

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

The Honorable Shirley C. Robinson, Administrative Law Judge
Trial Court Case No. 2012-ALJ-30-0281-AP

Appellate Case No. 2013-000525

Mary L. Dinkins Higher Learning Academy,..... Appellant,
v.
South Carolina Public Charter School District, Respondent.

INITIAL BRIEF OF RESPONDENT

BOWERS LAW OFFICE LLC

Karl S. Bowers, Jr.
Po Box 50549
Columbia, South Carolina 29250
(803) 260-4124

Attorney for the South Carolina Public Charter School
District

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Columbia, South Carolina

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STATEMENT OF ISSUES ON APPEAL

According to MLD's initial brief, this case presents four issues for the Court's review:

1. Does the Charter Schools Act provide schools with procedural due process during revocation proceedings?
2. Did the District comply with the timeline prescribed by the Charter Schools Act when revoking MLD's charter?
3. Undisputed evidence showed that MLD's academic performance had regressed under all of South Carolina's standardized measures. Undisputed evidence also showed that MLD had awarded a high school diploma to at least one student who had not accumulated enough credits to earn a diploma. Was there evidence in the record to sustain the District's decision to revoke MLD's charter?
4. Did the District properly consider its evaluation of MLD's academic performance when it decided to revoke MLD's charter?

STATEMENT OF THE CASE

The Mary L. Dinkins Higher Learning Academy ("MLD") is a charter school within the South Carolina Public Charter School District ("District"). MLD became a member of the District in August 2010 after an apparently difficult stint as a member of the local Lee County School District.

After the District performed routine evaluations of MLD, it became clear that the school was failing to satisfy its obligations under the charter agreement, particularly its primary obligation to educate students. Across the board, MLD significantly regressed in

its academic measures. Moreover, the school's own records demonstrated that it had awarded at least one high school diploma to a student who had not earned sufficient credits.

On March 12, 2012, the District put MLD on notice that the school's charter stood to be revoked effective at the end of the 2011–12 school year. (R. pp. 850–51.) Attached to that letter was a summary of MLD's deficiencies with respect to meeting academic objectives. (R. p. 852.) MLD requested a hearing on the revocation issue, so the District wrote MLD a letter outlining the procedures that would be followed at a revocation hearing. (R. pp. 855–56.) At MLD's counsel's request, the District postponed the revocation hearing to “ensure proper preparation time.” (R. p. 857.)

On April 19, 2012, the District held a hearing on the possible revocation of MLD's charter. (R. pp. 873–1094.) Witnesses from both the school and from the District staff testified and were subject to cross-examination. At the request of MLD's counsel, the District suspended those proceedings and agreed to hold open the record so that MLD's counsel could include additional materials. On April 30, 2012, counsel for MLD submitted additional materials for inclusion in the record.

On May 3, 2012, the District resumed the hearing. After considering all of the testimony and documentary evidence presented, the District's Board publicly voted to revoke MLD's charter.

On June 11, 2012, MLD filed a “Request for a Contested Hearing” with the Administrative Law Court. (R. pp. 3–5.) The parties then filed cross-motions with the Court: the District moved to dismiss MLD's initial filing, and MLD moved for a show-cause order asking the Court to stay any actions directed toward the school. The Administrative Law Court resolved those motions at a hearing on July 27, 2012, and the

appellate briefing at the Administrative Law Court level followed. (R. p. 52.) On March 1, 2013, Judge Shirley C. Robinson of the Administrative Law Court issued an order upholding the District's revocation of MLD's charter. (R. p. ____)

STANDARD OF REVIEW

The South Carolina Charter Schools Act provides that “[a] charter must be revoked or not renewed by the sponsor if it determines that the charter school” did any of the following:

- “committed a material violation of the conditions, standards, or procedures provided for in the charter application”;
- “failed to meet or make reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the charter application”; or
- “violated any provision of law from which the charter school was not specifically exempted.”

S.C. Code Ann. §§ 59-40-110(C)(1), -110(C)(2), & -110(C)(4). On appeal, this Court may reverse or modify a decision of the State Public Charter School District to revoke a charter only if the decision is:

- (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 error 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 of discretion.

Id. § 1-23-380(5). Under this deferential standard of review, which gives great weight to the informed decision of the school board, the Court “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.” *Sea Island Youth Build Charter Sch. v. Charleston County Sch. Dist.*, No. 08-ALJ-30-0436-AP, 2008 SC ALJ LEXIS 378, at *12 (Dec. 31, 2008).

On appellate review, the critical inquiry is whether the District’s decision is based on “substantial evidence contained in the whole record.” *Id.* at *13. In this regard, the South Carolina Supreme Court has explained:

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.

Porter v. S.C. PSC, 333 S.C. 12, 20–21, 507 S.E.2d 328, 332 (1998). As discussed below, the District’s ruling to revoke MLD’s charter easily withstands scrutiny under this deferential standard.

ARGUMENTS AND AUTHORITIES

I. The Charter Schools Act provides all necessary safeguards to comply with procedural due process.

In addition to challenging the District’s factual findings on appeal, MLD also asserts that the Charter Schools Act “is not constitutional in its provision which allows a charter school sponsor [to] be both the accuser and finder of fact in a charter revocation

hearing under [S]ection 59-40-110(C) of the South Carolina Charter School[s] Act.” (Br. of Appellant at 3.) Notably, MLD does not cite any authority for this argument—no case, no statute, no constitutional provision, nothing—relying instead on a Wikipedia article on judicial disqualification (for which it does not provide any citation information, and which would be inadmissible hearsay in any event) and a law review article that generally discusses recusal of judges.

MLD’s failure to base its argument – which is styled more as a baseless personal attack on the District’s Board Chairman than an actual legal argument – is no surprise, as the Charter Schools Act structures the process for conducting revocation proceedings consistent with the State Constitution’s mandate that any judicial or quasi-judicial decision by an administrative agency is without effect unless there is (1) “due notice,” (2) “an opportunity to be heard,” and (3) “the right to judicial review.” S.C. Const. art. I, § 22.

The Charter Schools Act provides each of these procedural safeguards. *See, e.g.*, S.C. Code Ann. § 59-40-110(D) (requiring written notification that describes the potential grounds for revocation “in reasonable detail” prior to any revocation decision); *id.* § 59-40-110(F) (permitting a school to request a hearing prior to revocation of its charter); *id.* § 59-40-110(H) (vesting the right to appeal an adverse decision to the Administrative Law Court). And the District honored each of these safeguards in this case. (*See, e.g.*, R. pp. 850–52 (notice of possible revocation letter to MLD with accompanying evidence of academic measures); R. pp. 855–56 (letter explaining procedures to be followed during revocation hearing); R. p. 857 (letter to MLD moving hearing date in order to ensure MLD had adequate time to prepare for the hearing); R. pp. 873–1094 (transcript of revocation

hearing); R. pp. 35–37 (order of the Administrative Law Court treating MLD’s filing as a notice of appeal).) Any due process objection here is an empty one.

Nor is there any merit to MLD’s general allegation that “the proceedings were a sham with a predetermined outcome,” (Br. of Appellant at 8), or that the District was “both the accuser and finder of fact” (*Id.* at 3). Article I, Section 22 of the State Constitution, of course, guarantees that the same person cannot serve “for both prosecution and adjudication.” But that is certainly not what happened here.

As the transcript makes clear, District staff presented evidence during the hearing, but none of the members of the District’s Board of Trustees—the individuals who actually voted on the revocation decision—had any involvement with the evidentiary presentation or the investigation underlying the staff’s testimony. The South Carolina Supreme Court has held that Article I, Section 22, is satisfied where, as here, an agency’s staff performs an investigatory function while its governing board serves as the ultimate decision-maker. *See, e.g., Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68–70, 492 S.E.2d 62, 72 (1997) (holding that a university president had not violated Article I, Section 22, when he investigated an employee, terminated that employee, and then testified against the employee at a hearing before the university’s Faculty Hearing Committee because the president did not make the ultimate decision on the employee’s grievance appeal).¹

If this were not the case, the entire structure of South Carolina’s agencies would crumble. The LLR, for instance, uses its staff to “investigate” issues associated with

¹ In *Ross*, the Court further explained that even if the university staff had improperly been involved in the decision-making process, any such error was harmless and would have been cured by the fact that an appellate process existed. 328 S.C. at 70, 492 S.E.2d at 72–73.

professional licenses, while the agency's occupational licensing boards retain ultimate authority over licensing decisions. Other agencies operate similarly. If the law were as MLD suggests it is, the State's administrative agencies would be rendered inoperable. And in any event, MLD acknowledges that the Administrative Law Court "correctly showed that MLD was afforded procedural due process" (Br. of Appellant at 8.). Accordingly, the Court should reject MLD's argument on this point.

Finally, the *ad hominem* personal attacks lodged by MLD against the District's Board chairman, Don McLaurin, and Superintendent Wayne Brazell are unfounded, improper, and uncalled for. Nothing in the record supports the wild allegation that these individuals "orchestrated a campaign (*sic*)" to "discredit MLD" (*Id.* at 4), and MLD should be ashamed for attempting to make up for its lack of substantive arguments with fictitious claims of personal agendas.

II. The District held MLD's revocation hearing within the time frame established by the Charter Schools Act.

MLD's also alleges that the District did not comply with the timeline for revocation established by the Charter Schools Act. (Br. of Appellant at 11.) The school's argument simply has no merit.

The Charter Schools Act provides that a school district must give a charter school at least sixty days-notice before a charter is finally revoked and the school is closed. S.C. Code Ann. § 59-40-110(D). Here, the District notified MLD on March 12, 2012, that MLD's charter may be revoked effective on the last day of classes for the 2011-12 school year, which is a far greater time period than the sixty-day minimum notice established by the Charter Schools Act. (R. p. 851.) MLD's argument on this issue should fail as a result.

III. The District’s decision to revoke MLD’s charter was supported by substantial evidence in the record.

There cannot be any legitimate dispute that the District’s revocation decision was supported by evidence—overwhelming evidence at that—in the record. The Charter Schools Act does not give school districts discretion with respect to the revocation decision when a charter school violates its charter or the law. *See* S.C. Code Ann. § 59-40-110(C) (describing situations under which “[a] charter ***must*** be revoked”) (emphasis added). Here, there are undisputed violations of both, and the District’s decision to revoke MLD’s charter is unassailable.

The Charter Schools Act directs a sponsoring school district to revoke a school’s charter if it fails to make reasonable academic progress based on the criteria set forth in the charter agreement. *Id.* § 59-40-110(C)(2). MLD’s charter indicates that it will measure academic progress against the State’s standardized tests. (R. pp. 73–74.)² But MLD has failed to demonstrate any academic progress under any measure. For instance:

- MLD met only ***one*** out of ***twenty-two*** academic objectives under the Adequate Yearly Progress standards from 2006 through 2011. (R. pp. 838, 852.)
- Between 2009 and 2011, the number of MLD students who passed both sections of the High School Assessment Program ***dropped*** from 55.6% to 16.7%. (R. pp. 836, 852.)
- Between 2009 and 2011, the number of MLD high school students who passed end-of-course exams ***dropped*** from 16% to 5.3%. (R. p. 852.)
- Between 2009 and 2011, the number of MLD middle school students who passed the English/Language Arts section of the Palmetto Assessment of State Standards test ***dropped*** from 27.2% (and from 45% in 2010) to 21%. (R. pp. 837, 852.)

² Failing to meet these academic standards also amounts to a violation of MLD’s charter agreement, which is an additional basis for revocation under South Carolina Code § 59-40-110(C)(1).

- Between 2009 and 2011, the number of MLD elementary students who passed the Math section of the Palmetto Assessment of State Standards test dropped from 46.1% to 14.3%. (R. pp. 837, 852.)

In addition to this staggering level of deteriorating academic performance, the school clearly has a reckless approach to administering its examinations. As the chart on Page 3 of the District's revocation order summarizes, MLD permitted twelve students to take the end-of-course examinations for classes in which they were not enrolled, but it also failed to administer an end-of-course examination to the vast majority of students who were actually enrolled in those classes. (R. pp. 835, 870.) No one at MLD has ever explained how such an incredible situation could have even happened. In any event, the District's decision to revoke MLD's charter based on its failure to make reasonable academic progress is indisputably supported by clear evidence in the record.³

³ MLD's initial brief relies heavily on an alleged prior decision of the Administrative Law Court in a different case when opposing the District's analysis of the "reasonable academic progress" issue. (See Br. of Appellant at 3-8, 12, 14-17 (citing *Lee County Sch. Bd. of Trs. v. Mary L. Dinkins Higher Learning Acad.*, Case No. 07-ALJ-30-597-AP (undated, unsigned order)) (copy included in Record at R. pp. 679-95).) Assuming that this unsigned order actually decided that case, it is irrelevant here for two straightforward reasons:

- (1) The South Carolina Public Charter School District was not a party to that case. Necessarily, then, the Administrative Law Court's prior statements do not trigger the "law of the case" doctrine here, as MLD incorrectly asserts on Page 8 of its initial brief.
- (2) The revocation decision there was based on MLD's failure to satisfy Adequate Yearly Progress goals in its very first year of operation. (R. p. 691.) The Administrative Law Court held that the law requires charter schools to show "reasonable progress," and there is simply no way to measure "progress" with only one year of data. (R. pp. 691-92.) That is a far cry from the facts of this case, where the District evaluated multiple years of data and found that MLD's academic indicators had dropped across the board over several years.

Accordingly, MLD's near-singular reliance on that prior ruling is misplaced.

IV. MLD's initial brief does not establish any other basis for reversing the District's revocation decision.

Finally, MLD presents the Court with three additional arguments that it claims should result in reversal. The first two—namely, that MLD's charter agreement was not for ten years, and that MLD's charter was "provisional" (Br. of Appellant at 35–36)—have nothing to do with the District's revocation decision, which is the sole issue before the Court. Accordingly, these arguments are irrelevant to this appeal.

MLD's third argument in this series claims that the District did not perform an annual evaluation of MLD and that the revocation should be reversed as a result. (*Id.* at 36-38.) But the Charter Schools Act only requires school districts to do an "annual evaluation" of the factors outlined in Section 59-40-110(C), and it directs districts to use the "annual evaluation results" when making a revocation determination. S.C. Code Ann. § 59-40-110(A).

As Judge Robinson concluded, the District followed this provision when making the revocation decision in this case. In fact, the District attached to its notice-of-revocation letter a summary of "Accountability Data" that the District assembled as part of its evaluation of MLD. (R. p. 852.) MLD's assertion that the District did not comply with its statutory obligations is incorrect, and the Court should reject MLD's final argument as a result.

CONCLUSION

The Charter Schools Act requires school districts to revoke the charters of schools that do not show academic progress, that violate their charter agreements, or that violate the law. Undisputed evidence shows that MLD has done all three of these revocation-triggering events. Despite the school's protestations—which are styled more as completely

baseless personal attacks against the District's Board members, and which should be absolutely rejected by the Court—the District's decision here was based on unbiased, standardized testing that exposed MLD's academic performance to be regressing at an alarming rate, as well as the fact that the school's own records showed that it had violated the clear and unambiguous terms and conditions of its charter agreement.

Moreover, the District reached this decision after giving MLD all of the procedural safeguards required by due process, including (1) postponing the revocation hearing at the request of MLD's counsel and (2) holding the record open so that MLD could provide the District with evidence that the school failed to bring to its own revocation hearing. Against this backdrop, the District respectfully submits that its decision to revoke MLD's charter should be affirmed, and that any stay over that decision should be lifted.

Respectfully submitted,

BOWERS LAW OFFICE LLC

By: 

Karl S. Bowers, Jr.

SC Bar No. 16141

butch@butchbowers.com

PO Box 50549

Columbia, South Carolina 29250

(803) 260-4124

Attorney for the South Carolina Public Charter School
District

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DESIGNATION OF MATTER OF RESPONDENT
SOUTH CAROLINA PUBLIC CHARTER SCHOOL DISTRICT

Respondent South Carolina Public Charter School District designates the following materials to the Record on Appeal in addition to those matters designated by the Appellant on July 10, 2013:

1. Return Brief of Respondent filed in the Administrative Law Court on October 29, 2012.
2. Final Order of The Honorable Shirley C. Robinson, Administrative Law Judge, dated and filed March 1, 2013.

I certify that the designation contains no matter which is irrelevant to this appeal.

SIGNATURE PAGE ATTACHED

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BOWERS LAW OFFICE LLC

By: 

Karl S. Bowers, Jr.

SC Bar No. 16141

butch@butchbowers.com

PO Box 50549

Columbia, South Carolina 29250

(803) 260-4124

Attorney for the South Carolina Public Charter School
District

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PROOF OF SERVICE

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PROOF OF SERVICE

I certify that I have served Respondent's initial brief and designation of matter on Johnny E. Watson, Sr., counsel for the Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2013, addressed to Post Office Box 2305, Columbia, South Carolina 29202.



Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, South Carolina 29250
Telephone: (803) 260-4124
Facsimile: (803) 250-3985
E-mail: butch@butchbowers.com

Attorney for Respondent South Carolina
Public Charter School District

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