

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 its 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 breaches 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

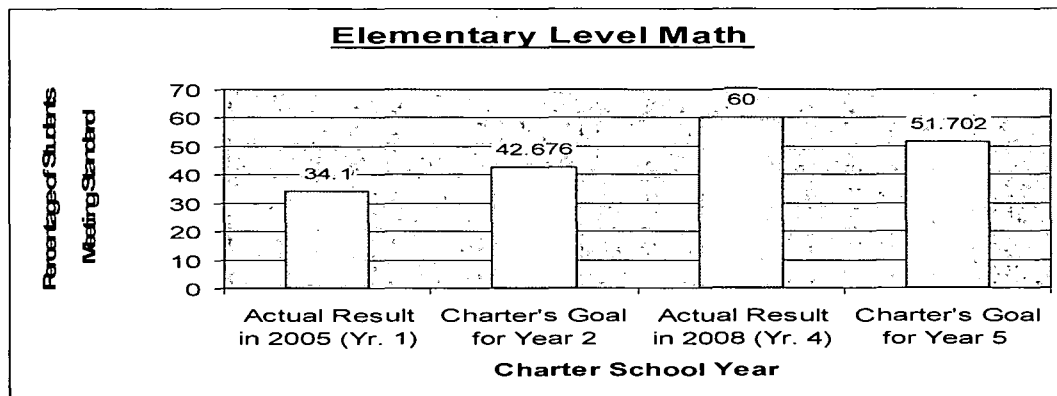
met almost all of its overall goals and for the two it did not meet, it made reasonable progress towards meeting those goals.

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.

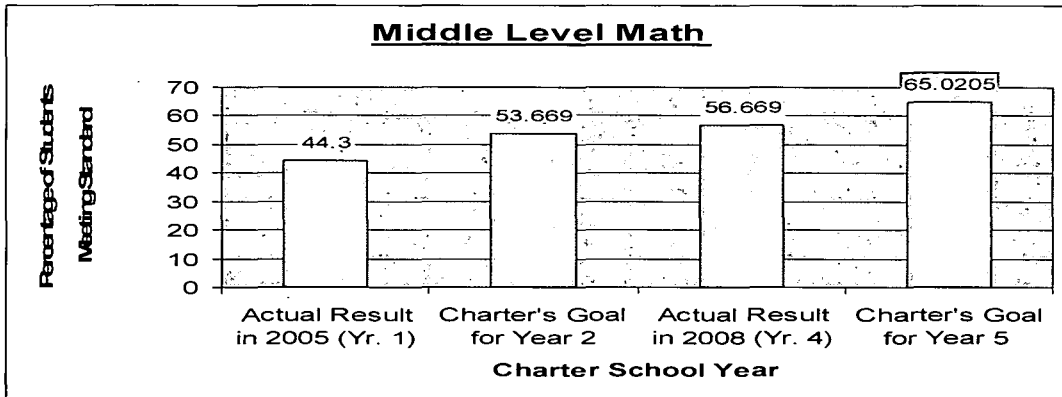
In order to comply with their charter, MMBA was required to increase their base Math score by 21.15% in year two (2006) and in year five (2009). The PACT test changed to PASS, therefore, there are no scores available for year five. Therefore, MMBA is demonstrating its academic progress by comparing 2008 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.



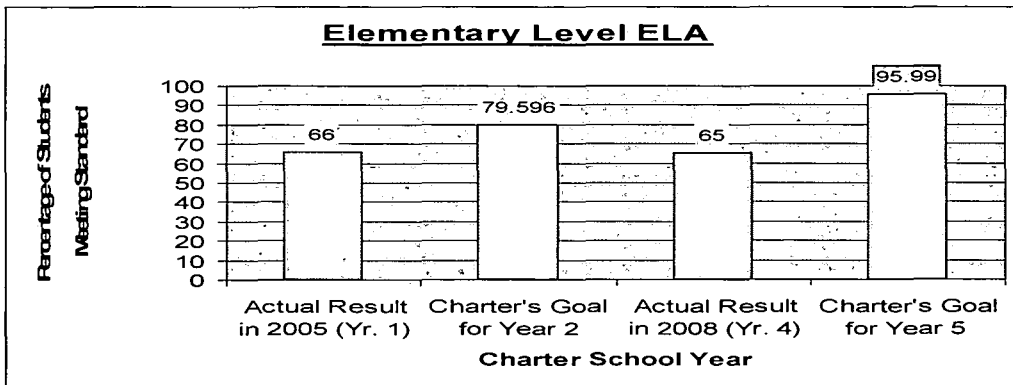
In 2005, 44.3% of MMBA students met standard for Middle School Math. In 2008, 56.2% of MMBA students met standard in Middle School Level Math. MMBA had an increase in 26.86% from their base score to their 2008 score. MMBA surpassed their

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.

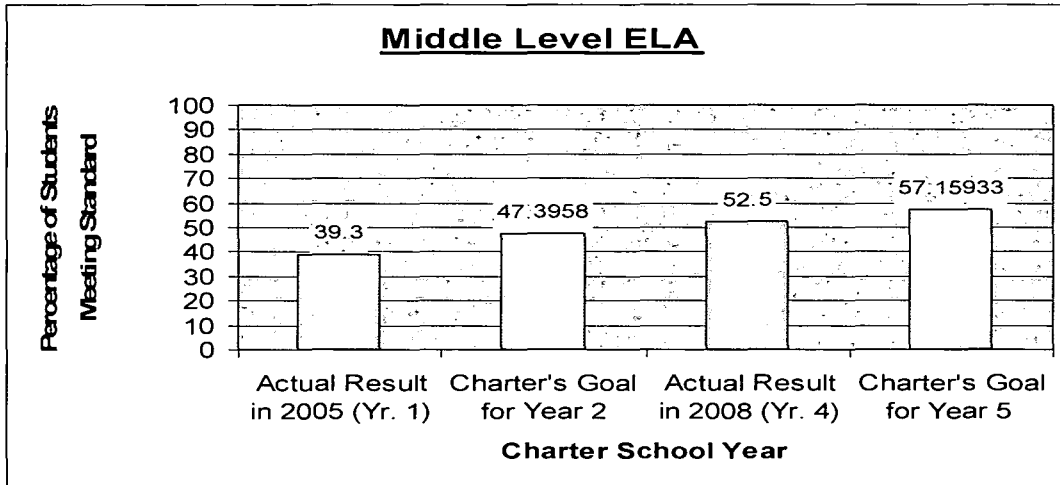
goal of having an increase of 21.15%.



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

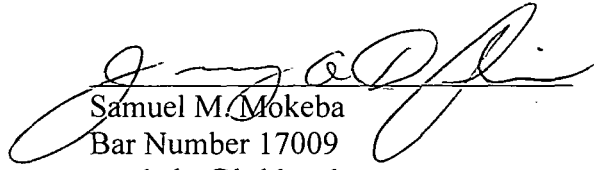
The District made many decisions and findings in 2009 that reviewing tribunals have accepted without question while ignoring reports, raw data, affidavits, and other evidence submitted by MMBA. To accept a District's sweeping conclusions about the performance of a charter school without question is an 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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Proof of Service

I, Ida M. Thomas, Legal Assistant to Jenny A. Draffin, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on this 9th day of July, 2012, served counsel below with **Appellant's Final Brief and Appellant's Final Reply Brief** by mailing a copy of same via United States Mail, postage pre-paid the return address clearly indicated on the envelope to counsel at the following address:

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SC Court of Appeals

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