

2003

## The Commonwealth Court of Pennsylvania Holds That Cyber Charter Schools Are Legal According to the Existing Charter School Law - Pennsylvania School Board's Ass'n, Inc. v. Zogby

Kathryn M. Kraft

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### Recommended Citation

Kathryn M. Kraft, Note, *The Commonwealth Court of Pennsylvania Holds That Cyber Charter Schools Are Legal According to the Existing Charter School Law - Pennsylvania School Board's Ass'n, Inc. v. Zogby*, 56 SMU L. REV. 1039 (2003)

<https://scholar.smu.edu/smulr/vol56/iss2/14>

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THE COMMONWEALTH COURT OF  
PENNSYLVANIA HOLDS THAT CYBER  
CHARTER SCHOOLS ARE LEGAL  
ACCORDING TO THE EXISTING CHARTER  
SCHOOL LAW—*PENNSYLVANIA SCHOOL  
BOARDS ASS'N, INC. v. ZOGBY*

*Kathryn M. Kraft\**

CONCERNED about the state of public schools, Americans pushed for education reform in the early 1990s.<sup>1</sup> This reform movement spawned several innovative attempts to improve public schools with charter schools emerging as the reform attempt most accepted by state legislatures.<sup>2</sup> Thirty-eight states and the District of Columbia now authorize charter schools with express charter school laws.<sup>3</sup> In a few states, the charter school movement has led to the creation of cyber charter schools.<sup>4</sup> A cyber charter school operates over the Internet to provide instruction to students who log on from their homes using computers purchased with public funds.<sup>5</sup> These schools faced immediate criticism. Opponents questioned the ability of these schools to provide quality instruction, the schools' reliance on parents to verify attendance and provide assistance, the amount of money these schools receive relative to the amount of money they expend, and the state's ability to moni-

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\* J.D. Candidate, 2004, Southern Methodist University Dedman School of Law. I would like to thank my husband, Bill Greving, for his support and encouragement.

1. Karla A. Turekian, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1372 (1997).

2. Molly O'Brian, *Symposium: Education and the Constitution: Shaping Each Other and the Next Century: Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 139 (2000). A charter school is a legislatively authorized, publicly-funded school created by a contract between an individual or group and a state or local school board. A charter school operates independent of many state and local regulations, and can offer students a diverse and innovative education without the hindrance of regulation. Turekian, *supra* note 1, at 1374-76.

3. Press Release, U.S. Dep't of Educ., Paige Announces \$198 Million in Support for Charter Schools (Oct. 7, 2002), available at <http://www.ed.gov/PressReleases/10-2002/10072002.html> (last visited Feb. 5, 2003).

4. Currently, thirty cyber charter schools operate in twelve states—Alaska, Arizona, California, Colorado, Florida, Kansas, Minnesota, New Mexico, Ohio, Pennsylvania, Texas, and Wisconsin. Neal McCluskey, *Beyond Brick and Mortar: Cyber Charters Revolutionizing Education*, at <http://edreform.com/pubs/cyber.htm> (last visited Feb. 5, 2003).

5. AM. FED'N OF TEACHERS, DO CHARTER SCHOOLS MEASURE UP? THE CHARTER SCHOOL EXPERIMENT AFTER 10 YEARS 98 (2002).

tor these schools and their students.<sup>6</sup> The first judicial challenge to the legality of these schools arose in *Pennsylvania School Boards Ass'n, Inc. v. Zogby*.<sup>7</sup> In this case of first impression, the Commonwealth Court of Pennsylvania held that the school districts required by statute to provide funding to cyber charter schools had no standing to challenge the legality of these schools.<sup>8</sup> The court continued, in dicta, to find cyber charter schools legal under the state's charter school law.<sup>9</sup> With this decision, the court blocked any chance for the school districts to challenge the legality of cyber charter schools in another forum and failed to acknowledge the legislative intent of the charter school law or to give meaning to its provisions.

Pennsylvania enacted its Charter School Law<sup>10</sup> in 1997 in an attempt to improve the state's education system.<sup>11</sup> Under this law, a charter school receives funds for each of its students from the district of the student's residence, payable in monthly installments.<sup>12</sup> If a school district fails to make a payment to a charter school, the charter school submits documentation to the Department of Education through the Secretary of Education; the Secretary then deducts the debt from state payments to the delinquent school district and directs this money to the charter school.<sup>13</sup>

When the Department, through its Secretary, withheld subsidies from school districts that refused to pay invoices submitted by cyber charter schools, the school districts, through the Pennsylvania School Boards Association, Inc.,<sup>14</sup> sued the Secretary, Charles Zogby.<sup>15</sup> The school districts proceeded on four counts, including a petition for the court to review, in its appellate jurisdiction, the Department's decision to withhold the subsidies.<sup>16</sup> The school districts asked the court to vacate that decision, compel the Department to pay the withheld money, and prohibit the Department from withholding subsidies for cyber charter schools.<sup>17</sup> Alternatively, the school districts asked the court to prohibit the Department from withholding subsidies until a complete hearing

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6. See Penn. Dep't of Educ., KPMG Consulting: Executive Summary (Oct. 30, 2001), at [http://www.pde.state.pa.us/charter\\_schools/lib/charter\\_schools/execsumprojappr.pdf](http://www.pde.state.pa.us/charter_schools/lib/charter_schools/execsumprojappr.pdf) (last visited Feb. 5, 2003).

7. Penn. Sch. Bds. Ass'n, Inc. (PSBA) v. Zogby, 802 A.2d 6 (Pa. Commw. Ct. 2002).

8. *Id.* at 10.

9. *Id.* at 11.

10. PA. STAT. ANN. tit. 24, §§ 17-1701 to 17-1732 (West 2002).

11. *W. Chester Area Sch. Dist. v. Collegium Charter Sch.*, 760 A.2d 452, 454 n.2 (Pa. Commw. Ct. 2000).

12. PA. STAT. ANN. tit. 24, § 17-1725(A)(2)-(3) (West 2002).

13. PA. STAT. ANN. tit. 24, § 17-1725(A)(5) (West 2002).

14. The Pennsylvania School Boards Association, Inc. (PSBA) is a nonprofit association of public school boards in Pennsylvania dedicated to promoting local leadership for public schools. Penn. Sch. Bds. Ass'n, About PSBA, at <http://www.prideandpromise.org/aboutpsba.php> (last visited Feb. 5, 2003).

15. *PSBA*, 802 A.2d at 7.

16. The school districts also sought relief in the court's original jurisdiction. The court determined the school districts could not proceed on claims made in both original jurisdiction and appellate jurisdiction, and thus dismissed their first three claims for lack of jurisdiction. *Id.* at 8.

17. *Id.*

could be held.<sup>18</sup>

The court remanded the case to the Department with instructions for the Department to provide an opportunity for the school districts to challenge the subsidy deductions.<sup>19</sup> However, the court held that, on remand to the Department, the school districts could not challenge the legality of cyber charter schools because the school districts lacked standing to do so and the Department similarly lacked authority to rule on the matter.<sup>20</sup>

The court concluded the school districts lacked standing to challenge the legality of cyber charter schools because the Charter School Law only allows the chartering school district<sup>21</sup> and the State Charter School Appeal Board to participate in the decision to grant or deny a charter school application.<sup>22</sup> The court found that non-chartering school districts have an obligation to pay for their students who attend charter schools but have no right to participate in the charter-granting process.<sup>23</sup> Similarly, the court found that, should a school district refuse to pay a charter school's invoice, the Department has no discretion to consider the legality of the school and must instead automatically direct the subsidy money to the charter school if the Department finds that each claimed student is actually in attendance.<sup>24</sup>

After acknowledging that it had addressed all the issues, the court continued its analysis of the Charter School Law, finding cyber charter schools legal under the Charter School Law.<sup>25</sup>

Judge Pelligrini wrote a one-sentence concurring opinion, joining the majority in the resolution of jurisdiction and standing.<sup>26</sup>

Judge Smith-Ribner wrote a concurring and dissenting opinion, joined by Judges McGinley and Cohn.<sup>27</sup> Judge Smith-Ribner disagreed with the way the court framed the issue of standing.<sup>28</sup> While the majority addressed whether a school district has standing to appeal another school district's decision to grant a charter, she would have answered whether an adversely affected school district has standing to seek a declaration of law regarding cyber charter schools.<sup>29</sup> She argued the school districts did have standing to seek a declaration because the withholding of money impacted them in a substantial, immediate, and direct way.<sup>30</sup> Judge Smith-Ribner also argued that the court applied the wrong standard for a

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18. *Id.*

19. *Id.* at 9.

20. *Id.*

21. The chartering school district is the school district that granted a charter to the charter school. *Id.* at 9-10.

22. *Id.*

23. *Id.* at 10.

24. *Id.* at 9.

25. *Id.* at 11.

26. *Id.* at 13.

27. *Id.* at 13-18.

28. *Id.* at 13.

29. *Id.*

30. *Id.* at 15.

ruling upon a demurrer.<sup>31</sup> She argued that, had the court followed the correct standard and accepted the school districts' well-pleaded facts as true, it could not have concluded with certainty that they were not entitled to proceed on their claim.<sup>32</sup>

The court's holding negatively impacted school districts, their students, and taxpayers and failed in several respects. First, the court failed to properly consider the school districts' standing and failed to grant them an opportunity to challenge the legality of cyber charter schools, either judicially or in a hearing before the Department. The court also failed in its analysis of the legality of cyber charter schools because it ignored legislative intent and liberally construed specific provisions of the Charter School Law.

When the court determined the school districts lacked standing to judicially challenge the legality of cyber charter schools, it misconstrued their claim as an appeal from the grant of a charter when the school districts were actually seeking a declaration of law.<sup>33</sup> For such a declaration, the school districts could establish standing by showing they had a substantial, direct, and immediate interest in the subject matter.<sup>34</sup> Though the school districts attempted to establish a substantial and direct interest in the subject matter by demonstrating a loss of over \$800,000 in subsidies,<sup>35</sup> the court determined they lacked standing by relying on a Commonwealth Court decision that held tax payers lacked standing to challenge the grant of a charter school.<sup>36</sup> However, the court's reliance on this case is misplaced for two reasons. First, the taxpayers in *West Chester* challenged the grant of a charter, whereas the school districts in *PSBA* sought a declaration of the law. Second, the *West Chester* court specifically noted the taxpayers lacked standing because their perceived harm was based on speculation and their interests were remote and far-removed.<sup>37</sup> However, in *PSBA*, the loss of the subsidies directly and immediately impacted the school districts. Because of this direct harm, the court should have found the school districts had standing to receive a declaration of the legality of cyber charter schools.

After denying the school districts a judicial remedy, the court effectively blocked any chance for them to challenge the legality of cyber charter schools in another forum by finding they also lacked standing to make this challenge in a hearing before the Department. In reaching this holding, the court relied on *Boyertown*, again misconstruing a Commonwealth Court holding. *Boyertown* held that, before withholding subsidies from a school district, the Secretary must give the school district both notice and

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31. *Id.* at 17.

32. *Id.*

33. *Id.* at 14, 16.

34. *Ken R. v. Arthur Z.*, 682 A.2d 1267, 1270 (Pa. 1996).

35. *PSBA*, 802 A.2d at 7.

36. *Id.* at 10 (citing *W. Chester*, 760 A.2d at 452).

37. *W. Chester*, 760 A.2d at 465-66.

a chance to challenge the factual and legal grounds for the withholding.<sup>38</sup> The court interpreted this to mean that school districts could only challenge the charter school's attendance records and the Secretary could only determine if each claimed student actually attended the charter school.<sup>39</sup> However, *Boyertown* specifically stated that, before the Secretary could withhold money, he must determine the answers to several questions: "is the charter school operating in compliance with the Charter School Law, is each claimed student actually attending the charter school and for what period has the student attended."<sup>40</sup> By framing the Secretary's duty as a duty to answer these three questions, the *Boyertown* court clearly found the Secretary has discretion to determine both if claimed students are in attendance and if the charter school is in compliance with the Charter School Law.

Therefore, *Boyertown* would support a finding that the Department could determine if cyber charter schools are in compliance with the Charter School Law before withholding subsidies. The *Boyertown* concurring opinion gives credence to this argument. In that opinion, Judge Pellegrini argued the Department and its Secretary should be limited to determining if the charter school sufficiently documented its enrollment and should not be able to determine the propriety of a charter.<sup>41</sup> Obviously if *Boyertown* held that the Department could only determine if the students were in attendance, Judge Pellegrini would have no reason to write separately to convey those exact thoughts. Therefore, case law supports the proposition that the Department and its Secretary have the discretion to determine the legality of a cyber charter school in a subsidy withholding hearing.

In determining that cyber charter schools were legal under the Charter School Law, the court both failed to acknowledge legislative intent and to correctly construe the specific provisions of this law. First, it is clear the legislature did not contemplate the existence of cyber charter schools when it drafted the Charter School Law in 1997, a time when the concept of schools operating exclusively over the Internet was simply not foreseeable. The court even acknowledges that it "cannot say that the General Assembly actually contemplated the creation of cyber schools when it enacted the Charter School Law."<sup>42</sup> Previous litigation in Pennsylvania supports this argument. Although no other court has ruled on the legality of cyber charter schools, three courts faced with this issue have expressed serious doubts about whether these schools were legal under the Charter School Law. One Court of Common Pleas noted that the Charter School Law was enacted before Internet technology came into widespread use and doubted the framers considered cyber schools within the scope of the

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38. *Boyertown Area Sch. Dist. v. Dep't of Educ.*, 797 A.2d 421, 426 (Pa. Commw. Ct. 2002).

39. *PSBA*, 802 A.2d at 9.

40. *Boyertown*, 797 A.2d at 426.

41. *Id.* at 428.

42. *PSBA*, 802 A.2d at 11.

Charter School Law.<sup>43</sup> Similarly, another Court of Common Pleas stated it believed the Charter School Law only applied to bricks and mortar institutions.<sup>44</sup> Finally, a federal district court noted it was unclear if cyber schools could lawfully be considered charter schools within the meaning of that term as used in the Charter School Law.<sup>45</sup> By examining the circumstances at the time of the Charter School Law's enactment and by reading previous case law, it seems unlikely the legislature contemplated the creation of cyber charter schools when it enacted the Charter School Law.

Not only is it unlikely the legislature contemplated these schools when it passed the Charter School Law, but specific provisions of the Charter School Law could only apply to a bricks and mortar school. For example, charter schools are required to comply with the compulsory attendance law which requires every child to attend a "day school."<sup>46</sup> Cyber charter schools are not day schools and have no way of monitoring daily attendance. The Charter School Law also prohibits charter schools from displaying religious objects "on the premises."<sup>47</sup> Obviously, cyber charter schools have no premises. Finally, the application for a charter school must contain a description and address of the physical facility where the charter school will be located.<sup>48</sup> However, cyber charter schools lack physical facilities. These specific provisions only make sense if applied to bricks-and-mortar charter schools. To stretch these provisions to include cyber charter schools ignores the clear meaning of the statute.

In Pennsylvania, parties litigated the legality of cyber charter schools before the legislature could address the issue. The legislature responded to the litigation with the passage of Act 88.<sup>49</sup> This new law creates a framework that enables cyber charter schools to continue operation, but under stricter accountability standards.<sup>50</sup> However, the majority of states maintain charter school laws with no express provisions for cyber charter schools. In these states, as the cyber charter school movement grows without a response from state legislatures, state courts will be left to resolve the difficult issue of whether their state's charter school law legalizes cyber charter schools. Hopefully, when confronted with this challenge, state courts will carefully frame the issues and strictly interpret the applicable charter school law.

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43. *Butler Area Sch. Dist. v. Einstein Acad.*, No. 2001-50031 (Pa. Ct. Com. Pl. Sept. 10, 2001).

44. *Fairfield Area Sch. Dist. v. Nat'l Org. for Children, Inc.*, No. 01-5-1008, slip op. at 14 (Pa. Ct. Com. Pl. Dec. 11, 2001).

45. *Angstadt v. Midd-West Sch. Dist.*, 182 F. Supp. 2d 435 (M.D. Pa. 2002).

46. PA. STAT. ANN. tit. 24, § 17-1732-A(a) (West 2002) (requiring charter schools to comply with PA. STAT. ANN. tit. 24, § 13-1327 (West 2002)).

47. PA. STAT. ANN. tit. 24, § 17-1715-A(5) (West 2002).

48. PA. STAT. ANN. tit. 24, § 17-1719-A(11) (West 2002).

49. 2002 Pa. Legis. Serv. Act 2002-88 (West).

50. PA. STAT. ANN. tit. 24, § 1741-50 (West 2002).