IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

CASE NO. **4D15-2032**
Lower Tribunal Case No. 2015-3112-FOI

THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Appellant,

vs.

FLORIDA CHARTER EDUCATIONAL FOUNDATION, INC.
and SOUTH PALM BEACH CHARTER SCHOOL,

Appellees.

ON REVIEW FROM A FINAL ORDER
Of the Florida Department of Education

APPELLANT'S INITIAL BRIEF

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PREFACE

Unless otherwise noted, statutory citations are to the 2014 Florida Statutes that were in effect when the Final Order was rendered on April 23, 2015. The following designations are used in this brief:

- "(R. *x*)" refers to page *x* of the Record on Appeal provided by the Agency Clerk of the Florida Department of Education, in the Appendix to this Brief.

- "Applicants" or "Appellees" refers collectively to the Appellees, the South Palm Beach Charter School and its governing body, Florida Charter Educational Foundation, Inc. They may also be referred to individually by their respective corporate names.

- "CSAC" refers to the Charter School Appeal Commission, an advisory body that makes recommendations to the State Board of Education concerning charter school actions. § 1002.33(6)(d), (e), Fla. Stat. (2015).

- "DOE" refers to the Florida Department of Education, an executive-branch administrative agency headed by the Commissioner of Education under section 1001.20, Fla. Stat. (2015).

- "Order" or "Final Order" refers to the Final Order of the Commissioner of Education, dated April 23, 2015, memorializing the State Board of Education's decision granting the Applicants' appeal and reversing the School Board's denial of the charter school application. (R. 1065-66.)

- "School Board" refers to the Appellant, The School Board of Palm Beach County, Florida, a political subdivision of the State of Florida with broad "home rule" powers under section 1001.32(2), Fla. Stat., and powers and responsibilities set forth generally in article IX, §§ 1 and 4, Fla. Const., and sections 1000.04(1), 1001.30–1001.33, and 1001.41–1001.42, Fla. Stat. (2015). The School Board members are constitutional elected officials.

- "State Board of Education" refers the body established to supervise the state system of public education under article IX, § 2, Fla. Const., and sections 1000.03(2)(b) and 1001.02–1001.03, Fla. Stat. (2015). It is a "citizen board" whose members are appointed by the Governor. § 1001.01(1), Fla. Stat.

QUESTIONS PRESENTED

I. Lack of innovation is good cause to deny a charter application. The DOE Order, memorializing the decision of the State Board of Education to overturn the School Board's denial of the charter school application, errs in failing to recognize that the School Board has the duty to "ensure that the charter is innovative," § 1002.33(5)(b)1.e, Fla. Stat., and that the school will "use … innovative learning methods," *id*. § 1002.33(2)(b)3. The Applicants' failure to fulfill the statutory purposes in section 1002.33(2)(b) was good cause to deny the application.

II. The Order is not supported by competent substantial evidence. It does not set forth any facts, rationale, or justification for the decision, nor does the record support it. The State Board of Education erroneously relied upon the unfounded allegations of the Applicants and the unsupported recommendation of the Charter School Appeal Commission ("CSAC"), which violated the requirements of the statute by failing to include any fact-based justification for its recommendation to the State Board of Education.

III. The charter application appeal statute is unconstitutional. The administrative appeal process unconstitutionally fails to set any standards for the decision of the State Board of Education, thus allowing for unbridled discretion or arbitrary decisions. The statute and the Order also exceed the State Board of Education's constitutional powers and are contrary to the School Board's constitutional powers and duties.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case.-- The School Board of Palm Beach County is a leader in sponsoring charter schools. All charter schools are public schools, § 1002.33(1), (17), Fla. Stat., but they are organized as, or operated by, nonprofit organizations. § 1002.33(12)(i), Fla. Stat. This county has one of the highest approval rates for new charter applications.[1] Charter school students comprise over 11% of the public school student population in the School District. (R. 1020:17-18.) As of early 2015, the School Board was actively sponsoring 50 charter schools and another 14 were set to open in August 2015. (R. 1020:13-20.) Under section 1002.33(5), the School District provides academic, financial, operational, and technical assistance to the charter schools, which must fulfill the statutory purpose of encouraging the use of innovative learning methods. § 1002.33(2)(b)3, Fla. Stat.

The School Board appeals from a Final Order of the DOE (R. 1065-66) memorializing a decision of the State Board of Education to override the School Board's denial of a charter application that failed to demonstrate innovative learning methods. As the local agency charged with enforcing the statutory mandate of section 1002.33(2)(b) and ensuring a "high quality system of free public schools" under article IX, § 1(a), Fla. Const., the School Board seeks reinstatement of its decision to deny the charter application. (R. 23-25.)

[1] *See* www.FLdoe.org/core/fileparse.php/5423/urlt/2014_Authorizer_Report.pdf .

B. Course of the Proceedings.-- This section will summarize the course of the charter application, the School Board's deliberations and reasons for denying the application, and the Applicants' appeal to the State Board of Education.

Application Submitted.-- On August 4, 2014, Florida Charter Educational Foundation, Inc., submitted an application to the School District's charter schools department to open a charter school to be named "South Palm Beach Charter School." (R. 26-909.) Pursuant to Fla. Admin. Code Rule 6A-6.0786, the Applicants submitted the application on Form IEPC-MI, Model Florida Charter School Application. The application listed "Charter Schools USA" (a for-profit company) as the education service provider. (R. 29.) It focused on replication of programs in its other charter schools, rather than innovation. (*See* R. 82-83; 980.)

Review by School District Staff.-- In reviewing the application, the School District staff utilized the required Form IEPC-M2, Florida Charter Application Evaluation Instrument, in accordance with Fla. Admin. Code Rule 6A-6.0786. (R. 912.) This instrument limits the opportunity of the staff to fully evaluate all necessary aspects of a charter application. For example, the instrument does not include specific criteria to evaluate whether the application complies with the mandatory statutory purposes of charter schools, including the mandate that charter schools must fulfill the purpose of encouraging the use of innovative learning methods under section 1002.33(2)(b)3, Fla. Stat. (*See* R. 975-76.)

School Board Deliberations.-- At a School Board meeting on December 10, 2014, the Superintendent of Schools recommended approval of the application based on the Charter Application Evaluation Instrument. For its review, the School Board also received the application; the proposed Five-Year Budget for the proposed charter school; the School Board's Overall Assessment/Checklist; a letter dated December 2, 2014 to Derek Kelmanson; and a document, "Matrix December 10, 2014 Charter School Items." (R. 26-912; 452-455; 912; 954.)

As charter schools are intended to use innovative learning methods under section 1002.33(2)(b)3, Fla. Stat., School Board members deliberated as follows:

> *Mr. Barbieri*: ... I did some research and I looked on the website for the Department of [Education] and it says charter schools are supposed to provide *innovative learning opportunities and creative educational approaches* to improve the education of students….
>
> * * *
>
> *Mr. Barbieri*: ... the charter statute provides for *innovative* … *learning* that we don't have in our own district schools and the particular school application it has *nothing innovative* that we don't have down the street at our other high schools.
>
> * * *
>
> *Mrs. Brill*: … I say let's test the statute regarding *innovation* now that you are bringing this forward. I am with you on that but I am also happy to hear us beginning a conversation[.] I am hoping this is the beginning of further ways that we can work together with the charters that are doing the right thing to help our children because at the end of the day they are all our babies. Thank you.
>
> * * *
>
> *Mrs. Andrews*: … When we ran, when I ran for election that was one of the things that people said to us[,] why are you continually bringing in *schools that are doing the very same thing* that we are doing and

when we look at the school right next to each other and there is *nothing different*[,] that is not acceptable to me….

* * *

Dr. Robinson: … we are not going to approve these charters that just fill out the paperwork properly and don't have anything different to offer our children.

* * *

Mr. Murgio: I guess my question is[,] I didn't see anything[,] *is there anything innovative* about this charter school that they are doing that is different that would *comply with the statutory requirement that they provide an innovative learning environment*?

* * *

Mr. [Oswald][2]: What [they would] have is a K-8 that is part of where they feel there is some innovation, blended instruction and extended technology to access text.

* * *

Mr. Murgio: … my question to staff to the superintendent is from staff's perspective *are they providing any program* that we can't provide or are not providing *that is innovat[ive]* and different than what we are currently doing in some of our schools?

Mr. [G]ent[3]: ***No***.

* * *

Ms. Whitfield: … I am wondering how those [existing charter] schools [of the same Applicant] are doing, I know the outcome of one because it was coming up before us today, but how are the other five doing, currently with their students?

* * *

Mr. [Pegg][4]: Comparable to our district schools we have A's, B's, C's, there is *the D school* …, but other than that they are performing comparably to the district schools.

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[2] The Applicants' unofficial transcript (R. 916-24) refers to "Mr. Chapman." The speaker was actually Keith Oswald, the Interim Chief Academic Officer.

[3] The Applicants' unofficial transcript refers to a "Mr. Trent." The speaker was Mr. Gent, who was the Superintendent of Schools at that time.

[4] The Applicants' unofficial transcript refers to "Mr. Gent." The audio recording indicates the speaker was Mr. James Pegg, Director of Charter Schools.

* * *

> *Mrs. Andrews*: … we can't continue the same process of doing the same thing that we have always done[,] especially if there is *nothing unique or different* that is going to *make a difference* for our children.
>
> *Chairman*: Any other discussion? Just to make sure everybody is aware if you vote yes on this item you are voting to approve the application, a no would be to not approve the application. All those in favor of the motion please signify by saying aye, all [o]pposed same sign, aye. The motion is defeated 7-0 and let the record show all board members voted against this item.

(R. 914-25 (e.s.).)

School Board's Decision.-- Following its deliberations, the School Board voted *unanimously* in favor of denial (R. 924-25), and the outcome was formally communicated to the Appellees in a letter dated December 18, 2014. (R. 23-25.) The three-page letter stated the Application had been denied because: "School Board Policy 2.57 on charter schools states: 'To establish a charter school, an applicant must meet the criteria within Fla. Stat. §§ 1002.33(2)(a) & (b), (3), and (6) (a).' This Applicant failed to meet the criteria in Fla. Stat. §§ 1002.33(2)[(b)] and (6)(a) as stated herein." (R. 23.) Additionally, the letter provided:

> The Board determined that the application failed to meet the statutory requirements, including but not limited to (2)(b)3. The Board also considered the District's past experience with charter schools within the District managed by Charter Schools, U.S.A.
>
> The Board determined that the learning methods *were not using new ideas or methods or new ideas about how learning can be done* in this District. The Department of [Education] has indicated that charter schools are supposed to provide innovative learning opportunities and improve the education of all children.

> The Board also determined that the Applicant's programs are not sufficiently innovative and one Renaissance school this past school year earned a grade of "D".

(R. 24-25 (e.s.).)

Applicants' Appeal to the State Board of Education.-- On January 15, 2015, the Applicants appealed from the School Board's denial of their application to the State Board of Education pursuant to section 1002.33(6)(c), Fla. Stat. (R. 1-21.[5]) They argued that the School Board was "plainly biased and acted illegally by denying the charter application" (R. 8-15) and improperly denied the application "on the basis of one school grade" (R. 15-16). They also alleged that the School Board's denial of the application on the issue of innovation "was not supported by competent and substantial evidence and was not a valid statutory basis for denial." (R. 16-19.) Additionally, the Applicants argued that they had been deprived of due process (R. 19) and that the School Board's denial was untimely. (R. 20.) Their primary argument, however, was to accuse the School Board of using the lack of innovation as "a smokescreen for the School Board's desire to deny the Application to save itself money." (R. 19.)

[5] The Applicants attached several exhibits, including the application; a copy of the letter from the School Board denying the application; an unofficial transcript of the December 10, 2014 School Board meeting; the School Board's Overall Assessment/Checklist; an unofficial transcript of the School Board Workshop 1/Budget Workshop of December 10, 2014; a letter dated December 2, 2014 to Derek Kelmanson; and two newspaper articles. (R. 21-969.)

School Board's Response.-- The School Board filed its Response on February 13, 2015 (R. 972-86) along with eight exhibits (R. 987-1013). The School Board explained that it denied the application due to a lack of innovative educational methods, and that replication of old methods is not innovation:

> The Applicant is repetitive in the argument [that it will use] innovative programs and strategies. All [methods] identified in the argument are and *have been practiced in this District for more than a decade*.… The School Board does not consider practices and programs already implemented in the schools of this District to be … innovative for any charter school applicant. The Applicant and Charter Schools, USA have not justified through practice that these strategies and programs are innovative. These strategies and programs … are *replicas or mirrored images of what has been practiced for more than a decade* in the schools of this District.

(R. 980 (e.s.).)

The School Board showed that its denial of the application was for a legally-sufficient reason of good cause and was supported by competent substantial evidence (R. 974-75), as the failure of the application to show encouragement of innovative learning methods is a statutory basis to deny the application; and an independent analysis by an education expert confirmed the lack of educational innovation in the Appellees' application (R. 975-80; 995-1007).

Charter School Appeal Commission Hearing.-- A brief, 35-minute hearing (argument) under section 1002.33(6)(c)1, Fla. Stat., was held before the Charter School Appeal Commission ("CSAC") on March 16, 2015. (R. 1014-47.)

Applicants' Arguments.-- The Applicants argued that the School Board's denial of the application was "not legally sufficient" because: 1) a letter had been sent to the Applicants' representative stating that the district's evaluators reviewed the 19 sections of the application and determined that the sections "meet the standard according to the Florida Charter School Application Evaluation Instrument and the Model Florida Charter School Application Criteria;" 2) the School Board allegedly knew that the application met all the statutory criteria but chose to deny the application anyway, allegedly to prevent outflow of funds to the charter school; 3) the denial letter "referenced only some vague notion of lack of innovation;" 4) the School Board approved nearly identical applications seven times previously (R. 1016 to 1020:6; and 1037:23 to 1040:17); and 5) the School Board allegedly decided to engage in "civil disobedience" (R. 1039:19 to 1040:7) (taking a phrase out of context from one member's comment at R. 922 line 10).

School Board's Rebuttal.-- The School Board pointed out that the Applicants took statements of some individual members out of context and ignored the fact that the School Board makes decisions as a corporate body. The decision was based upon a failure to demonstrate innovative learning methods, not upon one individual's casual allusion to "civil disobedience." (R. 1040:22 to 1041:18).

The School Board explained how it had good cause to deny the application and that there was competent substantial evidence to support its denial, which was

specifically based upon the Applicants' failure to demonstrate innovative learning methods as required by section 1002.33(2)(b)3, Fla. Stat., and that one of the operator's existing charter schools in this county had earned a school grade of "D" from the DOE the previous year. Further, the School Board pointed out that it had the duty to consider the statutory requirement of demonstrating instructional innovation regardless of whether it was listed on the Evaluation Instrument. (R. 1020:9 to 1026:17; 1030:17 to 1031:18; and 1040:22 to 1042:23; 1042:14-19.)

School Board's Objection to Issue One on the Motion Sheet.-- On the CSAC's motion sheet, "Issue One" upon which it would make a recommendation was whether the School Board "ha[d] competent substantial evidence to support its denial of the Charter School Application based on the Applicant's failure to meet the standards for the Education Plan pursuant to Section 1002.33, Florida Statutes, and State Board of Education Rule 6A-6.0786." (R. 1049.) The School Board objected to the motion sheet's failure to mention the specific bases for the denial:

> … Issue 1 does not capture the essence of the School Board's basis of denial of the charter school application. Please consider substituting the following language. Issue 1, whether the applicant's application failed to meet any of the following statutory requirements, that an applicant *demonstrate how the school will meet the statutorily defined purpose* of a charter school, which includes *encouraging the use of innovative learning methods*. Statutory reference is 1002.33(2)(b)[3] and 1002.33(6)(a)1, and then following that, *that the competent substantial evidence relate to that* as well.

(R. 1036:3-16 (e.s.).) The Chair overruled the objection. (R. 1037:17-18.)

C. Disposition in the Lower Tribunal.-- The CSAC took a vote and made a recommendation to the State Board of Education, which made the final decision.

CSAC Vote.-- On March 16, 2015, after the arguments, the Charter School Appeal Commission voted, without any questions to counsel or any discussion whatsoever, that the School Board did not have competent substantial evidence to support its denial of the application.[6] (R. 1043:12 to 1046:2.) Thus, the CSAC decided to recommend overriding the denial and said the parties would each have five minutes to address the State Board of Education. (R. 1045:25 to 1046:9.)

CSAC Recommendation.-- On March 25, 2015, the CSAC issued its written Recommendation that the State Board of Education should grant the appeal:

> Issue One
> The Commission voted 4 to 0 that the School Board *did not have competent substantial evidence* to support its denial of the Charter School Application based on the Applicant's failure to meet the standards for the Education Plan pursuant to Section 1002.33, Florida Statutes, and State Board of Education Rule 6A-6.0786, Florida Administrative Code.

(R. 1048-49 (e.s.).) The Recommendation did not state how or why the CSAC determined that the School Board did not have competent substantial evidence to deny the application. Nor had the CSAC members discussed the issue, asked any questions, or explained any rationale before voting. (R. 1043:12 to 1046:2.)

[6] The CSAC also concluded that the School Board did not violate the Applicants' due process rights. (R. 1034.)

State Board of Education Meeting.-- The matter came before the State Board of Education on April 15, 2015, with an agenda item focusing on the CSAC's recommendation to overturn the School Board's denial of the application. (R. 1050-51.) The sole issue asked, rather vaguely, "Whether the School Board had good cause to deny the application based on Applicant's failure to comply with Section 1002.33(6), Florida Statutes." (R. 1050.) It did not even mention the lack of innovative learning methods under section 1002.33(2)(b)3, Fla. Stat.

Both parties briefly reiterated their arguments before the State Board of Education. (R. 1055 to 1059:20; 1059:23 to 1063:13.) The Applicants emphasized their accusation that the "School Board had suddenly gone rogue" and "denied the application knowing that it was violating the law in doing so," falsely alleging that the "School Board simply denied the application because it was tired of losing money to charter schools." (R. 1057:18 to 1059:2.) The Applicants urged the State Board of Education to follow the CSAC's recommendation and overturn the School Board's denial of the application "because it would set a really bad precedent to allow School Boards to basically go rogue…." (R. 1059:8-15.)

The School Board, in turn, clarified that one member's comment about "civil disobedience" (R. 922 line 10) did not define the vote. (R. 1061:8-21.) Rather, the School Board had "made it clear when voting, as well as [in] its subsequent denial letter, that its denial was based on the lack of innovative learning methods" (R.

1061:4-8); and the Applicants' prior use of "the same exact language [in seven previous applications[7]] …. demonstrates that there is nothing new or innovative about the newest application." (R. 1062:7-15.) "Innovation requires making changes to something established by introducing something new." (R. 1063:3-4.)

Additionally, the School Board pointed out that many other charter schools in Palm Beach County are very innovative, fulfilling the purpose of the charter schools statute (R. 1060:18 to 1061:3); and section 1002.33(5)(b)1.e mandates that that "sponsor shall ensure that the charter is innovative." (R. 1062:16-19.)

Decision.-- Without any questions or discussion whatsoever, the State Board of Education unanimously voted to grant the Applicants' appeal. (R. 1063:14-21.)

Final Order.-- On April 23, 2015, the DOE issued the Order implementing the decision of the State Board of Education. (R. 1065-66.) The Order recited that, upon the CSAC recommendation, "it is hereby ordered that the School Board's denial of the Charter School's application is reversed. The School Board shall act in accordance with this order within 30 days." (R. 1065.) This appeal follows (R. 1067) under section 1002.33(6)(d), Fla. Stat. ("The State Board of Education's decision is a final action subject to judicial review in the district court of appeal.") and Fla. R. App. P. Rules 9.030(b)(1)(C), 9.110(a)(2), and 9.190(b)(1) or (3).

[7] The Applicants already have six charter schools operating in Palm Beach County and were set to open a seventh school in August 2015. (R. 1060:2-17.)

SUMMARY OF THE ARGUMENT

The State Board of Education committed reversible error in overturning the School Board's denial of the charter school application, for the following reasons: 1) the State Board of Education failed to recognize and defer to the School Board's statutory authority and duty to ensure that a charter school is innovative; 2) the reversal was not supported by competent substantial evidence and relied upon a CSAC Recommendation that failed to include any fact-based justification, which was required by the statute; and 3) the charter application appeal statute is unconstitutional and infringes on the School Board's constitutional powers.

I. Lack of innovation is good cause to deny a charter application**.** The DOE Order, memorializing the decision of the State Board of Education to overturn the School Board's denial of the charter school application, errs in failing to recognize that the School Board has the duty to "ensure that the charter is innovative," § 1002.33(5)(b)1.e, Fla. Stat., and that the school will "use … innovative learning methods," *id*. § 1002.33(2)(b)3. The Applicants' failure to fulfill the statutory purposes in section 1002.33(2)(b) was good cause to deny the application, as recognized in School Board Policy 2.57(2).

The State Board of Education failed to defer to the School Board's proper exercise of its statutory authority to ensure that a charter school is innovative. School boards, are responsible for ensuring that charter schools are innovative and

consistent with the statutory purposes of charter schools, including the purpose of using innovative learning methods. Further, a person wishing to open a charter school must demonstrate how the school will use the guiding principles and meet the statutorily defined purpose of a charter school. This Court has held that the School Board can look to the statutory purposes in section 1002.33(2)(b) as a basis for denying a charter application. Accordingly, the School Board was well within its authority to deny the charter school application for failing to show innovation.

II. The Order is not supported by competent substantial evidence. The Order does not set forth any facts, rationale, or justification for the decision, nor does the record support it. The State Board of Education simply relied erroneously upon the unfounded allegations of the Applicant and the unsupported recommendation of the Charter School Appeal Commission, which violated the statute by failing to include any fact-based justification in its recommendation to the State Board of Education. Under Florida law, the CSAC is required to provide a written recommendation to the State Board of Education as to whether the appeal should be upheld or denied, and a fact-based justification for the recommendation must be included. Here, however, the State Board of Education reversed the School Board's decision and granted the charter application based largely upon the unfounded allegations and arguments of the Applicants and the deficient CSAC Recommendation that failed to include any factual basis to support its conclusion.

Without any fact-based justification for the CSAC's Recommendation, the State Board of Education was ill-equipped to make a fair and impartial review of the appeal. Thus, the State Board of Education's reliance on the CSAC's deficient Recommendation was erroneous and unfairly prejudicial to the School Board.

The State Board of Education did not have competent substantial evidence to support reversal of the School Board's denial of the charter school application. The State Board of Education's decision failed to explain any rationale or justification. It simply accepted the Applicants' unfounded allegations and the unsupported CSAC recommendation. By contrast, the School Board presented overwhelming evidence to support its denial of the application. This evidence included, *inter alia*: 1) the official denial letter that specified the lack of innovation as the sole reason for the denial, along with the "D" grade of one of the Applicants' existing schools; 2) the transcript from the School Board meeting during which the Superintendent of Schools said the application was not innovative, and the School Board unanimously decided to deny the application for lack of innovation; and 3) a white paper by an educational expert finding a lack of innovation. Thus, the State Board of Education did not have competent substantial evidence to support its decision.

III. The charter application appeal statute is unconstitutional and the Order exceeds the State Board of Education's powers and infringes on the School Board's constitutional powers. The statute fails to set any standard for the decision of the

State Board of Education, thus allowing for arbitrary decisions or unbridled discretion. The statute also fails to require any reason or justification for the decision. The statute and the Order exceed the State Board of Education's constitutional powers and are contrary to the School Board's constitutional powers. School boards, the local government entities with the constitutional power to "operate, control and supervise all free public schools within the school district," art. IX, § 4(b), Fla. Const. (and to provide for a high quality school system in this county under article IX, § 1(a)), are best suited to determine the quality of a charter school application and the appropriateness of the proposed program in this county.

The State Board of Education, by contrast, has only "such supervision of the [state-wide] *system* of free public education as is provided by law." Article IX, § 2, Fla. Const.. (e.s.). In accordance with article IX, § 4(b), school boards were given the statutory authority to grant or deny a charter school application. But that authority has been eviscerated by the statute's delegating the power to the State Board of Education under an unconstitutional appeal scheme. The School Board had the constitutional and statutory authority to deny the application for lack of innovation. The State Board of Education lacked either constitutional authority or competent substantial evidence to overturn the School Board's decision.

Accordingly, this Court should reverse the State Board of Education's decision and reinstate the School Board's denial of the charter school application.

ARGUMENT

I. THE ORDER SHOULD BE REVERSED BECAUSE IT FAILS TO RECOGNIZE THAT A LACK OF INNOVATION IS GOOD CAUSE TO DENY A CHARTER APPLICATION, AND THE ORDER FAILS TO DEFER TO THE SCHOOL BOARD'S DUTY TO INSIST ON INNOVATION.

The State Board of Education erred in failing to recognize that the School Board has the duty to "ensure that the charter is innovative," § 1002.33(5)(b)1.e, Fla. Stat., and to require that the school will "use … innovative learning methods," *id*. § 1002.33(2)(b)3. This Court has held that the School Board can look to the statutory purposes in section 1002.33(2)(b) as the basis for denying a charter application, as recognized by School Board Policy 2.57(2). The failure to fulfill the purpose of innovation in section 1002.33(2)(b)3 was good cause for denial.

A. The standard of review is *de novo*.

The applicability of innovation as a criterion for a charter application under sections 1002.33(2)(b)3 and 1002.33(6)(a)1, Fla. Stat., is an issue of statutory construction. The interpretation of a statute is reviewed *de novo*, and the Court is guided by the purpose of effectuating the legislative intent. *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007). "The trial court's application of the law to the facts is reviewed *de novo*." *Hawley v. State*, 913 So. 2d 98, 100 (Fla. 5th DCA 2005) (citation omitted). The failure to apply the plain language of a statute is legal error. *See Justice Admin. Comm'n v. Peterson*, 989 So. 2d 663, 665 (Fla. 2d DCA 2008).

B. The School Board has the duty to "ensure that the charter is innovative," § 1002.33(5)(b)1.e, Fla. Stat., and that the school will "use … innovative learning methods," *id*. § 1002.33(2)(b)3.

A charter application must "[d]emonstrat[e] how the school will use the guiding principles and meet the statutorily defined purpose of a charter school." § 1002.33(6)(a)1, Fla. Stat. One of the statutory purposes of a charter school is the requirement that "[c]harter schools shall fulfill the following purposes: … Encourage the use of innovative learning methods." § 1002.33(2)(b), (b)3, Fla. Stat. Thus, the School Board has the duty to "ensure that the charter is innovative." § 1002.33(5)(b)1.e, Fla. Stat. The Applicants claimed that the lack of educational innovation "was not a valid statutory basis for denial of the Charter Application" and that "there is nothing in the charter school statute that requires that charter schools be more innovative than other charter or district schools." (R. 16.) To the contrary, however, the law *requires* charter schools to "use … innovative learning methods," and charges the sponsor to "ensure that the charter is innovative." §§ 1002.33(2)(b)3 and 1002.33(5)(b)1.e, Fla. Stat.

Accordingly, charter schools have a special purpose. By their unique guiding principles and purpose, they are required to be more innovative than regular district schools. Thus, the criterion of fulfilling the statutory purposes such as innovation in section 1002.33(2)(b) is recognized in School Board Policy 2.57(2), which is consistent with the School Board's home rule powers under § 1001.32(2), Fla. Stat.

C. The School Board is not limited by the Application Evaluation Instrument. This Court has held that the School Board can look to the statutory purposes in section 1002.33(2)(b) as a basis for denying a charter application.

Under the subtitle "Guiding Principles: Purpose," the statute includes four mandatory requirements using the word "shall." The requirement that charter schools "encourage the use of innovative learning methods" is mandatory:

> Charter schools shall fulfill the following purposes:
> 1. Improve student learning and academic achievement.
> 2. Increase learning opportunities for all students, with special emphasis on low-performing students and reading.
> 3. Encourage the use of **innovative learning methods**.
> 4. Require the measurement of learning outcomes.

§ 1002.33(2)(b), Fla. Stat. (e.s.).

This Court recognized the importance of the legislative intent reflected in the statute's guiding principles and purposes when it stated:

> The entire statutory scheme shows legislative concern with the quality of the academic and financial performance of charter schools and the ability of the applicant to meet the high standards set by the statute. The School Board's policy of requiring exemplary performance is a practical and reasonable approach to testing the academic and financial abilities of an applicant in furtherance of the statute's purposes.

Imhotep-Nguzo Saba Charter Sch. v. Department of Educ. and Palm Beach County Sch. Bd., 947 So. 2d 1279, 1284 (Fla. 4th DCA 2007).

The Applicants argued that the School Board was obligated to accept their

application if it appeared to meet the criteria listed on the Evaluation Instrument from the DOE. This Court has rejected such an argument:

> The schools contend that because their applications were facially complete, according to the statutory criteria, there was no 'good cause' for the School Board to deny them. *We disagree*. We find that the '*Guiding Principles; Purpose*' *section* of the charter school statute provides sufficient legislative guidance to support the School Board's Policy [and good cause for denial]….

Imhotep-Nguzo Saba, 947 So. 2d at 1284 (e.s.).

As the Court said in that case, the School Board has the right to enforce the statutory purposes for charter schools as criteria for charter applications. Lack of innovative learning methods is a proper criterion. That is the only logical conclusion in view of the requirement that "[a] person or entity wishing to open a charter school shall prepare and submit an application … which [among other things] *demonstrates* how the school will use the guiding principles and *meet the statutorily defined purpose* of a charter school." § 1002.33(6)(a), Fla. Stat. (e.s.).

The State Board of Education should have deferred to the School Board's interpretation of its duty under the statute to ensure that applications demonstrate that the proposed charter school will fulfill the statutory purposes, as recognized in Policy 2.57(2). "An agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved on appeal unless it is clearly erroneous." *Imhotep-Nguzo Saba,* 947 So. 2d at 1285 (citations omitted).

D. The School Board had good cause to deny the application due to the Applicants' failure to demonstrate innovative learning methods and the fact that one of their existing charter schools earned a grade of "D" from the DOE.

A school board can reject a proposed new charter school for any "good cause, supporting its denial of the charter application." § 1002.33(6)(c)3.a, Fla. Stat. Here, the School Board had good cause for denying the application. The School Board properly implemented its right and duty to enforce the statutory purposes in section 1002.33(2)(b), Fla. Stat., including use of innovative learning methods, as a criterion for approval of the application.

The School Board met its statutory obligation to ensure innovation—and its constitutional obligation to provide a high-quality system of education in this county—by denying the charter school application based on the application's lack of innovative learning methods that were required by the statute, along with the fact that one of the Applicants' existing charter schools earned a "D" (which failed to meet the statutory purpose of charter schools to "[i]mprove student learning and academic achievement" under section 1002.33(2)(b)1, Fla. Stat.).

Because the School Board had good cause to deny the application, the State Board of Education erred in failing to recognize the good cause and to defer to the School Board's authority and duty to ensure innovation. The Final Order should be reversed and the School Board's application denial should be reinstated.

II. THE ORDER SHOULD BE REVERSED BECAUSE IT IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. THE STATE BOARD OF EDUCATION ERRONEOUSLY ACCEPTED UNFOUNDED ALLEGATIONS OF THE APPLICANT AND THE UNSUPPORTED RECOMMENDATION OF THE CSAC.

The Order does not set forth any facts, rationale, or justification for the State Board of Education's decision to override the School Board's denial of the application. The State Board of Education simply relied upon the unfounded allegations of the Applicant and the unsupported recommendation of the CSAC, which violated the statute by failing to include any reasons or fact-based justification in its recommendation as required by section 1002.33(6)(e)5, Fla. Stat. Thus, the Order is not supported by competent substantial evidence.

A. The standard of review is mixed, including a review for competent substantial evidence and a *de novo* legal review.

The Court reviews whether "the State Board of Education's determination of an appeal of the … denial of a charter school application is supported by competent, substantial evidence in the record," *Imhotep–Nguzo Saba Charter School*, 947 So. 2d at 1285, and whether "the agency erroneously interpret[ed] the law." *Spiral Tech Elementary Charter Sch. v. School Bd. of Miami-Dade Cnty*., 994 So. 2d 455, 455 (Fla. 3d DCA 2008). This standard of review includes a *de novo* review of the legal issues. Additionally, the State Board of Education erred as a matter of law in relying on a recommendation that failed to include the reasons and

fact-based justification required by the plain language of the statute. The failure to apply the plain language of a statute is legal error subject to *de novo* review. *See Justice Admin. Comm'n v. Peterson*, 989 So. 2d 663, 665 (Fla. 2d DCA 2008).

B. The State Board of Education erred in accepting the CSAC's Recommendation that failed to include any rationale or fact-based justification, which is mandatory.

The "Charter School Appeal Commission [was] established to assist … with a *fair and impartial* review of appeals…." § 1002.33(6)(e)1, Fla. Stat. The CSAC "shall thoroughly review the materials presented to them." *Id*. § 1002.33(6)(e)5. The CSAC "shall provide a written recommendation to the state board as to whether the appeal should be upheld or denied." *Id*. § 1002.33(6)(e)5. The recommendation must "include the *reasons* for the recommendation being offered." § 1002.33(6)(e)2, Fla. Stat. (e.s.). "A *fact-based justification* for the recommendation *must* be included." *Id*. § 1002.33(6)(e)5 (e.s.).

Here, in its short meeting, the CSAC members had *no questions or comments* for either party. They remained uncharacteristically silent. They engaged in no discussion or deliberation. They failed to create any record as to any factual basis, rationale, or justification for their unanimous vote to recommend that the State Board of Education grant the Applicants' appeal and overturn the School Board's denial of the application.

The basis for the CSAC's vote was unclear and flawed *ab initio* because the

motion sheet failed to mention the specific bases for the denial. To have a meaningful vote, the CSAC should have aligned the motion sheet with the School Board's basis for denying the charter application, as the School Board requested:

> Please consider [revising the sheet to determine] whether the … application failed to … demonstrate how the school will meet the statutorily defined purpose of a charter school, which includes encouraging the use of innovative learning methods…. and … that the competent substantial evidence [would] relate to that as well.

(R. 1036:3-16.) As the Chair declined to correct the motion sheet (R. 1037:17-18), the CSAC's Recommendation simply states, in vague conclusory language:

> … the School Board did not have competent substantial evidence to support its denial of the Charter School Application based on the Applicant's failure to meet the standards for the Educational Plan pursuant to Section 1002.33, Florida Statutes and State Board of Education Rule 6A-6.0786, Florida Administrative Code.

(R. 1049.) The Recommendation was invalidated by its failure to comply with the CSAC's duty under section § 1002.33(6)(e)2, 5), Fla. Stat., to include the specific reasons and fact-based justifications as to how the application supposedly met all statutory criteria, since the School Board found that the application failed to satisfy the statutory innovation requirements as also recognized by Policy 2.57(2).

The State Board of Education erred in blindly accepting the patently-deficient CSAC Recommendation. It misapplied the law to the facts and failed to apply the plain language of the statute. *See Hawley v. State*, 913 So. 2d 98, 100 (Fla. 5th DCA 2005); *Justice Admin. Comm'n v. Peterson*, 989 So. 2d 663, 665

(Fla. 2d DCA 2008). This error of law permeated the proceedings with prejudice.

Moreover, the erroneous reliance on the deficient CSAC Recommendation was contrary to the CSAC's statutory purpose of assisting "the State Board of Education with a *fair and impartial review* of appeals." § 1002.33(6)(e)1, Fla. Stat. (e.s.). CSAC members are educators, whereas the State Board of Education is comprised of lay persons who are political appointees.[8] The purpose of providing balanced and knowledgeable assistance to the State Board of Education is frustrated when the State Board of Education itself has no standards or criteria to follow, and the CSAC failed to fulfill its obligations. After the CSAC failed to provide a fact-based justification as required, the State Board of Education was ill-equipped to make any fair or impartial review of the appeal; and it seems doubtful that its members reviewed the transcript or record documents. (*See* R. 1054:13-17.)

Accordingly, the State Board of Education committed reversible error in considering and relying upon the CSAC Recommendation that patently failed to fulfill the mandates of the statute. Reliance on a recommendation that lacked any fact-based justification demonstrates that the State Board of Education's decision was not based on competent substantial evidence. The Order should be reversed and the School Board's denial of the application should be reinstated.

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[8] Half of the CSAC members reviewing an appeal represent charter schools and half represent sponsors. § 1002.33(6)(e)3, Fla. Stat. But the State Board of Education is a "citizen board" appointed by the Governor. § 1001.01(1), Fla. Stat.

C. The State Board of Education erred in accepting one or more of the Applicants' unfounded arguments about alleged reasons for the School Board's denial of the application, instead of relying on the actual reasons articulated in the record.

As neither the CSAC Recommendation nor the Final Order express any fact-based justification or rationale for the decision—and neither body had any questions or discussion on the record—it appears that the CSAC or State Board of Education simply accepted one or more of the Applicants' unfounded allegations and arguments. That process was contrary to the proper role of the State Board of Education in an appeal of an application denial, which should determine whether the School Board: "[1] articulate[d] in writing the specific reasons, [2] [had reasons] based upon good cause, supporting its denial of the charter application[,] and [3] … provide[d] the letter of denial and supporting documentation to the applicant and to the Department of Education." *See* § 1002.33(6)(c)3.a, Fla. Stat.

Here, the Applicants ignored the School Board's articulated reasons for denying the application and instead alleged different reasons based on speculation. The Applicants' allegations and arguments can be distilled into three primary points, and it appears that the CSAC and State Board of Education must have believed one or more of them, even though it is not clear which one(s)—because there was no discussion, deliberation, or explanation before the votes, and no rationale is stated in the Order. The three arguments' falsity is summarized below.

1. *The False Allegation that a "Rogue Board" Bent on "Civil Disobedience" Allegedly Used the Lack of Innovation as a Pretext to Deny the Application and Conserve Funding*

If this allegation was the tacit basis for the CSAC Recommendation or State Board of Education's decision, the decision was not based on competent substantial evidence. The actual evidence upon which the decision should have been based, was the "good cause … provide[d] [in] the letter of denial and supporting documentation." § 1002.33(6)(c)3.a, Fla. Stat. Here, the letter and the School Board meeting transcript show that the basis was the lack of innovation.

Yet, the Applicants alleged that it was a pretext for conserving funding. They focused on the fact that a budget workshop was held prior to the Board meeting on December 10. But only one out of seven School Board members commented on the budgetary impact of charter schools and she prefaced her comment by pointing out that she was brand new to the School Board. The Applicants also seized upon one individual member's mention of the phrase "civil disobedience" (R. 922 line 10), taking the remark out of context and blowing it completely out of proportion.

If it were appropriate for an applicant to determine the reason for the School Board's decision by taking excerpts of the meeting transcript out of context, there would be no statutory requirement for the School Board to "articulate in writing the specific reasons." § 1002.33(6)(c)3.a, Fla. Stat. It is improper for the Applicants to take certain comments of individual members out of context to conclude that the

School Board's decision was based on something other than what was officially articulated in writing: the lack of innovative learning methods. There was no competent substantial evidence of an ulterior motive and pretext.

The arguments before the CSAC and State Board of Education were practically a "he-said, she said" scenario. It appears that they might have believed the Applicants' allegations. But the CSAC and State Board of Education were not in a position to make credibility determinations without holding an evidentiary hearing—which is not even allowed since the appeal process is not subject to Chapter 120. Whereas the State Board of Education apparently relied on suppositions and allegations, this Court is called upon to review the record and determine whether there was "good cause … provide[d] [in] the letter of denial and supporting documentation" (e.g., the appeal filings). § 1002.33(6)(c)3.a, Fla. Stat.

The Applicants focused on a letter dated December 2, 2014, which notified the charter applicant of the School Board meeting and the Superintendent's recommendation. (R. 954.) But that letter was from District staff and was not a final determination or ruling of the School Board. Indeed, it could not possibly reflect the outcome of a vote that had not yet occurred. The School Board was not obligated to accept the Superintendent's recommendation based on staff's review using the Application Evaluation Instrument. The Superintendent and staff have no authority to approve and accept an application. This authority is not delegated to

the Superintendent or the Charter School Director. The School Board has no obligation to accept the Superintendent's recommendation. The School Board, as the sponsor, maintains the sole authority to approve or deny charter applications.

Thus, the School Board engaged in a meaningful discussion analyzing whether the application met the statutory requirement of using innovative learning methods. They found that it did not. (R. 914-925.) The Superintendent himself said the application did not demonstrate innovation. (R. 922, line 18.) The School Board based its decision squarely on the lack of innovation, which is a valid statutory criterion and good cause for denying an application. *See* Point I, *supra*.

Accordingly, the denial letter of December 18, 2014, outlined the reasons for the School Board's decision as required by section 1002.33(6)(c)3.a, Fla. Stat. The letter articulates two specific reasons based upon good cause for the School Board's decision under sections 1002.33(2)(a)-(c) and 1002.33(6)(a)1, Fla. Stat.: the lack of innovative learning methods and the fact that one of the Applicants' existing charter schools earned a grade of "D" in the past school year. (R. 23-25.) That letter constitutes the official position and rationale of the School Board.

2. *The False Allegation that the Application Reflected Innovative Learning Methods Because Some Identical Applications Had Been Accepted in the Past*

The Applicants contended that "a nearly identical application to the one filed here has been approved seven times by the very same School Board previously."

(R. 6.) They argued: "That makes it clear that the application's educational plan must be sufficient." (R. 1037:25 to 1038:2.) Their argument actually weakens their position. The previous submission of identical applications demonstrates the *lack* of innovation in the newest application. "Innovation requires making changes to something established by introducing something new." (R. 1063:3-4.) An idea that was innovative in the past will no longer be innovative in the future.

> All [methods] identified in the argument … *have been practiced in this District for more than a decade*.… The School Board does not consider practices and programs already implemented in the schools of this District to be … innovative for any charter school applicant…. These strategies … are replicas or mirrored images of *what has been practiced for more than a decade* in the schools of this District.

(R. 980 (e.s.).) The Superintendent confirmed that the application failed to demonstrate innovation. (R. 922, line 18.) There was no competent substantial evidence to support overturning the School Boards' findings on lack of innovation.

3. *The False Argument that Lack of Innovative Learning Methods Would Not Be Good Cause to Deny a Charter Application*

If the CSAC and/or State Board of Education based its decision on the idea that lack of innovation is not a good cause to deny an application, the Order reflects an erroneous interpretation of the law. The falsity of the Applicants' argument was explained in Point I, *supra*. The record itself demonstrated that the lack of innovation was good cause to deny the application. (R. 975-80.) The Order implying otherwise, was not supported by competent substantial evidence.

D. The Order is not supported by the record, and it fails to set forth any rationale for overriding the denial of the application.

In view of State Board of Education's reliance on the deficient CSAC Recommendation and the unfounded allegations of the Applicants, the State Board of Education's decision is not supported by competent substantial evidence. "Competent" evidence is evidence that is sufficiently relevant and material. *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Substantial" evidence is evidence that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Id.* It must be evidence that any reasonable mind would accept as adequate to support the conclusion. *Id.* The record contains no such evidence that would justify the State Board of Education's decision. Notably, the State Board of Education made no effort to even try to indicate any such evidentiary basis. There was no discussion or audible deliberation before the vote. And the Order contains no rationale or fact-based justification for the vote, which further indicates the lack of competent substantial evidence.

A gauge this Court can use to see the lack of competent substantial evidence for the State Board of Education's decision, is the fact that the School Board provided evidence, justification, and documentation to support its decision under section 1002.33(6)(c)3.a, Fla. Stat. *Cf. School Bd. of Osceola County v. UCP of Cent. Fla.*, 905 So. 2d 909, 914 (Fla. 5th DCA 2005) (affirming an order of the

State Board of Education because it was supported by competent, substantial evidence, in view of the finding that the school board "*failed* to provide *any evidence* to support its contention.") Here the State Board of Education lacked competent substantial evidence to support the Order because the Applicants' allegations were unfounded and, conversely, the School Board presented ample evidence to the CSAC and State Board of Education to support its action.

First, the School Board presented evidence of its statutory authority to deny charter applications for good cause, including failure to meet the statutory criterion of innovative learning methods. Second, the record contained the transcript from the School Board meeting where the Superintendent said the application lacked innovation and the School Board unanimously decided to deny the application for lack of innovative learning methods. Third, the record contained the official denial letter from the School Board, reiterating and confirming lack of innovative learning methods as the reason and statutory basis for the denial. Fourth, the record included a white paper by an education expert providing a definition and examples of innovation, analyzing the charter application, and finding it lacked innovation. (R. 995.) The School Board properly relied upon the application's failure to satisfy specific statutory requirements. The School Board had good cause and competent substantial evidence to deny the application. But the State Board of Education's Order is not supported by competent substantial evidence, and should be reversed.

III. THE ORDER SHOULD BE REVERSED BECAUSE THE ADMINISTRATIVE APPEAL PROCESS IN THE CHARTER SCHOOL STATUTE IS UNCONSTITUTIONAL. IT LACKS STANDARDS FOR THE DECISION OF THE STATE BOARD OF EDUCATION, EXCEEDS ITS POWERS, AND INFRINGES ON THE SCHOOL BOARD'S CONSTITUTIONAL POWERS.

The charter application appeal unconstitutionally allows for unbridled discretion as it fails to set any standard for the decision of the State Board of Education. The statute and Order also exceed the State Board of Education's powers to provide general supervision of the state system of education, and they conflict with the School Board's exclusive power to establish public schools.

A. The standard of review is *de novo*.

"The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed *de novo* by this Court." *Florida Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). "[T]he Constitution must prevail over any enactment contrary to it." *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). The unconstitutionality of a statute may be raised at any time, including on appeal[9] where, as here, the issue "goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). Here, it goes to the heart of the case.

[9] This is also the first time the issue could reasonably be raised. It would not be appropriate to raise it before the CSAC, which is not a lower tribunal to the State Board of Education. To raise the issue before the State Board of Education would be like asking it to rule against itself. Moreover, it is not within the purview of the CSAC or State Board of Education to rule on the constitutionality of statutes.

B. The charter application appeal process is unconstitutional as it allows for unbridled discretion or arbitrary decisions where it fails to provide any standards for the State Board of Education's decision and fails to require any findings or rationale in the order.

Substantive due process protects against arbitrary or capricious government action.[10] Procedural due process requires reasonable notice and a fair and meaningful opportunity to be heard by an impartial decision-maker. *See Jennings v. Dade County*, 589 So. 2d 1337, 1340-41 (Fla. 3d DCA 1991). "[T]he term 'due process' embodies a fundamental conception of fairness." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (citations omitted). A scholarly analysis by a federal appellate judge concludes that a constitutional hearing must afford 11 aspects of due process, including an unbiased tribunal that bases the decision only on the evidence presented and issues a statement of the *reasons for the decision*.

> A written *statement of reasons* [is] almost *essential if there is to be judicial review*…. The necessity for justification is a powerful preventive of wrong decisions. The requirement also tends to effectuate intraagency uniformity…. Moreover, the requirement is not burdensome…. I would put this item close to the top [of the list of 11 due process requirements]….

Hon. Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1292 (1975) (e.s.). The application appeal statute fails to require this crucial element.

[10] "The test to be applied in determining whether a statute violates [substantive] due process is whether the statute bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and [the government action] is not discriminatory, *arbitrary*, or oppressive." *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214-15 (Fla. 2000) (e.s.).

Section 1002.33(6)(c)3.a, Fla. Stat. is vague as it provides no criteria or parameters for the State Board of Education's decision. Although the State Board of Education must "consider" a recommendation from the CSAC, it is not bound by that recommendation. § 1002.33(6)(e)2, Fla. Stat. The statute merely says: "The State Board of Education shall by majority vote accept or reject the decision of the sponsor."[11] § 1002.33(6)(c)3.a, Fla. Stat. It provides no criteria or standards for the vote, nor any guidance for evaluating a recommendation from the CSAC.

After the State Board of Education takes the vote, it remands the "application to the sponsor with its written decision that the sponsor [must] approve … the application. *Id*. § 1002.33(6)(c)3.a. The School Board "*shall* implement the decision of the State Board of Education." *Id*. (e.s.). The "State Board of Education's decision is a final action subject [only] to judicial review in the district court of appeal." *Id*. § 1002.33(6)(d). Thus, school boards are forced to accept a decision that may be arbitrary or groundless, as the statute provides no parameters or criteria for the State Board of Education's vote and thus allows unlimited discretion, which is not even subject to being tested through the crucible of the administrative hearing process under chapter 120.

Although section 1002.33(6)(e)1 mentions "fair and impartial review of appeals," the only part about the decision of the State Board of Education itself is

[11] State Board of Education Rule 6A-6.0781, regarding procedures for appealing the denial of an application, reiterates the very limited statutory appeal process.

section 1002.33(6)(c)3.a—which provides no standards, factors, or guidelines as to how the State Board of Education should make its decision.[12] Since the State Board of Education is free to disregard the CSAC's recommendation (including its required "reasons" and "fact-based justification") and there is no standard for the State Board of Education's decision (and the State Board of Education is not required to set forth any justification, rationale, good cause, or reasons for its decision), the statute inherently allows unbridled discretion and arbitrary action.

Without any justification, the State Board of Education can just "vote [to] … reject the decision of the sponsor [school board]." § 1002.33(6)(c)3.a, Fla. Stat. That is what it did here, without any discussion or deliberation. The Order just said "the State Board of Education granted the appeal of the Charter School Applicant," and "the School Board's denial of the … application is reversed." (R. 1065.)

"The brevity of the State Board's final order frustrates appellate review," as the statute does not "require the State Board to provide findings of fact and conclusions of law." *School Board of Polk County Florida v. Renaissance Charter School*, 147 So. 3d 1026, 1028-29 (Fla. 2d DCA 2014). Although the "State Board of Education's decision is a final action subject to judicial review in the district

[12] The lack of any requirement for any cause, reason, or justification by the State Board of Education stands in remarkable contrast to the requirements for decisions by school boards: "If an application is denied, the sponsor shall …*articulate* in writing the *specific reasons*, based upon *good cause*, supporting its denial of the charter application." § 1002.33(6)(c)3.a, Fla. Stat.

court of appeal," § 1002.33(6)(d), Fla. Stat., this provision is illusory in light of the unconstitutionally flawed statutory process for charter application review, which fails to require any statement of any rationale or procedure to demonstrate competent substantial evidence for the State Board of Education's decision. These flaws frustrate the guarantee of judicial recourse and render the charter appeal statute vague and invalid. As this Court has declared,

> … statutes granting enforcement powers to executive agencies "*must clearly set out adequate standards to guide the agency* in the execution of the powers delegated and *must define those powers with sufficient clarity* to preclude the agency from acting through whim, favoritism, or *unbridled discretion*." *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 311 (Fla. 1987).

Imhotep-Nguzo Saba Charter Sch. v. Department of Educ. and Palm Beach County Sch. Bd., 947 So. 2d 1279, 1282 (Fla. 4th DCA 2007) (e.s.).

> The "crucial test" is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent. If a statute is so vague and uncertain in its terms that no one can say with certainty, from the terms of the law itself, what the law is, *it must be held unconstitutional* as attempting to grant to the administrative body the power to say what the law shall be.

Id. at 1282-83 (e.s.; citations and internal quotes omitted).

> The Legislature cannot delegate to an administrative agency, even one clothed with certain quasi-judicial powers, the unbridled discretion to adjudicate private rights. It is *essential* that the act which delegates the power likewise defines with reasonable certainty the *standards which shall guide the agency* in the exercise of the power.

Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962) (e.s.). The

current charter appeal process is invalid for failure to meet those standards.

The original charter school statute provided that, after considering an appeal, the State Board of Education would "remand the application to the district school board with its written *recommendation* that the district board approve or deny the application consistent with the state board's decision." § 229.053(4)(b), Fla. Stat. (1996) (e.s.). Because it was only a recommendation, the State Board of Education's decision was exempted from the Administrative Procedure Act. *See id*.

But in 2002 the statute was renumbered as section 1002.33 and revised to make the State Board of Education's decision mandatory and binding upon the district school board. *See* § 1002.33(6)(b), Fla. Stat. (2002). In spite of that major, significant change in procedure and impact, the Legislature failed to delete the clause stating that "[t]he decision of the State Board of Education is not subject to the provisions of the Administrative Procedure Act, chapter 120." *See id*.

In effect, the State Board of Education suddenly gained the power in 2002 to establish charter schools (by ordering school boards to approve applications) without affording the school boards even the minimum level of procedural protections available under the Administrative Procedure Act. *Cf.* § 120.57(1)(b), (1)(e)2.d-f., Fla. Stat. (2015) (prohibiting arbitrary or capricious agency actions, requiring due notice, allowing presentation of evidence, and requiring that agency decisions be founded on competent substantial evidence).

The application appeal process that effectively gives the State Board of Education unlimited authority to approve charter applications, is also contrary to the statutory scheme for resolution of disputes subsequent to approval of a charter, which may involve a hearing under the APA. In those cases, the DOE

> shall provide mediation services for any dispute … except disputes regarding charter school application denials. If the Commissioner of Education determines that the dispute cannot be settled through mediation, the dispute may be appealed to an administrative law judge appointed by the Division of Administrative Hearings. The administrative law judge has final order authority … regarding this section except a charter school application denial….

§ 1002.33(6)(h), Fla. Stat. (e.s.). Thus, any matters regarding the application are not subject to the APA, but any disputes not involving an application denial (or a charter termination, or a nonrenewal), may be heard by DOAH under the APA. To be constitutional, the application appeal process should also be subject to the APA.

Judicial concerns about the statute were emphasized in a decision reversing an order of the State Board of Education which had allowed Charter Schools USA (which is connected with the Applicants here) to operate a charter school:

> Review in this case has been hampered by *deficiencies in the underlying statute*.… [T]he statute as formulated has *many shortcomings*… The statute also raises issues of *due process* by its *failure* to expressly provide for *any form of evidentiary hearing* or review.

School Board of Seminole County v. Renaissance Charter School, Inc., 113 So. 3d 72, 76-77 (Fla. 5th DCA 2013) (e.s.).

Not only is the charter application appeal statute invalid on its face, but the appeal process is also unconstitutional as applied[13] in this case, as the State Board of Education relied upon the CSAC's Recommendation that failed to set forth any "reasons for the recommendation" and "fact-based justification," which are mandatory under section 1002.33(6)(e)2, 5, Fla. Stat.

In sum, the charter application appeal process violates both procedural and substantive due process under article I, § 9 of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the U.S. Constitution, as it fails to provide a meaningful opportunity to be heard by a neutral decision-maker who will act only upon the evidence, for reasons that are not arbitrary. It improperly and invalidly allows the State Board of Education to ignore any "reasons for the recommendation" or "fact-based justification" in a CSAC recommendation, while failing to provide any standards or criteria for the State Board of Education to make its own decision. It also fails to require any fact-based justification or statement of reasons for the State Board of Education's decision. Thus, the statute should be held unconstitutional and the Order should be reversed.

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[13] "Three types of constitutional challenges may be raised in the context of the administrative decision-making process of an executive agency….: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule." *Key Haven Associated Enterprises, Inc., v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

C. The charter application appeal statute and the Order exceed the State Board of Education's constitutional power to supervise "the system of free public education" under article IX, § 2, Fla. Const.

The Constitution limits the powers of the appointed State Board of Education, which has a general supervisory role over the state educational system:

> The state board of education shall be a body corporate and have such *supervision of the system of free public education* as is provided by law. The state board of education shall consist of seven members appointed by the governor to staggered 4-year terms, subject to confirmation by the senate. The state board of education shall appoint the commissioner of education.

Art. IX, § 2, Fla. Const. (e.s.) General law allows the State Board of Education only an advisory role in charter application appeals, with the power only "[t]o *recommend* that a district school board take action consistent with the state board's decision relating to an appeal of a charter school application." § 1001.02(2)(q), Fla. Stat. (2015) (e.s.). This "recommend[ation]" language has stood undisturbed in the General Powers of the State Board of Education since it was added by section 4, chapter 96-186, Laws of Florida (1996), enacting section 229.053(2)(q), Fla. Stat. (1996).[14] The power to *recommend* action in section 1001.02(2)(q) is consistent with article IX, § 2, Fla. Const., as making recommendations to district school boards falls within the role of oversight of the state-wide system of education.

[14] At the same time, provisions for charter schools were first introduced into Florida law by section 1, chapter 96-186, Laws of Florida (enacting section 228.056, Fla. Stat. (1996), the ancestor of today's section 1002.33, Fla. Stat.).

Section 1001.02(2)(q) is also consistent with the general statutory scheme. The State Board of Education is the "coordinating body of public education in Florida … and it shall focus on *high-level policy* decisions." § 1001.02(1), Fla. Stat. (2015) (e.s.). Its general powers include the authority to "adopt comprehensive educational objectives for public education" and "enforce systemwide education goals and policies." § 1001.02(2)(a), (r), Fla. Stat. (2015). *See also* § 1000.03(2)(b), Fla. Stat. (2015) (the State Board of Education oversees enforcement of education laws and rules and provides direction, resources, assistance, and intervention to district school boards).

It is anomalous that the State Board of Education, which has general oversight of the statewide system of education under the Constitution and section 1001.02, Fla. Stat., would be allowed to make binding decisions compelling local school boards to take on the substantial responsibility and impact of sponsoring a charter school whose application the school board has already determined to be deficient. In effect, the statute invalidly delegates to the State Board of Education the authority to approve charter applications even though the School Board has the exclusive power to establish, "operate, control, and supervise all free public schools within the school district." Article IX, § 4(b), Fla. Const.

The statute's purported delegation of power of the State Board of Education to override the School Board's decision regarding an application, and effectively

authorize a charter school unilaterally, is analogous to a statute that was previously declared unconstitutional as it allowed the Florida Schools of Excellence Commission (a state-appointed commission independent from school districts) to authorize charter schools. After the enactment of that statute, many school boards filed resolutions with the State Board of Education, calling for school boards to retain their exclusive authority to authorize charter schools. Upon an appeal by a school board, the appellate court scrutinized the statute and held that section 1002.335, Fla. Stat., was facially unconstitutional as it established a state-run commission with the authority to authorize charter schools. *Duval County School Board v. State Board of Education*, 998 So. 2d 641, 644 (Fla. 1st DCA 2008).

The statute was facially invalid because it conferred independent, state-level power to the appointed commission to authorize charter schools. *Id*. Specifically, the unconstitutional statute granted the commission the power and duty to "[a]uthorize and act as a sponsor of charter schools, including the approval or denial of charter school applications…." § 1002.335, Fla. Stat. (2006). In invalidating the statute, the court noted:

> Section 1002.335 provides for the creation of charter schools throughout Florida. This statute permits and encourages the creation of a *parallel system* of free public education *escaping the operation and control of local elected school boards*. It vests in an "Excellence Commission" of seven people appointed by the State Board of Education from recommendations of the Governor, President of the Senate and Speaker of the House of Representatives, all the powers of

> operation, control and supervision of free public education *specifically reserved in article IX, section 4(b) of the Florida Constitution, to locally elected school boards*, with regard to charter schools sponsored by the Commission.

Duval County, 998 So. 2d at 643 (e.s.).

Likewise here, the charter application appeal process has the same basic effect as the statute that was found unconstitutional in *Duval County*. Much like the failed statute there, the application appeal process here effectively grants an appointed board statewide authority to approve applications and grant charters. If a local school board denies an application, the applicant can simply have the State Board of Education override the decision and grant the charter by ordering the School Board to do so. The statute exceeds the State Board of Education's constitutional power under article IX, § 2, Fla. Const., which is focused on high-level policy and general oversight of the state system of education. Thus, the charter application appeal process in section 1002.33(6)(c) is unconstitutional.

D. The charter application appeal statute and the Order violate the School Board's constitutional authority to "operate, control, and supervise" public schools under article IX, § 4(b), Fla. Const., and provide for a high quality system of public schools under § 1(a).

The Florida Constitution gives local control and home rule powers to the county school boards to meet the needs of students in their districts. *See* § 1001.32(2), Fla. Stat. But the charter application appeal process in section

1002.33(6)(c), (d), Fla. Stat., especially section 1002.33(6)(c)3.a, invalidly grants discretion to the State Board of Education to override the School Board's denial of charter school applications, effectively allowing the State Board of Education to authorize charter schools. This process undermines the School Board's constitutional duty under article IX § 1(a) to implement a high quality system of free public schools in this county where it has the sole power and responsibility to establish, authorize, and operate public schools under article IX § 4(b), Fla. Const.

Article IX, Section 4 of the Florida Constitution provides that school boards "shall operate, control and supervise *all* free *public schools* within the district." (e.s.). "All charter schools in Florida are *public schools*." § 1002.33(1), Fla. Stat. (e.s.). In violation of article IX, the charter school appeal process grants unfettered authority to the State Board of Education to accept a charter school application where the same application was previously denied by a school board.

The application appeal process undermines a school board's ability to determine and meet the needs of children within its own district. This application appeal statute conflicts with the School Board's constitutional powers, as it allows the State Board of Education to accept applications for Charter Schools over the authority of the School Board, which has the sole constitutional power under article IX § 4(b), Fla. Const., to authorize and operate public schools in this county. Thus, the statute should stricken and the Order should be reversed.

E. The unconstitutional statute is not saved by the Fifth District's distinguishable and non-controlling decision in *School Board of Volusia County v. Academies of Excellence, Inc*.

The Applicants may argue that the Fifth District in 2008 rejected an assertion "that, because the act of operating and controlling all free public schools in [the] County is conferred exclusively on the School Board, section 1002.33(6)(c) is unconstitutional because it permits the State Board to open a charter school." *School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So. 2d 1186, 1191 (Fla. 5th DCA 2008). The Fifth District reasoned that:

> Section 1002.33(6)(c) does not permit the State Board to open a charter school. Rather, the statute permits the State Board to approve or deny a charter application after it completes an extensive review process. Granting a charter application is not equivalent to opening a public school. The approval of an application is just the beginning of the process to open a charter school. Once the charter application has been granted, the school board still has control over the process because the applicant and the school board must agree on the provisions of the charter. *See* § 1002.33(6)(h), Fla. Stat. (2005). A school board can also cause a charter to be revoked or not renewed. *See* § 1002.33(8), Fla. Stat. (2005).

Volusia County, 974 So. 2d at 1193. That reasoning is flawed, as approval of the application plainly begins the establishment of the school. Because of its statutory authority to overturn school board decisions and unilaterally direct school boards to approve charters, the State Board of Education is ultimately in control of a charter school's establishment and operation. Further, the Fifth District's reasoning

was mistaken in its thinking that the State Board of Education did not usurp control of public (charter) schools because school boards can revoke or non-renew a charter. The court ignored the fact that, absent an "immediate and serious danger to the health, safety, or welfare of the charter school's students" under section 1002.33(8)(d), the basis for a termination or nonrenewal is limited under section 1002.33(8)(a)1-4 and it cannot occur without out due process.[15]

Volusia County's reasoning was further flawed in its rationale that the applicant and the sponsor must agree on the provisions of the charter. The court ignored the fact that the charter has to be consistent with the application, and the "applicant and the sponsor have [only] 40 days … to negotiate and notice the charter contract for final approval by the sponsor." § 1002.33(6)(h), Fla. Stat. A flawed application will result in a deficient charter. Here, for example, a forced approval of the Applicants' deficient application would result in a charter that fails to fulfill the statutory requirement of innovative learning methods. It would result in establishing a school that operates contrary to the legislative purpose of having innovative charters and innovative learning methods in charter schools.

[15] Further, charter schools could, at that time, appeal revocations or nonrenewals to the State Board of Education, which could order the school board to keep the school open. *See* § 1002.33(8)(c), Fla. Stat. (2008). The statute was revised in 2011 to provide for an appeal directly to the District Court of Appeal pursuant to section 120.68, Fla. Stat., in cases of nonrenewal of revocation. *See* § 1002.33(8)(c), Fla. Stat. (2011). The sponsoring school board still must notify the DOE of any nonrenewal or termination order. *Id*.

The end result of the appeal process is that the State Board of Education is effectively in control of the approval of charters and the establishment of public charter schools—a power reserved exclusively to the district school boards with their constitutional authority to "operate, control and supervise all free public schools within the school district." Article IX, § 4(b), Fla. Const.

That constitutional provision is vitiated by the flawed charter application appeal process, which undermines school boards' authority and devalues their expertise in serving the students and constituents of their counties.

> Few things in the administrative process are more destructive than the belief on the part of the applicant and the decision-maker that the "review" of [a school board's] administrative action is really nothing more than a "do-over" with more receptive listeners. A fact-finder and decision-maker who knows its decisions will not be accorded respect is less inclined to worry over their accuracy.

Volusia County, 974 So. 2d at 1193 (Griffin, J., concurring specially).

In sum, section 1002.33(6)(c), Fla. Stat., is unconstitutional as it fails to provide standards or factors to guide the decision of the State Board of Education, and the process fails to include the procedural protections of the APA, as discussed in sub-point B, *supra*. Additionally, it allows the State Board of Education to exceed its constitutional powers of oversight of the state system of education, and to infringe on the School Board's exclusive constitutional power to "operate, control, and supervise" public schools under article IX of the Florida Constitution.

"[T]he issue is what limits the Constitution imposes on the Legislature. We make no distinction between a small violation of the Constitution and a large one. Both are equally invalid…. [W]e abhor the small violation precisely because it is precedent for the larger one." *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006). The Court should strike the unconstitutional statute and reverse the flawed Order.

CONCLUSION

The State Board of Education erroneously relied on a recommendation that lacked the required fact-based justification. The Order is not supported by competent substantial evidence. It failed to recognize that the School Board had good cause to deny the application. Further, the appeal process in section 1002.33(6)(c) is unconstitutionally vague and lacking in standards for the State Board of Education's decision. The statute exceeds the State Board of Education's powers and infringes on the School Board's powers. "[T]he Constitution must prevail over any enactment contrary to it." *Bush*, 919 So. 2d at 392.

WHEREFORE, the Appellant, the School Board of Palm Beach County, Florida, respectfully requests that this Honorable Court should declare the application appeals portion of charter school statute to be unconstitutional, reverse the Order that memorialized the State Board of Education's decision to override the School Board's denial of the charter application, and remand with directions to reinstate the School Board's denial of the charter application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief has been e-filed via eDCA and has been served by Electronic Mail on the **27**th day of September, 2015, upon the following:

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I HEREBY CERTIFY that this Brief complies with the font requirements (14-point Times New Roman) of Fla. R. App. P. Rule 9.210(a)(2).

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