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

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

v.

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

APPELLANT'S REPLY TO RESPONDENTS' JOINT RESPONSE TO PETITION FOR WRIT SUPERSEDEAS

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INTRODUCTION

Petitioner, Richland County School District One Board of Commissioners, by and through its undersigned counsel, hereby replies to Respondents' Joint Response to Appellant's Petition for Writ of Supersedeas. As set forth more fully in the Petition for Writ of Supersedeas the: (1) stay is necessary to prevent one or more contested issues from becoming moot; (2) Petitioner is likely to suffer irreparable harm if a stay is not granted; and (3) Petitioner has a strong likelihood of success on the merits.

PROCEDURAL AND FACTUAL BACKGROUND

Petitioner incorporates by reference the Factual Procedural and Factual Background presented in its Petition for Writ of Supersedeas.

ARGUMENT

I. THIS COURT SHOULD GRANT APPELLANT'S WRIT OF SUPERSEDEAS IN THIS MATTER BECAUSE THE ADMINISTRATIVE LAW COURT HAS UNNECESSARILY DELAYED ITS RULING ON APPELLANT'S PETITION

By allowing Respondents a total of thirty-one days to respond to Appellant's Petition for Writ of Supersedeas, the Administrative Law Court ("ALC") unnecessarily delayed its ruling.

Pursuant to South Carolina Appellate Court Rule 241(d)(1), a petition for a writ of supersedeas may be made to this Court in the face of extraordinary circumstances which include unnecessary delay by the lower court in ruling on the petition.

Appellant's decision to bring its Petition for a Writ of Supersedeas ("Petition") to stay the opening of Respondent Clear Dot's school to this Court is proper and pursuant to the South Carolina Appellate Court Rules. Appellant made its Petition to the Administrative Law Court on June 7, 2019[1]. Respondents' actions in waiting until the Petition had been pending before the

[1] Appellant's Petition cites June 6, 2019, as the date on which it filed its Petition in the ALC, that is incorrect.

ALC for twelve (12) days before clarifying its duty to respond was unreasonable. Accordingly, the ALC's decision to grant Respondent an additional fifteen (15) days (from June 19, 2019) to respond unnecessarily delayed its ruling on the Petition. Significantly, while the ALC's decision contemplated a fifteen-day extension, the ALC simultaneously cited the deadline of Respondents' Response to be July 8, 2019, which amounted to an eighteen-day extension.

Contrary to Respondents' implication, Appellant does not contend that the ALC did not have discretion to grant the extension. Rather, Appellant submits that the ALC's use of its discretion in granting the extension resulted in an unnecessary delay warranting Appellant's action in bringing its Petition before this Court for a timely ruling.

While Respondents assert that this Court should allow the ALC to rule on the Petition because this Court will have no more time to consider the Petition than the ALC, Respondents do not consider Appellant's right to have this Court consider the Petition in the event that the ALC denies the it. Rule 241(d)(1), SCACR states that a Petition "must **first** be made to the lower court" not that the Petition may only be made to the lower court. (**emphasis added**). As such, the ALC's delay is likely to affect Appellant's right to have this Court consider the merits of the Petition before the opening of Respondent Clear Dot.

Lastly, on July 15, 2019, Respondents moved for a protective order from a hearing on the Petition beginning on July 23, 2019 through August 25, 2019, in pertinent part. If granted for the duration contemplated, the protective order would render this appeal moot because the harm of adverse impact to students would happen on August 21, 2019, Clear Dot's first day of classes. Pursuant to Respondent's proposed protective order, if the ALC does not issue a stay between July 15, 2019 and July 23, 2019, Clear Dot will be allowed to open as such is the effect of the ALC's order dismissing Appellant's appeal. Respondents' delay in responding to Appellant's

June 7, 2019 Petition combined with counsel's motion for protective order, if granted, effectively operates to bar Appellant from seeking a stay before the ALC.

Therefore, this Court should grant Appellant's Petition as Appellant properly exercised its right to have this Court consider the Petition in the event of unnecessary delay by the lower court.

II. THIS COURT SHOULD GRANT A WRIT OF SUPERSEDEAS IN THIS MATTER AS APPELLANT HAS DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE APPELLANT'S APPEAL WAS TIMELY FILED BASED UPON APPLICABLE PRECEDENT.

Appellant's appeal was timely in accordance with the Supreme Court of South Carolina's interpretation of S.C. Code Ann. § 1-23-380(b).

In Hamm v. South Carolina Public Service Com., 287 S.C. 180, 182 (S.C. 1985), the Supreme Court made the following ruling,

> [w]e hold that under Section 1-23-380(b), a party has thirty days after receiving written notice to appeal an agency decision.

Hamm v. South Carolina Public Service Com., 287 S.C. 180, 182 (S.C. 1985). After Hamm, the Supreme Court reiterated this rule in Cox, stating:

> we construed this provision [Section 1-23-380(b)] to allow a party thirty days after written notice of a decision to bring an appeal, rather than thirty days after a decision is made in which to file an appeal.

Cox v. County of Florence, 337 S.C. 340, 344 (S.C. 1999) (holding appellants' appeal was timely pursuant to the APA because appellants' window to appeal was not triggered until appellants received written notice of the county's decision approximately four years after the decision). These cases clearly establish that a party's window to appeal under Section 1-23-380(b) is not triggered until the party receives written notice of the decision. Otherwise, "an

agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run." Hamm, 287 S.C. at 182.

Nonetheless, Respondents rely on the Supreme Court's dicta in S.C. Coastal Conservation League v. SCDHEC, 390 S.C. 418 (S.C. 2010), for the proposition that Section 1-23-380(b) does not require written notice to trigger a party's window to appeal in this instance. Coastal, 390 S.C. at 427. However, as confirmed in Coastal and cited in Respondents' Response, the Hamm Court "read a notice requirement into [Section] 1-23-380(b)." Id. at 427. As such, in every instance where an appeal is undertaken pursuant to Section 1-23-380(b), a party has thirty days from the receipt of written notice to appeal the decision. Coastal, 390 S.C. at 427; see also Cox, 337 S.C at 344; Hamm 287 S.C. at 182.

Additionally, Respondents' rely on Coastal to contend that its action in posting its December 11, 2018 meeting agenda prior to the meeting and voting publicly to issued final approval was sufficient to avoid "an absurd result not possibly intended by the legislature." Notwithstanding the failure of Erskine to meet Hamm's explicit requirement of written notice under Section 1-23-380(b), Respondent Erskine relies on the very circumstances of which the Hamm court spoke by making its decision available only to Respondent Clear Dot, during its December 11, 2018 meeting and failing to make the meeting minutes reflecting the decision available to Appellant until thirty-five days after the decision, effectively depriving Appellant of its right to seek judicial review of the decision.

Appellant had an outstanding South Carolina Freedom of Information Act ("FOIA") request in which it requested notice of final approval of the Respondent Clear Dot of Columbia's ("Respondent Clear Dot or Clear Dot") Charter. Despite the open FOIA request, Respondent Erskine never provided notice of its decision to Appellant. Instead, at Appellant's specific

request for written notice, Appellant was advised that the decision in written form was contained in Respondent Charter Institute at Erskine's ("Respondent Erskine") December 11th meeting minutes which were not publicly available as they had not yet been approved by the Erskine Board. Appellant's first notice of the decision was during the January 16th meeting when the December 11th meeting minutes were approved and publicized. Pursuant to Section 1-23-380(b), Appellant timely appealed Respondent Erskine's decision on February 15, 2019.

Pursuant to this State's case law interpreting Section 1-23-380(b), Appellant timely appealed Respondent Erskine's decision and has demonstrated a likelihood of success on the merits.

III. THIS COURT SHOULD GRANT A WRIT OF SUPERSEDEAS IN THIS MATTER AS APPELLANT HAS BEEN DEPRIVED OF ITS STATUTORY RIGHT.

As the approval of Clear Dot's charter application deprived Appellant of its right to determine whether the opening of Clear Dot would have an adverse impact on students remaining in the its school district, Appellant has demonstrated a likelihood of success on the merits as well as irreparable harm.

Pursuant to S.C. Code Ann. § 59-40-70(G), Appellant had an explicit right to appeal an approved charter school application to the extent it had information that the charter school adversely affects students in its district or fails to meet the spirit and intent of the South Carolina Charter Schools Act ("Charter Schools Act").

Respondents contend that because this language is permissive, the deprivation of Appellant's right and duty to determine whether Respondent Clear Dot's opening would have an adverse effect on students remaining in its school district is not sufficient grounds to establish

that Appellant has a strong likelihood of success on the merits. The only entity with authority to appeal an approved charter school application on the basis of adverse impact to other students is a local school board. Consequently, if a sponsor, such as Respondent Erskine, approves a charter school application which is insufficient to meet the requirements of law and regulation, a local school board, such as Appellant, is deprived of the information necessary to makes its determination.

Here, Respondent Erskine approved an application which failed to meet the requirements of law and regulation. Accordingly, the approval could not have met the spirit and intent of the Charter Schools Act. Respondents cannot hide behind the deficiencies in Clear Dot's application by asserting that Appellant was not required to determine whether the opening of the charter school would result in an adverse impact to its students. Pointedly, the deficient application is the reason why Appellant could not exercise its right to do so. Therefore, while the potential adverse impacts to Appellant's students are unknown, Respondents' actions in depriving Appellant of its statutory right to investigate, consider, and present information which tends to establish an adverse impact to its students upon the opening of the charter school is an irreparable harm which will be suffered by Appellant.

Accordingly, Appellant has established that allowing Respondent Clear Dot to open its doors to students during the pendency of this appeal would irreparably harm Appellant as it will have effectively lost its right to appeal the approval on the basis of adverse impact and failure to meet the spirit and intent of the Charter Schools Act.

CONCLUSION

For the aforementioned reasons and those set forth more fully in Appellant's Petition for Writ of Supersedeas, incorporated herein by reference, Appellant respectfully requests that this Court grant the Writ of Supersedeas by staying the opening of Clear Dot Charter School.

Respectfully Submitted,

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July 15, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
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Deborah B. Durden, Administrative Law Judge

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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 **APPELLANT'S REPLY TO RESPONDENTS' JOINT RESPONSE TO PETITION FOR WRIT OF SUPERSEDEAS**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 15th day of July 2019.

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July 15, 2019

VIA HAND DELIVERY

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

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' Reply to Respondents' Joint Response to Petition for Writ 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

Kierra N. Brown

/clm
Enclosure
cc: The Administrative Law Court (w/encl.)
Sarah R. Anderson, Esq. (w/encl.)
Tyler R. Turner, Esq. (w/encl.)
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