

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 10-ALJ-30-0437-AP
Court of Appeals Tracking Number: 2012208467

Midlands Math and Business Academy Charter School, Appellants,

v.

Richland County School District 1 Board of Commissioners, Respondents.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. **DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT SUBSTANTIAL EVIDENCE SUPPORTED THE BOARD’S DECISION TO REVOKE MMBA’S CHARTER BECAUSE OF ALLEGED VIOLATIONS CONCERNING CURRICULUM, TEACHER AND STAFF QUALIFICATION, AND SPECIAL EDUCATION REPORTING?**
2. **DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN DEFINING “MATERIAL” UNDER SECTION 59-40-110(C) OF THE SOUTH CAROLINA CODE (SUPP. 2011)?**
3. **DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN APPLYING THE RESTATEMENT (SECOND) DEFINITION OF “MATERIAL” TO THE ISSUES PRESENTED FOR REVIEW IN THIS CASE?**
4. **DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO AFFIRM THE BOARD’S FINDING THAT MMBA FAILED TO MEET OR MAKE REASONABLE PROGRESS PURSUANT TO SECTION 59-40-110(C)(2) OF THE SOUTH CAROLINA CODE AND ERR AS A MATTER OF LAW IN APPLYING AND DEFINING “REASONABLE PROGRESS” UNDER SECTION 59-40-110?**
5. **DID THE ADMINISTRATIVE LAW COURT ERR IN FINDING THAT THE WEIGHT OF THE EVIDENCE DID NOT SUPPORT A FINDING THAT THE BOARD VIOLATED THE DUTY OF GOOD FAITH AND FAIR DEALING?**

STATEMENT OF THE CASE AND FACTS

Midlands Math and Business Academy (“MMBA”) opened its doors in August 2004 for the 2004-2005 academic year. The school opened after its charter had been approved by both the South Carolina Department of Education’s Charter School Advisory Committee and the Richland County School District One Board of School Commissioners (“Board”). The charter projected a student population of 200 students. However, when the school opened it had less than half of those students enrolled. Today, the school has 98 students, with its highest number being 139 students.

As required by section 59-40-110(A) of the South Carolina Code (Supp. 2011), during each year of its existence the school has prepared an annual report on the state of the school and presented it to Richland County School District One's ("District") administration. The report is typically distributed to various committees, and each year someone from the District will visit the school for an onsite observation and thereafter prepare a report regarding his or her findings. At the conclusion of this process, a final report is presented to the Board for approval. Section 59-40-110 of the Charter Schools Act of 1996 (the "Act") grants the Board the right to approve or revoke the charter at that time. At the end of each academic year of MMBA's existence, the Board has authorized MMBA to continue operating.¹

Consonant with its usual practice, MMBA prepared its annual report to the District at the end of the 2008-09 school year. (ROA. 1016-1095). During a regular board meeting on June 9, 2009, the Board decided to withhold renewing MMBA's charter pending a comprehensive action plan/review to be instituted by the District. (ROA. 1102-04). Immediately following the meeting, Ms. Michelle Spradley, at the time president of MMBA's board of directors, wrote Mr. Vince Ford, also at the time chairperson of the Board to express MMBA's concern regarding the Board's recommendation and decision not to renew the charter. Chairman Ford sent a response to Ms. Spradley responding to the concerns raised in her letter. In July the school received the proposed action plan and started providing the responses to recommendations that were requested by the District. (ROA. 1109-1124).

¹ In 2005, the District placed MMBA on an action plan to help improve its grades on the PACT test, but the Board did not make the implementation of this plan a condition of its continued operation.

During the period from July to November 2009, MMBA provided various information requested by the District. (ROA. 1125-1156; 1157-1333). In August, the District sent out a team to visit the school to determine compliance with the items that had been listed in the action plan. The first visit to the school was on August 25, 2009, and that team consisted of eight people who arrived at various times between 8:50 and 9:10 a.m. based on the time log. (ROA. 1150-55). MMBA cannot determine the duration of the visit because the District team members failed to sign out upon their departure. There were also three short visits to the school by the District Charter School liaison, Mrs. Donna J. Hammett, which took place on September 14, 15, and 18, 2009. During the September 18 visit, Ms. Hammett was accompanied by Chavon Jennings.

On October 6, 2009, the same group of eight individuals from the District again came to the school for an hour and a half. Four members of that same team came back on October 15, 2009, for a visit that lasted not more than an hour and a half. MMBA provided all information that was requested by the District, including data of its own internal testing system that is used to assist the school in determining and planning its curriculum for each grade level and other documents used by the school to measure student progress.

MMBA's final response to the action plan requested by the District was hand-delivered to its administration on November 10, 2009. (ROA. 1158-1320). This document was originally due in late October; however, MMBA had requested and received an extension from the District to submit its final report on or before November 13, 2009. (ROA. 1156). The document comprehensively answered all the District's curriculum questions, including those concerning pacing guides and the tracking of its

core knowledge curriculum with the South Carolina curriculum standards.

On November 24, 2009, the Board accepted the District administration's recommendation not to renew MMBA's charter (ROA. 290). On December 15, 2009, MMBA received a formal letter from the District indicating its intention not to renew MMBA's charter at the end of the 2009-2010 school year. (ROA. 287-89). In this letter to MMBA dated December 11, 2009, the Board indicated that MMBA had violated section 59-40-110 by committing *material violations* of the conditions, standards, and procedures provided for in its charter application, and by failing to make reasonable progress, as defined in the charter application, towards pupil achievement standards. (ROA. 288-89). On December 28, 2009, MMBA timely filed a request for a hearing with the District pursuant to section 59-40-110(F) (Supp. 2009).

On February 16, 2010, the Board held a hearing to determine whether to revoke MMBA's charter. On March 23, 2010, pursuant to section 59-40-110(C), the Board voted to revoke MMBA's charter. (ROA. 244; 249-50). The Board maintained it based MMBA's charter revocation on numerous material violations of the conditions, standards, and procedures provided in its charter application for pupil achievement standards. (ROA. 249-50). The Board provided a written order of the revocation on April 27, 2010, directing MMBA be dissolved pursuant to section 59-40-120 of the South Carolina Code (Supp. 2009) such that the school would not reopen for the academic year of 2010-2011. (ROA. 228-243).

MMBA timely appealed the Board's decision to revoke its charter to the Administrative Law Court ("ALC") on May 21, 2010. The Board filed a motion to curtail MMBA funding while the revocation appeal process is on going. The ALC

rejected that motion. (See ROA. 28-32). After ruling on several other preliminary motions, including denying a motion by the Board to lift the automatic stay, the ALC held oral arguments on December 21, 2010. On January 25, 2012, the ALC issued an order affirming the School Board's April 27, 2010 decision and holding that substantial evidence in the record supported the Board's final determination. (ROA. 20). On February 23, 2012, MMBA timely filed a notice of appeal regarding this order. This appeal follows.

BACKGROUND ON CHARTER SCHOOL ACT

The General Assembly enabled the creation of charter schools and provided its purpose in section 59-40-20 of the South Carolina Code (Supp. 2011). When compared with other statutory schemes, the Act contains a rare expression of the General Assembly's intent in enacting this legislation:

(A) In authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system. The General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities are actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, the provisions of [the Act] *should be interpreted liberally* to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

S.C. Code Ann. § 59-40-30 (Supp. 2011) (emphasis added).

An application to start a charter school must be submitted to the school's proposed "sponsor." "Sponsor" is statutorily defined as either the South Carolina Public

Charter School District Board of Trustees or “the local school board of trustees in which the charter school is to be located . . . from which the charter school applicant requested its charter and which granted approval for the charter school’s existence.” S.C. Code Ann. § 59-40-40(4) (Supp. 2011). If the application is approved, the approved application constitutes a contract between the charter school and its sponsor. S.C. Code Ann. § 59-40-60(A) (Supp. 2011). The Act is explicit in its use of contractual language to describe the relationship between a sponsor and a charter school. *See* S.C. Code Ann. § 59-40-60(A) (Supp. 2011).

The charter is a contract between the District and the charter school, and common law contract principles apply. A “contract” is an obligation that arises from actual agreement of the parties manifested by words, oral or written, or by conduct. *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). It has long been recognized in this state that every contract contains an implied obligation of good faith and fair dealing. *U.S. for Use & Benefit of Williams Elec. Co., v. Metric Constructors, Inc.*, 325 S.C. 129, 133, 480 S.E.2d 447, 448-49 (1997). In other words, each party to a contract has the obligation to act in good faith and to deal fairly with the other regarding all matters incident to the contract.

It is also universally held in the common law that:

Every breach of contract does not give a party the right to unilaterally terminate the contract, as long as the breaching party has substantially performed its duties under the contract. Rescission of a contract is not generally permitted for a casual, technical, or unimportant breach, but only for a breach so substantial, fundamental, and material as to defeat the very object of the contract.

17A Am. Jur. 2d *Contracts* § 557 (2004). South Carolina common law recognizes and applies the above-quoted authorities. See *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (noting that in order to warrant a repudiation, a breach must be so fundamental and substantial as to defeat the purpose of the contract); see also *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994) (noting that the majority of courts hold that to justify forfeiture, the breach of a commercial lease must be material, serious, or substantial).

Once a charter school has been started, the Act empowers a charter school sponsor to revoke or not renew the school's charter only if the sponsor determines 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) (Supp. 2009).

STANDARD OF REVIEW

The standard of review for a court reviewing a decision of the Administrative Law Court (herein after ALC) is set forth in the Administrative Procedures Act. S.C. Code Ann. § 1-23-610 (Supp. 2009). "The review of the administrative law judge's order must be confined to the record." § 1-23-610(B). Under section 1-23-610(B), the

appellate court may affirm or remand the case for further proceedings. Additionally, the appellate may reverse or modify the decision of the ALC if its findings, conclusions, or decisions 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 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.

§ 1-23-610(B). The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. *Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). “Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence.” *Id.* at 605, 670 S.E.2d at 676.

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT SUBSTANTIAL EVIDENCE SUPPORTED THE BOARD’S DECISION TO REVOKE MMBA’S CHARTER BECAUSE OF ALLEGED CHARTER VIOLATIONS CONCERNING CURRICULUM, TEACHER AND STAFF QUALIFICATION, AND SPECIAL EDUCATION REPORTING

a. Curriculum Alignment

In its order revoking MMBA’s charter, the Board asserts MMBA’s curriculum was not aligned to state standards. (ROA. 234-36). Further, the Board’s order states there were numerous gaps in the curriculum. (ROA. 235). The ALC found there was sufficient evidence in the record to support the Board’s finding on the alleged misaligned

curricula and ultimately concluded that “at the time of the District’s review, MMBA taught its students using the wrong standard in violation of its charter agreement.” (ROA. 12). This conclusion ignores that MMBA demonstrated that its curriculum has always been aligned with current academic standards. The ALC’s adoption of the District’s sweeping conclusions is not supported by substantial evidence contained in the record as a whole and warrants reversal.

For example, in its finding of facts the ALC adopted the Board’s position regarding MMBA’s Math Curriculum verbatim. As to math curriculum, the ALC order, quoting the Board’s report, concluded that “Core Knowledge curriculum is aligned with outdated S.C. State Standards and the main student text, Saxon Math, is not on the 2009 lists of recommendations.” (ROA. 5). The ALC fails to mention or consider MMBA’s submission of the Curriculum and Instruction Feedback Comprehensive Plan submitted on November 10, 2009, demonstrating how its curriculum is aligned to state standards. (ROA. 1158). Therein, MMBA clearly states that besides Saxon Math the school also uses Houghton Mifflin South Carolina Math, Glencoe Pre Algebra and Math Concepts, Glencoe Math South Carolina Edition, etc. (ROA. 1164). This example clearly demonstrates how the ALC clearly missed or ignored the substantial evidence in the record regarding the curriculum.

In a response to the District’s recommendation that MMBA demonstrate how its Core Knowledge curriculum is aligned to 2007 state standards, MMBA explained its use of many teaching materials and already existing alignment with state standards by explaining:

The Core Knowledge Sequence book is a teaching guide. The Sequence book is a detailed outline of the specific content to be taught in the

academic subjects, as well as, fine arts. The sequence does not list fact for memorization, but rather it's designed to encourage steady progress and growth as children build their knowledge and skills. MMBA does not isolate Core Knowledge from state standards. In many areas we often search for areas that mesh seamlessly, but when that is not possible state standards are taught at all cost. In instances where there is no correlation with Core Knowledge and state standards, MMBA teaches state standards. All of the books are state adopted textbooks, except Saxon Math. MMBA does not override state standards to teach Core Knowledge material, but Core Knowledge is embedded into the state standards. Integration of the Core Knowledge content and SC State standards helps to build a foundation of information.

(ROA. 1164).

In addition to demonstrating its alignment to state standards, the report demonstrated that MMBA was already using additional resources to supplement CORE curriculum prior to the District's request. Specifically, as a response to the Board's recommendation that MMBA align the Core Knowledge Sequence with the 2008 SC ELA Academic Standards, MMBA responded: "The academic standards and support documents *have been provided to the teachers again* to ensure the accuracy of the documents being utilized." (ROA. 1163). As a response to the District's recommendation that MMBA design a standards aligned pacing guide, MMBA responded: "MMBA *reissued* the Support Documents." (ROA 1164-65). In another response to the District's alignment request concerning social studies, MMBA responded: "The *teachers are aware* of Civil War ending in fourth grade and Reconstruction beginning in the fifth grade. This is *evident* in the lesson plans and pacing guides." (ROA. 1169).

In response to the conclusions drawn by the Board regarding MMBA's curriculum alignment, which the ALC has adopted, MMBA clearly demonstrated in the Curriculum and Instruction Feedback Comprehensive Plan that its curriculum was always

aligned with the current and correct version of state academic standards. (ROA. 1158). Interestingly, neither the Board nor the ALC challenged or found that MMBA's Curriculum and Instruction Feedback Comprehensive Plan was noncompliant or a breach of its charter. Instead, the Board acknowledged in its order that: "MMBA submitted materials at the hearing regarding its curriculum and State standards. The materials show that the MMBA made some efforts after the district review to align its curriculum with State Standards." (ROA. 236). MMBA's Curriculum and Instruction Feedback Comprehensive Plan did not change the curricula being used. Instead, the report presented to the Board demonstrated how MMBA uses Core Knowledge as a template to convey state academic standards to MMBA students. (ROA. 1158-1322).

However, in an attempt to mitigate the clear and convincing evidence of MMBA's alignment, as demonstrated in the Curriculum and Instruction Feedback Comprehensive Plan, the Board's order then claims that the submission was untimely and a post revocation attempt to align its curriculum to the state standard. (ROA. 236, note 2). The Board's charge that MMBA was tardy in its submissions is unfounded. An examination of the Board's Order reveals the District review began on July 22, 2009, and concluded in November 2009. (ROA. 233). Moreover, the record contains written confirmation from the District granting MMBA until November 13, 2009, to turn in its report. (ROA. 1156). Thus, MMBA timely submitted its Curriculum and Instruction Feedback Comprehensive Plan demonstrating its curricula is aligned to state standards on November 10, 2009, while the District review was still ongoing (or should have been ongoing). Consequently, the allegation that MMBA's Curriculum and Instruction Feedback Comprehensive Plan was submitted "months after the District conducted its

comprehensive review” as the Board Order recited and the ALC seems to adopt is clearly erroneous in light of the substantial evidence on the record. (ROA 236, n. 2).

Furthermore, the Board concluded MMBA’s curriculum was misaligned based solely on the materials it reviewed and the six visits to MMBA lasting no more than an hour and a half each. The materials the Board considered and the classes the District observed could not have been sufficient to determine whether MMBA was teaching current state standards to its students. To conclude that MMBA’s curriculum was misaligned, the District would have had to observe every lesson, every assignment, and every teaching resource used by MMBA’s teaching staff. There would be no other way for the District to determine whether MMBA was presenting current state standards to its students.

The South Carolina Department of Education (SDE) recognizes that state standards can be conveyed to students in many ways and through many curricula. In fact, the SDE encourages Districts to construct curricula to fit the needs of its students.² Depending on the individual students’ needs, curricula can and should vary from District to District, school to school, and even from classroom to classroom. Moreover, state standards are not the same as a curriculum and are not sequenced for instruction. Accordingly, the District could easily fail to observe a lesson conveying a certain state academic standard should it fail to observe a CORE subject taught in its entirety.

² “The *South Carolina Mathematics Academic Standards* is not a curriculum. The academic standards in this document are not sequenced for instruction; do not prescribe classroom activities or materials; and do not dictate instructional strategies, approaches, or practices. A mathematics standards support document, issued by the State Department of Education (SDE), will serve as a resource for districts in constructing district-level standards-based mathematics curricula. By constructing an individual district mathematics curriculum, each district may expand or add topics and organize course content to fit its particular students’ needs.” <http://www.ed.sc.gov/agency/pr/standards-and-curriculum/Mathematics.cfm> (last visited March 11, 2012).

The Board even acknowledges that MMBA utilized current textbooks. (ROA. 300-320). Therefore, to support its finding that MMBA's curriculum was aligned with out of date standards, the District made conclusions such as the following: "Since only broad topics are used in the MMBA Pacing Guide *it is difficult to assess* whether the topics are aligned with the SC Science Academic Standards. The SC Science Standards and Indicators are very grade specific, inquiry-based and rigorous." (ROA. 313) (emphasis added). Thus, the Board's conclusions and assumptions regarding the misaligned curriculum are based on materials the Board itself admits are difficult to extrapolate alignment from.

Nevertheless, based on such sketchy review, the District made the sweeping conclusion that the entire instruction given to MMBA students was not aligned to state standards. To accept the District's sweeping conclusions without examining the raw data submitted in MMBA's timely Curriculum and Instruction Feedback Comprehensive Plan, that the Board itself acknowledged showed alignment to state standards, is in gross error. (ROA. 236). Additionally, the finding that MMBA students failed to receive instruction under a properly aligned curriculum from 2005 to 2008 is a gross misstatement of the evidence. (ROA. 12). Nothing in the record or submitted by the District indicates or alleges that MMBA's curricula were misaligned in prior years. MMBA at all times based its instruction or "curriculum" on state standards and a breach of this charter provision never occurred. Hitherto the Curriculum and Instruction Feedback Comprehensive Plan submitted to the Board in November 2009, there has been no request from the District or anyone else questioning the alignment of MMBA's curriculum to state standards. The report submitted by MMBA clearly demonstrates that the school complies with state

standards. Therefore, the ALC's decision to affirm the Board's finding that MMBA breached its charter by aligning its curriculum with outdated standards is clearly not supported by substantial evidence contained within the record as a whole and warrants reversal.

b. Teacher and Staff Qualifications

Special Education Qualification

The ALC also affirmed the Board's finding that MMBA's special education teacher is not highly qualified as required by the No Child Left Behind Act (NCLB). Again, this finding is not supported by substantial evidence in the record. The ALC specifically found that the record demonstrated that Elsie White was a Board certified teacher with an undergraduate degree in music and a Master's Degree in Special Education. (ROA. 14; *see also* ROA. 1127 indicating that Ms. White is certified in special education, Certificate number 59232, expiring June 30, 2012). Nevertheless, the ALC found that no evidence exists that Ms. White is certified in the academic subjects that she teaches and is therefore, not qualified under NCLB. (ROA. 14). The ALC specifically stated that "[t]he charter indicates that she does teach academic subjects, providing that 'one of the Special Education Teachers will have a lighter class load so that he/she can handle all records of students with special needs on a daily basis.'" (*See id.*) It appears that the ALC inferred that Elsie White was teaching a core academic subject based on this language in the charter.

Elsie White teaches special education to students with special needs in a classroom. (*See* ROA. 1137 indicating area in which Ms. White teaches). There is absolutely no evidence in the record indicating that she has taught anything other than

special education classes that she is clearly qualified and board certified to teach. Special education is not considered an academic subject, and NCLB defines “core academic subjects” to include: “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.” 20 U.S.C.A. § 7801 (23). However, to the extent NCLB requires Ms. White to “demonstrate competency” in the subject or area she teaches, Ms. White possesses a graduate degree in special education. (ROA. 568; 14). Additionally, Elsie White has over thirty years of experience as an educator primarily in the field of special education. Under either the test articulated by the Board or the test articulated by the ALC, Ms. White is highly qualified.

As the Board noted in its order revoking MMBA’s charter, a teacher is highly qualified if she completes one of the following:

- (1) a validated statewide subject matter examination certified by the Commission on Teacher Credentialing (CTC);
- (2) a university subject matter program approved by the CTC;
- (3) an undergraduate major in the subject taught;
- (4) a graduate degree in the subject taught; or**
- (5) coursework equivalent to the undergraduate degree.

(ROA. 237-38) (emphasis added). The ALC defined “highly-qualified” under NCLB to mean the teacher:

- 1) holds a state certification or passes a state licensing exam; holds a license to teach and has not had a license revoked, **and**
- 2) holds a bachelor’s degree **and** has either passed a rigorous state test in basic curriculum, **or** demonstrated competency in the academic subjects she teaches by passing a rigorous state certifying exam in those topics **or** completing either an academic major, coursework at least equivalent to an academic major, a graduate degree, **or** advanced certification or credentialing in those subject.

(ROA. 13) (emphasis added).

Therefore, based on her qualifications, which the ALC acknowledges, Ms. White is highly-qualified under state and federal law according to both the Board and the ALC's definition of "highly-qualified." Uncontested evidence demonstrates that Ms. White holds a state teaching certificate, possesses a bachelor's degree in music, and possesses a graduate degree in special education. (ROA. 1331-34). Therefore, the ALC erred in affirming the Board's Order finding that Elsie White was not qualified under state and/or federal law and this warrants a reversal as a matter of law.

Interim Director Qualifications

Additionally, the ALC also affirms the Board's order indicating that MMBA's interim director, Gerald Jenkins, is unqualified under the provisions of MMBA's charter and the charter school laws. (ROA. 14-15). In its charter, MMBA indicates that its Director/Lead Teacher would have the following qualifications: "Must hold current South Carolina Teaching Certificate or Administrative Certification; Trained in South Carolina's Teaching Evaluation Program (ADEPT); Experience as supervisor or department chairperson." (ROA. 770).

Gerald Jenkins *and* Gloria Garmany assumed the *joint* responsibility for the Director/Lead Teacher role at MMBA because the previous Director/Lead Teacher left in the middle of the school year (October of 2009).³ (ROA. 1323-24). For the day-to-day operation of the school, Mr. Jenkins ran the overall business operation and served in the Director capacity, and Mrs. Garmany served as Lead Teacher. (ROA. 1323-24, ¶¶ 3 and 9).

³ Mr. Jenkins and Mrs. Garmany assumed their joint role as Director/Lead Teacher only two months prior to the Board's completion of its review where it ultimately determined to revoke MMBA's charter.

Admittedly, Gerald Jenkins did not possess an administrative or teaching certificate when he assumed the Director Role at MMBA in October of 2009. However, Mr. Jenkins and Mrs. Garmany split the duties of this position and collectively fulfilled the qualification requirements of MMBA's charter. Mrs. Garmany undisputedly possessed a South Carolina teaching certificate in ELA, number 81234 and was trained in South Carolina's Teacher Evaluation Program (ADEPT). (ROA. 1127). Therefore, she met the first two charter requirements and was qualified to serve in her role as Lead Teacher. Mr. Jenkins possessed the necessary supervisory experience required under the third charter requirement because he had served as Director of Trinity United Methodist Church Child Development Center & Kindergarten (Trinity) from 2002 to 2005. (ROA. 1323). While at Trinity, Jenkins supervised the entire day-to-day operations of the program, including its afterschool program. (*See id.*). Mr. Jenkins managed the budget, kept the books, performed budgetary projections, managed U.S.D.A. funds, and supervised the Curriculum and Instruction at the center. (*See id.*). Therefore, Mr. Jenkins and Mrs. Garmany were qualified to serve in their respective roles as Director and Lead Teacher. Mr. Jenkins' supervisory experience and Mrs. Garmany's certifications and teaching experience clearly fulfilled the requirements for the positions each held.

Additionally, Mr. Jenkins' experience as a Director of Trinity met the requirement found in the charter that provides: "*Either the director or the administrative assistant must hold current South Carolina certification in administration or have at least one year of experience in the field of school-based administration.*" (ROA. 770) (emphasis added). In writing its charter, MMBA specifically added the qualification at the bottom

of the page to track the requirements found in section 59-40-50(B)(6) of the South Carolina (Supp. 2011).

Based on the combined qualifications of Mrs. Garmany and Mr. Jenkins, MMBA did not breach its charter requirements regarding administrative staff. Therefore, the ALC clearly erred in affirming the Board's finding that Mr. Jenkins did not hold the credentials required by MMBA's charter because the substantial evidence in the record demonstrates that the requirements were met.⁴

c. *Special Education Reporting*

The ALC appears to affirm the Board's holding that MMBA's charter warranted revocation based on its failing to comply with federal Individualized Education Programs ("IEP") reporting guidelines. (ROA. 15). However, the ALC's order does not articulate the reason for affirming the Board's order or expressly state that substantial evidence in the record warranted affirming the Board's order. (*See id.*). The Disabilities Education Act requires that students with special education needs be evaluated periodically and requires that teachers send out IEPs reporting on how the individual student is progressing in his or her education plan that is in place. The ALC's holding should be reversed because it fails to consider evidence demonstrating that MMBA has complied with the requirements of the Disabilities Education Act at all times and simply adopts verbatim the District's allegations without question.

In finding MMBA's special education program to be a material breach of its charter, the Board alleges that progress reports were not forwarded to parents of students

⁴ To the extent that the court determines that *both* the director and lead teacher must individually possess the charter's qualifications, MMBA will address the materiality of this alleged breach in the following section.

receiving such services on a timely basis. This is inaccurate. Every parent with a special needs child at the time of MMBA's revocation submitted affidavits indicating they received timely and accurate student progress reports. (ROA. 1335; 1343-50). Moreover, Elsie White, the special education teacher at MMBA with over thirty years experience, most of them with the district, swore under oath that she developed IEPs for all the students in need of special education and sent reports to parents on a regular basis as required by statute. (ROA. 1332). Due to the sensitive information contained in special education progress reports, MMBA found it more prudent to submit affidavits from parents indicating their receipt of the timely report, rather than submit the actual reports as part of the record. (ROA. 1335; 1343-50).

The Board based its finding that MMBA failed to comply with IEP requirements entirely on a report prepared by Marilyn Davis. (ROA. 239-40). In affirming the Board's decision to revoke MMBA's charter, the ALC also relied entirely on Marilyn Davis's 2009 review. (ROA. 15). Furthermore, the ALC found that MMBA did not contest the inconsistencies within her report. (*See id.*). Such a finding is incorrect and completely unsupported by the evidence in the record. MMBA never conceded that it was not complying with IEP requirements of NCLB. (*See* ROA. 59).

In her report, Ms. Davis alleges that only seven out of the eleven special education students at MMBA had received reports as frequently as the general student population. (ROA. 356). Additionally, Ms. Davis found that three students' IEPs included quarterly progress reporting and that no record of a progress report existed for one student. (*See id.*). Ms. Davis's report does not reference any raw data from which her conclusions were made, it references no student identifiers, and interestingly, Ms.

Davis came to these conclusions without speaking to Elsie White, parents of special education students, or special education students. (*See id.*).

Ms. White, MMBA, and the parents of special education students do not know how Ms. Davis arrived at her conclusions or the data on which she relied. However, Ms. White and the parents swore under oath that IEP reports were sent and received as required by law, and to date neither the Board nor the ALC has pointed to any evidence contesting these sworn affidavits.

Other than Ms. Davis's uncorroborated conclusions that reference no raw data, student identifiers, or manner of investigation, no evidence demonstrates that Ms. White or MMBA failed to comply with reporting requirements. On the contrary, Elsie White's sworn and uncontradicted testimony under oath shows that she developed IEPs for all the students in need of special education and sent reports to parents on a regular basis as required by statute. (ROA. 1332). Furthermore, the conclusion arrived at by the ALC completely disregards the parents' interest in and satisfaction with their children's education at MMBA. Therefore, the ALC's determination that MMBA did not comply with state and federal law regarding special education contravenes the substantial evidence contained in the record as a whole and should be overturned.

In conclusion, the evidence fails to demonstrate that MMBA breached a provision of its charter. Instead, the evidence demonstrates that MMBA complied with all charter provisions regarding curriculum, teachers and staffing, and compliance with state and federal law. Not only does the evidence demonstrate that no breach occurred, it also fails to demonstrate that a *material* breach occurred. Therefore, this Court should overturn

the ALC's decision on all issues regarding alleged charter breaches by MMBA because the substantial evidence in record does not support such a ruling.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN DEFINING "MATERIAL" UNDER SECTION 59-40-110 (C) OF THE SOUTH CAROLINA CODE (SUPP. 2011)

As demonstrated in section I, MMBA has not committed a breach of the provisions in its charter, let alone a material breach. However, to the extent the court determines a breach occurred, which is expressly denied, the breach must be *material* in order to warrant revoking MMBA's charter. In determining whether the Board erred in revoking MMBA's charter based on alleged material breaches, the ALC adopted a definition or test for determining whether a breach is trivial or immaterial as articulated in the case of *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 367 (1994). Based on long standing legal principles in contract law, the ALC erred in adopting the *Kiriakides* case for the purpose of determining whether a material breach occurred in the context of a charter school's alleged breach of its charter warranting a revocation of the charter.

To warrant contract rescission, the breach of a contract cannot be trivial or minor. *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989) (“[A] rescission will not be granted for a minor or casual breach of a contract. . . .”). In South Carolina, contract forfeitures are not favored, and courts will try to prevent forfeitures when possible. *Elliott v. Snyder*, 246 S.C. 186, 191, 143 S.E.2d 374, 375 (1965) (“Forfeitures are not favored in law and Courts will seize upon even slight evidence to prevent one.”). As a general rule, “a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract.” *Gibbs v.*

G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993); *see also Rogers*, 299 S.C. at 143, 382 S.E.2d at 917; *Elliott v. Snyder*, 246 S.C. at 191, 143 S.E.2d at 375. Thus, under these contract principles “material” breach is defined as a “breach so fundamental and substantial as to defeat the purpose of the contract.”

Based on the articulated contract principles stated herein, the ALC erred as a matter of law in adopting the *Kiriakides* definition of “material” breach in the context of a charter school case. Though some of the factors of the test articulated in *Kiriakides* could apply to a charter school situation, prongs (b) and (c) of the test can only apply in a commercial lease situation. 312 S.C. at 276, 440 S.E.2d at 366. A clearer and more poignant test for a court to consider in determining whether a charter school materially breached its charter would be for the court to define “material” breach as a “breach so fundamental and substantial as to defeat the purpose of the contract.” While certain breaches of a charter would rise to that level, others would not. Further, the school district or charter sponsor would still have the opportunity to revoke a school’s charter based on subsections (2)-(4) of section 59-40-110(C), ensuring academic, fiscal, and legal compliance.

Had the ALC correctly defined and adopted the term “material,” it would not have affirmed the Board’s decision to revoke MMBA’s charter because no alleged breach was so fundamental and substantial as to defeat the purpose of the contract. As provided for in section 59-40-30, the purpose of MMBA’s contract is to create a legitimate avenue for new, innovative, flexible ways of educating where research and development in producing different learning opportunities are actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable.

Here, the fundamental objective is met as MMBA is providing a new and innovative learning opportunity where students are improving academically. Therefore, the ALC should be reversed as a matter of law based on its definition of “material” in the context of section 59-40-110.

III. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN APPLYING THE RESTATEMENT (SECOND) DEFINITION OF “MATERIAL” TO THE ISSUES PRESENTED FOR REVIEW

To the extent the Court determines a breach occurred, which is expressly denied, and should the Court agree with the ALC’s definition of “material” in the context of section 59-40-110, any alleged breach is still immaterial under the ALC’s definition and the ALC should be reversed as a matter of law.

In *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 367 (1994), the South Carolina Supreme Court adopted Section 241 of the Restatement (Second) of Contracts and articulated five factors to consider when determining whether the breach of a commercial lease is trivial or immaterial. After considering each of the five factors the court concluded that the breach was trivial, and found it would be inequitable to find “forfeiture” as a remedy. *Id.* at 277, 440 S.E.2d at 367. As articulated in its order, the ALC adopted the *Kiriakides* test in the context of determining whether a material breach of a charter provision occurred. The five factors of the *Kiriakides* test include:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at 276, 440 S.E.2d at 366-67. The ALC erred in applying the five factors of section 241 to the facts of this case. The ALC failed to consider all five factors of the *Kiriakides* test under the curriculum argument and later erred in its application of the factors when analyzing the special education teacher requirements.⁵ Furthermore, the ALC did not apply the test under any other sections or in the context of any other alleged breaches. Not only does no evidence support the ALC's conclusion that MMBA students were deprived of the benefit they reasonably expected, an analysis of the other factors clearly shows that any alleged breach was immaterial.

a. Curriculum

In addressing MMBA's argument that the Board erred in revoking its charter based on unaligned portions of MMBA's curriculum, the ALC found that the Board's review demonstrated that some subjects' curriculum was aligned with outdated standards. (ROA. 12). Thus, students "were deprived of the benefit which (were) reasonably expected." (ROA. 12). By finding a material breach occurred based only on the deprived benefit prong of the test, the ALC erred by failing to consider the four other factors enumerated in section 241.

Assuming arguendo that MMBA breached provisions in its charter concerning curriculum, which is expressly denied, there is no evidence in the record demonstrating that MMBA students or their parents were deprived of a benefit which *they* reasonably

⁵ As is further developed in Section I, MMBA vehemently disagrees with the assertion that its teachers and staff failed to meet required standards.

expected under prong (a) of the *Kiriakides* test. To that effect, there is no testimony, affidavit, or other evidence in the record demonstrating that a parent or his/her student believes that they were deprived of any benefit by attending MMBA.

Assuming the benefit at issue in this case was academic progress, the District, MMBA's parents, and MMBA's students received this benefit because MMBA students surpassed the PACT test score goals articulated in the charter or made reasonable progress toward meeting the goals⁶. Additionally, MMBA improved its Adequate Yearly Progress (AYP) results each year until it made AYP in 2009 and 2010. Thus, academically, no party has been deprived of a benefit by any perceived curriculum misalignment.

Additionally, there are several secondary benefits of charter schools that should be noted. Charter schools in South Carolina, by statute, are established to provide alternative learning opportunities and parental choice in schooling for his or her child. MMBA offers a unique learning experience and smaller classroom sizes than those offered in the District. Additionally, MMBA offers an innovative curriculum and subjects taught ranging from CORE subjects to managing money and becoming financially independent. Students and parents have rallied behind MMBA during this process in hopes to keep it from closing. Certainly, under their perspective, they have not been deprived of a benefit they expected under the first prong of the *Kiriakides* test. Rather, revoking the school's charter would deprive them of the benefit of the innovative educational experience offered by MMBA that they have chosen.

The second prong of the *Kiriakides* test-the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be

⁶ Test scores and "reasonable progress" are more fully developed in the following section.

deprived-is inapplicable to the facts of this case because neither students nor their parents can receive damages for an alleged deprivation of a benefit. However, parents have several school choices or remedies available should they feel dissatisfied with MMBA, and a parent may transfer a child back to a public school at any time should he or she believe their child is being deprived of a benefit.

Under the third criteria of *Kiriakides*, MMBA will suffer a complete forfeiture of contract should a court determine its alleged breach is material. This result is not a mere possibility. The revocation of the charter means the end of MMBA's existence, including but not limited to student and teacher relationships, improvements made to classrooms, contracts with vendors, teacher and staff employment, and a long term lease to the physical building. Therefore, any alleged breach is immaterial and it would be inequitable to find that the result of forfeiture would be an equitable remedy under the third prong of the *Kiriakides* test.

Applying the fourth prong of the *Kiriakides* test—"the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances"—strongly favors concluding that the alleged breach is immaterial. MMBA's efforts to comply with the Board's requests are evidenced by its numerous communications with the District, including its November 10, 2009 Curriculum and Instruction Feedback Comprehensive Plan that was hand-delivered to the Board's administration. These efforts indicate not only the likelihood but the actual cure of any perceived charter violation. The November report comprehensively answered all the District's curriculum questions, including those concerning pacing guides and the tracking of its core knowledge curriculum with the South Carolina

curriculum standards. (ROA. 1162-1333). Specifically, MMBA demonstrated it had met all of the District's objectives in the District's action plan as evidenced in the November 10, 2009 report. (ROA. 1111; 1161). The Curriculum and Instruction Feedback Comprehensive Plan proved that MMBA had demonstrated standard alignment and revised pacing guides on November 6 and November 10, 2009, respectively. (ROA. 1161). Additionally, MMBA provided various items of information requested by the District from July to November 2009. (ROA. 1125-1156; 1157-1333). The District even noted MMBA's cure of violations in its order revoking MMBA's charter where it indicated: "MMBA submitted materials at the hearing regarding its curriculum and State standards. The materials show that the MMBA made some efforts after the district review to align its curriculum with State Standards." (ROA. 236). Thus, ultimately MMBA demonstrated to the District that its curriculum was aligned to state standards as the Board acknowledges in its order.

All evidence demonstrates that MMBA actively and cooperatively worked with the Board as soon as it received notice of alleged misalignments or charter violations and responded to all alleged breaches. Therefore, it would be inequitable to remedy the conflict between MMBA and the Board through forfeiture when considering the fourth prong of the *Kiriakides* test. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 277, 440 S.E.2d 364, 367 (1994) (where our Supreme Court found United Artists' accounting department's effort to cure default once it received notice of default by immediately trying to contact Landlord to ascertain the amount due was reason to affirm trial court's finding that forfeiture would be inequitable because the breach was immaterial).

Finally, all evidence in the record demonstrates that MMBA performed its obligations under its charter in good faith. There is no evidence in the record demonstrating that MMBA's alleged violations were willful or in bad faith. In fact, MMBA did everything in its power to demonstrate to the Board that its operation was in compliance with its charter provisions and complied with all Board requests. Therefore, any alleged curriculum breach was immaterial under the final prong of the *Kiriakides* test.

b. *Teacher and Staff Qualifications*

The ALC also erred in its application of the *Kiriakides* factors under the teacher and staff qualification requirements. In addressing whether MMBA's special education teacher met required standards, the ALC found that: "the District and its students were deprived of that benefit, cannot be compensated, no cure of the failure is available, and neither MMBA's good faith or expected forfeiture outweigh the damage done by the violations of the charter." (ROA. 14). As demonstrated extensively above, MMBA's special education teacher, lead teacher, and director met all applicable federal, state, and charter school standards. However, to the extent this court disagrees, any alleged qualification breach was immaterial under the *Kiriakides* factors.

The ALC acknowledged that MMBA exhibited good faith and fair dealing in rendering its duties, and the ALC acknowledged MMBA's expected forfeiture under this section. (ROA. 14). However, the ALC failed to consider how the District, parents, and/or students were deprived of a benefit they reasonably expected based on Mr. Jenkins' qualifications and Ms. White's qualifications. In fact, no party was injured or

deprived of a benefit due to Mr. Jenkins' assumption of the role of director or Elsie White's role as special education teacher.

Furthermore, when Gerald Jenkins and Gloria Garmany assumed the responsibility for the day-to-day operation of the school beginning in March of 2009, Mr. Jenkins ran the overall business operation (director) and Mrs. Garmany served as lead teacher. In addition to Mr. Jenkins' prior supervisory experience, he was/is also a certified career specialist with the Center for Credentialing and Education, certificate number GCDF09772. (ROA. 400). Mr. Jenkins is a 2002 graduate of Claflin University with a Bachelor of Arts in Child Development. (ROA. 1323-24). In 2005, he graduated from South Carolina State University with a Masters of Arts in Individual and Family Development. (*See id.*). He recently graduated from S.C. Department of Education Foundations in School Leadership. (*See id.*). From MMBA's perspective, he is certainly qualified to manage its day-to-day operations, irrespective of whether he holds a South Carolina Teaching Certificate or Administrative Certification. These credentials more than qualified Mr. Jenkins to serve as interim director and did not deprive any party of an expected benefit. Instead, the school was run by a manager with leadership and business skills.

Elsie White's qualifications, as examined more thoroughly in section I of this brief, absolutely qualify her to serve the needs of special education students at MMBA. Parents have sworn under oath that the needs of their special education students are being met at MMBA. Ms. White's background and experience more than qualifies her to serve in her role as MMBA's special education teacher, and no one has been deprived of any benefit in her tenure there.

In considering subsection (d) of the *Kiriakides* test for materiality-the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances-it should be noted that Mr. Jenkins was serving as the director based on an extraordinary circumstance. He is no longer the director at MMBA. Thus, any alleged breach was ultimately cured as it was never MMBA's intention for Mr. Jenkins to permanently serve as MMBA's director. In regards to Ms. White, no breach has occurred, therefore, there is no need to cure any error. Should the Board call an error to MMBA's attention, MMBA will promptly respond to the Board's charges and either demonstrate its compliance or cure any error or breach as it has in every instance.

Finally, in considering subsection (e) of the *Kiriakides* test regarding the good faith and fair dealing, the ALC admitted that the evidence demonstrates that MMBA exhibited good faith and fair dealings in its performance of running the charter school. (ROA. 14 stating "neither MMBA's good faith or expected forfeiture"). Furthermore, when Gerald Jenkins and Gloria Garmany assumed the responsibility for the day-to-day operation of the school beginning in March of 2009, Mr. Jenkins ran the overall business operation (director) and Garmany served as lead teacher. Since the previous director/lead teacher left in the middle of the school year (October of 2009), MMBA decided to wait until the year's end to hire a permanent replacement. MMBA's operation ran smoothly during the interim of the Jenkins/Garmany leadership for the rest of the 2009-10 academic year. MMBA accomplished its consecutive AYP results during their tenure. Furthermore, in these days of difficult cuts to educational resources, MMBA thought it prudent to save on the cost of hiring an extra person when the people in place could

effectively execute the director/lead teacher role. Therefore, based on the situation with which MMBA was presented, it made a careful decision and in good faith made sure that both business operations and teaching supervision would be well-managed under its new leadership.

MMBA has also acted in good faith and fair dealing in its employ of Elsie White as its special education teacher. Based on its reasonable beliefs, MMBA has always maintained that Ms. White is qualified in her role under both its charter standard and legal standards. To date, MMBA insists that Ms. White is qualified, and she has ensured that MMBA has followed reporting requirements of IEP.

In considering the factors of the *Kiriakides* test, MMBA did not commit a material breach of its charter by employing Elsie White as its special education teacher and by appointing Gerald Jenkins as its interim director. To revoke MMBA's charter based on this alleged violation would be inequitable because these alleged beaches were immaterial. Therefore, the ALC erred as a matter of law in affirming the Board's finding that MMBA materially breached its charter by appointing Gerald Jenkins as its interim director and employing Elsie White as its special education teacher.

IV. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD TO AFFIRM THE BOARD'S FINDING THAT MMBA FAILED TO MEET OR MAKE REASONABLE PROGRESS PURSUANT TO SECTION 59-40-110(C)(2) OF THE SOUTH CAROLINA CODE AND ERRED AS A MATTER OF LAW IN APPLYING AND DEFINING "REASONABLE PROGRESS" UNDER SECTION 59-40-110.

The ALC found sufficient evidence existed in the record to affirm the Board's finding that MMBA failed to make reasonable progress toward its student achievement goals. (ROA. 17-19). In its order, the ALC acknowledged that MMBA made some

progress, just not enough to meet the charter requirements. (*See id.*). Moreover, the ALC acknowledges that there is little to no evidence existing in the record to review MMBA's 2009 performance. (ROA. 19). Substantial evidence does not exist in the record as a whole to support the ALC's holding on reasonable progress; therefore, this holding should be reversed.

Section 59-40-110(C) of the South Carolina Code allows the Board to revoke MMBA's charter should MMBA fail to meet or make "reasonable progress," as defined in the charter application, toward pupil achievement standards identified in the charter application. The substantial weight of the evidence demonstrates that MMBA's students have made improvements, or "reasonable progress."

The District has identified two specific measurable goals in MMBA's charter regarding student achievement which it alleges MMBA failed to meet. In its charter, MMBA stated that "[t]he entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (ROA. 240) The charter also provides that "[t]he number of students in our school meeting standard will increase by 20.6% in ELA and 21.15% in Math after [MMBA's] 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)." *Id.*

MMBA made reasonable progress toward its stated goal of meeting AYP every year of its existence and met AYP for the past two consecutive years. In regards to MMBA's alleged failure to "meet the standard set forth in the charter application, which requires an increase of 21.15%" there is simply no evidence indicating that MMBA did

not meet an articulated charter goal concerning PACT scores. MMBA stated it would improve its PACT scores by 21.15 % in math and 20.6% in ELA for the respective 2005-2006 and 2008-2009 school years. The scores on which MMBA would be measured should therefore be based on the PACT test results from 2006 and 2009. Therefore, the Board's order finding that MMBA failed to meet reasonable progress as stated in its charter with regards to their students' PACT performance is utterly unfounded. The 2008 PACT test results, on which the Board claims MMBA failed to deliver appropriate results, are not an academic achievement standard within MMBA's charter. Whether MMBA met its outlined objectives could only have been determined based on the 2009 PACT test results which were unavailable when the revocation process began. However, by the time of the final revocation MMBA was the only middle school in the district to make AYP. In order to meet the AYP objectives, MMBA students had to receive high scores on PACT in 2009. Thus, the Board's order revokes MMBA's charter based on an achievement standard that does not exist and a baseless breach.

Furthermore, MMBA's charter goals are for its own students to improve academic performances. Any claim by the Board that District students out-performed MMBA students is irrelevant and inaccurate. Revoking MMBA's charter based on such a comparison is utterly misplaced and not based on an achievement standard expressed in MMBA's charter.

MMBA has made reasonable progress as required by statute on both AYP and PACT. MMBA has made great efforts to demonstrate the academic strides of its students and has compiled graphs and other data demonstrating its improvement below.

a. PACT Achievement Standard

First, the ALC and the District are mistaken as to the actual percentage of students that met “standard.” According to the South Carolina Department of Education, if a student scores basic, proficient, or advanced on the PACT, he or she has met expectations and therefore they have met “standard.”⁷ Specifically, the SCDE divided the PACT test scores into the following four categories: below basic, basic, proficient, and advanced.⁸ Any score which is not “below basic” meets standard.⁹ The District and the ALC erroneously excluded the category of students scoring “basic” from their calculation of students who met standard.

The definition of “standard” applied by the ALC’s order is in reference to a goal slated for the 2013-14 school year. (ROA. 241; 900). “Standard” appears three times in the Addendum to MMBA’s Charter School Application before it is qualified with the parenthetical language “scoring proficient on PACT.” (ROA 241; 900). This definition as applied in the ALC order is not applicable to the school years at issue in this appeal, and therefore the SCDE definition of “standard” applies. Therefore, the District erred in their calculations of students who met “standard” by excluding the “basic” category.

Second, the District also did not properly calculate the *percent increase* in the number of students meeting standard.¹⁰ A proper calculation would show that MMBA

⁷ See Palmetto Achievement Challenge Tests, South Carolina Department of Education, <http://ed.sc.gov/agency/Accountability/Assessment/old/assessment/pact/> (last visited Oct. 8, 2010). This internet site no longer exists for review because PACT has changed to PASS.

⁸ See Palmetto Achievement Challenge Tests, South Carolina Department of Education, <http://ed.sc.gov/agency/Accountability/Assessment/old/assessment/pact/> (last visited Oct. 8, 2010).

⁹ See Midlands Math and Business Academy Charter-Richland 1-2008-PACT, South Carolina Department of Education, http://www.ed.sc.gov/topics/assessment/scores/pact/2008/show_school_pact_scores.cfm?ID=4001602/2008/show_school_pact_scores.cfm?ID=4001602 (last visited Oct. 8, 2010).

¹⁰ The Student Assessment Section of MMBA’s Charter in its entirety provides: “MMBA will meet federal guidelines for student achievement pertaining to the No Child Left Behind Act. All students at MMBA

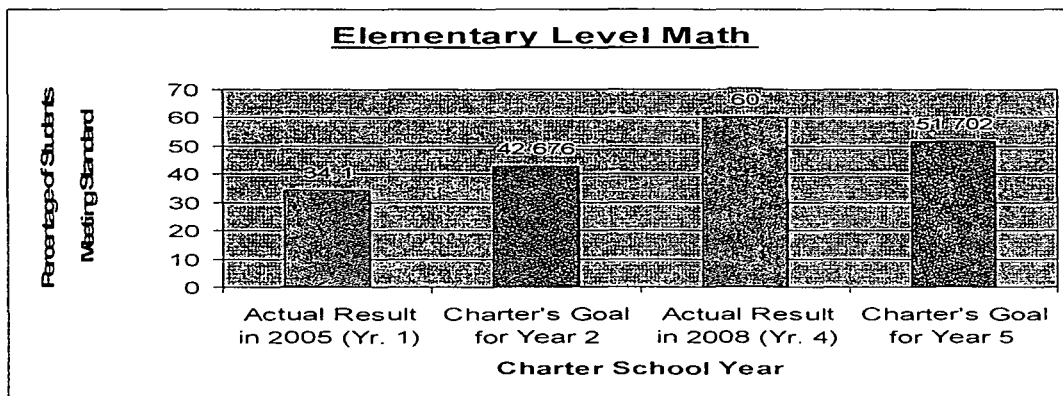
met almost all of its overall goals and for the two it did not meet, it made reasonable progress towards meeting those goals.

MMBA's charter calls for a percentage increase in students who met standard. The following example is used to show the difference between the concepts of percent increase and percent change. Suppose there are one hundred children in a class. The class takes a test and only ten of the children pass the test. The percent of students who passed the test would be 10%. The next year the same one hundred students take the test. After the second test, twenty out of the one hundred children pass. The overall percent of children who passed the second test is 20%. Under the District's logic, the School would have only increased their test passage rate by 10%. This is clearly incorrect. The school has in fact doubled the number of students passing the test. The school's passage rate has therefore increase by 100%.¹¹ The percent change from the first year to the second year would be 10%. The differences between these calculations drastically change the outcome in the present case. An analysis of each level of Math and English is provided below. The record only provides data for 2005 and 2008. Therefore, only these years will be used.

will be *proficient* in all areas of the Palmetto Achievement Challenge Test (PACT) by 2014. Based on the State of South Carolina's proficiency goals, the students at MMBA will demonstrate adequate yearly progress toward these goals. At the end of the school year 2003-2004, the numbers of the students meeting *standard* will increase by 20.6% in ELA and 21.15% in Math according to South Carolina's accountability Plan. Since MMBA will not be scheduled to open until the school year 2004-2005, the number of students in our school meeting standard 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 the students will be meeting standard (scoring proficient on PACT). Since we may be playing "catch up" our increases each year may be slightly higher than the state's increases of 20.6% in ELA and 21.5% in Math every three years. It is difficult to determine the exact percentage until we know our starting point." (ROA.900).

¹¹ There are many formulas which will allow one to find the percent increase of a percentage. One formula would be to subtract the base number (in our case the percentage in 2005) from the percentage which one wants to make a comparison to (percentage in 2008). Then one would divide that outcome by the base number to get the percent increase. The calculation in the present case would be as follows: $60\% - 34.1\% = 25.9\%$ / $34.1\% = 75.953\%$ increase.

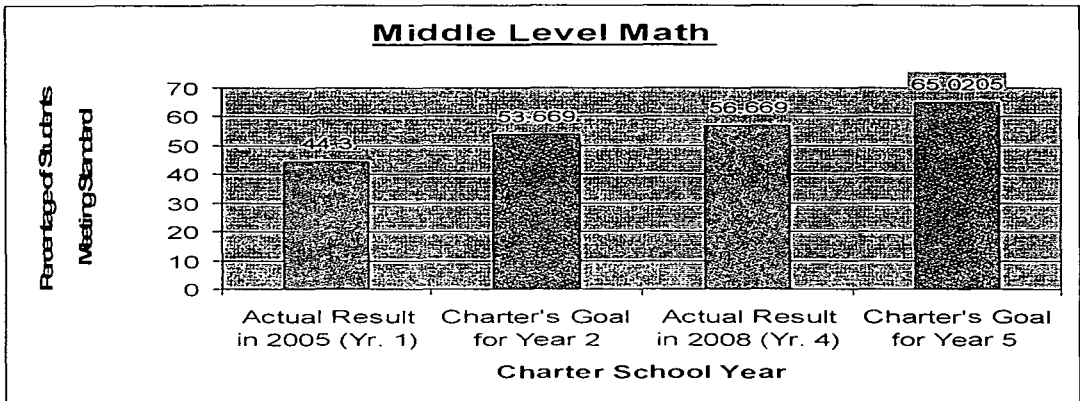
In order to comply with their charter, MMBA was required to increase their base Math score by 21.15% in year two (2006) and in year five (2009). The PACT test changed to PASS, therefore, there are no scores available for year five. Therefore, MMBA is demonstrating its academic progress by comparing 2008 results to its goals and results from prior years. The charts below show where MMBA's test results needed to be in 2005, the second year of operation, and 2009, the fifth year of operation, in order to have increases of 21.15%.¹² MMBA's student performances clearly surpass the goals set forth in the charter. The *percent change* in scores for the years 2005 and 2008 is 25.9%. The *percent increase* in the test scores is 75.95% or, stated differently, 75.95% more students met standard. Notably, this goal is met under either a percent increase or percent change a year sooner than slated.



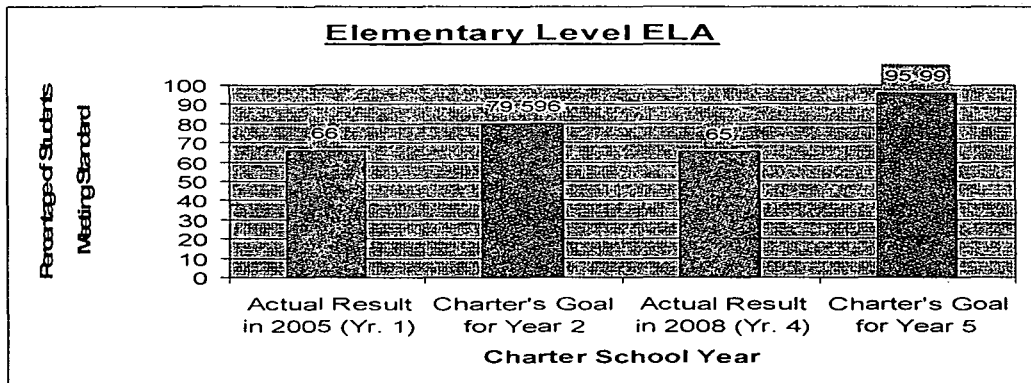
In 2005, 44.3% of MMBA students met standard for Middle School Math. In 2008, 56.2% of MMBA students met standard in Middle School Level Math. MMBA had an increase in 26.86% from their base score to their 2008 score. MMBA surpassed their

¹² MMBA's base number is 34.1%. MMBA would need a percentile of 42.676 % in year two to accomplish an increase the base number by 21.15%. In order to increase the results of year two by 21.15%, MMBA needs to have a rate of 51.702 % in year five.

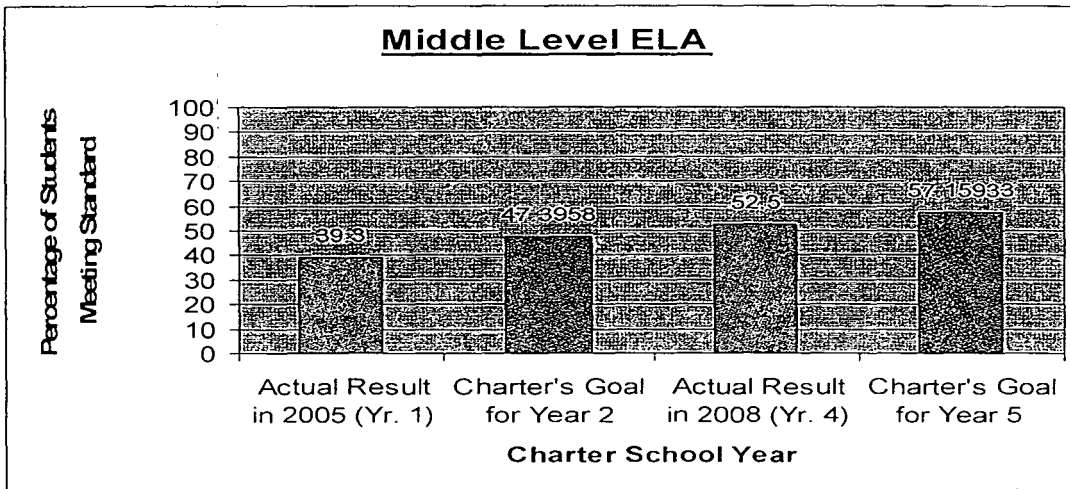
goal of having an increase of 21.15%.



MMBA concedes that students did not meet their charter's goal of 20.6% for Elementary level ELA. However, it is clear MMBA is making reasonable progress towards meeting this goal, and all their other goals.



MMBA's middle school ELA year four score is above the charter's standard. MMBA had 39.3% of student met standard in 2005. In 2008 they had 52.5% meet standard. This would give MMBA a 33.59% increase in their passage rate. MMBA complied with the charter's goals for middle school ELA.



b. AYP Achievement Standard

The trends outlined above are underscored by examining MMBA's AYP results. MMBA concedes it did not make AYP in its first three years. However, it is obvious that MMBA was making geometric progression toward that goal. In 2006,¹³ MMBA met 7 of its 13 AYP objectives. In 2007, it met 10 of 13 objectives. In 2008, it met 12 of 13 objectives. In 2009 and 2010 it made AYP. In fact, it was the only middle school in the District to do so.

A charter cannot be revoked when a school fails to meet *exact* pupil achievement standards as stated in its charter. On the contrary, section 59-40-110(C)(2) of the South Carolina Code (Supp. 2011) indicates that a charter may be revoked or not renewed if the school "fails to meet *or make reasonable progress*" toward pupil achievement standards. (emphasis added). Relying on this section, in an August 2008 order, Judge Kittrell found: "Section 59-40-110(C)(2) does not require a charter school to meet its stated pupil achievement standards, only that 'reasonable progress' be made." In his order, Judge Kittrell found a school board misapplied section 59-40-110(C)(2) in its decision to revoke

¹³ 2006 was the first year that MMBA was evaluated for AYP.

a school's charter and that it constituted legal error. Thus, the ALC has previously interpreted this language to mean that a charter school is not required to meet its stated pupil achievement standards in its charter so long as the charter school is making "reasonable progress" toward those objectives. (ROA. 1401-12)

The record does not support the ALC's holding that MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in its charter. The ALC fails to define "reasonable progress" under section 59-40-110(C)(2). However, the ALC determines that evidence supports the Board's conclusion that MMBA failed to make reasonable progress toward its academic goals, while in the same sentence acknowledging MMBA's performance improvement. The ALC seems to be equating reasonable progress with meeting exact stated pupil achievement standards stated in the charter. Such a definition is clearly not what is expressed in section 59-40-110(C), which allows revocation only upon failure to meet *or* make reasonable progress toward student achievement standards.

Clearly, the substantial weight of the evidence indicates that MMBA has exhibited reasonable progress in this case as demonstrated by MMBA's yearly improvement on the AYP. To hold otherwise is error. Additionally, the ALC erred as a matter of law in applying and defining the term "reasonable progress" under section 59-40-110(C)(2). Based on the lack of evidence in the record and the ALC's legal error, the court of appeals should overturn the ALC's decision on reasonable progress and find that MMBA made reasonable progress toward its student achievement goals.

V. THE ADMINISTRATIVE LAW COURT ERRED IN FINDING THAT THE WEIGHT OF THE EVIDENCE DID NOT SUPPORT A FINDING THAT THE BOARD VIOLATED THE DUTY OF GOOD FAITH AND FAIR DEALING

MMBA disagrees with the ALC's determination that District and Board acted in good faith and fair dealings. MMBA went to great lengths to demonstrate to the District that it was in compliance with its charter provision and complied with the action plan created by the District; however, it appears that the District and Board refused to consider the November 10, 2009 Curriculum and Instruction Feedback Comprehensive Plan prepared by MMBA on the unfounded grounds that it was untimely. Additionally, MMBA maintains that several means of communication were not attempted by the District or the Board in its revocation process. In that regard, many issues and alleged violations are still unanswered and unclear to MMBA. However, this issue is not outcome determinative. Therefore, MMBA will not more fully develop this argument for review by the Court. It simply notes here that it disagrees with the ALC's determination on this issue.

CONCLUSION

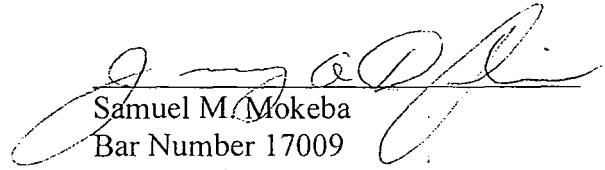
The District made many decisions and findings in 2009 that reviewing tribunals have accepted without question while ignoring reports, raw data, affidavits, and other evidence submitted by MMBA. To accept a District's sweeping conclusions about the performance of a charter school without question is an injustice to the charter school, its parents, and its students and frustrates the articulated legislative intent in enacting the Act. There are obvious reasons for there being a history of litigation between charter schools and school districts given that charter schools take funds away from the Districts in which they are zoned. Arguably, a school district is already biased well before an

investigation of a school begins. Such biases could lead, and MMBA believes in the instant matter did lead, to an arbitrary and capricious decision¹⁴.

There is currently no case law interpreting statutory terms at issue here. Whether one is for or against the charter school movement, the South Carolina legislature clearly intended to support the alternative school choice based on the clear language in the statutes. Therein, the legislature stated that “the provisions of [the Charter School Act] *should be interpreted liberally* to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.” S.C. Code Ann. § 59-40-30 (Supp. 2011) (emphasis added). MMBA asks the court of appeals to carefully consider all the evidence in the record before it and find that the substantial evidence in the whole record does not support the ALC’s holdings. Additionally, MMBA asks the court of appeals to correct the ALC’s legal errors in its definition and application of statutory terms “material breach” and “reasonable progress.”

¹⁴ Likely in response to the palpable tension that exists between charter schools and the school districts where they are located, our legislature has taken up the issue in the 2012 legislative session. House bill number 3241, as adopted by the South Carolina House of Representatives on March 29, 2012, adds and amends several portions of the Charter School Act. See house bill number 3241 at <http://www.scstatehouse.gov/billsearch.php?billnumbers=3241&session=119&summary=B> (last visited April 6, 2012). The bill, should it become law, allows for other entities to become sponsors of charter schools. It also adds code section 59-40-175 which regulates the distribution of charter school funding. The Bill also clarifies what must be included in a charter school application and requires the SCDE to create a template for the charter application and a template for the charter school’s annual performance that the charter school will submit to both its sponsor and the SCDE. Though not in its final version, the legislature’s action recognizes the problems that exist under the current charter school system and seeks to streamline funding, the application process, and the annual reporting process.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 10-ALJ-30-0437-AP
Court of Appeals Tracking Number: 2012208467


Midlands Math and Business Academy Charter School, Appellants,

v.

Richland County School District 1 Board of Commissioners, Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Midlands Math and Business Academy Charter School complies with Rule 211(b), SCACR.



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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

Midlands Math and Business Academy

Appellant

Richland County School District One Board of Commissioners

Respondent

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SC Court of Appeals

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 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. 748-900). 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. 761).

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. 762).

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. 770.)

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. 763).

All special education teachers will meet the certification requirements of the No Child Left Behind Law. (ROA p. 771).

The charter application listed each teacher position at MMBA 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. 771). 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. 750).

The charter application also set a goal for student achievement: 100% proficiency in all areas tested by 2014. (ROA p. 900). 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. 900).

[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. 900).

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. 232-233). 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. 233).

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. 233). 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. 1125-1128). 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. 290-370).

In August of 2009, District Administration provided MMBA with findings and recommendations relating to MMBA's curriculum. (ROA pp. 304-322). 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. 1161).

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. 295-298):

- 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. 229) After careful consideration of MMBA's performance under the contract, the Board voted 7-0 to revoke the charter. (ROA. pp. 249-250). 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. 228-243).

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. 226-227). The parties submitted briefs to the ALC summarizing their respective legal positions and the ALC heard oral argument on December 21, 2010. (ROA pp. 40-108).

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. (ROA pp. 2-21). In its Order, the ALC found, among other things, that: MMBA improperly used 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. *Id.* Based on these and other findings, the ALC affirmed the Board revocation of MMBA's charter. (ROA p. 20).

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. (ROA p. 10, 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 of 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. 763). 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. 771).

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 (Appellant's 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. 771). 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. 1125-1128). In that document, MMBA listed its teaching staff, including the one special education teacher, Ms. Elsie White. (ROA p. 1127). The document then identified the teachers at MMBA who were highly qualified under NCLB as the English/Language Arts, Social Studies, and Science teachers. (ROA p.1128). 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 1331-1334). The record also reflects that Ms. White had a class load, *i.e.*, she taught classes with special education students. (ROA pp. 14 and 568, 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 Administration Certification." (ROA p. 770). 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:

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.

Either the director or the administrative assistant must hold current South Carolina certification in administration or have at least one year of 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. (ROA p. 770).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. 761 and 762). 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

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. 1158, 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).

materials for ELA, Math and Science were not aligned with current South Carolina Standards. (ROA pp. 296-297 and 300-322). 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. 296-297).³ The findings of District Administration relating to curriculum were detailed in a report that was provided to MMBA in August 2009. (ROA pp. 300-322).

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 pp. 1158-1161). 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. 1159).

In the ALC proceedings, MMBA did not submit evidence to refute the substantial evidence that its curriculum had been misaligned. (ROA pp. 11-12). 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. (ROA p. 520). The ALC correctly rejected this argument as follows (ROA p. 12):

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 argument that the District should not have approved Core Knowledge in the first place also misses the point because the overarching basis for 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. (R. 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 1158-1180). 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. 1159). 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." (ROA p. 12).

In sum, pursuant to its charter, MMBA was required to provide instruction according to state standards. (ROA pp. 761, 762). 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. 750.)

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 pp. 353-357.) 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. 356.) 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 pp. 353-357). 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. 1343-1350). 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." (ROA p. 15).

MMBA also relies on an affidavit from its special education teacher which generally asserts that MMBA complied with special education law. (ROA pp. 1331-1332). 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. (ROA p. 15). 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.” (ROA p. 15).

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. 750). 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 pp. 761 and 762). 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. 768-771). 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 MMBA's good faith or expected forfeiture outweigh the damage done by the violations of the charter." (ROA p. 14).

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. 900). 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. 234).

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." (ROA p. 10). The Act mandates revocation for *any* material breach of the charter. (S.C. Code Ann. § 59-40-110 (c) and ROA p. 10). 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. (ROA pp. 10-11, 12-13, 14). 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 requirements 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." (ROA p. 900)(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." (ROA p. 900).

"[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)." (ROA p. 900).

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 (ROA pp. 295, 327-329). Further, MMBA failed to make the three year step increase in ELA and Math. (ROA pp. 327-329, 1351-1360). 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%. (ROA pp. 235, 327-329, 1352, 1356). 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%. (ROA pp. 327-329, 1353, 1357). Once again, these percentage increases are far below the progress measure of 21.15% defined in the charter.

MMBA argued that the District's calculations for student achievement, which are consistent with the numbers presented to the Board by MMBA, are incorrect. (ROA pp. 61-65). 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. (ROA pp. 16-18). 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. (ROA p. 242). A discussion of the change in tests and its impact on AYP and student performance is included in the Board's Order. (ROA p. 242). 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. 19, ROA p. 242).

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 its 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. 900). 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. 894, 898).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." (ROA p. 900)(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. (ROA pp. 886-894). Throughout the Accountability Plan, it states that students meet the requirements when they "meet or exceed the State's *proficient* level of academic achievement." (ROA pp. 883, 889, 891)(emphasis added). This is illustrated in a chart in the charter application that shows "percent meeting standard" increasing to 100% proficiency by 2013-2014. (ROA pp. 894, 898).

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. (ROA p. 900). 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. 894 and 898, 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% proficiency 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 [ROA pp. 894 and 898] 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.” (ROA p. 892).

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 year period 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. 900). 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. *Id.* 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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Board of Commissioners

July 6, 2012
Columbia, South Carolina

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.

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

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

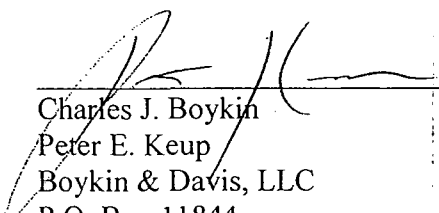
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of the Respondent complies with Rule 211(b), SCACR.

July 6, 2012



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No.: 10-ALJ-30-0437-AP

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

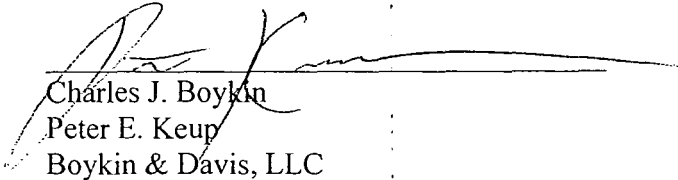
v.

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

PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Midlands Math and Business Academy Charter School by depositing a copy of it in the United States Mail, postage prepaid, on July 6, 2012, addressed to their attorney of record, Jenny A. Draffin, Baker, Ravenel & Bender, LLP., P. O. Box 8057, Columbia, South Carolina, 29202.

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Docket No.: 10-ALJ-30-0437-AP
Court of Appeals Tracking Number: 2012208467

Midlands Math and Business Academy Charter School, Appellants,

v.

Richland County School District 1 Board of Commissioners, Respondents.

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF ISSUES IN REPLY BRIEF

I. MMBA did not breach its charter provisions

- a. MMBA's employ of one special education teacher is not an issue on appeal to the Court of Appeals*
- b. MMBA's special education teacher is "highly qualified" under the No Child Left Behind (NCLB) Act*
- c. The combined qualifications of MMBA's Director/Lead Teacher met charter qualification provisions*
- d. MMBA's curriculum has always been aligned with the most current state standards*
- e. MMBA at all times complied with state and federal IEP reporting*

II. MMBA did not materially breach its charter provisions

III. MMBA made reasonable progress toward its stated pupil goals

STATEMENT OF THE CASE

MMBA has already addressed the salient factual issues in its initial brief, but it highlights some additional details herein. This appeal arises in response to the Richland County School Board's decision to revoke MMBA's charter pursuant to section 59-40-110 of the South Carolina Code (Supp. 2009). After MMBA submitted its annual report to the District at the end of the 2008-2009 school year, in June of 2009, the Board decided to withhold renewing MMBA's charter pending the completion of an action plan. (ROA 1102-04). As part of the improvement plan, MMBA provided feedback to the District's requests. (ROA 372-412).

These responses were provided to the District in phases starting in August and culminating in November of 2009. In August of 2009, the District asked MMBA about its curriculum/staffing requirements, and MMBA responded by providing information on its use of Core Knowledge Curriculum, its professional development plan, its professional development plan from its prior five years, teacher qualifications, and school

leadership. (ROA. 372-383; 1125-1147). In September of 2009, MMBA again provided the District with information in two reports entitled Data to Drive Instruction Strategies and Facilities Strategies. (ROA. 384-87; 403-04).

It appears that the District requested MMBA provide it with information demonstrating how Core Knowledge is aligned to state standards and sequencing after MMBA provided its August and September reports.¹ MMBA expanded on the answers and information contained in the August and September reports with its final written submission to the District entitled Curriculum and Instruction Feedback Comprehensive Plan, as submitted on November 10, 2009. (ROA 1158). In making its decision to revoke MMBA's charter, the Board ignored the final work product submitted by MMBA and voted to revoke MMBA's charter on November 24, 2009. (ROA 228).

ARGUMENTS

As the Appellant, MMBA must demonstrate to this Court how the ALC erred. In that regard, MMBA points to the errors of its sponsor in revoking its charter. The Board based its decision to revoke MMBA's charter on reports that do not contain specific findings of charter violations but draw sweeping conclusions. On appeal, the ALC relied on these reports to affirm the Board's revocation. These general conclusions do not constitute "substantial" evidence needed to support the ALC's rulings. Additionally, several legal errors occurred in the appellate process, including the interpretation and application of the Charter School Act and NCLB. Therefore, MMBA respectfully asks this Court to carefully consider the language in the charter, and the lack of evidence in the Board's Order when reviewing this case.

¹ This document was originally due in late October; however, MMBA had requested and received an extension from the District to submit its final report on or before November 13, 2009. (ROA. 1156).

I. MMBA did not violate its charter provisions.

As a first argument on appeal in its initial brief, MMBA maintained that it complied with all of the provisions of its charter and did not breach any provision. Under this argument, it would be unnecessary for the Court to determine whether MMBA materially violated a charter provision because a basic violation did not occur. Herein, MMBA addresses the Board's breach arguments in turn.

A. MMBA's employ of one special education teacher is not an issue on appeal to the Court of Appeals

Though MMBA appealed the Board's finding that MMBA did not materially violate its charter by employing one special education teacher to the ALC, this specific argument was not made on appeal to the Court of Appeals. In its order, the ALC did not affirm the Board's holding that MMBA materially violated its charter by failing to employ more than one special education teacher. (ROA. 13-15). Instead, the ALC held that MMBA's decision to hire only one special education based on the actual student enrollment was "a plausible explanation." (ROA. 13).

The ALC accepted MMBA's explanation of its employ of one special education teacher. The Board did not appeal this finding and because the ALC was satisfied with MMBA's decision to employ one special education teacher based on the actual student population enrolled, it is now the law of the case, and not an issue on appeal. *See Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011).

To the extent this court finds it proper to consider this argument, MMBA did not materially breach its charter by hiring one special education teacher. Based on changed

circumstances, employing only one special education teacher was not a *material* breach. MMBA's decision to employ only one special education teacher is a result of MMBA's actual special education student enrollment and overall student enrollment rather than the projected student enrollment when MMBA applied for its charter. (ROA. 751; 1103). Specifically, MMBA projected it would enroll approximately 200 students, but only 115 were enrolled at the time of the revocation. (ROA. 751; 1103). Furthermore, MMBA agrees with the Board that the need for special education teachers should be based on the needs of the special education students. (ROA. 237). In that regard, the only evidence on this issue clearly demonstrates that MMBA is meeting the needs of its special education students as parents of special education students have submitted affidavits demonstrating that MMBA is meeting or surpassing student needs. (ROA. 1335; 1343-50).

The Board minimized the parents' affidavits regarding the needs of their children. However, the record contains evidence of a parent's complaint against the District for its failure to comply with its responsibilities to an MMBA student under IDEA. (ROA. 1336-42). Thus, the record clearly demonstrates the involvement of MMBA parents in their children's education and their knowledge of the law. This involvement should not be discounted by the Board.

B. MMBA's special education teacher is "highly qualified" under the No Child Left Behind (NCLB) Act

There is absolutely no evidence in the record demonstrating that Elsie White is not highly qualified as a special education teacher. The ALC's order correctly recognizes that there is a separate "highly qualified" standard for special education teachers under 34

C.F.R. § 300.18. (ROA. 14).² Section 300.18 provides separate standards for special education teachers who are teaching core academic subjects and those who do not teach core academic subjects. Special education teachers who are not teaching core academic subjects are “highly qualified” if the teacher is state certified as a special education teacher, has not had their certification requirements waived, and the teacher holds a bachelor’s degree. *See* 34 C.F.R. § 300.18(b). Elsie White is certified as a special education instructor and possesses a Master’s degree in Special Education. (ROA. 14; 1331-32). There is no evidence that her certification requirements have ever been waived. Therefore, Ms. White is clearly highly qualified as a special education teacher.

The Board is attempting to hold Ms. White to the federal standard that applies to special education teachers who provide primary instruction in core academic subjects. There is absolutely no evidence in the record that Ms. White provided instruction in core academic subjects. The Board argues that special education teachers must instruct students in academic subjects because there is no “subject” of special education. (ROA. 81-82). This argument shows a lack of understanding of the role and services provided by special education teachers in our schools. “Special education” is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability” and includes, among other things, instruction in the classroom, speech-language pathology, and the development of motor skills. 34 C.F.R. § 300.39. The federal regulation defining “highly qualified special education teachers” also clearly recognizes the fact that special education teachers do not necessarily teach core academic

² *See also* 34 C.F.R. § 200.56(d), which provides: “A special education teacher is a ‘highly qualified teacher’ under the Act if the teacher meets the requirements for a ‘highly qualified special education teacher’ in 34 CFR 200.18.”

subjects by providing a separate “highly qualified” standard for special education teachers not teaching a core academic subject. *See* 34 C.F.R. § 300.18.

Furthermore, the South Carolina State Department of Education (SDE) also acknowledges that special education teachers do not necessarily teach core academic subjects. The SDE’s website provides a link to a document detailing South Carolina’s implementation of the highly qualified teacher requirements entitled “Quick Facts about South Carolina’s Highly Qualified Teacher Requirement.” *See* <http://ed.sc.gov/agency/se/Teacher-Effectiveness/Title-II/documents/HQquickfacts.pdf>. This document provides: “All teachers in all schools who provide the primary instruction in core academic subjects must be highly qualified.” *Id.* It further states:

Teachers who do not provide the primary instruction in a core academic subject are not required to meet the highly qualified requirement. Such teachers may include, but are not limited to, special education, ESOL, and Reading Recovery teachers who only provide reinforcement, accommodations, instruction in study skills, or act as a consultant to a highly qualified teacher of record.

Id.

The Board argues that “[t]here is no evidence in the record that Ms. White demonstrated competency in any academic subject she taught to students as required by NCLB.” (ROA. 82). However, there is no evidence in the record that she taught any academic subject. The ALC recognized the existence of a separate “highly qualified” standard for special education teachers who do not teach core academic subjects but failed to apply this appropriate standard to Ms. White. Apparently the ALC and the Board equate the reference to “class load” in the description of the Instructional Program in the charter to mean providing primary instruction in a core academic subject. (ROA, 14; 81-82). There is absolutely no evidence in the record to support this inference and, as

discussed above, there are many roles of a special education teacher that do not involve primary instruction in a core academic subject.

To support its allegation that Elsie White is not highly qualified, the Board cites in its Response Brief to a report MMBA provided to the District. (ROA. 81; 1125-28). Therein, MMBA listed teachers who were highly qualified under NCLB and taught CORE academic subjects. (ROA 1128). MMBA did not list Elsie White as highly qualified because she did not teach a CORE academic subject. (ROA 1128).³ The evidence in the record clearly demonstrates that Elsie White is highly qualified as a special education teacher. Therefore, the Court of Appeals should reverse the ALC's ruling on this issue because it is not supported by substantial evidence and applies an inappropriate legal standard, and is therefore based on an error of law.

C. The combined qualifications of MMBA's Director/Lead Teacher met charter qualification provisions

MMBA's Interim Director, Gerald Jenkins, had administrative experience as required by the charter, and Gloria Garmany, MMBA's lead teacher, held a teaching certificate as required by the charter. In its initial brief, MMBA thoroughly developed this argument-that its Director/Lead Teacher, a dual role temporarily assumed by both Gerald Jenkins *and* Gloria Garmany, met the qualification requirements of its charter. MMBA craves reference to this section of its Initial Brief herein. MMBA notes, however, that in its Response, the Board does not acknowledge that Mr. Jenkins possessed administrative experience when he assumed the role as Director for MMBA. (ROA. 82-83). Moreover, in its appointment of Mr. Jenkins as Director, MMBA ensured

³ See "Quick Facts about South Carolina's Highly Qualified Teacher Requirement", <http://ed.sc.gov/agency/se/Teacher-Effectiveness/Title-II/documents/HQquickfacts.pdf> (stating that teachers who provide primary instruction in core academic subjects must be highly qualified).

that someone on the leadership staff had administrative experience, but in its Response the Board claims Mr. Jenkins lacked such administrative experience despite the evidence to the contrary.

Additionally, MMBA reiterates that the joint role of Director/Lead Teacher as assumed by Mr. Jenkins and Ms. Garmany was a temporary solution to MMBA's need to fulfill a vacancy on its staff. The Jenkins/Garmany team assumed the responsibility of Director/Lead Teacher when MMBA's principal resigned for medical reasons in October of 2009, which was *one month prior* to the Board's November revocation vote.⁴ (ROA 228; 342; 1323). The Board did not address or recognize the temporary nature of the arrangement in its Response nor did the ALC recognize or consider the joint leadership assumed by Mr. Jenkins and Ms. Garmany or the temporary nature of the arrangement. (ROA. 14-15).

To the extent that the Court believes a breach occurred, in no way was the joint assumption of the duty of Director/Lead Teacher by Mr. Jenkins and Ms. Garmany a material breach of MMBA's charter. Therefore, substantial evidence does not exist to support a finding that a charter breach occurred because Mr. Jenkins and Ms. Garmany together met the qualifications stipulated MMBA's charter.

D. MMBA has always kept its curriculum aligned with current state standards as required by its charter

MMBA's good faith cooperation in acting on the Board's request that it demonstrate curriculum alignment was not an admission on MMBA's part that its curriculum was ever misaligned. MMBA responded to the District's July 2009 action plan in its Curriculum and Instruction Feedback Comprehensive Plan (a document that

⁴ At the time the review process began, Reginald Flenory was MMBA's principal and was certified in School Administration. (ROA 402).

the Board never reviewed) which clearly demonstrated that MMBA's curriculum is aligned to state standards. (ROA. 1159). MMBA has never conceded that its curriculum failed to convey state standards. On the contrary, "[t]he charter for MMBA states that Core Knowledge will be used as the base curriculum as it promotes the SC Standards for Curriculum in all disciplines. Core Knowledge is a driving force in the education of our students, but State Standards are primary and prioritized." (ROA. 1159). Furthermore, MMBA's November 2009 submission demonstrated to the Board what was already happening in the classrooms. (ROA. 1159). Unfortunately, this written submission, as the Board conceded in its order, was never taken into consideration. (ROA 236).

In complying with the Board's request that it demonstrate alignment, that culminated in MMBA's Curriculum and Instruction Feedback Comprehensive Plan, MMBA noted on numerous occasions that its teachers had already been provided with up-to-date materials on state standards and those standards were already being taught at MMBA. (Appellant's Brief p. 11). Moreover, it noted that "MMBA does not isolate Core Knowledge from state standards. In many areas we often search for areas that mesh seamlessly, but when that is not possible state standards are taught at all costs. In instances where there is no correlation with Core Knowledge and state standards, MMBA teaches state standards." (ROA. 1164). Thus, if an observer were to believe that MMBA only taught what was provided in the Core Knowledge teaching guide, she would have been misled into believing that there were curriculum gaps-which is likely what happened.

As noted above, during the document submission phase, Mr. Jenkins submitted an August 2009 report entitled "Midlands Math and Business Academy Core Knowledge

Curriculum.” (ROA 371-83). Therein, MMBA described the structure and approach of the Core Knowledge Curriculum as well as its benefits. (ROA 371-83). MMBA briefly mentioned state standards in the August report but noted that South Carolina state standards are the primary focus of classroom instruction. (ROA 382). Additionally, the August report explained: “The state standards guide the development of curriculum plans and lesson plans. MMBA has utilized the SC State Department of Education materials such as the Standards Implementation Guide, SC Department of Education Support Document and websites, and the ETV streamline website.” (ROA 382). However, the August report did not demonstrate how the current curriculum was aligned to state standards. Instead, the report gave an overall explanation of Core Knowledge and the other materials MMBA uses to supplement its curriculum. (ROA 382-83).

As MMBA stated in its charter application, the Core Knowledge Curriculum was used at MMBA as the *template* for teaching state standards. (ROA. 567; 762). When asked to demonstrate to the District how Core Knowledge was aligned to state standards, MMBA prepared the November 2009 Curriculum and Instruction Feedback Comprehensive Plan which demonstrated exactly what MMBA stated in its charter. In that section of its charter, MMBA indicated its plan to supplement lessons prepared using the Core Knowledge template with other outside materials, to include virtual/cyber lessons from South Carolina Virtual Charter School, to convey state standards to students in the classroom. (ROA 371-83). Thus, MMBA supplemented the Core Knowledge curriculum with other materials to align with current state standards continuously from the time the school opened its doors. MMBA’s curriculum in its entirety, including Core Knowledge as well as all other outside materials, was always aligned, as was

demonstrated in MMBA's Curriculum and Instruction Feedback Comprehensive Plan. (ROA 1159).

Absolutely no evidence in the record on appeal demonstrated that MMBA's curriculum has been misaligned for three plus years. The ALC, again, is relying on the District's findings without any supporting documentation. Nothing other than the District's sweeping conclusions indicate that teachers at MMBA were not "provid[ing] instruction to students based on the South Carolina Academic Standards on all subjects" as required under its charter. (ROA. 567; 762).

MMBA's approach to conveying state standards to its students is likely "unorthodox" as MMBA described it in its November Report because it is not the typical curriculum used in South Carolina public schools. (ROA 1159). However, use of Core Knowledge was and is simply not a breach of its charter provisions. In fact, the entire purpose of the charter school movement, as articulated by the legislature, is to explore alternative approaches to teaching. S.C. Code Ann. § 59-40-30 (Supp. 2011). In its review, the Board erred in finding that "[t]he Core Knowledge Curriculum used by MMBA had not been aligned to State standards." (ROA 233). Such a finding is flawed because MMBA only uses Core Knowledge as a template and supplements the same with additionally materials as described in its charter. Moreover, this finding does not indicate that MMBA breached its charter by failing to "provide instruction to students based on the South Carolina Academic Standards on all subjects." A thorough review of MMBA's submissions reveals that MMBA is complying with the provisions of its charter and teaching state standards.

Finally, MMBA reiterates that it never conceded that its curriculum was not aligned to current state standards. The Curriculum and Instruction Feedback Comprehensive Plan was an effort to demonstrate MMBA's pre-exiting compliance with state standards and was not an admission of non-compliance with state standards as the Board seems to indicate. In accepting the Board's limited review, the ALC equally ignores the substantial evidence contained in the record as a whole and warrants reversal.

E. MMBA complied with federal law at all times and never failed to provide IEP progress reports

In its Response Brief, the Board maintains that MMBA relies on an affidavit from Elsie White to assert that it complied with special education laws. (Resp. Br. 17). Thereafter, the Board argues that "the affidavit fails to address any specific findings of the District and fails to provide any support for the teacher's general assertion." (Resp. Br. 17). The same is true regarding Ms. Davis's report. Ms. Davis's made no reference to a student identifier, such as a number, or a student initials. (ROA 356). She merely used the term "student" or "students." (ROA 356). Additionally, Ms. Davis presumed that a parent of a special education student did not receive a progress report because there was no record of it. (ROA. 356). Ms. White's affidavit is a direct response to Ms. Davis's assertions. If Ms. Davis had been specific in her allegations Ms. White would have been able to address them specifically.⁵ Furthermore, there is no evidence from any MMBA parent that he or she did not receive a report as mandated under state and federal law. The finding that parents did not regularly receive IEP reports was based entirely on an assumption of Ms. Davis, and the *parents' affidavits disprove this assumption*.

⁵ Had Ms. Davis found: "Student Jane Smith did not receive a report timely," then Ms. White could have sworn that she timely sent Jane Smith's report and produced said report. Further, Jane Smith's parents could have sworn that they received the report that Ms. Davis sent. Without this raw data, MMBA was unable to address the District's findings specifically.

Moreover, Ms. Davis found that it was a violation of law for three of the special education students to be receiving quarterly progress reporting because it “d[id] not meet the requirement that students with disabilities receive IEP progress reports at least as often as general education students.” (ROA 356). However, general population students are required to receive progress reports, also known as report cards, once a quarter. 34 C.F.R. § 300.320 (a)(3)(ii). So, a student with disabilities who receives IEP progress reports once a quarter is receiving the reporting “as often as general education students.” 34 C.F.R. § 300.320 (a)(3)(ii) (“When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.”). The laws cited by both the ALC and the Board do not demonstrate that MMBA is failing to comply with a federal or state law by sending IEP reports out once a quarter.

Though MMBA recognizes that the Board, as its sponsor, may revoke its charter under section 59-40-110(C)(4) if it violated any provision of law from which the charter school was not specifically exempted, case law holds that only a material failure to implement an IEP violates the IDEA. *See e.g., S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008) (internal citation omitted) (“[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.”); *Van Duyn ex rel.*

Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 819 (9th Cir. 2007) (holding “state contract law does not apply to the interpretation of an IEP and that only material failures to implement an IEP constitute violations of the IDEA” and finding minor failures in implementing an IEP or following the IDEA are not violations of the statute).

It was pure legal error for Ms. Davis to find and reviewing tribunals to accept that IEP progress reports sent quarterly violate federal law. However, MMBA continues to maintain that it has at all times complied with IEP reporting and implementation. To the extent this Court finds that MMBA was not in compliance (which is refuted), a violation only occurs when there is a material failure to provide the disabled child a meaningful educational benefit. Here, there is no proof of a material failure or holding in that regard. Thus, it was legal error for the Board to revoke on that basis and for the ALC to affirm the Board’s decision on that basis.

In regards to evidence, though the Board maintains that MMBA never disproved the Board’s findings, it is MMBA’s position that the Board never demonstrated factual support for its findings in the first place. In other words, the record is not supported by any evidence, much less substantial evidence, to uphold the ALC’s determination that MMBA did not comply with state and federal law regarding special education and should be overturned. On this issue, the Court of Appeals should reverse the ALC’s holding on this issue because (1) it made a legal error and (2) the one paragraph of Ms. Davis’s report is not “substantial evidence” to support its decision.

II. MMBA did not materially breach its charter provisions

In regards to the Board’s argument that MMBA committed material violations of its charter, MMBA maintains that compliance with federal and/or state law and whether

it met reasonable progress should not be evaluated or analyzed in the context of whether or not a breach was material. Section 59-40-110(C) allows the sponsor to revoke its school's charter for four separate reasons. Therefore, MMBA is not arguing certain alleged breaches in the context of whether or not they were material.

The Charter School Act is new, as is the interpretation of it. As the Board concedes in its brief, "material" is a term of art that is not defined in the provisions of the Act. (Resp. Br. 18). Therefore, MMBA sought the definition of "material" from other legal authorities. As the Board recognized in its own Order, "[a] charter application constitutes a contract between the charter school and its sponsor." (ROA 234). Therefore, contract principles are applicable. Any alleged violation of MMBA's charter-regarding curriculum, and teacher and staff qualifications-are not "material" under either definition for "material" that MMBA cites in its initial brief.

Finally, the "arbitrary and capricious" standard of review is only one of the several articulated reasons to reverse the ALC on appeal. Here MMBA maintains that the ALC erred as a matter of law in analyzing and applying provisions of the Charter School Act. Additionally, MMBA maintains that many findings of the Board, many if not all of which were adopted by the ALC, were not supported by the substantial evidence in the record as whole; thus, the decisions and findings should be reversed. However, MMBA maintains that the Board acted arbitrarily in its annual review by ignoring reporting and other efforts of MMBA. For example, MMBA's special education teacher could not even respond to the Board's findings concerning special education reporting because she did not know where the factual basis for it arose. In that manner, the Board certainly acted arbitrarily. Moreover, the Board admittedly disregarded

MMBA's submission of its Curriculum and Instruction Feedback Comprehensive Plan from November of 2009.

MMBA did not violate its charter provisions. However, to the extent the Court finds a violation occurred, it was immaterial because (1) no breach was so fundamental and substantial as to defeat the purpose of the contract and (2) students were not deprived an expected benefit, and MMBA has cured any alleged breach. Thus, this Court should reverse the ALC's determination that a material breach occurred which warranted revocation under section 59-40-110(C)(1).

III. MMBA made reasonable progress toward its stated pupil goals

The Board argues that it had not only the right, but the obligation to revoke MMBA's charter because it did not exactly meet articulated student achievement standards in its charter. Such an assertion is legally inaccurate. Section 59-40-110(C) of the South Carolina Code allows the Board to revoke MMBA's charter should MMBA fail to meet or make "reasonable progress," as defined in the charter application, toward pupil achievement standards identified in the charter application. MMBA articulated desired student achievement goals in its charter. (ROA 900). However, there is no exact legal definition of "reasonable progress toward this goal" as the Board maintains in its brief, it merely defined its goals. (Resp. Br. 24). Moreover the Board admits that MMBA students progressed academically, just not exactly as defined in MMBA's charter. (Resp. Br. 25).

MMBA stands by its numbers and calculations. However, even if it uses the Board's data, it still made reasonable progress toward its stated student achievement goals, as the Board admits. The Board fails to acknowledge the obvious improvement on

AYP. Again, the Board is choosing to arbitrarily disregard MMBA's efforts and achievements. The Board maintains that a Court should interpret section 59-40-110(C)(2) to mean that it can and should revoke a school's charter when the school fails to meet *exact* pupil achievement standards as stated in its charter, and that any other interpretation would lead to a subjective determination of "reasonable progress." MMBA disagrees with such an assertion. Basically either a school's students are progressing academically or they are not. Either there are continued increases in test scores or there are not. It would be a simple review for a sponsor or any reviewing tribunal to recognize data moving in an upward direction, as is the case with MMBA. Additionally, the state publishes its AYP results for each school and a review of MMBA's results at the time of the revocation shows what anyone would describe as reasonable progress. These results demonstrate that in 2006,⁶ MMBA met 7 of its 13 AYP objectives. In 2007, it met 10 of 13 objectives. (ROA. 469). In 2008, it met 12 of 13 objectives, and in 2009 (the year of its revocation) and 2010 it made AYP. (ROA. 469). In fact, at the time of its revocation, MMBA was the only middle school in the District to make AYP.

Therefore, it was legal error for the ALC to hold that MMBA has failed to meet or make reasonable progress. Moreover the substantial evidence in the record on appeal does not support such a finding. On the contrary, evidence in the record indicates increased improvements in MMBA's student academic progress year after year. Therefore, the Court of Appeals should overturn the ALC's decision on reasonable progress and find that MMBA made reasonable progress toward its student achievement goals.

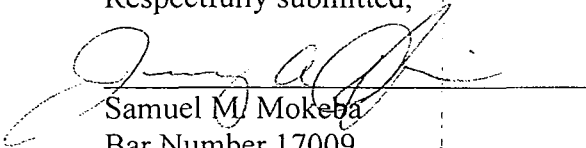
⁶ 2006 was the first year that MMBA was evaluated for AYP.

CONCLUSION

The District's review staff made many conclusions and findings that the Board and later the ALC accepted without question. MMBA had many questions about these findings and at times was baffled as to how they were reached because MMBA's staff was never provided with the raw data to support the conclusions drawn. Such a review process is flawed, and MMBA is asking the Court to interpret the Charter School Act and give guidance to those implementing it. Additionally, MMBA is asking the Court to ensure that it and all charter schools receive a fair and not arbitrary review from its sponsor.

To that end, MMBA asks the Court of Appeals to carefully consider the raw data on which the Board based many decisions and all the evidence in the record before it and find that the substantial evidence in the whole record does not support the ALC's holdings. Additionally, MMBA asks the Court of Appeals to correct the ALC's legal errors in its definition and application of statutory terms "material breach" and "reasonable progress."

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 10-ALJ-30-0437-AP
Court of Appeals Tracking Number: 2012208467

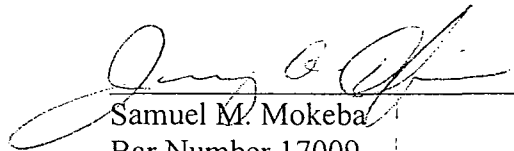
Midlands Math and Business Academy Charter School, Appellants,

v.

Richland County School District 1 Board of Commissioners, Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Reply Brief of Midlands Math and Business Academy Charter School complies with Rule 211(b), SCACR.



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