to apply for a regional charter.¹⁴⁷

Finally, the Court upholds the denial of the taxpayers’ petition to intervene. It cites the Commonwealth Court’s decision describing the taxpayers’ interest as too speculative to warrant intervention.¹⁴⁸ Like the Commonwealth Court, the Supreme Court does not say the taxpayers’ concerns are irrelevant; it says they lack proof that they will face a negative financial impact.¹⁴⁹ If anything, the Court’s silence supports the argument that, with proof, financial impact could be a valid consideration for an authorizing district.

The Court’s most recent examination of the CSL was in 2017 when it held that the plain language of the CSL, which details the procedures for appeals to the CAB, limits the jurisdiction of the CAB to appeals from denials of charters and decisions to revoke or not renew an existing charter.¹⁵⁰ It does not give the CAB jurisdiction to consider rejection of a request for an amendment of a charter, because CSL sets forth no procedure for amendment or a standard for evaluating an amendment request. The background facts of the case involved a charter school, Discovery, that wanted to nearly double its enrollment and move to a different facility.¹⁵¹ Its charter contained an enrollment cap and a provision that required the written consent of the School District for any relocation.¹⁵² When the charter was up for renewal, the District recommended renewal without the expansion or change of address and the school refused to sign the renewal

“based on the fiscal impact of the charter school on the School District, performing a cost/benefit analysis. After evaluating these criteria, the District Board made 53 separate findings of fact . . . and, based on those findings, concluded that the legislative intent of the CSL had not been fulfilled by Collegium’s application.” *W. Chester Area Sch. Dist.*, 760 A.2d at 455 n.6. That was the end of the discussion of fiscal impact in both of the decisions.

¹⁴⁶ *Id.* at 1183.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1186–87.

¹⁴⁹ *Id.* at 1187.

¹⁵⁰ *See generally* Discovery Charter Sch. v. Sch. Dist. of Phila., 166 A.3d 304 (Pa. 2017).

¹⁵¹ *Id.* at 307.

¹⁵² *Id.*

charter.¹⁵³ The school continued to operate without a signed charter but petitioned for appeal to the CAB, arguing that the District's refusal to act on its request for an amendment was an appealable denial of the request.¹⁵⁴ The CAB found it had no jurisdiction over the amendment but the Commonwealth Court reversed, holding that the CAB had jurisdiction by implication.¹⁵⁵ The Supreme Court reversed again.¹⁵⁶ It reviewed the detailed and comprehensive statutory provisions controlling the appeal process to the CAB, including the criteria for consideration of a charter application and separate ones for renewal or revocation, and the procedural requirements for an appeal.¹⁵⁷

The Court's analysis in *Discovery* refutes the argument that section somehow excludes financial impact from playing any role in an authorizer's decision. The CSL nowhere mentions amendments of existing charters. It provides for renewal or revocation but not amendment. The Court held "that the CSL as drafted by our Legislature does not provide for amendments."¹⁵⁸ In contrast, the intent provision of the CSL explicitly directs that new charters operate as additions to the existing system of public education.¹⁵⁹ The section on evaluation of applications explicitly includes the requirement that the authorizer consider the intent of the CSL—which, as explained above—envisioned charter schools as a supplement, not a replacement of the existing system of public education.¹⁶⁰ Just as the Court refused to judicially amend the CSL to expand the CAB's jurisdiction to include amendments, the CSL must be read as written—to not limit the authorizer's consideration of all factors which will further the intent of the CSL and which will affect the authorizer's ability to effectively incorporate and supervise the charters within its existing system.

VII. CONCLUSION

Pennsylvania's Constitution mandates that the Commonwealth provide "for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."¹⁶¹ The Pennsylvania Supreme Court recently traced the history of the clause and of Pennsylvania's commitment to public education as essential to democracy. It stressed:

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 308.

¹⁵⁶ *Id.* at 319–22.

¹⁵⁷ *Id.* at 318–19.

¹⁵⁸ *Id.* at 320.

¹⁵⁹ 24 PA. STAT. AND CONS. STAT. ANN. § 17-1702-A (West 2018).

¹⁶⁰ *Id.* § 17-1717-A.

¹⁶¹ PA. CONST. art. III, § 14.

While the procedural posture of this case militates against delving deeply into the history of—or drawing broad conclusions regarding the collective intent underlying—the phrase “thorough and efficient,” some contemporaneous context nonetheless is illuminating. Most notably, delegates to the convention appear to have linked the importance of public education to the success of democracy, with William Darlington averring that “the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education,” and further opining that “[t]he section on education is second in importance to no other section to be submitted to this Convention.”¹⁶²

Pennsylvania’s experiment with charter schools must be considered in light of this commitment to public education and to its role in preparing the Commonwealth’s students for their participation in democracy.

The underlying problem with Pennsylvania’s system of funding charters is that it forces the charters and the districts, both educating large numbers of marginalized and disadvantaged students, to fight each other for crumbs.¹⁶³ It also forces competition, not cooperation, on the charters and districts, thwarting the original purpose of the CSL to promote innovation and to have charters serve as a model for public schools. Representative Cowell recognized this problem back in 1997 when he called on Pennsylvania to fix the funding system so that the competition for scarce resources would not undercut the charter school experiment.¹⁶⁴

For now, though, until the foundational funding problem is resolved, the fight for crumbs cannot be allowed to further undercut Pennsylvania and its school districts’ capacity for meeting the constitutional obligation to provide a thorough and efficient system of public education. School districts must be empowered to consider the needs of all of their students, their families, and the surrounding community members when they make decisions about charter growth. The CAB should correct its misinterpretations and the courts should squarely uphold the ability of authorizers to act in the best interests of all of the stakeholders in their communities. Pennsylvania cannot have a thorough and efficient system of public education without empowering districts to fully

¹⁶² William Penn Sch. Dist. v. Pa. Dep’t of Educ., 170 A.3d 414, 423–24 (Pa. 2017) (citing Pa. Ass’n of Rural & Small Sch. v. Ridge, 11 M.D. 1991, slip op. at 98 (Pa. Commw. Ct. July 9, 1998), *aff’d per curiam*, 737 A.2d 246 (Pa. 1999) (quoting II Pennsylvania Debates of 1873, at 421)).

¹⁶³ Osamudia James has critiqued the use of market-based choice in education, examining “the ways in which race and racism warp the market, undermining the possibility that an education market could ever genuinely optimize educational outcomes for marginalized students and families in that market.” Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1104 (2014).

¹⁶⁴ Cowell, *supra* note 89.

consider the effect of the decisions they make.