

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

ALC Case No.: 2010-ALJ-30-0437-AP

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SC Court of Appeals

Midlands Math and Business Academy..... Appellant,

v.

Richland County School District One Board of Commissioners..... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Administrative Law Court (“ALC”) err in finding that Appellant violated its charter when uncontroverted evidence showed that Appellant failed to align its curriculum with current state standards, failed to hire the required number of special education teachers, employed a special education teacher who was not highly qualified, employed a director who did not hold teaching or administration certification, and violated special education reporting requirements?
- II. Did the ALC err in determining that substantial evidence supported the Board’s determination that Appellant’s violations of its charter, which involved the school’s curriculum, staffing and compliance with law, were material violations?
- III. Did the ALC err in finding there was substantial evidence to affirm the School Board’s determination that Appellant failed to make reasonable progress on student achievement as defined in the charter?
- IV. Did the ALC err in finding that the record did not support Appellant’s assertion that the Board violated a duty of good faith and fair dealing when the District gave Appellant five years, an action plan, a comprehensive review, and afforded Appellant all of the procedures required by the South Carolina Charter Schools Act?

STATEMENT OF THE CASE

This is an appeal from an Order of the South Carolina Administrative Law Court (“ALC”), issued on January 25, 2012. In the Order, the ALC Judge affirmed the decision of the Board of Commissioners of the Richland County School District One (“Board” or “Respondent”) to revoke the charter of Appellant Midlands Math and Business Academy (“Appellant” or “MMBA”).

This case involves interpretation and application of the South Carolina Charter Schools Act of 1996, S.C. Code Ann. § 59-40-10 et seq. (“Act”). Specifically, MMBA challenges the Board’s decision to revoke MMBA’s charter under the provisions set forth in S.C. Code Ann. § 59-40-110.

After conducting a hearing on the matter in accordance with the Act, the Board

determined that MMBA had violated material terms of its charter application and had failed to make reasonable progress toward student achievement standards as defined in the charter application. The Board's findings and revocation determination were detailed in a written order, dated April 27, 2010.

MMBA appealed the Board's decision to the ALC pursuant to S.C. Code Ann. § 59-40-110(H). The parties submitted briefs to the ALC summarizing their respective legal positions and the ALC heard oral argument on December 21, 2010. After a review of the record and careful consideration of the parties' arguments, the ALC affirmed the Board's decision to revoke MMBA's charter. MMBA then filed this appeal contesting the Order of the ALC.

STATEMENT OF THE FACTS

In 2003, MMBA submitted a charter application requesting sponsorship from the District under the South Carolina Charter Schools Act. Pursuant to the Act, the application included descriptions, representations and assurances that detailed the school's educational program, how the school would operate, and how student achievement progress would be measured. (ROA pp. 521-673). With respect to curriculum, the application stated, among other things, that:

All curriculum and projects will be based upon the South Carolina Standards for all disciplines. (ROA p. 534).

The teachers of MMBA will provide instruction to students based on the South Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level. (ROA p. 535).

The application also made representations regarding staffing and the qualifications that MMBA staff would possess, including the following:

Director/Lead Teacher Qualification: Must hold current South Carolina

Teaching Certification or Education Administration Certification . . .
(ROA p. 543.)

In order to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time Certified Special Education Teachers. . . . We will employ an additional Special Education Teacher during our 2nd year of implementation bringing the total to at least three full-time certified Special Education Teachers. (ROA p. 536).

All special education teachers will meet the certification requirements of the No Child Left Behind Law. (ROA p. 544).

The charter application listed each teacher position at MBBA and represented that MMBA would employ a special education teacher for grades 4 and 5, and another special education teacher for grades 6, 7 and 8. (ROA p. 544). The charter application further represented that a third special education teacher (also for grades 6, 7 and 8) would be added in MMBA's second year of implementation. *Id.*

With respect to compliance with disability laws, the application stated that MMBA "[w]ill adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (ROA p. 523).

The charter application also set a goal for student achievement: 100% proficiency in all areas tested by 2014. (ROA p. 673). The charter application then defined the following as reasonable progress toward this student achievement goal:

The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year. (ROA p. 673).

[T]he number of students in our school meeting standards will increase by 20.6% in ELA and 21.15% in Math after our first year of implementation. After the first year, the number of students meeting standard will increase

by the same percentage every three years until the school year 2013-2014, when 100% of students will be meeting standard (scoring proficient on PACT). (ROA p. 673).

Based on the descriptions, representations and assurances in MMBA's application, the Board voted to approve MMBA's charter. MMBA began instruction commencing with the 2004-2005 academic school year, which was its first year of implementation. Pursuant to S.C. Code Ann. § 59-40-60(A), the charter application, as drafted by MMBA and approved by the Board, became a contract between the school and the District. As such, MMBA was required by the Act to adhere to the descriptions, representations and assurances in the charter application.

After conducting annual reviews, the District became concerned about MMBA because of low student performance on the Palmetto Achievement Challenge Test ("PACT"). During the 2007-2008 academic school year, the District collaborated with MMBA to draft an improvement plan, whereby MMBA agreed to follow specific directives and the District agreed to provide technical assistance to aid MMBA in improving academic performance. (ROA p. 7-8). Despite the District's support, overall student performance continued to fall well below the reasonable progress standards set forth in the charter application. (ROA p. 8).

On May 26, 2009, the Board requested a comprehensive review of MMBA's adherence to its charter, with a focus on student achievement. (ROA p. 8). As part of the comprehensive review, District Administration requested and received from MMBA copies of MMBA's curriculum and supporting material. District Administration also requested and received information about MMBA's staffing including identification of all teachers employed by MMBA who were highly qualified under NCLB. (ROA pp. 896-899). District Administration reviewed the curriculum and other information submitted

by MMBA, conducted site visits, reviewed student files, and analyzed MMBA student performance data for statewide testing. (ROA pp. 65-145).

In August of 2009, District Administration provided MMBA with findings and recommendations relating to MMBA's curriculum. (ROA pp. 79-97). These findings detailed the numerous areas in MMBA's curriculum that were not aligned with state standards when the District reviewed the curriculum during the summer of 2009. They also showed that MMBA's curriculum had been misaligned for several years. *Id.* In November of 2009, MMBA acknowledged the findings of misaligned curriculum and represented that it had completed a "standard alignment" to address the findings. (ROA p. 932).

After completion of the comprehensive review, District Administration determined, among other things, that MMBA was in breach of its charter in the following particulars (ROA pp. 70-73):

- a. MMBA's ELA, Math and Science curricula had been aligned to outdated standards.
- b. The curriculum had gaps and lacked rigor and as such, could not ensure mastery of basic skill concepts.
- c. MMBA only employed one special education teacher, although the charter application provided for a minimum of two full-time certified Special Education Teachers in year one and three teachers starting in year two.
- d. The special education teacher was not "highly qualified" under NCLB as required by the charter.
- e. MMBA failed to meet federal and State guidelines regarding student individualized education program ("IEP") progress reports.
- f. MMBA failed to make reasonable progress on student achievement as defined in its charter.

- g. The Director of MMBA did not hold a S.C. teaching certificate or administration certification as required by the charter.
- h. Student resources were inadequate to support a strong literacy program as evidenced by absence of a comprehensive school library and adequate classroom print resources.

The findings of the review committee were presented to the Board, and on November 24, 2009, the Board voted to notify MMBA of its intent to revoke the charter.

In accordance with the provisions of S.C. Code Ann. § 59-40-110(F), the Board held a hearing to consider whether MMBA's charter should be revoked. The hearing was held at MMBA's request and included the recommendation of District Administration, written opposition to the recommendation by MMBA, oral argument by MMBA, and public comment. (ROA p. 4) After careful consideration of MMBA's performance under the contract, the Board voted 7-0 to revoke the charter. (ROA. pp. 24-25). On April 27, 2010, the Board issued a written order setting forth the reasons for the Board's decision and directing dissolution of MMBA pursuant to S.C. Code Ann. § 59-40-120. (ROA. pp. 3-18).

On May 21, 2010, MMBA appealed the Board's decision to the ALC pursuant to S.C. Code Ann. § 59-40-110(H). (ROA pp. 1-2). The parties submitted briefs to the ALC summarizing their respective legal positions and the ALC heard oral argument on December 21, 2010.

After a review of the record of the Board's proceedings and careful consideration of the parties' arguments, the ALC issued an Order, dated January 25, 2012. In its Order, the ALC found, among other things, that: MMBA improperly misaligned curriculum for at least three years; employed a teacher and an administrator who did not meet the qualifications set out in MMBA's charter; violated special education laws; and failed to

make reasonable progress on student achievement as outlined in the charter. (ALC Order). Based on these and other findings, the ALC affirmed the Board revocation of MMBA's charter.

On February 23, 2012, MMBA filed an appeal in the Court of Appeals seeking review of the Order of the ALC. (MMBA Notice of Appeal).

STANDARD OF REVIEW

This appeal involves three levels of review: (1) the Board's review of MMBA's compliance with the provisions and standards in its charter; (2) the ALC Judge's review of the Board's decision to revoke MMBA's charter; and (3) this Court's review of the ALC Judge's Order. The standards of review for each level are as follows:

Under the Act, a charter school operates within its sponsoring public school district and is accountable to that school district's board. S.C. Code Ann. § 59-40-40(1). The sponsoring district is to regularly evaluate the charter school and make determinations regarding whether the charter school is complying with the terms of the charter. S.C. Code Ann. § 59-40-110(A). A charter must be revoked by the sponsoring district if it is determined by the district's board after conducting a hearing that the charter school:

- (1) committed a material violation of the conditions, standards, or procedures provided for in the charter application;
- (2) failed to meet or make reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the charter application;
- (3) failed to meet generally accepted standards of fiscal management; or
- (4) violated any provision of law from which the charter school was not specifically exempted.

S.C. Code Ann. § 59-40-110(C).

As noted by the ALC, revocation by a school board under S.C. Code Ann. § 59-40-110 is mandatory, not discretionary, when any of these four conditions are met. (ALC Order, p. 9, f.n. 1).

A final decision of a school district to revoke a charter may be appealed to the ALC. S.C. Code Ann. § 59-40-110(H). On appeal, the ALC has authority to review the decision under the South Carolina Administrative Procedures Act (“APA”), S.C. Code Ann. § 1-23-380 (5), which provides for reversal only if the school board’s findings are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other errors of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise or discretion.

In applying this scope of review, the ALC may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. *Liberty Mutual Ins. Co. v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005). The ALC is to review the findings of the school board to determine if its findings of fact or conclusions of law are based on substantial evidence contained in the whole record. The South Carolina Supreme Court in *Porter v. South Carolina Public Service Commission*, 333 S.C. 12, 507 S.E.2d 328, 332 (1998) defined the substantial evidence standard as:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency’s action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from

the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding.

An ALC judge's decision may, as a matter of right, be appealed to the South Carolina Court of Appeals. S.C. Code Ann. § 1-23-610. The Court of Appeals reviews the case in the same manner as the ALC, *i.e.*, using the APA standard of review. *Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee*, 371 S.C. 561, 641 S.E.2d 24, 27 (2007). As such, on appellate review, a school board's decision to revoke a charter should not be overturned unless it is unsupported by substantial evidence or improper due to an error of law. S.C. Code Ann. § 1-23-380 (5).

ARGUMENT

I. MMBA's violations of its charter are clearly established in the record.

A. MMBA did not employ the special education staff required by the charter.

MMBA's charter provides that to fulfill its obligations under the Individuals with Disabilities Education Act ("IDEA"), and other laws effecting students with disabilities, MMBA would employ "at least two full-time Certified Special Education Teachers" in the first year of implementation and that an additional special education teacher would be hired in the second year of implementation "bringing the total to at least three full-time certified Special Education Teachers." (ROA p. 536). This special education staffing requirement was reaffirmed later in the charter, where it states:

MMBA will employ teachers in the following manner:

Special Education Teacher, grades 4, 5
Special Education Teacher, grades 6, 7, 8
Special Education Teacher, grades 6, 7, 8 (2nd year of implementation)

(ROA p. 544).

The charter does not include any provision that would allow for the number of special education teachers to be reduced if MMBA did not meet enrollment projections. In addition, the provisions on special education staffing in MMBA's charter have never been amended to allow for a reduction in staff.

Despite the clear mandate of the charter, MMBA employed only one special education teacher. MMBA argues that it should be excused from the charter's special education staffing requirements due to lower than expected enrollment. However, MMBA's enrollment reached as high as 139 students (Appellants Brief p. 2), which is almost 70% of its projected enrollment of 200, yet MMBA employed only 1/3 of the staff mandated by the charter. In addition, MMBA's reliance on overall enrollment numbers (which includes both general education and special education students) fails to address the specific needs of special education students or MMBA's unconditional promise to fully staff its special education program.

Moreover, MMBA was not at liberty to unilaterally change, or deviate from, the requirements of its charter. Charter school law does not allow charter schools to disregard the terms of their charters. Under charter school law, charter revisions require approval by both the charter school and the sponsor. S.C. Code Ann. § 59-40-60(C). At no time did MMBA obtain approval from the Board for a change to its special education staffing requirements. MMBA just failed to adhere to the requirements. Thus, MMBA's violation of the charter is clear and inescapable.

B. The one special education teacher employed by MMBA was not highly qualified under the No Child Left Behind (NCLB) Act.

MMBA's charter provides: "All special education teachers will meet the certification requirements of the No Child Left Behind Law." (ROA p. 544). The record

shows that MMBA's special education teacher was not "highly qualified" as required by NCLB.

During the comprehensive review, the District requested teacher qualification information from MMBA. MMBA responded with a document entitled "Teacher Qualifications," which was dated August 2009. (ROA pp. 896-899). In that document, MMBA listed its teaching staff, including the one special education teacher, Ms. Elsie White. (R. p. 898). The document then identified the teachers at MMBA who were highly qualified under NCLB as the English/Language Arts, Social Studies, and Science teachers. (R. p. 899.) MMBA did not identify Ms. White or any other special education teacher at MMBA as highly qualified. Thus, MMBA's own documentation reflects that its special education teacher was not highly qualified under NCLB.

Nevertheless, MMBA now asserts that Ms. White's state teacher certification and graduate degree in special education makes her "highly qualified" under NCLB. A review of the provisions of NCLB disproves MMBA's claim. Under NCLB, a teacher must hold state certification *and* demonstrate subject matter competency "in the academic subjects she teaches." 20 U.S.C. § 7801(23). A teacher can demonstrate competency through a state certifying exam, an academic major, a graduate degree, or advanced certification in the academic subject or subjects taught by the teacher. *Id.* NCLB defines "core academic subjects" as "English, reading or language arts, mathematics, science, foreign language, civics and government, economic, arts, history, and geography." 20 U.S.C. § 7801(23). Under this definition, and as acknowledged by Appellant (App. Brief p. 16), special education is not an academic subject taught to elementary or middle school students. In other words, special education teachers do not teach the subject of special education to students. Rather, special education teachers instruct classes of special

education students in academic subjects. Accordingly, to be highly qualified under NCLB, a special education teacher who teaches a class must demonstrate competency in the academic subjects that he or she provides instruction to students (*i.e.*, ELA, math, science, social studies, *etc.*).

The record reflects that Ms. White holds only an undergraduate degree in music and a masters' degree in special education. (ROA 1102-1105). The record also reflects that Ms. White had a class load, *i.e.*, she taught classes with special education students. (ROA p. 343, ALC Order p. 13, App. Brief pp. 15-16). There is no evidence in the record that Ms. White demonstrated competency in any academic subject she taught to students as required by NCLB.¹ Thus, she does not meet the highly qualified standard in NCLB as required by the charter.

C. MMBA's Director did not have teacher or administration certification as required by the charter.

The charter provides that MMBA's Director "[m]ust hold current South Carolina Teaching Certification or Education Administration Certification." (R. p. 543.) It is undisputed that MMBA's employed a Director that did not have teacher or administrator certification.

Despite the clear charter language, MMBA claims that its failure to hire a Director with the required certification is not a violation because the certification requirement is "qualified" by another statement in the charter application that provides:

Either the director or the administrative assistant must hold current South Carolina certification in administration or have at least one year of

¹ MMBA appears to assert in its brief that while Ms. White teaches students in a classroom she does not teach any academic subjects. (Appellant's Brief pp. 15-16). This does not make sense. Under the IDEA, special education students must be involved and progress in the general education curriculum. 20 U.S.C. § 1414(d)(1)(A)(i). Thus, if Ms. White is teaching a class of special education students but is not teaching any academic subjects, she is violating the students' individualized education programs (IEPs), MMBA's charter, and the law.

experience in the field of school-based administration.

The ALC properly rejected MMBA's argument as being contrary to the plain language of the charter. The charter unequivocally provides that the Director *must* hold either teaching or administrative certification. (R. p. 543).² The latter language in the charter adds a requirement that either the director or administrative assistant must also have administrative certification or administration experience. *Id.* This provision ensures that someone on the leadership staff will have administrative certification or administrative experience and not just teaching certification. It does not eliminate or "qualify" the earlier unequivocal certification requirement for MMBA's Director. Thus, MMBA's noncompliance with the charter application is apparent and cannot be reasonably contested.

D. MMBA failed to keep its curriculum aligned with current state standards as required by its charter.

In its charter, MMBA promised that its curriculum would "be based upon the South Carolina Standards for all disciplines" and its teachers would "provide instruction to students based on the South Carolina Academic Standards for all subjects." (ROA pp. 534 and 535). However, MMBA failed to keep its curriculum aligned with State standards.

During the District's comprehensive review in 2009, District Administration reviewed the curriculum submitted by MMBA and found that MMBA's instructional materials for ELA, Math and Science were not aligned with current South Carolina

² MMBA claims that Mr. Jenkins' lack of certification is not a violation of the charter because although he served as Director, he split some of his job duties with a "Lead Teacher". The Director is the main administrative position under the charter and it is clear from the record that Mr. Jenkins was directing the school. (See, e.g., ROA p. 929, where Mr. Jenkins was listed by MMBA as the sole person serving as Principal). Further, the charter does not provide for reduced certification if administrative job duties are split and MMBA cannot unilaterally change the charter's terms. S.C. Code Ann. § 59-40-60(C).

Standards. (ROA pp. 71 and 77-91). Specifically, District Administration found that the State of South Carolina had adopted new standards for Science in 2005, for Math in 2007, and for ELA in 2008, yet MMBA was using curriculum based on old standards that had been replaced. *Id.* District Administration also found multiple gaps in MMBA's curriculum. *Id.* To further assess MMBA's curriculum, District Administration observed classroom instruction at MMBA. These observations confirmed that MMBA was not teaching to current standards. (ROA pp. 71-72).³ The findings of District Administration relating to curriculum were detailed in a report that was provided to MMBA in August 2009. (ROA pp. 75-97).

In materials presented to the Board during the revocation proceedings, MMBA represented that after receiving the report from District Administration, MMBA conducted a "standard alignment" with the assistance of consultants. (ROA 929-932). As such, MMBA acknowledged the District's findings regarding MMBA's misaligned curriculum and the need for MMBA to "update, correct and nullify the cited areas." (ROA p. 930).

In the ALC proceedings, MMBA did not submit evidence to refute the substantial evidence that its curriculum had been misaligned. (ALC Order p. 11). Instead, MMBA argued that the curriculum used at MMBA must have met standards because it was the same curriculum that was approved at MMBA's inception. (App. ALC Brief p. 13). The ALC correctly rejected this argument as follows:

The argument that the District should not have approved Core Knowledge in the first place also misses the point because the overarching basis for

³ MMBA asserts that the District would have to observe every lesson to determine whether MMBA was teaching to state standards. This assertion is both unrealistic and incorrect. For the comprehensive review, the District reviewed all of the curriculum materials that MMBA submitted and conducted multiple observations. Based on this extensive review, it was apparent that MMBA was not teaching to state standards.

the Board's finding of a lack of alignment stemmed from MMBA's failure to update its curriculum in tandem with updates in state standards. MMBA had a duty to update its curriculum to match state standards. MMBA's charter stated that the curriculum would adhere to and even surpass state standards. (ROA at 383, 341, 342). The District's comprehensive 2009 review concluded that English and Language Art was aligned to 2006 standards, that Science was aligned to 2005 standards, and the Math was aligned with outdated standards. Therefore, at the time of the District's review, MMBA taught its students using the wrong standard in violation of its charter agreement.

In this appeal, MMBA has changed its argument and now asserts that its curriculum has always been aligned with current academic standards. (App. Brief p. 10). In support of this argument, MMBA relies almost exclusively on a document entitled "Curriculum and Instruction Feedback Comprehensive Plan" (hereinafter "Curriculum Plan"). However, this document was created by MMBA after District Administration discovered that MMBA's curriculum was misaligned. (ROA 929-951). On the first page of the Curriculum Plan it acknowledges the findings of District Administration with respect to MMBA's curriculum and states that MMBA addressed the findings after receiving the District's report. (ROA p. 930). It further provides that MMBA hired consultants to assist in aligning its curriculum to State standards and asserts that a standard alignment was completed by November 9, 2009. *Id.* Thus, contrary to MMBA's assertions, the document relied upon by MMBA does not show that MMBA's curriculum has always been aligned to State standards. In fact, it shows the opposite, which is that MMBA's curriculum had been misaligned for several years before MMBA made any attempt to fix it.⁴

⁴ Given that new state standards were adopted as early as 2005, the record reflects that MMBA employed misaligned curriculum for at least three years. As a result, the ALC properly concluded that: "The tangible recipients of the benefit of MMBA's promise of a properly aligned curriculum were its students who failed to receive instruction under a properly aligned curriculum from 2005 through 2008." (ALC Order p. 11).

In sum, pursuant to its charter, MMBA was required to provide instruction according to State standards. (R. pp. 534, 535.) To fulfill this mandate, MMBA was required to update and realign its curriculum when new state standards were adopted. MMBA failed to do so. Instead, it continued to use curriculum based on outdated standards. MMBA's failure in this regard is a clear violation of the charter.

E. MMBA violated special education law by failing to provide required progress reports on IEP goals.

Under S.C. Code Ann. § 59-40-50, a charter school must adhere to the disability rights requirements applied to public schools operating in the same school district. In light of this requirement, MMBA represented in its charter application that it would "adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (ROA p. 523.)

As part of the 2009 comprehensive review, District Administration reviewed MMBA's special education records and determined, among other things, that MMBA had failed to meet federal and State IEP guidelines regarding student individualized education program (IEP) progress reports. (ROA p. 128-132.) The IDEA requires that special education students and their parents receive progress reports on the progress of IEP goals at least as often as general education students receive progress reports, or as otherwise directed by the student's IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(3)(ii). The review by District Administration revealed numerous inconsistencies in the way MMBA provided student IEP progress reports. For example, one student's IEP required progress reporting on IEP goals every 4.5 weeks but the

student's records did not contain evidence of MMBA providing such reports. (ROA p. 131.) Other students' IEPs called for IEP progress reports less often than general education received progress reports, which violated federal and State mandates. *Id.*

MMBA claims that the record does not contain support for the District's findings. This claim is without merit. District Administration conducted a comprehensive review that included a review of MMBA's special education student records. It is from MMBA's own records that the District discovered the violations of special education law. (ROA p. 128-132.) Further, MMBA has not directly contested any of the District's specific findings. Instead, MMBA has attempted to dispute the District's findings by relying on affidavits of parents that contain only general statements regarding special education and progress reports. (ROA pp. 1114-1121.) The ALC properly rejected MMBA's argument finding that "[t]hese affidavits do not disprove the Board's finding that MMBA's reporting did not comply with federal law." (ALC Order p. 14).

MMBA also relies on an affidavit from its special education teacher which generally asserts that MMBA complied with special education law. (ROA pp. 1102-1104). However, the affidavit fails to address any specific findings of the District and fails to provide any support for the teacher's general assertion. Thus, MMBA claims of legal compliance are based solely on its own conclusory statements that lack factual support.

In sum, a comprehensive review of MMBA's records revealed that MMBA failed to comply with federal law regarding student individualized education program (IEP) progress reports. MMBA responded to the District's review with general assertions of compliance but did not directly contest any of the findings. (ALC Order p. 14). Thus, under the substantial evidence standard of review, the District's findings should be

upheld.

Finally, MMBA argues that its violation of special education law is not material to the charter. This argument is misguided. Violation of law is a mandatory ground for charter revocation under SC. Code Ann. 59-40-110(C)(4). As set forth in the ALC Order, “[m]ateriality plays no role in this statutory ground for revocation, which is plain and unequivocal.” (ALC Order p. 14).

II. MMBA’s charter violations, individually and collectively, were material as they involved necessary charter application elements and were relied upon by the Board in the approval process.

Since the record establishes that MMBA committed numerous violations of its charter, MMBA attempts to minimize its violations by labeling them as “immaterial”. To support its arguments, MMBA relies on inapplicable provisions pulled from contract treatises and cases.

The approval and revocation process for charter schools is set forth in statute, not contract. As such, the grounds for revocation should be interpreted in light of the statutory scheme and not superseded by inapplicable contract principles.

The Act provides that a charter must be revoked by the sponsoring district if the charter school commits “a material violation of the conditions, standards, or procedures provided for in the charter application.” Although the term “material violation” is not defined in the Act, the significance, and materiality, of charter provisions can be ascertained from the Act itself.

For example, the Act mandates that charter schools “adhere to the same health, safety, civil rights, and disability rights requirements as are applied to public schools operating in the same school district or, in the case of the South Carolina Public Charter School District, the local school district in which the charter school is located.” S.C.

Code Ann. § 59-40-50(B)(1). Further, to obtain approval, MMBA assured the District in writing that it would comply with all provisions of the IDEA. (ROA p. 523). Since MMBA did not comply with the provisions of the IDEA, revocation was mandatory under the Act. S.C. Code Ann. § 59-40-110(C)(4). In other words, the Act treats all violations of disability rights laws as material and grounds for revocation.

The Act also provides that a charter application must include:

a description of the charter school's educational program, pupil achievement standards, *and curriculum which must meet or exceed any content standards adopted by the State Board of Education* and the chartering district must be designed to enable each pupil to achieve these standards. S.C. Code Ann. § 59-40-60(F)(4)(emphasis added).

To meet this requirement, MMBA's charter application represented that its curriculum and instruction would be based upon the South Carolina Standards for all disciplines and subjects. (ROA 534 and 535). Under the Act, the curriculum description, and accompanying assurance that the curriculum will meet content standards, must be included in a charter application to obtain approval. S.C. Code Ann. § 59-40-60(F)(4). To deem these requirements to be "immaterial" would nullify the express terms of the Act.

In addition, the Act requires charter applicants to provide a description of the governance and operation of the charter school in the charter application. S.C. Code Ann. § 59-40-60(F)(7). Pursuant to this requirement, MMBA's charter application identified the administrative and teaching staff the charter school would employ, including the qualifications for the positions. (ROA pp. 541-544). MMBA's departure from these charter provisions (*i.e.*, employing persons without the requisite qualifications and not employing the number of special education staff required by the charter) altered

MMBA's governance and operation from what was promised. Further, as recognized by the ALC, because of MMBA's departure from the terms of its charter, the students and the school district did not receive the benefit of properly credentialed and qualified staff. "The district and its students were deprived of that benefit, cannot be compensated, no cure of the failure is available, and neither MMA's good faith or expected forfeiture outweigh the damage done by the violations of the charter." (ALC Order p. 13).

Another provision that must be included in a charter applications is:

a description of the charter school's plan for evaluating pupil achievement and progress toward accomplishment of the school's achievement standards in addition to state assessments, the timeline for meeting these standards, and the procedures for taking corrective action if that pupil achievement falls below the standards.

S.C. Code Ann. § 59-40-60(F)(5). MMBA included a student assessment section in its charter application to meet this statutory requirement. (ROA p. 673). The section designated how student achievement would be measured, and established reasonable progress measures and timelines. As with the other charter provisions, MMBA's performance did not match its representations. Consequently, MMBA now attempts to downplay the provision's significance as immaterial. As with the other violated charter terms, the statute makes clear that the provision on student achievement is important. In fact, all of the provisions at issue in this case were essential components of the charter application and had to be included for MMBA to gain approval from the District. As such, there can be no question that they are material under the Act.

In addition to designating what is to be included in a charter application, the Act also designates who is to make the determination as to whether a "material violation" of a charter application has occurred. It is the sponsor. S.C. Code Ann. § 59-40-110. This is

in accord with the statutory scheme as it is the sponsor who approves the charter application in the first place. S.C. Code Ann. § 59-40-40(4). Consequently, the sponsor is in the best position to determine whether the charter school has abided by the representations it made to gain sponsorship.

In this matter, the Board, who approved MMBA's charter application and sponsored MMBA, determined by a unanimous vote that MMBA committed material violations of the charter. In making its determination, the Board found that the charter application would not have been approved if the Board had known that MMBA would not comply with the identified charter terms. Specifically, in its Order, the Board stated that the assurances and representations that MMBA failed to fulfill were "material to the application and relied upon by the District when the charter application was approved." (ROA p. 9).

As the Act leaves the determination of whether a material violation has been committed to the Board's discretion, for the Board's decision to be overturned on appeal requires a showing that the Board's decision was "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise or discretion." S.C. Code Ann. § 1-23-380 (5). MMBA has not, and cannot, make such a showing.

The record reflects that the Board exercised its discretion in accordance with the applicable provisions of the Act. The Board notified MMBA of its intent to revoke the charter in accordance with S.C. Code Ann. § 59-40-110(D). The Board provided MMBA with a hearing before taking final action as required by S.C. Code Ann. § 59-40-110(F). Further, in making its decision, the Board applied the standards for revocation in S.C. Code Ann. § 59-40-110(C). Thus, there is no basis for MMBA to claim abuse of discretion.

It is also clear that the Board acted within its authority under the Act when it revoked the charter. Under the Act, a charter school operates within a public school district and "is accountable to the school board of trustees of that district which grants its charter." S.C. Code Ann. § 59-40-40(1). As the sponsor, the governing board approves the charter application, renews the charter, and, when necessary, revokes the charter. S.C. Code Ann. §§ 59-40-40(4), 59-40-70(B), 59-40-110. In this matter, the Board applied the standards in S.C. Code Ann. § 59-40-110(C) and determined that there were grounds for revocation. In so doing, the Board acted within, and in accordance with, its authority under the Act and in no way exceeded its powers.

There is also nothing in the record to support MMBA's contention that the Board's decision was arbitrary and capricious. A decision is arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. Bd. of Dentistry*, 286 S.C. 182, 332 S.E. 2d 539, 541 (Ct. App. 1985). The authority of a school board to revoke a charter is expressly provided in S.C. Code Ann. § 59-40-110. In this matter, before taking any action regarding revocation, the Board directed District Administration to conduct a comprehensive review of MMBA. After receiving the results of the review and the recommendations of District Administration that were based on the review, the Board notified MMBA of its intent to revoke and scheduled a hearing upon MMBA's request to consider MMBA's response. During and following the hearing, the Board carefully considered the charter and information presented by District Administration and MMBA. The Board then applied the standards for revocation set forth by S.C. Code Ann. § 59-40-110 in making its decision. Given these circumstances, it is clear that the

Board's decision was rational and deliberate and guided by legal procedures and standards and it was not made based on one's will or the absence of fixed rules.

In sum, the grounds for revocation and who and how a revocation decision is made are governed by statute, not contract. Further, a review of the Act and its content requirements for charter applications demonstrate that the charter provisions at issue in this case were material to the charter. Thus, the Board's decision to revoke MMBA's charter was proper and should not be disturbed on appeal.

In the event that the Court chooses to apply contract principles in this matter, MMBA's argument would still fail. MMBA relies on a definition of "rescission" of a contract that includes the word "material" in the definition. 17A Am. Jur. 2d Contracts § 557 (2004). It does not define the term "material" as used in a contract or in a statute. As such, it provides no guidance for this case.

Further, as determined by the ALC, MMBA's interpretation of material violation using unilateral rescission terminology is "wholly inconsistent with the clear meaning of the Charter School Act." (ALC Order p. 9). The Act mandates revocation for *any* material breach of the charter. (S.C. Code Ann. § 59-40-110 (c) and ALC Order p. 9). To impose a requirement that revocation only be based on a breach so substantial, fundamental *and* material as to defeat the purpose of the charter would fundamentally alter the Act and the revocation process.

After rejecting MMBA's proposed definition of "material", the ALC applied the standard for determining whether a breach has occurred for a commercial lease that was adopted in *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). In applying *Kiriakides*, the ALC found that as a result of MMBA's charter violations students and the District had been deprived of benefits they reasonably

expected, that the students and District could not be adequately compensated for the harm they suffered, and that MMBA's failures could not be cured. (ALC Order pp. 9-10, 11-12, 13). The record amply supports the ALC's determination. Specifically, the record shows that MMBA failed to provide the curriculum it promised, failed to provide the special education staff it promised, failed to employ qualified staff as promised, failed to fulfill the requirement of the IDEA as promised, and failed to make reasonable progress on student achievement as promised. Each of these transgressions from the charter deprived students and the District of benefits they expected to receive and each of them constitute a basis for revocation under the Act. Further, when the violations are viewed collectively, there can be no doubt that the Board and the ALC reached the proper conclusion.

III. The Board, and the ALC, correctly determined that MMBA failed to make reasonable progress on student achievement as defined in the charter.

In its charter application, MMBA identified its goal for student achievement as "All students at MMBA will be *proficient* in all areas of the Palmetto Achievement Challenge Test (PACT) by 2014." (R. p. 673)(emphasis added). It then defined reasonable progress toward this goal as:

"The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (R. p. 673).

"[T]he number of students in our school meeting standards will increase by 20.6% in ELA and 21.15% in Math after our first year of implementation" and "will increase by the same percentage every three years until the school year 2013-2014, when 100% of students will be meeting standards (scoring proficient on PACT)." (R. p. 673).

The record establishes that these reasonable progress measures were not met. It is undisputed that MMBA did not make adequate yearly progress in any of the years that

the PACT was administered to MMBA students (*i.e.*, 2005-2008).⁵ (R. p. 70, 102-104). Further, MMBA failed to make the three year step increase in ELA and Math. (R. pp. 102-104, 1122-1131). From 2005 to 2008, the number of MMBA elementary students who met standard (Proficient or Advanced) in English Language Arts (ELA) increased by 8.5% and the number of MMBA middle school students who met standard in ELA increased by 7.7%. (R. pp. 10, 102-104, 1123, 1127.) These percentages fall well below the 20.6% progress measure for ELA established in the charter. As for Math, the number of MMBA elementary students who met standard increased by 12.7% and the number of MMBA middle school students who met standard in Math increased by 0.2%. (R. pp. 102-104, 1124, 1128.) Once again, these percentage increases are far below the progress measure of 21.15% defined in the charter.

MMBA argues that the District's calculations for student achievement, which are consistent with the numbers presented to the Board by MMBA, are incorrect. (App. Brief pp. 22-25). The ALC rejected this argument finding that the District's determinations were in accordance with the terms of the charter application and MMBA's new calculations were not. Nevertheless, MMBA argues that the ALC's decision should be overturned based on MMBA's assertions that it made reasonable progress.

MMBA's new calculations are flawed in three respects. First, MMBA incorrectly asserts that its student performance should have been measured using PACT test results from 2006 to 2009. (App. Brief p. 34). As stated before, the PASS was administered in

⁵ South Carolina switched from the Palmetto Achievement Challenge Test (PACT) to the Palmetto Assessment of State Standards (PASS) in 2009. (R. p. 17.) A discussion of the change in tests and its impact on AYP and student performance is included in the Board's Order. (ROA p. 17). Both before the Board and the ALC, MMBA attempted unsuccessfully to use 2009 PASS results to discount its poor performance on the PACT and failure to meet the reasonable progress standards in the charter from 2005 to 2008. (ROA p. 17; ALC Order p. 18).

2009, not the PACT. Moreover, the charter provides that the first three year progress period would be from 2005-2008. The charter states that there will be an increase in student achievement in the first year of implementation, which was the 2004-2005 school year. Then it states that there will be increases every three years thereafter, *i.e.*, 2008, 2011 and 2014, so that 100% proficiency will be achieved at the end of the 2013-2014 school year. (ROA p. 673). These three year intervals are illustrated in charts contained in the charter, which show three year step increases in years 07-08, 10-11, and 13-14. (ROA pp. 667, 671).⁶

Second, MMBA asserts that a student meets standard under the charter application if the student scores basic on the PACT. (App. Brief, p. 35). However, in the section that sets out MMBA's student achievement standard and reasonable progress measures, the charter application expressly defines meeting standard as "scoring *proficient* on PACT." (R. p. 673)(emphasis added). The charter application also states that the increase will be according to South Carolina's Accountability Plan. *Id.* Portions of the Accountability Plan were included in the charter application. (R. pp. 659-667). Throughout the Accountability Plan, it states that students meet the requirements when they "meet or exceed the State's *proficient* level of academic achievement." (R. pp. 659, 662, 664)(emphasis added). This is illustrated in a chart in the charter application that shows "percent meeting standard" increasing to 100% proficiency by 2013-2014. (R. pp. 667, 671).

Thus, the inclusion of students scoring basic in the calculations is inappropriate as the standard in both the charter and State documents is proficiency. As such, MMBA's

⁶ In fact, using 2006-2009 would result in MMBA missing the ultimate goal of 100% proficiency by 2013-2014 as the three year increases would be delayed to 2009, 2012 and 2015.

attempt to redefine the student performance standard is simply an admission that the student performance progress called for in the charter application was not made.

Third, MMBA mistakenly applies a “percentage increase” methodology to reach its conclusions. (App. Brief pp. 36-39). The charter application provides that “the numbers of the students” will increase by 20.6% in ELA and 21.15% in Math every three years. (R. p. 673.) In other words, the percent of students who meet standard must increase by 20.6% in ELA and 21.15% in Math. So, for example, if the number of students scoring proficient or above in ELA in 2004-2005 was 38.2%, the number of students scoring proficient or above would have to increase to 58.8% by 2007-2008, which is 38.2% plus 20.6%. This is made clear by the chart in the record on pp. 667 and 671, which shows “percent meeting standard” increasing by 20.6% in ELA and 21.15% in Math every three years to meet 100% proficiency by 2013-2014.⁷

MMBA attempts to convolute this easily understood reasonable progress measure by introducing more complicated formulas to obtain a “percent increase”. There is no support for MMBA’s methodology in the charter. In fact, provisions in the charter make no sense when MMBA’s methodology is employed. For example, under MMBA’s percentage increase methodology MMBA could greatly exceed all of its three year progress measures (three year step increases) and still be nowhere close to the final goal adopted in the charter, which is 100% proficient standard by 2013-2014. MMBA’s flawed methodology would also allow MMBA to make the three year progress measure after failing to make AYP for each of the three years in the progress period. MMBA’s proposed methodology is contrary to the methodology employed by the State and the

⁷ The State’s Accountability Plan provides “The chart shown in attachment D [R. pp. 667 and 671] depicts the State’s intermediate goals, ensuring that all students will meet or exceed the state’s proficient level of academic achievement by 2013-2014.” (R. p. 665.)

District and, more importantly, it is contrary to the clear provisions in the charter.

In sum, the methodology used by the District, and affirmed by the ALC, is correct under the terms of the charter. MMBA's "percentage increase methodology" is not.

Using the appropriate standard and methodology yields the following results for the three years after MMBA's first year of implementation (2005-2008):

Subject/School Level	MMBA's increase	Progress measure in charter application
ELA (elementary)	8.5%	20.6%
ELA (middle)	7.7%	20.6%
Math (elementary)	12.7%	21.15%
Math (middle)	0.2%	21.15%

Based on these correct results, MMBA did not make any of the three year progress measures in its charter application.

Lastly, MMBA argues that it should be excused from meeting the reasonable progress measures in its charter because while it did not meet the measures, it made progress towards them. This argument is contrary to the language of the Act. Section 59-40-110(C)(2) provides that a charter must be revoked if the charter school "failed to meet or make reasonable progress, *as defined in the charter application*, toward pupil achievement standards identified in the charter application." (Emphasis added). Thus, under the Act, reasonable progress is not subjectively determined. It is defined by the charter application.

Here, the charter application established the student achievement standard or goal as: "All students at MMBA will be proficient in all areas of the Palmetto Achievement Challenge Test (PACT) by 2014." (ROA p. 673). It then defined reasonable progress towards this standard as three year increases of 20.6% in ELA and 21.15% in Math and meeting AYP every year. If MMBA's argument was accepted then these objective

reasonable student progress measures that were defined in the charter application would be supplanted by a subjective determination of “reasonable progress.” In other words, the determination of reasonable progress would rest solely on a case-by-case subjective review regardless of how reasonable progress is defined in the charter application. This is contrary to the plain language in S.C. Code Ann. § 59-40-110(C).

In this case, the Board reviewed the reasonable progress measures that were defined in the charter application and found they were not met. As such, the Board’s decision was made in accordance with S.C. Code Ann. § 59-40-110(C). To reverse the decision based on a subjective assessment of “reasonable progress” that sets the bar lower than that designated in the charter application would be improper.

IV. The ALC correctly rejected MMBA’s contentions regarding the covenant of good faith and fair dealing as the Board revoked MMBA’s charter in accordance with charter school law.

In its brief, MMBA identifies as an issue on appeal its claim of violation of the covenant of good faith and fair dealing. (App. Brief p. 2). MMBA also states that it disagrees with ALC determination on the claim. (App. Brief p. 41). However, MMBA then states that the issue is not “outcome determinative” and it “will not more fully develop this argument for review by the Court.” *Id.* The Board interprets these statements to mean that it has abandoned its good faith and fair dealing argument for purposes of this appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (deeming an issue abandoned because the appellant failed to provide pertinent argument or supporting authority).

To the extent this Court may review the issue, the Board agrees with the ALC that the record does not support MMBA’s claim. The District worked with MMBA for five years and helped MMBA serve its students. The District collaborated with MMBA to

draft an improvement plan and provided technical assistance to aid MMBA in improving academic performance. The District also conducted a comprehensive review before deciding to initiate revocation proceedings and provided a revocation hearing in accordance with law. Under such circumstances, there is simply no basis for a claim of bad faith.

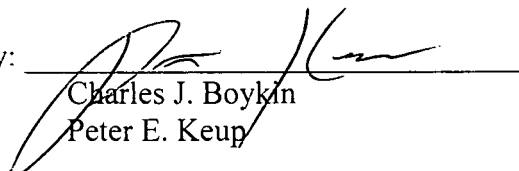
CONCLUSION

For the aforementioned reasons, Respondent, the Board of Commissioners of the Richland County School District, respectfully requests that the South Carolina Court of Appeals affirm the order of the ALC and the decision of the Board to revoke the charter of Appellant Midlands Math and Business Academy.⁸

Respectfully Submitted,

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⁸ In the conclusion of Appellant's Brief, MMBA implies that the District was biased in making its revocation decision. This suggestion is unfounded as there is no evidence in the record of bias. Further, it is inappropriate to make such a suggestion as it is not relevant to any issue on appeal and has never been raised as an issue before. Finally, it is important to note that the District approved the charter application and sponsored MMBA, which would not make sense if the District was biased against MMBA.