

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.

RECORD ON APPEAL
VOLUME I OF IV

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

Docket No. 10-ALJ-30-0437-AP

ORDER

Appearances: Samuel M. Mokeba, Esquire
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Charles J. Boykin, Esquire
For Respondent

STATEMENT OF THE CASE

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. §§ 59-40-10 et seq., the South Carolina Charter Schools Act of 1996 ("Act"). The Midlands Math and Business Academy Charter School ("MMBA") filed an appeal with the ALC on May 21, 2010, seeking review of the decision of the Richland County School District One Board of Commissioners ("Board"), dated April 28, 2010. In its decision, the Board revoked MMBA's charter based upon material violations of its charter, as well as its failure to make reasonable progress towards student achievement objectives.

Following the notice of appeal, this court ruled on two preliminary motions: MMBA's motion to supplement the record and the Board's motion for a lift of the automatic stay imposed by ALC Rule 34. In an order dated September 8, 2010, the court granted the motion to supplement the record as to photographs of the school library, denied the same motion as to a request for a transcript, and denied the motion to lift the automatic stay.

The court heard oral argument at the ALC on December 21, 2010. After a review of the

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Record on Appeal and careful consideration of the parties' arguments, the court affirms the Board's decision to revoke MMBA's charter.

BACKGROUND

Procedural Background

MMBA submitted a charter application to the Richland School District One ("District") in 2003, seeking the District's sponsorship as required by S.C. Code Ann. § 59-40-10 et. seq. (Supp. 2009). The District approved the application, and MMBA began operating in August of 2004.

The District gave MMBA annual reviews and feedback in accordance with S.C. Code Ann. § 49-40-110 (Supp. 2009). At the conclusion of the 2006-2007 school year, the District became concerned with MMBA's low student performance on the Palmetto Achievement Challenge Test ("PACT"). The District instituted an action plan designed to assist MMBA in raising its scores.

In the spring of 2009, finding that the action plan had not satisfactorily improved performance, the Board implemented a comprehensive review of MMBA's compliance with its charter. The Board decided to withhold renewing the charter until the conclusion of its review. The review lasted from July through November of 2009. Based on the findings of the review, described *infra*, the Board voted on November 24, 2009 to revoke MMBA's charter.

MMBA requested a hearing to contest the revocation pursuant to S.C. Code Ann. § 59-40-110(F). The Board heard the matter on February 16, 2010. On March 23, 2010, the Board voted 7-0 to revoke the charter. This appeal followed.

Factual Background

In MMBA's charter application, it proposed to "provide students the opportunity to experience learning through an innovative, as well as a traditional, approach." (R. at 333). The application stated that MMBA would emphasize business and math. The application contained a number of specific provisions outlining MMBA's operations and its student achievement goals. The most pertinent provisions of the charter relating to the revocation as outlined in the Board's order are as follows:

- a. "All curriculum and projects will be based upon the South Carolina Standards for all disciplines" (MMBA Application, pg. 9)
- b. "The teachers of MMBA will provide instruction to students based on the South

Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level.” (MMBA Application, pg. 10)

- c. “In order to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time certified Special Education Teachers...” (MMBA Application, pg. 11)
- d. MMBA “[w]ill adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable.” (MMBA Application pg. 3, numbered 13 of 15)
- e. “All special education teachers will meet the certificate requirements of the No Child Left Behind Law.” (MMBA Application pg. 19)
- f. “The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year.” (MMBA Application pg. 27)
- g. “[T]he 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” and “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).”

(R. at 4).

During the Board’s comprehensive review in 2009, it determined that MMBA violated the above enumerated provisions of its charter. Specifically, the Board found that MMBA failed to use a curriculum aligned with South Carolina standards; that it failed to employ two special education teachers; that its teaching and administrative staff did not meet the qualifications outlined in the charter; that it failed to comply with federal and state individualized education program (IEP) progress report requirements; and that MMBA failed to meet make reasonable progress towards its student achievement goals as defined in its charter.

As to curriculum, the Board found that MMBA had not updated its chosen curriculum, the

"Core Knowledge" curriculum, with South Carolina science standards adopted in 2005 and English Language Arts (ELA) standards adopted in 2007. (R. at 8, 75-97). MMBA purchased the Core Knowledge curriculum from the Core Knowledge Foundation for use in its school, with the understanding that any curriculum used would meet the academic standards set by the state of South Carolina. As stated in the application, "Core Knowledge will be the base curriculum used as it promotes the SC Standards for Curriculum in all disciplines and spirals throughout the grades to cover basic information and skills that all people should know in order to be productive and literate in our American society." (R. at 338). The charter application goes on to say that "Core Knowledge provides a template in which educators in different states can correlate their state standards to topics covered in the Core Knowledge Sequence." (R. at 342).

The District found that MMBA's Core Knowledge curriculum was not aligned to state standards. (R. at 75-97). The District's report concluded that the English and Language Arts (ELA) curriculum was "... aligned with outdated (2006) S.C. ELA standards." (R. at 77). The report also concluded that there were "... no specific lesson plans and resources to address multiple gaps in the curriculum ...". *Id.* As to the Math curriculum, the 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 list of recommendations." As to the Science curriculum, the report's conclusion was that "[t]he Core Knowledge Science curriculum is not aligned with current standards. It is aligned with the 2000 standards." The District reported that MMBA was using the "current and correct" standards for Social Studies. At the hearing, MMBA submitted materials to the Board indicating that MMBA had taken steps to remedy the unaligned portions of its curriculum.

Regarding MMBA's failure to hire two special education teachers, MMBA did not assert to the Board (or to this court) that it ever employed two special education teachers. The charter stated that MMBA would employ two special education teachers. (R. at 11). MMBA hired only one special education teacher, and there is no evidence a second special education teacher was ever employed by MMBA.

As to the qualifications of MMBA's teachers and staff, the Board found that MMBA's special education teacher did not meet the requirements of the No Child Left Behind Act (NCLB) as required by the charter. (R. at 10, 352). The Board also found that MMBA's principal did not hold

the requisite South Carolina Teaching Certification or Education Administration Certification required by the charter. (R. at 13, 351).

With regard to the failures to meet reporting requirements under the Individuals with Disabilities Education Act (IDEA), the Board found "... numerous inconsistencies in providing student IEP progress reports and at least one situation where no progress report had been developed for a student whose IEP required progress reporting every 4.5 weeks." (R. at 14, 128-132).

As to MMBA's failure to make reasonable progress towards student achievement objectives, the Board considered PACT data from 2005 through 2008. The Board found that MMBA did not meet South Carolina's adequate yearly progress (AYP) goals as mandated by the charter. The Board did find that MMBA made AYP in 2009.

JURISDICTION AND STANDARD OF REVIEW

The Charter Schools Act provides for the creation and establishment of charter schools in South Carolina. Section 59-40-60 of the Act provides that "[a]n approved charter application constitutes an agreement, and the terms must be the terms of a contract between the charter school and the sponsor," that "[t]he contract between the charter school and the sponsor shall reflect all agreements regarding the release of the charter school from school district policies," and that "[a] material revision of the terms of the contract between the charter school and the approving board may be made only with the approval of both parties." See also James Academy of Excellence v. Dorchester County School District Two, 376 S.C. 293, 299-300, 657 S.E.2d 469, 472 (2008).

S.C. Code Ann. § 59-40-110(C) provides that a sponsor must revoke a school's charter if it determines that the charter school:

- (1) committed a material violation of the conditions, standards, or procedure 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 specifically exempted.

Section 59-40-110(A) requires the sponsor to annually evaluate the conditions outlined in

§ 59-40-110(C) and to use those evaluation results in making a determination for nonrenewal or revocation of the charter. If a sponsor decides to revoke a charter, it must notify the charter school's governing body in writing and in reasonable detail of the grounds for the proposed termination at least sixty days prior to termination of the charter. Section 59-40-110(D). A charter school's governing body may then request, in writing, a hearing before the sponsor within fourteen days of receipt of the notice of termination of the charter. Section 59-40-110(F). After receipt of a timely request for a hearing by a charter school governing body, the sponsor shall conduct a hearing prior to taking final action. Id. A school may appeal the final decision of the sponsor to revoke a charter to this court pursuant to § 59-40-90.

The ALC has authority to review the final order of the Board as an appeal under § 1-23-380(5), which provides for reversal only if its findings are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (e) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In applying the above defined scope of review, this court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005). This Court reviews the findings of the School Board to determine if its findings of fact or conclusions of law are based on substantial evidence contained in the whole record. The South Carolina Supreme Court in Porter v. South Carolina Public Service Commission, 333 S.C. 12, 20-21, 507 S.E.2d 328, 332 (1998) defined the substantial evidence standard of review:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence

supports an administrative agency's finding.

The Supreme Court found "[t]his deferential standard of review does not mean, however, the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." Id. at 21, 507 S.E.2d at 332. Further, the agency "must fully document its findings of fact and base its decision on reliable, probative, and substantial evidence on the whole record." Id. "An administrative body must make findings, which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings." Id. And if "material facts are in dispute, the administrative body must make specific, express findings of fact." Id.

DISCUSSION

MMBA raises the following issues on appeal:

1. The Board erred in revoking MMBA's charter based on the misalignment of its curriculum.
2. The Board erred in revoking MMBA's charter because MMBA did not materially violate the criteria for teacher and staff qualifications.
3. The Board erred in revoking MMBA's charter because MMBA did not materially violate criteria for special education reporting.
4. The Board erred in holding that MMBA did not make reasonable progress towards student achievement goals.
5. The Board violated its duty of good faith and fair dealing in revoking the charter.

The court will address each argument in turn, following a discussion of materiality.

Materiality

As a threshold matter, the parties have argued at length as to the meaning of "material" under the Charter Schools Act. The Act states that "[a] charter must be revoked or not renewed by the sponsor if it determines that the charter school committed a material violation of the conditions, standards, or procedures provided for in the charter application." S.C. Code Ann. § 59-40-110(C). Pursuant to statute, the charter constitutes a contract: "[a]n approved charter application constitutes an agreement, and the terms must be the terms of a contract between the charter school and the sponsor." S.C. Code § 59-40-60. The Supreme Court of South Carolina confirmed the contractual nature of a charter application in James Academy of Excellence v. Dorchester County School District

Two, 376 S.C. 293, 299-300, 657 S.E.2d 469, 472 (2008).

The charter, therefore, constitutes a contract and principles of contract law apply. The Board argues that “material” under the Act requires an inquiry into the reliance of the Board on representations made by the applicant in the charter application. MMBA argues that a sponsor may not revoke a charter unless the charter school has committed a breach “so substantial, fundamental, and material as to defeat the very object of the contract.” Appellant’s Br. at 10, quoting 17A Am. Jur. 2d *Contracts* § 557 (2004). MMBA also cites factors from the *Restatement (Second) of Contracts* § 241, (1981) to define “material.” The court rejects both parties’ interpretation of “material,” but holds that substantial evidence supports the Board’s finding of material violations.

The Board argues in favor of a test of materiality using an analysis akin to an action to void a contract based on a misrepresentation made by a party. Materiality in the context of misrepresentation and materiality in the context of a breach for nonperformance are different concepts. See, *Restatement (Second) of Contracts* § 162 n. c (directing the reader to view the contrast between the concepts of materiality in the context of misrepresentation versus that of nonperformance). Materiality in the context of a misrepresentation turns, among other things, on the reliance of the party seeking to void the contract based on a pre-contract assertion made by the other party. Id. Materiality in the context of a breach of contract depends on the gravity of the breach, as described *infra*. The Board’s test for materiality is inappropriate in the context of a material violation under the Charter School Act.

MMBA’s proposed interpretation of materiality under the Charter School’s Act is also inappropriate in that it defines materiality based on the rescission provisions of 17A Am. Jur. 2d *Contracts* § 557 (2004), (hereinafter § 557). That section reads:

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.

This section does not define materiality. Rather it provides that a party may rescind a contract for a breach that is “substantial, fundamental, *and* material as to defeat the very object of the contract.” (Emphasis added). Section 557 provides guidelines for circumstances under which a party may

terminate a contract unilaterally. To define the material violation clause of the Charter School Act's revocation provision based on the language of § 557 would be inconsistent with the meaning of the Charter School Act. The essence of § 557 is that a party may unilaterally terminate a contract if the other party commits a breach so substantial, fundamental and material as to defeat the purpose of the contract. The essence of S.C. Code § 59-40-110(C) is that a school's charter must be revoked if that school commits a material violation of its charter. To accept MMBA's position would require this court to find that a school's charter may only be revoked if the school commits a material violation of its contract so substantial and fundamental that it defeats the purpose of the charter. This court rejects this proposition as wholly inconsistent with the clear meaning of the Charter School Act. To the contrary, S.C. Code § 59-40-110(C) mandates revocation of a school's charter for any material breach of the charter.¹

While § 557 may not be used to define the material violation clause of the Charter School Act's revocation provision, the Act does deem school charters contracts, and contractual principles do apply. MMBA properly cited South Carolina case law and treatise definitions of materiality in the context of a breach of contract. In Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994), the Supreme Court of South Carolina adopted *Restatement (Second) of Contracts* § 241 (1981) as the pertinent test for determining whether a breach of a commercial lease is material. Section 241 states:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (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 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;

¹ Other state statutes allow for more sponsor discretion when a sponsor revokes a charter, which tends to emphasize the significance of the mandatory language of § 59-40-110(c). See, A.R.S. § 15-183 (Arkansas), ("The sponsor may deny the request for renewal if, in its judgment, the charter school has failed to complete the obligation of the contract or has failed to comply with this article."); 70 O.S. § 3-137 (Oklahoma) ("The sponsor may deny the request for renewal if it determines the charter school has failed to complete the obligations of the contract or comply with the provisions of the Oklahoma Charter Schools Act"); 24 P.S. § 17-1729-A (Pennsylvania) ("During the term of the charter or at the end of the term of the charter, the local board of school directors may choose to revoke or not to renew the charter based on any of the following...").

- (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.

While a commercial lease and a charter school application are substantively dissimilar, the application of the definition of materiality from § 241 to the charter school is appropriate, and is otherwise consistent with the holding in James Academy,² *supra*.

The Curriculum

MMBA argues that the Board erred in revoking its charter based on the unaligned portions of MMBA's curriculum. MMBA points to the fact that the Board "all but admitted" that the curriculum was aligned as of the 2009 hearing, and identifies subjective assessments in the Board's findings, such as the lack of rigor in the classroom and the inadequacy of library resources. MMBA argues that the Board's initial approval of the curriculum precludes the Board's subsequent holding that the curriculum did not align with state standards. Finally, MMBA argues that by meeting AYP in 2009, MMBA demonstrated that its curriculum was sufficient.

MMBA further argues that requirements of rigor and adequate library resources do not come from the charter and therefore amount to subjective determinations by the Board in violation of the foundational document. The court agrees that if the Board's findings rested merely on subjective assessments, the decisions would suffer from a lack of substantial evidence and be susceptible to reversal. However, in addition to finding that the curriculum lacked rigor³ and that the library lacked sufficient resources, the Board found that the curriculum was not properly aligned, a finding supported by substantial evidence. This court will sustain a school district's holding when a reasonable mind would accept the evidence supporting the decision. The District's comprehensive

² In James Academy, the Supreme Court of South Carolina held, in pertinent part, that a charter school applicant's failure to secure a facility meeting the terms of the charter constituted sufficient grounds for the sponsor to hold that the charter had not met the terms of the agreement and therefore was not authorized to operate a charter school. 376 S.C. 293, 299, 657 S.E.2d 469, 472. The Supreme Court stated, in reference to the discrepancy between the specifications of the building in the charter and the actual facility, "A material revision of the terms of the agreement requires the approval of both parties." *Id.* The Supreme Court did not discuss materiality under the statutory provisions for revisions of a charter or revocation of a charter.

³ The Board did not pull the word "rigor" out of thin air. The charter promises "to provide our students with a rigorous and challenging curriculum that would ensure mastery of basic skills and concepts." (R. at 341).

review of MMBA revealed evidence of a misaligned curriculum, and MMBA has not refuted the evidence supporting the Board's holding.

The charter states that Core Knowledge would promote the South Carolina standards for curriculum and serve as a template for correlating to state standards. (R. at 338, 342). By the very terms of the charter itself, the District agreed to sponsor MMBA with the understanding that the state standards would take precedence in the classroom. The District did not endorse MMBA's use of Core Knowledge as a stand-alone curriculum. The District merely approved the use of Core Knowledge as a template. The mere fact that ten other schools in South Carolina may use Core Knowledge as a template reveals nothing about curriculum alignment at those schools, and therefore this fact does not render the District's initial approval of MMBA's use of Core Knowledge and the District's subsequent disapproval of MMBA's alignment incongruent. MMBA indicates in its brief that it augmented its curriculum with additional materials; however, the District's review revealed inadequate alignment even when it considered supplemental materials in use. (R. at 211-231).

The argument that the District should not have approved Core Knowledge in the first place also misses the point because the overarching basis for the Board's finding of a lack of alignment stemmed from MMBA's failure to update its curriculum in tandem with updates in state standards. MMBA had a duty to update its curriculum to match state standards. MMBA's charter stated that the curriculum would adhere to and even surpass state standards. (R. at 383, 341, 342). The District's comprehensive 2009 review concluded that English and Language Arts (ELA) was aligned to 2006 standards, that Science was aligned with 2000 standards, and that Math was aligned with outdated standards. Therefore, at the time of the District's review, MMBA taught its students using the wrong standard in violation of its charter agreement.

Finally, the fact that MMBA made AYP in 2009 does not cure the error of using an unaligned curriculum from 2005 through 2008. The tangible recipients of the benefit of MMBA's promise of a properly aligned curriculum were its students who failed to receive instruction under a properly aligned curriculum from 2005 through 2008. As to the materiality of the breach, MMBA's failure to reach its performance goals from 2005 through 2008 demonstrates that students were "deprived of the benefit which (were) reasonably expected." The result might be different if MMBA had only used a misaligned curriculum for only a short period of time, with a reasonable chance of curing the

defect in curriculum by way of remedial instruction. However, the court can find no way for MMBA to cure three years of improperly aligned instruction.

Teacher and Staff Qualifications

MMBA argues that the Board erred in relying on evidence of the lack of MMBA's teacher and staff qualifications. Specifically, MMBA argues that its hiring of one Special Education teacher instead of the two Special Education teachers required by the charter was not a material violation of the charter. It also argues that the Board erred by finding that its one Special Education teacher, Ms. Elsie White, failed to meet the qualification requirements of the charter. Finally, it argues that the Board erred in finding that its principal, Gerald Jenkins did not meet the requirements of the charter.

MMBA explains in its brief that it only hired one Special Education teacher because it only met approximately half of its student population goals. The charter required two Special Education teachers in contemplation of student population of 200 students, but only enrolled 115. While this is a plausible explanation for MMBA's decision to hire only one Special Education teacher, it fails to address the Board's findings that the teacher failed to meet the qualification requirements of the charter.

As to the Special Education teacher's qualifications, MMBA argues that the Board erred in finding that she was not properly qualified in accordance with the charter. The charter application states that "all special education teachers will meet the certification requirements of the No Child Left Behind Law." (NCLB) (R. at 352). Section 6319(a) of the NCLB mandates that after 2002, all teachers must be "highly qualified" as defined by the Act. Under NCLB, a teacher who is "not new to the profession" is highly qualified if she 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) has 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 subjects.⁴ 20 U.S.C. § 7801(23). Alternatively, a teacher who is not new to the profession can hold a bachelor's degree and pass a high objective uniform State standard of evaluation (HOUSSE) to attain "highly qualified" status.

Id.

The record establishes that Ms. White has a master's degree in special education, and is certified as a special education instructor. There is no evidence that Ms. White is certified in the academic subjects in which she teaches or is otherwise highly qualified in accordance with the provisions of § 7801 of the NCLB. The charter indicates that she does teach academic subjects, providing that "[o]ne 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." (R. at 343). Because Ms. White actually teaches academic subjects, this precludes her from being classified as highly qualified under 34 C.F.R. § 300.18(b)(3), which relaxes the qualification criteria for a Special Education teacher who does not actually teach a core academic subject. MMBA has pointed to no evidence in the record indicating that Ms. White is highly qualified under NCLB and therefore under the charter.

As to the materiality of this violation, the charter, state law, and federal law all required the Special Education teacher to meet a technical definition of highly qualified. Teacher credentialing standards exist for the benefit of the students, so the benefit the school district and its students reasonably expected was to have a Special Education teacher who met the required standards. 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. Substantial evidence supports the Board's finding that the violation was material.

MMBA also argues that the board erred by holding that its director, Mr. Gerald Jenkins, did not hold the credentials required by the charter. The charter application held that the director "[m]ust hold current South Carolina Teaching Certification or Administration Certification; Trained in South Carolina's Teacher Evaluation Program (ADEPT); Experience as supervisor or department chairperson." (R. at 543). The Director does not hold a teaching or administration certification. MMBA explains this by pointing to language underneath the list of qualifications for the administrative and teaching staff, which reads, "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." Id. MMBA argues that the latter language

⁴ This is an intentionally general explanation of the definition of "highly qualified" under NCLB.

qualifies the first, and that Jenkins meets the requirements of the qualifying language. The court rejects this reading of the charter. The plain language of the charter requires the Director to have a teaching or administration certification. The latter language adds a requirement that either the Director or the Administrative Assistant must hold current South Carolina certification in administration. This is a separate requirement from the requirement that the Director have either a teaching or administration certification.

Special Education Reporting

MMBA argues that the Board erred in revoking MMBA's charter based on violations of special education reporting requirements. The Individuals with Disabilities Education Act (IDEA) requires that special education students and their parents receive progress reports on the student's individualized education program (IEP) goals at least as often as general education students receive progress reports, or as otherwise directed by the student's IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(II). The Board's review revealed "numerous inconsistencies in providing student IEP progress reports and at least one situation where no progress report had been developed for a student whose IEP required progress reporting every 4.5 weeks." (R. at 14, 128-132).

MMBA did not directly contest the inconsistencies. Rather, it submitted affidavits of the parents of special education students in which the parents stated they had "regularly received progress reports and updates regarding our child." (R. at 1114-1121). These affidavits do not disprove the Board's finding that MMBA's reporting did not comply with federal law. MMBA argues that the discrepancies cannot be material because the District did not notify MMBA about the failures earlier than at the comprehensive review of the school. MMBA states that the District should have raised the issue during the course of the statutorily required annual reviews. This court rejects this argument. The Board was not required to notify MMBA that violating the law would result in revocation of its charter, as this is state law. Section 59-40-110(C)(4) states that a sponsor must revoke a charter if it determines that the school has "violated any provision of law from which the charter school was not specifically exempted." Materiality plays no role in this statutory ground for revocation, which is plain and unequivocal.

Academic Progress

MMBA argues that the Board erred in holding that MMBA did not make reasonable progress

towards student achievement goals. Section 59-40-110(C) states that "A charter must be revoked or not renewed by the sponsor if it determines that the charter school ... failed to meet or make reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the charter application." In its order, the Board found that MMBA failed to meet performance objectives for five years. MMBA argues that the Board miscalculated its adequate yearly progress (AYP), and that it made reasonable progress towards its goals as outlined in the charter.

According to the charter, MMBA's entire student population as well as each specific subgroup would meet South Carolina's adequate yearly progress (AYP) goals. South Carolina has established a series of intermediate goals along the road to reaching 100 percent proficiency in all areas by 2014 as required by NCLB. (R. at 671); 20 U.S.C. § 6311(b)(2)(F).⁵ MMBA's charter school application adopted South Carolina's intermediate goals in accordance with S.C. Code Regs. § 43-601(III)(E).⁶ The intermediate goals under the charter were that:

At the end of the school year 2003-2004, the number of students in our school meeting standard will increase by 20.6 percent in ELA and 21.15 percent 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 percent of students will be meeting standard (scoring proficient on PACT).

(R. at 673). The percentages identified by the board mirror South Carolina's AYP intermediate goals for elementary schools, as shown by a chart in the record. (R. at 671).

The Board found that from 2005 through 2008, MMBA's did not make adequate progress as defined in the charter. Specifically, it found that MMBA's elementary students meeting standard increased by 8.5 percent in ELA and 12.7 percent in math, and that MMBA's middle school students increased by 7.7 percent in ELA and .2 percent in math. (R. at 16, 102-03).

MMBA argues on appeal that the Board miscalculated MMBA's student progress

⁵ "Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001-2002 school year, all students in each group described in subparagraph (C)(v) will meet or exceed the State's proficient level of academic achievement on the State assessments under paragraph (3)."

⁶ "The application must include a description of the charter school's plan for evaluating pupil achievement and progress toward accomplishment of the school's achievement standards. ... The timeline must identify the expected yearly progress toward meeting the school's long-term performance goals. The expected yearly progress must meet

towards reaching the achievement goals outlined in the charter application. This argument has two components: that the Board has used an incorrect definition of meeting standard, and that the Board incorrectly calculated percent increase.

The Board defined meeting the standard as scoring at least proficient on the PACT. The PACT, no longer in use, had four categories into which students are scored for purposes of determining the student's mastery of a particular academic area. The four levels are below basic, basic, proficient, and advanced. According to the Board, any student scoring proficient or advanced has met the standard within its meaning in the charter. According to MMBA, any student scoring at least basic has met the standard within its meaning in the charter. MMBA points to language on the South Carolina Department of Education's website describing the performance levels of the PACT. The website defines those levels as follows:

Advanced: The student exceeded expectations for student performance based on the curriculum standards.

Proficient: The student has met expectations for student performance based on the curriculum standards.

Basic: The student has met minimum expectations for student performance based on the curriculum standards.

Below Basic: The student has not met minimum expectations for student performance based on the curriculum standards.⁷

MMBA argues that because the definition of basic indicates that the student has met minimum expectations, its students who have scored basic have met standard. However, the charter explicitly states that meeting standard means scoring proficient on PACT. (R. at 673). The language of the charter application is clear, and the Board correctly applied it in reviewing MMBA's student scores. "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 494 579 S.E.2d 132, 134 (2003).

Next, MMBA argues that the Board miscalculated the percent increase in students

or exceed the expectation of adequate yearly progress as established in the No Child Left Behind Act."

⁷ <http://ed.sc.gov/agency/accountability/assessment/old/assessment/pact/> (last visited Feb. 2, 2011).

meeting standard within its definition under the charter. A proper calculation of the percent increase in students meeting standard, according to MMBA, would require considering the percent by which the percentage itself increases. Using this approach, a change in the number of students meeting standard from ten to twenty percent would constitute a 100 percent increase in the students meeting standard. However, MMBA's definition of percent increase does not conform to the plain meaning of percent increase as described by the charter. The charter adopts South Carolina's intermediate AYP goals. Those goals, and MMBA's charter, aspire to 100 percent proficiency by 2014. The intermediate goals are uniform increases towards the 100 percent goal, calculated by subtracting a given year's data from the previous year's data in order to arrive at the percent increase. (R. at 671). The Board applied this approach which is congruent with the language of the charter.

MMBA argues that even if the court accepts the Board's calculation of MMBA's progress towards its student achievement goals, the court should still reverse the Board's decision because MMBA made "reasonable progress" towards those goals. MMBA cites a previous ALC decision, Lee County School Board of Trustees v. Mary L. Dinkins Higher Learning Academy, No. 07-ALJ-30-0597 (S.C. Admin Law Ct. August 14, 2008) (Hereinafter MLD) for the proposition that "reasonable progress" may mean something less than the progress described in the charter. In MLD, the school board revoked the school's charter after the school failed to make AYP in the school's first year. The court held that "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." Id. Without making a definitive statement on the soundness of the analysis cited from the MLD case, this court finds sufficient evidence in the record to support the Board's finding that MMBA failed to make even reasonable progress towards its student achievement goals. Using the correct definition of meeting standard and percent increase, MMBA fell short of meeting its intermediate goals. MMBA's students meeting standard in ELA increased by 8.5 percent for elementary students and 7.7 percent for middle school students, in both cases less than half the increase required under the charter, which set the three-year step increase at 20.6 percent. Progress in Math fared no better. While MMBA made marginal progress during its existence, it never came anywhere close to meeting the intermediate progress goals outlined in

the charter. Unlike the facts in MLD, this not a case in which the school district revoked a school's charter after one year of operation, or where the school missed its goal by one or two percentage points.

MMBA states that it made AYP in 2009, and therefore the Board should not have revoked its charter. MMBA asserted that it was the only middle school in the district to make AYP, an assertion the Board calls misleading. The Board contended that the middle school failed to make AYP in 2009 and that MMBA's middle school students' scores were inflated due to higher elementary scores, which the Board contends did meet AYP. The Board in its order indicated that increases in MMBA's 2009 scores were due in part to the change from PACT to Palmetto Assessment of State Standards (PASS), a change that resulted in inflated scores across the state due to different assessment tools and less achievement categories. The Board also argued that MMBA's meeting AYP in 2009 had more to do with its low basis from previous years than actual student achievement. The Board characterizes MMBA's 2009 AYP success as too little, too late.

The paucity of evidence in the record supporting the Board's findings regarding MMBA's 2009 performance constrains this court's review of those findings. The record contains no 2009 data. The Board makes some concessions regarding MMBA's elementary school making AYP, but the record is otherwise devoid of reports or comparative analysis of the 2009 performance. This court cannot conclude that substantial evidence supports the Board's findings regarding MMBA's 2009 performance. Nevertheless, while there is some evidence that MMBA's 2009 performance improved, substantial evidence supports the Board's conclusion that MMBA failed to make reasonable progress towards its academic goals from 2005 – 2008, requiring revocation of MMBA's charter pursuant to the act

Good faith and fair dealing

MMBA's final argument is that the Board violated its duty of good faith and fair dealing when it revoked the charter. The record does not support this assertion. The evidence establishes that the District took steps to maintain the charter relationship, working with MMBA to help it serve its students. The District created an action plan to help MMBA reach its goals. The District gave MMBA five years, an action plan, and a comprehensive review before taking steps to revoke the

charter as required by the statute. The weight of the evidence does not support a finding that the District or the Board violated the duty of good faith and fair dealing in revoking MMBA's charter.

Conclusion

Having reviewed the entire record, and listened carefully to the arguments presented by the parties, the court finds that there is substantial evidence in the record supporting the Board's final determination and affirms the Board's decision.

ORDER

Based upon the foregoing, it is hereby

ORDERED that the School Board's decision dated April 27, 2010 is **AFFIRMED**.

AND IT IS SO ORDERED.

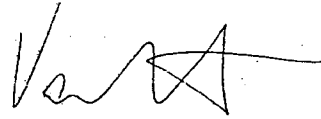


January 25, 2012
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE

I, R. Vance Eaton, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



R. Vance Eaton
Law Clerk

January 25, 2012
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy,
Charter School,

Appellant,

v.

Richland County School District 1 Board of
Commissioners,

Respondent.

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

NOTICE OF ORAL ARGUMENT

IT IS HEREBY ORDERED that this action will be heard on the appeal before the Honorable S. Phillip Lenski, Administrative Law Judge beginning at 10:00 a.m., Tuesday, December 21, 2010, at the Administrative Law Court (ALC or court), Edgar A. Brown Building, Second Floor, 1205 Pendleton Street, Columbia, South Carolina.

1. This hearing will be conducted in accordance with the Rules of Procedure of the Administrative Law Court, a copy of which is available from the Clerk of the Court.
2. Unless otherwise determined by the Administrative Law Judge, the hearing will proceed as follows:
 - a. Call of the case;
 - b. Oral statement by appealing party, not to exceed fifteen (15) minutes;
 - c. Oral statement by responding party, not to exceed fifteen (15) minutes;
 - d. Oral reply statement by appealing party, not to exceed five (5) minutes;
3. The hearing is appellate in nature, and will be based on the record before the court. No witnesses or new evidence will be permitted.
4. A party may represent himself or may be represented by an attorney at the hearing. An attorney representing a party must file a Notice of Appearance within ten (10) days of service of this Notice, unless previously filed with the court.
5. TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

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SC ADMIN. LAW COURT

- a. A finding that the party who fails to appear does not object to the relief of which notice has been given;
 - b. Dismissal of the case or striking of the pleading of the party who fails to appear;
 - c. Exclusion of evidence proffered by the party who fails to appear; or
 - d. Such other rulings as are deemed appropriate by the Administrative Law Judge.
6. **Continuances will be granted only when extraordinary circumstances exist.** Parties may request continuances no later than 24 hours prior to the scheduled hearing date.
8. In case of settlement or dismissal, failure of the parties to inform the court prior to the scheduled hearing that the hearing is not necessary may result in imposition of court costs and Court Reporter fees against the parties.

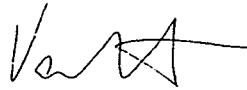


S. Phillip Lenski
Administrative Law Judge

November 24, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, R. Vance Eaton, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



R. Vance Eaton
Law Clerk

November 24, 2010
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy,
Charter School,

Appellant,

v.

Richland County School District 1 Board of
Commissioners,

Respondent.

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

ORDER

This matter came before this Court upon motions filed by the parties to this action. On July 9, 2010, Appellant Midlands Math and Business Academy Charter School (hereinafter MMBA) filed a Motion to Supplement Record requesting that this Court order the Respondent Richland County School District 1 Board of Commissioners (hereinafter the Board) to prepare a transcript of the Board's February 16, 2010 hearing, which is the subject of this appeal. Additionally, MMBA requested that this Court supplement the record on appeal with five photographs of what appears to be the library at MMBA. Additionally, on July 9, 2010, the Board filed a Motion For Relief from the Automatic Stay imposed by ALC Rule 34. This Court heard oral argument on the motions on August 10, 2010. Upon careful consideration of the arguments and the memoranda submitted by the parties, I order that: (1) MMGA's Motion to Supplement the Record with a transcript is denied, (2) MMBA's Motion to Supplement the record with the photographs is granted; and (3) the Board's Motion for Relief from the Automatic Stay is denied.

BACKGROUND

MMBA is a charter school located in the Richland County School District One. It is an elementary and middle school hybrid serving grades four through eight. The Board granted MMBA a charter, and MMBA commenced instruction during the 2004-2005 school year. On December 11, 2009, the Board notified MMBA in writing that it intended to revoke the school's charter, effective on the last day of the 2009-2010 school year. The reasons for the Board's action stated in the

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notification were that the school had committed numerous violations of the conditions, standards, and procedures provided in its charter application and that it had failed to meet reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the school's application. The Board heard the matter on February 16, 2010, and at its conclusion voted to revoke MMBA's charter. MMBA's appeal to this Court timely followed.

DISCUSSION

A. Motion to Order Transcript and to Supplement the Record

Pursuant to ALC Rule 36(B), the Record on Appeal consists of the following:

- (1) All pleadings, motions, and intermediate rulings;
- (2) All evidence received or considered;
- (3) A statement of matters judicially noticed;
- (4) All proffers of proof of excluded evidence;
- (5) The final order or decision which is subject to review;
- (6) The transcript of the testimony taken during the proceeding.

Testimony is "(e)vidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is particular kind of evidence that comes to (a) tribunal through live witnesses speaking under oath or affirmation in (the) presence of (a) tribunal, judicial, or quasi-judicial." Black's Law Dictionary, 5th Edition, 1979.

MMBA seeks an order from this Court directing the Board to prepare a transcript of the Board's February 16, 2010 hearing and for an order supplementing the record on appeal with five photographs of what appears to be the library at MMBA. Regarding the transcript, it is undisputed that there was no recording made of the February 16, 2010 Board hearing. Furthermore, there appears to be no disagreement that the proceedings before the Board consisted of presentations by attorneys for MMBA and the Board, followed by public comment and questions by the Board. There were no sworn statements given by any party or witness, and aside from the presentations, public comment, and Board questions, the record consisted solely of documents submitted to the Board by the parties. Therefore, there was no testimony taken at the hearing.

The South Carolina Charter Schools Act, S.C. Code Ann. § 59-40-110 et seq. (Supp. 2009), does not require that hearings pertaining to the nonrenewal or revocation of a school's charter be

recorded or transcribed. See, S.C. Code Ann. 59-40-110(F) (Supp. 2009) (affording a charter school the right to a hearing before the school's governing body upon notification by the body that its charter is not being renewed or that it is being revoked; however, there is no legislative requirement that the hearing be recorded or transcribed). In the absence of such a requirement, the Board acted within its discretion when it neither recorded nor transcribed the February 16, 2010 hearing. See, Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (2001).

Additionally, nothing in the Rules of Procedure for the Administrative Law Court requires that agency hearings be recorded or transcribed. MMBA cites to ALC Rules 32, 35 and 36 as authority for this Court to compel the Board to produce a transcript of the February 16, 2010 hearing. However, reference to ALC Rule 32 is inappropriate, as ALC Rules 25 through 32 refer to contested case hearings before the Administrative Law Court, and not to hearings before other agencies. Furthermore, ALC Rule 35 only mandates that the party filing the appeal of a final agency decision with the Administrative Law Court must order the transcript. ALC Rule 36(B)(6) includes "the transcript of the testimony taken during the (contested case) proceeding" in the Record on Appeal. Nothing in the ALC rules compels an agency such as the Board to record and transcribe all hearings, and insofar as ALC Rule 36(B)(6) includes the transcript of testimony taken during a proceeding, this does not address nontestimonial communication made at a contested case proceeding. Here, there is no suggestion that the hearing included testimony, and therefore, Rule 36(B)(6) is inapplicable.

MMBA also requests that five photographs of its library be supplemented into the Record on Appeal. The Board objects, asserting that MMBA fails to establish the purpose or relevancy of the photographs. However, at oral argument on this motion, MMBA's counsel informed the Court that while the photographs were not part of MMBA's original submission to the Board, they had become relevant during the Board's questioning of MMBA, were offered to the Board by MMBA's counsel to address the Board's particular question, and the Board received them at that time. Counsel for the Board did not dispute this assertion.¹ It therefore appears that the photographs at issue were made a

¹ The Board's counsel at the motion hearing was not present at the February 16, 2010 hearing and did not know whether the photographs had been offered to and received by the Board. The lack of a transcript in this matter prevents the Court from determining when the photographs were offered during the hearing, or for what purpose. However, it is apparent that the Board did receive and consider the five photographs during the hearing.

part of the record during the February 16, 2010 hearing and should have been included in the Record on Appeal.

B. Motion for Relief from Automatic Stay

The Board seeks relief from the automatic stay of its decision imposed by ALC Rule 34. ALC Rule 34 provides:

The filing of an appeal from the final decision of an agency shall stay the final decision of that agency unless the effect of filing an appeal is otherwise established by statute, the Administrative Procedures Act notwithstanding; or the administrative law judge has entered an order regarding the effect of the proceedings in the agency. Notwithstanding the foregoing, upon the filing of an appeal from the final decision of an agency, any party may apply to the administrative law judge for an order regarding the effect of the appeal on the agency decision.

This rule allows the court to lift or alter the effect of the stay in this case, but it does not identify criteria or a legal test for the court to employ when determining whether to do so. Provisions for granting and lifting stays in other situations have more developed parameters than ALC Rule 34. For example, in contested administrative cases, an administrative law judge “shall lift the stay for good cause shown or if no irreparable harm will occur.” S.C. Code § 1-23-600(H)(4) (Supp. 1988). Prior to the existence of a statutory standard for lifting a stay in contested cases, the Administrative Law Court employed a “balancing of the hardships” test. See, Slovic v. S.C. Dept. of Health & Env’tl Control, No. 99-ALJ-07-0196-CC, 1999 WL 988662 (S.C. Admin. Law Ct. Oct. 7, 1999); Greenville Metro Treatment Ctr. v. S.C. Dept. of Health & Env’tl Control, No. 97-ALJ-07-0143-CC, 1998 WL 166271 (S.C. Admin. Law Ct. Mar. 27, 1998); Bishop v. S.C. Dept. of Health & Env’tl Control, No. 95-ALJ-07-0513-CC, 1995 WL 930057 (S.C. Admin. Law Ct. Nov. 16, 1995). In civil matters, Rule 241, SCACR provides that a court “should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot” in determining whether to lift an automatic stay imposed pursuant to that rule of civil procedure. Rule 241(c)(2), SCACR. Rule 241 is a self-described rule of general application and courts will not lift the automatic stay imposed by the rule unless an exception applies. See, State v. Cooper, 342 S.C. 389, 399, 536 S.E.2d 870, 876 (2000). Similarly, the imposition of an equitable stay requires balancing hardships. “An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination,

the court must weigh competing interests and maintain an even balance.” Merritt Bros., Inc. v. Marine Midland Realty Credit Corp., 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (internal citations omitted).

The stay provisions described above do not directly apply to ALC Rule 34, however they are helpful in that they illustrate a recurring theme: when faced with motions to impose or lift stays, courts consider the harm to the parties and the potential for mootness of issues should the court take no action. In its supporting brief, the Board equates its motion for lifting the automatic stay to a motion for a preliminary injunction and sets forth the legal test for granting a preliminary injunction as the test that this court should employ in determining whether to lift the automatic stay. MMBA likewise argues against lifting the stay using the same preliminary injunction criteria. While neither party has cited authority for the proposition that this court should analogize the lifting of ALC Rule 34’s automatic stay to ordering a preliminary injunction, the court recognizes the logic in doing so.

A court may grant a preliminary injunction if the party seeking the injunction has established: 1) that the party would suffer irreparable harm if the injunction is not granted; 2) the party will likely succeed on the merits of the litigation; and 3) that the party seeking the injunction has no adequate remedy at law. Levine v. Spartanburg Reg’l. Serv. Dist., Inc., 626 S.E.2d 38 (Ct. App. 2005). “Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief.” Peek v. Spartanburg Reg’l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36-37 (Ct. App. 2005).

In so balancing the equities, this court finds that the Board has not satisfied the first element of the preliminary injunction test in that it has failed to demonstrate that it would suffer irreparable harm if the automatic stay is not lifted. The evidence the Board offered to support its irreparable harm argument is hardship that MMBA students might face if they are forced to transfer from MMBA to another school in the middle of the school year if the Board ultimately prevails in its decision to revoke MMBA’s charter. While transitioning from one school to another in the middle of an academic year can be unsettling on a student, this court is not prepared to find that such a transition would create irreparable harm on the students. Additionally, the potential irreparable harm to the argument is further diminished in light of the fact that the Board has repeatedly chosen not to

institute procedures to revoke MMBA's charter for at least five years, despite having determined at each annual review that the school has committed violations of the conditions, standards, and procedures provided in MMBA's charter, and despite having the authority to do so pursuant to S.C. Code Ann. § 59-40-110(C). On the other hand, lifting the stay imposed by ALC Rule 34 in this case would cause the District's revocation of MMBA's charter to take effect immediately, would cause the cessation of MMBA's operations, and would close the school. Under this analysis, and balancing the equities, MMBA is more entitled to the benefit of the stay automatically imposed by ALC Rule 34 than the Board is entitled to the extraordinary relief that lifting the stay would grant in this case. In finding that the Board has failed to show irreparable harm and that the equities favor the Board, this court declines to consider the second and third elements of the preliminary injunction test. Without expressly adopting the preliminary injunction test as the applicable standard for determining whether to lift or alter an automatic stay under ALC Rule 34, this Court finds that the Board's motion must fail.

This Court also finds persuasive the case of Lee County School District Board v. Mary L. Dinkins Higher Learning Academy, 07-ALJ-30-0597-AP (S.C. Admin. Law Ct. Dec. 28, 2007). That case dealt with a motion to lift the automatic stay of a reversal of the revocation of a school's charter. In Lee County the administrative law judge lifted the automatic stay, thereby allowing the school to continue operating during the pendency of the appeal. The order did not identify the appropriate test to use under ALC Rule 34, but its reasoning is applicable here. By lifting the automatic stay of the Board of Education's reversal of the Lee County School District's revocation of Mary L. Dinkins Higher Learning Academy (hereinafter MLD), the administrative law judge permitted MLD to continue operating during the litigation. The ALC's order referenced two prior orders in related litigation, one from a South Carolina Circuit Court and one from the Supreme Court of South Carolina, both of which had the exact same effect on MLD by allowing the school to continue operating during the pending appeal. Similarly, I find the reasoning of the ALC order, the circuit court order, and the Supreme Court order in the MLD cases persuasive. The fact that the MLB litigation included two separate actions is immaterial. Rather, the determinative consideration was ensuring the viability of the school during the pendency of the appeal. The same consideration drives this court to deny the motion to lift the stay of the Board's decision in this case.

Accordingly, it is

ORDERED that MMBA's Motion to Supplement the Record with a transcript is **DENIED**.

ORDERED that MMBA's Motion to Supplement the record with photographs is
GRANTED.

ORDERED that the Board's Motion for Relief from the Automatic Stay is **DENIED**.

IT IS FURTHER ORDERED that the MMBA must file its appellate brief with the Court no later than 5:00 p.m. on Monday, October 11, 2010. The Board must file its responsive brief with the Court no later than 30 days after the date of filing of the appellant's brief. MMBA may file its reply brief with the Court no later than 10 days after the date of filing of the Board's responsive brief.

IT IS SO ORDERED.

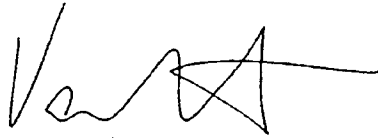


S. Phillip Lenski
Administrative Law Judge

September 8, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, R. Vance Eaton, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in black ink, appearing to read 'R. Vance Eaton', written over a horizontal line.

R. Vance Eaton
Law Clerk

September 8, 2010
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District 1 Board of
Commissioners,

Respondent.

Docket No. 10-ALJ-30-0437-AP

NOTICE OF MOTION HEARING

This matter is before the Administrative Law Court (ALC or Court) pursuant to the appeal filed by Appellant Midlands Math and Business Academy Charter School (Appellant) on May 21, 2010. On July 9, 2010, Appellant filed a Motion to Supplement Record and requested the following: 1) that the Court compel Respondent Richland County School District 1 Board of Commissioners (Respondent) to turn over the transcript of the February 16, 2009 hearing; (2) that the record be supplemented with copies of photographs attached to Appellant's motion; and (3) that the Court toll Appellant's time on appeal until the record is supplemented as requested in Appellant's motion. On July 9, 2010, Respondent filed a Motion for Relief from the Automatic Stay. Accordingly, it is hereby

ORDERED that a hearing on the above-referenced motions will begin before the undersigned Judge at 10:00 a.m. on Tuesday, August 10, 2010, at the offices of the South Carolina Administrative Law Court, 1205 Pendleton Street, Edgar A. Brown Building, Second Floor, Suite 224, Columbia, South Carolina. This hearing will be conducted in accordance with the Rules of Procedure for the Administrative Law Court, a copy of which is available from the Clerk of Court or on the Court's website, www.scalc.net. It is further

ORDERED that the briefing schedule in this matter shall be held in abeyance pending a decision regarding the Motion to Supplement Record and Motion for Relief from the Automatic Stay.

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July 26, 2010

IT IS SO ORDERED.

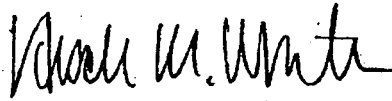


July 26, 2010
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Nicole M. Wooten, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Nicole M. Wooten
Staff Attorney

July 26, 2010
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy,

Appellant,

v.

Richland County School District I Board of
Commissioners.

Respondent.

Docket No. 10-ALJ-30-0437-AP

**ORDER GOVERNING
PROCEDURE**

This appeal is before the Administrative Law Court (ALC or Court) pursuant to the Notice of Appeal filed by Midlands Math and Business Academy (Appellant) on May 21, 2010. The purpose of this Order is to state the dates and procedures to follow in presenting this matter. Failure to comply with this Order may result in dismissal of the appeal in a fashion contrary to the position of the party failing to comply.

I. Record on Appeal and Transcript

Pursuant to ALC Rule 35, the Appellant, as the party filing the Notice of Appeal, is responsible for ordering a transcript of the proceedings below. Pursuant to ALC Rule 36(A), Respondent must file the original and two (2) copies of the Record on Appeal with the undersigned Judge and serve a copy on all parties to the appeal within forty-five (45) days of the date of the Notice of Assignment. The Notice of Assignment was issued on June 8, 2010. Further, the Record on Appeal must be prepared as required by ALC Rule 36.¹

II. Briefs

Pursuant to ALC Rule 37, the Appellant shall file with the undersigned Judge and serve on the opposing parties a Brief of Appellant within thirty (30) days after the Record on Appeal is filed. The Respondent must file a Brief of Respondent within thirty (30) days after the date the Brief of

¹ See The ALC's Rules of Procedure, effective April 30, 2009.

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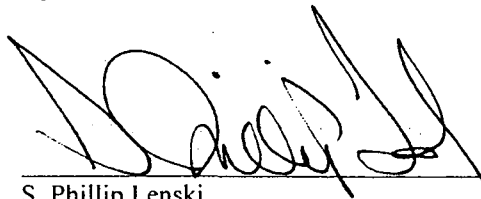
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Appellant is filed. The Appellant is not required but may file a Reply Brief within ten (10) days after the Brief of Respondent is filed. All documents shall be filed directly with Judge Kittrell's office. Furthermore, ALC Rule 37(A) states that the parties shall file an original and two (2) copies of their briefs. The briefs must be prepared as required by ALC Rule 37.

III. Presentation of the Case by the Parties

After the Record on Appeal and all Briefs have been received, the parties will be notified of the date, time, and place of the hearing of the case. The Notice of Oral Argument will be provided at least twenty (20) days in advance of the hearing date.

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

June 9, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served in a copy of the above entitled action upon all parties to this cause by depositing a copy thereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party, test or their attorney(s).

This 9th day of June, 2010
By: [Signature]
Staff Counsel

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School.

Appellant,

vs.

Richland County School District 1 Board
of Commissioners,

Respondent.

NOTICE OF ASSIGNMENT
(Appeal)

DOCKET NO. 10-ALJ-30-0437-AP

NOTICE IS GIVEN that a notice of appeal seeking review of agency action was filed on May 21, 2010. In accordance with S.C. Code Ann. § 1-23-570 (Supp. 2009), the **Honorable S. Phillip Lenski**, Administrative Law Judge, has been assigned to preside in this appeal. The Administrative Law Judge may be contacted by mail at 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201, and by telephone at (803) 734-0550.

Rules of Procedure governing matters before the Court may be obtained from the Clerk of Court or on the Court's website, www.scalc.net.

The parties are directed to the relevant provisions of the Rules of Procedure for deadlines for perfecting the appeal and briefing the issues on appeal.

This the eighth day of June, 2010.

Ralph King Anderson, III
Chief Administrative Law Judge

By: _____

Jana E. Shealy
Jana E. Shealy, Clerk
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

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Case

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Cash Receipt

Number: CR1006-0148
Till: ALC Till
Posted: Yes

Dated: 06-07-2010
Total Paid: \$100.00

Void Information

Void Method: Voided: No
Void Posted: No
Void Explanation:

Generate

Cash Receipt

Receipts (1)					
Date	Number	Item Type	Customer	Paid	
06-07-2010	NV1006-0147	Case Filing Fee - \$100	Midlands Math and Business Academy Charter School	100.00	

Payments (1)			
Payment Method	Reference	Paid	
Check	Baker, Ravenel & Bender	100.00	

THE STATE OF SOUTH CAROLINA

Before the South Carolina Administrative Law Court

APPEAL RICHLAND COUNTY DISTRICT ONE BOARD OF SCHOOL
COMMISSIONERS

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

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

v.

Richland County School District 1 Board of Commissioners, ... Respondents.

BRIEF OF APPELLANT

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OCT 11 2010

SC ADMIN. LAW COURT

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STATEMENT OF ISSUES ON APPEAL

- I. Richland County School District One Board of Commissioners (the Board) erred in revoking MMBA's charter because its decision (1) violates the Charter School Act's statutory provisions that require a material breach occur; (2) is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and/or (3) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record
 - a. The Board erred in revoking MMBA's charter because MMBA did not materially breach or materially violate the curriculum and standards set out in its charter.
 - b. The Board erred in revoking MMBA's charter because MMBA did not materially breach or materially violate criteria for teacher qualification set out in its charter
 - c. The Board erred in revoking MMBA's charter because MMBA did not materially breach or materially violate criteria for special education reporting as set out in its charter
- II. The Board erred in revoking MMBA's charter because the District's assertion that MMBA has failed to make reasonable progress is erroneous in light if the substantial evidence in the record as a whole

STANDARD OF REVIEW

The Administrative Law Court reviews the order of the District Board of Education under the Administrative Procedures Act (APA), which provides for reversal only if its findings are:

- a) in violation of constitutional or statutory provisions;
- b) in excess of the statutory authority of the agency;
- c) made upon unlawful procedure;
- d) affected by other 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. § 1-23-380(A)(5) (Supp. 2009).

When reviewing decisions of administrative agencies, the applicable standard of review is the substantial evidence rule. *S.C. Coastal Conservation League v. S.C. Dept. of*

Health & Envtl. Control, 380 S.C. 349, 360-61, 669 S.E.2d 899, 905 (Ct. App. 2008).

The reviewing court may reverse or modify the decision when an appellant's substantive rights have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law. *SGM-Moonglo, Inc. v. S.C. Dept. of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008). Substantial evidence is evidence that, when viewing the record as a whole, would allow reasonable minds to reach the same conclusion the ALC arrived at in justifying its decision. *Coastal Conservation League*, 380 S.C. at 362, 669 S.E.2d at 905.

STATEMENT OF THE CASE

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 115 students, with its highest number being 139 students.

As required by section 59-40-110(A) of the South Carolina Code, during each year of its existence the school has prepared an annual report on the state of the school and presented it to the 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. At the conclusion of this process, the final report is presented to the Board for approval. Section 59-40-110 of the Charter

December 28, 2009, MMBA timely filed a request for a hearing with the District pursuant to section 59-40-110(F) (Supp. 2009).

In its 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. (R.Vol.I; p.63-64).

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. (R.Vol.I; p.19;24-25). The Board maintained it based MMBA's charter revocation on numerous material violations of the conditions, standards, and procedures provided in its charter application, toward pupil achievement standards. (R.Vol.I; p.24-25). 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. (R.Vol.I; p.3-16).

In response to the Board's decision to revoke its charter, MMBA filed this appeal with the ALC. MMBA received a notice of assignment from the ALC indicating Judge Lenski will hear the appeal. The District then filed a motion to curtail MMBA funding while the revocation appeal process is on going. This court rejected that motion. MMBA submits the following arguments herein on appeal.

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. 2009). 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. 2009) (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. 2009). 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. 2009). The Act is explicit in its use of contractual language to describe the relationship between a sponsor and a charter school. *See* § 59-40-60(A).

Accordingly, we highlight several common law contract principles that apply in South Carolina. First, 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). Second, 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); *see also* Restatement (Second) of Contracts § 241 (1981). South Carolina common law falls in line with the above-quoted authorities. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994) (adopting Restatement (Second) of Contracts § 241); *see also 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).

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). The Board's order indicates that it based MMBA's revocation on the first and second subsections of 59-40-110(C) as set forth above.

ARGUMENTS ON APPEAL

I. The Board's decision revoking MMBA's Charter is erroneous because it (1) violates the Charter School Act's statutory provisions that require a material breach occur; (2) is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and/or (3) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record

The Board's order dated April 27, 2010, indicates that the District's decision not to renew MMBA's charter was based in part on alleged *material* violations related to curriculum and standards, special education teachers, teacher qualifications, administrative staff qualifications, and state individualized education programs (IEP) progress report requirements. These alleged violations must be analyzed in light of the definition of a "material" breach of a contract, which is "a breach . . . so fundamental and

their subjective nature could not constitute a *material* breach. By claiming that there are insufficient support materials, the District admits there are support materials at the school, just not sufficient; it admits there are resources to support a literacy program, but not adequate resources to support a strong literacy program; it admits there is a library but the library is not comprehensive enough.

The Board revoked MMBA's charter based on the District's subjective observations on goals that are not in place. Specifically, the District fails to define the criteria used for measuring these objectives. Nowhere in MMBA's charter, the Act, or the applicable regulations⁴ is there a definition or description regarding what constitutes: "rigorous" school curriculum (especially when teaching the state standards); "adequate" number of print resources to support a strong literacy program; "sufficient" support materials; a "comprehensive" library for a middle school; or an example of "outdated" resources. The District is therefore making an overreaching subjective finding that has no basis in the charter or the law.

In revoking MMBA's charter, the District completely disregarded MMBA's charter as the source that sets out goals and objectives. The District in its order created objectives for MMBA to meet and then, by its own definition, found MMBA failed to meet certain standards. Therefore, we request the ALC find the Board's decision to revoke MMBA's charter was arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion and a violation of the Act.

Further still, the District's Order is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In response to the Board's request to explain how its curriculum is aligned to the state standards, MMBA took great

⁴ S.C. Code Regs. § 43-601 (Supp. 2009).

pains to demonstrate said alignment. Those efforts culminated in the production of the document forwarded to the District on November 10, 2009, entitled Curriculum and Instruction Feedback Comprehensive Plan. (R.Vol.III;p.929-1183) The District's order all but consents that the documents indicate that the curriculum is aligned with state standards. (R.Vol.I;p.11)

Additionally, the progress made by the school towards its goal of attaining Annual Yearly Progress (AYP) is a further indication that MMBA's curriculum is aligned to state standards. In MMBA's first year of participation in the yearly "state report card," it met 7 out of the 13 AYP objectives. In the second year it met 10 out of 13 objectives, in the third year it met 12 out of 13 objectives, and in the fourth and fifth years it has been the only middle school in the District to make AYP. In fact, it is the only middle school in the District to make AYP since it opened its doors. No district middle school has made AYP since 2005, let alone make it in consecutive years. It therefore stands to reason that the curriculum at MMBA must be congruent and aligned to state standards based on the students' performance. The AYP results debunk the District's assertion that MMBA's curriculum is not aligned to state standards.

For these reasons we request the ALC find the Board's ruling, revoking MMBA's charter based on its curriculum and standard, clearly erroneous in view of the reliable, probative, substantial evidence on the whole record, is arbitrary and capricious and an abuse of discretion, and a violation of the Act.

- b. **The Board erred in revoking MMBA's charter because MMBA did not materially breach or materially violate criteria for teacher qualification set out in its charter.**

to her retirement. Even during retirement, she continued to teach at some of the District's schools until she joined MMBA. Additionally, she is certified as a special education teacher. Therefore, by the Board's own definition, Elsie White meets the Board's requirements. Accordingly, we submit the Board's finding that "there is no evidence that [White] has established competency in the subject matter that she teaches" is wholly unsupported by the evidence in the record.

Additionally, the District has deemed it a material breach of the charter that MMBA's Director/Lead Teacher does not hold a South Carolina Teaching Certificate or an Educational Administrative Degree. Again, we disagree. Gerald Jenkins and Gloria Garmany assumed the responsibility for the day-to-day operation of the school beginning in March of 2009.⁵ 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 task.

⁵ MMBA has had four directors over the course of its existence. Michelle Spradley was the Director/Lead Teacher from its inception until the end of the 2007-08 school year. At that point, Ms. Benita Robinson held this position for three months until Reginald Flenory was hired in October 2008. Flenory served as principal for the rest of the 2008 academic year but left the school in September 2009. During Flenory's tenure, he suffered an injury and on sick leave for most of the year (from March 2009 to Sept. 2010).

Jenkins is a 2002 graduate of Claflin University with a Bachelor of Arts in Child Development. In 2005, he was graduated from South Carolina State University with a Masters of Arts in Individual and Family Development. From 2002 to 2005, he served as Director of Trinity United Methodist Church Child Development Center & Kindergarten. He supervised the day-to-day operations of the program, including its afterschool program. He managed the budget, kept the books, performed budgetary projections, managed U.S.D.A. funds, and supervised the Curriculum and Instruction at the center. He recently graduated from S.C. Department of Education Foundations in School Leadership. 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.

Furthermore, the charter does not require that its Director/Lead Teacher hold such a certification. 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." (R.Vol.II;p.543) However, this statement is qualified by the following language that is set forth at the bottom of the page: "*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.*" *Id.* (emphasis added) Jenkins meets this requirement, which tracks the requirement of section 59-40-50(B)(6) (Supp. 2009).

Garmany, on the other hand, is a veteran certified teacher with many years of experience. She is trained in South Carolina's Teaching Evaluation Program (ADEPT)

and is handling the lead teacher role at MMBA. Given the credentials and experience of its current director and lead teacher, MMBA fails to discern how its employment of these two individuals could constitute a material breach of its charter.

Based on the evidence demonstrated, we submit that the Board erred in revoking MMBA's Charter based on MMBA's special education teacher and director's alleged failure to meet certain qualifications specified in its charter application and therefore has to be overturned as it is not a material breach and is unsupported by the substantial evidence in the record.

- c. **The Board erred in revoking MMBA's charter because MMBA did not materially breach or materially violate criteria for special education reporting as set out in its charter.**

The Board found MMBA did not comply with federal and state IEP progress report requirements which are a violation of MMBA's charter. We contend this finding is wholly unsupported by the evidence.

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 receiving such services on a timely basis. This is inaccurate. Parents whose children require special education have submitted affidavits indicating they received timely and accurate student progress reports. (R.Vol;p.1106;1114-21)

Regardless of the merits of the specific findings on which the District has based its decision, MMBA is astounded that the District has waited this long to highlight these alleged material violations of the charter agreement and views this delay as a breach of District's duty of good faith and fair dealing. District has the responsibility of annually evaluating MMBA with regards to the conditions outlined in section 59-40-110(C). The

annual evaluation results must then be used in making a determination for nonrenewal or revocation. MMBA has been reviewed annually since its inception and not until now has the District raised the issues regarding its curriculum, special education teacher not being highly qualified, or IEP reports not being forwarded on a timely basis, and the lack of qualification of the lead teacher/director or any of the other allegations cited herein above as a material breach of the charter agreement. If these conditions existed in prior years and were allowed by the District to persist, the alleged breaches could not be "material," as required by the Act and as defined by courts.

II. The Board erred in affirming the District's decision to revoke MMBA's charter because the District's assertion that MMBA has failed to make reasonable progress is erroneous.

In its order, the District determined that MMBA's charter should not be renewed because MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in its charter. We submit that evidence in the record does not support this finding. On the contrary, evidence demonstrates MMBA has made continuous improvements academically.

The District has identified two specific measurable goals in MMBA's charter regarding student achievement and criticizes MMBA for failing to meet those goals. 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." (R. Vol. I; p. 15) Next, the charter states "[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.* The District asserts MMBA did not meet the standards for Math and English. The District erred in its calculations for two specific reasons.

First, the District is mistaken as to the actual percentage of students that met standard. If a student scores basic, proficient, or advanced on the PACT, he or she has met expectations and therefore they have met standard.⁶ The District does not include the basic category in their calculations of students who met standard. The District’s order only computes students who scored proficient or advanced when the charter clearly states that all its students would be proficient by 2014. (R.Vol.I;p.16)

Second, the District did not properly calculate the *percent increase* in the number of students meeting standard.⁷ MMBA acknowledges it was equally wrong in using and relying on said computations. A proper calculation would show that MMBA met almost all of its overall goals and for the two it did not meet, it made reasonable progress towards meeting those goals.

⁶ 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).

⁷ 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 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.” (R.Vol.II;p.673)

The South Carolina Department of Education divides the PACT test scores into four categories.⁸ These categories are: below basic, basic, proficient, and advanced. Any score which is not “below basic” meets standard.⁹ Stated differently, in order for a student to meet standard, the student must score within the basic, proficient or advanced category of the PACT test. The District excludes the category of students scoring basic from their calculation of students who met standard.

The District is also mistaken as to the difference between a *percent increase* and a *percent change*. MMBA’s charter calls for a percentage increase in students who met standard. The following example is used to show the difference between the two concepts in 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%.¹⁰ The percent change from the first year to the second year would be 10%. The differences between these calculations

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).

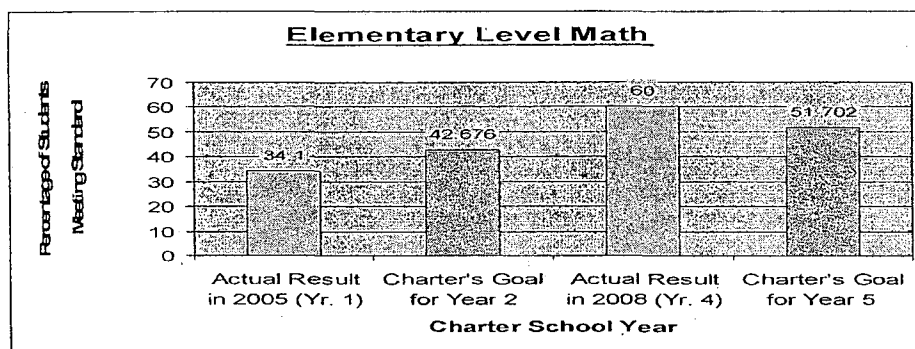
⁹ See Midlands Math and Business Academy Charter-Richland 1-2008-PACT, South Carolina Department of Education, http://www.ed.sc.gov/topics/assessment/scores/pact/2008/show_school_pact_scores.cfm?ID=4001602/2008/show_school_pact_scores.cfm?ID=4001602 (last visited Oct. 8, 2010).

¹⁰ 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.

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, only these years will be used in the analysis.

In order to comply with their charter, MMBA was required to increase their base Math score by 21.15% in year two and in year five. The PACT score was eliminated before year five. The charts below show where MMBA needed to be in the second year and the fifth year to have increases of 21.15%.¹¹ MMBA's percent increases 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 would be 75.95% or, stated differently, 75.95% more students met standard.

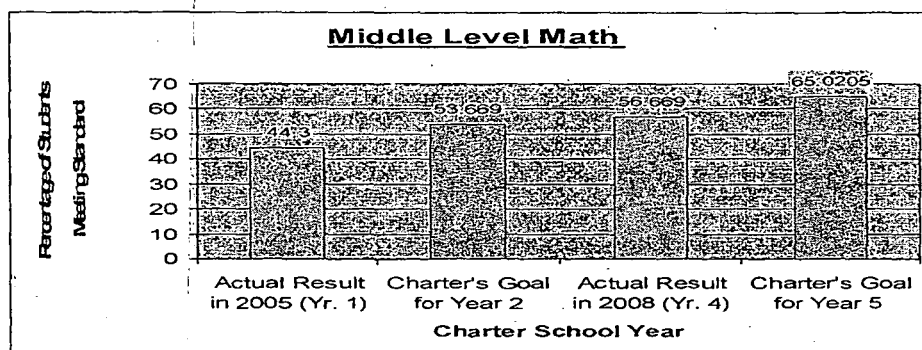
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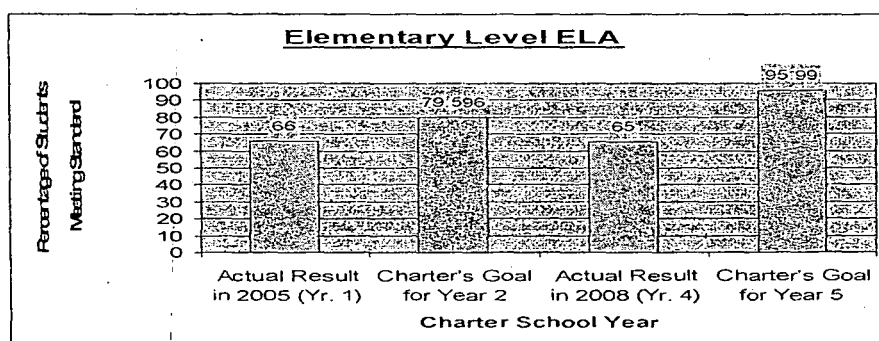
¹¹ MMBA's base number is 34.1%. MMBA would need a percentile of 42.676 % in year two to accomplish an increase the base number by 21.15%. In order to increase the results of year two by 21.15%, MMBA needs to have a rate of 51.702% in year five.

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.

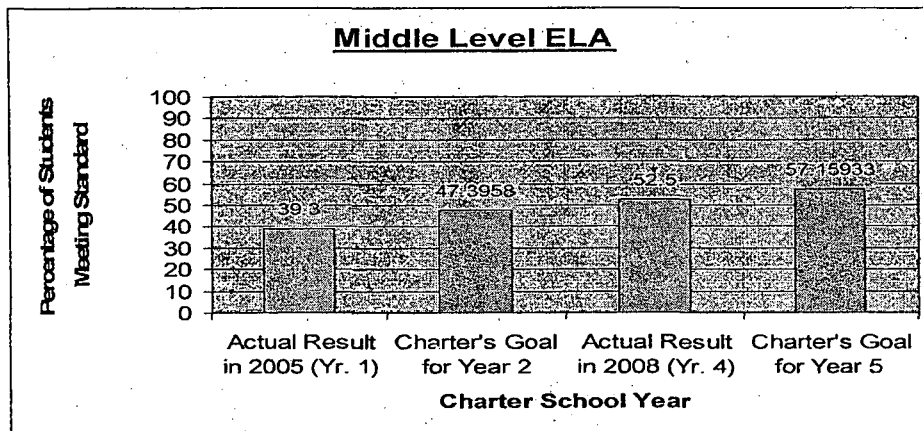
In 2005, 44.3% of MMBA students met standard for Middle School Math. In 2008, 56.2% of MMBA students met standard in Middle School Level Math. MMBA had an increase in 26.86% from their base score to their 2008 score. MMBA surpassed their goal of having an increase of 21.15%.



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% met standard. This would give MMBA a 33.59% increase in their passage rate. MMBA complied with the charter's goals for middle school ELA.



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.

Moreover, it is not a material violation of a school's charter 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. 2009) 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-

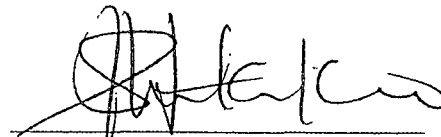
¹³ 2006 was the first year that MMBA was evaluated for AYP.

110(C)(2) in its decision to revoke a school's charter which amounted to legal error. Thus, the ALC has 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 is making "reasonable progress" toward those objectives. (R.Vol.III;p.1172-1183) That has certainly occurred in this case as demonstrated by MMBA's yearly improvement on the AYP.

Based on the evidence demonstrated above, we submit that evidence in the record does not support the Board's finding that MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in its charter. Also, the Board's decision to revoke based on "failure to meet standards in the charter application," as in Judge Kittrell's case above, amounts to a legal error. Accordingly, we submit it was error for the Board to revoke MMBA's charter and request the ALC reverse the revocation.

CONCLUSION

In our conclusion, we would like to point out language from Judge Kittrell's opinion. There, he states that creating a charter school takes funds away from the District. Therefore, for obvious reasons there is a history of litigation between charter schools and school districts. Arguably, a school district is already biased well before an investigation of a school begins. Such biases could lead, and we believe did lead, to an arbitrary and capricious decision. We are dumbfounded that a school district would decide to revoke a school's charter the first year it makes AYP. Further, to prove AYP results from 2008 were not a fluke, MMBA met AYP again in 2009, and in both cases, MMBA was the only middle school in the District to make AYP. For the reasons set forth herein, MMBA hereby respectfully requests the ALC reverse the Board's decision to revoke MMBA's charter.



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October 11, 2010

IN THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

APPEAL FROM RICHLAND COUNTY SCHOOL DISTRICT ONE
BOARD OF COMMISSIONERS

Vince Ford, Chairperson

Case No. 10-ALT-30-0817-AP

Midland Math and Science Academy Charter School

Appellant

Richland County School District One Board of Commissioners

Respondent

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the decision of the Richland County School District One Board of Commissioners ("the Board") to revoke the charter of Midlands Math and Business Academy Charter School ("the Appellant" or "MMBA") was in violation of the South Carolina Charter Schools Act.
- II. Whether the Board's decision to revoke MMBA's charter was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- III. Whether the Board's decision to revoke MMBA's charter was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

STATEMENT OF THE CASE

This matter is before the Administrative Law Court pursuant to an appeal by Midlands Math and Business Academy Charter School of a decision by the Richland County School District One Board of Commissioners to revoke the Appellant's charter.

In 2003, MMBA submitted a charter application requesting sponsorship from Richland County School District One ("the District") under the South Carolina Charter Schools Act, S.C. Code Ann. § 59-40-10, et. seq. ("the Act"). Pursuant to the Act, the application included descriptions, representations and assurances that detailed the school's educational program, how the school would operate, and how student achievement progress would be measured. (R. pp. 521-673). With respect to curriculum, the application stated, among other things, that:

"All curriculum and projects will be based upon the South Carolina Standards for all disciplines." (R. p. 534).

"The teachers of MMBA will provide instruction to students based on the South Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level." (R. p. 535).

The application also made representations regarding staffing and the qualifications that MMBA staff would possess, including the following:

"Director/Lead Teacher Qualification: Must hold current South Carolina Teaching Certification or Education Administration Certification . . ." (R. p. 543.)

"In order to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time Certified Special Education Teachers. . . . We will employ an additional Special Education Teacher during our 2nd year of implementation bringing the total to at least three full-time certified Special Education Teachers." (R. p. 536).

"All special education teachers will meet the certification requirements of the No Child Left Behind Law." (R. p. 544).

With respect to compliance with disability laws, the application stated that MMBA "[w]ill adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (R. p. 523).

The charter application also defined the following standards for reasonable progress on student achievement:

"The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (R. p. 673).

"[T]he number of students in our school meeting standards will increase by 20.6% in ELA and 21.15% in Math after our first year of implementation" and "will increase by the same percentage every three years until the school year 2013-2014, when 100% of students will be meeting standard (scoring proficient on PACT)." (R. p. 673).

Based on the descriptions, representations and assurances in MMBA's application, the Board voted to approve MMBA's charter. MMBA began instruction

commencing with the 2004-2005 academic school year. Pursuant to S.C. Code Ann. § 59-40-60(A), the charter application, as drafted by MMBA and approved by the Board, became a contract between the school and the District. As such, MMBA was required by the Act to adhere to the descriptions, representations and assurances in the charter application.

Based on annual reviews, the District became concerned about MMBA because of low student performance on the Palmetto Achievement Challenge Test ("PACT"). During the 2007-2008 academic school year, the District collaborated with MMBA to draft an improvement plan, whereby MMBA agreed to follow specific directives and the District agreed to provide technical assistance to aid MMBA in improving academic performance. However, despite the District's support, overall student performance continued to fall below the standards set forth in the charter application.

On May 26, 2009, the Board requested a comprehensive review of MMBA's adherence to its charter, with a focus on student achievement. As part of the comprehensive review, District Administration reviewed MMBA's curriculum, which had been submitted by MMBA, conducted site visits, reviewed student files, and analyzed MMBA student performance on statewide testing. (R. pp. 65-145.)

Upon conclusion of the comprehensive review, District Administration determined, among other things, that MMBA was in breach of its charter in the following particulars (R. pp. 70-73):

- a. MMBA's ELA, Math and Science curricula were not aligned to current State curriculum standards.
- b. The curriculum lacked rigor and as such, could not ensure mastery of basic skill concepts.

- c. MMBA only employed one special education teacher, although the charter application provided for a minimum of two full-time certified Special Education Teachers.
- d. The special education teacher was not "highly qualified" under NCLB as provided for in the charter.
- e. MMBA failed to meet federal and State guidelines regarding student individualized education program ("IEP") progress reports.
- f. MMBA failed to meet the standards for reasonable student achievement progress outlined in its charter. For five years, MMBA failed to make adequate yearly progress on PACT. MMBA also failed to increase the number of students meeting standard on PACT by 20.6% in ELA and 21.15% in Math over a three year period.
- g. The Director of MMBA did not hold a S.C. teaching certificate or an educational administration certification as required by the charter application.
- h. Student resources were inadequate to support a strong literacy program as evidenced by absence of a comprehensive school library and adequate classroom print resources.

The findings of the review committee were presented to the Board, and on November 24, 2009, the Board voted to accept the recommendation of District Administration to notify MMBA of its intent to revoke the charter. (R. pp. 63-68.)

In accordance with the provisions of S.C. Code Ann. § 59-40-110(F), the Board held a hearing on February 16, 2010, to consider whether MMBA's charter should be revoked. (R. p. 4.) The hearing was held at MMBA's request and included the recommendation of District Administration, written opposition to the recommendation by MMBA, oral argument by MMBA, and public comment. *Id.* After careful consideration of MMBA's performance under the contract, the Board voted at a meeting on March 23, 2010, by a vote of 7-0, to revoke the charter. (R. p. 24-25.) The Board issued a written

order setting forth the reasons for the Board's decision and directing dissolution of MMBA pursuant to S.C. Code Ann. § 59-40-120. (R. pp. 3-18.) MMBA now appeals the Board's decision.

The Board submits that its decision to revoke the charter is supported by substantial evidence in the record. In fact, MMBA does not dispute many of the Board's findings. The Board further submits that in making the decision the Board acted reasonably, within its authority, and in accordance with the Act. Therefore, for these and other reasons contained herein, the decision of the Board should be affirmed and judgment should be entered in the Board's favor.

STANDARD OF REVIEW

A school board's decision not to renew or revoke a charter is governed by S.C. Code Ann. § 59-40-110(C), which provides:

A charter must be revoked or not renewed by the sponsor if it 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.

Pursuant to S.C. Code Ann. §§ 59-40-90 and 59-40-110(H), a final decision of a school district to revoke a charter school may be appealed to the Administrative Law Court ("ALC") as provided in §§ 1-23-380 and 1-23-600(D) of the Administrative Procedures Act ("APA"). On appeal, the ALC has authority to review the decision under

S.C. Code Ann. § 1-23-380(5), which provides for reversal only if the school board's findings are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other errors of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In applying this scope of review, the ALC may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. S. Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (S.C. Ct. App. 2005). The ALC is to review the findings of the school board to determine if its findings of fact or conclusions of law are based on substantial evidence contained in the whole record. The South Carolina Supreme Court in Porter v. S. Carolina Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328, 332 (1998) defined the substantial evidence standard as:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding.

ARGUMENT

I. The record reflects, and MMBA concedes, that MMBA committed several violations of its charter.

In reviewing the Board's decision, it is critical to begin with findings of the Board that were clearly established when the Board revoked MMBA's charter. There are several Board findings that MMBA concedes. First, MMBA concedes that it employed only one special education teacher when the charter application required at least two.¹ (Appellant's Brief, p. 16). Second, MMBA's Director did not have teaching certification or administration certification as required by the charter application. (App. Brief pp 18-19). Third, MMBA failed to make adequate yearly progress (AYP) on PACT in 2006, 2007 and 2008 even though it promised to make AYP every year. (App. Brief p. 26). Fifth, MMBA did not meet the 20.6% increase required by the charter application for ELA. (App. Brief p. 25).

There are additional Board findings that MMBA erroneously disputes. As will be shown herein, MMBA's arguments regarding these findings are based on incorrect assumptions and are contradicted by the record. The findings are:

1. MMBA's curriculum was not aligned with current State standards in Math, ELA and Science.
2. MMBA's special education teacher was not "highly qualified" under NCLB.
3. MMBA students were not receiving individualized education program (IEP) progress reports in accordance with law.
4. MMBA failed to meet the 21.15% increase required by the charter for Math.

¹ As MMBA was in its 5th year of operation it arguably should have employed a minimum of three special education teachers as the charter application provides: "We will employ an additional Special Education Teacher during our 2nd year of implementation bringing the total to at least three full-time certified Special Education Teachers." (R. p. 536).

The foregoing findings (those conceded and erroneously disputed), establish that MMBA committed numerous violations of its charter application. They also establish that MMBA failed to meet the reasonable progress standards for student achievement that were set out in the charter application.

Nevertheless, MMBA argues that the ALC should overturn the Board's decision. MMBA rests its appeal on two contentions: (1) even though MMBA violated its charter in several respects, the violations should be classified as not material and disregarded as inconsequential; and (2) MMBA should not be held to the student achievement progress measures defined in its charter application.

As explained below, neither of these contentions are supported by the Act, nor do they justify reversal under the standard of review in the APA.

II. Under the APA standards of review, MMBA has no basis for its appeal and the Board's decision should be affirmed.

MMBA asserts that the Board's decision should be overturned based on the following three standards in S.C. Code Ann. § 1-23-380: (1) violation of statutory provisions; (2) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion and (3) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. However, MMBA fails to demonstrate how any of these standards would support reversal in this matter.

The record reflects that the Board complied with the applicable provisions of the Act. It is undisputed that the Board notified MMBA of its intent to revoke the charter in accordance with S.C. Code Ann. § 59-40-110(D). It is also undisputed that the Board provided MMBA with a hearing before taking final action as required by S.C. Code Ann. § 59-40-110(F). Further, it is clear from the record that in making its decision, the Board

applied the standards for revocation in S.C. Code Ann. § 59-40-110(C). Thus, there is no basis for MMBA to claim a violation of the Act.

It is also clear that the Board acted within its authority under the Act when it revoked the charter. Under the Act, a charter school operates within a public school district and "is accountable to the school board of trustees of that district which grants its charter." S.C. Code Ann. § 59-40-40(1). As the sponsor, the governing board approves the charter application, renews the charter, and, when necessary, revokes the charter. S.C. Code Ann. §§ 59-40-40(4), 59-40-70(B), 59-40-110. Further, the Act provides that the determination of whether there are grounds for revocation rests with the sponsoring school board. S.C. Code Ann. § 59-40-110(C). In this matter, the Board applied the standards in S.C. Code Ann. § 59-40-110(C) and determined that there were grounds for revocation. In so doing, the Board acted within, and in accordance with its authority under the Act, and in no way abused or exceeded its powers.

There is also nothing in the record to support a contention that the Board's decision was arbitrary and capricious. A decision is arbitrary if it is "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S.C. Bd. of Dentistry, 286 S.C. 182, 332 S.E. 2d 539, 541 (Ct. App. 1985). The authority of a school board to revoke a charter is expressly provided in S.C. Code Ann. § 59-40-110. In this matter, before taking any action regarding revocation, the Board directed District Administration to conduct a comprehensive review of MMBA. After receiving the results of the review and the recommendations of District Administration that were based on the review, the Board

notified MMBA of its intent to revoke and scheduled a hearing upon MMBA's request to consider MMBA's response. During and following the hearing, the Board carefully considered the charter application and information presented by District Administration and MMBA. The Board then applied the standards for revocation set forth by S.C. Code Ann. § 59-40-110 in making its decision. Given these circumstances, it is clear that the Board's decision was rational and deliberate and guided by legal procedures and standards and it was not made based on one's will or the absence of fixed rules as described in Deese. Therefore, MMBA's contention that the decision was arbitrary and capricious is without merit, and the Board's revocation of the charter should be affirmed.

The "substantial evidence" standard supports the Board's decision. As set forth above, many of the Board's findings are uncontested. (See Board's Findings of Fact, R. pp. 5-9). The uncontested findings alone justify revocation and provide substantial evidence to support the Board's decision. Further, the few findings that MMBA contests are also supported by substantial evidence in the record, which includes the results of the comprehensive review of District Administration. (R., Tab 4, pp. 61-505). MMBA cannot establish that the Board's findings lacked factual support or that the Board's decision was clearly erroneous. Thus, MMBA seeks to have the ALC reweigh the evidence and afford less weight to MMBA's violations of its charter than the Board did. For MMBA to prevail would require the ALC to substitute its judgment for that of the Board and render a decision based on its own view of the facts. This is not the role of the ALC in charter school matters and is not appropriate under the APA. See Liberty Mut. Ins. Co. v. S. Carolina Second Injury Fund, 611 S.E.2d at 300 ("Under the scope of

review established in the APA, this Court may not substitute its judgment for that of the [agency] as to the weight of the evidence on questions of fact.”).

In sum, based on the APA standards of review, no error of law has occurred in this matter and as such, the appeal is without basis. Therefore, the Board’s decision to revoke MMBA’s charter should be affirmed.

III. Revocation was warranted because MMBA’S failure to adhere to the standards, representations and assurances in the charter application relating to curriculum, staffing and compliance with disability laws constituted material violations of the charter.

MMBA’s appeal relies heavily on manipulating the term “material” in S.C. Code Ann. § 59-40-110(C)(1). The Act does not define what constitutes a “material violation” of a charter. So, MMBA argues that “material” should be interpreted in such a way that its violations of its charter are dismissed as inconsequential. In support of this argument MMBA utilizes a partial quote from 17A Am. Jur. 2d Contracts § 557 which it claims defines a “material” breach of contract as “a breach . . . so fundamental and substantial as to defeat the purpose of the contract.” App. Brief, p. 11-12. This partial quote is misleading (and inaccurate). The section does not define the term “material” as used in a contract or in a statute. Rather, it discusses rescission of contract and states (in its entirety):

- 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 (American Jurisprudence, Second Edition, updated July 2010) and Appellant’s Brief, p. 10.

While the section uses the term "material" it does not define it. When viewed in its entirety, the provision provides guidance to those seeking to unilaterally rescind a contract. However, it provides little guidance for interpreting "material violation" of a charter as used in the Act.

In determining whether the violations of MMBA were material, the Board utilized a common-sense approach consistent with the structure of the Act and the sponsor/charter school relationship. To obtain sponsorship, a charter school must submit an application that includes representations and assurances regarding the educational program that will be provided, how the school would operate, and how much student achievement progress will be made. S.C. Code Ann. §§ 59-40-50 and 59-40-60. Based on these representations and assurances, the school board either approves and sponsors the school or denies the application. S.C. Code Ann. § 59-40-70(C). Accordingly, when a school board considers revocation based on violations of a charter, the board should look to whether the charter school has acted consistently with the representations and assurances it made to obtain sponsorship. In other words, the school board should inquire whether the charter school has violated terms of the charter that were relied upon by the board when the charter was approved.

This interpretation of "material" has been used in other contexts where a party makes representations in the formation of a contract. Black's Law Dictionary defines "material" as: "Of such a nature that knowledge of the item would affect a person's decision-making process." Blacks Law Dictionary, Seventh Edition (1999). Further, in Homelite v. Trywilk Realty Co., 272 F.2d 688 (1959),² the U.S. Fourth Circuit Court of

² The Homelite case is referenced in regard to the term "material" in 17A Am. Jur. 2d Contracts §557 (see footnote 5).

Appeals applied a similar analysis in determining whether a false representation was material to a contract. The Court stated that: "A false representation is material if the fact untruly asserted, or wrongfully suppressed if it had been known to the party, influenced his judgment or decision in entering the contract." 272 F.2d at 691.

Based on the foregoing, the Board submits that in the charter school context, a violation of a charter application is material if the charter provision was relied upon for the charter's approval. In other words, a violation is material if the charter application would not have been approved if it was known at the time that the charter school would not comply with the provision.

Using this analysis, the question is whether MMBA's charter application would have been approved if it changed its application as follows:

We will employ less special education teachers than that specified in our charter.

The one special education teacher we employ will not be highly qualified under NCLB.

Our Director will not have teacher or administrator certification.

Our curriculum will not align to current State standards and will lack rigor.

We will not have sufficient resources to support a strong literacy program.

We will not provide IEP progress reports as required by special education laws.

The answer to this inquiry is clearly "no." The Board, who initially approved the charter application, determined by a unanimous vote that the charter application provisions that were violated were material to the charter and that the application would not have been approved if the Board had known that MMBA would not comply with

them. Specifically, in its Order, the Board stated that the assurances and representations that MMBA failed to fulfill were "material to the application and relied upon by the District when the charter application was approved." (R. p. 9). As such, the Board determined that revocation was warranted.

The Board's determination that the provisions were material is consistent with the requirements for charter applications in the Act. The provisions that were violated by MMBA involved core issues for charter schools: curriculum, staffing, student achievement and compliance with law. Under the Act, the charter application must include a description of the charter schools curriculum (which must meet or exceed State content standards), a description of reasonable progress towards student achievement standards, and a description of the governance and operation of the charter school. S.C. Code Ann. § 59-40-60(F). Charter schools must also agree to adhere to the disability rights requirements applicable to public schools. S.C. Code Ann. § 59-40-50(A)(1). Given their express inclusion in the Act, the significance of these provisions is evident. Thus, regardless of what definition of "material" is applied, revocation for violation of the provisions was warranted under the Act.

IV. Revocation was warranted because MMBA failed to meet the student achievement progress measures in the charter application.

Before analyzing MMBA's student achievement scores, it is important to recognize a few concepts regarding achievement testing. First, AYP is a measure of reasonable progress. It is not a final goal or final student achievement standard. This is apparent from the term itself, which stands for adequate yearly progress.

Second, AYP is measured by comparing a school's scores from prior years to the school's scores from the current year. It does not look to overall student achievement.

So, a school that has extremely high scores may not make AYP (because it did not improve compared to prior years), while a school with very low scores may make AYP because the school's scores from prior years were even worse. This occurred with MMBA. When MMBA finally met AYP in 2009, it did so based on the low basis established by prior years of less than adequate test results. This is illustrated by the fact that MMBA met AYP in 2009 when its percentage of students scoring "Not Met" on the Palmetto Assessment of State Standards ("PASS")³ exceeded District averages on all grade levels and subject areas except 8th grade science. (R. p. 17.) Thus, due to the nature of AYP, claims of being the best school in a district based on making AYP, as MMBA has done in this appeal, are grossly misleading.

Third, the number of subgroups that are measured for AYP is dependent on the number of students in the subgroups at the school. If a school does not have a minimum number of students in a subgroup, then the subgroup is not counted for AYP. As a result, small schools, like MMBA, have a relatively low number of subgroups for AYP (MMBA has 13) when compared to larger District schools, which are measured on 17 to 23 subgroups. Small schools like MMBA also do not have sufficient numbers for AYP assessment of groups that have proven to be very difficult for AYP purposes, such as special education students.

In light of these concepts, MMBA identified in its charter application its pupil achievement standard as "All students at MMBA will be proficient in all areas of the Palmetto Achievement Challenge Test (PACT) by 2014." (R. p. 673). It then defined reasonable progress toward this goal as:

³ South Carolina switched from the Palmetto Achievement Challenge Test (PACT) to the PASS in 2009. (R. p. 17.)

"The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (R. p. 673).

"[T]he number of students in our school meeting standards will increase by 20.6% in ELA and 21.15% in Math after our first year of implementation" and "will increase by the same percentage every three years until the school year 2013-2014, when 100% of students will be meeting standards (scoring proficient on PACT)." (R. p. 673).

The record unequivocally establishes that these reasonable progress measures were not met. It is undisputed that MMBA did not make adequate yearly progress in any of the years that the PACT was administered to MMBA students (*i.e.*, 2005-2008). (R. p. 70, 102-104). Further, based on the District's analysis *and on MMBA's data from the February 16, 2010 meeting*, MMBA failed to make the three year increase in ELA and Math. (R. pp. 102-104, 1122-1131). From 2005 to 2008, the number of MMBA elementary students who met standard (Proficient or Advanced) in English Language Arts (ELA) increased by 8.5% and the number of MMBA middle school students who met standard in ELA increased by 7.7%. (R. pp. 10, 102-104, 1123, 1127.) These percentages fall well below the 20.6% progress measure for ELA established in the charter application. As for Math, the number of MMBA elementary students who met standard increased by 12.7% and the number of MMBA middle school students who met standard in Math increased by 0.2%. (R. pp. 102-104, 1124, 1128.) Once again, these percentage increases are far below the progress measure of 21.15% defined in the charter.

Thus, the record confirms the Board's conclusion under S.C. Code Ann. § 59-40-110(C)(2), that MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in the charter application. As such, revocation was warranted under the Act.

In its brief, MMBA concedes that it did not make AYP in any of the years that the PACT was administered to MMBA students (*i.e.*, 2005-2008). (App. Brief p. 26). However, for the first time, MMBA argues that it made the three year increase, at least in part, on Math. (App. Brief pp. 22-25). This argument lacks merit for two reasons: (1) it improperly relies on information, data and calculations which do not appear in the record; and (2) the calculations are incorrect as they are based on assumptions contradicted by the charter application.

The District's calculations on the three year increases in ELA and Math are in accord with those presented by MMBA to the Board at the revocation hearing. (R. pp. 102-104, 1122-1131). Consequently, the undisputed evidence in the record supports the Board's finding that the progress measures were not met. In contrast, nothing in the record supports the new calculations and charts in MMBA's brief. The new calculations were created during the appeal and are derived from sources not contained in the record, or presented to the Board during the revocation proceedings. As such, they are not appropriate for appellate review under the APA as the review "must be confined to the record." S.C. Code Ann. § 1-23-380(4). The reliance on information outside the record is also contrary to ALC Rule 36(G), which provides that, "The Administrative Law Judge will not consider any fact which does not appear in the record."

Further, information in the record demonstrates that the new calculations in MMBA's brief are incorrect. MMBA states that a student meets standard if the student scores basic on the PACT. (App. Brief, p. 22). However, in the section that sets out MMBA's student achievement standard and reasonable progress measures, the charter

application defines meeting standard as “scoring proficient on PACT.” (R. p. 673).⁴ It also states that the increase will be according to South Carolina’s Accountability Plan. *Id.* Portions of the Accountability Plan were included in the charter application. (R. pp. 659-667). Throughout the plan, it states that students meet the requirements when they “meet or exceed the State’s proficient level of academic achievement.” (R. pp. 659, 662, 664). This is illustrated in a chart that shows “percent meeting standard” increasing to 100% *proficiency* by 2013-2014. (R. pp. 667, 671.) Clearly, the charter application employs the same method of calculation used by the State and the District and applies it to MMBA, *i.e.*, meeting standard is meeting or exceeding the State’s proficient level of academic achievement. Thus, MMBA’s new found student performance standard is simply an admission that the student performance progress called for in the charter application was not made.

MMBA is also mistaken in its “percentage increase” methodology. The charter application provides that “the numbers of the students” will increase by 20.6% in ELA and 21.15% in Math every three years. (R. p. 673.) In other words, the percent of students who meet standard must increase by 20.6% in ELA and 21.15% in Math. So, for example, if the number of students scoring proficient or above in ELA in 2004-2005 was 38.2%, the number of students scoring proficient or above would have to increase to 58.8% by 2007-2008. This is made clear by the chart in the record on pp. 667 and 671, which shows “percent meeting standard” increasing by 20.6% in ELA and 21.15% in

⁴ “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*).” (R. p. 673, *emphasis added*).

Math every three years to meet 100% proficiency by 2013-2014.⁵ Under MMBA's percentage increase methodology MMBA could make all of its three year progress measures and be nowhere close to the final goal of 100% proficient standard by 2013-2014. This flawed methodology would also allow for MMBA to make the three year progress measure after failing to make AYP for each of the three years. This makes no sense. It is contrary to the methodology employed by the State and the District as shown in charter application.

In sum, the methodology used by the District, and used by MMBA in its presentation to the Board, is correct and supported by the charter application. MMBA's new "percentage increase methodology" is not.

As stated previously, using the appropriate standard and methodology yields the following results for the three years after MMBA's first year of implementation (2005-2008):

Subject/School Level	MMBA's increase	Progress measure in charter application
ELA (elementary)	8.5%	20.6%
ELA (middle)	7.7%	20.6%
Math (elementary)	12.7%	21.15%
Math (middle)	0.2%	21.15%

As such, MMBA did not make the three year progress measures in its charter application.

Lastly, MMBA argues that it should be excused, as a matter of law, from meeting the reasonable progress defined in its application because it made progress towards the progress measures. In support of this argument, MMBA relies on an ALC decision from 2008 in the case of Lee County School Board of Trustees v. MLD Higher Learning

⁵ The State's Accountability Plan provides "The chart shown in attachment D [R. pp. 667 and 671] depicts the State's intermediate goals, ensuring that all students will meet or exceed the state's proficient level of academic achievement by 2013-2014." (R. p. 665.)

Academy. In that case, the State Board reversed a school board decision's to revoke a charter when the school board's decision was based on one year's performance on statewide testing. The order in the MLD case provides that the State Board commented that "it is unreasonable to expect every school to reach AYP in its first year because it takes time for students to reach the goals of NCLB." (R. p. 1179.)

Here, as in MLD, the District had concerns about MMBA's student achievement performance in its initial years. However, rather than immediately initiating revocation proceedings based on MMBA's failure to make reasonable progress on student achievement, the District worked with MMBA on an improvement plan and afforded MMBA additional time to make progress. When concerns persisted, the Board requested a comprehensive review, which revealed material charter violations by MMBA. At that point, the Board decided to initiate revocation proceedings.

In contrast to the MLD case, MMBA had several years of implementation to make progress on student achievement. Further, the Board considered multiple years of testing and long-term progress measures expressly defined in the charter application and did not rely on a single year's AYP results. Specifically, the Board reviewed four years of PACT scores (2005-2008) where MMBA failed to make AYP each year. In addition, the Board looked to the three year progress measures where MMBA fell well short of what was defined in its charter application for both ELA and Math. Thus, the ALC decision in MLD is distinguishable in its facts and provides little guidance in this case.

Moreover, if MMBA's argument is accepted then the objective student progress measures that MMBA defined in its charter application would be supplanted by a subjective determination of "reasonable progress." This is not consistent with the clear

language of S.C. Code Ann. § 59-40-110(C)(2), which calls for revocation when a charter school “fails to meet or make reasonable progress, *as defined in the charter application.*” (Emphasis added.) In making its decision to revoke MMBA’s charter under S.C. Code Ann. § 59-40-110(C), the Board reviewed the progress measures defined in the charter application and found they were not met. To reverse the decision based on a subjective assessment of “reasonable progress” that sets the bar lower than that designated in the charter application would be improper under the Act.

V. MMBA’s contentions regarding its curriculum are misguided and are not supported by the record.

During the District’s comprehensive review, District Administration reviewed MMBA’s curriculum. -They found that, with regard to ELA, Math and Science, MMBA’s curriculum was not aligned with current South Carolina Standards. (R. p. 71.) They also found multiple gaps in the curriculum. (Id.) District Administration detailed its findings regarding the curriculum in a report provided to MMBA. (R. pp. 75-97.) They also observed classroom instruction at MMBA and confirmed that MMBA was not teaching to current standards. (R. pp. 71-72.) Thus, the evidence in the record supports the deficiencies in MMBA’s curriculum noted in the Board’s findings.

In its brief, MMBA does not identify evidence that refutes the Board’s findings. Rather, MMBA argues that the curriculum used at MMBA must have met standards because it is the same curriculum that was approved at MMBA’s inception. (App. Brief p. 13). This argument supports the Board’s findings. From time to time, the State Department of Education updates the State standards for curriculum. For example, new standards were adopted for Science in 2005, for Math in 2007, and for ELA in 2008. (R. pp. 79-91.) Pursuant to its charter, MMBA was required to provide instruction according

to State standards. (R. pp. 534, 535.) Accordingly, MMBA was required to update and realign its curriculum when new state standards were adopted. However, MMBA failed to do so. Instead, it continued to use its outdated curriculum and as a result, provided instruction that was not in accordance with State standards in violation of its charter.

MMBA also misinterprets the Board's order revoking the charter. In the order, the Board pointed out that MMBA had admitted the curriculum deficiencies when it attempted to correct its curriculum after the deficiencies were identified in the August report. (R. p. 11.) The Board's order did not acknowledge alignment with curriculum standards. Rather, it cited to clear evidence of failure to align with State standards.

As for the other findings related to curriculum, *e.g.*, curriculum lacked rigor, inadequate print resources, *etc.*, they supported the District's conclusion that MMBA was not providing the instruction that it represented it would provide in its application. These findings did not create "new objectives for MMBA" to meet. Rather, they reflected evidence of MMBA's failure to adhere to its charter application.

Ultimately, MMBA's arguments illustrate MMBA's curriculum shortcomings and fail to establish any error by the Board. Moreover, in reviewing the record, it is clear that the Board's decision, and its findings related to curriculum, were supported by substantial evidence.

VI. MMBA materially violated its charter by employing only one special education teacher who was not "highly qualified" under NCLB.

MMBA's charter application provides that it would employ at least two special education teachers, which would increase to three during the second year of implementation. (R. p. 536.) It is undisputed that MMBA employed only one.

MMBA attempts to diminish this violation by alleging that it decided to employ only one teacher because its enrollment was less than expected. MMBA also implies that additional teachers were not needed. Given the other special education deficiencies discovered during the comprehensive review, the District disagrees with this implication. Moreover, under the Act, MMBA cannot unilaterally alter its charter. S.C. Code Ann. § 59-40-60(C). The charter application does not allow for a reduction in special education staffing. If a reduction was justified, MMBA could have requested an amendment to the charter application as it had done on other occasions. (R. p. 10.) It did not.

As for the provision's significance, it is apparent from the charter application itself. MMBA's commitment to fully staffing its special education program is contained in the main text of the charter application where MMBA describes its instructional program and provides assurances that it will comply with the laws affecting students with disabilities. (R. p. 536.) The two (increasing to three) special education teacher requirement is also included in the "Teachers" section, where MMBA details the staff it will employ. (R. p. 544.) Moreover, the Board, who sponsored MMBA, found that the provisions were material and relied upon when the charter application was approved. (R. p. 9).

MMBA also asserts that the special education teacher was "highly qualified" under NCLB. The record shows otherwise. In a document from MMBA, entitled "Teacher Qualifications" and dated August 2009, MMBA identified its staff, including the special education teacher, Ms. Elsie White. (R. pp. 896-899.) It also identified those teachers at MMBA who were highly qualified as the ELA, Social Studies and Science

teachers. (R. p. 899.) Thus, MMBA's documentation reflects that Ms. White, the special education teacher, was not highly qualified.

Further, MMBA misinterprets the provisions of NCLB. MMBA correctly states that to be highly qualified under NCLB, a teacher must demonstrate subject matter competency in the subjects he or she teaches. 20 U.S.C.A. § 7801(23). However, MMBA claims that Ms. White is highly qualified because she has a degree in special education. Special education is not an academic subject taught to elementary or middle school students. NCLB defines "core academic subjects" as "English, reading or language arts, mathematics, science, foreign language, civics and government, economic, arts, history, and geography." 20 U.S.C.A. § 7801(23). To be highly qualified, a special education teacher would need to demonstrate competency in the subjects that she provides instruction to students, which is most commonly ELA and Math. There is no evidence in the record that Ms. White demonstrated such subject matter competency. Thus, she does not meet the highly qualified standard in NCLB.

VII. MMBA materially violated its charter because its Director did not have the certification required by the charter application.

The charter application provides that MMBA's Director "[m]ust hold current South Carolina Teaching Certification or Education Administration Certification." (R. p. 543.) MMBA acknowledges that its Director does not have teacher or administrator certification. Nevertheless, MMBA claims that this is not a violation because the requirement is qualified by a later statement in the charter application.

The Board submits that MMBA's interpretation is contrary to the clear language of the charter application. The charter application unequivocally provides that the Director must hold teaching or administrative certification. (R. p. 543.) The charter

application later adds to this requirement that either the director or administrative assistant must have administrative certification or administration experience. *Id.* This provision ensures that someone on the leadership staff will have administrative certification or administrative experience. It does not supplant or "qualify" the earlier unequivocal certification requirement.

VIII. The District's review of MMBA's special education records revealed that MMBA had not complied with disability law requirements.

Under S.C. Code Ann. § 59-40-50, a charter school must adhere to the disability rights requirements as are applied to public schools operating in the same school district. In light of this requirement, MMBA represented in its charter application that it would "adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (R. p. 523.)

As part of the 2009 comprehensive review, District Administration reviewed MMBA's special education records and determined, among other things, that MMBA had failed to meet federal and State IEP guidelines regarding student individualized education program (IEP) progress reports. (R. p. 128-132.) The IDEA requires that special education students and their parents receive progress reports *on the progress of IEP goals* at least as often as general education students receive progress reports, or as otherwise directed by the student's IEP. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(3)(ii). The review revealed numerous inconsistencies in providing student IEP progress reports. For example, one student's IEP required progress reporting every 4.5 weeks but the records did not contain evidence of such reports. (R. p. 131.) Other

students' IEPs called for IEP progress reports less often than general education received progress reports, in violation of federal and State mandates. Id.

MMBA attempted to dispute the findings by submitting affidavits of parents containing general statements regarding the attention provided to special education students at MMBA and "progress reports." (R. pp. 1114-1121.) However, the affidavits did not address the specific findings of District Administration which related to students IEPs and the required progress reports *on IEP goals* as evidenced by MMBA's records.

With respect to whether the provision at issue is material to MMBA's charter, the Charter Schools Act specifically requires compliance with laws and regulations concerning students with disabilities. S.C. Code Ann. § 59-40-50. Further, special education is of particular concern to the District because as the Local Education Agency or "LEA" under the law, the District is ultimately responsible for ensuring that all students with disabilities in the District, including those attending charter schools, are served appropriately. As a result, a charter school's failure to adhere to federal and State special education laws reflects directly on the District and can result in legal claims and penalties against the District. Thus, MMBA failure to comply with federal and State law relating to students with disabilities was a material violation of its charter application and grounds for revocation pursuant to S.C. Code Ann. § 59-40-110(C)(1) and (4).

CONCLUSION

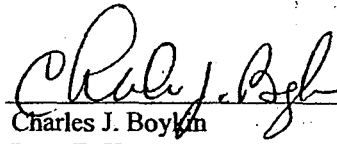
Substantial evidence in the record demonstrates that MMBA committed material violations of its charter application. Substantial evidence also shows that MMBA failed to make reasonable progress on student achievement as defined in its charter application. The Board acted within its authority, and in accordance with the standards of the Act,

when it considered the facts and decided to revoke the charter. Therefore, the Board respectfully requests that this Court affirm the Board's decision and deny MMBA's appeal.

Respectfully submitted,

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November 10, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

Before the South Carolina Administrative Law Court

**APPEAL RICHLAND COUNTY DISTRICT ONE BOARD OF SCHOOL
COMMISSIONERS**

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

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

v.

Richland County School District 1 Board of Commissioners, ... Respondents.

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES IN REPLY BRIEF

- I. MMBA used the correct definition of material breach in the correct context
- II. The District violated its duty to act in good faith and fair dealings
- III. MMBA's Academic Progress calculations are correct and supported by raw data in the record on appeal and demonstrate that MMBA met its charter objectives and made reasonable progress
- IV. MMBA did not commit material violations and made reasonable progress as defined in the Charter School Act

STATEMENT OF THE CASE

As more thoroughly discussed in MMBA's initial brief, this appeal arises in response to the Richland County School Board's decision to revoke MMBA charter pursuant to section 59-40-110 of the South Carolina Code (Supp. 2009). Due to this appeal, MMBA has remained open, and this court denied the District's motion to curtail MMBA funding during the appellate process. MMBA filed its initial brief, and the District filed its response brief, approximately ten days ago. MMBA now submits the following arguments in reply to the District's response brief.

ARGUMENTS ON APPEAL

- I. **MMBA used the correct definition of material breach in the correct context**

MMBA agrees with the District's assertion that the definition of "material breach" will be outcome determinative; however, MMBA disagrees with the District's definition and maintains MMBA used "material" in the proper context.

Once approved, the charter application is a contract between the charter school and the Sponsoring District. Here, the District voted to rescind its contract with MMBA based on alleged material breaches. Black's Law Dictionary 1048 (7th ed. 2000) defines

rescission as: "A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach." Here, the District is attempting to undo its contract with MMBA; hence, MMBA cited to AmJur for a legal definition of "material" in the context of a rescinding a contract.

MMBA agrees that the Charter School Act fails to define "material". Therefore, this court should interpret "material" as it is customarily used in case law. City of Camden v. Brassell, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997) ("Where the legislature elects not to define the term in the statute, courts will interpret the term in accord with its usual and customary meaning."). South Carolina case law provides a nearly identical definition of "material breach" in the context of rescinding a contract as the AmJur definition. See e.g., Brazell v. Windsor, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) ("A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract."); Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004) (indicating as a general rule, to warrant rescission of a contract, the breach must be fundamental and substantial):

MMBA stands by the definition it provided in its brief and disagrees with the District's assertion that the definition provided is inaccurate. In fact, the District wants you to believe that a common sense approach is the correct approach to take in determining whether there was a material breach. (Resp. Brief pg.12). The District's proposal to use "common sense" is indicative of the District's continuous urge to propel this court to acquiesce to its use of subjective standards, which are subject change with each election.

The District uses the term "material" in the context of parties making

representations prior to entering into a contract. (Resp. Brief 12-14) Clearly, this is not the framework in which the legislature intended "material" to be used. Instead, the legislature intended for the review process to determine whether a charter "committed a material violation of the conditions, standards, or procedures provided for in the charter application." S.C. Code Ann. § 59-40-110(C)(1) (Supp. 2009). No where is the word "representation" used, only "violation." Therefore, the court should determine whether a material breach occurred during the charter, or contract's existence instead of determining whether a "material misrepresentation" occurred prior to the charter's acceptance. Further, MMBA's assurances prior to entering the contract were true, and MMBA never knowingly or intentionally withheld information or failed to disclose a material fact.

II. The District violated its duty of good faith and fair dealing

The District, after overseeing MMBA since its opening in 2004, alleges several violations have occurred. The District, in calling attention to MMBA's employment of one special education teacher, the special education teacher's qualifications, the library resources, and the curriculum, is breaching its implied duty of good faith and fair dealing which is inherent in every contract. 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). If such violations were "material" under the statute, then the District should have objected to them earlier rather than waiting until its review in 2008. MMBA had been in operation for over four years when the District complained of the alleged violations.

The District argues MMBA has employed only one special education teacher and that this special education teacher is unqualified. MMBA disagrees that its special

education teacher is unqualified under the District's definition of NCLB. This same argument applies to MMBA's library which the District as "insufficient resources to support a strong literacy program" as well as MMBA's curriculum which the District maintains was not aligned with state standards and "lacks rigor."

In fact, the District has failed to give one specific example demonstrating what portion of MMBA's curriculum is not aligned with the District's curriculum. Instead, in broad terms, the District maintains simply, that MMBA's curriculum is not aligned to state standards and lacks rigor. Such evidence is not supported in the record on appeal, and the District fails to point out one example of a misalignment in either its brief or in the record on appeal. To this end, the District again fails to use good faith and fair dealings by failing to point to certain errors and by demonstrate that certain violations are supported by facts in the record.

III. MMBA's academic progress correct and supported by raw data in the record on appeal and demonstrate that MMBA met its charter objectives and made reasonable progress

MMBA stands by its calculations which came from data appearing in the record on appeal. Specifically, the District provided the data below and relied upon it in its decision to revoke MMBA's charter. In its charter, respective yearly progress goals included and actual performances are as follows:

<u>Year</u>	<u>Goal Percentage Improvement in Math</u>	<u>Goal Percentage Improvement in ELA</u>
2004-2005	Base Year for Year 2 Comparisons	Base Year for Year 2 Comparisons
2005-2006 (Year 2)	20.6% improvement over Year 1, the base year	21.15% improvement over Year 1, the base year
2008-2009 (Year 5)	20.6 % improvement over Year 2	21.15% improvement over Year 2

<u>Year</u>	<u>Actual Percentages for Elementary Math Meeting Standard As Provided by the District</u>	<u>Actual Percentages for Middle School Math Meeting Standard As Provided by the District</u>
Year 1 or Base Year	34.1% (100%-65.9%) (Record 102)	44.3% (100%-55.7%) (Record 103)
2007-2008 (Year 4)	60% (100%-40%) (Record 102)	56.2% (100%-43.8%) (Record 103)
2007-2008 (Year 5)	No data	No data

In comparing Year 4 to the base year, and in using the numbers provided by the District, MMBA's data the percentage change and percent increase is as follows.

<u>Year 4 compared to Year 1</u>	<u>Percent Change from Year 1 to Year 4</u>	<u>Percent Increase from Year 1 to Year 4</u>
Elementary School Results	25.9% (60%-34.1%) (Year 4 -Base Year)	75.95% (25.9%/34.1%) (Future Year-Base Year)/(Base Year)
Middle School Results	11.9% (56.2%-44.3%) (Year 4-Base Year)	26.86% (11.9%/44.3%) (Future Year-Base Year)/(Base Year)

Therefore, MMBA is making reasonable progress whether one uses a percent change or a percent increase in order to determine improvement. ELA results also demonstrate reasonable progress as the following results demonstrate:

<u>Year</u>	<u>Actual Percentages for Elementary ELA Meeting Standard As Provided by the District</u>	<u>Actual Percentages for Middle School ELA Meeting Standard As Provided by the District</u>
2004-2005 (Year 1 or Base Year)	66% (100%-34%) (Record 102)	39.3% (100%-60.7%) (Record 103)
2007-2008 (Year 4)	65% (100%-35%) (Record 102)	52.5% (100%-47.5%) (Record 103)
2007-2008 (Year 5)	No data	No data

<u>Year 4 compared to Year 1</u>	<u>Percent Change</u>	<u>Percent Increase</u>
Elementary ELA Results	-1% (60%-34.1%) (Year 4 – Base Year)	<i>Negative</i>
Middle School ELA Results	13.2% (52.5 %-39.3%)	33.58% (52.5%-39.3%)/(39.3%) (Future Year-Base Year)/(Base Year)

Therefore, MMBA is making reasonable progress in Middle School ELA results, and MMBA's percent change for elementary ELA is -1%. Though elementary ELA test results decreased in comparing data for the only two years in which the District provided in its decision to revoke, the decrease is only slight. Overall results demonstrate an upward trend.

Regardless of the definition used to define reasonable progress, whether one uses a percent change or a percent increase, there is definite improvement, or "progress" as defined by the statute. Further, MMBA begins accepting students at the fourth grade level. Therefore, the elementary school students, inherited from the District, have not yet been given an adequate amount of time to improve at MMBA, hence little change.

MMBA concedes that it made new calculations during the pendency of the appeal; however, MMBA used raw data in the record in its calculations as required by section 1-23-380(4) of the South Carolina Code (Supp. 2009) and as cited in the tables above. Both MMBA and the District have made several calculations in determining whether MMBA met or made reasonable progress in student achievement as stated in its charter. These calculations changed during the Board's review process. However, the ultimate goal in the review process should be to determine the *correct results* and, in essence, seek the truth.

Though the calculation of the test scores are simplistic and reveal obvious improvement (though disputed by the District), AYP is one indicator that both sides agree upon, and the court can also look to it as an indicator of reasonable progress. In fact, the District acknowledges in its brief that, "AYP is a measure of reasonable progress." (Resp. Br. Pg. 14) Based on the District's logic and MMBA's demonstration of successive AYP improvement: in 2006,¹ MMBA met 7 of its 13 AYP objectives, in 2007, it met 10 of 13 objectives, in 2008, it met 12 of 13 objectives, (Record 110) and in 2009 and 2010, it made AYP. In fact, it was the only middle school in the District to do so. There is no doubt that MMBA has made such progress and is in compliance with the statute.

IV. MMBA did not commit material violations and made reasonable progress as defined in the Charter School Act

MMBA contests many points raised in the District's brief to the ALC and disagrees with the District on many purported "violations." The main point and focus of this appeal is that MMBA did not commit material violations and operated its charter as recommended by statute.

In regards to material breaches, nothing the District complained of rises to the level of a material breach within the context of rescinding a contract. The purpose of the Act is 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." S.C. Code Ann. § 59-40-30 (Supp. 2009) (emphasis added). Here, students are thriving in an alternative educational environment of choice.

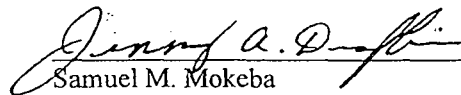
¹ 2006 was the first year that MMBA was evaluated for AYP.

The District, on the other hand, is making every attempt to stifle the legislative intent by imposing subjective and arbitrary standards such as MMBA lacking a comprehensive library and MMBA's curriculum lacking rigor without any evidence based on the statute or regulation. The legislature expressly qualified violation with "material" and progress with "reasonable." If a charter school is shut down for violating any charter provision or in failing to meet one in a category of students inherited by the student achievement goals, then charter schools would rarely survive or remain open.

The intention of the legislature was to allow the District to revoke a charter only when material violations have occurred or when reasonable progress is not met. Further, in determining whether a violation is material, the legislature further instructed courts to "interpret[] liberally [and] 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." § 59-40-30.

CONCLUSION

For the above argued reasons, MMBA requests the ALC overturn the District's decision to revoke MMBA's charter.


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Attorneys for Appellants

November 22, 2010.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

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

**NOTICE OF MOTION AND MOTION FOR
RELIEF FROM THE AUTOMATIC STAY**

TO: SAMUEL M. MOKEBA AND KIRBY D. SHEALY, ATTORNEYS FOR APPELLANT

YOU WILL PLEASE TAKE NOTICE that Respondent, Richland County School District One Board of Commissioners ("the Board"), by and through undersigned counsel, hereby moves this Court pursuant to Rule 34 of the South Carolina Administrative Law Court Rules and Rule 225 of the South Carolina Appellate Court Rules of the South Carolina Rules for relief from the automatic stay of the Board's decision to revoke the charter of Petitioner, Midlands Math and Business Academy ("MMBA"). Cause exists to grant the Board the requested relief from the automatic stay as follows:

- (1) Relief from the automatic stay is warranted because irreparable harm would result should students be allowed to remain enrolled at MMBA throughout the appeal of the Board's decision to revoke MMBA's charter;
- (2) The Board is entitled to relief from the automatic stay because it will likely succeed on the merits of MMBA's appeal; and
- (3) This Court should dissolve the stay because there is no adequate remedy at law.

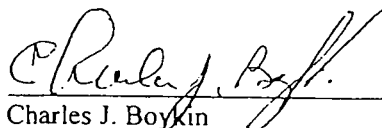
FILED

JUL 09 2010

Therefore, as set forth in the supporting Memorandum of Law and affidavits, filed contemporaneously herewith and incorporated herein, the Board prays for an Order allowing enforcement of the Board's decision notwithstanding the appeal of this matter.

Respectfully submitted,

BOYKIN & DAVIS, LLC

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ATTORNEYS FOR RESPONDENT

July 9, 2010

Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

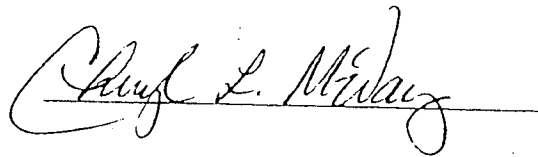
Respondent.

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

CERTIFICATE OF SERVICE

The undersigned of Boykin & Davis, L.L.C., hereby certifies that she has served the following counsel of record with the foregoing **RESPONDENT'S NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY**, by hand-delivering same to the following on this 9th day of July, 2010:

Samuel M. Mokeba, Esq.
Kirby D. Shealy, III, Esq.
Baker, Ravenel & Bender, L.L.P.
P.O. Box 8057
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

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

**MEMORANDUM OF LAW IN SUPPORT
OF RESPONDENT'S MOTION FOR
RELIEF FROM THE AUTOMATIC STAY**

I. INTRODUCTION

This matter comes before the Court pursuant to a motion by Respondent, Richland County School District One Board of Commissioners ("the Board"), for relief from the automatic stay of its decision to revoke the charter of Appellant, Midlands Math and Business Academy ("MMBA"). On March 23, 2010, the Board, pursuant to S.C. Code Ann. § 59-40-110(C), voted unanimously to revoke MMBA's charter based upon numerous material violations of the conditions, standards, and procedures provided in its charter application and MMBA's failure to make reasonable progress, as defined in the charter application, toward pupil achievement standards. An Order was executed by the Board on April 27, 2010 setting forth the express reasons for revocation and directing MMBA's dissolution in accordance with S.C. Code Ann. § 59-40-120 so as to effectuate revocation by the last day of the 2009-2010 academic school year. (R. pp. 3-18).

FILED

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SC ADMIN. LAW COURT

On May 21, 2010, MMBA filed a Notice of Appeal with this Court appealing the Board's Order. Thus, pursuant to Rule 34 of the South Carolina Administrative Law Court Rules and Rule 225 of the South Carolina Appellate Court Rules, enforcement of the Board's decision to revoke is automatically stayed pending the outcome of the appeal.

As explained below, because just cause exists for relief from the automatic stay, the Board moves for an Order from this Court, terminating the stay and allowing the Board to proceed with enforcement of its decision to revoke consistent with the grounds stated herein.

II. STATEMENT OF THE FACTS

MMBA began instruction commencing with the 2004-2005 academic school year pursuant to the Board's grant of a charter. In order to obtain sponsorship by Richland County School District One ("the District"), MMBA submitted a charter school application which contained numerous statements, promises and assurances. (R. pp. 327-505). Promises such as the following became the consideration for the District's sponsorship and grant of a charter to MMBA:

- a. "All curriculum and projects will be based upon the South Carolina Standards for all disciplines." (R. p. 341).
- b. "The teachers of MMBA will provide instruction to students based on the South Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level." (R. p. 342).
- c. "In order to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time certified Special Education Teachers" (R. p. 343).

- d. MMBA “[w]ill adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable.” (R. p. 330)
- e. “All special education teachers will meet the certificate requirements of the No Child Left Behind Law.” (R. p. 352).
- f. “The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year.” (R. p. 673).
- g. “[T]he number of students in our school meeting standards will increase by 20.6% in ELA and 21.15% in Math after our first year of implementation” and “will increase by the same percentage every three years until the school year 2013-2014, when 100% of students will be meeting standards (scoring proficient on PACT).” (R. p. 673).

Pursuant to S.C. Code Ann. § 59-40-60(A), the charter application, as drafted by MMBA, constituted a contract between the school and the District. Initial evidence of MMBA's noncompliance with the terms and conditions of its charter came in the form of low student performance on the Palmetto Achievement Challenge Test (“PACT”). During the 2007-2008 academic school year, in order to curtail MMBA's decline in student achievement, the District collaborated with MMBA to draft an improvement plan, whereby MMBA agreed to follow specific directives and the District agreed to provide technical assistance to aid MMBA in improving academic performance. However, despite the District's technical support, overall student performance continued to fall below the standards set forth in the charter application.

On May 26, 2009, the Board requested a comprehensive review of MMBA's adherence to its charter, with a focus on student achievement. The review commenced on July 22, 2009, and was concluded in November of the same year. Upon conclusion of the comprehensive review, it was determined that MMBA was in breach of its charter in the following particulars:

- a. The Core Knowledge Curriculum used by MMBA had not been aligned to State standards. MMBA's ELA, Math and Science curricula were not aligned to current standards. MMBA had not updated its curriculum to meet current ELA standards, which were released by the South Carolina Department in 2007, and its Science curriculum did not align with the latest State standards that were adopted in 2005.
- b. MMBA used very little supplemental print sources and most of what they did use was outdated. The curriculum lacked rigor and as such, could not ensure mastery of basic skill concepts.
- c. MMBA only employed one special education teacher, although the charter application provided for a minimum of two full-time certified Special Education Teachers. Further, the special education teacher is not "highly qualified" as provided for in the charter.
- d. MMBA failed to meet federal and State guidelines regarding student IEP progress reports.
- e. MMBA failed to meet the achievement objectives outlined in its charter. For five years, MMBA failed to make adequate yearly progress on PACT, which is an achievement standard adopted in the charter application.
- f. MMBA failed to increase the number of students meeting standard on PACT by 20.6% in English and Language Arts (ELA) and 21.15% in Math over a three year period as promised in the charter application.
- g. The Director of MMBA does not hold a S.C. teaching certificate or an educational administration certification.
- h. Student resources were inadequate to support a strong literacy program as evidenced by absence of a comprehensive school library and adequate classroom print resources.

On November 7, 2009, the findings of the review committee were presented to the Board and on November 24, 2009, the Board voted to accept the District's recommendation to notify MMBA of its intent to revoke the charter. The Board, in accordance with the provisions of S.C. Code Ann. § 59-40-110(F), held a hearing on February 16, 2010, to consider whether MMBA's

charter should be revoked. The hearing was held at MMBA's request and included the recommendation of the District's Administration, opposition to the recommendation by MMBA, supporting evidence, oral argument by MMBA and public comment. After careful consideration of MMBA's performance under the contract, the Board voted to revoke the charter, a decision which MMBA now appeals.

III. STANDARD OF REVIEW

Under the provisions of Rule 34 of the South Carolina Administrative Law Court Rules, the filing of an appeal imposes an automatic stay upon the agency's action that is the subject of the appeal, unless a statute establishes otherwise. Rule 34, ALJD. "This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court." Rule 225, SCACR. "However, Rule 34 specifically allows a party to apply to the Administrative Law Judge for an order regarding the effect of the appeal on the agency decision." Nellie H. Roberson vs. SCDHHS, Docket No. 99-ALJ-08-0207-AP.

In the instant matter, should this Court dissolve the automatic stay, the force and effect of the Court's decision would be to enjoin MMBA from continuing to operate pending the outcome of the appeal. Thus, the Board's motion to lift the automatic stay is akin to a request for prohibitory injunctive relief. An injunction is a drastic remedy issued by the Court in its discretion to prevent irreparable harm suffered by the plaintiff. To establish a cause of action for a preliminary or temporary injunction, a plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is no adequate remedy at law. Levine v. Spartanburg Regional Services Dist., Inc., 626 S.E.2d 38 (S.C. Ct. App. 2005).

"Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36-37. The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation. Id. The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. Peek at 456, 626 S.E.2d at 37.

"When a court is requested to issue a temporary injunction, it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). "Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." Id.

IV. ARGUMENT

A. Relief From The Automatic Stay Is Warranted Because Irreparable Harm Would Result Should Students Be Allowed To Remain Enrolled At MMBA Throughout The Appeal Of The Board's Decision To Revoke MMBA's Charter.

A local school board of trustees is charged with the duty to promote the educational interest of all students, which the board, as fiduciaries, hold in trust. S.C. Code Ann. § 59-19-90(7). A local school board is in breach of this duty when the board does not move to cure deficiencies in areas such as curriculum, instructional delivery and student services that pose a significant threat to academic achievement of current and prospective students in the district. As the duly-elected board for Richland School District One, the Board, in moving for relief from the automatic stay, is governed by its interest in the educational wellbeing of all students in the

District and submits that should relief from the stay not be granted, irreparable harm will result to MMBA's students who will be transferred to District schools by virtue of the Board's decision to revoke MMBA's charter.

- 1. MMBA's failure to provide a curriculum that is aligned to State standards prevents students from obtaining the requisite knowledge to perform on grade level.**

Curriculum and instruction are at the heart of any education endeavor, as they determine what is taught, and how. As part of the District's comprehensive review of MMBA's adherence to its charter, the District's curriculum team, led by Chovan Jennings, Executive Director of Curriculum and Instruction, and comprised of four core area consultants, evaluated MMBA's curriculum to determine to which MMBA's curriculum and instruction might have contributed to the school's lack of student achievement. The scope of the District's curriculum team's review included the following:

- a. Auditing MMBA's curriculum to determine its alignment with academic standards;
- b. Reviewing curriculum pacing guides for all core subjects and providing written critiques with recommendations; and
- c. Reviewing teacher lesson plans for alignment of indicators, instructional components and assessment key practices.

(Jennings Affidavit, p. 2). As a result of the District's comprehensive review, Ms. Jennings concluded that:

- a. The curriculum used by MMBA, Core Knowledge, aligns with outdated South Carolina standards for education;
- b. MMBA's chosen curriculum, Core Knowledge, does not address over fifty percent (50%) of the current state standards;
- c. MMBA's English/Language Arts ("ELA"), Math and Science curricula were aligned to outdated standards;

- d. MMBA had not updated its curriculum to meet current Science standards, which were released by the South Carolina Department of Education in 2005;
- e. MMBA's Math curriculum did not align with current State standards that were adopted in 2007;
- f. MMBA's ELA curriculum did not align with current State standards that were adopted in 2008;
- g. MMBA's classroom support materials are limited and outdated and thus do not support teaching of S.C. Standards; and
- h. Instruction at MMBA is not on grade level.

(Jennings Affidavit, pp. 2-3). Even after receiving notification of the curriculum deficiencies in October 2009, MMBA has continued to ignore the District's concerns in the following regards:

- a. MMBA has not submitted an updated curriculum plan to address the curriculum deficiencies;
- b. While MMBA reported to the District that it would use a series of benchmark tests with their students, and would provide the results of that testing to the Executive Director of Testing, no such data was ever submitted by MMBA;
- c. Instruction at MMBA depends primarily upon lectures and worksheets, which are not the modern tools of instruction;
- d. No other evidence of individualized instructional planning based on diagnostic data has been provided to the District by MMBA.

(Jennings Affidavit, p. 3).

A school's curriculum determines the daily learning that should occur to meet State and federal requirements in order for students to achieve. (Jennings Affidavit, p. 1). Curriculum is essentially a design, or roadmap for learning, and as such focuses on knowledge and skills that are judged important to learn. While a charter school has the discretion to implement whatever curriculum it desires, the selected curriculum must align to State standards. The State

Department of Education establishes the curriculum and content standards that any given course must adhere to in order to equip students with the knowledge necessary to meet State objectives.

The Board submits that, given MMBA's willful neglect with regards to curriculum and instruction, if students were to continue to receive instruction at MMBA, the likelihood that they will be unable to meet future academic challenges is substantial. Because, MMBA's chosen curriculum addresses less than fifty percent (50%) of the current State standards, students enrolled at MMBA are exposed to less than fifty percent of the information they are expected to know. (Jennings Affidavit, p. 4). Thus, MMBA's failure to consistently adhere to a curriculum that is fully aligned with State standards causes its students to fall behind their grade level peers who attend District schools. Accordingly, irreparable harm results when students, after having attended MMBA, leave unprepared for the rigors of academia which wait upon transfer to a District school.

The High School Assessment Program (HSAP) test is administered to students in the 10th grade. Students must pass the HSAP to graduate from high school. HSAP is based on the State standards and skills that students are expected to have achieved in grade levels leading up to the examination. Therefore, by being instructed on a curriculum that does not address the very standards that are necessary for success on the HSAP, irreparable harm ensues where students are not prepared to perform proficiently on the HSAP at a level that enables them to continue their education or enter the world of work. (Jennings Affidavit, p. 4).

In addition to MMBA's misaligned curriculum, MMBA does not have adequate technology incorporated into its instructional program. (Jennings Affidavit, p. 3). In today's high-tech world, technology is a necessity. Id. MMBA's charter stated that as the name MMBA implies, "Math and Business will be the focus of MMBA." Id. Today, all math and business

enrollment is reassigned to the District's school prior to the commencement of the 2010-2011 school year. (Davis Affidavit, p. 4).

MMBA's failure to provide timely and accurate progress reports have jeopardized student achievement because without a progress report, significant information about students' progress and continued eligibility is not available to consider when planning their IEPs as required by federal and State laws. *Id.* Up-to-date progress reports assures that a student's parents are regularly informed of their child's progress and whether that progress is enough for the child to achieve the goals by the end of the year. *Id.* In the absence of timely progress reports, parents, students, and staff are uneducated regarding the status of the student's progress and therefore, cannot make informed decisions regarding the provision of services and progress. Thus, students cannot receive appropriate instruction and support essential to student achievement. (Davis Affidavit, p. 4).

Having the District absorb MMBA's enrollment at the commencement of the 2010-2011 school year would ensure that students would no longer be deprived of the services and programs required by law.

B. The Board Is Entitled To Relief From The Automatic Stay Because MMBA's Failure To Comply With The Material Provision Of Its Charter Results In A Substantial Likelihood That The Board Will Succeed On The Merits Of MMBA's Appeal.

A school board's decision not to renew or revoke a charter is governed by the provisions of the South Carolina Charter Schools Act, S.C. Code Ann. § 59-40-10, et. seq. Specifically, S.C. Code Ann. § 59-40-110(C) provides, in pertinent part:

A charter must be revoked or not renewed by the sponsor if it 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. (emphasis added).

Because the Board determined that MMBA had committed numerous material violations of the conditions, standards or procedures provided in the charter application and that MMBA had failed to meet reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the application, revocation of MMBA's charter was warranted pursuant to S.C. Code Ann. § 59-40-110(C).

The Administrative Procedures Act confines the Administrative Law Court's review of a final decision of an administrative agency to the record. The Court may affirm or remand the matter for further proceedings. The Court may also "reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, 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." S.C. Code Ann. § 1-23-380.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995); S.C. Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (S.C. Ct. App. 2005); Broughton v. S. of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (S.C. Ct. App. 1999).

The No Child Left Behind law states each teacher employed by a public school as a special education teacher must meet the requirements as highly qualified. MMBA employed only one special education teacher, even though its charter provided for at least two. The special education teacher was currently certified as of 8/14/09, but Human Resources reported no evidence of highly qualified status as of 10/21/09, a requirement for teachers in all other District schools. (Davis Affidavit, pp. 4-5). MMBA was notified of its highly qualified special education deficiency in a status report as recently as Fall 2009 and to-date, has failed to address the deficiency. (Davis Affidavit, p. 4).

Given the background, experience and professional assessment of administrators such as Ms. Jennings and Ms. Davis, the Board properly relied upon their findings and their recommendations provide substantial evidence to support the Board's decision to revoke MMBA's charter. Thus, the Board's decision to revoke on these grounds is likely to be affirmed.

2. **Because there is substantial evidence on the record to support the District's conclusion that MMBA failed to make reasonable progress, as defined in the charter application, toward pupil achievement standards, the Board's decision to revoke MMBA's charter is likely to be affirmed.**

Under the South Carolina Charter Schools Act, the standards for reasonable progress are defined by the charter application. S.C. Code Ann. § 59-40-110(C). MMBA's charter application included a section entitled "Student Assessment" that sets forth standards for measuring MMBA's pupil achievement. The achievement standards contained in the section use student test scores from the Palmetto Achievement Challenge Test (PACT) to measure student progress. Included in the "Student Assessment" section are two specific measurable standards for pupil achievement:

1. "The entire student population and specific subgroups of MMBA will meet the adequate yearly progress (AYP) goals each year." (R. p. 673).
2. "[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)." This standard is also referred to as a "three-year step increase." (R. p. 673).

As stated in the Board's Order setting for its reasons for revocation, over the previous five (5) years of PACT (academic years 2003 - 2004 through 2007 - 2008) and one (1) year of PASS (2008 - 2009), test scores released by the South Carolina Department of Education shows that students at MMBA did not meet its charter application achievement goals by failing to make AYP in any of the years that the PACT was administered to MMBA students. (R. pp. 235-245). Further, MMBA's scores fell below the District's average performance scores. Id.

From 2005 to 2008, the number of MMBA elementary students who met standard (Proficient or Advanced) in ELA increased by 8.5% and the number of MMBA middle school students who met standard in ELA increased by 7.7%. Both of these percentages fall well below the required 20.6% for ELA. As for Math, the number of MMBA elementary students who met standard increased by 12.7% and the number of MMBA middle school students who met standard in ELA increased by 0.2%. Once again, these percentage increases do not meet the standard set forth in the charter application, which requires an increase of 21.15%.

Furthermore, performance of MMBA students on the newly adopted Palmetto Assessment of State Standards (PASS) in 2009 PASS was still below District averages. (R. p. 17). The percentage of MMBA students scoring "Not Met" exceeded District averages on all grade levels and subject areas of PASS except 8th grade science. Thus, even after five years of

implementing its program, MMBA has been unable to raise student achievement to District average levels. Given this data, substantial evidence exists to support the Board's conclusion that MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in the charter application. Therefore, the Board's decision to revoke MMBA's charter is likely to be affirmed on appeal.

C. This Court Should Dissolve The Stay Because There Is No Adequate Remedy At Law.

Generally, equitable relief is available only where there is no adequate remedy at law. Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Id. The party seeking an injunction must prove it has no adequate remedy at law. Strategic Res. Co. v. Bcs Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). In the case at bar, money damages cannot afford the Board complete relief. Rather, equity must intervene to serve the best interest of those students whose educational interest the Board holds in trust.

- 1. Dissolving the stay and allowing the District to absorb MMBA's enrollment prior to the commencement of the 2010-2011 academic school year, would be in the best of interest of all students attending MMBA.**

If this Court were to deny the Board's motion for relief from the automatic stay and hold the Board's decision to revoke in abeyance pending the outcome of the appeal, then the likelihood that MMBA's students will continue to fall behind is substantial. In the absence of immediate relief, a decision affirming the Board's revocation of MMBA's charter would in all likelihood be rendered in the middle of the 2010-2011 academic school year. Accordingly, MMBA's students would have to be transferred into a District school after the commencement of

instruction for the upcoming school year. Such a mid-year decision would cause an adverse effect on students which can be demonstrated in several ways.

First, because it has already been identified that MMBA's students have not been afforded a curriculum that is fully aligned to State standards and have consistently performed below District standards, it is imperative that students be evaluated to determine what remediation is necessary to bring them into proficiency with their grade level peers. Delay in evaluation and subsequent accommodation during the pendency of the appeal would only ensure that students continue to regress rather than progress academically.

Second, allowing the District to absorb MMBA's enrollment prior to the start of the 2010-2011 academic school year, would allow students to participate in programmatic offerings which require students to be present at the commencement of instruction. Moreover, participation in co-curricular activities such as band, chorus and certain sports would be foreclosed to student transferees who were not present during tryouts or introductory level instruction.

Third, and most detrimentally, from a psychological and sociological perspective, it would be in the best interest of students currently enrolled at MMBA to be reassigned to District schools prior to the commencement of the 2010-2011 school year because transferring students mid-year would have a significant impact on student learning. Beginning the academic year in the environment a student will be in for the duration of the academic term is pertinent for a student to embrace and internalize the academic and social expectations for that academic environment. The relationships students establish with faculty, staff, and peers early on in the academic year significantly impact their academic performance. Furthermore, beginning a school year in one setting and transferring to another site during that school year requires significant

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

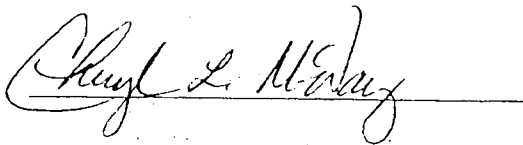
Respondent.

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

CERTIFICATE OF SERVICE

The undersigned of Boykin & Davis, L.L.C., hereby certifies that she has served the following counsel of record with the foregoing **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY**, by hand-delivering same to the following on this 9th day of July, 2010:

Samuel M. Mokeba, Esq.
Kirby D. Shealy, III, Esq.
Baker, Ravenel & Bender, L.L.P.
3710 Landmark Drive, Suite 400
Columbia, SC 29204



FILED

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

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

AFFIDAVIT OF MARILYN L. DAVIS

Personally appeared before me, Marilyn L. Davis, who being duly sworn, deposes and says the following:

1. I am over eighteen years of age, and I have personal knowledge of the facts and circumstances set forth in this affidavit.
2. Except where otherwise stated, the facts contained in this declaration are based upon my personal knowledge. If called to testify, I could and would testify competently to such facts.
3. I am an employee of Richland County School District One ("District") located in Columbia, South Carolina.
4. My educational experience consists of the following:
 - a. Bachelor of Science Degree in Home Economics from Georgia Southern University in Statesboro, Georgia;
 - b. Master's Degree in Educational Administration from the University of South Carolina in Columbia, South Carolina; and
 - c. +30 Graduate hours in Educational Administration.
5. I have worked as a teacher and administrator in school districts for over 35 years.
6. I am employed with the District as Executive Director overseeing the Special Education Department and programs for all schools within the district. I have worked in this position for 9 years.
7. Compliance with laws and regulations concerning students with disabilities is of particular concern to the District because as the Local Education Agency ("LEA") under

the law, the District is ultimately responsible for ensuring that all students with disabilities in the District, including those attending District charter schools, are served appropriately.

8. During the 2007-2008 academic school year, the District placed MMBA on an improvement plan in an effort to address MMBA's lack of student achievement.
9. To reverse the decline in student achievement and to assist MMBA in meeting the standards contained in its charter, my department provided MMBA with technical assistance in special education. Such assistance, included the following:
 - a. Special education consultants and school psychologists from the District's Office of Special Education were assigned to monitor MMBA's adherence to Individualized Education Plans (IEPs), the status of all MMBA's special education students, and to provide reevaluations as needed;
 - b. MMBA's staff was encouraged to attend District-sponsored in-service training on special education topics and received notifications of scheduled in-service activities.
10. As required by federal law, the Individuals with Disabilities Education Act ("IDEA"), and the South Carolina State Board of Education regulations, each student served in special education must have an IEP that promotes challenging expectations and ensures participation and progress in the general education curriculum that focuses on local and state content standards and related assessments.
11. The IDEA requires that special education students and their parents receive progress reports on the progress toward IEP goals at least as often as general education students receive progress reports, or as otherwise directed by the student's IEP.
12. While on the improvement plan there were numerous inconsistencies in providing student IEP progress reports and at least one situation where no progress report had been developed for a student whose IEP required progress reporting every 4.5 weeks.
13. MMBA's neglect regarding the issuance of student progress reports has persisted despite the following:
 - a. The MMBA special education teacher was trained by Richland special education personnel in the use of the computerized IEP program and the progress report component;

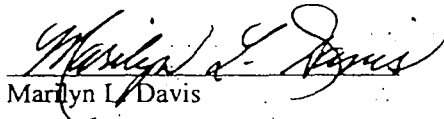
- b. In a status report provided from the District during notified of the students on the special education + received IEP progress reports for the first quarter;
 - c. MMBA's special education teacher is included' listserv, and progress report reminders were emailed us.
 - d. A special education consultant was assigned to MMBA, but no tec. has been requested.
- 14. Despite, the provision of technical assistance, special education problems continued to be identified and student achievement continued to decline. Therefore, under the direction of the Board, the District commenced a comprehensive review of MMBA on July 22, 2009.
- 15. As part of the District's comprehensive review, I was responsible for reviewing MMBA's compliance with the provisions of its charter regarding special education.
- 16. The scope of my review included the following:
 - a. Determining whether accurate and appropriate Individualized Education Plans (IEPs) had been provided as required by law;
 - b. Auditing MMBA's compliance with notifying the special education database analyst of new enrollment to ensure that special education needs are addressed and met;
 - c. Examining special education personnel's participation in training provided by the District; and
 - d. Reviewing credential and certifications of special education staff to ensure compliance with the federal No Child Left Behind Act and the terms of MMBA's charter.
- 17. Overall, I concluded that MMBA had violated its charter by failing to comply with all aspects of State and federal laws related to the education of children with special needs. Additionally, MMBA failed to comply with many of the strategies required by Richland One's Board of Commissioners.
- 18. My conclusions were based on the following findings:
 - a. Inaccurate and inconsistent IEP progress reporting;
 - b. The No Child Left Behind law states each teacher employed by a public school as a special education teacher must meet the requirements as highly qualified;

- c. MMBA employed only one special education teacher, even though its charter provided for at least two. The special education teacher was currently certified as of 8/14/09, but Human Resources reported no evidence of highly qualified status as of 10/21/09, a requirement for special education teachers in all other District schools;
 - d. MMBA was notified of its highly qualified special education deficiency in a status report as recently as Fall 2009 and to-date, has failed to address the deficiency;
 - e. Failure by MMBA's staff to attend in-service training offered by the District in the areas of student intervention and special education; and
 - f. Timely reevaluation of students with special education needs was not met, thus required information was not available to consider for the development and implementation of IEPs.
19. MMBA's continued failure to strictly adhere to State and federal education requirements by providing IEP progress reports have caused the school's special education students to suffer injury that could lead to irreparable harm unless MMBA's enrollment is reassigned to the District's school prior to the commencement of the 2010-2011 school year.
20. MMBA's failure to provide timely and accurate progress reports have jeopardized student achievement because without a progress report, significant information about a student's progress and continued eligibility is not available to consider when planning their individualized educational programs as required by federal and State laws.
21. Up-to-date progress reports assures that a student's parents are regularly informed of their child's progress and whether that progress is enough for the child to achieve the goals by the end of the year.
22. In the absence of timely progress reports, parents, students, and staff are uneducated regarding the status of the student's progress and therefore, can not make informed decisions regarding the provision of services and progress. Thus, students cannot receive appropriate instruction and support essential to student achievement.
23. From a psychological and sociological perspective, it would be in the best interest of students currently enrolled at MMBA to be reassigned to District schools prior to the commencement of the 2010-2011 school year because transferring students mid-year would have a significant impact on student learning.
- a. Beginning a school year in one setting and transferring to another site during that school year requires significant adjustment, particularly for students with emotional disabilities, other health impairments such as severe ADHD, learning disabilities, autism, etc. Students of all the aforementioned special education categories are enrolled at MMBA.

- b. A common characteristic of special education students is a greater difficulty adjusting to change than is experienced by their non-disabled peers.
24. Given MMBA's continued failure to make progress towards student achievement, non-compliance with State and federal special education requirements; and the foreseeable psychological and sociological impact on students should MMBA be closed midyear, it would be in the best interest of all students, if MMBA's pupil enrollment were reassigned to a District school at the commencement of the 2010-2011 school year.
25. Having the District absorb MMBA's enrollment at the commencement of the 2010-2011 school year would ensure that students would no longer be deprived of the services and programs required by law.

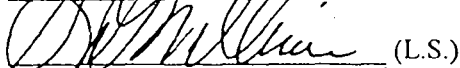
I declare under penalty of perjury under the laws of the United States of America and the State of South Carolina that the foregoing is true and correct.

Executed this 8th day of July 2010, in the city of Columbia, South Carolina.


Marilyn L. Davis

SWORN TO Before me this

8th day of July 2010

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 11/26/2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

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

AFFIDAVIT OF CHOVAN JENNINGS

Personally appeared before me, Chovan Jennings, who being duly sworn, deposes and says the following:

1. I am over eighteen years of age, and I have personal knowledge of the facts and circumstances set forth in this affidavit.
2. Except where otherwise stated, the facts contained in this declaration are based upon my personal knowledge. If called to testify, I could and would testify competently to such facts.
3. I am an employee of Richland County School District One located in Columbia, South Carolina.
4. I am employed as the Executive Director of Curriculum and Instruction overseeing K-12 curriculum development and implementation for all schools within the district. I was appointed to this position starting July 1, 2009. Prior to this appointment, I worked as Director of Curriculum and Instruction for two years.
5. My educational experience consists of the following:
 - a. Bachelor of Science Degree in Elementary Education from Voorhees College
 - b. Master's Degree in Education from South Carolina State University
 - c. Education Specialist Degree in Administration from Cambridge College
6. I have worked as a teacher and administrator in school districts for over 26 years.
7. A school's curriculum establishes the daily learning that should occur to meet State and federal requirements in order for students to achieve.

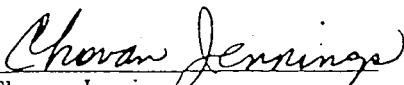
8. Over the previous five (5) years of PACT (2003 - 2004 academic year through 2007 - 2008) and one (1) year of PASS (2008 - 2009), test data shows that students at MMBA failed to meet charter application achievement goals and also fell below the district's average performance scores.
9. As an initial attempt to address the lack of student achievement, the District placed MMBA on an improvement plan during the 2007-2008 school year.
10. Even after being placing MMBA on the improvement plan, MMBA continued to make inadequate progress towards the student achievement goals provided in its charter.
11. In September, 2009 and October, 2009 the District's curriculum team (the Executive Director of Curriculum and Instruction and four (4) core area consultants) completed a comprehensive review of the curriculum documentation submitted by MMBA's Administration.
12. The scope of the District's curriculum team's review included the following:
 - a. Auditing MMBA's curriculum to determine its alignment with academic standards;
 - b. Reviewing curriculum pacing guides for all core subjects and providing written critiques with recommendations; and
 - c. Reviewing teacher lesson plans for alignment of indicators, instructional components and assessment key practices.
13. As a result of the District's comprehensive review, my department concluded that:
 - a. The curriculum used by MMBA, Core Knowledge, aligns with outdated South Carolina standards for education;
 - b. MMBA's chosen curriculum, Core Knowledge, does not address over fifty percent (50%) of the current state standards;
 - c. MMBA's ELA, Math and Science curricula were aligned to outdated standards;
 - d. MMBA had not updated its curriculum to meet current Science standards, which were released by the South Carolina Department of Education in 2005;
 - e. MMBA's Math curriculum did not align with current State standards that were adopted in 2007;
 - f. MMBA's ELA curriculum did not align with current State standards that were adopted in 2008;

- g. MMBA's classroom support materials are limited and outdated and thus do not support teaching of S.C. Standards; and
 - h. Instruction at MMBA is not on grade level.
- 14. Even receiving notification of the curriculum deficiencies in October 2009, MMBA has continued to ignore the District's concerns in the following regards:
 - a. MMBA has not submitted an updated curriculum plan to address the curriculum deficiencies.
 - b. While MMBA reported to the District that it would use a series of benchmark tests with their students, and would provide the results of that testing to Executive Director of Testing, no such data was ever submitted by MMBA.
 - c. Instruction at MMBA depends primarily upon lectures and worksheets, which are not the modern tools of instruction.
 - d. No other evidence of individualized instructional planning based on diagnostic data has been provided to the District by MMBA.
- 15. Books are essential for students to learn how to read.
- 16. The Director of Instructional Technology Services for the District conducted a comprehensive review of the library at MMBA in October, 2009.
- 17. Prior to the 2009- 2010 academic year, no in-house library was available at MMBA. This issue was addressed with MMBA's administration in 2008 and 2009.
- 18. MMBA began a library collection during the 2009-2010 academic year with outdated materials and without a media specialist.
- 19. To the District's knowledge, and based on a walk-through of the library at MMBA on May 28, 2010, MMBA did not remove discarded and outdated materials.
- 20. No information has been provided to the district verifying that a certified media person had been hired and that the library collection was improved to provide the adequate library necessary to meet S.C. Library Standards.
- 21. MMBA does not have adequate technology incorporated into its instruction.
- 22. In today's high tech world, technology is a necessity. MMBA's charter stated that as the name MMBA implies, "Math and Business will be the focus of MMBA." Today, all math and business students must have access to math and engineering simulation programs and other math software and internet sites. Without technology, students will be behind their peers.

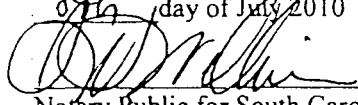
23. After an on-site walk-through of MMBA, the Director of Instructional Technology Services for the District followed up with two memos outlining her findings and her suggestions for immediate and long term action.
24. The District's Coordinator for Gifted and Talented Education has confirmed through her school observations, review of the curriculum, and talks with MMBA's Administration that MMBA does not have a gifted and talented program that addresses the minimum standards of S.C. Gifted and Talented Programs.
25. MMBA's continued failure to provide a rigorous curriculum which meets State standards has caused its students to suffer irreparable injury in the following ways:
 - a. Because, MMBA's chosen curriculum does not address over fifty percent (50%) of the current State standards, students enrolled at MMBA are not learning over fifty percent of the information they are expected to know;
 - b. Instruction at MMBA is not on grade level. As a result, students are not learning what society expects them to know;
 - c. Students who leave MMBA to attend a District school may not be prepared for more rigorous high school programs; and
 - d. By being instructed on a curriculum that does not address the very standards that are necessary for success on the HSAP, irreparable harm ensues where students are incapable of demonstrating that they possessed the requisite knowledge for graduation.

I declare under penalty of perjury under the laws of the United States of America and the State of South Carolina that the foregoing is true and correct.

Executed this 8th day of July 2010, in the city of Columbia, South Carolina.


Chovan Jennings

SWORN TO Before me this
8th day of July 2010

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 11/24/2013

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy)
Charter School,)

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

Appellant,)

**RESPONSE TO MOTION FOR
RELIEF FROM AUTOMATIC
STAY**

vs.)

Richland County School District 1 Board)
of Commissioners,)

Respondent.)

INTRODUCTION

This issue arose after Richland County School District One Board of Commissioners (the Board) revoked Midlands Math and Business Academy's (MMBA) charter. In response to the Board's revocation of its charter, MMBA filed a notice of appeal with the Administrative Law Court (ALC). Pursuant to Rule 34 of the ALC, enforcement of the Board's decision is automatically stayed pending the outcome of an appeal on the merits.

On or about July 9, 2010, the Board filed a motion for relief from the automatic stay of its decision to revoke MMBA's charter, citing to Rule 34 of the ALC and Rule 225 of the Appellate Court Rules. The Board specifically requested the ALC lift the current stay. Lifting the stay would effectively mean MMBA would no longer receive public funding for its operation which would lead to closure of the school. We submit that lifting the stay would amount to a legal error. Alternatively, we submit that the evidence does not support a decision to lift the current stay.

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FACTS AND PROCEDURAL BACKGROUND

MMBA opened its doors in August 2004, for the 2004-2005 academic year. The school opened after both the South Carolina Department of Education's Charter School Advisory Committee and the Board approved its charter. The charter called for a student population of about 200 students. However, when the school opened it had less than half of those students enrolled. Today, the school has 115 students, with 139 as its highest enrollment.

During each year of its existence the school has prepared an annual report on the state of the school and presented it to the Richland County School District One's ("District") administration pursuant to section 59-40-110(A) of the South Carolina Code (Supp. 2009). The report is typically distributed to various committees, and each year someone from the District will visit the school for an onsite observation. At the conclusion of this process, the final report is presented to the Board for approval. The Charter Schools Act of 1996 (the "Act"), pursuant to section 59-40-110(C) 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.

Consonant with its usual practice, MMBA prepared its annual report to the District at the end of the 2008-09 school year. 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. Immediately following the meeting, Ms. Michelle Spradley, president of MMBA's board of directors, wrote Mr. Vince Ford 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 the concerns raised in her letter.

On November 24, 2009, the Board accepted the District administration's recommendation not to renew MMBA's charter. 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 current school year. On December 28, 2009, MMBA timely filed a request for a hearing with the District pursuant to section 59-40-110(F).

In its letter to MMBA dated December 12, 2009, the Board indicated MMBA had violated section 59-40-110 by committing material violations of the conditions, standards or procedures provided for in its charter application, and by failing to make reasonable progress, as defined in the charter application, towards pupil achievement standards.

On March 23, 2010, the Board, pursuant to section 59-40-110(C), voted to revoke MMBA's charter. The Board maintained it based MMBA's charter revocation on numerous material violations of the conditions, standards, and procedures provided in its charter application, toward pupil achievement standards. 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.

In response to the Board's decision to revoke its charter, MMBA filed for an appeal with the ALC. MMBA received a notice of assignment from the ALC indicating Judge Lenski will hear the appeal. Both parties have submitted motions to the ALC regarding different issues, and the parties will start submitting their briefs on the merit of

the revocation in the coming weeks. We write this reply in response to the Board's motion for relief from the automatic stay filed on or about July 9, 2010.

STANDARD OF REVIEW

"The grant of an injunction is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." AJG Holdings, LLC v. Dunn, 382 S.C. 43, 49, 674 S.E.2d 505, 507 (Ct. App. 2009). The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. Levine v. Spartanburg Reg'l Services Dist., Inc., 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. Id.

ARGUMENTS

We respectfully request the ALC dismiss or deny the Board's motion for relief from the automatic stay. We submit that lifting the stay would amount to a legal error because (1) a supercedeas is not an available legal remedy in an administrative action, or, alternatively (2) the Charter School Act according to the South Carolina Supreme Court prohibits withholding of funds to charter schools during the pendency of the appellate process. Therefore, we request the ALC dismiss the motion to lift the stay. As a final resolution, if the ALC decides to determine this motion on the merits, we submit that the evidence does not support a decision to lift the current stay and respectfully request the ALC deny the Board's motion to lift the stay.

I. NO SUPERCEDEAS REMEDY AVAILABLE IN ADMINSTRATIVE ACTIONS

As an initial response, we maintain Rule 241, captioned "STAY AND SUPERSEDEAS IN CIVIL ACTIONS" does not apply to **administrative** actions. (emphasis added). In other words, we submit there is no legal remedy of a supercedeas here. Further, we submit the Rules were designed to prevent such a remedy as the Appellate Court Rules expressly allow for stays in civil and criminal cases, per Rules 241 and 247, respectively. However, no rule specifically allows a party to an administrative action to petition a court for a supercedeas. Accordingly, we respectfully request the Administrative Law Court dismiss the Board's motion for lack of an available legal remedy.

II. CHARTER SCHOOL ACT PROHIBITS WITHHOLDING OF FUNDS DURING PENDING APPEAL

The Administrative Law Court, with guidance from the South Carolina Supreme Court, has considered this exact issue before in Lee County School District Board of Trustees v. Mary L. Dinkins Higher Learning Academy. (See attached order, exhibit 1) There, Lee County School District (the District) initially denied MLD's application to become a charter school. The Board of Education reversed the District's denial, and the supreme court affirmed the Board's reversal.¹ Thereafter, the District again revoked MLD's charter, and the Board of Education reversed the District's decision to revoke. There, while appeals were pending, the District sought a stay of the enforcement of a circuit court order-which would effectively have meant that the revocation remained in

¹ The South Carolina Board of Education is the body responsible for public elementary and secondary education in South Carolina. The Board consists of seventeen members, one appointed from each of the state's sixteen judicial circuits by the legislative delegations representing the various circuits and one member appointed by the governor. Members are appointed for four-year terms. Under the previous appeals' process, review of a District's revocation of a charter was initially appealed to the State Board of Education. Current reviews of agency decisions go directly to the ALC.

effect, and the District would not have to fund MLD's operation. The circuit court, under Judge Cooper, denied the District's motion to stay. Judge Cooper balanced the financial hardships of the budget deficit with the hardship of MLD being unable to operate and found MLD's closing a greater hardship.

Thereafter, The MLD petitioned the Supreme Court for a supercedeas to compel the District to continue funding the Academy while the appeal remained pending. In an order dated August 24, 2006, the Supreme Court held:

Nothing in the Charter Schools Act allows the withholding of funds while the revocation process is pending. Because the withholding of funds would likely result in the closing of the charter school, the action could render this appeal moot. Accordingly, [District] is ordered to fully fund [MLD] as required by the Charter School Act until this appeal is decided or the revocation of the respondent's charter becomes final.

When the Academy appeared before the Administrative Law Court in a similar matter, the ALC, under Judge Kittrell, relied on the rulings and language from the circuit court and the Supreme Court and ordered the District to continue funding the Academy while the District's appeal was still pending before it. (See **Attached Order, exhibit 2**)

We respectfully request the ALC find the above mentioned authority persuasive and similarly hold that nothing in the Charter School Act allows a District to withhold funding during the appeals process. Moreover, Rule 241(c)(2) states that courts should consider whether lifting an automatic stay is necessary to preserve jurisdiction of the appeal or to present a contested issue from becoming moot. Here, as in MLD, Midlands Math would likely close without funding; thus, rendering the appellate issue moot. Therefore, pursuant to earlier decisions of the ALC, circuit court, and Supreme Court, we

respectfully, request the ALC deny the Board's Motion for Relief from the automatic stay.

III. MERITS OF THE MOTION TO REMOVE THE STAY

In the event the ALC wishes to address the Board's motion on its merit, which we do not consider relevant or appropriate in light of the above mentioned authority and the pending appeal, we submit the following arguments for consideration.

A. LIFTING STAY IS CONTRARY TO AN INJUNCTION'S PURPOSE

A party wishing to obtain an injunction must demonstrate (1) irreparable harm, (2) a likelihood of success on the merits, and (3) an inadequate remedy at law. MailSource, LLC v. M.A. Bailey & Associates, 356 S.C. 363, 367-68, 588 S.E.2d 635, 638 (Ct. App. 2003). The purpose of a temporary injunction is to maintain the status quo of the condition of the controversy during litigation until the subject of the controversy is resolved. County of Richland v. Simpkins, 348 S.C. 664, 671, 560 S.E.2d 902, 905 (Ct. App. 2002) (noting the inherent purpose of the equitable remedy of an injunction is to preserve the status quo).

In this situation, lifting the stay would be contrary to the purpose of granting an injunction. Specifically, without funding, MMBA would close, forcing the students to change schools and their current curriculum. Thus, the condition of the controversy would be materially altered, rather than stay the same, if the ALC grants an injunction. Accordingly, we respectfully request the ALC deny the Board's motion because the effect of lifting the stay is contrary to the purpose of an injunction as an equitable remedy.

B. IRREPARABLE HARM

The District asks for relief from the automatic stay and argues without it, students at MMBA would suffer irreparable harm. Specifically, the District argues the students enrolled at MMBA would fail to obtain requisite knowledge to perform on grade level. Additionally, the District maintains MMBA's failure to comply with State and federal laws and regulations concerning students with disabilities impedes timely and accurate evaluation of student needs and prevents students from receiving services designed to help them achieve learning goals. We disagree.

The District continues to maintain oversight responsibility for the school as its sponsor and can therefore ensure that standards are maintained and met per the Charter School Act. Furthermore, there is ample evidence to the contrary that the students at MMBA will benefit, not suffer, from the curriculum and instructions of the only Middle School in the District to make AYP (see attached affidavit, exhibit 3).

1. MMBA's Curriculum

First, from MMBA's point of view, the school would suffer irreparable harm should the ALC lift the stay requiring that the District fund the school. Essentially, the school would shut down, forcing students to change school, and disrupting their current course work. Therefore, based on the irreparable harm MMBA would suffer, we respectfully request the ALC deny the Board's motion to lift the stay.

Next, MMBA's current curriculum is aligned with state standards hence its academic success in the preceding academic year. The District's allegation that MMBA's current curriculum is preventing students from obtaining the requisite knowledge to perform at grade level was fully debunked when MMBA was the only middle school in the District to obtain a passing grade on the AYP. We submit that

further hearings and an appeal on this matter will better demonstrate that MMBA's current curriculum prepares students to obtain the requisite knowledge to perform at grade level.

The District alleges that MMBA committed a material violation of the terms of its charter based on classroom observations that yielded mostly subjective conclusions that seek to compare MMBA with non-charter schools within District's jurisdiction. It further claims that student resources are inadequate to support a strong literacy program—another wholly subjective determination. However, the District conveniently fails to identify the section in MMBA's charter or a provision of South Carolina law that requires MMBA's classes to be conducted in an identical fashion to the other classes in the district. Further, the District blames MMBA for lack of adequate student resources. Nowhere in the charter does one find a section in which MMBA and the District agree as to what constitutes adequate resources to support a strong literacy program. Nowhere in the Act or the applicable regulations is there a definition or description regarding what constitutes adequate resources to support a strong literacy program. The District is therefore making an overreaching subjective finding that has no basis in the charter or the law.

The District faults MMBA for using "worksheet and lecture as the predominant instruction strategies." However, the District team only went to MMBA about two times and only spent about an hour and a half each time prior to reaching such a sweeping conclusion, ignoring the rest of the school days when MMBA uses other teaching methods. The conclusion also ignores MMBA's representations regarding instructional delivery in its charter: "MMBA will use various teaching strategies (i.e. question and

answer sessions, hands-on activities, lecture with note-taking, class discussions, demonstrations/modeling, technology assisted instruction, etc.).”

Clearly, by faulting MMBA for using hands-on activities, which in this case would include worksheets, and lectures, the District either seeks to rewrite MMBA’s charter or disregard it altogether. Further, the Board fails to cite a rule or regulation requiring MMBA maintain “adequate technology.” Conveniently, the Board fails to define “adequate” such that MMBA would be on notice as to what level of technology would be adequate. In any event, MMBA has sufficient technology to prepare its students to be on par with their grade level peers. As previously mentioned, MMBA teaches students interactively with cyber lessons, and more than adequately incorporates technology within the classroom.

Finally, the Board mentions the High School Assessment Program (HSAP) test that all tenth graders must pass in order to graduate from high school. By merely noting that students are required to pass the HSAP, the Board presents no evidence that an MMBA student has failed the HSAP. Instead, the Board raises this issue for no apparent purpose. In no way does a mention of the HSAP demonstrate a manner in which MMBA’s curriculum is not up to par.

MMBA strongly believes that its students are not suffering from its current curriculum; hence the pending appeal before the ALC. Therefore, we respectfully maintain that no relief from an automatic stay is warranted. As attested in the enclosed affidavit, the educational interests of MMBA students are not at stake given MMBA was the only Middle School with a passing grade on the AYP.

2. Compliance with laws and regulations for students with disability

We disagree with the Board's assertion that MMBA has failed to comply with State and federal laws and regulations concerning students with disabilities and such failure would impede timely and accurate evaluation of student needs and prevents students from receiving services designed to help them achieve learning goals. Again the District continues to maintain a supervisory responsibility over the school and can ensure that the standards are maintained and met.

The Board's assertions that students would fail to obtain requisite knowledge to perform on grade level are misplaced. Additionally, the Board's assertion that MMBA has failed to comply with state and federal rules and regulations concerning students with disabilities are misplaced. To the contrary, MMBA's students are adequately prepared to perform at grade level, and above. Moreover, there is ample evidence to demonstrate MMBA's compliance with federal and state rules regarding special education. Therefore, we disagree with the Board's assertion that irreparable harm will result if students remain enrolled at MMBA.

C. LIKELIHOOD OF SUCCESS OF THE MERITS

The Board maintains it has a substantial likelihood of success on appeal because of MMBA's failure to comply with the material provision of its Charter. We disagree.

1. Substantial evidence does not demonstrate material violations of MMBA's charter application

The Board argues there is substantial evidence in the record to support the District's conclusion that MMBA committed material violations of the conditions, standards, or procedures provided for in the charter application. Without rewriting the above mentioned arguments, MMBA's charter application indicates its proposed

curriculum which we believe MMBA has successfully implemented. Additionally, we continue to maintain MMBA is in compliance with all state and federal rules and regulations concerning students with disabilities.

2. Substantial evidence does not demonstrate MMBA failed to make reasonable progress

The District maintains there is substantial evidence to support the District's conclusion that MMBA failed to make reasonable progress, as defined in the charter application, toward pupil achievement standards, the ALC will likely affirm the Board's decision to revoke MMBA's charter. We disagree.

District has determined that MMBA's charter should not be renewed because it has allegedly "failed to make adequate student achievement gains." District alleges that "MMBA has not met the objectives outlined in the original contract, student achievement is below the district's performance scores, and MMBA has failed to meet AYP each year." If there is one school that has demonstrated reasonable academic progress, it is MMBA. (See again attached affidavit, exhibit 3)

In arriving at these conclusions, District compares MMBA with the schools within its jurisdiction in ELA, Math, Social Studies and Science, in each case concluding that MMBA's results from 2005-08 are inferior to the District's 2008 numbers. The given statistics glaringly failed to make side-by-side comparison of the performance of MMBA's students to that of the performance of the students in the entire district throughout that three-year time frame. If one makes such a comparison, the results actually favor MMBA. (See ROA 1122-71). MMBA saw a 9.725% decrease in the number of elementary level students scoring below basic during that time frame, while

the District at large only experience a 2.375% decrease. Simultaneously, MMBA has seen a 6.625% increase in the number of elementary level students scoring proficient or advanced, while the District can only boast of a 5.11% increase.

At the middle school level, MMBA saw a 10.25% decrease in the total number of students scoring below basic, while the District experienced only a 4.46% decrease. However, the District did outpace MMBA in the number of students scoring proficient or advanced. MMBA saw a 1.98% increase, while the District saw a 4.88% increase. MMBA submits that this kind of comparison yields more valuable information than that performed by the District administration.

The trends outlined above are underscored by examining MMBA's AYP results. In 2006,² MMBA met 7 of its 13 objectives. In 2007, it met 10 of 13 objectives. In 2008, it met 12 of 13 objectives. In 2009, it made AYP. In fact, it was the only middle school in the District to do so.

It is worth noting that section 59-40-110(C)(2) 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). At least one judge has interpreted this language to mean that a charter school is not required to meet its stated pupil achievement standards in its charter; rather, that it only make "reasonable progress" toward those objectives. (See **Attached decision, Exhibit 4**). That standard of progress has certainly occurred in this case.

D. NO ADEQUATE REMEDY AT LAW

Finally, the Board maintains that dissolving the stay and allowing the District to absorb MMBA's enrollment prior to the commencement of the 2010-2011 academic

² 2006 was the first year that MMBA was evaluated for AYP.

school year, would be in the best of interest of all students attending MMBA. Specifically, the Board argues students will continue to regress rather than progress academically. We disagree.

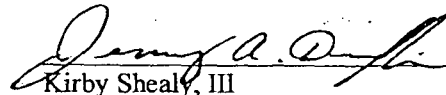
First, as indicated above, we vehemently disagree about MMBA's student regression. As indicated above, MMBA's curriculum and student performance is on par with that of the state. In the District, in terms of AYP results and the No Child Left Behind Legislature, MMBA is the best Middle School in the District. Therefore, we maintain, students will not suffer but will continue to progress by attending MMBA.

Next, addressing the Board's argument regarding the start of the 2010-11 academic school year, we submit that the ALC should not grant the Board an injunction based on a scheduling conflict. Indeed, the commencement of the school year is approaching. However, we have every confidence that should MMBA fail to succeed in this appeal, the students currently enrolled at MMBA would find alternative placement and begin their student lives at the alternate school in a non-disruptive manner. For example, should the ALC decide the merits of this appeal in the late fall; the students could enroll in another school at the beginning of 2011. Moreover, approximately 9,000 students are enrolled in Richland School District One. In the event MMBA's charter is ultimately revoked, the District would have to place roughly 115 students, a relatively small number of students in comparison with the amount already enrolled within the District.

CONCLUSION

For the abovementioned reasons, we respectfully request the ALC dismiss the Board's motion based on our argument that a supercedeas motion does not apply to

administrative actions. Additionally, we request the ALC dismiss the Board's motion based on our assertion that the Charter Schools Act, per the South Carolina Supreme Court, the Circuit Court, and ALC, does not allow withholding of funds while a charter revocation appeal is in progress. Finally, in the event the ALC wishes to address this issue on the merits, we respectfully request the ALC deny the Board's motion to be relieved from the automatic stay of its decision to revoke MMBA's charter. Comprehensive briefs on the merits of the appeal are forthcoming, and this honorable court will have an opportunity after reviewing the entire record to make its decision on the merits.



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P. O. Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Appellants.

July 21, 2010.

EXHIBIT ONE

The Supreme Court of South Carolina

Lee County School District
Board of Trustees,

Appellant,

v.

MLD Charter School Academy
Planning Committee,

Respondent.

ORDER

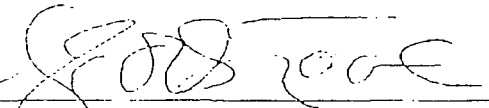
Respondent requests a writ of supersedeas to enjoin appellant from taking any action against respondent until this appeal is resolved. In addition, respondent asks the Court to find that appellant has rendered this appeal moot by its admission it is the sponsor of, and bound by a contract with, the school; to sanction appellant for filing a frivolous appeal and continuing to harass respondent; and to hold appellant in contempt of the circuit court's order dated April 12, 2005. In the alternative, respondent asks that it be placed under the direction and supervision of the State Department of Education. Appellant opposes the requests.

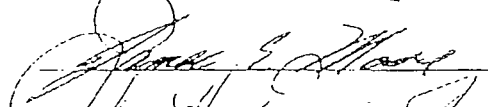
The sole issue before the Court in this appeal is whether appellant wrongfully denied respondent's charter school application. Whether respondent's charter should be revoked for reasons arising after this action was begun is not an issue involved in or affecting this appeal. Appellant has

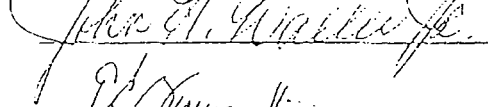
begun the process of revoking respondent's charter, and respondent has requested a hearing before the school board under S.C. Code Ann. § 59-40-110(E) (2004). Because appellant's decision to revoke respondent's charter is not a matter involved in this appeal, we deny respondent's motions.

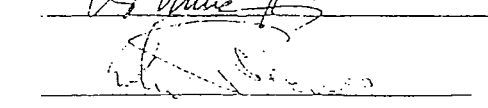
Appellant has admitted that it has not fully funded respondent since its decision to revoke respondent's charter. However, that decision is not yet final. See S.C. Code Ann. §§ 59-40-90 and -110 (2004). Nothing in the Charter Schools Act allows the withholding of funds while the revocation process is pending. Because the withholding of funds would likely result in the closing of the charter school, the action could render this appeal moot. Accordingly, appellant is ordered to fully fund respondent as required by the Charter Schools Act until this appeal is decided or the revocation of respondent's charter becomes final.

IT IS SO ORDERED.



C. J.


J.


J.


J.

Columbia, South Carolina

August 24, 2006

EXHIBIT TWO

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Lee County School District Board of
Trustees,

Appellant,

vs.

Mary L. Dinkins Higher Learning Academy,

Respondent.

Docket No. 07-ALJ-30-0597-AP

ORDER

FILED

DEC 28 2007

SC ADMIN. LAW COURT

(1) This matter is before the Administrative Law Court ("ALC" or Court") pursuant to a petition for a writ of mandamus filed on December 27, 2007 by Respondent Mary L. Dinkins Higher Learning Academy ("MLD") in the above-captioned appeal. Alternatively, MLD prays for relief from the automatic stay imposed by ALC Rule 34. In either case, MLD seeks to have this Court compel Appellant Lee County School District ("District") to continue funding MLD in consonance with S.C. Code Ann. § 59-40-140(A) (Supp. 2006) while this appeal is pending. MLD filed its petition on December 19, 2007 after initially seeking similar relief from the South Carolina Supreme Court by way of a petition filed on December 10, 2007.¹ This Court held a hearing on MLD's petition by telephone on December 27, 2007, and counsel for both parties presented their respective positions. For the reasons set forth below, the Court hereby grants MLD relief from the automatic stay imposed by ALC Rule 34.

From the materials submitted with MLD's petition, this Court has learned of the extensive litigation between the parties. The present appeal is from a decision of the South Carolina Board of Education that reversed District's August 7, 2007 decision to revoke MLD's charter. District initially denied MLD's application to become a charter school on July 20, 2004, but that decision was likewise reversed by the Board of Education, and the Board's decision was subsequently upheld by the Circuit Court and the South Carolina Supreme Court. During the course of the prior appeal, the issue of whether District should continue funding MLD while the appeal was pending arose on two separate occasions. District sought a stay of enforcement of the Circuit Court's Order upholding the Board of Education's decision, which was denied by Order of The Honorable Thomas W. Cooper, Jr. and filed on

¹ By Order filed December 14, 2007, the Supreme Court declined to exercise its original jurisdiction in this matter without prejudice to Respondent's right to petition this Court for relief.

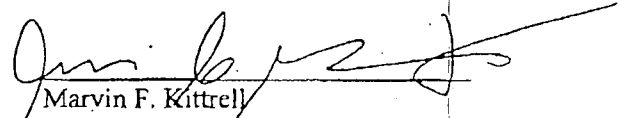
April 13, 2005. In that Order, Judge Cooper noted that "[i]n balancing the financial hardship of the District created by a budget deficit on the one hand against an Order which might make it impossible for MLD to operate, I find that the greater hardship would be imposed by staying the enforcement of this Court's earlier Order."

District later appealed Judge Cooper's decision, and the South Carolina Supreme Court assumed jurisdiction of the appeal. While the appeal was pending, District initiated a charter revocation proceeding pursuant to S.C. Code Ann. § 59-40-110 (2004) in August of 2006. MLD petitioned the Supreme Court for a writ of supersedeas to compel District to continue funding the school while the appeal was pending. In response to that petition, the Supreme Court issued an Order on August 24, 2006 in which it held that:

Nothing in the Charter Schools Act allows the withholding of funds while the revocation process is pending. Because the withholding of funds would likely result in the closing of the charter school, the action could render this appeal moot. Accordingly, appellant is ordered to fully fund respondent as required by the Charter Schools Act until this appeal is decided or the revocation of the respondent's charter becomes final.

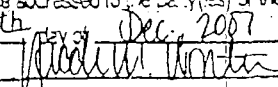
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m
This Court is persuaded by the rationale of both the Circuit Court and the Supreme Court in the prior appeal. Therefore, pursuant to ALC Rules 16 and 34, the Court lifts the stay of the State Board of Education's decision and orders District to continue funding MLD while this appeal is pending before this Court.

AND IT IS SO ORDERED.


Marvin F. Kittrell
Chief Administrative Law Judge

December 28, 2007
Columbia, South Carolina

2
ROA 163

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
in the United States mail, postage paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s).
This 28th day of Dec. 2007
By: 
Self Course.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201
(803) 734-0550
Fax (803) 734-6400

FAX TRANSMITTAL SHEET

TO: Kirby Shealy, III, Esq. - 779-3423

Charles Boykin, Esq. - 254-5609

FAX NO(s): _____

FROM: Judge Kittrell's office

DESCRIPTION OF DOCUMENT(S): Order - 07-ALJ - 30-0597-AP

MESSAGE: _____

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EXHIBIT THREE

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy)
Charter School,)

Appellant,)

vs.)

Richland County School District 1 Board)
of Commissioners,)

Respondent.)

AFFIDAVIT OF NANCY BUSBEE

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

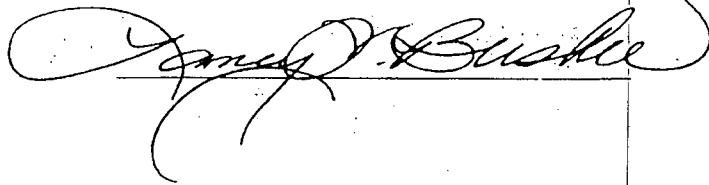
The undersigned having been duly sworn, affiant *Nancy Busbee* does hereby testify as follows:

1. I am *Nancy Busbee*, and I am over the age of 18 and fully competent to give this affidavit.
2. I am currently employed as the Director of Federal and State Accountability for the South Carolina Department of Education.
3. My office oversees the evaluation of Annual Yearly Progress (AYP) for schools in South Carolina.
4. Adequate Yearly Progress, or AYP, is part of the federal Elementary and Secondary Education Act (ESEA) also known as the No Child Left Behind Act (NCLB) of 2001. ESEA requires all public schools and school divisions to meet certain goals (called annual measurable objectives or AMOs) to determine if they are making "adequate progress" each year.
5. AYP results are based on state testing scores on PASS, the standardized test replacing PACT, for elementary and middle schools. High schools have different scoring formulas.
6. Midlands Math and Business Academy Charter School (MMBA) met AYP for the academic year of 2008-2009.

7. MMBA was the only middle school in the Richland County School District One to make AYP in 2008-2009.

8. AYP results for 2009-2010 have not yet been released but the anticipated release date from the SCDE is August 2, 2010.

FURTHER AFFIANT SAYETH NOT.



Sworn to and subscribed before me

this 20 day of July, 2010

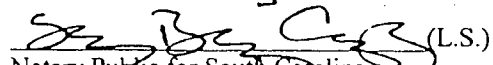
 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/4/12

EXHIBIT FOUR

~/pdf/070162.pdf

➔ Office of Motor Vehicle Hearings

Tuesday, January 05, 2010

Search: **SC Administrative Law Court Decisions**PDF **CAPTION:**

Greenville Science Charter School vs. The School District of Greenville County

AGENCY:

The School District of Greenville County

PARTIES:**Appellant:**

The School District of Greenville County

Respondents:

Greenville Science Charter School

DOCKET NUMBER:

07-ALJ-30-0162-AP

APPEARANCES:Greenville Science Charter School:
Edwin Russell Jeter, Esq.

The School District of Greenville County:

Kenneth L. Childs, Esq.,
William F. Halligan, Esq.,
John M. Reagle, Esq.**ORDERS:****ORDER OF REMAND****STATEMENT OF THE CASE**

This matter is before the Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. §§ 59-40-10 *et seq.* (Supp. 2006), the South Carolina Charter Schools Act of 1996 ("Act"). In late spring of 2006, the Greenville Science Charter School ("Charter School") [1] submitted a charter school application ("application") to the State Charter School Advisory Committee ("Advisory Committee"). The Advisory Committee reviewed the application and recommended in writing to the School District of Greenville County ("School District") that it approve the application. On November 16, 2006, the board of trustees for the School District ("School Board") held a hearing on the matter and issued its order and decision on November 27, 2006 ("School District Decision"). In the School District Decision, the School Board held that the Charter School had not complied with the statutory requirements of S.C. Code Ann. §§ 59-40-10 through 59-40-240. The School District Decision was appealed to the State Board of Education ("State Board") which conducted an appellate hearing on February 14, 2007. On March 6, 2007, the State Board issued its Final Order ("State Board Order") in which it reversed the School Board Decision and approved the Charter School's application.

The School District and the Charter School filed cross appeals from the State Board Order to the ALC on April 4, 2007, and April 12, 2007, respectively. [2] The record on appeal was delivered to the ALC by the State Board on May 8, 2007. [3] After timely notice to the parties, a hearing was held at the ALC in Columbia, South Carolina on November 27, 2007, at which time the parties presented arguments on their respective positions. This Order addresses both appeals.

FACTUAL BACKGROUND [4]

ROA 169

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The Charter School is a product of the efforts of science faculty at Clemson University, as well as other individuals, to create a charter school in the Greenville, South Carolina area that will specialize in the teaching of science. Its mission – as stated in its application – is “to provide improved science learning opportunities that promote scientifically literate individuals, workforce, and leadership through world class and challenging science teaching standards.” Its charter committee consists of five individuals: Ms. Joan Breitenbrück^[5]; Dr. Guven Yucesan^[6]; Dr. Mevlut Tascan^[7]; Ethan E. Ballard^[8]; and Ali Ozer^[9]. Mr. Ozer is the project director of the charter committee for the Charter School and has previously assisted in the founding of two charter schools, one having been in operation for one year at the time of the application filing and the other, located in Atlanta, having been in operation for six years at the time of the application filing.^[10]

On June 15, 2006, the Advisory Committee met with representatives from the Charter School, the South Carolina Department of Education (“Department”) and the School District’s administration, to review the application. At that meeting, the Advisory Committee determined that the Charter School had not met the minimum requirements for the issuance of a charter. Among the concerns the parties discussed at the meeting was a failure by the Charter School to show that it could meet its enrollment projections, the soundness of its proposed budget, and its partial reliance on special education funding for its support and the purchase of needed equipment and technology.

On June 29, 2006, the representatives from the Department and the School District met once again with representatives of the Charter School. At this meeting, the same concerns were discussed. The Advisory Committee again found that the Charter School’s proposal was not in compliance with applicable state law. After this meeting, the Charter School conducted a survey to solicit support from interested persons in the community. On September 21, 2006, representatives of the Charter School met for the third time with representatives from the School District and the Department, and the Charter School provided the School District and the Department a revision of its proposed charter application. Attached to the revision were more than 160 completed survey forms (characterized by the Charter School as support letters),^[11] copies of two newspaper advertisements, and six survey forms. Each survey form stated that the Charter School would be known as “Greenville Science” and that it would be a “tuition-free college preparatory middle and high school with a rigorous inquiry based educational program focusing on science.” Further, it stated that the Charter School would consist of grades 6-12, would begin in the fall of 2007, would provide “exceptional learning in a tuition-free private school environment,” and would contain “80 students per grade level.” The survey form contained blank spaces in which interested persons could write their name, address, email address, and any comments. Also, the survey form listed a personal email address and a website which interested persons could write to or log onto to request or obtain additional information about the Charter School. Finally, each survey form contained two questions which interested persons could respond to by circling the word “yes” or “no” at the end of each question: (1) “Do you support the idea of opening this school in the Greenville County School District?” and, (2) “Would you consider sending your children to this school if the application is approved?”^[12]

The School District asserts that throughout this entire review process its representatives expressed concerns about the Charter School’s enrollment projections,^[13] budget, projected revenue (particularly to its inability to hire a qualified teaching staff, special education teachers and to purchase equipment and technology),^[14] and the projected revenue’s heavy reliance on special education funds.^[15] In sum, representatives of the School District and the Advisory Committee were extremely concerned that the Charter School’s budgetary plans were based upon faulty assumptions, used excessive revenue projections, and that, absent sufficient community interest, it would not attract enough students to generate the funds needed for its operation.

On October 17, 2006, the Advisory Committee notified the School District in writing that the Charter School’s application complied with the standards set forth in Reg. 43-601 and

recommended that the School District approve the application. On Friday, November 10, 2006, the School District notified the public of its School Board's regular monthly meeting and that the agenda included consideration of the Charter School's application. The meeting was set for the following Tuesday, November 14, 2006; however, on Monday, November 13, 2006, the Charter School requested a postponement of the special meeting of the School Board. The School District postponed the meeting to 9:00 a.m. on November 16, 2006.

During the School Board's hearing, the Charter School objected to the timing of the hearing based upon procedural irregularities, arguing that due process required more than two business days notice of the hearing and that the hearing should be a public hearing. Also, it requested an opportunity to supplement the record after the hearing. During the hearing, representatives from the Charter School and the School District's administration gave their respective positions on the application. At the conclusion of the hearing, the School Board denied the charter application request, finding that the Charter School had not complied with the statutory requirements of §§ 59-40-60 (F)(3) and 59-40-60 (F)(6) as follows: (1) the Charter School failed to show that an adequate number of parents, teachers, pupils, or any combination of them supported the formation of the Charter School; and, (2) the Charter School failed to show that its plan was economically sound.

On December 7, 2006, the Charter School appealed the School District Decision to the State Board, seeking its reversal and alleging procedural irregularities by the School Board. Subsequently, on February 1, 2007, the Charter School filed a motion with the State Board, requesting to supplement the record before the State Board with evidence it alleged it was unable to present to the School Board during its hearing. The State Board denied the motion to supplement the record, stating that pursuant to Reg. 43-600 only the record before the School Board should be considered by the State Board on review.

The State Board held its appellate hearing on February 14, 2007, and both parties gave oral arguments. [16] The Charter School argued that representatives of the School District neither commented about the adequacy of the completed surveys during the meeting on September 21, 2006, nor did they approve or reject the application until Friday, November 10, 2006 – when the Charter School was told that a public hearing would be held on November 14th to consider its application. Further, the Charter School argued that it was first told of the specific reasons for the School District's denial of the application at 3:00 p.m. on November 14, 2006, just over one day prior to the hearing, which began at 9:00 a.m. on November 16, 2006. At the conclusion of the hearing, the State Board found that the procedures utilized by the School District were neither unlawful nor did they affect a substantial right of the Charter School; however, the State Board did express concern about the short notice of the hearing. The State Board reversed the School District Decision, finding that: (1) there was substantial evidence in the record to show sufficient community support for the Charter School; and, (2) there was substantial evidence in the record to show that the Charter School had an economically sound plan.

JURISDICTION AND STANDARD OF REVIEW

A proposed charter school must seek review of its application by submitting it to the Advisory Committee and by providing a copy to the local school board of trustees in the district in which it is seeking sponsorship. Thereafter, the Advisory Committee receives input from the local school district and requests clarifying information from the applicant. Within sixty days after submission, the Advisory Committee determines if the application is in compliance with the Act. If the application is deemed in compliance, the Advisory Committee forwards the application to the local school district along with a letter informing it of the compliance. The letter must contain a recommendation to approve or deny the charter application together with the Advisory Committee's reasons for its recommendation. The recommendation is not binding on the local school board of trustees. § 59-40-70 (A)(5).

The board of trustees of a local school district, upon receipt of an application from a proposed charter school seeking sponsorship must, within thirty days after its receipt, rule on the

application at a public hearing. The statute requires that reasonable public notice of the hearing must be given. § 59-40-70(B). After the hearing, the local school board must deny the application if it does not comply with those requirements contained in §§ 59-40-50 or 59-40-60, fails to meet the spirit and intent of the Act, or adversely affects, as defined in the regulation, the other students in the district in which the charter school is to be located. § 59-40-70(C). The local school district shall provide, within 10 days of the public hearing, a written explanation of its reasons for denial, citing specific standards related to the provisions of §§ 59-40-50 or 59-40-60 that the application violates. This written explanation must be sent immediately to the charter school and must be filed with the State Board and the Advisory Committee. § 59-40-70(C).

Appeals from a decision by a local school board must be filed with the State Board within 10 days of the school board's decision. §§ 59-40-70 (E), (G) and 59-40-90 (B); see also Reg. 43-600. Pursuant to § 59-40-90 (C) and Reg. 43-600(G), the State Board must, within 45 days after receipt of the Notice of Appeal and, after reasonable public notice, conduct a public hearing to consider the appeal. Each party to the appeal is authorized to make an oral argument at the hearing addressing the issues on appeal, and the State Board may, at its discretion, allow public comments addressing the issues on appeal. Within 20 days of the public hearing, the State Board must issue a final written order. Reg. 43-600(D) provides that the State Board's review will be limited to the record on appeal and that it will not consider any fact that does not appear in the record on appeal. Further, Reg. 43-600(E) provides that the standard of review to be applied by the State Board in its appellate review mirrors the limited standard of review contained in the South Carolina Administrative Procedures Act ("APA"): Beaufort County Bd. of Educ. v. Lighthouse Charter School Comm., et al, 335 S.C. 230, 234, 516 S.E. 2d 655, 657 (1999); S.C. Code Ann. § 1-23-380 (A)(5) and (B).

A decision by the State Board may be appealed to the ALC as provided in § 1-23-600(D). See § 59-40-90(D) (Supp. 2005). [17] The ALC has authority to review the order of the State Board as an appeal under § 1-23-380 (A)(6), which provides for reversal only if its findings are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (e) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In applying this scope of review, the reviewing court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mutual Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005). This Court reviews the findings of the School Board to determine if its findings of fact or conclusions of law are based on substantial evidence contained in the whole record. The South Carolina Supreme Court in Porter v. South Carolina Public Service Commission, 333 S.C. 12, 20-21, 507 S.E.2d 328, 332 (1998) defined the substantial evidence standard of review:

Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. It is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding.

The Supreme Court found "[t]his deferential standard of review does not mean, however, the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Id.* at 332. Further, the agency "must fully document its findings of fact and base its decision on reliable, probative, and substantial evidence on the whole record." *Id.* "An administrative body must make findings, which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. *Id.* And if "material facts are in dispute, the administrative body must make specific, express findings of fact." *Id.*

DISCUSSION

Did the hearing before the School Board involve significant procedural irregularities affecting a substantial right of the Charter School?

The Act establishes the process that must be followed in filing an application, provides that an applicant must meet with the Advisory Committee, and provides that the applicant must demonstrate to both the Advisory Committee and the local school district that the application complies with the Act's requirements. Sections 59-40-50 and 59-40-60 of the Act state the requirements for admission of a charter school, and § 59-40-70(C) provides that "a school district board of trustees only shall deny an application if the application does not meet the requirements specified in § 59-40-50 or 59-40-60" Section 59-40-70(B) of the Act clearly provides that within thirty days after the Advisory Committee submits an application for a charter school to a local school board, the board shall, after reasonable notice, approve or deny the application in a public hearing. The School Board is not required to issue its written order until ten days after the public hearing.

The instant application process began in 2006. On April 23 and April 26, 2006, the Charter School placed advertisements in the "Greenville News," a newspaper of general circulation in Greenville County, South Carolina, notifying interested persons of the proposed charter school. Further, during the summer of 2006 the Charter School solicited written indications of interest from persons in the community and provided those completed or partially completed survey forms to the Advisory Committee and representatives of the School District during the meeting on September 26, 2006.

The Charter School argues that the School District's failure to provide it more notice and time to prepare for a hearing was unjust, unreasonable and totally insufficient for it to digest the reasons for the denial of the charter application and to prepare for a hearing. It opines that the South Carolina Supreme Court in Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 641 S.E.2d 24 (2007), has mandated that the thirty day notice requirement for hearings, as contained in § 1-23-320(a) of the APA, must be applied to hearings required under the Act. In Lee County, the Supreme Court addressed several issues concerning the APA. The first issue dealt with the standard of review the circuit court (the court that reviewed appeals from the State Board at that time) must apply when reviewing an order of the State Board. The second issue dealt with the requirement that administrative agencies make specific, express findings of fact in their final orders, as outlined in Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998). [18] It is clear that the South Carolina General Assembly has enacted statutory provisions and the State Board has promulgated regulations which provide the process applicable to hearings concerning charter schools. Although these statutes and regulations do not provide that the hearings held by local school boards are subject to the APA, the Supreme Court in Lee County held that local school boards, just as all administrative agencies, must comply with the requirements of § 1-23-350. However, the Lee County holding did not make the leap to require that hearings held by local school boards are subject to the APA. Consequently, because the local school board is not required to adhere to the notice requirements set forth under the APA, specifically § 1-23-320, the notice requirement provided for under the Act must be used. Section 59-40-70 requires that the local school board "rule on the application for a charter school in a public hearing, upon reasonable notification, within thirty days after receiving the application." § 59-40-70(a).

reasonable public notice, within thirty days after receiving the application. § 59-40-70(B). Given the clear and plain language of the statute, it would be almost impossible for the local school board, upon receipt of a charter school application, to provide notice of the hearing to the parties and general public, and conduct a hearing -- in which the local school board renders a decision on the charter application -- within the 30 days as required under § 59-40-70(B).

Section 59-40-70(B) does not provide a specific period of time for which the local school board must provide notice of the public hearing. Rather, the statute merely provides that "reasonable public notice" must be given. Here, the Charter School received two business days notice that the School Board would hold a public hearing regarding the Charter School's application. Although § 59-40-70(B) does not specify the number of days notice that must be provided, this Court does not find that two business days satisfies the "reasonable notice" requirements. *See In re Mixson*, 258 S.C. 408, 412, 189 S.E.2d 12, 14 (1972) (stating that twenty-five days notice of a hearing to an individual was sufficient under a rule that specifies "reasonable notice" must be given); *see, e.g., S.C. Dep't of Health and Envtl. Control v. Armstrong*, 293 S.C. 209, 215, 359 S.E.2d 302, 305 (Ct. App. 1987) ("Due process is not a technical concept with fixed parameters unrelated to time, place and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands.").

This requirement by our General Assembly that the school board give reasonable notice to the public is provided in part to ensure that the entire general public has the opportunity to participate in the hearing; it is not meant solely as a procedural protection for a charter school applicant. Although the Charter School knew, as a result of its investigations, [19] that the School Board was required by statute to conduct a hearing at some point after it received the letter from the Advisory Committee, the general public was not as aware. The general public must be given an opportunity at the hearing to raise any concerns it has about the application and the applicant must be prepared at the same time to support its application and answer any queries raised by any member of the public and/or the school board and the school district administration.

Further, because the School Board did not provide reasonable notice to the Charter School of the public hearing, its right to prepare for a hearing was prejudiced and adversely affected. It was denied the time to properly digest the reasons for denial of the application, to seek legal counsel, and prepare for the hearing. Further, by giving reasonable notice of the public hearing, the general public is given an opportunity to meaningfully participate in the hearing to raise any concerns it may have. For its failure to give reasonable notice of the hearing, the Court finds that the matter must be remanded to the School Board for a public hearing to be conducted on the merits after giving reasonable notice of at least ten (10) days to the Charter School and the general public. *See Ross v. MUSC*, 328 S.C. 51, 492 S.E.2d 62 (1997) (holding that a state may cure a procedural deprivation of due process rights by providing later procedural remedy). Because of the Court's ruling in these matters, it is unnecessary to address the parties' additional arguments.

ORDER

IT IS HEREBY ORDERED that this matter is remanded to the School District of Greenville County.

IT IS FURTHER ORDERED that the School Board shall conduct a public hearing after giving reasonable notice of at least 10 days to the parties and to the general public of the public hearing.

IT IS FURTHER ORDERED that the School Board shall render a written, amended decision, within 10 days of the public hearing, taking into account any new evidence or arguments propounded during the public hearing.

AND IT IS SO ORDERED.

Marvin F. Kittrell

Chief Administrative Law Judge

April 25, 2008

Columbia, South Carolina

[1] The South Carolina Secretary of State issued a certificate of incorporation for Palmetto Education Corporation as a nonprofit corporation on January 5, 2006. The registered agent for the corporation was Guven Yucesan. Its address was listed as 230 Roper Mountain Road, Greenville, South Carolina 29615. The corporate filing was amended on June 26, 2006 to reflect that the corporate name had been changed to "Greenville Science."

[2] Docket No. 07-ALJ-30-0162-AP, filed by the School District, challenges the State Board Order which reversed the School District Decision and approved the Charter School's application. Docket No. 07-ALJ-30-0184-AP, filed by the Charter School, challenges the State Board Order regarding the issue of notice of a public hearing.

[3] The index to the record delineates five separate inclusions: the State Board Order; the "Pleadings (Notice of Appeal to the State Board of Education)"; the Transcript of the State Board hearing; the Record on Appeal before the State Board; and, a certificate of service of the record to the Court and the parties involved in both appeals. The Court did not receive – as part of the record – the tapes or transcriptions of the 3 cassette tapes which recorded the three Advisory Committee meetings referenced in the body of this Order.

[4] No record of the hearing before the School Board was presented to this Court for review. The parties attempted to have the tape of the hearing transcribed, but because there were gaps in the testimony and it was not offered to the State Board for its review and consideration, the parties requested that the transcript of the hearing before the School Board not be reviewed or considered by this Court. The Court granted this request. The Court did have before it a written transcript of the hearing conducted by the State Board held on February 14, 2007, together with exhibits considered by both the School Board and the State Board.

[5] Ms. Breitenbruck holds a Bachelor of Science degree and is a resident of Clemson, South Carolina. She is a certified to teach high school physics, chemistry, biology and physical science in South Carolina, and she teaches physical science at Traveler's Rest High School, Traveler's Rest, South Carolina.

[6] Dr. Yucesan holds a Master of Science degree and a Doctor of Philosophy degree. He is a resident of Greenville who previously taught aeronautical engineering courses at various universities. Presently, he is employed by General Electric Energy in Greenville where he works on improving the efficiency of gas turbines in electricity production.

[7] Dr. Tascan holds a Bachelor of Science degree, two Master of Science degrees, and a Doctor of Philosophy degree. He is a resident of Clemson, South Carolina and teaches at Clemson University.

[8] Mr. Ballard holds a Bachelor of Science degree and Master of Science degree. He is a resident of Easley, South Carolina, and, at the time of the application submission, was a Doctor of Philosophy candidate in materials science and engineering. Mr. Ballard teaches physical and organic chemistry at Clemson University.

[9] Mr. Ozer holds a Master of Science degree and has completed course work requirements for a Master of Education degree.

[10] Pages 9-11 of the application were not included in the record sent to the Court by the State Board.

[11] From a review of the entire record, discussion, references and exhibits, the number of completed surveys varies in number from 160 to 180.

[12] See Ex. 6, which contains copies of the surveys submitted to the School District by the Advisory Committee. They illustrate the actual information provided to interested persons as well as the information they listed on the surveys.

[13] The School District opined that the survey's reference to a "tuition-free private school environment" was misleading and questioned how much support the survey actually indicated when those completing it had not read the Charter School's proposed charter application. For this and other reasons, it felt that the completed surveys did not show adequate support in the community for the school.

[14] The School District opined that the budget plan's proposal to hire science and math teachers at a \$30,000.00 salary was unrealistic given that the School District paid a much higher salary to hire qualified teachers for those positions.

[15] The School District noted that its student population included various categories of students, i.e. vocational educational students and special education students, for whom it received considerably more money than it received for non-vocational and non-disabled students. Further, it opined that neither of these categories of students would realistically abandon the School District's programs – because of their structure to provide for these students' special needs – to enroll in the Charter School which planned to provide improved science learning opportunities.

[16] As stipulated to by both parties, no record of the hearing that was conducted by the School Board was provided to the State Board. S.C. Code Ann. Regs. 43-600 (I)(C), entitled "Record on Appeal," only requires that the record to the State Board contain the "written explanation of the decision of the school board of trustees and evidence, submitted by either party that was considered by the school board of trustees and that is relevant to the issue(s) on appeal." There is no requirement that a transcript of the hearing be made and provided to the State Board as is required in matters heard on appeal by this Court pursuant to §§ 1-23-600 and 1-23-650, as well as ALC Rule 36(B)(6).

[17] The statutory change in 2006 (Act No. 274, § 1, effective May 3, 2006), which provided that appeals from the State Board would go to the ALC versus the circuit court and which delineated that the standard of review by this Court would be pursuant to the APA and this court's rules, resolved the disagreement between the majority and the dissent (Justice Pleicones) in Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee, 371 S.C. 561, 641 S.E.2d 24 (2007).

[18] Section 1-23-350, which is contained in the APA, requires that all final decisions in contested cases heard by a state board, state commission, state department, or a state officer, except the legislature or the courts, must contain findings of fact and conclusions of law, separately stated.

In the first instance, the Supreme Court held that the circuit court, when hearing these appeals from the State Board, must apply the standard of review as set forth in the APA. See § 1-23-380 (A)(6). However, as Justice Pleicones stated in his dissent in Lee County, the General Assembly provided in § 59-40-180 that the State Board "shall promulgate regulations and develop guidelines necessary to implement the provision of this chapter" and the State Board, following that mandate, promulgated Reg. 43-600, entitled "Charter School Appeals." See Reg. 43-600 (I)(E). Although he noted that the standard of review is the same, he opined that the majority was wrong in its holding that the standard contained in the APA was applicable.

The Supreme Court also held in Lee County that its holding in Porter, which required the Public Service Commission to set forth detailed findings of fact in its orders that are supported by the law, was "applicable to all administrative agencies, including local school boards." Lee County, 371 S.C. at 568, 641 S.E.2d at 28. Again, Justice Pleicones disagreed with the majority, writing that a school board is not an agency, does not come within the meaning of the APA and there is no authority for the Supreme Court to require a school board to make its findings of fact in accordance with the APA. He noted that our courts have previously articulated that the term "agency" as used in the APA means a state board, commission, department or officer, of the executive branch only and not the boards of local political subdivisions. Id. at 569, 641 S.E.2d at 28; see, e.g., Kores Nordic (USA) Corp. v. Sinkler, Gibbs & Simmons, 284 S.C. 513, 327 S.E.2d 365 (Ct. App. 1985); Rowe v. City of West Columbia, 334 S.C. 400, 513 S.E. 2d 379 (Ct. App. 1999).

[19] Our General Assembly spelled out clearly in § 59-40-60 all the information a charter school applicant must provide or conform with before a charter could be issued to it. This section, as well as § 59-40-115, speaks about the contract or agreement the charter school enters into with its sponsor, and subsections 59-40-60 (D) and (E) list all the requirements that must be met. Since the application had undergone repeated rewrites and reviews before approval by the Advisory Committee, it strains credibility for the Charter School to assert it was unaware that a public hearing would be required.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy)
Charter School,)

Appellant,)

vs.)

Richland County School District 1 Board)
of Commissioners,)

Respondent.)

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

CERTIFICATE 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 21st day of
July, 2010, served counsel below with **Appellant's Response to Motion for
Relief from Automatic Stay** 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:

Charles J. Boykin, Esquire
Ralph J. Smiley, Esquire
Boykin & Davis, LLC
Post Office Box 11844
Columbia, South Carolina 29211

Mr Vince Ford, Chairman,
Richland One Board of Commissioners
1616 Richland Street
Columbia, South Carolina 29201

FILED

JUL 21 2010

SC ADMIN. LAW COURT

Ida M. Thomas
Ida M. Thomas

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District 1 Board of
Commissioners,

Respondent.

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

**RESPONDENT'S REPLY TO
APPELLANT'S RESPONSE TO MOTION
FOR RELIEF FROM THE AUTOMATIC
STAY**

INTRODUCTION

This matter arises from the appeal of a charter school, Midlands Math and Business Academy (MMBA), of the decision of the Board of Commissioners of Richland County School District One (Board) to revoke MMBA's charter. The Board filed a motion to lift the automatic stay imposed by Rule 34 of the Administrative Law Court (ALC) Rules and a memorandum of law in support of the motion. MMBA then submitted a response to the Board's motion. The Board believes that MMBA's response contains legal assertions and factual statements not raised in the Board's motion that necessitate a response or clarification from the Board. Therefore, the Board submits this reply for the ALC's consideration.

FILED

AUG 05 2010

SC ADMIN. LAW COURT

ARGUMENT

- A. **The ALC has express authority to lift the automatic stay under Rule 34 and lifting the stay in this case would be consistent with the Charter Schools Act.**

In its response, MMBA argues that lifting the stay is not an available legal remedy and that granting the Board's motion would amount to legal error. This argument is contrary to the language of Rule 34 of the ALC, which provides:

The filing of an appeal from the final decision of an agency shall stay the final decision of that agency unless the effect of filing an appeal is otherwise established by statute, the Administrative Procedures Act notwithstanding; or the administrative law judge has entered an order regarding the effect of the proceedings in the agency. *Notwithstanding the foregoing, upon the filing of an appeal from the final decision of an agency, any party may apply to the administrative law judge for an order regarding the effect of the appeal on the agency decision.* (Emphasis added).

Under Rule 34, any party has the right to request an order "regarding the effect of the appeal on the agency decision." In other words, any party may request that the ALC lift the stay and allow the agency's ruling to remain in effect. This authority of the ALC to lift the automatic stay was utilized in the MLD case cited by MMBA, wherein the ALC lifted the stay of the State Board of Education's decision. See Exhibit 2 to MMBA's Response. Other ALC cases also recognize the authority of the ALC to lift the Rule 34 stay. See, e.g., *Nellie H. Roberson v. SCDHHS*, 99-ALJ-08-0207-AP (Order dated August 23, 199).

Rule 241 of the Appellate Court Rules confirms the ALC's authority in this regard stating that the automatic stay on an appeal "continues in effect for the duration of the appeal unless lifted by order of the lower court, *the administrative tribunal*, appellate court, or judge or justice of the appellate court." (Emphasis added). The rule's application to administrative actions is clear from the rule's reference to administrative tribunals.

MMBA also misinterprets the order of the South Carolina Supreme Court in Lee County School District Board of Trustees v. MLD Charter School Academy Planning Committee.

Exhibit 1 to MMBA's Response. In that case, the school board had begun the process of revoking MLD's charter but the revocation process was not complete because the hearing before the board had not been held. In addition, the Supreme Court was hearing the appeal of the school board's original denial of MLD's charter. The Court determined that funding of MLD should continue because of the pending appeal of the charter denial and because the school board's decision on the revocation was not yet final. Consequently, the Court ordered the school board to fund MLD until the appeal on the charter denial was decided "or the revocation of respondent's charter becomes final."¹

Here, there is only one matter, the revocation, and the Board has taken final action after conducting a hearing in accordance with S.C. Code Ann. § 59-40-110(F) ("The sponsor shall conduct a hearing before taking *final action*."). Under the provisions of the Charter Schools Act, the revocation of MMBA's charter is final and funding may cease.² Thus, the Board's request to lift the automatic stay is consistent with Rule 34 of the ALC and the revocation provisions of the Charter Schools Act.

B. MMBA's misleading assertions regarding student achievement fail to address the undisputed fact that MMBA did not make reasonable progress as defined in the charter application.

MMBA asserts repeatedly in its brief that "MMBA was the only Middle School in the District to make AYP" and "in terms of AYP results and the No Child Left Behind Legislature [sic], MMBA is the best Middle School in the District." MMBA's Response pp. 8, 10, 13, and 14. As an initial matter, MMBA is not a middle school. MMBA is an elementary and middle

¹ This was a second revocation proceeding.

² The Act permits a charter school to appeal a decision to revoke but does not provide that an appeal affects the finality of the school board's decision. S.C. Code Ann. § 59-40-110(H).

combination school, serving grades 4-8. Further, MMBA proclaims to be the "best middle school" based on scores from a single year, 2009, even though MMBA failed to meet AYP every year prior. Moreover, in making these assertions MMBA references only AYP, which measures a school's scores against the school's scores from the prior year. In doing so, MMBA ignores the raw scores and student performance in relation to the District. When you examine MMBA's scores you find that student performance of MMBA students on the 2009 PASS was below District averages. The percentage of MMBA students scoring "Not Met" exceeded District averages on all grade levels (grades 4-8) and in all subjects areas of PASS except 8th grade science. Thus, even after five years of implementing its program, MMBA is below average and no where near the best.

What is most significant about MMBA's brief is not what it asserts but what it is missing. MMBA's response fails to make any reference to the measures of reasonable progress that are contained in MMBA's charter. Page 27 of the charter³ provides the following student achievement progress measures:

1. "The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year."
2. "[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)."

It is undisputed that MMBA did not meet these progress standards. MMBA did not make adequate yearly progress in any of the years that the PACT was administered to MMBA students (i.e., 2005-2008). Further, from 2005 to 2008, the number of MMBA elementary students who

³ A copy of page 27 of the charter, which is p. 673 of the Record on Appeal, is attached as Exhibit 1 to this reply.

met standard (Proficient or Advanced) in English Language Arts (ELA) increased by 8.5% and the number of MMBA middle school students who met standard in ELA increased by 7.7%. (See Record on Appeal, pp. 1123, 1127.) Both of these percentages fall well below the required 20.6% for ELA. As for Math, the number of MMBA elementary students who met standard increased by 12.7% and the number of MMBA middle school students who met standard in Math increased by 0.2%. (Record on Appeal, pp. 1124, 1128.) Once again, these percentage increases are far below the required 21.15%.

Due to MMBA's failure to meet the progress standards in its charter, the Board was required to revoke MMBA's charter. S.C. Code Ann. § 59-40-110(C) provides in pertinent part:

A charter must be revoked or not renewed by the sponsor if it determines that the charter school:

(2) failed to meet or make reasonable progress, as defined in the charter application, toward pupil achievement standards identified in the charter application;

In sum, MMBA's claims of great student achievement are misleading. A review of student scores shows that MMBA is performing below District averages. More importantly, MMBA's assertions are beside the point. MMBA failed to meet the reasonable progress standards defined in the charter. Therefore, the Charter Schools Act requires revocation.

C. The Board's revocation should not be stayed because MMBA's violations of its charter, and failure to meet the progress standards in its charter, jeopardize the educational interests of students.

The Board's decision to revoke MMBA's charter was not based on subjective or minor issues. Rather, the Board found violations of the charter that were central to MMBA's operations and to the education that MMBA promised to deliver. The Board found that MMBA did not employ qualified staff as promised in the charter. The Board found that MMBA did not

use curriculum aligned to state standards as promised in the charter. The Board also found that MMBA failed to adhere to certain federal and State special education laws. Lastly, the Board found that MMBA failed to make reasonable progress on student achievement as defined promised in the charter.

Under the Charter Schools Act, each of these findings necessitates revocation. S.C. Code Ann. § 59-40-110(C). Collectively, they demonstrate that MMBA has departed drastically from the educational program MMBA committed to provide in its charter and as a result, has jeopardized the educational interests of students. The education of these students is under the Board's care. Consistent with this duty, the Board acted to revoke MMBA's charter as mandated by the Charter Schools Act. Through this motion, the Board requests that the ALC allow the Board's legally-mandated actions to take effect in order to prevent any further harm.

CONCLUSION

For the reasons set forth above, and in the Board's motion and supporting memorandum, the Board respectfully requests this Court grant its motion to be relieved from the automatic stay imposed by ALC Rule 34.

Respectfully submitted,
BOYKIN & DAVIS, L.L.C.

By: _____

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Peter E. Keup

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Telephone: (803) 254-0707

Attorneys for Respondent
Richland County School District One
Board of Commissioners

August 5, 2010
Columbia, South Carolina

EXHIBIT 1

Proposed Charter School: Midlands Math and Business Academy (MMBA)

Addendum to Charter School Application

Section E. Student Assessment

MMBA will meet federal guidelines for student achievement pertaining to the No Child Left Behind Act. All students at MMBA 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 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 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 21.15% in Math every three years. It is difficult to determine the exact percentage until we know our starting point.

Once students are enrolled in MMBA and we obtain their PACT test scores from their previous school, a starting point will then be established for our school. Once the starting point is established, we will calculate how much progress must be made each year between 2004 and 2014 in order to achieve the State of South Carolina's adequate yearly progress goals.

The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year. The subgroups include white students, African-American, free/reduced lunch recipients, students with disabilities, limited English proficient, and any other ethnic groups.

In addition to meeting the federal and state guidelines for student achievement, MMBA will also use Core Knowledge's evaluation and assessment instruments in monitoring student performance and achievement.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

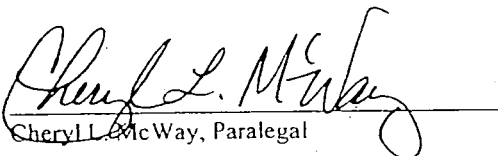
Respondent.

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

CERTIFICATE OF SERVICE

The undersigned of Boykin & Davis, L.L.C., hereby certifies that she has served the following counsel of record with the foregoing **RESPONDENT'S REPLY TO APPELLANT'S RESPONSE TO MOTION FOR RELIEF FROM THE AUTOMATIC STAY**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this ____ day of August, 2010:

Samuel M. Mokeba, Esq.
Kirby D. Shealy, III, Esq.
Baker, Ravenel & Bender, L.L.P.
P.O. Box 8057
Columbia, SC 29202


Cheryl L. McWay, Paralegal

Boykin & Davis, L.L.C.
P. O. Box 11844
Columbia, South Carolina 29211
Telephone: 803-254-0707
Facsimile: 803-254-5609

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AUG 05 2010

SC ADMIN. LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Midlands Math and Business Academy)
Charter School,)

Appellant,)

vs.)

Richland County School District 1 Board)
of Commissioners,)

Respondent.)

**MOTION TO SUPPLEMENT
RECORD (Appeal)**

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

We hereby move before the Honorable S. Phillip Lenski of the Administrative Law Court (ALC) to supplement the record on appeal in the above referenced case pursuant to Rules 35 and 36 of the ALC. Pursuant to Rule 35 the appealing party is responsible for ordering a transcript and shall file a copy of the request with the notice of appeal. Specifically, Rule 35 also provides: "The administrative law judge may also order the agency to prepare a transcript. The transcript of the proceedings shall be filed with the clerk of court of the agency pursuant to Rule 35." Additionally, Rule 36 B(6) provides the Record shall consist of the transcript of the testimony taken during the proceeding. (emphasis added). Moreover, Rule 32 of the ALC requires: "The hearings concerning a contested case shall be available for transcription as required by S.C. Code Ann. 1-23-600 (a) (1976) (as amended)."

Appellant has, on multiple occasions, requested that Richland County School District 1 Board of Commissioners (the Board) provide a transcript of the hearing on February 16, 2009. In response, the Board maintains they do not have a recording of the February 16 hearing. Accordingly, we request the Honorable S. Phillip Lenski compel the Board to turn over the transcript to Appellants or submit said transcript to the ALC pursuant to Rule 35

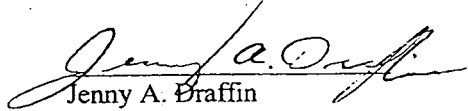
Additionally, we hereby move, pursuant to Rule 36, to supplement the record with photographs attached to this motion, or alternatively, request the Board supplement the record on appeal with copies of photographs with which we provided pursuant to Rule 36. Specifically, Rule 36 F provides photographs "shall be inserted in the record where they can be reduced or drawn to a size which permits them to be printed and inserted in the record, without folding more than one time." We respectfully make these motions before Judge Lenski based on our belief that the requested transcript and photographs could be outcome determinative in our appeal before the ALC.

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Furthermore, we respectfully request the court toll our time on appeal until the agency submits the requested transcript and/or photographs requested for the record on appeal.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jenny A. Driffin", is written over a horizontal line.

Jenny A. Driffin

BAKER, RAVENEL & BENDER, L.L.P.

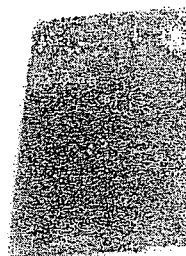
Post Office Box 8057

Columbia, South Carolina 29202

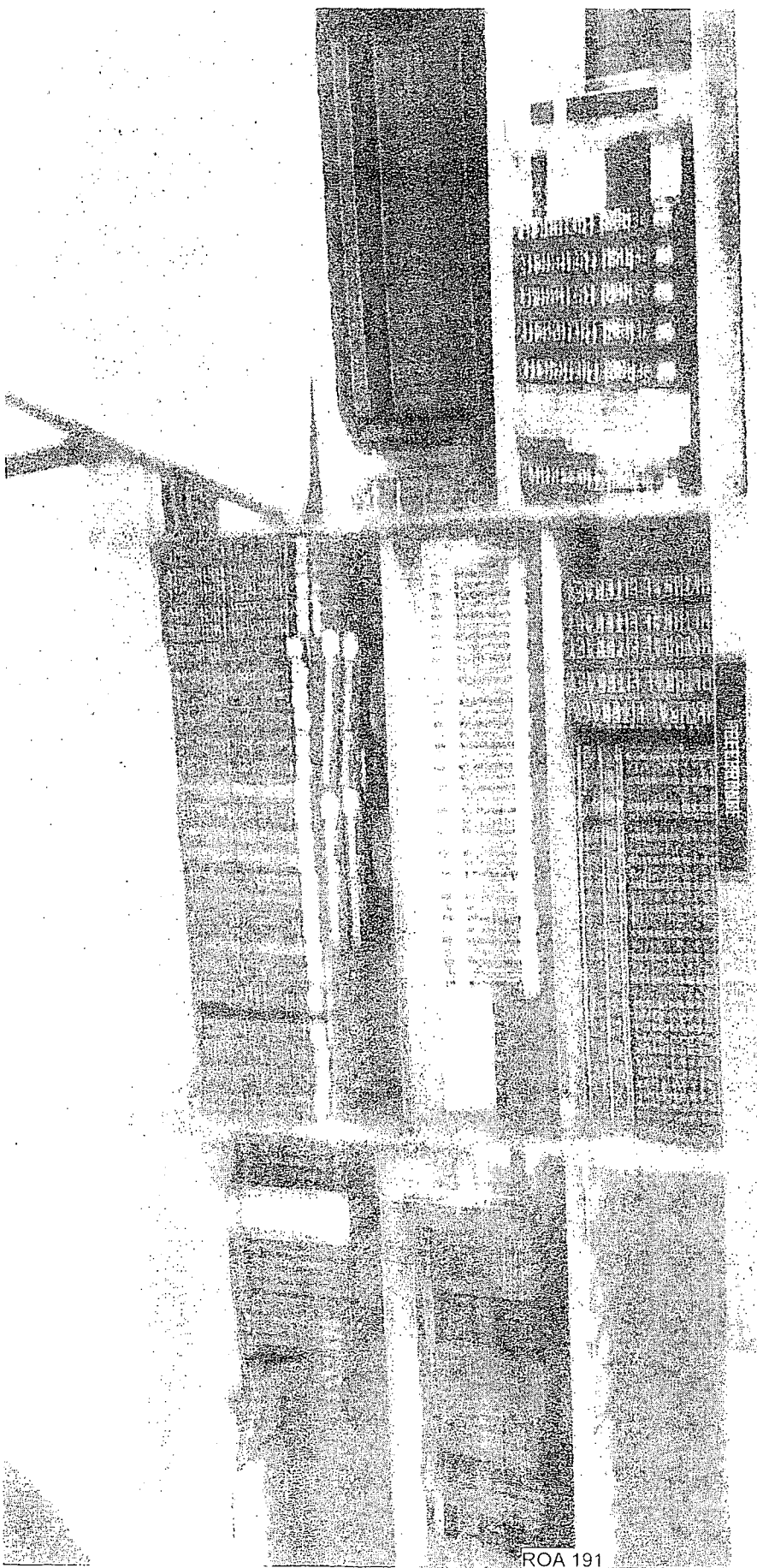
(803) 799-9091

Attorneys for Defendant

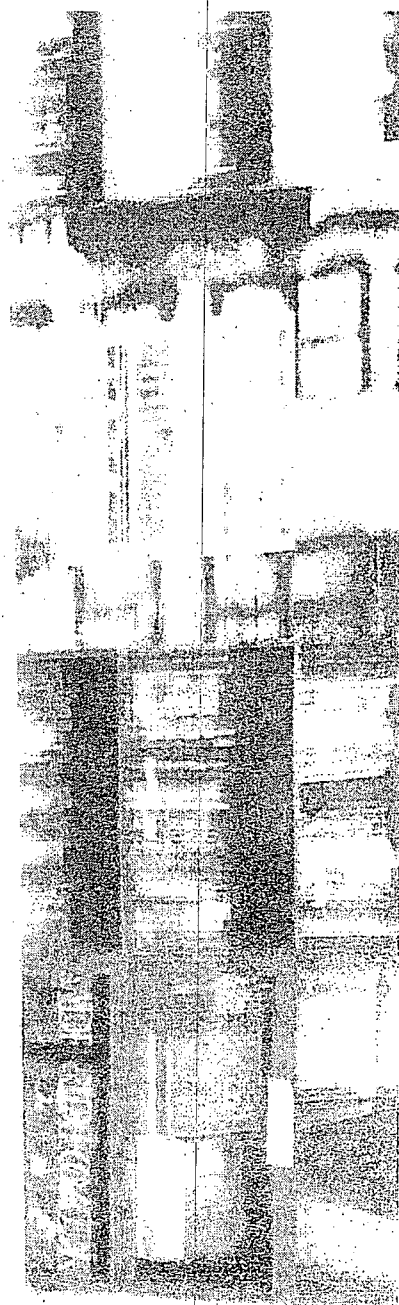
July 9, 2010

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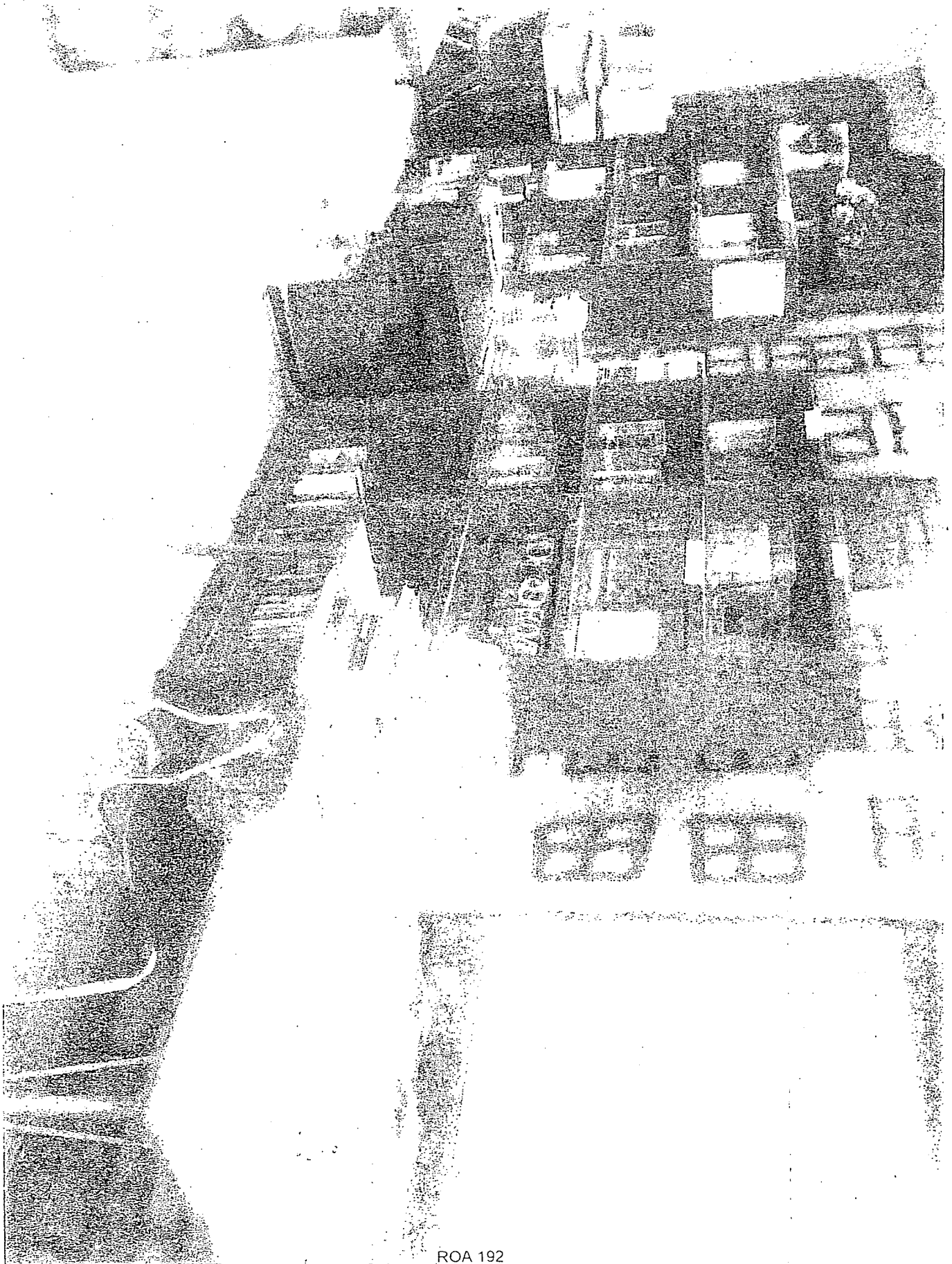




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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy)
Charter School,)

Appellant,)

vs.)

Richland County School District 1 Board)
of Commissioners,)

Respondent.)

CERTIFICATE OF SERVICE

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

I, Ida M. Thomas, Legal Assistant to Jenny A. Drafin, an employee of Baker,
Ravenel & Bender, L.L.P., hereby certify that I have, on this 9th day of
July, 2010, served counsel below with a **Motion to Supplement Record** 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:

Charles J. Boykin, Esquire
Ralph J. Smiley, Esquire
Boykin & Davis, LLC
Post Office Box 11844
Columbia, South Carolina 29211

Mr Vince Ford, Chairman,
Richland One Board of Commissioners
1616 Richland Street
Columbia, South Carolina 29201

The Honorable Jana Shealy, Clerk of Court
South Carolina Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

FILED

JUL 09 2010

SC ADMIN. LAW COURT

Ida M. Thomas

Ida M. Thomas

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

Respondent.

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

**RESPONDENT'S OPPOSITION TO
APPELLANT'S MOTION TO
SUPPLEMENT RECORD**

Respondent, Richland County School District One Board of Commissioners ("the Board"), by and through undersigned counsel, hereby opposes the motion to supplement the record on appeal made by Appellant, Midlands Math and Business Academy ("MMBA"). Appellant has moved, pursuant to Rules 35 and 36 of the Administrative Law Court ("ALC"), to supplement the record to include: (1) a transcript of the hearing before the Board on February 16, 2010; and (2) certain photographs submitted by Appellant. Respondent opposes the motion on the following grounds:

1. There is no transcript of the hearing to submit.

Rule 36(B) of the ALC provides that the record on appeal shall include, among other things: "The transcript of the testimony taken during the proceeding." It is undisputed that there was no testimony taken at the hearing on February 16, 2010. Further, the hearing, which took place at a Board meeting, was not recorded or transcribed. Thus, the transcript provision in Rule 36(B) is inapplicable as there is no transcript of testimony to include in the record.

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2. The Board conducted the hearing in accordance with the South Carolina Charter Schools Act, which does not require a transcript.

At the hearing, MMBA's attorney made a presentation to the Board and submitted documents in support of MMBA's request that the Board not revoke MMBA's charter. Following MMBA's presentation, Richland County School District 1 Administration ("District Administration") made a presentation to the Board and submitted documents in support of its recommendation of revocation. MMBA was then given an opportunity to present a rebuttal argument. Thereafter, the Board allowed for public comment and asked questions of MMBA and District Administration.

The hearing afforded MMBA the opportunity to respond to the recommendation of revocation in accordance with the South Carolina Charter Schools Act ("Act"), S.C. Code Ann. § 59-40-110 *et seq.* The section in the Act on charter revocation, S.C. Code Ann. § 59-40-110, provides, in pertinent part:

(F) The charter school's governing body may request in writing a hearing before the sponsor within fourteen days of receiving notice of nonrenewal or termination of the charter. Failure by the school's governing body to make a written request for a hearing within fourteen days must be treated as acquiescence to the proposed action. Upon receiving a timely written request for a hearing, the sponsor shall give reasonable notice to the school's governing body of the hearing date. The sponsor shall conduct a hearing before taking final action. The sponsor shall take final action to renew or not renew a charter by the last day of classes in the last school year for which the charter school is authorized.

There is no requirement in the Act that the hearing be transcribed or otherwise recorded. In another case involving administrative proceedings, the South Carolina Supreme Court held that a transcript was not required when "the legislature has imposed no requirement that a verbatim recording be made." *Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229, 232 (2001) (wherein the Court determined that preparation of a transcript in a hearing before a city

zoning board was within the board's discretion). The cardinal rule in statutory construction is to effectuate the intent of the legislature. *Id.* at 231. If the legislature intended to require a transcript in charter school hearings it would have included an express requirement as it has done in other sections in Title 59. See *Drayton Hall Charter Elementary School v. Charleston County School District Board of Trustees*, ALC No. 09-ALJ-30-0023-AP, Final Order and Decision of the Honorable Carolyn C. Matthews, pp. 9-10 (finding that Charter Schools Act did not require sworn testimony and cross-examination of witnesses in hearings, when such procedures were not included in the Act). For example, school boards are required to employ a reporter to transcribe teacher dismissal proceedings under the South Carolina Teacher Employment and Dismissal Act. S.C. Code Ann. § 59-25-460. The fact that the legislature chose not to include a transcript requirement in the Charter Schools Act demonstrates the legislature's intent in this regard.

In sum, the hearing before the Board was not an evidentiary proceeding involving sworn witness testimony. Rather, the Board followed a presentation format which is commonly used during the required hearings involving charter school matters. See, e.g., *Drayton Hall Charter Elementary School v. Charleston County School District Board of Trustees*, ALC No. 09-ALJ-30-0023-AP, Final Order and Decision of the Honorable Carolyn C. Matthews. The hearing was not transcribed as no transcription is required by statute. Nevertheless, all of the materials from the presentations are included in the Record on Appeal that has been submitted to the ALC. If counsel for MMBA wishes to present the same arguments to the ALC that were presented to the Board, they have the materials and opportunity to do so.

3. The hearing parameters were discussed and agreed upon prior to the hearing and no request for testimony or a transcript was made.

On February 12, 2010, attorneys for MMBA, District Administration and the Board participated in a conference call. See Affidavit of Regina Hollins Lewis submitted with this opposition. During the call, the parties discussed the hearing format and agreed that the hearing would include presentations to the Board by each side, a rebuttal by MMBA, and time for public comment. Although the conference call afforded an opportunity to do so, counsel for MMBA did not request that testimony be taken at the hearing or that the hearing be transcribed or recorded.

On February 16, 2010, the Board conducted the hearing using the agreed upon format. Only after completion of the hearing did MMBA raise the issue of a transcript, and even then, MMBA decided not to request a rehearing. As such, MMBA's attempt to raise the transcript issue now, on appeal, is untimely and improper.

4. MMBA has not established the purpose or relevancy of the photographs.

In MMBA's motion to supplement the record, MMBA requested the inclusion of copies of certain photographs. However, the motion failed to identify the purpose of the photographs or their relevance to the appeal. MMBA asserts that it believes that the photographs could be "outcome determinative" but provides no explanation for its belief. MMBA has not shown, and we do not see, how the photographs in any way refute the grounds for revocation set out in the Board's Order. Record, pp. 3-18. Therefore, there is no basis for their inclusion.

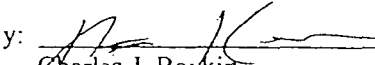
Moreover, MMBA's request to include the photographs in the record invites the ALC to weigh evidence in contradiction to the standard of review for this appeal. Under S.C. Code Ann. § 1-23-380(5), the ALC has authority to review the Board's order to determine whether the Board's decision is:

- (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.

In conducting its review, the ALC "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). By offering the photographs, MMBA appears to be seeking a *de novo* review of evidence by the ALC. This contravenes the scope of review set out in statute and therefore, should be rejected.

Based on the foregoing, Respondent respectfully requests that the ALC deny Appellant MMBA's motion to supplement the record.

Respectfully submitted,
BOYKIN & DAVIS, LLC

By: 
Charles J. Boykin
Peter E. Keup

P.O. Box 11844
Columbia, SC 29211
Ph. (803) 254-0707
Fax (803) 254-5609

ATTORNEYS FOR RESPONDENT

July 23, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District One Board
of Commissioners,

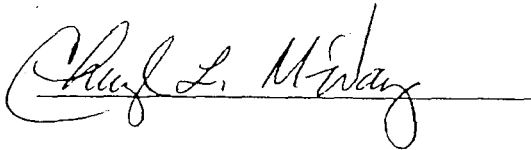
Respondent.

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

CERTIFICATE OF SERVICE

The undersigned of Boykin & Davis, L.L.C., hereby certifies that she has served the following counsel of record with the foregoing **RESPONDENT'S OPPOSITION TO APPELLANT'S MOTION TO SUPPLEMENT RECORD**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this, 23rd day of July, 2010:

Samuel M. Mokeba, Esq.
Kirby D. Shealy, III, Esq.
Baker, Ravenel & Bender, L.L.P.
P.O. Box 8057
Columbia, SC 29202



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Midlands Math and Business Academy
Charter School,

Appellant,

v.

Richland County School District 1 Board of
Commissioners,

Respondent.

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

AFFIDAVIT OF REGINA HOLLINS LEWIS

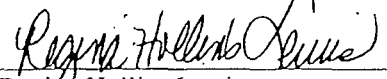
Personally before me, Henri H. Johnson, a notary public for the state of South Carolina, appeared Regina Hollins Lewis, who being duly sworn, says and deposes:

1. I am over eighteen years of age, and I have personal knowledge of the facts and circumstances set forth in this affidavit.
2. Except where otherwise stated, the facts contained in this declaration are based upon my personal knowledge.
3. I am a partner with the law firm of Gaffney, Lewis & Edwards, LLC, located in Columbia, South Carolina.
4. I was retained by the Richland County School District One Board of Commissioners ("the Board") to assist and advise the Board in regard to the procedure for the recommended revocation of Midlands Math and Business Academy ("MMBA").
5. As set forth's in the Board's Order, after MMBA requested a hearing, on the recommended revocation, the Board scheduled a public hearing for February 16, 2010, and provided written notice to MMBA.
6. Prior to the hearing, I scheduled a conference call with legal counsel for MMBA and legal counsel for Richland County School District One Administration ("Administration") to discuss the parameters for the hearing.
7. During the conference call, which took place on the afternoon of February 12, 2010, we discussed the hearing format and agreed that it would include: a presentation by MMBA; a presentation by Administration; a rebuttal by MMBA; public comments; and Board questions.

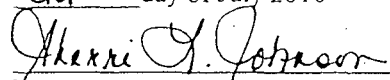
8. Originally, we discussed twenty (20) minutes as the allotted time for the presentations. MMBA's attorney requested additional time and we agreed upon twenty five (25) minutes as the amount of time for presentations to the Board.
9. To the best of my recollection, at no time during the conference call did MMBA's attorney request that testimony be taken at the hearing nor did he request that the hearing be recorded or transcribed.
10. Following the conference call, I sent a confirming email to counsel that summarized the hearing format that had been agreed upon. A copy of the email is attached.
11. On February 16, 2010, the Board held the hearing in accordance with the format discussed in the conference call and confirmed in my email.
12. Following the hearing, MMBA's attorney inquired as to whether a transcript had been or was going to be prepared.
13. After informing MMBA that there was no transcript or recording of the hearing, I asked MMBA's attorney if MMBA wanted another hearing before the Board that would be transcribed. Counsel for MMBA indicated that he would confer with MMBA and follow-up with me. Counsel subsequently informed me that MMBA believed that would be prejudiced by having to present at a second hearing and thus, chose not to have the matter reheard. Thereafter, the Board proceeded to render its decision to revoke the charter of MMBA.

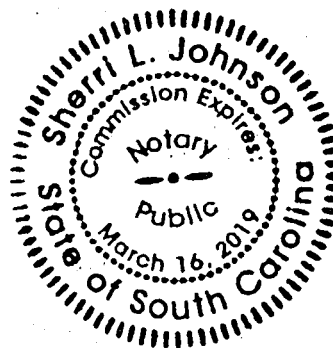
I declare under penalty of perjury under the laws of the United States of America and the State of South Carolina that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 22nd day of July 2010, in the city of Columbia, South Carolina.


Regina Hollins Lewis

SWORN TO Before me this
22nd day of July 2010

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/16/2019



Midlands Math and Business Academy

From: **Regina Lewis** (RLewis@glelawfirm.com)

Sent: Fri 2/12/10 3:03 PM

To: Mokeba, Samuel (SMokeba@brblegal.com); Charles J. Boykin (cjboykin@boykinlawsc.com); Ralph Smiley (rsmiley@boykinlawsc.com); pkeup@live.com

Counsel:

Thank you for participating in the conference call this afternoon. Please allow this email to confirm the parameters for the hearing that were agreed upon during the call. Counsel for Midland's Math will present first and will have up to 25 minutes to present. Thereafter, the District's counsel will present for up to 25 minutes, followed by a response from counsel for Midland's Math, for which there be up to 5 minutes allotted. The Board will then have the opportunity to ask questions/make comments, after which there will be a time for comments by the public. Public comments will be limited to three (3) minutes per person and the Board, within its discretion, will determine the length of time allowed for the public comments portion of the hearing. Counsel for MMBA indicated that he would provide written materials for the Board's consideration either prior to or at the time of the hearing.

If there are any questions regarding this email or the process for the hearing, please let me know. Thank you all, Regina Lewis

Regina Hollins Lewis

Gaffney Lewis & Edwards, LLC

3710 Landmark Drive, Suite 304

Columbia, South Carolina 29204

803.790.8838 (office)

803.790.8841 (fax)

rlewis@glelawfirm.com



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before printing this email.*

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THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

APPEAL FROM RICHLAND COUNTY SCHOOL DISTRICT 1
BOARD OF COMMISSIONERS
Vince Ford, Chairperson

10-ALJ-30-0437-AP

Case No.

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

v.

Richland County School District 1 Board of Commissioners, ...Respondent.

NOTICE OF APPEAL

Midlands Math and Business Academy Charter School ("MMBA") hereby appeals an order from the Richland County School District 1 Board of Commissioners ("District") issued on April 28, 2010, revoking Appellant's charter to operate a public Charter school within the respondent's jurisdiction. A copy of the Order is attached hereto.

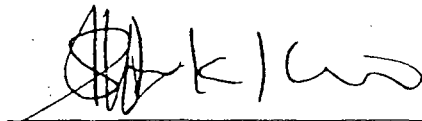
ISSUES ON APPEAL

- I. Are District's factual findings with respect to MMBA's charter clearly erroneous in view of the substantial evidence on the record?
- II. Do District's findings and reasons for revoking MMBA's charter constitute a material breach of the charter?
- III. Did the district err in ruling that MMBA failed to meet or make reasonable academic progress as laid out in its charter?

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- IV. Is the District's conclusion that MMBA curriculum is not aligned to state standards clearly erroneous in view of the substantial evidence on the record?
- V. Did the District err in finding that MMBA did not comply with federal and State individualized education program progress report requirement?
- VI. Is District's conclusion that MMBA's teaching and administrative staff do not meet the qualifications specified in MMBA application and therefore and material breach clearly erroneous in view of the substantial evidence on the record?
- VII. Was District's decision to revoke MMBA's charter application arbitrary and capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion?
- VIII. Are the District's factual findings with respect to MMBA arbitrary and capricious and therefore clearly erroneous in view of the substantial evidence on the record?



Samuel M. Mokeba
Kirby D. Shealy III
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
P.O. Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Appellant

May 21, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE RICHLAND COUNTY
SCHOOL DISTRICT ONE
BOARD OF COMMISSIONERS

In the Matter of Midlands Math and
Business Academy Charter School)
)
)

ORDER

INTRODUCTION

Richland County School District One Board of Commissioners ("the Board"), in accordance with the provisions of S.C. Code Ann. § 59-40-110(F), held a hearing on February 16, 2010 to consider whether the charter of Midlands Math and Business Academy Charter School ("MMBA")¹ should be revoked. The hearing was held at the request of MMBA and included the recommendation of the District's Administration, opposition to the recommendation by MMBA, supporting evidence, oral argument by MMBA and public comment. After careful consideration of MMBA's performance under the contract, the Board voted to revoke the charter. The Board herein provides a written explanation of its reasons for revocation of the charter.

PROCEDURAL BACKGROUND

On November 24, 2009, the Board voted to notify MMBA of its intent to revoke the charter, effective the last day of the 2009-2010 school year. The Board's action was based on its initial findings that MMBA had committed numerous material violations of the conditions, standards or procedures provided in the charter application and that MMBA had failed to meet reasonable progress, as defined in the charter application, toward pupil achievement standards

¹ Under sponsorship of Richland County School District One, MMBA commenced with instruction during the 2004-2005 school year pursuant to an application approved by the Board in accordance with the provisions of the South Carolina Charter Schools Act.

identified in the application. MMBA was notified of the Board's intent in a letter dated December 11, 2009. Also included in the correspondence was a summary of the evidence used by the Board in making its decision. These materials included a copy of the findings by the District's Administration and staff following their comprehensive review of MMBA's compliance with the provisions of its charter application.

In accordance with MMBA's request for a hearing, the Board scheduled a public hearing for February 16, 2010, the purpose of which was to provide MMBA an opportunity to be heard and to receive public comment prior to taking final action on whether to revoke MMBA's charter. The Board provided written notice to MMBA of the public hearing and the Friday preceding the public hearing an agenda was posted on the District's website and sent to five newspapers (The State, The Columbia Star, The Black News, The Free Times, and Midlands Live), the Associated Press, five television stations (WIS TV 10, WLTX 19, WOLO 25, WACH Fox 57, and SCETV), six radio stations (B106 FM, WVOC, WXBT, WFMV, WWDM, and WMHK) and the New Millennium Magazine, which is a web-based publication.

During the February 16, 2010 public hearing, MMBA submitted written materials to the Board and made a presentation based on those materials asking that the Board not proceed with revocation. District's Administration then made a presentation to the Board setting forth the grounds for revocation which had previously been given to MMBA. Following the presentations of District's Administration and MMBA, the Board opened the floor for public comment from community members and others in attendance. The Board also directed questions to both MMBA and the District's Administration which were limited to the materials presented. However, no witness testimony was taken during the hearing.

For its next regularly scheduling meeting of March 23, 2010, the Board placed the matter of MMBA's revocation as an action-item on the agenda and provided notice to MMBA. At the meeting, a motion was made and adopted by the Board, to revoke MMBA's charter based upon the numerous material violations by MMBA of the conditions, standards, and procedures provided in the charter applications and MMBA's failure to make reasonable progress, as defined in the charter application, toward pupil achievement standards. The Board also adopted a motion authorizing the board Chairman to execute this written order setting forth the reasons for the Board's decision.

LEGAL STANDARDS

A school board's decision not to renew or revoke a charter is governed by the provisions of the South Carolina Charter Schools Act, S.C. Code Ann. § 59-40-10, et. seq. Specifically, S.C. Code Ann. § 59-40-110(C), provides in pertinent part:

A charter must be revoked or not renewed by the sponsor if it 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. (emphasis added).

FINDINGS OF FACT

The Board, having considered the record in its entirety, hereby makes the following findings of fact:

1. MMBA's charter application contained numerous statements, promises and assurances that were relied upon when the Board decided to grant sponsorship, including the following:
 - a. "All curriculum and projects will be based upon the South Carolina Standards for all disciplines." (MMBA Application, pg. 9)
 - b. "The teachers of MMBA will provide instruction to students based on the South Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level." (MMBA Application, pg. 10)
 - c. "In order to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time certified Special Education Teachers . . ." (MMBA Application, pg. 11)
 - d. MMBA "[w]ill adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (MMBA Application pg. 3, numbered 14 of 15)
 - e. "All special education teachers will meet the certificate requirements of the No Child Left Behind Law." (MMBA Application pg. 19)
 - f. "The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (MMBA Application pg. 27)
 - g. "[T]he 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" and "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)."
2. Annual reviews were conducted and feedback was given to MMBA in accordance with § 59-40-110 of the South Carolina Charter Schools Act. In addition, the District's Administration made numerous site visits throughout MMBA's existence to monitor compliance and offer assistance to MMBA so that State and District standards are met.

3. At the conclusion of the 2006-2007 school year, MMBA demonstrated a lack of student achievement under the provisions of the charter application and an unacceptable gain towards meeting State standards as evidenced by low student performance on the Palmetto Achievement Challenge Test (PACT).
4. As MMBA's students continued to perform below acceptable standards, MMBA was placed on an improvement plan in an effort to reverse the continued decline in student achievement.
5. To assist MMBA in meeting the standards for student achievement provided in its charter application, the District's Administration and staff provided substantial technical assistance which included the following:
 - a. The District routinely notified MMBA's teachers and administrators of all District-sponsored staff development activities related to standards-based instruction and assessment;
 - b. The Executive Directors of Elementary Schools and Curriculum and Instruction along with subject area specialists regularly monitored the implementation of the MMBA academic improvement plan and provided written feedback to MMBA teachers and staff;
 - c. The District's Office of Accountability, Assessment, Research and Evaluation provided MMBA a PACT data analysis and provided a session to the principal and teachers on interpretation and use of PACT data to drive instruction; and
 - d. The District's Charter School Liaison, facilitated communications between MMBA and the District.
6. While MMBA's PACT scores showed some improvement, the annual review completed in Spring 2008 revealed that MMBA had yet to make adequate yearly progress (AYP) in any year and overall student performance continued to fall below the standards set forth in the charter application.
7. The District continued its efforts to assist MMBA to meet the standards for student achievement provided in its charter application by increasing technical support in the following ways:
 - a. Two consultants and a psychologist from the District's Office of Special Education were assigned to monitor MMBA's adherence to Individual Education

Plans (IEPs), the status of all MMBA's special education students, and to provide reevaluations as needed;

- b. All District professional development dealing with State standards for curriculum and instruction were continuously made available to MMBA teachers; and
 - c. The District assisted MMBA in procuring and implementing SuccessMaker®, an intervention skills-based program in math and reading.
- 8. In Spring 2009, the District again reviewed MMBA's student achievement and determined that despite increased support by the District, adequate student progress at MMBA had not occurred and problems continued to exist in the area of instruction.
 - 9. On May 26, 2009, the Board requested a comprehensive review of MMBA's adherence to its charter, particularly in the area of student achievement.
 - 10. A review committee, appointed by Superintendent Percy Mack, developed and executed a comprehensive review plan which was approved by the Board on July 21, 2009. The comprehensive review was interactive with the staff and administration of MMBA working with the review committee to gather information.
 - 11. The comprehensive review commenced on July 22, 2009 and was concluded in November 2009. During the review, extensive and regular feedback was given by the review committee to MMBA's leadership team.
 - 12. Several key findings were made by the review committee which evidenced MMBA's failure to comply with its charter:
 - a. The Core Knowledge Curriculum used by MMBA had not been aligned to State standards. MMBA's ELA, Math and Science curricula were not aligned to current standards. MMBA had not updated its curriculum to meet current ELA standards, which were released by the South Carolina Department in 2007, and its Science curriculum did not align with the latest State standards that were adopted in 2005.
 - b. MMBA used very little supplemental print sources and most of what they did use was outdated. The curriculum lacked rigor and as such, could not ensure mastery of basic skills concepts.

- c. MMBA only employed one special education teacher, although the charter application provided for a minimum of two full-time certified Special Education Teachers. Further, the special education teacher is not "highly qualified" as provided for in the charter.
 - d. MMBA failed to meet federal and State guidelines regarding student IEP progress reports.
 - e. MMBA failed to meet the achievement objectives outlined in its charter. For five years, MMBA failed to make adequate yearly progress on PACT, which is an achievement standard adopted in the charter application.
 - f. MMBA failed to increase the number of students meeting standard on PACT by 20.6% in English and Language Arts (ELA) and 21.15% in Math over a three year period as promised in the charter application.
 - g. The Director of MMBA does not hold a S.C. teaching certificate or an educational administration certification.
 - h. Student resources were inadequate to support a strong literacy program as evidenced by absence of a comprehensive school library and adequate classroom print resources.
13. On November 7, 2009, the findings of the review committee were presented to the Board and on November 24, 2009 the Board vote to accept the Administration's recommendation to notify MMBA of its intent to revoke the charter.

DISCUSSION

I. MMBA committed material violations of the conditions, standards and procedures in the charter application.

A charter application constitutes a contract between the charter school and its sponsor. S.C. Code Ann. § 59-40-60(A). As such, the charter school is obligated by law to comply with its charter application and fulfill the promises contained therein. As set forth below, MMBA's charter application included several assurances regarding its curriculum and staffing to gain sponsorship by the District. These assurances and promises were material to the application and relied upon by the District when the charter application was approved. However, MMBA did

not comply with the provisions of its charter application as it had promised. As a result, revocation is warranted.

A. MMBA's curriculum was not aligned with State standards as agreed to in its charter.

With respect to curriculum and the application of State standards, the charter application provides:

"All curriculum and projects will be based upon the South Carolina Standards for all disciplines." (MMBA Application, pg. 9)

"The teachers of MMBA will provide instruction to students based on the South Carolina Academic Standards for all subjects. These standards identify the goals that our students will achieve in each subject area at each grade level." (MMBA Application, pg. 10)

In May 2009, members of the District's Curriculum and Instruction Department reviewed the curriculum and instructional materials that were submitted by MMBA for the annual review process. Based upon their review, they found that MMBA's ELA, Math and Science curricula were aligned to outdated standards. MMBA had not updated its curriculum to meet current Science standards, which were released by the South Carolina Department of Education in 2005. In addition, MMBA's Math curriculum did not align with current State standards that were adopted in 2007, and its ELA curriculum did not align with current State standards that were adopted in 2008. Further, District staff found that the Core Knowledge Program, which MMBA uses for all grades and across subjects, was not aligned with current State standards. District staff also found that some standards were not addressed in MMBA's curriculum at all, and that there were numerous gaps in the curriculum, insufficient support materials, and inadequate resources to support a strong literacy program as evidenced by the absence of a comprehensive school library and adequate classroom print resources.

District staff also observed classroom instruction at MMBA. During their observations, they found that standards for lessons were not visible or evident during lessons. . Additionally, they found that MMBA was utilizing very little supplemental print resources and most of what they did use was outdated. They also found that there was a lack of rigor in MMBA's curriculum.

At the hearing, MMBA submitted materials regarding its curriculum and State standards. The materials show that MMBA made some efforts after the District's review to align its curriculum with State standards.² However, the materials fail to demonstrate that MMBA was using curriculum, and providing instruction, based on State standards for all subjects continually throughout its existence as promised by MMBA in its charter application. MMBA's assertion that it has now corrected the alignment issues is an admission that MMBA's curriculum was not in alignment when the District conducted its review and for a substantial period of time prior to the review. MMBA's failure to continuously adhere to a curriculum that is aligned with State standards is a direct violation of the conditions, standards and procedures provided in its charter application and is therefore, grounds for which revocation is warranted.

B. MMBA does not employ two special education teachers as required by its charter application.

MMBA's charter application provides that:

"In order to comply with the individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act, MMBA will work collaboratively with Richland School District One in serving all students with special needs. We will employ at least two full-time certified Special Education Teachers . . ." (MMBA Application, pg. 11)

² According to the "Project Completion Timeline" on the fifth page of Exhibit 8 in MMBA's binder, the task of "Standard Alignment" was completed by MMBA on November 6, 2009, which is months after the District conducted its comprehensive review.

Notwithstanding the provisions of its charter, MMBA employs only one special education teacher. MMBA attempted to justify its digression from the charter application by stating that they only had a little over 100 students and would only need 2 special education teachers if they had full enrollment of 200 students. However, the need for special education teachers should be based on the needs of the special education students, not the overall enrollment of the school. Further, the charter application does not provide that special education staffing will be reduced if MMBA did not meet its enrollment goals. If MMBA intended to do so, it should have stated this in its charter application. In the alternative, MMBA should have requested an amendment to the charter application. On previous occasions MMBA has requested, and the Board has approved, amendments to MMBA's charter. However with regard to special education staffing, MMBA failed to make such a request.

C. Members of MMBA's teaching and administrative staff do not meet the qualifications specified in MMBA's charter application.

MMBA's charter application provides that:

"All special education teachers will meet the certificate requirements of the No Child Left Behind Law." (MMBA Application pg. 19)

The No Child Left Behind Act (NCLB), 20 U.S.C. § 6319, requires that teachers be "Highly Qualified." In order to be Highly Qualified under the NCLB, a teacher must establish competency in each subject matter that he or she teaches. To establish competency, a teacher must complete one of the following for every academic subject currently assigned: a validated statewide subject matter examination certified by the Commission on Teacher Credentialing (CTC); a university subject matter program approved by the CTC; an undergraduate major in the subject taught; a graduate degree in the subject taught; or coursework equivalent to the undergraduate major.

MMBA has one special education teacher. This teacher possesses a South Carolina teaching certificate in the area of Special Education. However, there is no evidence that she has established competency in the subject matters that she teaches. Thus, she is not "Highly Qualified" and does not meet the requirements of NCLB as promised in MMBA's charter application.

MMBA's charter application also lists the qualifications for its Director:

"Director/Lead Teacher Qualification: Must hold current South Carolina Teaching Certification or Education Administration Certification . . ." (MMBA Application pg. 18)

The charter application also provides that:

"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." (MMBA Application pg. 18)

MMBA's Director, Gerald A. Jenkins, does not hold a South Carolina teaching certification or education administration certification. At the hearing, MMBA contended that the latter provision on page 18 of the charter application "qualified" or superseded the first requirement. In other words, MMBA asserts that the Director does not need to have certification if he or the administrative assistant has administrative experience. We do not believe that this is a correct interpretation. The charter application clearly provides that the Director must hold teaching or administrative certification. The charter application later provides that either the director or administrative assistant must have administrative certification or administration experience. This provision does not excuse the certification requirement. Rather, it adds an assurance that someone on the leadership staff will have administrative certification or administrative experience.

D. MMBA did not comply with federal and State individualized education program (IEP) progress report requirements.

Under S.C. Code Ann. § 59-40-50, a charter school must adhere to the disability rights requirements as are applied to public schools operating in the same school district. Further, South Carolina regulations on charter schools provide that a charter application must include an explanation as to how the school will comply with the IDEA, Section 504, and the Americans with Disabilities Act. S.C. Code Ann. Regs. 43-601(II)(D)(9).

In the "Statement of Assurances" section of MMBA's charter application, MMBA promised that it:

"Will adhere to all provisions of the federal law relating to students with disabilities, including Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 that are applicable." (MMBA Application pg. 3, numbered 14 of 15)

A review conducted by Marilyn Davis, the District's Executive Director of Special Education, as part of the 2009 comprehensive review, revealed that MMBA had failed to meet federal and State IEP guidelines regarding student progress reports. Under the IDEA, periodic reports on progress toward IEP goals are to be provided as directed by the student's IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(3)(ii). Ms. Davis' review revealed numerous inconsistencies in providing student IEP progress reports and at least one situation where no progress report had been developed for a student whose IEP required progress reporting every 4.5 weeks.

Compliance with laws and regulations concerning students with disabilities is of particular concern to the District because as the Local Education Agency or "LEA" under the law, the District is ultimately responsible for ensuring that all students with disabilities in the District, including those attending charter schools, are served appropriately. As a result, a

charter school's failure to adhere to federal and State special education laws reflects directly on the District and can result in legal claims and penalties against the District. MMBA is required by law and its charter application to comply with the provisions of the federal law relating to students with disabilities. Their failure to do so is a breach of their obligations and grounds for revocation pursuant to S.C. Code Ann. § 59-40-110(C)(1),(4).

II. MMBA failed to meet or make reasonable progress toward pupil achievement standards as defined in the charter application.

MMBA's charter application included a section entitled "Student Assessment" that sets forth standards for measuring MMBA's pupil achievement. The section is on page 27 of the charter application, which is labeled as "Addendum to Charter School Application." The achievement standards contained in the section use student test scores from the Palmetto Achievement Challenge Test (PACT) to measure student progress. Included in the "Student Assessment" section are two specific measurable standards for pupil achievement:

1. "The entire student population and specific subgroups of MMBA will meet the adequate yearly progress goals each year." (MMBA Application pg. 27)
2. "[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)." (MMBA Application pg. 27) This standard is also referred to as a "three-year step increase."

The test scores released by the South Carolina Department of Education reveal that MMBA did not make adequate yearly progress in any of the years that the PACT was

administered to MMBA students (*i.e.*, 2005-2008). Thus, MMBA did not meet the first pupil standard in its charter application, which required adequate yearly progress on PACT every year.

This failure to meet the standards in the charter application was compounded by the fact that MMBA's student achievement on the PACT fell well below the district's overall performance scores. (See Exhibit 14 in MMBA's binder.) For example, on 2008 PACT testing students enrolled at MMBA had higher percentages of Below Basic scores than Richland One students in ELA, Math, Science and Social Studies. In addition, students enrolled at MMBA had much lower percentages of students scoring Proficient or Advanced than Richland One students in ELA, Math, Science and Social Studies.

MMBA also failed to meet the second standard, which requires a three-year step increase of 20.6% in ELA and 21.15% in Math. From 2005 to 2008, the number of MMBA elementary students who met standard (Proficient or Advanced) in ELA increased by 8.5% and the number of MMBA middle school students who met standard in ELA increased by 7.7%. (See Exhibit 14 in MMBA's binder.) Both of these percentages fall well below the required 20.6% for ELA. As for Math, the number of MMBA elementary students who met standard increased by 12.7% and the number of MMBA middle school students who met standard in ELA increased by 0.2%. Once again, these percentage increases do not meet the standard set forth in the charter application, which requires an increase of 21.15%.

Under the South Carolina Charter Schools Act, the standards for reasonable progress are defined by the charter application. S.C. Code Ann. § 59-40-110(C). As detailed above, MMBA did not meet either of the two measurable achievement standards contained in the Student Assessment section of its charter application. Therefore, the charter must be revoked.

During the February 16, 2009 hearing, MMBA argued that its charter should not be revoked because MMBA students made adequate yearly progress in 2009.³ The Board rejects this argument for several reasons. First, the charter application promised that MMBA would make adequate yearly progress every year, not just one year. Second, the State utilized a different assessment tool in 2009, the newly adopted Palmetto Assessment of State Standards (PASS), and the scores from PASS are not directly comparable to PACT scores. Under the PASS, students can score into one of three categories: not met, met and exemplary. In contrast, the PACT used four categories: below basic, basic, proficient and advanced. Because of the differences in the assessment tools and achievement categories, 2009 PASS scores are most useful as a baseline for analyzing future PASS results and do not provide a strong indicator of improvement.⁴ Third and finally, the performance of MMBA students on the 2009 PASS was still below District averages. The percentage of MMBA students scoring "Not Met" exceeded District averages on all grade levels and subjects areas of PASS except 8th grade science. Thus, even after five years of implementing its program, MMBA has been unable to raise student achievement to District average levels.

Improving student achievement is an imperative that requires immediate action. MMBA has been afforded five years to fulfill the promises it made regarding student achievement. The data reveals that MMBA did not deliver the results it promised.

³ MMBA also asserted that it was the only middle school in the District to make AYP in 2009. This assertion is misleading. MMBA is an elementary and middle school hybrid, serving grades 4-8. When MMBA's middle school grade scores are disaggregated from its elementary grade scores, MMBA's middle school grades did not meet AYP. MMBA's elementary grade scores did meet AYP as did most of the District's elementary schools.

⁴ The South Carolina Department of Education acknowledged in a press release that the increased number of schools meeting adequate yearly progress (AYP) based on scores from the 2009 Pass was more likely due to a change in the AYP calculation than dramatically improved test scores.

SUMMARY OF DECISION

Based on the foregoing findings, analysis and conclusions the Board hereby revokes the charter for the Midlands Math and Business Academy Charter School effective the last day of the 2009-2010 academic school year. Accordingly, the Board directs MMBA's dissolution to commence pursuant to S.C. Code Ann. § 59-40-120.

Executed by:



Vince Ford
Chairman, Board of Commissioners
Richland County School District One

April 27, 2010

Columbia, South Carolina

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,

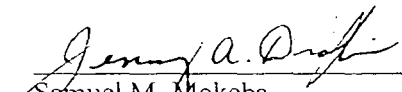
v.

Richland County School District 1 Board of Commissioners, ... Respondents.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), *SCACR*, the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by all parties and does not contain any other material.

SC COURT OF APPEALS
JUN 18 2012
CLERK OF COURT


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