

*NORTHSIDE URBAN PATHWAYS CHARTER SCHOOL V.
STATE CHARTER SCHOOL APPEAL BOARD: IMPLIED
POWERS WITHIN THE PENNSYLVANIA CHARTER
SCHOOLS LAW*

I. INTRODUCTION

Despite a lack of specific statutory delegation, Pennsylvania administrative agencies are empowered with 'implied powers' beyond their enumerated powers in order to fulfill the purpose of the statute itself. Administrative agencies are created through statutory provisions.¹ Those statutory provisions, known as the organic statute, vest certain powers in the agency.² Because agencies are created in this manner, they are traditionally allowed to exercise only the specific powers delegated to them by the organic statute.³ Occasionally, Pennsylvania courts have determined that agencies possess implied powers, when such powers are necessary to carry out the intent of the legislature.⁴

A charter school is an "independent public school" created by a charter granted by a local school board and operated by a nonprofit corporation.⁵ In *Northside Urban Pathways Charter School v. State Charter School Appeal Board*,⁶ the Commonwealth Court of Pennsylvania determined that school districts have the implied power to consider and act upon charter school amendment requests and that the State Charter School Appeal Board (CAB) has implied jurisdiction to consider and rule upon denials of amendment requests.⁷

¹ See 36 JEAN E. MAESS, ET AL., STANDARD PENNSYLVANIA PRACTICE 2D § 166:5 (2d ed. 2007).

² See *Mack v. Civil Serv. Comm'n*, 817 A.2d 571, 574 (Pa. Commw. Ct. 2003) (explaining that agency "authority is limited to the powers granted by legislative enactment").

³ *Id.*

⁴ See *infra* notes 31-36 and accompanying text.

⁵ 24 PA. STAT. ANN. § 17-1703-A (West 2006).

⁶ *Northside Urban Pathways Charter Sch. v. State Charter Sch. Appeal Bd.*, 56 A.3d 80 (Pa. Commw. Ct. 2012).

⁷ *Id.* at 84-85.

In Part II, this survey first addresses the state of the law prior to *Northside Urban Pathways*. Specifically, it examines the powers of the CAB and the law regarding charter amendments. Part III explains *Northside Urban Pathways'* procedural history and facts. It then explores the court's majority and dissenting opinions, specifically focusing on each authoring judge's rationale for the position taken. Part IV consists of an analysis of the court's ruling, including the author's personal evaluation. Finally, Part V presents a conclusion.

II. BACKGROUND

This section first examines the Charter School Law (CSL). Second, it addresses statutory interpretation in Pennsylvania. Next, this section discusses administrative agency power. Finally, this section addresses court interpretation of implied authority under the Public School Code.

A. *The Charter School Law*

Pennsylvania public schools are governed by the Public School Code of 1949 (School Code).⁸ The CSL,⁹ enacted in 1997,¹⁰ permits the establishment of charter schools by individuals, groups of parents or teachers, museums, universities, or corporations.¹¹ In order to form a charter school, the applicant first needs to submit a charter school application to the school board of the district where the proposed charter school will be located.¹² The CSL enumerates a list of seventeen types of information that must be included in the charter application.¹³ This information includes the identity of the applicant, the name of the proposed

⁸ tit. 24, §§ 1-101 to 27-2702.

⁹ *Id.* §§ 17-1701-A to 17-1751-A.

¹⁰ *Summary of Charter School Legislation*, PA. DEPARTMENT OF EDUC., http://www.portal.state.pa.us/portal/server.pt/community/charter_school_regulations/7359/summary_of_charter_school_legislation/508170 (last visited May 23, 2013).

¹¹ tit. 24, § 17-1717-A(a).

¹² *Id.* § 17-1717-A(c).

¹³ *Id.* § 17-1719-A.

school, the school's proposed location, and the grades or ages to be served by the school.¹⁴

After submission of the charter school application, the local school board must hold a public hearing and determine if the application will be granted or denied.¹⁵ The CSL provides a list of criteria for the school board to consider when determining whether to grant or deny a charter school application.¹⁶ If the applicant has met all requirements, the school board must approve the application.¹⁷ Once granted, a charter is considered a government license and not a contract between the school board and the charter school.¹⁸

However, the courts have noted that local school boards may have a bias against the establishment of a charter school within their district.¹⁹ With this bias in mind, the CSL creates the CAB.²⁰ The CSL confers jurisdiction upon the CAB to hear appeals from denials of charter school applications, charter revocations, and charter renewal denials.²¹ The CAB "shall meet as needed to fulfill the purposes provided [in the CSL]."²² There is no provision in the CSL that addresses charter amendments or any appellate review of denials of amendment requests.²³

B. *Statutory Interpretation in Pennsylvania*

The legislature has codified the method Pennsylvania courts should use to interpret state statutes.²⁴ When interpreting

¹⁴ *Id.*

¹⁵ *Id.* § 17-1717-A(d) to (e)(1).

¹⁶ *Id.* § 17-1717-A(e)(2).

¹⁷ *Foreman v. Chester-Upland Sch. Dist.*, 941 A.2d 108, 115 (Pa. Commw. Ct. 2008).

¹⁸ *See id.* (describing the relationship between local school boards and charter schools as regulatory and not contractual).

¹⁹ *See W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452, 461 (Pa. Commw. Ct. 2000) (noting references to school board bias against charter schools in the CSL's legislative history).

²⁰ *See* tit. 24, § 17-1721-A (creating the CAB and setting its membership).

²¹ *Id.* § 17-1717-A(f), (h).

²² *Id.* § 17-1721-A(b).

²³ *See id.* §§ 17-1701-A to 17-1751-A (containing the provisions of the CSL).

²⁴ 1 PA. CONS. STAT. § 1921 (1975).

Pennsylvania statutes, the courts are to "ascertain and effectuate the intention of the General Assembly" and to give effect to all the provisions of the statute, if possible.²⁵ Courts should not disregard the language contained in the statute, in order to effectuate the spirit of the law, whenever the words used are "clear and free from all ambiguity."²⁶ In the event that the words contained in the statute are not "explicit," the statute provides a list of factors for the courts to consider:

- (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.²⁷

C. Administrative Agency Power

Although a Pennsylvania administrative agency may be created by a state constitutional provision, as was the Board of Pardons, most administrative agencies are created by legislative enactment "to regulate and control segments of society which the legislature, in its wisdom, deems it necessary to control."²⁸ An agency is limited to the authority vested in it by the legislature through the organic statute creating the agency's jurisdiction.²⁹ When delegating authority to an administrative agency, the legislature must use "language that is clear and unmistakable."³⁰

Despite this requirement, the Supreme Court of Pennsylvania has acknowledged that narrow statutory interpretation of administrative agency authority may cause an impractical result

²⁵ *Id.* § 1921(a).

²⁶ *Id.* § 1921(b).

²⁷ *Id.* § 1921(c).

²⁸ MAESS, ET AL., *supra* note 1, at § 166:5.

²⁹ Mack v. Civil Serv. Comm'n, 817 A.2d 571, 574 (Pa. Commw. Ct. 2003).

³⁰ Dep't of Transp. v. Beam, 788 A.2d 357, 359 (Pa. 2002).

that would be contrary to legislative intent.³¹ Statutorily created commissions "derive[] . . . authority from legislative action."³² They may use powers that are either "expressly granted, or which may be necessary and proper to carry out those specifically declared."³³ Pennsylvania courts are to consider the possible consequences of a particular interpretation when interpreting agency jurisdiction.³⁴ Further, an administrative agency is empowered with "implied authority necessary to . . . effectuat[e] . . . its express mandate[]." ³⁵ Therefore, an administrative agency may use its implied authority, beyond the authority specifically enumerated in the agency's organic statute, so long as the use of the authority permits the agency to carry out the tasks delegated by the legislature.³⁶

D. Implied Power in the Realm of the Public School Code

Although Pennsylvania courts have not yet addressed the issue of whether the CAB has appellate authority in the area of charter amendment denials, the Supreme Court of Pennsylvania has addressed implied authority arising from the School Code in *Burger v. Board of School Directors of McGuffey School District*.³⁷ In *Burger*, the court determined that, despite a lack of specific statutory authorization, school districts have the power to suspend a superintendent prior to a termination hearing.³⁸ That interpretation is based on a statutory provision that empowers school districts with " 'all necessary powers to enable them to carry out the [the School Code's] provisions.' "³⁹

³¹ *Id.* at 359-60.

³² *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348, 349 (Pa. Super. Ct. 1945).

³³ *Id.*

³⁴ *Beam*, 788 A.2d at 359.

³⁵ *Id.* at 360.

³⁶ *Id.* at 359-60.

³⁷ *Burger v. Bd. of Sch. Dirs. of McGuffey Sch. Dist.*, 839 A.2d 1055, 1061 (Pa. 2003).

³⁸ *Id.* at 1062.

³⁹ *Id.* at 1061 (brackets in original) (quoting 24 PA. CONS. STAT. § 2-211 (2013)).

III. *NORTHSIDE URBAN PATHWAYS CHARTER SCHOOL V. STATE
CHARTER SCHOOL APPEAL BOARD*

This section first addresses both the factual background and procedural history of the case and the issue before the court. It then states the parties' arguments on appeal. Next, this section discusses the court's majority opinion. Finally, it examines the dissenting opinion.

A. Background

Northside Urban Pathways Charter School (Northside) was established in 1998 when the Pittsburgh Public School District (District) issued the school its initial charter.⁴⁰ The school serves a student population of approximately 300 students in sixth through twelfth grade.⁴¹ The school body is comprised mostly of poor and minority students from the District.⁴² The school caters to many foster children by allowing them the opportunity to remain in the same school when their family situation changes.⁴³ Northside's faculty has noted "learning gaps" between the school's current students and incoming sixth through eighth grade students.⁴⁴ As a result of these gaps, Northside faculty must engage in a "triage" process that involves the identification of those students most in need and intensive training for those students.⁴⁵

To avoid the development of these learning gaps, in December 2009, Northside submitted an application to the District requesting an amendment to its charter expanding the grades served by the school to include kindergarten through fifth grade.⁴⁶ The additional grades would be served at a second location.⁴⁷ That same month, the District stated that it would review the application.⁴⁸ In

⁴⁰ *Northside Urban Pathways Charter Sch. v. State Charter Sch. Appeal Bd.*, 56 A.3d 80, 82 (Pa. Commw. Ct. 2012).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Northside*, 56 A.3d at 82.

⁴⁷ *Id.*

⁴⁸ *Id.*

February 2010, the District denied Northside's amendment application, stating that a new charter application was required due to the extensive nature of the amendment request.⁴⁹ In March 2010, Northside appealed the denial to the CAB.⁵⁰ The District alleged that the CAB lacked jurisdiction to hear the appeal and it moved for dismissal.⁵¹ The CAB granted the motion and dismissed Northside's appeal.⁵²

The issue before the Commonwealth Court of Pennsylvania in this action was whether the CAB has appellate jurisdiction over denials by local school boards of charter amendment requests based on implied authority.⁵³

B. Arguments on Appeal

On appeal to the Commonwealth Court of Pennsylvania, Northside, while acknowledging that the CSL does not specifically address charter amendments, argued that "agencies have implied powers where necessary to fulfill their express mandates."⁵⁴ Northside further argued that the CAB would be unable to fulfill its statutory mandate "to oversee the opening and closing of charter schools" if it did not also have authority over charter amendments.⁵⁵

The CAB defended its decision to dismiss Northside's appeal on the basis that the CAB lacked jurisdiction to hear the appeal.⁵⁶

C. Majority Opinion

In the majority opinion, written by Judge Mary Hannah Leavitt,⁵⁷ the court held that the CAB does have jurisdiction to exercise appellate review over denials of charter amendment requests.⁵⁸ Judge Leavitt based that determination, in large part, on

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 82-83.

⁵² *Northside*, 56 A.3d at 83.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.* at 82-83 (explaining the procedural history of the case).

⁵⁷ *Id.* at 81.

⁵⁸ *Northside*, 56 A.3d at 85.

the Supreme Court of Pennsylvania's decision in *Burger*.⁵⁹ In order to determine whether the CAB has appellate jurisdiction over charter amendment denials, the court first determined whether charter amendments are permissible at all.⁶⁰ The court then evaluated the CAB's implied powers to exercise appellate review in the area of charter amendments.⁶¹

i. Charter Amendments Generally

The court noted that the CSL does not address the availability of charter amendments.⁶² However, it determined that school districts' implied authority includes the "authority to consider and act upon a charter amendment."⁶³ Judge Leavitt made this determination based on support she found in *Burger*.⁶⁴ Because charters are government licenses and the holder possesses a property interest in the charter, both due process and the Pennsylvania Constitution require some form of review of denials of charter amendments.⁶⁵

The court determined that charter amendments are a necessity that have been recognized by both school districts and Pennsylvania courts.⁶⁶ It cited to cases from the Commonwealth Court of Pennsylvania in which the court acknowledged the existence of amendments to either charters or other similar government licenses.⁶⁷ *Northside* suggests two examples where

⁵⁹ *Id.* at 84-85; *Burger v. Bd. of Sch. Dirs. of McGuffey Sch. Dist.*, 839 A.2d 1055 (Pa. 2003).

⁶⁰ *Northside*, 56 A.3d at 84-85.

⁶¹ *Id.* at 85-86.

⁶² *Id.* at 84.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Northside*, 56 A.3d at 84-85.

⁶⁷ *Id.*; *see also* *Sch. Dist. of Phila. v. Dep't of Educ.*, 41 A.3d 222, 224 (Pa. Commw. Ct. 2012) (referencing a charter amendment requesting the addition of a kindergarten program); *Yellow Cab Co. of Pittsburgh v. Pa. Pub. Util. Comm'n*, 524 A.2d 1069, 1071 (Pa. Commw. Ct. 1987) (affirming the agency's grant of applicant's request to amend its certificate of public convenience); *Morgan Drive Away, Inc. v. Pa. Pub. Util. Comm'n*, 515 A.2d 1048, 1050 (Pa. Commw. Ct. 1986) (affirming the agency's grant of applicant's request to amend its certificate of public convenience).

charter amendments would be required in order for the charter school to satisfy both its obligation under the charter and its statutory obligations to the Department of Education.⁶⁸ The majority found both to be persuasive.⁶⁹ Charter applications require a great deal of in-depth information,⁷⁰ and that information is likely to change over the course of time.⁷¹

The first example is the physical location of the charter school.⁷² If a charter school is forced to change the physical location of the school due to either physical conditions or landlord-tenant disputes, the school would need to amend its charter to reflect the change or face closure of the school due to non-compliance with the terms of the charter.⁷³ The second example involves changing academic standards.⁷⁴ The initial charter application that is incorporated into the charter may contain provisions referencing academic standards that are subject to change.⁷⁵ If there is no avenue to amend a charter, when those standards do change, the charter school is faced with the decision of either violating the terms of the charter or violating state academic standard requirements.⁷⁶

Based on necessity and tacit acceptance by courts, schools, and districts of the use of charter amendments, the court determined, as a threshold issue, that charters may be amended, and school districts have the implied authority to approve or deny those amendments.⁷⁷

ii. CAB Appellate Authority Over Charter Amendments

The court ruled that the CAB does have implied authority to handle appellate review of charter amendment denials.⁷⁸ After

⁶⁸ *Northside*, 56 A.3d at 86.

⁶⁹ *Id.*

⁷⁰ *Id.* at 85; 24 PA. STAT. ANN. § 17-1719-A (West 2006).

⁷¹ *Northside*, 56 A.3d at 86.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Northside*, 56 A.3d at 84-86.

⁷⁸ *Id.* at 87.

determining that charter amendments are valid tools, Judge Leavitt analogized the implied authority of a school district, discussed in *Burger*, with the CAB's implied authority.⁷⁹ She noted that both the school district at issue in *Burger* and the CAB are "creature[s] of the School Code."⁸⁰ While school districts are empowered with "all necessary powers to . . . carry out the School Code,"⁸¹ the CSL "vests the CAB with jurisdiction over every significant decision involving a charter school."⁸² Charter amendments are such significant decisions.⁸³

As discussed above, the court found that school districts have the authority to issue determinations on charter amendment requests.⁸⁴ The court noted school districts have historically had a bias against charter schools.⁸⁵ The court concluded that, based on that bias, the school district cannot be the ultimate decider of the fate of charter amendments.⁸⁶ Appellate oversight by the CAB is necessary to avoid "restrict[ing] the creation and growth of charter schools" and to carry out the legislature's intent to "provid[e] parents and students with expanded choices in public education."⁸⁷

The court ruled that the CAB does have implied authority to review charter amendment denials.⁸⁸

D. Dissenting Opinion

President Judge Dan Pellegrini authored a dissenting opinion.⁸⁹ He dissented for two reasons.⁹⁰ First, he stated that what Northside is requesting is not simply to amend its charter, but

⁷⁹ *Id.* at 85.

⁸⁰ *Id.*

⁸¹ *See* *Burger v. Bd. of Sch. Dirs. of McGuffey Sch. Dist.*, 839 A.2d 1055, 1061 (Pa. 2003).

⁸² *Northside*, 56 A.3d at 85.

⁸³ *Id.*

⁸⁴ *See id.* at 84-86.

⁸⁵ *Id.* at 85.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Northside*, 56 A.3d at 87.

⁸⁹ *Id.* (Pellegrini, P.J., dissenting).

⁹⁰ *Id.* at 87-88.

rather to open a second school.⁹¹ Second, he stated that the CAB lacks jurisdiction to consider charter amendment denial appeals.⁹²

i. Northside is Requesting to Open a New School

President Judge Pellegrini suggested that Northside's request is not just to amend its charter; the request is actually to open a new school.⁹³ Although Northside submitted an amendment request, it is requesting to "create another separate school at another location without first submitting a charter application for such a facility."⁹⁴ Judge Pellegrini described the new school as a "distinct charter school serving a different student population with different educational needs in a different physical facility."⁹⁵

The CSL only authorizes the creation of a charter school by application to the local school board.⁹⁶ That application requires the applicant to enumerate the grades to be served and the physical location that will house the school.⁹⁷ Once the application has been approved, its terms become "legally binding" on the school and the district.⁹⁸ The dissent states that once this process has occurred there is no vehicle that would permit the charter-holder to add a new school at a new location, serving additional grades.⁹⁹

ii. The CAB Lacks Jurisdiction to Exercise Appellate Review Over Charter Amendments

The CSL only empowers the CAB with jurisdiction over appeals from school district denials of charter applications or charter renewals.¹⁰⁰ According to President Judge Pellegrini, the language in section 17-1721-A that requires the CAB to "meet as needed to fulfill the purposes provided in this subsection" merely places a requirement that the CAB meet to fulfill its express

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 87.

⁹⁴ *Northside*, 56 A.3d at 87 (Pellegrini, P.J., dissenting).

⁹⁵ *Id.* at 88.

⁹⁶ *Id.*

⁹⁷ *Id.* at 88-90.

⁹⁸ *Id.* at 90.

⁹⁹ *Id.*

¹⁰⁰ *Northside*, 56 A.3d at 90 (Pellegrini, P.J., dissenting).

mandates and was not meant to "confer any additional implied powers."¹⁰¹ According to the dissent, the CSL in no way empowers the CAB with appellate review of charter amendment denials.¹⁰²

IV. EVALUATION

In the author's opinion, the majority made the correct determination as to law, but the wrong determination based on the facts of this case. Despite a lack of express statutory language, charter amendments are a necessary tool. As the examples given by Northside and used by the majority illustrate, there are clearly situations where forces outside the four corners of the charter cause unavoidable conflict with the charter provisions. When charter provisions conflict with either state law or some unforeseen phenomena renders the provisions impossible to carry out, there must be a means to amend the charter provisions. Allowance of charter amendments would be a workable solution to the problem.

The Supreme Court of Pennsylvania already determined that the School Code imparts implied authority upon school districts. However, that determination was based on language in the School Code granting districts the authority to do what is necessary to carry out the code's other provisions. The CSL does not contain such broad language when discussing the CAB's authority. Instead, it merely dictates that the CAB must meet to carry out its charges. Despite this discrepancy, the legislature appears to have delegated authority to the CAB to deal with any significant decisions regarding charter schools. The potential for the types of conflicts that may be found in charters creates a situation where a significant decision is needed. From an administerability standpoint, there is a clear need for charter amendments, and the CAB is best suited to carry out appellate review over denials of those amendments.

As the court recognized, school districts are inherently biased against a charter school that would siphon funds away from the district. Left unchecked, school districts would be free to deny amendment requests in an attempt to retain precious tax dollars. For this reason, there must be some avenue to appeal amendment

¹⁰¹ *Id.* (quoting 24 PA. STAT. ANN. § 17-1721-A (West 2006)).

¹⁰² *Id.*

request denials. The two obvious options would be either the courts or the CAB. From an institutional competence standpoint, the CAB should be the foremost expert on charter schools in the Commonwealth. It is better positioned than the courts to use its institutional knowledge and expertise in determining whether an amendment denial is appropriate or not.

In reaching its interpretation of the CSL, it is interesting that the court failed to consider, or at least cite to, the Legislative Intent Controls statute that governs statutory interpretation in Pennsylvania.¹⁰³ The legal interpretation would likely be the same. While it could be argued that the language used in the CSL clearly enumerates the CAB's power, the absence of any language addressing ways to amend the charter or prohibiting amendments can be viewed as an ambiguity. The majority used other language contained in both the CSL and the School Code, legislative history, and judicial interpretation of other School Code provisions to reach its interpretation. This is consistent with the factors established by the Legislative Intent Controls statute.

While the author believes the majority made the correct determination as to the legal rule, he believes that the dissent's factual argument is more persuasive. There are several situations in which a charter school would need to amend its charter to correct unavoidable conflicts. However, what Northside was attempting to accomplish by amendment really seems to be the creation of a new school. Situations may arise where a charter school may seek to amend its charter to either add additional grades or an additional location to accommodate a growing student population. However, a completely different student population, even if it will feed into the existing population, coupled with a completely different location, does not seem to pass the 'smell test' of whether it is a change to an existing school or in fact a new school.

V. CONCLUSION

While the holding in this case addressed the appropriateness of charter school charter amendments, it can be useful in interpreting what implied authority may be possessed by other administrative

¹⁰³ 1 PA. CONS. STAT. § 1921 (1975).

agencies. This case is consistent with prior precedent in that it permits an administrative agency to exercise implied authority to carry out the duties that are expressly delegated to the agency. It is, however, instructive as to the means of determining if such implied authority exists.

More narrowly, this case addressed a pressing need in the charter school arena by officially acknowledging the existence of charter amendments and establishing a means to appeal amendment denials. Although the facts of this particular case may not be best suited for an amendment, this case correctly addressed that need.

Philip M. McCarthy^{*+}

* The author has served as an employee of the Pennsylvania Office of Attorney General since March 2009. Although he is employed by the Office of Attorney General, this comment contains only the author's opinions and is in no way endorsed by the Pennsylvania Office of Attorney General.

⁺ J.D. Candidate, Widener University School of Law (Harrisburg), May 2014. This survey is dedicated to my family and friends. I would especially like to thank my wife, Melissa, for her love, support, and understanding throughout law school.