

Charter School Appeals

The **National Association of Charter School Authorizers (NACSA)** is the trusted resource and innovative leader working with educators and public officials to increase the number of high-quality charter schools in cities and states across the nation. NACSA provides training, consulting, and policy guidance to authorizers and education leaders interested in increasing the number of high-quality schools and improving student outcomes. Visit us at www.qualitycharters.org.

Contents

- **Background on Charter School Appeals 1**

- **Key Considerations for Policymakers in Structuring Effective Charter Appeals Processes 1**
 - What are the due process considerations for appeals of authorizer actions?
 - What are the possible entities that could hear charter school appeals?
 - When an appeal is successful, who should issue the contract?
 - How does the presence or absence of multiple authorizers in a state impact appeals?
 - How can the interests of strong authorizing be balanced with the need for viable appeals?
 - How can statewide charter school appeals boards be tools for effective process?
 - How have courts handled charter school appeals?

- **Recommendations and Best Practices for State Policy on Charter School Appeals 4**

- **Resources and Further Analysis 5**

About NACSA’s Policy Guide Series

The growth and quality of a charter school sector is largely dependent on state policies that define approval, monitoring and renewal structures, criteria and processes. NACSA’s Policy Guide series is intended to support state legislatures in developing policy environments that promote quality authorizing and high-quality charter schools. Additional copies of this Guide are available upon request.

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Charter School Appeals: Ensuring Fairness and Due Process

An assurance of due process and the right to appeal critical authorizer decisions are important checks and balances in the charter school sector. They provide fundamental fairness for applicants and schools and encourage authorizers to conduct their duties professionally. Appeals processes should be well-defined and be administered equitably.

■ Background on Charter School Appeals

Authorizers must decide whether a proposed school should be allowed to open and whether it should be required to close. To enable authorizers to serve as quality gatekeepers for the sector, state policy must give authorizers clear power to deny low-quality charter school applications and to close charter schools that fail to meet expectations.

At the same time, when the authorizer decides against a school, a well-structured appeals process enhances fairness for charter school applicants and schools and helps hold authorizers accountable for making sound, merit-based decisions.

In the life cycle of a charter school, there are three common circumstances that can trigger an appeal:

Rejected application for a new charter school: An authorizer determines an application for a new charter school to be insufficient and declines to approve it.

Rejected application for charter school renewal: An authorizer rejects an application to renew an existing contract, and the school therefore loses its authority to operate beyond the end of its final contract year.

Revocations: An authorizer decides to cut short the

term of an existing charter school contract and moves to close the school quickly. Most frequently, revocations happen for financial reasons — a school may be unable to pay its bills going forward — or in instances where the health and safety of students are in serious jeopardy.

Whatever the circumstances of appeal, one important consideration is whether the appeal is procedural (claiming that the authorizer did not follow proper process) or substantive (claiming that the decision-making body made a bad decision on the merits). A procedural appeal might argue, for example, that an authorizer violated its own renewal procedures by failing even to read a school’s renewal application, while a substantive appeal could argue that the authorizer failed to appreciate all the merits of the renewal application. Whatever the administrative rules are regarding charter school appeals in a particular location, those threatened with the closure of a charter school may also seek to have a court weigh in on whether the process is being carried out lawfully, and perhaps seek an injunction halting the process at least temporarily.

■ Key Considerations for Policymakers in Structuring Effective Charter Appeals Processes

What are the due process considerations for appeals of authorizer actions?

At its core, due process means “fundamental fairness.”¹ The U.S. Constitution and system of laws require that people have the opportunity to protect important rights

(such as to life, liberty, and property) before they are taken away by the government. Precise definitions vary, but courts have consistently found that individuals threatened with such a loss are entitled to notice and an opportunity to be heard, and to defend their rights

Generally speaking, the more important the right and the more substantial the deprivation, the more thorough the process that is due.

before a knowledgeable decision-making body. Just how much process is due in any particular situation depends on the circumstances.

Generally speaking, the more important the right and the more substantial the deprivation, the more thorough the process that is due. Common elements of charter school due process include basic written notice, such as a letter to an applicant or the school's board informing them of a negative decision, and an opportunity to be heard. Depending on the seriousness of the action threatened, an appropriate opportunity to be heard could be as simple as the ability to offer oral or written comments in defense of an application or school. In other cases, however, it might call for a full-blown hearing including attorney representation, a written record of the proceedings, and the right to call witnesses and confront negative evidence. A further consideration is timing – sufficient notice and time to prepare are essential to ensure a fair opportunity to make one's case on appeal, as is a speedy decision on the appeal, especially where the school's rights could be impacted by any delay in the ruling.

While there is no hard and fast rule governing what process is due, in the charter school context, the range of common appeal options roughly corresponds to a sliding scale of due process concerns:

■ **Rejection of an Application for a New Charter School: Minimal Deprivation**

When an application for a new charter school is rejected, no established right is taken away from the applicant. A chance to create a school is lost, but no entitlement is affected. The applicant will also likely be able to resubmit a revised application at a later date to the same authorizer or possibly a different one (in states with multiple authorizers). Only minimal process may be due. Some states allow for notice and an opportunity to be heard

after an initial rejection by an authorizer; others allow no appeal.

■ **Denial of an Application for Renewal: Moderate Deprivation**

A school nearing the end of its charter term must have its contract renewed in order to continue operation. When an authorizer decides not to renew a contract, the school must close, so the consequences are substantial and process is clearly due. But at the same time, the school was nearing the end of its approved life span and was not entitled to operate beyond its contract term, absent a decision by the authorizer to renew the contract. Appropriate process would include written notice and an opportunity to present a case in favor of renewal, at least through the submission of written argument and supporting documents, and perhaps with oral testimony and a hearing as well.

■ **Revocation of a Contract: High Degree of Deprivation**

When a contract is revoked and a school is shut down before the end of its term, a serious deprivation takes place. A school that has a contract with its authorizer arguably has a significant property right in that contract and should have a robust opportunity to make its case against closure before the contract is terminated. A formal process for notice, a hearing, the ability to call witnesses on the school's behalf, and to right to challenge the evidence against the school are all appropriate in this context.

What are the possible entities that could hear charter school appeals?

To varying degrees of specificity, state charter laws determine the types and structure of charter school appeals from authorizer decisions. Options vary by state, but include:

- Appeal to the same authorizer that made the initial determination. This is essentially a request for reconsideration. It may be made more meaningful if the appeal is to a separate decision-making body within the organization, such as to an executive board or board of trustees in instances where the initial decision was made at the board committee level or by an advisory body.
- Appeal to the state education department or board of education where a district or non-traditional authorizer² made the initial ruling. In these cases, state law could provide for an appeal to the broader and perhaps higher authority of the state education department. In some states, the state board of education receives input on appeals from an advisory commission or review panel that investigates and recommends action to the state board of education, which makes the ultimate decision.
- Appeal to a special charter appeals board appointed to hear challenges to authorizer rulings. Such a board is independent of the state education department.
- Appeal to a court. Depending on state law, courts may hear appeals of authorizer determinations either directly or as a secondary level of review. For example, it may be necessary under the law to exhaust appeals to a state education department or special charter school appeals board before seeking review by a court, and the scope of what the court will hear may be more limited. Even where the charter school law does not call for review of decisions by a court, schools or applicants that receive an adverse decision may also be able to bring a declaratory judgment action or similar state law challenge claiming that the authorizer did not lawfully carry out its functions or exceeded the scope of its authority.

In each type of appeal, the organization or authority hearing the appeal has the power to either confirm or overrule the ruling initially made by the authorizer. It may then direct the authorizer to change its posi-

tion and execute a new or renewed contract, or, in the case of some state education departments or independent chartering boards, may issue a new or renewal contract under its own authority.

When an appeal is successful, who should issue the contract?

When an authorizer decision is overturned, some entity must then execute the contract. Sending an applicant or school back to an authorizer that rejected it in the first place tends to force both parties into a dysfunctional relationship and deprives the school of a willing, interested authorizer. On the other hand, the state office that approved the appeal may lack the capacity to effectively oversee charter schools. State law should provide for some entity with appropriate competence and capacity – other than the original authorizer – to assume chartering responsibility if the original authorizer’s decision is overturned.

How does the presence or absence of multiple authorizers in a state impact appeals?

The ability to select among authorizer options may reduce the risk that an applicant will be subject to authorizer bias. In addition, the availability of multiple authorizers provides rejected applicants the opportunity to seek approval from a different authorizer. For these reasons, states that provide an effective multiple-authorizer environment tend not to allow applicants to appeal rejections of new applications. Offering an authorizing alternative can be enough to ensure fairness while maintaining the efficiency, predictability and authoritativeness of authorizer decisions on applications. The availability of such second-opinion options at the application phase does not, however, take away the need for authorizers to offer a baseline due process.

How can the interests of strong authorizing be balanced with the need for viable appeals?

It would be possible to construct an appeals structure that allows for the maximum possible process in

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challenging all authorizer decisions on new and renewal applications and revocation, but this could have a chilling effect on good authorizing. Just as it is important to ensure due process, it is essential that states do not deter authorizers from denying low-quality charter applications or closing chronically failing charter schools. In instances where due process concerns are low, such as the denial of an application for a new charter school, leaving an authorizer free to exercise its judgment can provide an important balance, so long as more than one authorizing route is available to applicants.

How can statewide charter school appeals boards be tools for effective process?

A strong approach for handling appeals of authorizer

decisions can be through a statewide charter school appeals board. This board could either focus solely on appeals or hear appeals as one of its functions. A state may opt to allow appeals boards to hear a full range of appeals (rejected new applications, denials of contract renewal, and decisions to revoke a contract) or some subset of those.

How have courts handled charter school appeals?

Few charter school appeals make it to the courts. They are generally handled at the district or state administrative levels. When appeals are brought before a county or state court,³ the court examines whether the authorizer followed proper process under applicable laws and regulations.⁴

Recommendations and Best Practices for State Policy on Charter School Appeals

Given the high-stakes and public nature of charter school authorizing decisions, the right to an appeal is an important practice to ensure fairness and professionalism in the process. In structuring appeals processes, NACSA recommends the following best practices:

- **Make multiple authorizer options available within the state in order to foster fairness, and offer an appeals option for renewals and revocations.**

In the case of applicants for new charter schools, the availability of more than one authorizer is a sufficient check on bias and poor authorizing, and providing a formal appeal from such decisions may hamper the ability of authorizers to do their job. Nonrenewal decisions and revocations require fair and sufficient measures to ensure due process including a robust appeals process. Such

processes should strike a balance; effectively protecting the rights of schools without dissuading authorizers from closing down schools that are severely or chronically underperforming.

- **Adopt an appeals process that aligns with the state's charter school authorizing environment.**

Schools are assured of fundamental fairness when effective process and appeals are allowed and authorizers are held accountable for making good and fair decisions.

- **To ensure legal sufficiency, provide a level of process that corresponds to the rights at issue.**

The process due depends on the rights at risk and the seriousness of the possible deprivation. More serious risks call for more robust process (e.g., revocation calls for more due process than the rejection of an application).

- Empower an authority distinct from that which made the initial rejection to hear the appeal and give it sufficient autonomy to direct changes and make approvals. Appeals to a new authority provide a second opinion and guard against bias.
- Provide for some other competent, capable entity apart from the initial authorizer to assume chartering authority if the initial authorizer's decision (in any situation) is overturned. States should strongly consider allowing an appeals board or state education department to issue its own contracts and oversee schools that successfully appeal authorizer rulings.

■ Resources and Further Analysis

Comprehensive Community Schools v. Rockford School District No. 205, et al. 216 Ill. 2d 455; 837 N.E.2d 1 (Illinois Supreme Court, 2005).

National Alliance for Public Charter Schools (June 2009). *A New Model Law for Supporting the Growth of High-Quality Public Charter Schools*.

National Association of Charter School Authorizers (2007). *Principles and Standards for Quality Charter School Authorizing: Agency Capacity and Infrastructure*.

O'Neill, P. (August 2009). "Multiple Charter Authorizing Options," NACSA Policy Guide, National Association of Charter School Authorizers.

O'Neill, P., and Ziebarth, T. *Charter School Law Deskbook* (2009, 2nd Edition) Matthew Bender & Co., Charlottesville, VA. See, in particular, state charts depicting various data including appeal information.

Pennsylvania Charter Appeal Board Decisions (representative samples): http://www.pde.state.pa.us/charter_schools/cwp/view.asp?a=147&Q=46469

http://www.heartland.org/publications/school%20reform/article/16293/Illinois_Supreme_Court_to_Hear_Charter_School_Appeal.html

■ Acknowledgements

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¹ Black's Law Dictionary, West Publishing Company, St. Paul Minnesota 1979, p. 449 (quoting *Pinkerton v. Farr*, W.Va., 220 S.E.2d 682, 687).

² For more information about authorizer types, see O'Neill, P., "Multiple Charter Authorizing Options."

³ It is unlikely that a challenge to an authorizer decision would be heard by a federal court, since charter schools are creatures of state law. It is possible, though, that federal claims such as those alleging violations of the 14th Amendment protection against discrimination could open the door to jurisdiction in federal court.

⁴ One interesting case that made it all the way from administrative review to state supreme court is the Illinois case

of *Comprehensive Community Schools v. Rockford School District No. 205*. There, a charter school application was rejected by a district solely on the grounds that the proposed school was not financially viable for the district. This factor was one of a number of criteria established under the state's charter school law. The applicant appealed to the state board of education, which received and rejected input from its own review panel. The panel recommended approval of the application, but the state board upheld the district's denial. Illinois courts at the county, state appellate, and supreme court levels all ruled in favor of the district as well. The Illinois Supreme Court stated that while it would not be acceptable for all districts to reject charter school applications based solely on district economic factors, here the applicant failed to meet an important criterion for approval.