

STATE OF FLORIDA
DEPARTMENT OF EDUCATION

IN RE: REQUEST FOR EXCLUSIVE)
AUTHORITY TO AUTHORIZE CHARTER)
SCHOOLS FOR THE 2008-2009)
FISCAL YEAR BY THE SCHOOL) Case No. DOE-_____
DISTRICT OF DADE COUNTY)
)

RECOMMENDED FINAL ORDER

This matter came before the undersigned for informal hearing pursuant to Rule 6A-6.0783, Florida Administrative Code, on July 31, 2008, in Tallahassee, Florida.

APPEARANCES

Applicant: Tiffanie Pauline
Melinda L. McNichols, Esquire
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Challenger(s): Olga Camarena
Theodore R. and Thelma A. Gibson
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Miami, FL 33133-1410
(305) 324-6963

David Calvo and Nancy Suarez
Mater East Academy Middle School
450 SW 4th Street
Miami, FL 33133-1410
(305) 324-6963

Jose Nunez and Christine McGuinn
Mater Academy Charter Middle
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Hialeah Gardens, FL 33016-2419

Betty Nunez and Susie Dopico
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Alex Tamargo
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STATEMENT OF THE ISSUE

The issue in this case is whether the Applicant has provided fair and equitable treatment to its charter schools during the four years prior to the Applicant's submission of the resolution for exclusive authority to authorize charter schools for the 2008-2009 fiscal year.

PRELIMINARY STATEMENT

On or before March 1, 2008, the Applicant submitted to the Agency Clerk a written resolution indicating its intent to retain exclusive authority to authorize charter schools for the 2008-2009 fiscal year. The Applicant subsequently timely filed an application for exclusive authority pursuant to Rule 6A-6.0783(4), F.A.C. Several Challengers timely filed responses to the application pursuant to Rule 6A-6.0783(5), F.A.C. The Applicant timely filed a rebuttal to the Challengers' responses pursuant to Rule 6A-6.0783(6), F.A.C. Thus, the matter was referred to the Department for review pursuant to Rule 6A-6.0783(6), F.A.C., and Form IEPC-EA1.

The Department subsequently completed its review of the application, response and rebuttal. On June 4, 2008, the Commissioner issued a Notice of Intent of the State Board of Education to deny exclusive authority for the Applicant based on the scoring requirements identified in Form IEPC-EA1. See, Rule

6A-6.0783(8), F.A.C.

The Applicant timely challenged this intended action by filing a request for hearing with the Agency Clerk pursuant to Rule 6A-6.0783(10), F.A.C. The Applicant subsequently filed with the Agency Clerk a written statement identifying each score challenged, stating with specificity the reasons why said score should be different. Challengers subsequently filed a written statement in response and rebuttal to such. The undersigned was subsequently designated by the Commissioner of Education pursuant to Rule 6A-6.0783(10)(a), F.A.C., as the informal hearing officer in this matter.

A hearing was requested by the Applicant, and was subsequently held on July 31, 2008, in Tallahassee, Florida. In addition to the argument and documentation presented pursuant to Rules 6A-6.0783(4), (6), and (10)(b), F.A.C., the Applicant presented the following witnesses to further discuss and clarify the matters identified in the written statements: Melinda L. McNichols, Esquire, Senior Attorney for Academics; and Tiffanie Pauline, Executive Director, Charter School Operations. In addition to the argument and documentation presented pursuant to Rules 6A-6.0783 (5) and (10)(c), F.A.C., the Challengers presented the following witnesses to further discuss and clarify the matters identified in the written statements: Olga Camarena,

David Calvo, Nancy Suarez, Jose Nunez, Christine McGuinn, Betty Nunez, Susie Dopico, Suzette Ruiz, and Alex Tamargo.

The Applicant submitted many new documents during the informal hearing. The informal hearing was transcribed by a court reporter, but the undersigned has been without the benefit of any transcript to date. No witnesses were placed under oath. The Florida Evidence Code and Florida Rules of Civil Procedure were not applicable to the informal hearing.

Citations to the Florida Statutes refer to the 2007 Florida Statutes, unless otherwise stated. References to Exhibits submitted pursuant to Rule 6A-6.0783(4)-(6), F.A.C., will be "App. A. Ex. x" for Applicant's exhibits, and "App. C.Name Ex. x" for Challenger exhibits. References to Exhibits presented pursuant to 6A-6.0783(10), F.A.C., will be "Chal. A. Ex. x" for Applicant's exhibits, and "Chal. C.Name Ex. x" for Challenger exhibits.

FINDINGS OF FACT

1. The Florida Schools of Excellence Commission ("FSE") was created by the Florida Legislature as an independent state-level commission (under the supervision of the State Board of Education) whose primary focus is the development of charter schools in order to better meet the growing and diverse needs of some of the increasing number and array of charter schools in

the state and to further ensure that charter schools of the highest academic quality are approved and supported throughout the state in an efficient manner. § 1002.335(2)-(3), Fla. Stat.

2. The FSE may authorize and act as the sponsor of charters schools; however, a charter applicant may submit an application to the FSE only if the school district in which the FSE charter school is to be located has not retained exclusive authority to authorize charter schools. § 1002.335(4)(a)1. & (5)(a), Fla. Stat.

3. If a district school board has not retained exclusive authority to authorize charter schools, the district school board and the FSE shall have concurrent authority to authorize charter schools and FSE charter schools, respectively, to be located within the geographic boundaries of the school district. §1002.335(5)(a), Fla. Stat.

4. For each fiscal year, a district school board may seek to retain exclusive authority to authorize charter schools within the geographic boundaries of the school district by presenting to the State Board of Education ("SBE"), on or before March 1 of the fiscal year prior to that for which the exclusive authority is to apply, a written resolution adopted by the district school board indicating the intent to retain exclusive authority to authorize charter schools. §1002.335(5)(c), Fla.

Stat.

5. The written resolution shall be accompanied by a written description addressing the elements described in § 1002.335(5)(e), Fla. Stat. § 1002.335(5)(c), Fla. Stat.

6. The SBE shall grant¹ to a district school board exclusive authority to authorize charter schools within the geographic boundaries of the school district if the SBE determines, after adequate notice, in a public hearing, and after receiving input from any charter school authorized by the district school board, that the district school board had provided fair and equitable treatment to its charter schools during the four years prior to the district school board's submission of the resolution. §1002.335(5)(e), Fla. Stat.

7. Pursuant to § 1002.335(5)(e), Fla. Stat., the SBE review of the resolution shall, at a minimum, include consideration of the following:

- a. compliance with the provisions of s. 1002.33;
- b. compliance with full and accurate accounting practices and charges for central administrative overhead costs;
- c. compliance with requirements allowing a charter school, at its discretion, to purchase certain services or

¹ This decision is not subject to chapter 120, but is a final action subject to review by the district court of appeal. §1002.335(5)(f), Fla. Stat.

a combination of services as actual cost to the district;

d. the absence of a district school board moratorium regarding charter schools or the absence of any districtwide charter school enrollment limits;

e. compliance with valid orders of the SBE;

f. the provision of assistance to charter schools to meet their facilities needs by including those needs in local bond issues or otherwise providing available land and facilities that are comparable to those provided to other public school students in the same grade levels within the school district;

g. the distribution to charter schools authorized by the district school board of a pro rata share of federal and state grants received by the district school board, except for any grant received for a particular purpose which, by its express terms, is intended to benefit a student population not able to be served by, or a program not able to be offered at, a charter school that did not receive a proportionate share of such grant proceeds;

h. the provision of adequate staff and other resources to serve charter schools authorized by the district school board, which services are provided by the district school board at a cost to the charter schools that

does not exceed their actual cost to the district school board;

i. the lack of a policy or practice of imposing individual charter school enrollment limits, except as otherwise provided by law; and

j. the provision of an adequate number of educational choice programs to serve students exercising their rights to transfer pursuant to the "No Child Left Behind Act of 2001," Pub. L. No. 107-110, and a history of charter school approval that encourages chartering.

8. These ten criteria are further refined via the application that a district school board is required to submit. The application is found in Form IEPC-EA1, which is adopted and incorporated by reference in Rule 6A-6.0783(3), F.A.C.

9. The application is divided into Part I and Part II.

10. Part I involves a review to determine if the Applicant has been sufficiently responsive to statutory requirements that are characterized as compliance requirements. Scores are assigned based on whether the question is answered as Yes (1 point) or No (0 points). The maximum possible score for Part I is 14 points. See, Form IEPC-EA1.

11. Part II involves a qualitative consideration of how well the Applicant has fulfilled the sponsor requirements

identified in Florida Statute. Scores are assigned on a scale of 0-2 to indicate how well the Applicant has fulfilled the requirement. The reviewer evaluation instrument assigns certain standards to receive 0 points, 1 point, or 2 points. The maximum possible score for Part II is 36 points. Id.

12. The maximum possible score for the application - combining Part I and Part II - is 50 points. Id.

13. To obtain exclusive authority, Applicants are required to score the maximum possible in both Part I and Part II, for a total score of 50. Id.

14. The inability of an applicant to meet the minimum scoring requirements constitutes a basis for the denial of the applicant's request. § 1002.335(5), Fla. Stat.; Rule 6A-6.0783, F.A.C.

15. After review, the Applicant received a score of 39, and the Commissioner subsequently issued a Notice of Intent of the State Board of Education to deny exclusive authority because the Applicant did not obtain the minimum score identified in Form IEPC-EA1.

16. The Applicant has challenged this Intent pursuant to Rule 6A-6.0783(9), F.A.C., and has requested rescoring of the following questions: Part I, Questions 1, 3, 5, 11, 12, and 13; and Part II, Questions 4, 5, 6, 11, and 12.

17. Neither the Applicant nor any other party challenged any other scores assigned by the Department; thus, such scores stand "as-is" and the undersigned is without jurisdiction to review such. For the scores not challenged, the Applicant received 34 out of a possible 34 points - or 100% of the possible points for the non-challenged questions.

18. The undersigned's review utilizes the same scoring elements and criteria as provided in the Department's review.

19. It must be acknowledged that some of the evidence is in conflict. Given these evidential conflicts, the undersigned supposes that reasonable people might disagree about the ultimate findings. Ultimately, however, it falls to the undersigned, rather than a group of hypothetical "reasonable people," to resolve the evidential conflicts and settle this conflict. Thus, to the extent that any finding below (or herein) is inconsistent with the evidence or testimony presented to the contrary, the finding reflects a rejection of all such inconsistent evidence and testimony (none of which was overlooked, disregarded, or ignored) in favor of proof that the undersigned deemed, in the exercise of his prerogative as the fact-finder, to be more believable and hence entitled to greater weight.

First Challenge - Part I, Question 1

20. This question is "[c]harter school growth and expansion in the district has not been limited by district-imposed moratoriums or enrollment limits."

21. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement. The data provided by applicant clearly show an increase in the number of charter schools and the student populations at charter schools within the Applicant's geographic boundaries.

22. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Second Challenge - Part I, Question 3

23. This question is "[p]olicies or practices have not been imposed to limit individual charter school enrollment other than those as provided for in state law."

24. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement. There is a provision in some of the contracts between applicant and charter schools that appears to limit enrollment by limiting

the number of students a charter school may "recruit" from competing traditional public schools. The Applicant testified that this provision of the contract reflected then-existing law which permitted such limitations being placed on charter schools. The Applicant testified further that this provision has never been enforced, and has been phased out of all contracts as they are renewed. Finally, the Challengers acknowledged that their schools were not impacted by the Applicant's enforcement of this provision.

25. There was additional evidence regarding the Applicant's use of an "exit interview" with parents who have expressed a desire to transfer their student children from a traditional public school to a charter school. The Challengers testified that this has led to frustration with parents and charter school staff, and has caused a "chilling effect" on the transfer of these students to charter schools. While this policy certainly does not add support to the Applicant's position that it provides fair and equitable treatment to the charter schools within the Applicant's geographic boundaries, it is not an "enrollment limit" as addressed by this question and prohibited under Florida law.

26. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Third Challenge - Part I, Question 5

27. This question is "[c]harter schools are exempt from all district policies except those that have been mutually agreed to by both the sponsor and each individual charter school."

28. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement. While the Challengers offered testimony regarding the many policies they are required to follow, there was no evidence presented that these policies were not mutually agreed to by the Applicant and the charter school.

29. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Fourth Challenge - Part I, Question 11

30. This question is "[d]oes the district ensure that reading is a primary focus of the charter school curriculum?"

31. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement. The Applicant presented evidence that it ensures reading is a

primary focus of the charter school curriculum beginning at the charter school application stage, through regular instruction and curriculum review, and by providing general and school-specific reading coaches.

32. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Fifth Challenge - Part I, Question 12

33. This question is "[a]dditional reporting requirements are not imposed on a charter school without reasonable and specific written justification being provided to the charter school."

34. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement. The Applicant presented evidence that all reporting requirements placed on charter schools are either permitted under applicable Florida law, or mutually agreed to by the Applicant and the charter school

35. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Sixth Challenge - Part I, Question 13

36. This question is "[d]oes the district provide the opportunity for the charter schools to participate in the district's free and reduced lunch program?"

37. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement.

38. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Seventh Challenge - Part II, Question 4

39. This question is "[r]eceive and review charter school applications."

40. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has not established that it has been sufficiently responsive to this statutory requirement. The Applicant acknowledges that on at least one occasion it did not meet the statutory requirement that it report to the Department the approval or denial of a charter application within 10 calendar days after such approval or denial. The undersigned cannot find that the Applicant has established that it has been "consistent" in meeting its

timelines.

41. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Seventh Challenge - Part II, Question 5

42. This question is "[a]pprove charter school contracts."

43. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has not established that it has been sufficiently responsive to this statutory requirement. The Applicant testified that its process for executing charter school contracts "is always within the required timelines." However, the Applicant did not identify any statutory timelines in its written policies or procedures.

44. Therefore, the undersigned finds that the Applicant's score for this question is 1.

Eighth Challenge - Part II, Question 6

45. This question is "[e]nsure charter schools receive all state funding for which they are eligible."

46. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement.

47. Therefore, the undersigned finds that the Applicant's score for this question is 2.

Ninth Challenge - Part II, Question 11

48. This question is "[f]acilities needs are included in district bond issues or available land and facilities are made available that are comparable to those provided to other public school students in the same grade levels."

49. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement.

50. Therefore, the undersigned finds that the Applicant's score for this question is 2.

Tenth Challenge - Part II, Question 12

51. This question is "[a]dequate staff and other resources are provided at the district office to serve charter schools at a cost to the charter schools that does not exceed their actual cost to the district school board."

52. Based on a review of all the evidence and testimony provided, the preponderance of the evidence leads the undersigned to find that the Applicant has established that it has been sufficiently responsive to this statutory requirement.

53. Therefore, the undersigned finds that the Applicant's score for this question is 2.

Ultimate Findings of Fact

54. The greater weight of the evidence establishes, and the undersigned finds that, based on the scores not challenged by the Applicant (identified in Finding # 17), and the rescoring indicated above, the Applicant's revised total score is 48.

55. As this score does not meet the minimum scoring requirements, this does constitute a basis to continue the denial of the applicant's request for exclusive authority.

CONCLUSIONS OF LAW

56. The undersigned has jurisdiction in this informal hearing pursuant to § 1002.335(5) Fla. Stat., and Rule 6A-6.0783(10), F.A.C.²

57. The burden of proof rests with the Applicant. See, §1002.335, Fla. Stat.; Rule 6A-06.0783, F.A.C. Additionally, the Applicant is the party opposing the proposed agency action. See State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981)(The general rule is that the burden of

² To the extent any Findings of Fact could be construed to be a Conclusions of Law, or vice versa, the undersigned hereby incorporates the Findings of Fact into the Conclusions of law, and incorporates the Conclusions of Law into the Findings of Fact.

proof is on the party asserting the affirmative of an issue before an administrative tribunal.)

58. The undersigned is charged with conducting a de novo review of the parties written statements submitted pursuant to Rule 6A-6.0783(10), F.A.C., oral hearing, and information previously submitted by the parties pursuant to Rule 6A-6.0783(4)-(6), F.A.C., and submitting this Recommended Final Order to the Commissioner. See, Rule 6A-6.0783(10)(g)-(h), F.A.C.

59. New argument and evidence have been presented to the undersigned since the Department scored the Application. Additionally, the Department is not a party in this matter and no Department personnel testified to explain the rationale behind any scoring.

60. As such, it would not be prudent for the undersigned to review the scores previously assigned by the Department.

61. Rather, the proper review mechanism for the undersigned is to rescore the challenged scores, based on all of the information in the undersigned's possession. See, Rule 6A-6.0783(10)(g)-(h), F.A.C.

62. Alex Tamargo appeared as a representative of Mater Academy East Charter High School. This school is managed by Academica, a charter school service and support organization.

All of the other schools that have challenged the Applicant's appeal of the denial of the Applicant's application are also Academica-managed schools. While all of the other schools submitted correspondence to the Department to indicate that they wanted to participate in the hearing, Mater Academy East Charter High School did not. Therefore, Mr. Tamargo should not have been permitted to participate in the hearing. It is the undersigned's recollection that Mr. Tamargo did not provide testimony during the hearing.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the State Board of Education enter a Final Order determining that the Applicant's request for exclusive authority to authorize charter schools for the 2008-2009 fiscal year is DENIED.

DONE AND ENTERED this _____ day of _____, 2008, in Tallahassee, Leon County, Florida.

Matthew J. Carson
215 S. Monroe Street, Suite 130
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(850) 222-6550

Filed with the Agency Clerk of the Department of Education this ____ day of _____, 2008.

Copy to:

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Commissioner of Education
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Deborah Kearney, General Counsel
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished by regular mail or hand delivery to:

Applicant

Challenger(s)

on this _____ day of _____, 2008.

Name