

**COMMONWEALTH OF KENTUCKY  
KENTUCKY BOARD OF EDUCATION  
APPEAL NO. 20-BOE-001**

**RIVER CITIES ACADEMY, INC.**

**APPELLANT**

v.

**NEWPORT INDEPENDENT BOARD OF EDUCATION**

**APPELLEE**

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**FINAL ORDER**

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This matter came before the Kentucky Board of Education by appeal of River Cities Academy, Inc. (Appellant), pursuant to 701 KAR 8:030 following the denial of the Appellant's charter school application by the Newport Independent Board of Education (Appellee). The Kentucky Board of Education, being sufficiently advised, hereby renders the following findings and Final Order:

**FACTUAL AND PROCEDURAL BACKGROUND**

1. On June 29, 2017, Kentucky's public charter school legislation became law and was codified in KRS 160.1590-160.1599. At that time, the Appellee became a public charter school authorizer charged with reviewing, approving, and denying charter applications and possessing the authority, pursuant to KRS 160.1594(4)(a), to only approve applications from charter applicants "that possess competence in all elements of the application requirements."

2. During the 2017 Regular Session of the Kentucky General Assembly, the legislature also passed House Bill 471 (2017), which amended the 2016-2018 executive branch budget to, among other items, provide a funding mechanism for public charter schools. That legislation required a local school district wherein a public charter school was situated to "transfer the public charter school's portion of the local school district's funding calculated pursuant to KRS

157.360” and to allocate such “in the same manner as the school allocation model used by the local school district based on applicable data provided by the public charter school.” However, this funding mechanism expired on June 30, 2018 and is no longer law in Kentucky. And, to date, no legislative action has been undertaken to reinstitute House Bill 471 (2017) language or provide another alternative funding mechanism for public charter schools in the state.

3. Four administrative regulations promulgated by the Kentucky Board of Education became effective on March 9, 2018 that implement Kentucky’s public charter school legislation and address the following:

- a. 701 KAR 8:010, Charter school student application, lottery, and enrollment;
- b. 701 KAR 8:020, Evaluation of charter school authorizers;
- c. 701 KAR 8:030, Charter school appeals process; and,
- d. 701 KAR 8:040, Conversion charter school petition, conversion, and operation.

Most relevant to this appeal is 701 KAR 8:030 establishing the process to appeal a public charter school authorizer’s decision to deny a charter application and incorporating the Notice of Appeal form required for submission of an appeal to the Kentucky Board of Education.

4. On October 30, 2019, Lynn Schaber and Evelyn Pence, acting on behalf of the Appellant, filed a Kentucky Charter School Application and Addendum (“charter school application” or “application”) with the Appellee. This document totaled 939 pages and proposed “a K-8 urban community charter school targeting a diverse learner population” from “six (6) local districts,” including the Appellee as well as Covington Independent School District, Bellevue Independent School District, Dayton Independent School District, Ludlow Independent School District, and Fort Thomas Independent School District. Although no specific school facility location was cited by the Appellant, the application did state, “The founders...have selected

Newport, KY as the targeted location...located in the middle of the 6 river cities.” See Exhibit A to the Brief of Appellant.

5. In accordance with KRS 160.1594(3)(e) and the Appellee’s Board Policy 01.911, the Appellee notified the Appellant of deficiencies in the Appellant’s charter school application on December 6, 2019 and, at that time, granted the Appellant a maximum of ten (10) calendar days to provide additional materials and/or amend its charter application to address identified deficiencies. Related to this notice, the Appellee received supplemental communications from the Appellant on December 9, 2019. See Brief of Appellee and Exhibit J to the Brief of Appellant.

6. The Appellee conducted an in-person interview, pursuant to KRS 160.1594(3)(b), with the Appellant on December 17, 2019, and the following day, on December 18, 2019, held a public forum to allow local residents to become familiar with the charter school application and provide feedback in accordance with KRS 160.1594(3)(c). See Exhibit A-1 to the Brief of Appellant.

7. As required by KRS 160.1594(3)(a), the Appellee engaged in a review of the Appellant’s charter school application and, to do so, assembled a panel of 31 individuals with combined experience related to finance, transportation, food services, curriculum and instruction, special education services, and school leadership. These educators and stakeholders evaluated the application against the Appellee’s chosen rubric and, on December 23, 2019, recommended the Appellee deny the Appellant’s application due to the application’s cover sheet and enrollment projection being deemed “partially complete.” Furthermore, the panel recommended denial of Appellant’s application because the following six components of the Appellant’s charter school application were judged “does not meet:” School Overview; Educational Program Design and

Capacity; Operations Plan and Capacity; Financial Plan and Capacity; Closure and Dissolution; and, Optional Information. See Exhibits A-C to the Brief of Appellee.

8. Pursuant to KRS 160.1594(5) requiring public charter school authorizers to “adopt by resolution all charter approval or denial decisions in an open meeting” within “sixty (60) days following the filing of the charter application,” the Appellee adopted in a public meeting held on December 26, 2019 a resolution stating, “NOW THEREFORE BE IT RESOLVED BY THE NEWPORT INDEPENDENT SCHOOLS BOARD OF EDUCATION THAT, The Newport Independent Schools Board of Education has denied the River Cities Academy Charter School application submitted by Lynn Schaber and Evelyn Pence.” See Exhibit O to the Brief of Appellant.

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9. On January 23, 2020, the Appellant appealed the denial of its charter school application and, pursuant to 701 KAR 8:030, filed the Notice of Appeal form with the Kentucky Board of Education. Therein, the Appellant acknowledged this appeal is the “first...notice of appeal to the Board on this authorizer decision” and waived its right to a hearing before the Kentucky Board of Education. See Exhibit A-1 to the Brief of Appellant.

10. On January 28, 2020, a Notice of Appeal and Briefing Schedule was served by U.S. First Class Mail and E-Mail to the Appellant and the Appellee. Subsequently, the Appellant filed its brief in support of its appeal prior to the deadline of 4:30 p.m. on February 5, 2020, and the Appellee filed its responsive brief in support of its position prior to the deadline of 4:30 p.m. on February 12, 2020. By mutual agreement of the parties, the Appellant was permitted to and did file a reply to the Appellee’s brief prior to the deadline of 4:30 p.m. on February 17, 2020.

11. At a public meeting on February 25, 2020, the Kentucky Board of Education met to decide upon the written pleadings and, at that time, adopted this Final Order.

## **BURDEN OF PROOF AND STANDARD OF REVIEW**

The Kentucky Board of Education, pursuant to KRS 160.1595(3)(a), "...shall review the decision of the authorizer and make its findings." *Id.* The Board is to review the decision of the Appellee to determine if "...the authorizer's decision was contrary to the best interest of the students or community..." *Id.*

The Appellant, as they are the party proposing that the Appellee takes a certain action, bears the burden of proof in this appeal. "In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought."

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*McManus v. Kentucky Ret. Sys.*, 124 S.W.3d 454, 457 (Ky. App. 2003). *See also Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962); *Dawson v. Driver*, 420 S.W.2d 553 (Ky. 1967); *cf. Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925 (Ky. 2002). As such, the Appellant bears the burden of proof to show that the authorizer's decision was contrary to the best interest of the students or community.

The decision of the Appellee denying the application will be reviewed in the following manner. Factual findings will not be set aside unless they are clearly erroneous. Factual findings are not clearly erroneous if they are supported by substantial evidence which constitutes evidence having the fitness to induce a belief in the minds of reasonable people. The Kentucky Board of Education will review the Appellee's application of the laws and regulations at issue *de novo*; *i.e.* if the Appellee correctly applied the law and regulations to the factual determinations contained in their decision.

## ANALYSIS

### 1. The Appellant's Financial Plan and Capacity:

a. Attachment 25 of the Appellant's charter school application includes a five (5) year budget that includes the start-up year and four (4) years of charter school operation. During the start-up year, the budget shows that the Appellant projects a deficit of \$529,957. See Exhibit A to the Brief of Appellant.

b. The Appellant's budget proposes paying down the projected shortfall in its start-up year over time using revenue from grants and fundraising. The four (4) year operational projections rely heavily on public funds for the majority of funding in each year of the budget and makes assumptions about receiving public funds based on a student Average Daily Attendance (ADA) allocation. The Appellant asserts that, in the first fiscal year of operation, it will receive \$186,916 of public funds per month from July to June for a total of \$2,242,994. The budget also predicts revenue from charter school grants totaling \$225,000, a local transportation allocation of \$42,009, federal and state grants in the amount of \$150,000, and \$75,000 in direct contributions. In total, the budget assumes \$2,735,003 of total revenue and \$2,636,635 in total expenses. See Exhibit A to the Brief of Appellant.

c. In subsequent years of the budget, the Appellant's reliance on public funds for the majority of its charter school revenue continues. Specifically, in Fiscal Year 2021-2022, the Appellant assumes total revenues of \$2,722,498, including \$2,230,719 from public funding, and total expenditures of \$2,652,483; in Fiscal Year 2022-2023, the Appellant assumes \$2,998,815 in total revenues, including \$2,673,739 from public funding, and \$2,992,461 in total expenditures; in Fiscal Year 2023-2024, the Appellant assumes \$3,400,132 in total revenues, including

\$3,116,758 from public funds, and \$3,344,389 in total expenditures; and, in Fiscal Year 2024-2025, the Appellant assumes \$3,635,453 in total revenues, including \$3,347,753 from public funds, and \$3,536,566 in total expenditures. See Exhibit A to the Brief of Appellant.

d. KRS 160.1593(3) requires a charter school application include, among other items, “a proposed five (5) year budget, including the start-up year and projections for four (4) additional years with clearly stated assumptions” and “a detailed start-up plan, including financing, tasks, timelines, and individuals responsible for carrying out the plan.” Further, KRS 160.1594(7)(b) says that “an application shall be approved if,” among other items, “the applicant demonstrates the ability to operate the school in an educationally and fiscally sound manner.”

e. While the Appellant has provided, as required by KRS 160.1593(3)(g), “a proposed five (5) year budget, including the start-up year and projections for four (4) additional years with clearly stated assumptions,” the assumptions within that five year budget are wrongly premised on the Appellant receiving public funding. The Appellant’s budget assumes that the majority of its funding will come from public funds through an ADA allocation; however, under Kentucky law, there is no such current funding formula for public charter schools.

f. Pursuant to KRS 157.330, the Support Education Excellence in Kentucky (SEEK) funding formula is the primary source of allocating the majority of public funds to school districts. SEEK provides funding to districts using a formula based on student Adjusted Average Daily Attendance (AADA). However, this funding does not currently extend to public charter schools. The application is unclear as to whether these are the public funds contemplated.

g. Further, as noted in subsection b. above, other funding sources projected by the Appellant include, for example, federal and state grant funding as well as direct contributions. However, the Appellant does not include within its charter school application evidence of

securing such grant and donor funding. Thus, the Appellant has not demonstrated the ability to operate in a “fiscally sound matter,” pursuant to KRS 160.1594(7)(b), as its budget is built on financially unsound assumptions regarding the receipt of public and private funds necessary to sustain its public charter school.

h. In the Reply Brief of the Appellant, the Appellant declines to address the funding concerns raised in the Brief of Appellee and only says, “The reason RCA did not mention funding in its pleading was simply because it was not highlighted by the Board as a major concern.” However, the Appellant was on notice of the finance-related concerns its charter school application presented as the Appellant’s charter school application was judged “does not meet” in the area of Financial Plan and Capacity as well as five other application components.

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See Exhibit B to the Brief of Appellee.

i. Additionally, KRS 160.550(1) prohibits a local school district superintendent from recommending and prohibits a local board of education from knowingly approving “an expenditure in excess of the income and revenue of any year” except in very limited circumstances. While KRS 160.1592(1) generally exempts public charter schools from “all statutes and administrative regulations applicable to...a local school district,” subsection (3)(h) of that same statute requires a public charter school to “adhere to all generally accepted accounting principles and adhere to the same financial audits, audit procedures, and audit requirements as are applied to other public schools.” Further, pursuant to KRS 160.1592(3)(p)4., a public charter school may only “incur debt in reasonable anticipation of the receipt of public or private funds.”

j. The Appellant’s projected deficit of \$529,957 during its start-up year does not adhere to “generally accepted accounting principles” as required by KRS 160.1592(3)(h) and is



prohibited under KRS 160.1592(3)(p)4. as it is not “in reasonable anticipation of the receipt of...funds.” As noted above in subsection e., the Appellant’s budget assumes that the majority of its funding, including funding needed to repay the deficit incurred during its start-up year, will come from public funds. However, such an assumption is inconsistent with Kentucky law regarding allocation of public school funds as set forth more fully in subsections e and f above. Further, additional funding sources cited by the Appellant in its application are not supported by evidence demonstrating that the Appellant would be eligible for such grant and donor funding or that it has been secured.

k. KRS 160.1594(1)(e)1. requires a public charter school authorizer decline to approve a charter school application that fails to meet the requirements of KRS 160.1593, including the requirements in subsection (3) for a charter school application to include “a proposed five (5) year budget, including the start-up year and projections for four (4) additional years with clearly stated assumptions” and “a detailed start-up plan, including financing, tasks, timelines, and individuals responsible for carrying out the plan.” Furthermore, KRS 160.1594 requires, in subsection (7)(b), that an application be approved when “the applicant demonstrates the ability to operate the school in an educationally and fiscally sound manner.” KRS 160.1594(4)(a) grants an authorizer the discretion to authorize a charter school application only if that application demonstrates “competence in all elements of the application requirements.”

l. Based upon the Kentucky Board of Education’s determination that the Appellant’s charter school application is deficient in the area of Financial Plan and Capacity, the Appellant’s application fails to meet the requirements of KRS 160.1593 and 160.1594 and lacks competence in “all elements of the application requirements” as required by KRS 160.1594(4)(a). In light of these insufficiencies, the Appellee was legally barred from

authorizing the Appellant's application and, accordingly, neither erred in its denial of the Appellant's charter school application nor acted contrary to the best interest of the students or community under KRS 160.1595. Authorizing Appellant's application for the operation of a charter school when Appellant's projected revenue to operate the school is premised on receipt of public funds it will not actually receive is contrary to the best interest of students and the community. To authorize such a charter application would ignore the fact that Appellant's proposed school is not financially sustainable.

2. Other Components of the Appellant's Application: Pursuant to KRS 160.1594 (1)(e)1. and (4)(a), the demonstrated deficiency in the Financial Plan and Capacity component of the Appellant's charter school application is determinative of this appeal in favor of the Appellee, and the Kentucky Board of Education declines to issue any additional analysis or findings related to the Appellant's charter school application or the Appellee's analysis thereof.

3. The Appellee's Deficiencies Raised by the Appellant:

a. The Appellant asserts that the Appellee failed to comply with its authorizer duties on several occasions, including: (1) Failing to allow, in accordance, with KRS 160.1594(3)(e), the Appellant "a reasonable time to provide additional materials and amendments to its application to address any identified deficiencies;" (2) Failing to properly publish, in accordance with 701 KAR 8:030, Section 2, policies and procedures, including "a rubric for its evaluation of a charter application;" and, (3) Failing to meaningfully comply with KRS 160.1594(3)(c), which requires an "opportunity in a public forum for local residents to provide input and learn about the charter application." See Brief of Appellant, Exhibit A-1 to the Brief of Appellant, and Reply Brief of Appellant.

b. Pursuant to KRS 160.1594(1)(e)1. and (4)(a), the demonstrated deficiency in the Financial Plan and Capacity component of the Appellant’s charter school application is determinative of this appeal in favor of the Appellee, and the Kentucky Board of Education declines to issue findings related to the Appellee’s compliance with its authorizer duties. Even if the Appellee were to have relied upon deficient policies and procedures in its processing of the Appellant’s charter school application, issues of procedural non-compliance would not negate the fact that the Appellee was legally barred from authorizing the Appellant’s application and, accordingly, neither erred in its denial of the Appellant’s charter school application nor acted contrary to the best interest of the students or community under KRS 160.1595.

c. The Appellant also states, “One of the forces spurring efforts such as this has been the longstanding, unresolved, issues that have faced the Newport Independent Schools District (“NISD”).” The Appellant continues by citing improvement priorities found during a turnaround audit that the Appellee underwent during the 2018-2019 school year pursuant to KRS 160.346 as well as 703 KAR 5:280. See Brief of Appellant.

d. The Appellant’s charter school application clearly states that it is for a “start-up” charter school and not a “conversion” charter school. See Exhibit A to the Brief of Appellant. The performance of a district or its schools is not a prerequisite to or justification for the establishment of a start-up charter school. Furthermore, the Kentucky Board of Education found that the Appellee was legally barred from authorizing the Appellant’s application and, accordingly, neither erred in its denial of the Appellant’s charter school application nor acted contrary to the best interest of students or the community under KRS 160.1595. As such, it is not necessary for the Kentucky Board of Education to consider the performance of the Appellee or the schools it presently governs in this appeal.

4. The Appellee's Bias Raised by the Appellant:

a. The Appellant states, "From the start, the authorizer's approach has been heavily biased against RCA." The Appellant also states, "The overall lack of engagement of the Board, when they were charged to lead the review process, brings into question just how seriously they took RCA's application to begin with." The Appellant provides instances in which perceived bias and apathy was evident, including statements made at the public forum held pursuant to KRS 160.1594(3)(c) on December 18, 2019 as well as the lack of interaction between the Appellant and the Appellee at various times throughout the application process. See Exhibit A-1 to the Brief of Appellant. Further, in the Reply Brief of the Appellant, the Appellant alleges, "In its pleading, the Board does not refute RCA's concerns of bias in the process, as outlined in RCA's notice of appeal."

b. Pursuant to KRS 160.1594(1)(e)1. and (4)(a), the demonstrated deficiency in the Financial Plan and Capacity component of the Appellant's charter school application is determinative of this appeal in favor the Appellee, and the Kentucky Board of Education declines to issue findings related to allegations of bias raised by the Appellant. A *de novo* review (i.e. a review independent of any alleged bias or apathy of Appellee) of the Appellee's application of laws and regulations governing this matter leads the Kentucky Board of Education to find that the Appellee was legally barred from authorizing the Appellant's application and, accordingly, neither erred in its denial of the Appellant's charter school application nor acted contrary to the best interest of the students or community under KRS 160.1595.

**CONCLUSION**

The Kentucky Board of Education has determined that the authorizer's decision was not contrary to the best interest of the students or community under KRS 160.1595 and,

accordingly, upholds the decision by the Appellee to deny the Kentucky Charter School Application and Addendum filed by the Appellant.

SO ORDERED THIS 25<sup>th</sup> DAY OF February, 2020:



DAVID K. KAREM, CHAIR  
KENTUCKY BOARD OF EDUCATION

**NOTICE OF APPEAL RIGHTS**

KRS 13B.140(1) provides:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." Some courts have interpreted this language to mean that a summons must be served upon filing an appeal in Circuit Court.

KRS 160.1595(3)(d) provides:

Within thirty (30) days following receipt of the **second notice of appeal** or the making of a motion for a second review by the State Board of Education and after reasonable public notice, the state board, at a public hearing shall determine if the final decision of the authorizer was contrary to the best interest of the students or community. If such a finding is made, the state board shall remand such final decision to the authorizer with instructions to approve the charter application or amendment, or to renew or reinstate the charter, or to approve or disapprove conditions imposed. The decision of the state board shall be a final action subject

to judicial review in the Circuit Court encompassing the school district in which the public charter school is located.

**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing document was served by U.S. Mail and e-mail on this 25<sup>th</sup> day of February, 2020 to the following:

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