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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
Administrative Law Court

Deborah B. Durden, Administrative Law Judge

ALC Case No.: 19-ALJ-30-0036-AP  
Appellate Case No.: 2019-000947

**RECEIVED**

JUN 27 2019

**SC Court of Appeals**

Richland County School District One Board of Commissioners.....Appellant,

v.

The Charter Institute at Erskine and Clear Dot Charter School Columbia.....Respondents.

**PETITION FOR WRIT SUPERSEDEAS**

June 27, 2019

By: Kierra N. Brown

Charles J. Boykin, Esq. (SC Bar #65149)  
Kenneth A. Davis, Esq. (SC Bar #66416)  
Kierra N. Brown, Esq. (SC Bar #103143)  
BOYKIN & DAVIS, LLC  
220 Stoneridge Drive, Suite 100  
Columbia, South Carolina 29210  
(803) 254-0707

Attorneys for Appellant

Other Counsel of Record:

Sarah R. Anderson, Esq. (SC Bar #10007)  
SARAH ANDERSON LAW FIRM, LLC  
416 E. North Street, Second Floor  
Greenville, South Carolina 29601  
(864) 906-0289

Attorney for Respondent Charter  
Institute at Erskine

Tyler R. Turner, Esq. (SC Bar #78447)  
Mary A. Caudell, Esq. (SC Bar #101187)  
TURNER & CAUDELL, LLC  
914 Richland Street, Suite A-101  
Columbia, South Carolina 29201  
(803) 898-9708

Attorneys for Respondent Clear Dot  
Charter School Columbia

## INTRODUCTION

Appellant, Richland County School District One Board of Commissioners, by and through its undersigned counsel, hereby petitions this Court to issue a Writ of Supersedeas, in accordance with its authority pursuant to South Carolina Appellate Court Rules 241(c)(1) and 241(d)(1), South Carolina Rule of Civil Procedure 62(d), and S.C. Code Ann. § 1-23-610(A)(2) staying the Administrative Law Court's ("ALC") order.

Appellant petitions this Court to issue a Writ of Supersedeas staying Clear Dot Charter School of Columbia's ("Clear Dot") opening in August 2019 on the following grounds: (1) extraordinary circumstances exist which makes it impractical to have the ALC rule on this petition; (2) a stay is necessary to prevent one or more contested issues from becoming moot; (3) the Appellant is likely to suffer irreparable harm if a stay is not granted; and (4) the Appellant has a strong likelihood of success on the merits.

## PROCEDURAL AND FACTUAL BACKGROUND

In February of 2018, Clear Dot submitted an application seeking sponsorship by the Charter Institute at Erskine ("Erskine") to open a charter school within the bounds of Richland County School District One ("District"). Erskine issued conditional approval to Clear Dot on April 20, 2018, and subsequently issued final approval orally on December 11, 2018. Erskine did not issue a final written order; and when a written order was requested by Appellant, Erskine informed Appellant that its meeting minutes reflecting the decision would be publicly available online upon the approval by Erskine's Board of Directors ("Erskine's Board") during their January 16, 2019 meeting.

Accordingly, Appellant served its Notice of Appeal on the Respondents and filed it in the ALC on February 15, 2019, contending that: (1) Erskine's failure to issue a written notice memorializing the final approval of Clear Dot's charter application deprived the Board of its statutory obligation to determine whether the opening of Clear Dot would have an adverse impact on the students remaining in the District; (2) because Clear Dot's charter application lacked a secure facility and/or a description of facility needs at the time of approval, the approval is in contravention of the requirements enunciated in S.C. Code Reg. § 43-601; and, (3) the approval of Clear Dot's charter application failed to meet the spirit and intent of the South Carolina Charter Schools Act ("Charter Schools Act").

On March 28, 2019, the Respondents filed an Amended Joint Motion to Dismiss the District's appeal on the grounds that: (1) the appeal was untimely; and, (2) Appellant failed to exhaust its administrative remedies by addressing its concerns to Erskine's Board. Appellant submitted its Response to Respondents' Amended Joint Motion to Dismiss on April 10, 2019, contending that: (1) the District timely filed and served the Notice of Appeal by doing so on February 15, 2019, within 30 days of the Erskine Board's approval and publication of the December 11, 2018 meeting minutes; and, (2) the District did not have a statutory duty to address its concerns to the Erskine Board prior to instituting its appeal to the ALC.

On May 7, 2019, Administrative Law Judge the Honorable Deborah Brooks Durden issued an order dismissing the District's appeal as untimely ("Order"). Appellant timely filed and served the instant Notice of Appeal on June 6, 2019.

Simultaneously, Appellant filed and served a Petition for a Writ of Supersedeas ("Petition") staying the ALC's Order which permits Clear Dot to open its doors to students in August 2019 pursuant to SCACR 241(d)(1). Thirteen (13) days later, Respondents sent correspondence to the ALC asserting their position that no response was necessary because the

ALC did not have jurisdiction to rule on the Petition; and, alternatively, requesting an extension if a response in opposition was required. Upon finding that the ALC did have jurisdiction to hear the Petition, the ALC granted the Respondents an additional 15 days to respond to the Petition, until July 8, 2019.

### **STANDARD OF REVIEW**

Pursuant to S.C. Code Ann. § 1-23-610(A), a notice of appeal does not stay the enforcement of an Administrative Law Judge's order; however, upon motion, the court of appeals may order a stay upon appropriate terms. S.C. Code Ann. § 1-23-380 (stating that the filing of notices of appeals from administrative tribunals will not result in an automatic stay).

Instead, upon an appeal from an order of an administrative tribunal, a stay may be imposed only if a "party move[s] for an order imposing supersedeas of matters decided in the order . . . after service of the notice of appeal." Rule 241(c)(1), SCACR. SCACR 241(d)(1) provides that a petition for a writ of supersedeas must be made in the lower court which entered the order except in extraordinary circumstances. The result of granting a petition for supersedeas is to suspend or stay the matters decided in the order. Rule 241(c)(1), SCACR.

In determining whether an order of supersedeas should be issued, a court considers whether the order is necessary to preserve jurisdiction of the appeal or to prevent one or more contested issues from becoming moot. Rule 241(c)(2), SCACR. Courts may also consider the moving party's likelihood of success on the merits and the likelihood that the moving party will suffer irreparable harm. Rule 65, SCRCR. While the terms of an order of supersedeas remain in effect for the pendency of the appeal unless modified or revoked by the issuing court or a superior court, the order of supersedeas cannot be construed to affect the validity of the judgment stayed until the order is formally reversed or modified by the appellate court. Rule 241(c)(4), SCACR.

## ARGUMENT

### **I. EXTRAORDINARY CIRCUMSTANCES EXIST WHICH WARRANT APPELLANT MAKING THIS PETITION IN THE COURT OF APPEALS TO PREVENT THE APPEAL FROM BECOMING MOOT.**

Pursuant to SCACR 241(d)(1), absent extraordinary circumstances, a petition for a writ of supersedeas must be made to the lower court which entered the order. The rule further establishes that unnecessary delay by the lower court in ruling on the petition shall constitute an extraordinary circumstance. Rule 241(d)(1), SCACR. As shown below, unnecessary delay by the ALC in ruling on the Petition filed below have created extraordinary circumstances for Appellant to now file for Petition in the Court of Appeals.

In this instance, Appellant filed and served its Petition with the ALC on June 6, 2019, after filing and serving its Notice of Appeal with the Court of Appeals. Thirteen (13) days later, Respondents asserted their position that a response in opposition to the petition was unnecessary as the ALC lacked jurisdiction to hear the Petition despite the clear requirements of Rule 241(d). Alternatively, Respondents requested an extension of time in which to respond to Appellant's Petition to the extent the ALC retained jurisdiction to hear the Petition. The ALC found that it did have jurisdiction to hear the Petition and granted Respondents a 15-day extension. Therefore, the Respondents' response is due on July 8, 2019.

As such, Respondents' decision to wait until almost two (2) weeks after the filing of the Petition to determine if they had a duty to oppose it and the ALC's decision to grant Respondents an additional 15 days to respond has resulted in an unreasonable delay, as Appellant's Petition seeks to delay Clear Dot's scheduled opening in August 2019. This delay may render the Appellant's Appeal moot if the school is able to open before a ruling is issued. Respondents have offered no reason why the extension should be granted and the ALC did not require a reason in granting the extension.

As a consequence, because the ALC granted the extension to Respondents, the ALC will not render a decision on Appellant's Petition until July 8, 2019, at the earliest, despite Appellant having filed its Petition since June 6, 2019. Even after receiving the Respondents' response in opposition to the Petition on July 8, 2019, the ALC will need additional time to properly and thoroughly consider the parties' respective positions which increases the likelihood that the ALC will not render a decision on the Petition until much closer to or even after Clear Dot's scheduled opening.

This Court should consider this Petition for a Writ of Supersedeas as the ALC's extension of the Respondents' deadline to respond to the Petition has resulted in unnecessary delay of the ALC in ruling on the Petition.

**II. THIS COURT SHOULD ISSUE AN ORDER OF SUPERSEDEAS STAYING THE ADMINISTRATIVE LAW COURT'S ORDER WHICH PERMITS CLEAR DOT TO OPEN ITS DOORS IN AUGUST 2019 AS A FAILURE TO DO SO WOULD RENDER CONTESTED ISSUES MOOT.**

A central issue of the Appellant's appeal is that Erskine's approval of Clear Dot's deficient charter application without a written order deprived the District of its statutory duty to conduct an analysis of whether Clear Dot's opening would have an adverse impact on the students remaining in the District; and, as such, the approval fails to meet the spirit and intent of the Charter Schools Act.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Byrd v. Irmo High School, 321 S.C. 426, 431 (S.C. 1999) (*quoting* Mathis v. South Carolina State Highway Dep't., 260 S.C. 344, 346 (S.C. 1973)).

Pursuant to law, "[i]f a local school board of trustees has information that an approved application . . . adversely affects the other students in its district . . . or that the approval fails to

meet the spirit and intent of [the Charter Schools Act], the local board of trustees may appeal.” S.C. Code Ann. § 59-40-70(G). In the instant case, Clear Dot’s charter application has received full approval; and, as a result, the school will open its doors to students in August 2019. Should this happen, Appellant’s appeal will be moot as students remaining in the District will likely suffer unknown and unmitigated adverse impacts during the pendency of this appeal and the issue of whether the approval of Clear Dot’s charter application met the spirit and intent of the Charter Schools Act will be of no consequence.

In determining whether a charter school will have an adverse impact, school boards review the details of the charter application to include the charter school’s: targeted student demographics, proximity to other schools serving the targeted student demographic, student enrollment projections by grade, academic and educational curriculum programs to be offered, and extracurricular programs to be offered. The board then identifies which of its schools are likely to be impacted by the opening of the charter school and estimates the number of its students likely to enroll in the charter school and the impact the exiting students could have on the district schools’ academic and extracurricular programs. Such an analysis requires a complete application which is fully compliant with the specificity required by S.C. Code Ann. Regs. § 43-601. Failure to comply with the specifics of this regulation deprives the local school board of its ability to conduct a thorough analysis.

In the instant matter, Appellant was unable to complete its statutory obligation to determine whether the opening of Clear Dot would have an adverse impact on students remaining in the Appellant’s District as the application failed to meet several provisions of law and comply with the S.C. Code Ann. Regs. § 43-601. Specifically, at the time of approval, Clear Dot lacked a secured facility in which to operate; and, due to this, did not know the number of students it would be enrolling in its first academic year. Because Clear Dot was unable to

identify the number of students to be enrolled and did not specify a location for its facility, Appellant has been unable to determine the extent of impact that will be faced by its schools nor which schools would bear the brunt of the impact. Nonetheless, Erskine approved Clear Dot to open its doors to an unspecified number of students in an unidentified location within the bounds of the District without regard to any adverse impact such an opening would present to the Appellant's remaining students.

Furthermore, Erskine's final approval of Clear Dot's deficient application fails to meet the spirit and intent of the Charter Schools Act as Clear Dot failed to meet the terms of its conditional charter. "A sponsor may conditionally authorize a charter school before the applicant has secured its space, equipment, facilities, and personnel." S.C. Code Ann. § 59-40-80. As evidenced by letter dated May 1, 2018, Clear Dot was authorized to report to Erskine regarding its: execution of preopening conditions, meeting of student enrollment projections, and finalizing of a facility to open in August 2019. Erskine's approval of Clear Dot failed to meet the spirit and intent of the Charter Schools Act as the application had several deficiencies and Clear Dot failed to meet the terms of the conditional charter issued on April 20, 2018, at the time of approval. Even further, the final approval of Clear Dot's charter application was never reduced to writing as required by South Carolina law. Hamm v. South Carolina Public Service Com., 287 S.C. 180, 182 (1985).

If Clear Dot opens in August 2019, during the pendency of this appeal, the students remaining in the District will be adversely impacted in unspecified ways. Appellant has no way of mitigating the effects of Clear Dot's opening by merging its academic and extracurricular programs as Clear Dot's charter application failed to provide the information necessary to allow Appellant to determine which of its programs and schools are at risk. Accordingly, the adverse impact that Appellant seeks to avoid with this appeal will be endured during the pendency of the

same and the issue will be moot if this Court does not intervene upon this Petition. The failure of the approval to meet the spirit and intent of the Charter Schools Act will be similarly moot.

Appellant's only remedy under these circumstances is an appeal to the ALC during which these issues will be decided on the merits. However, the ALC has dismissed Appellant's appeal due to Appellant's alleged failure to timely file and serve its Notice of Appeal. Accordingly, the ALC has not heard Appellant's arguments related to the deficiencies of Clear Dot's charter application and approval. The Order dismissing Appellant's appeal enables Clear Dot to open its doors to students in August 2019.

Because the ALC's Order would permit Clear Dot to open its doors in August 2019, this Court should grant this Petition staying the ALC's Order to prevent the contested issues on appeal from becoming moot. Without an Order of Supersedeas, the ALC's Order would allow the school to open without a determination of (1) whether the opening will have an adverse impact on Appellant's students; and, (2) whether the approval of the charter application met the spirit and intent of the Charter Schools Act.

**III. BECAUSE APPELLANT CAN DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS, THIS COURT SHOULD ISSUE AN ORDER OF SUPERSEDEAS STAYING THE ADMINISTRATIVE LAW COURT'S ORDER, WHICH WOULD OTHERWISE PERMIT CLEAR DOT TO OPEN ITS DOORS IN AUGUST 2019,**

Because Clear Dot's application was deficient in several respects at the time of approval, Appellant can demonstrate a likelihood of success on the merits of its appeal.

As an initial matter, Appellant timely filed and served its appeal in the ALC. In appealing Erskine's final approval of Clear Dot's charter application, Appellant was required to file and serve its Notice of Appeal within 30 days of the decision. S.C. Code Ann. § 1-23-380(1). S.C. Code Ann. § 1-23-380(1) provides that "proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days

after the final decision” of the agency is rendered. S.C. Code Ann. § 1-23-380(1). However, the Supreme Court of South Carolina (“Supreme Court”) has held that a party has 30 days after receiving **written notice** to appeal an agency decision pursuant to Section 1-23-380. Hamm v. South Carolina Public Service Com., 287 S.C. 180, 182 (S.C. 1985). The Supreme Court concluded that,

[w]hile a literal reading of Section 1-23-380(b) suggests the thirty days to appeal runs from the time the decision is made, [the court] believe[s] the statute must be read to allow a party thirty days after *notice* of a decision to bring an appeal.

Id. at 181-82. The Supreme Court reasoned that without such a liberal reading, “an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run.” Id. at 182.

Here, upon the Appellant’s request for written notice memorializing Erskine’s final decision on Clear Dot’s charter application, Erskine informed the Appellant that its December 11, 2018 meeting minutes would be approved on January 16, 2019, six (6) days after Appellant’s alleged window to appeal had closed thereby, “preclude[ing] judicial review . . . by simply concealing its decision until [after] the thirty days had run.” These are the precise circumstances contemplated in Hamm which prompted the Supreme Court to enunciate that Section 1-23-380 must be read to give a party 30 days after receiving written notice of a decision to appeal. Id.

Despite these facts, and although Appellant never received a copy of Erskine’s minutes and the same were not immediately posted online, Appellant used January 16, 2019, as its trigger date to appeal the decision; and, thus, filed and served its appeal on February 15, 2019. Therefore, Appellant’s appeal was timely and should have been considered on the merits by the ALC.

As related to the merits of Appellant's appeal before the ALC, Appellant has a strong likelihood of success. At the time of approval, Clear Dot lacked a secured facility and was unable to specify the number of students to be enrolled in August 2019. The Charter Schools Act requires all applications to describe the school's "building, facilities, and equipment and how they shall be obtained." S.C. Code Ann. § 59-40-60(F)(11). The same is reiterated in S.C. Code Ann. Regs. § 43-601(III)(L)(3) which specifies that,

[i]f the charter school has not identified a suitable facility, the application must specify a plan for obtaining such a facility and must include: a description of facility needs, a statement as to whether an existing facility will be remodeled or a new facility will be built, a schedule for completing or obtaining a suitable facility, and a description of the equipment that will be used to support the proposed curriculum."

As such, the final approval of Clear Dot's charter application without a secured facility or an appropriate description of the same is in violation of the Charter Schools Act and accompanying regulations. Additionally, the approval of Clear Dot's deficient application deprived Appellant of a meaningful opportunity to determine whether Clear Dot's opening would have an adverse impact on its remaining students as is its statutory duty. The approval further fails to meet the spirit and intent of the Charter Schools Act as Clear Dot did not meet the terms of its conditional approval prior to Erskine issuing final approval.

Because Appellant can demonstrate a likelihood of success on merits of the instant appeal, this Court should grant this Petition staying the Order which would allow Clear Dot to open its doors in August 2019.

**IV. THIS COURT SHOULD ISSUE AN ORDER OF SUPERSEDEAS STAYING THE ADMINISTRATIVE LAW COURT'S ORDER WHICH PERMITS CLEAR DOT TO OPEN ITS DOORS IN AUGUST 2019 BECAUSE APPELLANT WILL OTHERWISE SUFFER IRREPARABLE HARM.**

Appellant will suffer irreparable harm due to the unknown adverse impacts that the opening of Clear Dot will have on its educational and extracurricular programs.

In South Carolina, the concept of irreparable injury does not necessarily mean that the injury is beyond the possibility of compensation in damages. Bethel Methodist Episcopal Church v. Greenville, 211 S.C. 442, 451 (S.C. 1947). Rather, the fact that no actual damages can be proved is often the best reason for a court of equity to interfere to prevent continuous injury. Id.

In the instant action, Appellant will suffer irreparable harm if this Court does not stay the Order. One of the most important grounds for Appellant's appeal is that it has been unable to determine what impact the opening of Clear Dot will have on its academic and extracurricular programs available to students remaining in the District. Appellant has a statutory duty to conduct such an adverse impact analysis but has been deprived of its ability to do so as Erskine approved a deficient application which failed to identify a location and estimate a number of students to be served. If Clear Dot is allowed to open, Appellant will suffer unspecified adverse impacts even though this appellate process, the only due process to which Appellant is entitled, is incomplete.

Therefore, even if Appellant is ultimately successful in appealing Erskine's final approval of Clear Dot's charter application, Appellant will suffer the effects of the opening of the school until such time as this appeal is resolved. Students choosing to enroll in Clear Dot will be unnecessarily subject to instability in their learning environment as it is not apparent that Clear Dot can win this appeal on the merits. Additionally, there is no way to guarantee that the likely returning students will not suffer academically from a midyear transfer. Similarly, students

choosing to remain in the District may be deprived of certain educational and extracurricular programs left unsustainable by the departing students until such time that this appeal is resolved, and the departing students are returned to their home schools.

Accordingly, Appellant's only adequate remedy is to have this Court issue Writ of Supersedeas staying the Order which would allow Clear Dot to open its doors in August 2019.

**CONCLUSION**

For the aforementioned reasons, Appellant respectfully petitions this Court to issue Writ of Supersedeas staying the Administrative Law Court's Order, which would otherwise permit Clear Dot Charter School of Columbia to open its doors in August 2019.

Respectfully Submitted,

BOYKIN & DAVIS, LLC

By: Kierra N. Brown

Charles J. Boykin, Esq. (SC Bar #65149)  
Kenneth A. Davis, Esq. (SC Bar #66416)  
Kierra N. Brown, Esq. (SC Bar #103143)

P.O. Box 11844  
Columbia, South Carolina 29211  
Telephone: (803) 254-0707  
Facsimile: (803) 254-5609

Attorneys for Appellant

June 27, 2019  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
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The Charter Institute at Erskine and Clear Dot Charter School Columbia.....Respondents.

**PROOF OF SERVICE**

The undersigned of Boykin & Davis, L.L.C., hereby certifies that he has served the following counsel of record with the foregoing **PETITION FOR WRIT SUPERSEDEAS**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 27th day of June 2019.

The Honorable Jana E. Shealy  
Clerk of SC Administrative Law Court  
1205 Pendleton Street, Suite 224  
Columbia, South Carolina 29201

Sarah R. Anderson, Esq.  
Sarah Anderson Law Firm, LLC  
416 E. North Street, Second Floor  
Greenville, South Carolina 29601

Tyler R. Turner, Esq.  
Turner & Caudell, LLC  
914 Richland Street, Suite A-101  
Columbia, South Carolina 29201

By:     *Kierra N. Brown*    

Charles J. Boykin, Esq. (SC Bar #65149)  
Kenneth A. Davis, Esq. (SC Bar #66416)  
Kierra N. Brown, Esq. (SC Bar #103143)  
BOYKIN & DAVIS, LLC  
220 Stoneridge Drive, Suite 100  
Columbia, South Carolina 29210  
(803) 254-0707

Attorneys for Appellant

# BOYKIN & DAVIS, LLC

Attorneys and Counselors at Law

220 STONERIDGE DRIVE, SUITE 100  
COLUMBIA, SOUTH CAROLINA 29210

TELEPHONE: 803-254-0707  
FACSIMILE: 803-254-5609

POST OFFICE BOX 11844  
COLUMBIA, SOUTH CAROLINA 29211

Kierra N. Brown  
kbrown@boykinlawsc.com

June 27, 2019

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings  
SC Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**RECEIVED**

JUN 27 2019

SC Court of Appeals

Re: Richland County School District One Board of Commissioners v. Clear Dot Charter School and Charter Institute at Erskine  
Appellate Case No.: 2019-000947

Dear Ms. Kitchings:

Enclosed please find for filing the original and six (6) copies of Richland County School District One Board of Commissioners' Petition for Supersedeas in the above-referenced case. Please return the time-stamped copies to our courier.

By copy of this letter, we are today serving a copy of same to all parties of record.

Thank you for your assistance with this matter.

Sincerely yours,



Kierra N. Brown /tjb

/tjb

Enclosure

cc: The Administrative Law Court (w/encl.)  
Sarah R. Anderson, Esq. (w/encl.)  
Tyler R. Turner, Esq. (w/encl.)  
Mary A. Caudell, Esq. (w/encl.)  
Charles J. Boykin, Esq. (w/o encl.)