THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Judge

Case No. 19-ALJ-30-0131-AP
Appellate Case No. 2019-001809

Compass Collegiate Academy, Inc., ...

Appellants,

v.

Charleston County School District , ...

Respondent.

INITIAL BRIEF OF APPELLANT

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Statement of the Issues on Appeal

1. Did the Administrative Law Court commit reversible error by determining that the Appellant's appeal was moot because another sponsor, the South Carolina Public Charter School District, approved Appellant's charter application while Respondent denied Appellant's charter application?
2. Because the appeal is not moot, did the Administrative Law Court commit reversible error by failing to determine that Respondent should have granted Appellant's charter application?

Statement of the Case

In South Carolina, an applicant may seek approval to open a public charter school pursuant to the Charter Schools Act of 1996, S.C. Code Ann. §§59-40-10 to -240 ("the Act"). The process and standards for submitting and reviewing applications are set forth in §§59-40-50, -60 and -70. The State Department of Education ("Department") has been entrusted with the task of promulgating and developing guidelines necessary to implement the Act, including the application process. *See* S.C. Code § 59-40-180.

Procedurally, the Act requires that an applicant to submit an application to a "sponsor," which may be a local school district, such as the Respondent, or a statewide sponsor such as the South Carolina Public Charter School District, by February 1. With some exceptions not applicable here, the sponsor must rule on the application within ninety days of receiving the application. If the application is not ruled on within ninety days of receipt, the application is considered approved. If a sponsor denies the application, it must provide the reasons and basis for the denial within ten days of the decision to deny. An applicant may appeal the sponsor's decision to deny the application to the Administrative Law Court.

On January 31, 2019, Appellant Compass Collegiate Academy, Inc. ("CCA" or "Appellant") submitted an application to open a public charter school (the "Application") to the Charleston County School District Board of Trustees ("District Board" or "Respondent"). (R. 10).[1] The District Board scheduled a Special Meeting for Monday, April 8, 2019 to conduct the statutorily-required public hearing on the Application. (R. 10).

The District Board notified CCA about the Special Meeting on Thursday, April 4, 2019, leaving one business day for CCA to prepare for the public hearing. CCA objected the short notice,

[1] All references to the Record are to the Record submitted to the Administrative Law Court.

but the District Board overruled the objection. (R. 10).The District Board heard a presentation from CCA and asked questions of CCA at the board meeting on April 8. (R.___). The District Board did not discuss the Application in public on April 8, but in a closed door "executive" meeting and against CCA's objections. (R. 21). The District Board later voted to deny the application in a public vote. (R. 21).

After the denial by the District Board, CCA received approval from the South Carolina Public Charter School District ("SCPCSD") on April 16, 2019, in which SCPCSD became a sponsor for CCA. Though CCA received approval of its application, SCPCSD and CCA never entered into a contract as required by the Act.

Despite this approval, CCA continued to seek sponsorship from the District Board and timely filed its Notice of Appeal to the Administrative Law Court ("ALC") on May 7, 2019. No written decision had been issued by the District Board at the time, even though the Act requires the written decision to be issued within ten days of the public hearing. On May 20, 2019, the District Board sent CCA a written decision acknowledging the Board Order had not been sent to CCA previously. (R. 2).

On October 10, 2019, the ALC issued its Final Order ("Order"), in which it only addressed the issue of whether the approval of the Appellant's charter by SCPCSD rendered the appeal contesting the District Board's decision moot. The ALC found that the approval of the CCA's application by SCPCSD bound CCA to operate the charter school under the terms submitted to SCPCSD and bound SCPCSD to serve as CCA's sponsor. Therefore, CCA could no longer obtain the District Board's sponsorship and the ALC dismissed CCA's appeal as moot. Following this Order, CCA filed its notice of appeal on October 23, 2019.

Standard of Review

South Carolina Court of Appeals regularly reviews orders from the Administrative Law Court, especially cases involving charter schools. *See Mary L. Dinkins Higher Learning Acad. v. S.C. Pub. Charter Sch. Dist.*, No. 015-UP-338, 2015 WL 4137977 (S.C. Ct. App. July 8, 2015); *Palmetto Youth Acad. Charter Sch. v. Florence Cty. Sch. Dist. 1 Bd. of Trustees*, No. 2013-UP-460, 2013 WL 8541637, at *1 (S.C. Ct. App. Dec. 11, 2013); *Hope Acad. Charter Sch. v. Richland Cty. Sch. Dist. Two*, No. 2012-UP-080, 2012 WL 10830178, at *1 (S.C. Ct. App. Feb. 15, 2012).

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC." *Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control*, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct. App. 2012). "The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(a) in violation of constitutional or statutory provisions,

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

S.C. Code Ann. § 1-23-610(B). Thus, the Court's standard of review is limited to whether substantial evidence supports the ALC's decision. *See* S.C. Code Ann. § 1–23–610(B) (Supp.2014)

(providing this court may reverse if the ALC's decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"); *Lake City College Preparatory Academy v. S.C. Public Charter School Dist.,* 2016 WL 3944731 (Ct. App. 2016). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control,* 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct.App.2008).

Argument

I. There is No Executed Contract Between CCA and SCPCSD, therefore, the Case is Not Moot.

The Administrative Law Court erred in its analysis and failed to establish substantial evidence to support its finding that the Act "clearly establishes a statutory scheme in which an approved charter application immediately binds both parties to [an] agreement" and making the appeal moot. (Order p. 9).

An approved charter application constitutes **an agreement** between the charter school and the sponsor. *See* S.C. Code Ann. § 59-40-60(A)(emphasis added). However, this is only the first step in forming a binding contract between the charter school and the sponsor. Section 59-40-60(B) states that, "[a] contract between the charter school and the sponsor **must be executed** and must reflect all provisions outlined in the application as well as the roles, powers, responsibilities, and performance expectations for each party to the contract." (Emphasis added). The contract must be based on a template designed by the Department, separate and apart from the charter, that includes specifics such as the exact location of the school within the approved area, once it has been obtained. *See* S.C. Code Ann. § 59-40-60(B). In short, approval of the charter application is nothing more than an agreement to negotiate the charter school contract.

Contrary to the ALC's analysis, the act of applying and receiving approval of an application is not one in the same with entering into a contractual relationship with the sponsor. These are two distinct and separate actions required the Act. In the present case, the record reflects no contract being executed between CCA and SCPCSD and, in fact, no contract was executed.

Even if there was a binding, executed contract in this case, which there is not, it would still not lead to the appeal being moot. A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). The Act specifically allows a charter school to voluntarily terminate its charter and contract with the consent of the sponsor. *See* S.C. Code Ann. § 56-40-115. The Record contains no evidence to exclude the possibility that the SCPCSD would allow CCA to terminate its charter and contract for purposes of entering into a charter and contract with the CCSD. Therefore, the ALC incorrectly determined that the case was moot.

While the ALC may make valid points regarding the lack of regulatory guidance of the charter school application process from the State Department of Education, its conclusion that the Legislature did not intend for schools to apply to multiple sponsors is erroneous. A school might elect to contract with one sponsor over another for any number of valid reasons, including differences in funding available or potential facility space available through one sponsor over another. The Legislature created an avenue for the charter school to make this determination after the application is approved by creating the second step of contractual negotiations before the school and sponsor become legally bound.

Therefore, the decision of the ALC should be reversed and this Court should remand this matter to the ALC to issue a ruling that the CCSD should have approved the CCA charter application, as explained below.

II. The Issues Not Addressed by the ALC Should Be Decided by This Court and Not Remanded Back to the ALC

This Court is permitted to review issues on the merits not addressed by the ALC. *See Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (addressing the merits of an issue in the interest of judicial economy even though the respondent was entitled to review by the lower court); *S.C. Public Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 804 S.E.2d 854 (2017) (declining to remand the case involving mootness issues to the appellate court in the interest of judicial economy).

Based on the aforementioned arguments, the ALC erred in finding this case moot and, therefore, the remaining issues the ALC declined to reach must be heard on the merits. Here, this Court's standard of review is the same as the ALC's standard of review. Sending the case back to the ALC would result in the same standard of review and analysis being applied to the unaddressed issues. Further, time is of the essence as the Court's decision determines whether or not CCA will be able to move forward with securing and opening a school for the next school year. As such, this Court should decline to remand this case, and review the remainder of the arguments in the name of judicial economy and needed expeditious review.

a. The Charter is Approved as a Matter of Law.

While there are many reasons the District's decision should be reversed, this Court need not proceed past the first, most obvious, and undeniable one. Section 59-40-70(B) requires that the District Board rule on any charter school application submitted to it within ninety days of receiving the application. If the District decides to deny the application, 59-40-70(C) requires that the ruling be issued in the form of a written decision explaining the reasoning for the denial. This ruling must be issued within ten days of the public hearing in which the District Board made

the decision to deny. (Id.). Importantly, Section 59-40-70(B) provides, "[I]f there is no ruling within ninety days, the application is considered approved."

Here, the ruling indisputably occurred more than ninety days after the application was received. According to the District Board's Order Denying the Application, the charter application was received on January 31, 2019. Therefore, the statute required the final ruling to be issued within ninety days, by May 1, 2019. The hearing was held on April 8, 2019, and the Order is dated April 17, 2019. (R. 3-7). However, as evidenced by the letter from counsel for District dated May 20, 2019, the District admits the Order was not issued until May 20, long after the May 1, 2019 deadline. (R. 3-7). In fact, the Order was not sent until after the Notice of Appeal was filed.

Therefore, no ruling was issued within the required 90 days and the charter was approved as a matter of law. Alternatively, the written decision issued after the appeal was filed is invalid and should not be considered part of the Record because it was sent after the ten days time period required by the Act. As such, the Record would be devoid of any substantial evidence to support the Board Decision.

In any case, the decision of the District Board to deny must be reversed.

b. The District Board Failed To Properly Implement Its Evaluation System In Accordance With Statute And Based On Clearly Erroneous Conclusions

The Charter Act requires sponsors to approve charter applications that meet the requirements of Section 59-40-50 and -60, and deny applications only in accordance with Section 59-40-70(C). *See* S.C. Code Ann. § 59-40-55. The District Board denied the application based on the failure to meet four of the fifteen requirements under Section 59-40-60. (R. 6-7, ¶ 24-27). These four requirements are (1) specifying a facility even though the

plan to identify one is acceptable; (2) specifying a transportation plan for all 720 proposed students; (3) providing an educational program that meets district standards; and (4) a plan for meeting district and state standards for serving students with disabilities. Conversely, then, the District Board found that the CCA application met the other eleven requirements of section 59-40-60, all of the requirements of 59-40-50 and all of the other requirements of Section 59-40-70, including that the charter meets the spirit and intent of the charter act, that it would not adversely impact the other students in the District, and that CCA has capacity to establish a quality charter school based on national industry standards. In other words, the District wrongly denied the application based on the misapplication and misinterpretation of the Charter Act along with clear errors in reading the application.

i. The District applies the incorrect standard and commits clear error in evaluating the description of facilities.

Section 59-40-60(F)(11) requires the charter application to include "a description of the building, facilities, and equipment and how they shall be obtained." By the plain language of the statute, the Act does not contemplate that the applicant will have obtained all of these things before the school is approved. Indeed, the charter application does not require this information at all. (R. 139). The application promulgated by the State Department of Education and used by the District, specifically states:

> 5. If a facility has not been identified, specify a plan for obtaining such a facility and include a description of the facility needs, a statement as to whether an existing facility will be remodeled or a new facility will be built, and a schedule for completing or obtaining a suitable facility and, if applicable, a description and timeline for any plan to raise funds for completing or obtaining the facility.

(Id.) (emphasis in original). The Order wrongly ignores this portion of the application, and denies the application because CCA does exactly what the application commands: "...the Applicant has not yet identified its facilities but outlines a general timeline for establishing a permanent facility." (R. 6, ¶ 24).

Indeed, the Record evidences every single requirement set forth in the application. In its application, CCA explains how it is committed to finding a facility to meet support the execution of its instructional model, and "has already been actively searching for a location and has identified potential facility sites and options." (R. 139). CCA further also explains that it is likely to lease space in the first four years of existence while building its fund balance and credit profile to invest in a permanent facility. (R. 139). CCA describes how it has researched educational facilities needs and concluded that it should utilize a smaller facility footprint than traditional district-managed schools, including a summary of the research regarding how that can assist students, and included a sample 725 square foot classroom layout based on this research in Appendix BB of its application. (R. 140). CCA further discusses how it plans to focus its space needs on classroom space and special classrooms for academic interventions, while adding a gym and athletic fields in later years. (Id.).

After describing the facility, CCA goes on to discuss its plan for obtaining it on R. 141-142. CCA states that it has been working with a professional commercial real estate firm (Charleston-based Bridge Commercial) to identify facility sites. (Id.). The application explains that the search has been focused on existing building for immediate lease with long-term ownership potential and available land for lease for a modular campus. (Id.). CCA has been working with an established modular company to develop a design in the event a modular campus is selected. (Id.).

Short of coming with a piece of property in hand, the application could hardly be more specific. In fact, CCA's application lists all of the viable sites considered in Appendix CC. (R. 141). It even goes on to discuss 1691 Turnbull on the Navy Base as a "leading candidate." (R. 141). It describes exactly how the lease agreement might work, how it would meet facility needs as the school grew over time and how CCA has budgeted to account for this potential site using public resources. (Id.) CCA notes that it will pursue private funding to assist with facilities costs, but will not be dependent upon it. (Id.) Finally, CCA describes how its approach to its facilities are aligned to its enrollment growth. (R. 142).

In the end, even the District acknowledged that CCA's facilities plan is good. On the evaluation rubric the State Department of Education requires the District to use as part of its evaluation process, the District noted that CCA's application included a "Good description of process to follow to identify a facility" and "good thought process to understand classroom and other space requirements." (R. 35). The only area of weakness noted by the District was "No specific facility yet identified, but real state search indicates progress." (Id.) No other issues with facilities were raised in public session at the public hearing. (R. 12-21). The District's error is that it used the incorrect standard of requiring a facility to be identified, when the statute and the application used by the District only require a plan for a facility. To judge charter applications as the District Board does, the Charter Act would severely limit the ability of people without significant private financial means to apply for a charter since the committee would have to obtain the commercial property before it even applied. The Act does no such thing, of course.

Further, the District's concerns about the charter being vague on this point has no merit. (R. 6, ¶ 23). The Charter Act requires that a charter school and its sponsor enter into a contract, based on a template designed by the State Department of Education, separate and apart from the

charter that include specifics such as the exact location of the school within the approved area, once it has been obtained. *See* S.C. Code Ann. § 59-40-60(B).

In short, the District made a clear error by finding that Section 59-40-60(F)(11) was not met based on a facility not being obtained when the Act and the application only require a plan in place to do so. Further, because the only evidence in the Record is that CCA's plan to obtain the facility is a "good one," in the words of the District, and meets the requirements of the statute, it was clear error for the District to deny the application on the basis of Section 59-40-60(F)(11).

ii. The District applies the incorrect standard and commits clear error in evaluating the description of transportation.

Section 59-40-60(F)(11) requires the charter application to include "a description of how the charter school plans to meet the transportation needs of its pupils." Importantly, however, Section 59-40-50(D) provides that charter schools are not required to provide transportation to a charter school except under limited circumstances not applicable here. As stated in the instructions to the application itself:

> The SC Charter Schools Act of 1996 does not require charter schools to provide transportation for students but does allow for a charter school to enter into a contract with a school district or private provider to provide transportation to the charter school students. ***The law does, however, require an applicant to describe how the charter school plans to meet the transportation needs of its students.***

(R. 127). Stated another way, "A charter school is not required to provide or facilitate transportation for students. If the lack of transportation is preventing students from attending, the charter school should provide a plan to address their transportation needs." What the law

seeks here is thoughtful planning from the applicant that the students being recruited will be able to regularly attend because of regularly available transportation. (R. 297).

The District, on the other hand, wrongly concludes that CCA's transportation plan must provide bus transportation for up to 720 students from day one of operation. (R. 6, ¶ 25). However, in the first year, only a maximum of 100 students would enroll in CCA, with the amount increasing as grades are added. (R. 297). The transportation plan also includes multiple other means of transportation besides school bus, including parent-provided transportation, carpools, walkers in the neighborhood and other traditional public transportation. (R 297). Many options for transportation, private and public, exist on the Charleston Peninsula, and certainly not every student would need school-provided transportation in order to attend. Moreover, as permitted by the Act, CCA's application did not contemplate a transportation plan to cover every student in Charleston County. Instead, the transportation plan, and indeed the entire application, is directed toward serving students that live on the Peninsula, defined as the area from I-526 to downtown Charleston, generally known as North Charleston and the Downtown areas.[2] (R. 42-45). The application reflects that CCA has calculated the anticipated bus rider student population and budgeted according to that bus rider student population, as it should have. (R. 128). CCA budgeted a robust $50,000 per bus based on the fair market estimations for costs of transporting the projected bus rider student population at CCA. (R. 21, l. 44:45).

With regard to meeting applicable state and federal laws, CCA plainly stated it would follow the bus requirements to the extent they apply, and the application refers to State

[2] Pursuant to the Act, any student eligible to enroll in Charleston County may enroll, but CCA is not required to provide a transportation plan to cover the entire county in the same way charter schools sponsored by the statewide sponsors are not required to have transportation plans that cover the entire state.

Department of Education guidance to school districts as to how to comply. (R. 161). The Charter Act does not go so far as to require an applicant to have a plan for engaging a vendor for every annual inspection or every background test or drug test that might be required in the life of a charter school.

Again, the District utilizes an improper standard for evaluating the transportation plan requirement. The law requires only that an applicant describe how it plans to meet the transportation needs of the students it is designed to serve, and then only if those students have transportation needs that would prevent them from attending the charter school. Otherwise, a charter school does not have any obligation to provide or facilitate transportation to students under South Carolina law.[3]

In this case, CCA is designed to serve students on the Charleston Peninsula and has articulated its plan to serve the transportation needs of those students. Therefore, it was clear error for the District to deny the application on the basis of Section 59-40-60(F)(10).

iii. The District applies the incorrect standard and commits clear error in evaluating the description of the education program.

Section 59-40-60(F)(5) requires an applicant to provide "a description of the charter school's educational program, including how it will meet or exceed the academic performance standards and expectations, including academic standards adopted by the State Board of Education and how the instructional design, learning environment, class size and structure, curriculum, and teaching methods enable each pupil to achieve these standards." Section 59-40-60(F)(6) requires the applicant to describe how students will be evaluated in addition to state assessments. The District acknowledges on the state-required rubric that the "assessment plan

[3] In some circumstances, federal special education law may require the school district to provide transportation to meet the specific needs of a student.

is very comprehensive" and the "goals were well formulated." (R. 28). Again, the issue is that the District utilizes the wrong evaluation standard, denying the application because CCA intends to use assessment strategies that do not align with the District.

A central legislative purpose of the Act is for charter schools to be innovative and flexible utilizing new forms of accountability for schools. *See* S.C. Code Ann. § 59-40-60(F)(5). The District's process for evaluation strips any chance of that from occurring by requiring charter schools to follow in lockstep with the District's assessment plans.

For example, even though the District acknowledged on the state-required rubric that the "goals were well formulated," the District Board found that the application did not include a "meaningful description" of measurable goals. (*Cf.* R. 28 with R. 4, ¶ 10). The internal contradiction between the rubric and the District Board Order may be explained by the District Board applying the incorrect standard once again, requiring the applicant to meet some undefined District academic standard that appears nowhere in the application. (R. 4, ¶ 10) ("In other words, the Application's proposed educational and assessment program simply does not offer the School's student the same quality of measurable educational program and opportunity that the District requires to be provided for its students.") This is particularly problematic because the Act and application makes no reference to any such District standards, instead stating only that the academic plan "should align with state performance standards, as well as with the school's pupil performance goals..." (R. 95). To the extent the District is requiring details about meeting different standards in the application, the applicant would have no way of knowing. It is clear error for the District to impose such a standard outside of the Act and after submission of the application. It is also difficult to discern how the unidentified standard of the District is

could be higher than the state standard met by CCA when many District schools are not meeting the state standard as it is.[4] (R. 42-45).

In any event, the Record contains no evidence or analysis to explain why any of the goals or standards proposed do not meet state standard or any other standard. It appears that the only stated objection is that many of the goals will only be measurable after the school has been in operation for several years. While true that the goals are designed to account for a ten year charter and the addition of grades during that time, the District's seeming belief that there are no measurable goals in the first years of CCA's operation is simply inaccurate.

Specifically, CCA's application notes that it will administer a formative assessment known as STEP from the University of Chicago to its Kindergarten and First Graders in its first year. (R. 19, 32:29; R. 59). The other highest performing elementary school in the District utilizes STEP. (Id.) The application provides that 75% of CCA students enrolled at the end of the academic year who have attended CCA for at least four months will be on their expected STEP level. (R. 96). CCA also will use a norm-referenced test called FAST measure baseline skills against national peers, including Kindergarten and First Grade, beginning the first year. (R. 239). Therefore, the District is simply wrong in its concern regarding the assessment of CCA students in its first year.

The District also appears to object that using STEP and FAST will not allow the District to compare CCA students to District students because the District uses different assessments or uses the assessments at a different time. The Act does not allow the District to deny the application on this basis. In fact, as noted above, the Act expressly encourages charter schools

[4] This should not be read to be critical of the District. Many reasons exist why a student or school might not meet a state standard at a given time. It is simply to point out that the District standard should be the same as or within the State's standard.

to utilize innovation and look for new ways of accountability. One of the ways CCA intends to accomplish that purpose is to "test smarter" rather than "test more," (R. 99) part of the mandate heard from almost every corner during the education reform debate this year.

iv. The District applies the incorrect standard and commits clear error in evaluating the description of the special education program.

The Act contains no requirement or standard for a description of the special education program. The only mention of special education in the Act is a statement that a charter school may not discriminate on the basis of the need for special education services and a further statement that "the sponsor retains responsibility for special education and shall ensure that students enrolled in its charter schools are served in a manner consistent with LEA obligations under applicable federal, state and local law." S.C. Code Ann. § 59-40-40(2)(b) and (4). Nonetheless, the State Department of Education application used by the District includes a section that states that "charter schools must open their enrollment to *any* student and must provide a free appropriate public education (FAPE) by offering special education and related services as needed for students with disabilities." (R. 90) (emphasis in original). The application then asks the applicant for four pieces of information: (1) the type and size of the special population expected to be served; (2) how the school's educational plan will meet the needs of the special population; (3) the plan to provide a continuum of services in the least restrictive environment; and define the roles and responsibilities between the school and the potential sponsor. CCA's application includes each of these items.

CCA first noted that it expected to serve a population that includes approximately 15% special education students based on student demographic research. (R. 91). The planning committee of CCA includes a certified special education teacher and administrator currently

employed by the District, who was also the District's 2014 Teacher of the Year. (R. 92). The Application explained the process both for serving students enrolling with an Individualized Education Plan (IEP) already in place and for identifying students after enrollment, even including model forms. (R. 93). In addition, CCA noted that the school's daily schedule and facility plans includes time and space for required supports in an IEP to be provided either in the classroom or in an appropriate space outside of the classroom. (Id.; 151-153) Even though the sponsor is the LEA and CCA does not even know what the IEP's might require at this time, CCA provided a great deal of detail about how its processes, staffing and systems were designed to serve students with disabilities. (R. 91-94). CCA even has budgeted significant amounts for outside contractors to provide services as needed for individual student plans. (R.92) This exceeds what the statute requires.

The Findings of Fact in the District Board's Order are clearly erroneous. (R. 6, ¶ 3-9). For example, the Application contains a list of the continuum of services that would be available at CAA at R. 92-93. The facilities plan notes that ample space is being planned for intervention rooms or special needs rooms, which would include the flexibility needed if CCA served a student or students who needed to be outside of the classroom more than 40% of the day. (R. 140). The Order is simply inaccurate in this regard.

The Application also clearly describes a description of its role and responsibilities in meeting the needs of students with disabilities, and how it will coordinate with the District even though the Order says it does not. Even though the law provides that the sponsor remains responsible for special education, CCA states that it embraces the opportunity to provide services to special education students when appropriate as part of its autonomy, but also agrees to follow the requirements and protocols of the District, including using the sponsor's form if requested.

(R. 91). CCA will employ a full-time Special Education Coordinator in year one, which will be on the leadership team of the school, and anticipates having two special education coordinators by year six. (R. 88). In the job description of the Special Education Coordinator, it plainly states that he or she will "[s]erve as the primary liaison with the charter school sponsor's Special Education Team," "[a]ttend all required charter school sponsor special education training and workshops," and "[m]onitor and respond to special education scholar data requests from the charter school sponsor." (R. 304).

The curriculum indisputably is designed to address the needs of special needs students despite the Order's assertions to the contrary. CCA's Application states that "[o]ur curriculum identification and implementation process accommodates the learning needs of all students and includes the ability to adapt curriculum for students with disabilities, English Language Learners and low-income scholars." (R.55). The Application includes a sample list of accommodations that may be utilized for students with disabilities within the context of the CCA curriculum, and also includes forms for tracking intervention strategies used. (R. 201, 202, 238).

In short, the Application includes everything about special education the statute requires and even those additional things the District Board's Order says should be there.

Based on Section A-D above, the District Board used the wrong standard to evaluate the application requirements, and is either overlooked, ignored or misapprehended what is in the Application as well. The District admits the Application describes a good plan for the facilities, thereby meeting the requirements of Section 59-40-60(F)(11). The District wrongly applies the transportation requirements of a traditional school district to CCA, but the Application well exceeds the very minimal requirements to describe a transportation plan under Section 59-40-60(F)(10). Similarly, the District applies some unknown and unannounced academic standard

to CCA's academic program beyond meeting State Board of Education and Charter Act requirements, but even the District admitted in the rubric that CCA had well thought out and well formulated goals. Finally, the District seems to have erroneously applied the LEA requirements to CCA in evaluating the special education program, but CCA met them nonetheless because of its obvious passion and professionalism for that part of its job related to students with disabilities.

Therefore, because the District cannot deny the Application for any of the reasons allowed in Section 59-40-70, the Order must be reversed.

c. The District Board Decision Should Be Reversed Because Proper Notice Was Not Provided To CCA, Board Members, Or The Public.

Even if this Court for some reason determines CCA does not already have a charter, and also decides that the District somehow was within its rights to deny the Charter, it still should reverse the District's decision based on its failure to provide adequate notice. Section 59-40-70(B) requires the District to give "reasonable public notice" before the public hearing on the charter application. The District failed to provide such notice in this case.

When challenged, the District has the burden of proving reasonable public notice. *See Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20-21, 507 S.E.2d 328 332 (1998) (holding that "if material facts are in dispute, the administrative body must make specific, express findings of fact."). Here, CCA disputed the reasonableness of the notice provided at the hearing. (R. 10, 14). Nonetheless, the Record contains absolutely no evidence of reasonable public notice. Even though CCA timely submitted its application on January 31, 2019 and was in continual contact with the District regarding a date for the hearing, the District unreasonably waited until April 4 to notice a Special Meeting one business day prior to the meeting. In addition, the meeting

was scheduled in the middle of the work day at noon, at the most inconvenient possible time to professionals comprising the application committee and the public.

This simply does not constitute reasonable notice under the circumstances, and the Record contains no substantial evidence upon which the District Board can base its erroneous finding. Therefore, the District Board decision must be reversed.

d. The District Board Decision Should Be Reversed Because CCA Was Not Afforded A Public Hearing.

The Charter Act requires that the application be ruled on in a "public hearing." S.C. Code Ann. § 59-40-70(B). The Act further provides that "[a]n approved charter application constitutes an agreement between the charter school and the sponsor," but a separate "contract between the charter school and the sponsor must be executed." S.C. Code Ann. § 59-40-70(B).

In this case, the District Board did not engage in any deliberation or discussion in public. Instead, all deliberation was conducted in Executive Session. (R. 8.) The relevant stated reason on the Agenda for entering Executive Session, among others unrelated to this matter, was "Charter School Contractual Matter pursuant to SC Code 30-4-70(a)(2)." (R. 8). The District Board went into Executive Session immediately after CCA's presentation and remained in Executive Session for, among other things "CCA Collegiate Academy Charter School Application Discussion pursuant to SC Code 30-4-70(a)(2)." The Executive session lasted a little over one hour, and the Board voted to deny the Application by a 6-1 vote without any further discussion. (R. 10-11). It was reversible error for the Board to conduct the discussion of the Charter School Application in Executive Session.

Section 30-4-70(a)(2) allows closed door meetings out of public view for discussion of "negotiations" incident to "proposed contractual arrangements." However, a charter school

application hearing does not involve "negotiations." The District Board members are obligated to approve the Application unless one of the statutory criteria allowing denial are met. As such, it was improper and a violation of FOIA to go into Executive Session to discuss whether to approve the Application.

Further, the Charter Act requires that the application be ruled on in a "public hearing," and further requires a ruling within 90 days. S.C. Code Ann. § 59-40-70(B). The time sensitivity and need for strict compliance, of course, relates to the funding and enrollment deadlines inherent in opening a new school. Because the District Board failed to provide CCA a proper public hearing and a ruling within ninety days, it should reverse the District Board.

Conclusion

This Court should reverse the ALC's decision and review the remainder of the arguments not decided by the ALC in regard to the denial of CCA's application by the District Board.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
Administrative Law Court

H.W. Funderburk, Jr., Administrative Law Judge

Case No. 19-ALJ-30-0131-AP

Compass Collegiate Academy, Inc., ... Appellant.

v.

Charleston County School District Board of Trustees,..... Respondent,

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Compass Collegiate Academy, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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January 2, 2020

The Honorable Jenny Abbott Kitchings
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Re: Compass Collegiate Academy, Inc. v. Charleston County School District
Case No. 19-ALJ-30-0131-AP
Appellate Case No. 2019-001809

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter an original and one copy of the Initial Brief of Appellant. Please file the original and return a clocked-in copy with our courier.

By copy of this letter, I am serving a copy of this to all parties.

Very truly yours,

Erik T. Norton

ETN:mk
Enclosure

cc: John M. Reagle, Esq.