FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

Case No: 4D16-2207
L.T. Case No.: 2015-3244-FOI

Appellant,

vs.

RENAISSANCE CHARTER SCHOOL, INC. and RENAISSANCE CHARTER HIGH SCHOOL OF PALM BEACH,

Appellees.
_____/

APPELLEES' ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellees will be collectively referred to as "the Appellees" throughout the brief. Appellee Renaissance Charter School, Inc. will be referenced as "Appellee Renaissance."

The Appellant in the instant matter is the School Board of Palm Beach County and will be referred to as "the School Board" throughout the brief.

The Charter School Application of the Renaissance Charter High School of Palm Beach that is the subject of this appeal will be referred to throughout the brief as the "Charter Application."

"CSAC" refers to the Charter School Appeal Commission

For the Court's convenience, Appellees will endeavor use the same record citation format used by the Appellant throughout its Initial Brief.

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Facts filed by the School Board in its Initial Brief misstates the record, including the actual basis for the School Board's denial of the Charter Application at issue in this appeal. In addition, the School Board's Statement omits some key facts and background necessary to a full understanding of this appeal.

A. Introduction

Appellee Renaissance currently operates six charter schools in Palm Beach County. However, the School Board has decided that it does not want any more direct competition from successful charter schools in Palm Beach County. To that end, it has engaged in an unlawful and illegal pattern of nullification of charter school law by denying valid charter applications and by adopting its own illegal rules that directly contravene Florida's charter school statute in order to do so. Hence, both the Charter School Appeals Commission ("CSAC") and the State Board of Education have both overturned the School Board's denials unanimously. Indeed, this is the second, related appeal involving the School Board and a charter application that would have been managed by the same Education Service Provider, Charter Schools USA, Inc. ("CSUSA").

In the first appeal (currently awaiting decision by this Court)[1], School Board members admitted on the record that they were denying that charter application as an act of civil disobedience and would not be approving any new charter applications for charter schools that would directly compete with their own public schools. The transcript of the School Board meeting in the first appeal confirms this bias. For example, School Board Member Barbieri stated:

> So I will not support voting today for [the charter application] I realize that the district had no choice but to recommend, the superintendent had no choice but to recommend approval because they meet the statutory guidelines . . . . So until we have a level playing field I am not voting for any more charter schools like Renaissance that have nothing more no more objective than to make profit at the disadvantage of our children so I will not support this recommendation of the superintendent.

School Board Member Robinson also joined the chorus, proclaiming:

> but we are not going to approve these charters that just fill out the paperwork properly and don't have anything special to offer our children

And, School Board Member Robinson capped her comments by openly admitting that the School Board was being lawless in denying a charter application that met all the required statutory criteria, claiming she did not care because there were no real consequences to her "civil disobedience":

> So, if this was denied today, then there is no children that are negatively impacted. Right? The worse case scenario from my point

[1] *See Florida Charter Educational Foundation, Inc. v. School Board of Palm Beach Count*y (Case No. 4D15-2032).

> of view, is that they could appeal and then we could be told that we have to accept them. There is no negative impact on any children you know and this you know this is an act of civil disobedience cause some of this stuff that we are told to do is crazy and it does not harm children to say no.[2]

From these quotes, it is obvious that the School Board is not going to be approving any new charter applications from Appellee Renaissance any time soon, regardless of whether its charter applications meet all required legal standards. Thus, the School Board's denial of the that first charter application was overturned unanimously by both the CSAC and the State Board of Education in the first appeal.

Unfortunately, the School Board's pattern of lawlessness continues in this second charter application denial here. In its Initial Brief, the School Board suggests that it had legal reason to deny the Charter Application for not being sufficiently "innovative" and other partial grounds. But, the School Board neglects to tell this Court that the "innovative" definition it used to deny the Charter Application here is not contained in the controlling charter statute and also violates previously-adopted State Board of Education rules and forms.

[2] The School Board did not challenge the accuracy of these quotes in the first appeal, but disputed their import. They have only been included here briefly as relevant background to this related case. Both parties have already filed notices with this Court asserting that *Florida Charter Educational Foundation, Inc. v. School Board of Palm Beach Count*y (Case No. 4D15-2032) is a related case.

Regardless, the instant Charter Application model was, in fact, very innovative—and School Board members even acknowledged this on the record.

For example, Ken Haiko, the Chairman of Appellee Renaissance, testified to numerous ways in which this proposed charter school, like all the charter schools he runs, would be innovative:

> MR. HAIKO: My name is Ken Haiko, H-a-i-k-o. And good afternoon, Chairman Shaw, board members. Superintendent Avossa. I'm here before you today asking for your support for Renaissance Charter High School of Palm Beach because our parents deserve the right to choose the best educational options for their children. As Chairman of the Renaissance board, I've heard from our parents and I can tell you they want a high school.
>
> CHAIRMAN SHAW: Please, no response from the audience.
>
> MR. HAIKO: They want to be able to continue their children's education with us. Today Renaissance operates six schools in Palm Beach County and we have a strong track record of success. I must take a moment to thank our educators because their dedication truly makes the difference in our classrooms. As in that work, we value every single instructional minute and feel that seconds count towards helping our students reach mastery. Our renovation extends beyond the surface. ***Every student receives a personal learning plan. That is innovative. We offer a longer school day that allows us to develop schedules tailored to the unique needs of our students. That is innovative. We have a unique grading philosophy that only reflects mastery of the student standards taught. That is innovative. We offer a blended learning that provides instruction through a combination of direct teacher instruction and online programming. That is innovative.*** Each summer we hold a summit. School Board Member Whitfield attended this past year, and our summits are high energy events where our teachers and staff celebrate the past year's success and rated themselves for the new school year. That is innovative. Our principals like Jackson himself used value-driven decision-making

> process as an approach to moving student achievement. That is innovative. Recently I read a statement by Superintendent Avossa in which he says a one size fits all approach does not work when dealing with legislation across the state for School Districts. I would echo similar sentiments when it comes to our childrens' educational experiences. Board members, a one size fits all doesn't work. Our parents deserve the right to choose what is best for their children. Not me, and not any of you. Each that -- taking that choice away turns back the clock to a time when student's education was defined by their zip codes. Please give parents the option of a Renaissance Charter High School of Palm Beach, the school that they want, and allow them to make a choice that is best for their child. And while I have a couple of seconds, I just want to point out I have another five pages of innovative practices that we employee in our schools that are not employed in the District. So the idea that we're not innovative, I think is just wrong. Thank you very much.

See R. 676 (emphasis supplied). Several current parents also testified to the merits of Appellees' academic approach at the School Board hearing at which the Charter Application was denied, and this Court is urged to read the full transcript of that meeting at R. 675-688.

Perhaps, more importantly, however, several of the School Board's own members acknowledged that Appellees' charter schools were, in fact, more innovative than their own district schools in some ways, a fact noted prominently in an article entitled *"Palm Beach County's charter school standoff is getting personal"* published originally by the Palm Beach Post on November 6, 2015:

> The board members' discussion led to odd contrasts. Moments after rejecting the proposed school as failing to be innovative, two board members said the school district's own schools could improve by learning from Charter Schools USA's model.

> Robinson said the parents' passion for the company's smaller campuses underscored "the need to make sure that we have options for small schools" among the district-run schools.
>
> Board member Karen Brill agreed, adding that mimicking Renaissance's individual learning plans and frequent communication to parents might behoove the school district.
>
> "I think what really struck me was about the personal learning plans, the daily reports to parents," Brill told the parents. "I think the things you're getting, yes, we need to do better in our district as well."

See R. 690-692; *see also* R. 687 (Transcript pp. 49-50).

Despite these quotes by School Board members acknowledging how innovative Appellees' educational program was, the School Board still denied this Charter Application for an alleged lack of innovation even though it had already approved the same application ***seven times before***, because this new charter school would directly compete with its own public schools. The School Board cannot deny new charter applications simply because it does not want more competition. Local school boards are not free to rewrite the charter statute or to reject the Florida Legislature's decision to allow charter public schools to compete with traditional public schools to provide Florida parents and schoolchildren with more robust educational options. The Florida Legislature has already made that choice, and the School Board is not free to disregard it.

B. Nature of the Case

This case involves an application for a new charter high school in Palm Beach County that was denied by the School Board, but unanimously reversed by

both the CSAC and the State Board of Education. Appellee Renaissance already operate six charter schools in Palm Beach County, but no charter high school. Appellees wanted to offer their students the opportunity to continue their education through high school in the same charter school model. On appeal, the School Board, is asking that this Court take the extraordinary step of invalidating the State Board of Education's Final Order on constitutional and legal grounds.

C. Statement of the Facts

1. Charter Schools Are Public Schools.

In 1996, the Florida legislature authorized the creation of the first charter public schools. Charter public schools were specifically created to compete with traditional public school to provide more educational school choice to Florida parents. In Florida, charter public schools are nonsectarian public schools that operate pursuant to a charter contract with a public sponsor, in this case a supervising local school board. See § 1002.33(1), Fla. Stat.; *Sch. Bd. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1227 (Fla. 2009). Charter schools in Florida are, through and through, public schools. *Id.* Although charter public schools have more autonomy than traditional public schools (in terms of staffing, curriculum and resource allocation), the Florida Legislature has ensured that charter public schools remain accountable to the local school boards who sponsor them, to their governing boards, to the Florida Department of Education, and to

the parents who send their children there. Moreover, charter public school students are subject to the same standardized and other testing as traditional public school students. Charter public school applications, governance, enrollment, and other requirements are set out in a comprehensive and reticulated charter school statute, § 1002.33, Fla. Stat.

2. The Instant Charter Application.

The School Board has approved virtually the same charter application from Appellee Renaissance ***seven times*** previously and the same substantive charter application has also been approved by other local school boards across the state and also by the State Board of Education. Appellees submitted this Charter Application to the School Board on August 1, 2015 pursuant to the charter statute. The Charter Application of the proposed Renaissance Charter High of Palm Beach was thorough, detailed, and sufficient in all respects. It stretched 565 pages, including exhibits. *See* R. 45-612. The Education Service Provider for the Renaissance Charter High School at Palm Beach was set to be CSUSA, a very experienced charter school operator. In fact, AdvancEd awarded CSUSA the first Southern Association of Colleges and Schools (SACS) district accreditation for an education management company (and CSUSA schools recently received SACS reaccreditation). This means that, in fact, the projected charter school manager is so strong that all of the charter schools it manages become SACs-

accredited by virtue of their connection with CSUSA and its proven academic model. The CSUSA academic model, already proven in 7 states and with over 70,000 students, that was to be employed at the Renaissance Charter High of Palm Beach was one that the students and parents of its existing Palm Beach charter schools wanted to continue with through their high school years.

The Charter Application at issue in this appeal clearly and unequivocally specifies how its educational model and learning methods would be innovative:

- *Encourage the use of innovative learning methods*.

  As outlined in this application, the School will encourage the use of innovative learning methods and deliver educational best practices within the framework of a research-based Education Model. The School will implement innovative learning methods that are unique in their delivery and processes. Some examples, described further in this application, include, but are not limited to:

  Student-Centered Learning - Based on Marzano's research, students will go through an innovative, seven step learning process that enables them to construct a deep understanding of the material and develop autonomy and critical thinking skills.

  Blended Learning and Educational Technology - Students will have the opportunity to experience various blended learning models (flipped, rotation, a la carte, individualized, etc.) to learn content in a new and innovative way. A unique aspect of being a part of the CSUSA network is that students will have the opportunity to take courses that are offered in other CSUSA schools, while physically being located in this School. To facilitate effective blended learning strategies, the School will use state-of- the-art technology resources, including interactive displays, tablets, laptops, document cameras, production rooms, and more.

  Also described in more detail further in the application, other innovative practices that differ from typical schools in their implementation include:

• **Guaranteed and Viable Curriculum** - The School will use a curriculum mapped to the standards, clustered and ordered in a particular manner for maximum learning opportunity. The School will determine core textbook resources, however, teachers will have the freedom to use multiple research-based effective resources chosen from an approved list. CSUSA is piloting an online curriculum mapping and lesson-planning platform to increase ease and effectiveness of the use of the curriculum.

• **Data-Driven Instructional Model** - In connection with our timely and effective measurement tools, the proven Education Model focuses on using student performance data to drive the instructional decisions made within the classroom. Data-driven instruction occurs for whole-group, small-group, and individualized learning.

• **Timely and Effective Measurement Tools** - The School will use innovative measurement tools, NWEA and CMA, which accurately pinpoint exactly which skills the students need to work on in order to reach mastery of the standards. These assessments provide instant results so teachers can provide timely feedback to their students to improve and make timely decisions with regard to student groupings, content taught, and other instructional decisions.

• **Restorative Justice** - In conjunction with The School District of Palm Beach County Student Code of Conduct, the School will implement a school-wide behavior plan that promotes student advocacy, empathy, empowerment, and positive decision-making skills, which are essential for adolescent development throughout high school. Every student will have an adult advocate, and students may be a part of the decision-making process with regard to reparation for misconduct.

• **Grading Philosophy** - The philosophy is unique in that grades reflect true standards mastery. Students are given multiple opportunities to demonstrate understanding, andare not penalized for non-academic aspects, such as neatness or timeliness. Those are considered for behavioral consequences.

• **Personalized Learning Plans** - Students take ownership of their data, provided by the timely measurement tools, to make decisions with regard to actions steps to meet academic goals. Students lead conferences with their

> parents and teachers to describe their plan to improve performance. These plans also promote the values of Student- Centered Learning and Restorative Justice, as both aim to empower students and make them more accountable and independent in their learning and behavior.
>
> To further encourage the use of innovative learning methods in the classroom, the School will have access to an Innovations Team at CSUSA. These experts provide many facets of support and their aim is to bring 21st century skills and products into the classroom to further enhance the learning environment…..

(R. 52-53; *for more detail see also* R. 47-57 & 60-72.)

3. The School Board's Denial Of The Charter Application.

After submission of the Charter Application, the School Board interviewed Appellees at length on September 22, 2015 and Appellees answered detailed questions raised by School Board staff about the Charter Application at length and in great detail at that time. (R. 614-673.) Thereafter, on November 4, 2015, Appellees (along with a number of parents) appeared at the School Board meeting and demonstrated both the need for the new charter high school and the legal sufficiency of the instant Charter Application. (R. 675-688.) Although the School Board has approved virtually the same charter application by the same Appellee Renaissance at least seven times before, the School Board voted unanimously to deny the Charter Application here. None of the School Board members actually discussed why the Charter Application was being denied. In its Denial Letter dated November 13, 2015 authored by the Superintendent, the

School Board asserted that the Charter Application had failed only one standard. The School Board also claimed that the Charter Application only partially met four other standards. (R. 23-32.)

4. The Appeal Before the Charter School Appeal Commission.

Appellees filed their appeal with the Charter School Appeal Commission (the "CSAC") on December 10, 2015. (R. 1-692). The CSAC held a hearing on Appellees' appeal on April 4, 2016. The hearing before the CSAC was lengthy, with stakeholders from both charter schools and school boards asking detailed questions of the parties. (R. 874-945.) The CSAC also discussed each denial reason asserted by the School Board in detail and voted separately on each issue after hearing from witnesses and counsel for both sides. The CSAC voted against the School Board on every single denial reason asserted by the School Board, recommending unanimously that the School Board's denial of this Charter Application was not supported by ***any*** competent substantial evidence on any issue. (R. 946-947.) Because the CSAC specifically found that the School Board lacked any competent substantial evidence to support its denial, it did not need to vote on whether the School Board had "good cause" to the deny the Charter Application. (*Id*.) Thereafter, the Florida Department of Education issued an Action Item memorializing the CSAC's recommendation that also recommended

to the State Board of Education that the School Board's denial of the Charter Application be reversed. (R. 948-951.)

5. Ruling By The State Board of Education.

The parties argued the matter before the State Board of Education on May 20, 2016 and, like the CSAC before it, the State Board of Education ruled unanimously in favor of Appellees. The State Board issued its Final Order on May 31, 2016 (R. 1114-1115.) The Final Order states that "[u]pon review of the evidence presented to the School Board, the [CSAC] recommendation and hearing transcripts, the State Board of Education granted the appeal of the Charter Applicant." (R. 1114.)

This appeal followed.

SUMMARY OF ARGUMENT

The Final Order of the State Board of Education should be affirmed. This is the second charter appeal in which the School Board has denied a charter application on the basis of its own illegal definition of "innovative" not contained in the charter statute. The facts are clear that the Charter Application at issue in this appeal met all the applicable legal requirements as the School Board itself has approved largely identical charter applications from Appellee Renaissance seven times previously (and it already operate six charter schools in Palm Beach County). Although the School Board was required to support its denial of the Charter Application with "competent substantial evidence," it points to nothing other than the opinions of its staff and its own illegal "innovative" requirement in defense of its denial. Hence, both the CSAC and the State Board of Education were right to reject the School Board's obviously pretextual reasons for denying the Charter Application. Moreover, the School Board lacked the authority to add a new definition of "innovative" onto charter statute requirements via School Board Policy 2.57 as rulemaking authority has been specifically denied school boards in the charter statute. Lastly, the School Board's constitutional challenges should be dismissed for lack of standing or denied outright for lack of merit.

LEGAL ARGUMENT

I. THE FINAL ORDER OF THE STATE BOARD OF EDUCATION SHOULD BE AFFIRMED AS THE SCHOOL BOARD LACKED ANY COMPETENT EVIDENCE TO SUPPORT ITS DENIAL.

The School Board here approved virtually the same charter school application as being legally sufficient in all respects seven times previously. The School Board does not really dispute this fact on appeal. Moreover, the School Board has not pointed to any change in charter school law in the interim that would have suddenly rendered virtually the same charter application now somehow legally deficient. Both the CSAC and the State Board of Education had also approved virtually the same charter application as being legally sufficient in all respects in previous charter appeals involving different school boards. Hence, it must be beyond doubt that the instant Charter Application also met all of the controlling legal standards, and both the CSAC and the State Board of Education were, therefore, correct in reversing the School Board's denial of the instant Charter Application.

A. Standard of Review.

The recitation of the controlling standard of review contained on Page 19 of the School Board's Initial Brief is incomplete. The State Board of Education'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.

BellSouth Telecomms., Inc. v. Johnson, 708 So.2d 594, 596–97 (Fla.1998). Moreover, § 120.68(7)(b), Fla. Stat., provides that although a court may set aside agency action when it finds that "agency action depends on any finding of fact that is not supported by competent, substantial evidence in the record," the court may not "substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." *See also Hausdorff v. Hausdorff*, 913 So.2d 1267, 1268 (Fla. 4th DCA 2005) (appellate court must view the evidence in the light most favorable to the challenged judgment in evaluating whether competent, substantial evidence supported the ruling).

B. The School Board's Denial Was Not Supported By <u>Any</u> Competent Evidence.

Pursuant to § 1002.33(6)(b), Fla. Stat., a local school board cannot deny a charter application unless it has the requisite "good cause" to do so. Moreover, under that same charter statute, the Florida Legislature has specifically given the State Board of Education the power to accept or reject a school board's decision on a charter application. *See* § 1002.33(6)(c)(3), Fla. Stat. Application of this "good cause" standard was discussed in detail in *Sch. Bd. of Osceola County v. UCP of Cent. Fla.*, 905 So.2d 909 (Fla. 5th DCA), *review denied*, 914 So.2d 954 (Fla.2005).

Just as in the *Osceola County* case, the School Board's denial of the Charter Application here was not supported by any competent evidence, but only by conjecture and opinion. The School Board had only the opinions of its own staff to support its denial. This is plainly insufficient. Indeed, even on appeal, the School Board fails to point to any objective support for its denial. "Substantial evidence" is evidence that provides a factual basis from which a fact at issue may reasonably be inferred." *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc*., 857 So.2d 202, 204 (Fla. 3d DCA 2003)(citation omitted). Opinion testimony is not sufficient. *Id*. Moreover, according to the Florida Supreme Court,

> [a]lthough the terms "substantial evidence" or "competent substantial evidence" have been variously defined, past judicial interpretation indicates that an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient.

Fla. Rate Conference v. Fla. R.R. & Pub. Utils. Comm'n, 108 So.2d 601, 607 (Fla.1959). In short, evidence which is conclusory or unreliable is not competent substantial evidence. The School Board does not really dispute that it approved virtually the same charter application seven times previously. Further, Appellees rebutted all of the School Board's denial reasons repeatedly at the applicant interview (R. 614-673), the School Board meeting (675-688) and before the CSAC (R. 874-945) in detail. In the end, the School Board was left only with its

own self-serving definition of "innovative" (which was not in the charter statute) and the self-serving conclusions of its own staff. But, the School Board's own opinions and those of its staff do not constitute competent "evidence" under the law. *Id*. The State Board of Education was not required to reweigh the evidence, but was charged only with deciding whether there was sufficient competent evidence to support the School Board's denial. It correctly determined that there was not and that the School Board's denial should be reversed.

In its Initial Brief, the School Board asserts that the Mission Section of the Charter Application failed to satisfy the definition of "innovative" contained in School Board Policy 2.57 and its related innovative rubric.[3] However, as discussed in more detail in Subsection II below, only the State Board of Education has been granted the authority by the Florida Legislature to adopt charter school rules (as the Legislature wants to keep charter school rules uniform across the state). *See* § 1002.33(28), Fla. Stat. Moreover, the State Board of Education has already adopted model forms and standards for charter applications and school board reviews thereof that preempt the field. *See* Model Rule 6A-6.0786, F.A.C. (and adopted model charter application forms). Thus, the School Board lacks the authority to functionally amend the charter statute or

[3] A copy of School Board Policy 2.57 (Charter Schools) is published online at http://www.boarddocs.com/fl/palmbeach/Board.nsf/goto?open&id=9R8NGJ5AD10B#.

State Board of Education rules by adopting its own policy or otherwise use its own standards (not in the charter statute) to deny a charter application. Regardless, the Charter Application did set forth an innovative educational model. (*See, e.g*., R. 52-53.) School Board members conceded this on the record[4] (R. 676), the head of Appellee Renaissance's governing board testified to this (R. 690-692; *see also* R. 687 (Transcript pp. 49-50)), and Appellees' answered questions about the Charter Application posed by School Board staff in significant detail (R. 614-673).

In this case, the School Board acknowledges that the charter statute does not define the word "innovative" so it decided what "innovative" should mean. It is clear that, had the School Board not used its own definition, the Charter Application would have met the standard for the Mission Section (as it did seven times previously). But, the School Board is not entitled to change the charter statute or add more requirements onto charter applications than those already adopted by the Florida Legislature and the State Board of Education. The School Board's use of its own definition of "innovative" to deny the instant Charter Application was both self-serving and illegal. The School Board also argues in its

[4] In Footnote 10 of its Initial Brief, the School Board argues that its members did not concede that the educational model set forth in the Charter Application was innovative. However, the transcript of the State Board meeting shows School Board members acknowledging that the "personal learning plans" and smaller schools outlined in the Charter Application and discussed at the School Board meeting were better models than their own. (R. 687.)

Initial Brief that it is statutorily in charge of ensuring that the "charter" is innovative under the controlling charter statute pursuant to § 1002.33(5)(b)(1)(e), Fla. Stat. However, the reference to the word "charter" in the charter statute there is plainly to the parties' future charter contract, not to a charter application. The School Board also conveniently ignores the fact that the charter statute states that charter schools may also "[p]rovide rigorous competition within the public school district to stimulate continual improvement in all public schools." § 1002.33(2)(c)(2), Fla. Stat. The School Board's own standard of "innovative" where only charter public schools that do not compete directly with traditional public schools would be approved guts the very premise of charter public schools in the first place. Charter public schools were intended by the Florida Legislature to compete with traditional public schools so that a rising educational tide would lift all boats. Instead, the School Board here has defined the charter statute requirements as approving only those charter public schools that do not directly compete with it. This violates the charter statute in multiple ways.

With respect to the ESE and Budget Sections of the Charter Application, it is clear from a review of both the Charter Application and the relevant transcripts in this case, that the parties disagreed over the numbers that should be used in the Charter Application. However, this is not enough to support the School Board's denial. *See School Board of Volusia County v. Academies of Excellence*, 974

So.2d 1186 (5th DCA 2008)(school board cannot base charter application denial on opinion or conjecture). Although the School Board attempts to distinguish the *Volusia County* case in its Initial Brief, it fails to point to any evidence proving that the figures used in Appellees' Charter Application were unreasonable or to somehow refute all the rebuttal proffered by Appellees at every interview or hearing. Indeed, the School Board itself found the same basic projections to be reasonable ***seven times*** previously. Moreover, the conclusions of the School Board's own staff are not competent evidence, and this is exactly the type of argument rejected by the appellate court in the *Volusia County* case. This Court should rule likewise here.

The same argument applies to the ELL and Student Recruitment Sections of the Charter Application challenged by the School Board on appeal. These sections of the Charter Application had been approved by the school board seven times previously, but the School Board wants this Court to believe that they are now somehow deficient without specifically asserting in its Initial Brief how or why Appellees' numbers were actually wrong. The fact that Appellees thought that different numbers were more appropriate does not make Appellees' numbers wrong. The School Board was required to have both substantial and competent evidence to support its denial, but it had neither here. The fact that the School Board's staff might disagree with certain projections contained in the Charter

Application does not constitute the required competent or substantial evidence. The School Board's blanket conclusions, given the context, also lack credibility, and the State Board of Education was right to reject them.[5]

In its Initial Brief, the School Board also points to the fact that the Appellees did not reference its Resolution Agreement with the Department of Justice in the ELL Section of the Charter Application, as required by School Board Policy 2.57. Initial Brief, p. 22. However, this is not a requirement of the model charter application form or the charter application review instrument adopted by the State Board of Education by rule. Further, it is not a statutory requirement that charter applications must meet. It is an extra-statutory standard imposed illegally by the School Board. Hence, it was unlawful for the School Board to deny the Charter Application because it failed to refer to something that was not legally required to be there.

C. The School Board Points To No Actual Evidence To Refute the State Board's Reversal Of Its Charter Application Denial.

The totality of the administrative record below confirms that the School Board had no competent substantial evidence that the Charter Application was

[5] Appellees' point here is further supported by the fact that, in the appeal already-pending before this Court involving a substantially similar charter application (*Florida Charter Educational Foundation, Inc. v. School Board of Palm Beach County* (Case No. 4D15-2032), the School Board never claimed that these other areas (such as the ESE and Budget Sections) were legally insufficient.

deficient in any area and, indeed, the School Board does not really dispute that it approved virtually the same charter application as being legally sufficient seven times previously. In its Initial Brief, the School Board asserts that the State Board merely accepted the CSAC's recommendation to reverse, nothing more. Initial Brief, pp. 23-26. This is patently untrue. The Final Order of the State Board of Education confirms that it not only reviewed the CSAC recommendation, but the hearing transcripts and all the other documents in the record. (R. 1114-1115.) The fact that the State Board of Education disagreed with the School Board's conclusion does not mean that the State Board of Education's determination was wrong or cursory.

In its Initial Brief, the School Board tries to undermine the credibility of the State Board of Education by arguing that it did not ask questions about the substance of the Charter Application or express any rationale during the oral argument before it. However, it is apparent from the record that no questions were necessary because, again, virtually the same charter application had been approved by the same school board seven times previously and also had been approved by both the CSAC and the State Board of Education in previous appeals. The School Board also failed to raise any evidence other than the opinion of its own staff in support of its position. If the State Board of Education had no questions, it was because the School Board's denial was clearly wrong.

The School Board similarly claims in its Initial Brief that the CSAC proceeding was conclusory and somehow improper. However, a review of the transcript of that proceeding confirms that the questions of the CSAC members, which included members from both charter school and school board stakeholders, were very thorough and detailed and that the CSAC went through (and voted on) every major reason raised by the School Board in support of its denial of the Charter Application. (R. 874-945.) Further, the School Board's assertion that the CSAC recommendation did not contain any findings is belied by the text of the recommendation itself. The CSAC's Recommendation did, in fact, assert very specific justifications:

> On April 4, 2016 the Charter School Appeal Commission met and heard the appeal of this matter. **Thereafter, the Commission voted 4 to 0 to recommend that the State Board of Education grant the appeal of the Charter Applicant.** The Commission's justifications for its recommendations were as follows:
>
> 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 Educational Plan pursuant to Section 1002.33, Florida Statutes, and State Board of Education Rule 6A-6.0786, Florida Administrative Code.
>
> Issue Two
>
> 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 Organizational Plan pursuant to Section 1002.33, Florida Statutes, and State Board of Education Rule 6A-6.0786, Florida Administrative Code.
>
> Issue Three
>
> The Commission voted 3 to 1 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 Business Plan pursuant to Section 1002.33, Florida Statutes, and State Board of Education Rule 6A-6.0786, Florida Administrative Code.

R. 946-947(emphasis in original). The CSAC did not ultimately vote on whether the School Board had "good cause" to deny the Charter Application because it had already voted unanimously that the School Board lacked competent substantial evidence on every point. Thus, the School Board could not have had "good cause" to deny the Charter Application. Based upon all the foregoing, it must be clear that not only did the State Board of Education not commit "harmful error" in this case, it actually committed no error at all. And, neither did the CSAC before it.

The School Board never explains in its Initial Brief how it found the very same charter application to be legally sufficient seven times previously but suddenly determined that this Charter Application was remiss in multiple areas when the underlying charter school law remained the same.[6] Indeed, the School

[6] In Footnote 13 of its Initial Brief, the School Board questions Appellees' assertion that the School Board's charter denials were pretextual. However, as quoted earlier in the Answer Brief, the School Board's own members openly

Board should have been bound to approve this Charter Application under principles of collateral estoppel. In concluding its argument on the "competent substantial evidence" point, the School Board does seem to acknowledge that there was at least contradictory evidence in the record, citing the proceedings before itself and also before the CSAC. Initial Brief, p. 25. This argument confirms Appellees' points on appeal that the School Board lacked competent substantial evidence in support of its denial of the Charter Application. The fact that School Board staff might have disagreed with certain projections in the Charter Application was not "evidence."

The School Board also seems to be suggesting on appeal that the evidence adduced with respect to Appellees' other charter schools in the CSAC proceeding was somehow outside the scope of appropriate inquiry. However, a review of the School Board's Initial Brief (and also its arguments to both the CSAC and the

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admitted on the record in the already-pending appeal that virtually the same charter application met all the legal standards but that they wanted to commit nullification and "civil disobedience" anyway. *See the record in Florida Charter Educational Foundation, Inc. v. School Board of Palm Beach County* (Case No. 4D15-2032). Further, with respect to the Charter Application at issue in this appeal, School Board members conceded on the record that it was more innovative than their own public schools in some ways. *See* R. 690-692(*"Palm Beach County's charter school standoff is getting personal"* published originally by the Palm Beach Post on November 6, 2015); *see also* R. 687 (Transcript pp. 49-50). Yet, it still denied the Charter Application for not being sufficiently "innovative" under its own illegal standard adopted in School Board Policy 2.57.

State Board of Education below) confirm that it never objected to the CSAC's questions about Appellee Renaissance's other Palm Beach charter schools. Hence, it cannot now raise these issues for the first time on appeal. *See Yachting Arcade, Inc. v. Riverwalk Condo. Assoc., Inc.*, 500 So.2d 202, 204 (Fla. 1st DCA 1986)(for an administrative issue to be preserved for appeal it must be raised in the administrative proceeding of the alleged error).

Thus, based on all the foregoing, the School Board clearly lacked any competent substantial evidence to deny the Charter Application here, and it has telling that the School Board cites to no actual evidence in support in its Initial Brief either (other than the self-serving conclusions of its own staff that were repeatedly rebutted by Appellees in the record or its own illegal definition of "innovative"). The School Board cannot credibly reject a Charter Application that it had approved seven times previously without any evidence other than the musings of its own staff. Under the circumstances presented here, the School Board obviously had no evidence in support of its position, and both the CSAC and the State Board of Education were right to reverse.

II. The State Board Of Education Did Not Err In Reversing The School Board's Denial of Appellees' Charter Application.

The Florida Department of Education, like the CSAC before it, specifically recommended that the State Board of Education reverse the School Board's

denial here. (R. 948-951)(State Board of Education Action Item including the entire administrative record below). In its Final Order, after reviewing all the "evidence presented to the School Board, the [CSAC] recommendation and hearing transcripts, the State Board of Education granted the appeal of the Charter Applicant." R. 1114. The School Board contends in its Initial Brief that that the State Board of Education should have found that it had "good cause" to deny the Charter Application, arguing that Appellees' rebuttals in the record did not refute its "good cause." However, the School Board ignores the fact that there is no basis in either the record or in the law supporting the School Board's denial of the Charter Application at issue in this appeal (other than the self-serving conclusions of its own staff suddenly recommending rejection of a charter application that the very same School Board had already approved seven times previously and the illegal definition of "innovative" it purposely adopted to deny charter applications). Under these circumstances, the School Board could not—and did not—have "good cause" to deny the Charter Application under either the charter statute or the charter application rules and forms lawfully adopted by the State Board of Education.

A. The Standard of Review Over The State Board's Reversal Is Not *De Novo.*

The appropriate standard of review on this issue is not *de novo*. Instead, this Court properly reviews the decision of the State Board of Education to confirm that it looked at whether competent substantial evidence existed in support of the challenged administrative decision. The State Board of Education was charged only with determining whether the School Board had "good cause" to deny the Charter Application. Thus, the review is not *de novo*.

B. The School Board's Use Of Its Own Extra-Statutory Definition Of "Innovative" In School Board Policy 2.57 To Deny The Charter Application Cannot Constitute "Good Cause."

The School Board concedes that it used its own definition of "innovative" adopted in School Board Policy 2.57 to deny Appellees' Charter Application. The charter statute does say that charter schools shall, among other things, "***encourage*** the use of innovative learning methods." § 1002.33(2)(b)(3), Fla. Stat. "Encourage" is defined by dictionary.com to mean "to promote, advance, or foster." Appellees have never contended that the statute does not require charter schools to ***encourage*** innovative learning methods and the School Board has never contended that the Charter Application did not "***encourage*** the use of innovative learning methods" either. Indeed, as discussed in connection with Subsection I above, the Charter Application detailed a number of planned

innovations that would be implemented at the new charter public school and School Board members agreed that it contained innovative elements. Instead, the Appellees have asserted, correctly, that the charter statute does not require the types of new and different "innovation" that the School Board defined and demanded here. The School Board also argues that it is in charge of ensuring that the "charter" is innovative under the controlling charter statute pursuant to § 1002.33(5)(b)(1)(e), Fla. Stat. but, again, fails to tell this Court that the word "charter" therein specifically refers to the parties' charter contract, not to a charter application. The charter statute also states that charter schools may also "[p]rovide rigorous competition within the public school district to stimulate continual improvement in all public schools." § 1002.33(2)(c)(2), Fla. Stat. But, the School Board's own standard of "innovative" where only charter public schools that do not compete directly with traditional public schools violates the charter statute and plainly exceeds the School Board's legal authority with respect to charter schools.

On appeal, the School Board concedes that it has adopted its own definition of required charter application "innovation" in School Board Policy 2.57 and claims that it is entitled to enforce its own charter school standards over

those contained in the charter statute and State Board of Education rule.[7] The School Board's arguments are totally wrong. More specifically, the School Board argues that it had every right to go beyond the State Board of Education's adopted forms and rules in denying the Charter Application and that its definition of "innovation" should have been given deference by the CSAC and State Board of Education. These are nothing but more lawless arguments on the part of the School Board. The School Board, is, by law, required to follow the dictates of the State Board of Education. § 1001.32(1), Fla. Stat., mandates that "[a]ll actions of district school officials shall be consistent and in harmony with state laws and with rules and minimum standards of the state board [of education]." The law is so clear on the point that local school boards must obey State Board of Education rules that the State Board of Education has the power to take enforcement action

[7] In Footnote 14 of its Initial Brief, the School Board claims that it can add requirements to a charter application because it is allowed to request additional information from charter applicants under the charter statute. But, this is not what happened here. The School Board never asked for additional information on innovation from Appellees. Indeed, its own pleading before Court confirms that it would not allow any further substantive information from charter applicants. *See* Footnote 17 of Initial Brief. Instead, the School Board simply added its own requirements regarding innovation onto the charter statute and charter application, used its own "innovative rubric" (that did not request any additional information either) and then denied the Charter Application on the basis of its own self-serving definition that was not contained in the charter statute or State Board rules. Further, there is nothing in the charter statute that allows local school boards to deny charter applications on the basis of any requested additional information.

against any local school board that disobeys its rules. *See* § 1001.83(8), Fla. Stat.; § 1008.32, Fla. Stat.

Moreover, the School Board is precluded from adopting charter school rules that modify the charter statute by the express terms of the charter school statute itself. Indeed, the State Board of Education is the only agency with the delegated legislative authority to adopt charter public school rules interpreting or supplementing the charter statute (especially in the area of charter school applications) under subsection (28) of the charter statute. The charter school statute is explicit on this point (and even states that both local school districts and charter schools are limited to having only a consulting role in the adoption of charter school rules) under section (28) thereof:

> **(28) Rulemaking.--*The Department of Education, after consultation with school districts and charter school directors, shall recommend that the State Board of Education adopt rules to implement specific subsections of this section.*** Such rules shall require minimum paperwork and shall not limit charter school flexibility authorized by statute. ***The State Board of Education shall adopt rules, pursuant to ss. 120.536(1) and 120.54, to implement a charter model application form, standard evaluation instrument,*** and standard charter and charter renewal contracts in accordance with this section.

§ 1002.33(28), Fla. Stat. (emphasis supplied).

With respect to charter school applications, in 2010 the State Board of Education adopted Rule 6A-6.0786, entitled "Forms for Charter School Applicants and Sponsors." Subsection (1) of that Rule requires all charter

applicants to use the Model Florida Charter School Application (Form IEPC-M1) adopted by the State Board of Education. Subsection (2) of that State Board Rule, in turn, requires that local school board "Sponsors shall evaluate Model Florida Charter School Applications using Form IEPC-M2, Florida Charter School Application Evaluation Instrument." None of these adopted State Board forms provide for a local school board to add additional requirements (such as their own definition of "innovative") into the charter statute or otherwise deviate from the substance of the adopted model forms.

Further, the very text of the charter statute confirms that local schools boards have no authority to force their policies onto charter schools. The terms of the charter statute state explicitly at § 1002.33(5)(1)(d), Fla. Stat., that:

> The [school board] sponsor shall not apply its policies to a charter school unless mutually agreed to by both the sponsor and the charter school. If the sponsor subsequently amends any agreed-upon sponsor policy, the version of the policy in effect at the time of the execution of the charter, or any subsequent modification thereof, shall remain in effect and the sponsor may not hold the charter school responsible for any provision of a newly revised policy until the revised policy is mutually agreed upon.

And, in case this prohibition was not clear enough, the charter statute goes on to reiterate at § 1002.33(6)(h), Fla. Stat., that the:

> [school board] sponsor may not impose unreasonable rules or regulations that violate the intent of giving charter schools greater flexibility to meet educational goals.

This means that the School Board cannot lawfully apply School Board Policy 2.57 (and its newly-created definition of "innovative") to Appellees without their consent, and Appellees clearly have not so consented. *See also W.E.R. v. School Board of Polk Co.*, 749 So.2d 540, 542 (Fla. 2d DCA 2000)("While the school board has significant authority in matters not addressed specifically by the Legislature, it is prohibited from promulgating rules at variance with legislation.)

The School Board's argument that it does not have to comply with, and can go beyond, the State Board of Education's charter rules on the basis of this Court's decision in *Imhotep-Nguzo Saba Charter School v. Dept. of Education*, 947 So.2d 1279 (Fla. 4th DCA 2007), is similarly flawed. The *Imhotep* decision is outdated (having been decided before the State Board of Education adopted its own model charter application rules and forms) and does not mention that the State Board of Education is the only agency with delegated legislative authority to adopt charter schools rules under § 1002.33(28), Fla. Stat. Hence, it is apparent that the Fourth DCA never actually addressed the issues raised here in the *Imhotep* case and it is, therefore, distinguishable.

Second, from a factual perspective, it is clear that the only reason that the school board was allowed to adopt its charter application policy in the *Imhotep* case is because it received a special waiver ***from the State Board of Education*** allowing it do so under a provision of the charter school law that has long been

rescinded. Indeed, the case itself even notes that the school board "policy implements a State Board of Education waiver, exempting Palm Beach County from the statutory cap on the number of charter schools permissible in a particular county." *Imhotep*, 947 So.2d at 1281. There is no longer a cap on the number of charter schools under Florida law as that provision of the charter school statute was rescinded years ago. Adopting a policy after being delegated the power to do so by the State Board of Education is a very different point than the issue raised in this case, namely whether the School Board has the delegated legislative authority to adopt charter school rules since that power lies only with the State Board of Education. Hence, the school board in *Imhotep* would thus no longer be legally allowed to enforce its policy (and neither would any school boards be allowed to do so today as the State Board of Education's charter application rules preempt the field). *See* Rule 6A-6.0786, F.A.C. Further, the *Imhotep* decision clearly contradicts the provisions of the charter statute delegating legislative authority to adopt charter rules to the State Board of Education only and the statutory provision that precludes school board sponsors from applying their policies to charter schools without their consent. In sum, with all due respect to this Court, the *Imhotep* case is no longer good law.

C. The School Board Did Not Properly Conclude That Appellees' Projections Were Not Realistic.

The School Board improperly concluded that the numerical projections contained in the Charter Application were not realistic. The School Board here found two of the Charter Application's sections to "partially meet the standard" because it did not like the numerical projections contained therein. However, the fact that School Board staff might question these projections because it would have used different numbers is not sufficient to deny the application on these points. *See School Board of Volusia County v. Academies of Excellence*, 974 So.2d 1186 (5th DCA 2008)(school board cannot base charter application denial on opinion or conjecture). The fact that district staff suddenly determined the Appellees' projections on these points to somehow be unrealistic, when staff had found those same basic projections to be realistic at least seven times previously and also in the last charter application it reviewed from CSUSA, can only prove the merits of Appellees' position here. Regardless, Appellees adequately rebutted the School Board's assertion that its projections were unrealistic during the many proceedings below. It is telling that the School Board never explains anywhere in its Initial Brief what evidence it actually had to support its denial. The opinions of its staff alone are not sufficient. Further, there is nothing in the charter statute that allows a school board to deny a charter application for only being partially deficient. The School Board does not contend anywhere that these sections of the

Charter Application actually fail the standard. To the contrary, the School Board's own documents confirm that these sections at least partially met the standard and did not fail them. It is axiomatic that an area that does not actually fail the standard cannot be used to deny a charter application for being legally insufficient. *See School Board of Volusia County v. Academies of Excellence*, 974 So.2d 1186 (5th DCA 2008)(school board cannot base charter application denial on opinion or conjecture).[8]

D. The School Board Cannot Base Its Denial On Sections Of The Charter Application That Did Not Fail The Standard.

The School Board argues on appeal that it can deny a charter application for only partially meeting the applicable legal standards. While the School Board is tasked under the State Board of Education's Evaluation Instrument with assessing whether sections of a charter school application meet the standard, partially meet the standard, or do not meet the standard, the School Board points to nothing in charter school law that specifically allows it to deny a charter application based upon sections that even it concedes did not actually fail the governing legal standard. Indeed, to hold otherwise would be both unfair and unlawful. And, again, nowhere does the School Board ever set forth what

[8] Moreover, the School Board's own Director of Charter Schools confirmed that it had approved charter applications that only partially met applicable standards in the past and that it had no set standard in that regard. (R. 686.)

evidence it actually had to support its denial, explain how the assessment of its staff constitutes competent evidence, or even rebuts all the information proffered by Appellees at multiple points below that proved the School Board's conclusions to be wrong, insufficient, or incomplete. The fact that School Board staff disagreed with numbers in the Charter Application does not mean that the Charter Application did not meet legal standards.

E. The School Board's Approval of Substantially-Similar Charter Applications Seven Times Previously Does Prove That The School Board Lacked Good Cause Here.

On this point, the School Board contends that it has every right to deny this Charter Application even though it has approved virtually the same charter application seven times previously. Although the School Board concedes that it cannot act arbitrarily or unlawfully in its review of charter school applications, it argues that it acted properly in this case. If this Charter Application had been substantively different from the seven charter applications that were approved by the School Board previously or the law had somehow changed in the interim, the School Board might be able to plausibly make that argument. However, it points to no change in the law nor to any substantive difference in this Charter Application in its Initial Brief that would somehow explain its sudden denial or the change in its denial standards here (other than its own illegal definition of

"innovative" contained in School Board Policy 2.57 that defines "innovative" to limit direct competition from charter schools).

F. The School Board Never Objected To The Discussion Of The Performance Of Appellees' Other Schools Below And That Evidence Also Proved That The School Board's Conclusions To The Contrary Were Unreasonable.

With respect to the four sections of the Charter Application that the School Board conceded "Partially Met the Standard," the School Board argues that the fact that the Appellees demonstrated that these areas were in no way deficient at its current charter schools in Palm Beach County did not refute that the School Board had good cause to deny this Charter Application. To the contrary, this is exactly what it means. The School Board misses the point that Appellees' demonstration that these four areas were not at issue in other schools confirmed that the School Board's determination on these points in this Charter Application were insufficient, unreasonable, or conjectural. Regardless, as noted earlier in the Answer Brief, the School Board never objected to the discussions about Appellees' other charter schools either before the State Board of Education or before the CSAC below and has, thus, now waived the issue. *Yachting Arcade, Inc. v. Riverwalk Condo. Assoc., Inc.*, 500 So.2d 202, 204 (Fla. 1st DCA 1986)(for an administrative issue to be preserved for appeal it must be raised in the administrative proceeding of the alleged error).

However, the record actually confirms that the School Board both participated in, and had the opportunity to rebut, the adducement of this evidence. The School Board also fails to acknowledge that it had the very same opportunity to make additional points at multiple hearings below and took advantage of them. The School Board cannot legally use its own self-serving definition of "innovative" to limit competition from charter schools, and it cannot deny a Charter Application in areas where it has not even asserted that the Charter Application actually failed the standard.

III. The Charter School Appeal Process Is Wholly Constitutional And The School Board Lacks Standing To Raise Constitutional Issues In This Appeal.[9]

A. This Court Cannot Here The School Board's Constitutional Challenges.

Case law from the Florida Supreme Court is clear that the School Board, as a state agency, cannot bring a constitutional claim in this appeal (even as a constitutional office). In the case of *Dept. of Education v. Lewis*, 416 So.2d 455 (Fla. 1982), the Florida Supreme Court held specifically that state agencies or

[9] The same constitutional arguments were raised by the School Board in the *Florida Charter Educational Foundation, Inc. v. School Board of Palm Beach County* appeal (Case No. 4D15-2032) currently pending before this Court. This appeal has been fully briefed and oral argument was held on October 4, 2016. It is Appellees' position that this Court's ruling in Case No. 4D-2032 on these very same constitutional issues will be largely dispositive of the same constitutional issues raised by the School Board here in this appeal.

officers, such as the School Board here, cannot challenge the constitutionality of statutes in their official capacity:

> In the court below, the appellees challenged the appellants' standing to seek a determination that the proviso is unconstitutional. While we find the individual appellants to have such standing as ordinary citizens and taxpayers, they have no standing in their official capacities. ***State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise.***

416 So.2d at 458-459 (emphasis supplied). *See also Crossings At Fleming Island Community Development Dist. v. Echeverri,* 991 So. 2d 793 (Fla. 2008)(fact that property appraiser was defendant in action claiming tax exemption did not entitle appraiser to challenge constitutionality of statute); *Miller v. Higgs*, 468 So.2d 371, 374 (Fla. 1st DCA 1985).

Moreover, the School Board would also lack standing to challenge the State Board Rule codifying the model charter application form and its requirements either under *Graham v. Swift*, 480 So.2d 124 (Fla. 3d DCA 1986):

> The foregoing principles are equally applicable when a public official questions the validity of a regulation or rule because a valid rule or regulation of an administrative agency has the force and effect of law.

In this appeal, it is plain, by simply examining the case caption, that the School Board has brought suit in its official capacity as a school board. As such, it is absolutely precluded from bringing a constitutional claim involving the CSAC, the State Board, or the charter school statute in this appeal since it must, by law,

"presume all such legislation to be valid." Hence, the constitutional claims it raises in this appeal (and in its previous appeal) must be dismissed for lack of standing. *See also Island Resorts Investments, Inc. v. Jones*, 189 So.3d 917, 922 (Fla. 1st DCA 2016)(county property appraiser lacked standing to raise constitutional challenge to statute).

B. The Charter School Appeal Process Does Not Vest "Unbridled Discretion" In the State Board of Education And Is Not Unconstitutionally Vague.

As noted in Subsection A above, the School Board lacks standing to bring a constitutional claim involving the charter statute. However, even if the School Board could bring a constitutional challenge in this appeal, the School Board could not prevail. In its Initial Brief, the School Board argues that 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's decision." Initial Brief, pp. 37-50.

The School Board claims that there are no standards in the charter school statute to guide the State Board of Education's decision. Initial Brief, p. 38. This is not true. The charter statute explicitly states that a charter application can be denied by a school board only for "good cause," and that is the very standard that the State Board of Education used to test whether a school board had adequate grounds for denial here. Although the statute itself does not define "good cause,"

the standard is a familiar legal one interpreted without difficulty by many agencies and courts and, thus, provides an adequate standard here (as it does in many statutes and state rules). A quick search in Westlaw revealed that there are apparently several hundred Florida statutes that apparently use the "good cause" standard. There is no due process violation in the statute's use of the common "good cause" standard or the State Board of Education's implementation of it in this case.

C. The Charter Application Appeal Process and State Board's Final Order Are Fully Constitutional.

In its Initial Brief on this point, the School Board asserts that the charter appeal process and the Final Order issued by the State Board of Education reversing its denial of a Charter Application unconstitutionally exceeded the constitutional powers granted to the State Board of Education. Initial Brief, pp. 43-45. The constitutional challenge against the State Board of Education's role in the Florida charter school law raised by the School Board here is entirely political in nature. At its core, the Florida charter school statute, § 1002.33, Fla. Stat, was passed (and repeatedly amended) by the Florida Legislature to challenge the near monopoly enjoyed by traditional public school boards who were often failing to adequately educate Florida's school children, especially minorities.

The powers of the State Board of Education are set out in Article IX, Section 2 of the Florida Constitution which provides, in pertinent part:

> **§ 2. State board of education**
>
> 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.

According to the Florida Constitution, then, the State Board of Education's constitutional powers are not defined only in the Florida Constitution, but in the powers granted to it by the Florida legislature through the passage of law. Ultimately, the State Board of Education has the authority to supervise all public education matters in Florida. To that end, the Florida Legislature has specifically decided that the State Board of Education should have the power to reverse local school boards who deny charter applications to frustrate competition, as monopolists often do. *See* § 1002.33(6)(c)&(d), Fla. Stat. Because this power was granted to the State Board of Education by statute, it is now part of its ***constitutional*** powers "as provided by law" and it exercised those constitutional powers here. The *Duval County School Board v. State Board of Education*, 998 So.2d 641, 644 (Fla. 1st DCA 2008), case cited by the School Board is, therefore, wholly distinguishable as the State Board was exercising its own constitutional powers here, and it would no longer be good law after the *Echeverri* line of cases regardless.

On balance, the charter application appeal section of the Florida charter statute is neither extraordinary nor unique. It merely establishes a procedure whereby the State Board may, upon the request of a charter applicant or a school board, pursuant to certain statutory criteria, reverse the decision of a local school board regarding a charter school application. This is a reasonable and common delegation of authority by the Florida Legislature to the State Board of Education.

Importantly, the authority delegated to the State Board of Education through the charter school statute provides for consistency in the administration thereof throughout the State, and is consistent with the general supervisory role of the State Board of Education over public schools seen throughout the Florida Education Code. For instance, the Legislature has delegated to the State Board the authority to establish binding statewide regulations on local school boards regarding: school fees; teacher certification; standardized testing; accounting and reporting; and school transportation, among others. The fact that local school boards are prohibited from disobeying the charter school law by State Board of Education oversight of the charter application process fits perfectly within the established constitutional scheme.

It is well-established that statutes come to the district courts of appeal clothed with a presumption of constitutionality. *Crist v. Florida Ass'n of*

Criminal Defense Lawyers, Inc., 978 So.2d 134 (Fla. 2008). A "determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." *Fla. Dep't of Revenue v. City of Gainesville*, 918 So.2d 250, 256 (Fla.2005).

D. The Charter Appeal Process and the State Board's Final Order Do Not Violate The School Board's Constitutional Powers.

In this appeal, the School Board also claims that the charter appeals process and the State Board of Education's Final Order violate its constitutional power over local schools. Initial Brief, p. 45-49. Although Article IX, section 4(b) of the Florida Constitution does provide local school boards with the authority to "operate, control and supervise" local schools, their constitutional power is not exclusive as the State Board of Education, as outlined above, has the overall role of governing Florida's education system.

For example, under § 1001.02(2)(r), Fla. Stat., and § 1001.03(8), Fla. Stat., the Florida Legislature has also made it very clear that local school boards have to comply with the actions and rulings of the State Board of Education. Section 1001.32, Fla. Stat., provides specifically that "[a]ll actions of district school officials shall be consistent and in harmony with state laws and with rules and minimum standards of the state board and the commissioner." Moreover, local school boards are also specifically prohibited from promulgating rules at variance

with legislation. The Florida Legislature has made the choice, through the charter appeal process, that it wants the State Board of Education to review school board charter application decisions to maintain uniformity of standards throughout the State and to provide some check on local school boards' attempts to thwart the rise in competition from charter public schools (as happened here). The Legislature was right, given the openly lawless conduct exhibited by the School Board here, not to let the fox guard that henhouse.

The State Board of Education ultimately supersedes and supervises over local school boards, just as the Florida Constitution dictates. The State Board of Education adopts instructional standards, standardized tests, teacher certification requirements, building requirements, busing requirements, requirements governing the hiring and dismissal of teachers, and the like. All of these rules and regulations must be obeyed by local school boards and school boards often have to appeal adverse findings of the State Board of Education/DOE.

Hence, it is simply untrue that the constitutional authority of local school boards is either exclusive or preeminent in the way suggested by the School Board in its Initial Brief, and the constitutional authority of local school boards is not violated by the sensible charter appeals process set forth in statute by the Florida Legislature. Indeed, the CSAC is composed of members from both charter public schools and local school board stakeholders equally to make sure

that the process is fair to both sides. *See* § 1002.33(6)(e), Fla. Stat. In sum, the charter appeals process is constitutional, fair, and balances the interests of competing stakeholders who have often have opposite interests quite well, and Florida's schoolchildren have better educational opportunities because of it.

E. The *Volusia County* Case Is Directly On Point And Dispositive.

Despite the School Board's protestations to the contrary, the Fifth Circuit case, *School Board of Volusia County v. Academies of Excellence*, 974 So.2d 1186 (5th DCA 2008)[10], is both directly on point and dispositive of the substantive constitutional challenge to the charter appeal sections of the charter statute raised by the School Board here. In the *Volusia County* case, the appellate court specifically analyzed whether the charter application appeal process was constitutional and held that it was:

> Finally, the School Board challenges the State Board's final order, claiming that the order which was entered pursuant to section 1002.33 of the Florida Statutes conflicts with, and thereby violates, the School Board's constitutional authority under Article IX, section 4(b), of the Florida Constitution, to operate, control and supervise public schools, and its authority under Article IX, section 1(a), of the Florida Constitution, to make adequate provision for a uniform and high quality system of free public schools. Specifically, the School Board argues that, because the act of operating and controlling all free public schools in Volusia County is conferred exclusively on

[10] The *Volusia County* case was decided before the Florida Supreme Court's *Echeverri* decision was handed down and, thus, the School Board's lack of standing does not appear to have been raised as an issue in that case.

> the School Board, is unconstitutional because it permits the State Board to open a charter school.
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> ****
>
> §1002.33(6)(c), Fla. Stat. 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). Furthermore, under the Constitution of Florida, while the school board shall operate, control and supervise all free public schools within their district the State Board of Education has supervision over the system of free public education as provided by law.
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> AFFIRMED.

974 So.2d at 1192-1193.

In its Initial Brief, the School Board argues essentially that the *Volusia County* case is flawed because the charter statute gives the State Board of Education the power to review charter application decisions and that this power is unconstitutional. But, as detailed above, the School Board's authority over local schools in Florida's constitutional scheme is not absolute by any stretch. Indeed, the Florida Constitution specifically gives the State Board of Education all the power of "supervision of the system of free public education as is provided by law." And, the charter law unequivocally and specifically gives the State Board

of Education the power to review charter application denials. Hence, this power must be constitutional.

CONCLUSION

The School Board of Palm Beach County denied Appellees' Charter Application solely on the basis of staff opinion and its own definition of "innovation" adopted in School Board Policy 2.57 (in violation of the charter statute and State Board of Education rules) specifically to curb charter school competition. Thus, the Charter School Appeal Commission (which consisted, in equal part, of school board stakeholders) unanimously determined that the School Board lacked any competent substantial evidence to support its denial of the Charter Application, and the State Board of Education unanimously agreed. If the School Board had any competent substantial evidence that the Charter Application was legally deficient (other than the opinion of its own staff or illegal definition of "innovation"), it surely would have cited to that evidence on appeal. Further, the School Board plainly lacks standing to raise constitutional issues in its official capacity, and the Fifth Circuit has already held in the *Volusia County* case that the charter appeal process set out in the charter statute is fully constitutional regardless. This Court, if it reaches the issue, should hold likewise.

WHEREFORE, for all the foregoing reasons, the Renaissance Charter School, Inc. and Renaissance Charter High of Palm Beach respectfully request

that this Court: 1) affirm the Final Order of the State Board of Education; 2) order the School Board of Palm Beach County to comply forthwith and move forward with negotiating the charter contract between the parties: and, 3) order any further relief deemed just and proper.

CERTIFICATE OF COMPLIANCE

We hereby certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been e-filed via e-DCA and has been served by Electronic Mail on this 4th day of January, 2017 upon the following:

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