



DEPARTMENT OF EDUCATION

The Townsend Building
401 Federal Street Suite 2
Dover, Delaware 19901-3639
DOE WEBSITE: <http://www.doe.k12.de.us>

Lillian M. Lowery, Ed.D.
Secretary of Education
Voice: (302) 735-4000
FAX: (302) 739-4654

MEMORANDUM

To: The Delaware State Board of Education
From: Lillian M. Lowery, Secretary of the Delaware Department of Education
Re: Newark Charter School Application for Charter Modification
Date: April 12, 2012

On December 22, 2011, the Newark Charter School (“NCS”) submitted an application for a major modification to its charter, including almost doubling the size of the existing school by adding grades 9-12. The Delaware Charter School Law provides that major modifications may be granted only with the assent of the authorizer, which in this case is the Department of Education (the “Department”), and the State Board of Education. As with initial charter school applications, however, major modifications are to be reviewed by the Charter School Accountability Committee (“CSAC”) prior to consideration by the Department. The CSAC considered the NCS application and on February 1, 2012, the CSAC issued a report recommending approval of the application. Following issuance of that report, a public hearing on the application was heard on March 7, 2012. Significant public input supporting and opposing the application was received both prior to and at the public hearing, which had over 130 people in attendance.

Given the significant interest and input from both proponents of and opponents to NCS’s application, I am submitting this written decision to the State Board in advance of my presentation at their upcoming meeting on April 19, 2012. I do so to provide context and background for the Department’s position on this matter.

I. Background

NCS is a very successful charter school and the Department recognizes and is supportive of the school’s many accomplishments. As the CSAC properly found, NCS has met the academic performance criterion in the law and the school is to be commended for the performance of its students to date. The Department is also required to make a finding as to whether the charter modification is consistent with the legislative intent of the charter school law and the restrictions provided therein. More broadly, one of my core objectives as Secretary of Education is to ensure that all Delaware public school students have access to the kind of excellent opportunities afforded to NCS’s students. As a result and to that end, the Department approves the application for modification but conditions that approval on: (1) the development, approval and implementation of an outreach plan to significantly increase, consistent with the public school population it serves, the diversity of NCS going forward; and (2) NCS providing a free and reduced lunch program for all grades starting in the fall of 2012.

II. Discussion

As stated in Delaware Code, one of the main purposes of the Delaware Charter School law is to provide greater opportunities in choosing public schools, and the law strictly prohibits discrimination based on race or national origin. After concerns were raised regarding the demographics of NCS, the Department reviewed the data comparing NCS's student population to: (i) the student population of other public schools operating within the 5-mile radius preference of NCS; and (ii) all public school students living within 5 miles of NCS. The 2011-12 data is as follows:

	African American	Hispanic	White	Low Income ¹	Special Education
Schools Operating within 5-mile Radius of NCS	37%	15%	41%	60%	18%
Public school students living within 5-mile radius of NCS	27%	15%	49%	50%	13%
Newark Charter School	11%	4%	68%	21%	6%

The demographic data above makes clear that NCS is significantly less diverse than the pool of public school students living within its designated 5 mile radius.

NCS argues that their demographics should be measured against the demographics of all students within their five mile radius, including those students who attend private school. Delaware's charter school law states that the purpose of the law is to create alternatives "to traditional public schools operated by school districts" and is intended to provide "greater opportunities in choosing public schools." 14 Del. C. § 501. Further, the synopsis of the bill establishing Delaware's charter school law stated that the law would "increase choices for parents of public school students (particularly for parents who cannot afford private school options)..." (138th General Assembly, Senate Substitute No. 1 to Senate Bill No. 200). I fully recognize some parents whose children

¹ Students are considered "Low Income" if they receive Free and Reduced Lunch or their family participates in any of the following programs with low income eligibility criteria: Temporary Assistance for Needy Families, Food Supplement Program, Medicaid, or General Assistance. The Department utilized alternate indicators since NCS argued the school's low income population was underrepresented when using just students receiving Free and Reduced Lunch. The reason, according to NCS, is that since NCS does not offer the Free and Reduced Lunch program, families at the school that otherwise qualify may not apply. As such, this definition includes other programs as well to provide the most complete picture of the population of low income students in attendance at NCS.

attend NCS would choose to send their children to private school if NCS were not an option, and it is a positive for those families that NCS provides a good option. The purpose of the charter school law, however, is to offer an alternative for students who would otherwise attend “traditional public schools.” As such, these publicly funded schools should reflect much more closely the diversity of the public school population in their communities. Given the data above, NCS does not.²

Importantly, the Department has received no direct evidence that NCS has intentionally sought to discriminate in the context of its admissions process to achieve this result. However, the demographics show a significant disparity, and NCS’s existing policies regarding the Free and Reduced Lunch program coupled with NCS’s use of a five-mile radius preference and their response to concerns raised regarding that preference warrant closer scrutiny on the part of the Department.

a. Five Mile Radius

Significant concerns have been raised regarding the existence of the five mile radius preference and whether eliminating this preference is necessary.³ While it is true the demographics of the public school children in the Christina School District are more diverse than those within the five mile radius of NCS, geographic radius preferences are permissible under the law and there are legitimate programmatic reasons for schools wanting to serve children in the local community, including increased parent and community engagement with the school. More to the point, since NCS is significantly less diverse than the public school population *within the 5 mile radius*, it does not appear the geographic radius restriction is the principal cause of the current disparity. In other words, based on the analysis cited above, it is my view that NCS could achieve significantly more diversity even among students within the five mile radius. In short, while I have been advised by the Attorney General’s Office that the Department has the discretion to condition approval on removing the five mile radius restriction for all grades, I am not convinced at this time that doing so will materially impact this issue. Further, doing so could have the negative impact of less parent and community engagement with the school.

b. NCS’s Proposed Amendment

Although I am not inclined to remove the radius restriction at this time, NCS’s March 13, 2012 written response to the five mile radius issue has raised separate

² Even based on a comparison with public and private school students in the 5 mile radius, however, it is clear that in the categories of African American, Hispanic and low income students, NCS falls short when compared with the student population in the five mile radius. Professor James Corbett of the University of Delaware submitted a report suggesting that “Newark Charter School currently represents the full diversity of the population in its service area, and indeed represents the full diversity of a population within a radius twice as large as the current NCS Charter and state law provide.” But even using the figures cited in that report, the Hispanic, African American and low income populations at NCS are 43%, 35% and 26% lower than the respective public and non-public student populations in the five mile radius.

³ NCS responded to these concerns in a letter dated March 13, 2012.

concerns. The letter, which was forwarded to the Department by the School Director, Gregory R. Meece, Sr., is from the Board Chairman, Stephen Dressel, on behalf of the Board of Directors. The letter provides an aggressive defense of NCS's five mile radius in response to claims that "some have alleged" this preference "was designed to exclude certain groups." While it is not clear who made such allegations, the letter purports to remedy any such concerns by proposing to eliminate the preference for the proposed high school "in order to remove any misunderstandings or misperceptions." The offer to remove the preference as to the high school grades only, however, is questionable, given that the modification request is carefully structured to ensure that essentially only NCS elementary and middle school students actually are accepted into the NCS high school. Specifically, the letter of March 13, 2012 from Mr. Dressel states the following:

All currently enrolled students will be able to remain enrolled in the school, and all current and future attendees will be able to automatically matriculate into higher grades at Newark Charter School (grades K-12) regardless of whether they reside inside or outside the five-mile radius.

In other words, students already admitted at NCS would be automatically matriculated into the high school. Moreover, pursuant to NCS's plan, there appears to be little if any opportunity for students other than those already matriculated at NCS to attend the high school. Specifically, if approved, NCS would add a ninth grade class beginning in 2013/14 school year, but that class would hold only 162 slots – exactly the number of 8th grade students that will be at NCS in the 2012/13 school year. NCS would then add a tenth grade class the following school year, in 2014/15. But that class would again hold only 162 slots – just enough to serve the ninth graders from the prior year. The addition of high school grades occurs one per year through 2016/17, when the senior class is added – again, at 162 students, picking up only those students who were juniors the year before. Given this structure, the only way for students to gain access to NCS high school, other than those few slots that may be vacated by NCS students leaving the school, is by being an NCS elementary school student.⁴

As noted above, I am not prepared at this point to conclude that the five mile preference is the reason for NCS's lack of diversity. But, if the NCS board believes, as suggested by the letter of March 13, 2012, that the five mile preference should be lifted in

⁴ NCS notes as much in its application, explaining the expansion is structured to help ensure that NCS students are in the program from kindergarten on:

Our teachers have encountered serious disparities between students who have been in our program and progress to the next year and students who have not. For example, most of the 52 newly-admitted first graders in 2009 were not on the same reading level as students who came from Newark Charter School's Kindergarten. Of the 30 new fourth grade students, 29 fell into the bottom 29% of our fourth grade class. We tried to remediate these students' gaps in knowledge prior to their entering Newark Charter School, but the summer program the school offered was not enough to fully address the students' needs. The school determined that the only way to reduce the gaps in learning that result from gaps in enrollment is to level the grade-by-grade enrollments.

order to diversify their student body, they should do so at the elementary grades, since removing it only at the high school level has virtually no impact. It is not clear whether the NCS Board fully understood that its proposal to remove the five mile radius for the high school only is meaningless with respect to the admission of any students other than those already matriculated at the elementary and middle school, now and in the future.⁵

c. Free and Reduced Lunch Program

A second issue that has been raised regarding NCS's diversity is their failure to participate in the Free and Reduced Lunch program. The lack of availability of this program at NCS could certainly have had an impact on the number of low income students attending that school.⁶ Given the data regarding the number of low income students at NCS versus the surrounding community, the issue is important. While NCS has now agreed to offer that program if this application is approved, the Department believes this should be a mandatory and immediate condition of approval.⁷

Authorizer Discretion

The current demographics of NCS simply do not reflect the diversity of the public school population they serve and while there may be a variety of appropriate reasons for that, the Department believes NCS must put forth a concerted and thoughtful effort to attract a more diverse population, including across income lines. As a result, before granting an application for modification to almost double the size of NCS, the Department sought clarification from the Delaware Department of Justice as to its authority to impose conditions designed to open NCS's doors to a more diverse group of students.

Based on the Department's consultation with the Attorney General's Office, the Department believes it has broad legal discretion to condition NCS's charter modification request. The legislative intent behind Delaware charter law is to, among other things, provide parents and students with "greater opportunities in choosing public schools

⁵ It is worth noting the Delaware Charter School regulations specifically require the applicant to demonstrate that its Board of Directors has and will maintain collective experience in diversity issues, including but not limited to outreach and student recruitment.

⁶ The legislative intent to remove barriers to low income students attending charter schools is evident from the synopsis to an amendment to the original charter school law (138th General Assembly, Senate Amend. No. 3 to Senate Substitute No. 1 to Senate Bill No. 200), addressing charter school transportation. That synopsis notes that the amendment will "ensure[] that charter school students, such as low-income students, would be eligible for such transportation assistance as may be provided in public school choice legislation...".

⁷ A third issue raised by the Christina School Board and others is the impact that approval of this modification will have on the school district. I note, however, the current charter school law does not provide for consideration of impact on a school district in this case. The issue of impact on school districts has been discussed with stakeholders and last year a law was passed providing for impact to be considered in cases where a charter school is increasing its enrollment by more than 15% in less than an 18 month period. There continue to be discussions around this and other important issues involving charter schools.

within and outside their school districts...” and to provide for “a well-educated community.” 14 Del. C. § 501. Charter schools are limited in their ability to restrict student admission and may not “[d]iscriminate against any student in the admissions process because of race, creed, color, ... handicap, or national origin...”. 14 Del. C. § 506(a)(4). While the Code does permit the use of a preference for students residing within a five mile radius of a charter school, that preference is granted at the discretion of the authorizer. 14 Del. C. §506(b).

Charter modifications are to be granted “by the same procedure and based on the same criteria as they are approved” (14 Del. C. § 511(b)(1)), and the approving authority is given great deference in placing conditions on such approvals. “The approving authority may approve an application subject to such conditions as the approving authority, *in its sole discretion, may deem appropriate* to ensure the applicant’s continuing compliance with the approval criteria.” 14 Del. C. § 511(j). The approval criteria require that the school’s mission statement, goals and educational objectives be consistent with the legislative intent described above and with the admissions restrictions found in 14 Del. C. § 506.

Taken together, the intent of the charter law and the restrictions regarding student admission to charters indicate a desire for charter schools to provide broad opportunities for choice, with a limited and discretionary opportunity to employ a geographic preference. In addition, the Code specifically provides the Secretary with “sole discretion” to impose conditions that she “may deem appropriate” in order to ensure “continuing” compliance with the intention of the charter law and the student admission restrictions identified above.

Conclusion

Given the above demographic information and the charter school law as referenced above, the Department believes it appropriate to use its discretion to impose conditions on NCS’s modification request. First, the Department is utilizing its discretion to condition the approval of NCS’s modification request on the development and implementation of a significant outreach effort to those underrepresented populations within the five mile preference area.⁸ The outreach plan must be approved by the Secretary, prior to implementation, with the goal of having more underrepresented families avail themselves of the opportunities available at NCS. The Department believes such a condition will help to better ensure NCS’s compliance with the legislative intent and admissions restrictions of the charter law described above.

Second, the Department is also imposing a condition that requires NCS to begin offering free and reduced lunch to all eligible students beginning in the fall of 2012. NCS has already indicated they plan to begin participating in the free and reduced lunch programs prior to the expansion, so this condition would make that agreement part of the

⁸ To be clear, students who are already attending NCS – both now and in the future – will be permitted to continue at NCS. Given that most students at NCS stay there in successive years, the majority of new students enter NCS in kindergarten and the outreach effort should therefore be targeted accordingly.

charter modification. Since the lack of free and reduced lunch is another potential barrier that could lead to some of the disparities outlined above, the Department believes this is also a proper exercise of its allowable discretion.

Finally, the level of strife and discord around this application has been unfortunate. This is an important decision about an issue that properly raises strong emotions for parents, both for and against, regarding the educational opportunities available to their children. The questions raised are complex, both legally and from a policy perspective, and they deserve very careful attention. NCS has passionate representatives who are strong advocates for the school but it was disappointing that such advocacy too quickly turned visceral when sincere and legitimate questions were raised. Whether it was NCS's insistence the Department was prohibited from taking additional time to review the application or the allegations that such a decision was somehow "politically motivated" by "external forces," the tenor of public discourse in this matter is not the example we should be setting for our children. NCS is a great school with dedicated people teaching and operating the school. The Governor, this Department and the State Board are also dedicated to the children of our State. Going forward, we should strive to have wholesome and thoughtful public discourse about these critical issues without impugning those with different views.

In closing, NCS is located within one of our most diverse and lowest performing districts, yet it serves strikingly few of the most at-risk students within its five mile radius. While I believe that NCS is an exemplary school, it is that belief that makes it more compelling that NCS should be accessible to more high need students. I am hopeful these conditions, coupled with NCS's full and earnest implementation of them, will result in NCS being more accessible to high need students. However, the Department will review this issue carefully when NCS seeks its next charter renewal and will be inclined to impose additional conditions in the absence of significant progress on this issue. Thank you for your time and consideration of this important matter.