

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

APR 25 2013

Shirley C. Robinson, Administrative Law Judge

**SC Court of Appeals**

Case No. 2013-525

Mary L. Dinkins Higher Learning Academy,..... Appellant,

v.

South Carolina Public Charter School District,..... Respondent.

RETURN IN OPPOSITION TO MOTION TO REINSTATE APPEAL

The South Carolina Public Charter School District opposes the Appellant's Motion to Reinstate Appeal. At its core, this appeal asked the Court to review the Administrative Law Court's determination that evidence in the record supported the District's decision to revoke the Appellant's charter to operate as a charter school for failing to make reasonable academic progress, as directed by South Carolina Code § 59-40-110(C)(2). An agency's decision, of course, is to be given deference, and the evidence was uniform that the Appellant had failed to demonstrate academic progress under any measure while operating as a charter school. (See Order of the Administrative Law Court at 10-15 (Mar. 1, 2013) (copy attached as Exhibit A) (cataloguing the Appellant's myriad undisputed failings with respect to academic progress).)

Notwithstanding the dubious merits of the appeal, the Appellant has ignored the Appellate Court Rules' guidelines for perfecting its appeal. Rule 207(b)(1), SCACR, requires an appellant to order "a transcript of the entire proceedings before the administrative tribunal" within ten days of serving its notice of appeal, and to copy

counsel and this Court's clerk on all correspondence associated with that request. Similarly, Rules 208(a)(1) and 209(a) direct an appellant to file its opening brief and designation of matter within thirty days after receipt of the transcript or, if none is ordered, within thirty days after serving the notice of appeal. Here, not only has the Appellant missed the deadline to order a transcript of the July 27, 2012, hearing before the Administrative Law Court, it has apparently still not even ordered this transcript.<sup>1</sup>

In this case, the notice of appeal was filed and served on March 14, 2013. The deadline for ordering a transcript, therefore, was March 25, 2013 (as March 24th fell on a Sunday). As of the date of this filing, the District is not aware of anything to indicate that the Appellant ever ordered a transcript from the Administrative Law Court, nor has the Appellant ever moved for an order extending this deadline. The Appellant's Motion to Reinstate does not attempt to explain the one-month lapse in satisfying a necessary component of perfecting an appeal.

Importantly, Rule 208(a)(4) directs dismissal when a party misses these deadlines:

Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260.

Rule 260(a), in turn, provides that a case should only be reinstated "upon good cause shown." Nothing in the Motion to Reinstate Appeal suggests that there is any "good cause" for the Appellant's failure to perfect its appeal.

---

<sup>1</sup> Even if a transcript was not needed here—which is not the case, as Judge Robinson held a hearing on July 27, 2012, in this matter—the deadline for filing the Appellant's opening brief would have been April 15, 2013 (as April 13th fell on a Saturday). The Appellant sought the District's consent to extend this non-existent deadline on April 18th—three days late under the best scenario for the Appellant—but it did not even bring this request to the Court's attention until April 22nd—three days after the Court dismissed the appeal.

The South Carolina Supreme Court has explained that the Appellate Court Rules “are not mere technicalities,” and that the failure to follow them “justifie[s]” dismissal of an appeal. Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). This Court has echoed Henning’s sentiment. Forner v. Butler, 319 S.C. 275, 277 n.1, 460 S.E.2d 425, 427 n.1 (Ct. App. 1995). In this regard, the Supreme Court has held it appropriate to dismiss an appeal where a party misses an essential deadline. See, e.g., Roberts v. LaConey, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007) (holding that because the party objecting to a special referee’s report had not filed a brief, “we hereby dismiss his exceptions”) (citing Rule 208(a)(4), SCACR). The Court should follow this authority here, particularly when the Appellant has not offered any justification for ignoring the very first step in perfecting the appeal once this Court’s jurisdiction has attached.

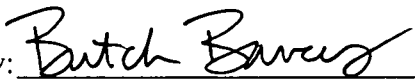
Nor is the Appellant correct when it argues that reinstating the appeal will not prejudice the District. The State Public Charter School District has scarce resources to allocate among its constituent schools. In May 2012, after a full merits hearing, the District revoked the Appellant’s charter, but the Appellant has managed to further deplete the District’s resources for nearly an additional year through procedural delays. This time, though, it has no excuse for ignoring the rules and deadlines, nor does it offer any “good cause” for reinstating this case. The District needs finality with respect to its roster of schools for the upcoming academic year, and it will be prejudiced in both its finances and its reputation if this appeal is reinstated and the Appellant is allowed to further delay a final decision in this matter.

**CONCLUSION**

At bottom, the Appellate Court Rules unambiguously direct an appeal to be dismissed when an appellant misses deadlines for perfecting its appeal, and they authorize reinstatement of an appeal only when the appellant demonstrates “good cause” for its delays. Because the Appellant does not even attempt to offer an explanation for why it has never ordered a transcript—the very first step of the appellate process after noticing an appeal—the District respectfully opposes the Appellant’s Motion to Reinstatement its appeal.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

Karl S. Bowers, Jr.  
SC Bar No. 16141  
butch.bowers@wcsr.com  
M. Todd Carroll  
S.C. Bar No. 74000  
todd.carroll@wcsr.com  
1727 Hampton Street  
Columbia, South Carolina 29201  
(803) 454-6504

Attorneys for the South Carolina Public Charter School  
District

April 24, 2013  
Columbia, South Carolina

Exhibit A

Order from the Administrative Law Court  
Affirming District's Decision

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

**SC ADMIN. LAW COURT**

Mary L. Dinkins Higher Learning Academy, )  
)  
Appellant, )  
)  
v. )  
)  
South Carolina Public Charter School )  
District, )  
)  
Respondent. )  
)

Docket No. 12-ALJ-30-0281-AP

**ORDER**

**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”). Appellant Mary L. Dinkins Higher Learning Academy (“MLD”) filed an appeal with the ALC on June 11, 2012, seeking review of the South Carolina Public Charter School District Board of Trustees’ (“Board”) decision dated May 16, 2012. In its decision, the Board revoked MLD’s charter based upon violations of state law, as well as material violations of its charter.

After a review of the Record and careful consideration of the parties’ arguments, the Court affirms the Board’s decision to revoke MLD’s charter.

**BACKGROUND**

**A. Procedural Background**

MLD submitted its initial charter school application, dated May 31, 2004, with the Lee County School District (“Lee County”). While under Lee County’s sponsorship, the parties were engaged in continuous litigation. In 2007, Lee County sought to revoke MLD’s charter based upon alleged violations of state law and the charter school application. In that case, the administrative law judge affirmed the State Board’s Order, finding that MLD did not violate state law or its charter school application.<sup>1</sup> MLD subsequently left the sponsorship of Lee County and became a charter school member of the Respondent South Carolina Public School

---

<sup>1</sup> See Lee County Sch. Bd. of Trs. v. Mary L. Dinkins Higher Learning Acad., 07-ALJ-30-0597-AP, (S.C. Admin. Law Ct. Aug. 14, 2008). Appellant was the Respondent in that appeal; however, the Respondent South Carolina Public Charter School District was not a party to the 2007 action.

Charter District (“District”) on August 12, 2010, on probationary status. On August 15, 2011, the District informed MLD that it was being placed on academic probation due to substandard academic performance.

On February 23, 2012, MLD was informed by the District that it was considering recommending revocation of MLD’s charter to the Board. This decision was based upon MLD’s academic performance, as well as deficiencies in the areas of compliance and finance. On March 12, 2012, the District notified MLD that the Board, during its monthly meeting, moved to revoke MLD’s charter commencing with the 2012-2013 school year “for material violation of the charter application and failure to meet or make reasonable academic process.” The Board based its decision upon the following: an independent audit revealed significant financial deficiencies; MLD failed to make reasonable academic progress; MLD failed to meet 100% of its academic goals; and, MLD failed to adhere to the accounting, auditing, and reporting procedures set forth in its charter application. MLD subsequently filed a request for a hearing before the Board concerning the notice of revocation. By letter dated March 27, 2012, MLD was notified that the hearing would take place on April 12, 2012. The letter also informed MLD of the procedures to be followed at the hearing.

On March 30, 2012, the Board notified MLD that the hearing had been rescheduled for April 19, 2012, at MLD’s request, to “ensure proper preparation time.” The Board held the hearing on April 19, 2012. Both parties presented evidence and witnesses. Near the conclusion of the revocation hearing, MLD’s counsel requested that the Board suspend the hearing so that MLD may supplement the record with additional information. The Board agreed to hold the record open until April 30, 2012. The Board further agreed to reconvene on May 3, 2012, and vote on the revocation issue.

The Board resumed the hearing on May 3, 2012. After considering all the testimony and evidence presented, as well as the applicable law, the Board voted to revoke MLD’s charter. Based upon the Board’s decision, MLD filed an appeal with the ALC on June 12, 2012.

Following the notice of appeal, the parties filed cross-motions with the Court: the Board moved to dismiss MLD’s appeal, and MLD filed a motion asking the Court to stay any actions directed toward the school. By order dated July 24, 2012, the Court denied the Board’s motion to dismiss. In its order, the Court also ruled that the automatic stay provided under ALC Rule 34 was applicable to this matter. On July 25, 2012, MLD filed a Rule to Show Cause motion

alleging the Board's violation of the automatic stay imposed under ALC Rule 34. A hearing on MLD's motion was held on July 27, 2012. After receiving arguments from the parties, the Court accepted an agreement between the parties whereby MLD agreed to withdraw its motion, and the Board agreed to refrain from taking any further action to enforce the revocation of MLD's charter.

**B. Factual Background**

In MLD's charter application, MLD proposed to offer "an academically challenging, developmentally appropriate, experiential, holistic, child-centered education to all young people." The application stated a number of specific provisions outlining MLD's operations and its student achievement goals. In its order, the Board noted pertinent provisions of the charter application, as related to the revocation proceeding:

1. "As a condition of entering the District, MLD agreed to show a high degree of academic progress."
2. "MLD's charter agreement states that it will teach its students to '[r]ead, write, and communicate effectively.'"
3. "MLD's charter agreement states that it will teach its students to '[u]se mathematics, science, the arts, and computers effectively.'"
4. "MLD's charter agreement states that it will teach its students to '[a]cquire, integrate, and apply essential knowledge from the core academic disciplines.'"
5. "MLD's charter agreement states that it will incorporate the 'South Carolina Academic Standards for all subjects' to 'identify the goals that our students will achieve at each grade level.'"

In its decision, the Board determined that MLD had committed violations of state law and of its charter application, making revocation appropriate pursuant to § 59-40-110(C)(4). Specifically, the Board found that MLD failed to make progress towards adequately educating its students, violated state law, and violated its charter:

1. Over a six-year period, MLD has met only one out of twenty-two AYP [Adequate Yearly Progress] academic objectives.
2. In 2011, only one student passed any EOC [end-of-course] examination. Fifty-four out of sixty-one students were never given an EOC examination in classes that required such a test.
3. The percentage of MLD students who passed the HSAP [High School Assessment Program] test fell from 55.6% in 2009 to 16.7% in 2011.

4. From 2010 to 2011, the percentage of MLD elementary students who met the state's standards for mathematics, as measured through the PASS [Palmetto Assessment of State Standards] test, dropped from 32.4% to 14.3%. In this same time period, the percentage of MLD middle school students who met the state's standards for English and language arts dropped from 45% to 21%.

5. At the revocation hearing, MLD's chief administrative official acknowledged that the school had not met at least one of the academic standards set forth in the school's charter agreement.

6. S.C. Code Ann. Regs. 43-234(I)(A) requires students to earn twenty-four specific course credits in order to be awarded a high school diploma. MLD awarded at least one student a high school diploma when the student had only earned twenty-two of the required credits.

### **JURISDICTION AND STANDARD OF REVIEW**

The 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 Acad. of Excellence v. Dorchester County Sch. Dist. 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 state in reasonable detail the grounds for the proposed termination at least sixty days prior to termination of the charter. § 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. § 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.

Appellate review by this Court of a final decision of the Board is governed by the standards set forth in § 1-23-380 of the South Carolina Code. See S.C. Code Ann. § 59-40-90 (providing that appellate review of decisions of the South Carolina Public Charter School District be consistent with the standards provided in §§ 1-23-380(B) and 1-23-600(D)); S.C. Code Ann. § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner as prescribed in § 1-23-380 for judicial review of a final agency decision). Section 1-23-380 provides that this Court “may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” § 1-23-380(5). However, pursuant to § 1-23-380(5), this Court:

may reverse or modify the decision if 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.

Id.

Under this standard of review, “[t]he findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence.” Hull v. Spartanburg County Assessor, 372 S.C. 420, 424, 341 S.E.2d 909, 911 (Ct. App. 2007) (quoting Kearse v. State Health and Human Servs. Fin. Comm’n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). Moreover, “[t]he ‘possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.’” Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). Further, “a

judgment upon which reasonable men might differ will not be set aside.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Finally, “the decision of the agency should be affirmed unless it is clearly erroneous in view of the substantial evidence in the record, is arbitrary or capricious, or is affected by other error of law.” Wilson v. State Budget & Ctrl. Bd., 374 S.C. 300, 305, 648 S.E.2d 310, 312 (Ct. App. 2007).

“‘Substantial evidence’ is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County Sch. Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). An abuse of discretion occurs when a factual ruling is without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s findings from being supported by substantial evidence. Sharp v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

#### **ISSUES ON APPEAL**

1. Did the Board violate MLD’s due process rights by serving in prosecutorial and adjudicatory capacities during the revocation process?
2. Did the Board violate MLD’s due process rights regarding the time limits set forth in the Act?
3. Did the Board err in its decision to revoke MLD’s charter pursuant to § 59-40-110?
4. Did the Board violate other provisions of the Act in its decision to revoke MLD’s charter?

#### **DISCUSSION**

##### **A. Roles of the District**

MLD argues that the Act “is not constitutional in its provision which allows a charter school sponsor be both the accuser and finder of fact in a charter revocation hearing” held pursuant to § 59-40-110(C). To the extent MLD challenges the constitutionality of the Act, an administrative law judge does not have the authority to declare a statute unconstitutional. Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) (“ALJs are an agency of the executive branch of government and must follow the law as written

until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.”). To the extent MLD challenges the constitutionality of the hearing procedures as applied to MLD’s hearing, the Court concludes MLD’s due process rights were not violated in this matter.

More specifically, the procedures utilized by the Board did not violate MLD’s right to due process. The requirements of procedural due process which apply in a hearing affecting an individual’s property or liberty interest generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful manner, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to judicial review. Sloan v. S.C. Bd. of Physical Therapy Exam’rs, 370 S.C. 452, 636 S.E.2d 598 (2006). See also Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires adequate notice; adequate opportunity for a hearing; the right to introduce evidence; and the right to confront and cross-examine witnesses). Due process is flexible and calls for such procedural protections as the particular situation demands. Id.

Article I, § 22 of the state’s Constitution also prohibits an individual from being subject to the same person for both prosecution and adjudication. S.C. Const. Art. I, § 22 (“No person shall be . . . subject to the same person for both prosecution and adjudication; . . .”). Having reviewed the Record, District staff investigated the allegations against MLD and ultimately presented such evidence to the Board during the revocation hearing. The Board did not have any involvement with the evidentiary presentation or the investigation underlying the staff’s testimony. There is no due process violation where an administrative agency’s staff performs an investigatory function while its governing board serves as the ultimate decision-maker. See e.g., Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997) (holding that a university president had not violated Article I, § 22, when he investigated an employee, terminated that employee, and then testified against the employee at a hearing before the university’s Faculty Hearing Committee because the president did not make the ultimate decision on the employee’s grievance appeal).

Moreover, even if the Board had violated MLD’s due process rights in this matter regarding its role during the hearing, such error was harmless as MLD is entitled to judicial review of the Board’s decision. See Ross, 328 S.C. at 70, 492 S.E.2d at 72-3 (stating that a constitutional violation occurring by an individual’s dual capacity participation in administrative

hearing may be cured where there is an adequate appeal process).

**B. Notice**

MLD next argues that the revocation hearing before the Board was not held within the time limits set forth under the Act. MLD received notice of the proposed termination on February 23, 2012, and the hearing was held on April 19, 2012, approximately 56 days later. MLD argues that the Board failed to comply with § 59-40-110(D) because the hearing was held less than sixty (60) days after notice was received by MLD. In response, the Board argues that it complied with the time requirements set forth in § 59-40-110(D). More specifically, the Board asserts that the 60 days' notice refers to the date the school is closed, not the date of the revocation hearing.

Section 59-40-110 provides for the following:

At least sixty days before not renewing or terminating a charter school, the sponsor shall notify in writing the charter school's governing body of the proposed action. The notification shall state the grounds for the proposed action in reasonable detail. Termination must follow the procedure provided for in this section.

§ 59-40-110(D). However, § 59-40-110(F) provides additional guidance regarding the revocation process:

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.

The cardinal rule of statutory construction is to give effect to the intent of the legislature. S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008).

See also Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) (“The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.”). Further, “[a] statute should not be construed by concentrating on an isolated phrase.” S.C. State Ports Authority v. Jasper County, 368 S.C. 388, 397, 629 S.E.2d 624, 629 (2006).

In reading these sections together, it is apparent that the Board’s interpretation of the statute is correct. Section 59-40-110(F) requires a charter school to request, in writing, a hearing before its sponsor within 14 days of receiving the revocation notice from the sponsor. Once a timely hearing request is made, “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.” Id. This subsection does not specify the time period in which the hearing must be conducted. Rather, the hearing will be convened once the sponsor has given “reasonable notice” to the charter school. The 60-day time period in § 59-40-110(D) refers to the actual revocation of the charter – i.e., the closing of the school – and not the time period before the hearing is scheduled once the charter school receives notice of the proposed revocation. Here, MLD was notified on February 23, 2012, of the proposed revocation. The effective date of the revocation was the end of the school year, well beyond the 60-day time frame mandated in § 59-40-110(D).

Because the Board has complied with the time frame set forth in § 59-40-110(D), the Court will not overturn the Board’s decision as urged by MLD.

### **C. Substantial Evidence**

MLD next argues that the Board erred in revoking its charter pursuant to § 59-40-110 because “[t]he record is devoid of any showing of any material violation of any condition, standard or procedure provided for in the . . . Act.” In response, the Board argues that there is overwhelming evidence in the Record to support its decision. Specifically, the Board asserts that MLD awarded a high school diploma to at least one student who had not acquired sufficient credits, in violation of state law, and that MLD failed to make reasonable academic progress based upon the criteria set forth in the charter agreement.

#### **1. High School Diploma**

In its decision, the Board determined that MLD had awarded a high school diploma to a student who had not earned sufficient credits to receive the diploma. In response, MLD asserts that it is not aware of any student that was awarded a high school diploma without earning

sufficient credits. MLD further asserts that if the diploma was incorrectly awarded to the student, it was “an oversight.”

S.C. Code Ann. Regs. 43-234(I)(A) requires students to earn twenty-four credits in specific courses in order to earn a high school diploma from the state of South Carolina. Under the Act, a violation of law requires revocation of the school’s charter. See § 59-40-110(C) (stating that a school district must revoke a school’s charter if the school has violated any provision of law which the charter school was not specifically exempted). Here, the Board determined that MLD awarded a high school diploma to a student that earned 22 credits, 2 credits less than the requirement under the above regulation. However, in reviewing the Record, it appears this student in fact earned 27 credits. Specifically, it appears that the calculation of total earned credits is incorrect: the student earned 22 credits at the end of the third year, but earned an additional 5 credits in the fourth year. Those 5 credits were not added to the total earned credits. Further, the student’s grade point average (“GPA”) also supports this conclusion: the student’s GPA from the third year is 3.00, and the GPA from the fourth year is 2.5. In the academic summary, the student’s cumulative GPA is 2.68, and as such, it appears to include the student’s GPA from the fourth year. Therefore, it appears that the student’s grades from the fourth year were calculated into the cumulative GPA, but the credits earned from the fourth year were not included in the cumulative credits earned. There is simply no evidence in the Record to support the Board’s conclusion that MLD incorrectly awarded a high school diploma to this student; rather, it appears there is a scrivener’s error on the student’s transcript.<sup>2</sup>

## **2. Reasonable Academic Progress**

MLD next argues that the Record does not support the Board’s determination that MLD failed to make reasonable academic progress based on the criteria set forth in the charter agreement and in violation of § 59-40-110(C)(2). As support for its decision, the Board noted the following: 1) MLD met 1 out of 22 academic objectives under the AYP standards from 2006 through 2011; 2) between 2009 and 2011, the number of MLD students who passed both sections of the HSAP dropped from 55.6% to 16.7%; 3) between 2009 and 2011, the number of MLD high school students who passed EOC examinations dropped from 16% to 5.3%; 4) between 2009 and 2011, the number of MLD middle school students who passed the English/Language

---

<sup>2</sup> Additionally, the student’s total earned credits also appear to meet the specific course requirements as provided for in S.C. Code Ann. Regs. 43-234(I)(A).

Arts section of the PASS test dropped from 27.2% to 21%; and, 5) between 2009 and 2011, the number of MLD elementary students who passed the Math section of the PASS test dropped from 46.1% to 14.3%.

The Board also asserts that MLD permitted 12 students to take EOC examinations for classes in which they were not enrolled, yet failed to administer an EOC examination to students actually enrolled in those classes. Finally, the Board asserts that MLD’s charter states that it will measure academic progress against the State’s standardized tests. Because MLD failed to meet those academic standards, the Board argues this is a violation of MLD’s charter, and thus, is an additional basis for revocation of the charter under § 59-40-110(C)(1).

In reviewing the Record, the Court concludes that MLD has committed a material violation of the conditions set forth in its charter, and MLD has failed to make reasonable progress toward pupil achievement as provided under §§ 59-40-110(C)(1) and (2).

**a. Adequate Yearly Progress**

<b>AYP (Adequate Yearly Progress)</b>			
	<b># Objectives MET</b>		<b># Objectives NOT MET</b>
	<b>Attendance/ Participation</b>	<b>Academic</b>	
2011	4	0	7
2010	7	1	3
2009	7	0	2
2008	7	0	2
2007	5	0	4
2006	7	0	6

The Record reflects that MLD only met 1 academic objective under the AYP standards from 2006 through 2011. MLD argues that it is unfair to use data from years when MLD was not operating under the District’s sponsorship, especially when “previous years have been addressed by [the ALC] in prior litigation. Notably, the prior decisions of administrative judges are not binding upon one another. See 73A C.J.S. Public Administrative Law and Procedures § 292 (“While one administrative law judge (ALJ) may look to another’s decisions for guidance, administrative decisions are not binding on other administrative law judges.”). Even if this Court

excluded data from prior years, the Court would reach the same conclusion. For years 2009 through 2011, MLD met 1 out of 10 academic objectives. This is clearly evidence of MLD's failure to make reasonable progress toward pupil achievement. In its brief, MLD states, for the years 2009 through 2011, it has met 18 out of 21 objectives. However, MLD includes attendance/participation objectives within its calculation. While attendance and participation are important, the "pupil achievements" referenced in § 59-40-110(C) refer to academic standards, and not attendance objectives.

**b. HSAP (High School Assessment Program)**

<b>HSAP</b>			
<b>% Second Year Students Passing Both Subtests</b>			
	<b>MLD</b>	<b>District S=SCPCSD L=Lee Co</b>	<b>Schools w/Similar Poverty</b>
2011	16.7	61.4 (S)	49.6
2010	14.3	59.6 (L)	52.5
2009	55.6	57.1 (L)	57.0

The Record further reflects that between 2009 and 2011, the number of MLD students who passed both sections of the HSAP dropped from 55.6% to 16.7%. MLD does not dispute the drastic drop in passage rate; rather, MLD asserts that most of its students who took the HSAP test in 2011 were special education students. However, there is nothing in the Record to substantiate MLD's claim. Even if MLD's assertion is correct, its' charter does not state that MLD was initiated or operates for the benefit of special education students. Nor does it delineate standards between special education students and other students. MLD's passage rates have significantly decreased within the past three years. Further, there is a marked disparity between MLD's passage rates when compared to similarly-situated schools.

**c. High School EOC Examinations**

<b>High School EOC Examinations</b>			
<b>% Students Scoring 70% or Above</b>			
	<b>MLD</b>	<b>District S=SCPCSD L=Lee Co</b>	<b>Schools w/Similar Poverty</b>
2011	5.3	55.5 (S)	32.1
2010	21.4	39.4 (L)	33.2
2009	16.0	37.8 (L)	33.5

The Record also reflects that between 2009 and 2011, the number of MLD students who passed EOC examinations dropped from 16% to 5.3%. In comparison, schools with a similar poverty level averaged a 32.1% passage rate for the year 2011, and schools within the District averaged a 55.5% passage rate for the year 2011. Again, MLD's passage rates significantly dropped within the past three years, and there is a large disparity between similarly-situated schools.

The Board also determined that MLD permitted 12 students to take an EOC examination for classes in which they were not enrolled, and MLD also failed to administer an EOC examination to students who were actually enrolled in those specific classes:

<b>Class</b>	<b>Students Enrolled</b>	<b>Enrolled Students who took an EOC</b>	<b>Enrolled Students who passed an EOC</b>	<b>Non-Enrolled Students who took an EOC</b>	<b>Non-Enrolled Students who passed an EOC</b>
Algebra I	20	1	0	0	0
Biology	10	0	0	0	0
Physical Science	11	3	0	6	0
United States History	8	0	0	5	0
English I	12	3	1	1	0

MLD does not dispute that this situation occurred. Rather, MLD disputes the total number of EOC examinations administered by MLD. While the students enrolled in the classes may overlap, the Record supports the Board's determination that MLD did not require each enrolled student to take an EOC examination. Further, MLD permitted non-enrolled students to take an EOC examination. It would be difficult, if not impossible, for MLD to measure if students were making reasonable academic progress or meeting the goals of the charter school if MLD was not requiring the students to take EOC examinations. MLD has neither stated why this situation occurred nor how MLD can measure a student's progress if no examinations are administered.

**d. PASS/PACT (Palmetto Assessment of State Standards)**

PASS/PACT						
% Students Scoring Met or Above						
	English/Language Arts			Math		
	MLD Elem/Middle	District S=SCPCSD L=Lee Co	Schools w/Similar Poverty	MLD Elem/Middle	District S=SCPCSD L=Lee Co	Schools w/Similar Poverty
2011	50.0/21.0	73.3 (S)	65.8/45.0	14.3/21.1	60.1 (S)	60.6/47.9
2010	44.2/45.0	43.4 (L)	64.5/47.4	32.4/11.2	37.4 (L)	57.5/45.4
2009	38.5/27.2	42.4 (L)	64.2/49.9	46.1/14.3	35.9 (L)	57.2/48.0
2008	29.4/14.3	49.0 (L)	68.6/50.7	23.5/16.7	47.0 (L)	62.8/51.6

In consideration of the Record, it is abundantly clear that MLD's academic performance decreased dramatically between the years of 2009 and 2011. Between 2009 and 2011, the number of MLD middle school students who passed the English/Language Arts section of the PASS test dropped from 27.2% (and from 45% in 2010) to 21%. Like the analysis above, there is a large disparity between MLD's rates and those of similarly-situated schools. While MLD's passage rate averaged 21% in 2011, the District has a 73.3% passage rate, and schools with a similar poverty level as MLD averaged a 45% passage rate.

During the same time frame, the number of MLD elementary students who passed the Math section of the PASS test dropped from 46.1% to 14.3%. The District's rate was 60.1% during 2011, and schools with a similar poverty level as MLD averaged a 60.6% passage rate.

While MLD made small gains in other areas, overall, MLD's scores across the board have remained consistent on two bases: the scores have significantly dropped or there is a marked disparity between MLD and other comparable schools.

In reviewing the Record, there is substantial evidence to support the Board's finding that MLD failed to make reasonable progress towards its academic goals, requiring revocation of MLD's charter pursuant to the Act.

#### **D. Other Violations**

Finally, MLD argues that the Board violated other provisions of the Act in its decision to revoke MLD's charter: 1) by granting MLD a "provisional charter"; and 2) by failing to conduct an annual audit of MLD for the 2010-2011 and 2011-2012 school years.

##### **1. Renewal of Charter**

MLD argues that the Board violated the Act by granting a "provisional charter" to MLD rather than a charter with a duration of 10 years, as set forth in § 59-40-110:

A charter must be approved or renewed for a period of ten school years; however, the charter only may be revoked or not renewed under the provisions of subsection (C) of this section. The sponsor annually shall evaluate the conditions outlined in subsection (C). The annual evaluation results must be used in making a determination for nonrenewal or revocation.

§ 59-40-110(A). In reviewing the Record, MLD's argument has no merit. MLD was initially granted a charter under the sponsorship of Lee County. In 2010, upon agreement of the parties, MLD transferred its charter to become a member under the sponsorship of the District. "The terms of an approved charter application become the terms of the agreement between the parties. James, 376 S.C. at 299, 657 S.E.2d at 472 (2008) (citing § 59-40-60(A)). Further, "a material revision of the terms of the agreement requires the approval of both parties." Id. In the agreement between MLD and the District, MLD was permitted to operate under the District for one year before a decision was made regarding MLD's application for a renewal.<sup>3</sup> MLD was aware of the terms of the agreement. It cannot choose now to dispute the terms of the contract.

---

<sup>3</sup> See also S.C. Code Ann. § 59-40-115 ("A charter school may terminate its contract with a sponsor before the ten-year term of contract if all parties under contract with the charter school agree to the dissolution. A charter school that terminates its contract with a sponsor directly may seek application for the length of time remaining on its original contract from another sponsor without review from the Charter School Advisory Committee.). In this matter, MLD agreed to dissolve its sponsorship under Lee County. MLD subsequently applied to become a member of the District. Section 59-40-115 provides that MLD "may seek application for the length of time remaining on its original contract." (emphasis added). However, the statute does not require the new sponsor to accept the charter school for the remainder of time under the previous contract.

C.A.N. Enterprises, Inc. v. S.C. Health and Human Services Finance Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (“When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense.”).

## 2. Annual Evaluation

MLD next argues that the Board violated the Act by failing to conduct an audit of MLD for the 2010-2011 and 2011-2012 school years, and as such, the Board’s decision to revoke MLD’s charter should be overturned. The Court disagrees. As noted above, § 59-40-110(A) only requires that a sponsor annually evaluate the conditions set forth in § 59-40-110(C) before using those evaluation results when making a determination for nonrenewal or revocation of a charter. The District did this. The March 12, 2012 revocation notice specifically informed MLD that the District has “monitored and evaluated MLD’s academic, compliance, fiscal, and operational performance since the time MLD entered the District.” These are the same factors specified in § 59-40-110(C). Moreover, in its revocation notice to MLD, the District attached a summary of “Accountability Data” used by the District in its evaluation of MLD. The Accountability Data is based on “Education Accountability Act Annual Report Cards” published on the South Carolina Department of Education’s Website. (emphasis added). As evidenced by the Record, the District complied with its statutory obligations under the Act regarding its revocation determination. Accordingly, the Court will not overturn the Board’s decision as urged by MLD.

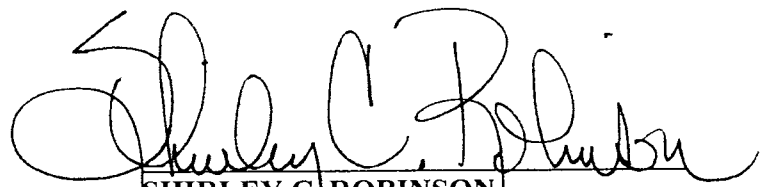
Having reviewed the entire Record, and carefully considered the arguments presented by the parties, the Court concludes that there is substantial evidence in the Record to support the Board’s final determination in this matter.

## ORDER

Based upon the foregoing, it is hereby **ORDERED** that the Board of Trustee’s decision dated May 16, 2012, is **AFFIRMED**.

**AND IT IS SO ORDERED.**

March 1<sup>st</sup>, 2013  
Columbia, South Carolina

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

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 emergency Mail Service addressed to the party(ies) or their attorney(s).

Page 16 of 16


This 1 day of March 2013  
By: Jacob Henderson

**CERTIFICATE OF SERVICE**

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice LLP, attorneys for South Carolina Public Charter School District do hereby certify that I have served all parties in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Pleading:                   **Return in Opposition to Motion to Reinstate Appeal**

Parties Served:                   Johnny E. Watson  
  2715 Edgewood Avenue  
  Columbia, SC 29204

  
\_\_\_\_\_  
Todd Mathis

April 25, 2013

**RECEIVED**

APR 25 2013

**SC Court of Appeals**