IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC07-2402

Fourth DCA Consolidated Case Nos. 4D06-2378 & 4D06-2379

Fla. Board of Education Case Nos. 2006-1169 FOI

THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA
Petitioner,

vs.

SURVIVORS CHARTER SCHOOL, INC.
Respondent

AMENDED ANSWER BRIEF OF RESPONDENT SURVIVORS CHARTER SCHOOL, INC.

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REFERENCES TO THE RECORD AND ABBREVIATIONS

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The abbreviations used throughout this brief are as follows:

"APA" refers to the Administrative Procedures Act.

"Charter School Statute" refers to § 1002.33, Fla. Stat.

"CSAC" refers to the Charter School Appeal Commission.

"I. Br." refers to the Initial Brief of the School Board.

"SBE" refers to the State Board of Education.

"School Board" refers to the School Board of Palm Beach County.

"Superintendent" refers to the Superintendent of the School District of Palm Beach County.

"Survivors" refers to Respondent Survivors Charter School, Inc.

STATEMENT OF THE CASE AND THE FACTS

I. Nature of the Case.

The pivotal issue in this case is whether the School Board is subject to the provisions of the Administrative Procedures Act ("APA"), Chapter 120. Fla. Stat. in its application of the immediate termination provisions of the Charter School Statute, § 1002.33, Fla. Stat.

The Fourth District Court of Appeal, in its meticulous, in-depth examination of the issue, specifically held the School Board was not exempt from the APA, lacking an express statutory exemption. Further, The Fourth District unequivocally determined School Boards must obey the Legislature's mandate, set forth in the APA, that the School Board had the obligation to give Survivors adequate notice and conduct an quasi-judicial hearing prior to its determination that Survivors' substantial interests should be foreclosed for its alleged maladministration .

The record below demonstrates the School Board dodged its duty as gatekeeper, made an end run around the APA, failed to provide the requisite adequate notice and hearing, and deprived Survivors' right to due process of law .

II. Factual Background

A. The School Board's End Run

Survivors operated two charter schools, Survivors West Palm Beach

("Survivors WPB") and Survivors Boynton Beach ("Survivors BB") pursuant to two different charter contracts. (R.0121, R.0166) On January 13, 2006, an Audit Report regarding Survivors' financial operations was issued by the School District's Auditor. (R.0252-0289) Importantly, Survivors auditors reported that the alleged financial mismanagement identified in the Audit Report amounted to approximately 1% of Survivors' budget. (R.0376)

Shortly after publication of the final Audit Report, Survivors received notices that the School Board intended to sit in judgment of Survivors' fate within 24 hours. (R.0332, R.0335) These *gotcha* notices failed to inform Survivors that it could request a hearing or appear at the meeting in an adversarial manner.

The School Board convened the noticed meeting on January 25, 2006. "The citizens regarding the Charter School meeting have assembled . . . ." (R.0340) announced Superintendent Johnson in his opening statement.

That this meeting was to be short, sweet and to the point was clear. There would be with no opportunity afforded Survivors for any presentation of witnesses, introduction of evidence or argument of counsel. Stunningly, School Board Chairman Lynch announced:

> We're going to cover this today. Our meeting ends at 6:00. . . . We will go ahead and honor the 3-minutes per speaker -- there should be enough time to get through at 20 'til 6 whether the speakers are finished or not, we will switch it over to the Board, so the Board will have 20 minutes to discuss and vote on the issues at hand. . . .

(R.0340) The timeline was set. The School Board heard comment from the public and then spent a scant 20 minutes sinking Survivors' schools and its substantial interests therein. (R.0348-357)

Clearly, 20 minutes was insufficient for informed decision-making. The record shows the School Board members did not understand the Audit Report, did not believe that an emergency existed, and did not believe that any health, safety or welfare issues existed. In their own words:

> Dr. Richmond: . . . I really would have liked to have had more time to look into this [Audit Report], but this came to me in the last 24 hours, could I ask our Auditor, what is the point of the Audit is it to fix what's wrong...to tell the school to fix what's wrong. . .to eliminate what's wrong...and also why did we not get it [the Audit Report] until now? Why did it take so long to get to us and did anybody else have the Audit results?

(R.0354)

> Dr. Richmond: . . . you know it's just frustrating not having had more time to really understand the other options, etc.

(R.0355-0356)

> Dr. Benaim: . . . there isn't an urgency here, it's an exasperation.

(R.0356)

> Dr. Robinson: . . . I'm not aware of any children in danger. I don't see any health, safety, welfare issues. I see money mishandling and so it just seems to me that we could provide some additional oversight recommendations . . .

(R.0353)

Importantly, the School Board members, the Superintendent, and their Chief Counsel had no idea whether they had afforded due process to Survivors:

> Dr. Robinson: Can legal verify for me, somebody verify for me that due process rights were afforded to the schools?
>
> Chief Counsel Williams: Under the Statute, the Board has the ability to immediately terminate if it finds that good cause exists. After that the Charter School has the right to file an appeal and if they file an appeal, they will have the opportunity to present their side of the story to the Appeals Commission which would make a determination whether or not the decision of this board constituted good cause.
>
> Dr. Johnson: Short answer is yes.
>
> Dr. Robinson: That's not how I interpreted that, but okay.

(R.0351)

Yet, despite expressed confusion and conflict, the School Board followed like sheep, ignored due process, and made swift slaughter of Survivors ….all on a single word: "okay." The School Board voted for the immediate termination of Survivors' two charters. (R.0356-357) Its termination orders state that cause for termination existed "because of the severity of the Audit Findings." (R.0359, R.0362).

B. Appeal to The SBE.

Survivors appealed to the SBE which, pursuant to the Charter School Statute, referred the appeal to the CSAC. CSAC scheduled and convened a meeting, not a hearing: As CSAC is specifically exempt from the APA, the

meeting is permissible. "Dr. McDougal: We have this process. It's new, it's different, **it's not a hearing.**" (R.1015)(emphasis added). Moreover, the CSAC refused to accept any new evidence at this meeting.

> Mr. Yarnell: I just want to offer that I have a transcript of the deposition here today that was taken yesterday of the internal auditor Robert Bliss, as well as exhibits to that transcript, and I would like to offer it into this – into evidence at this hearing, and that's the proffer I make.
>
> Dr. McDougal: At this time the Commission is not accepting new information by either party due to the diligence of the Commission and having to be able to review the documentation prior to the commission [meeting]. In addition, **our decision is made off the information that was supplied the school board since we are reviewing the school board's decision**. (emphasis added)

(R.1206-1208)

At the conclusion of its meeting, the CSAC recommended reversing one of the School Board's terminations and upholding the other. (R.1252)

Subsequent to the CSAC meeting, the SBE met in Tampa and considered each appeal for approximately ten minutes. The SBE determined that it would uphold both of the School Board's terminations, (R.1321-22, R.1329), ignoring CSAC's recommendation that Survivors WPB should not be terminated, (R.1252). The SBE never discussed the violation of Survivors' due process rights. (R.1260-1329) Survivors preserved its due process rights by raising their violation throughout its appellate briefings and arguments to both the CSAC and SBE.

C. Proceedings Before The Fourth District Court of Appeal.

After losing at the SBE, Survivors perfected its appeal to the Fourth District, pursuant to § 120.68, Fla. Stat. (2003). The Fourth District considered two issues:

> The first is whether the Administrative Procedure Act (APA) applied to the School Board's charter termination process. The second is, if the APA did apply, what due process protections were required and whether they were provided by the School Board.

See Survivors Charter School, Inc. v. School Bd. of Palm Beach County, 968 So.2d 39, 42 (Fla. 4th DCA 2007).

As to the first issue, the Fourth District held that (a) the School Board is an agency to which the APA applies, (b) termination affects Survivors' substantial interests, and (c) the School Board is not exempt from the APA. *Survivors* at 43.

As to the second issue, the Fourth District held that (a) "substantial interests" cannot be terminated using abbreviated emergency meeting procedures, (b) the charters and the immediate termination provision of the Charter School Statute require a showing of good cause before, not after, termination, (c) "immediate" means something less than the ninety (90) days provided for normal terminations, and (d) the APA procedures for determining substantial interests supply the timelines for notice and hearing not stated in the Charter School Statute. *Survivors* at 45. The Fourth District reversed the terminations because the School Board failed to follow the notice and other mandates of the APA thereby violating Survivors' right to due process of law. *Survivors* at 45-46.

SUMMARY OF ARGUMENT

The APA applies to School Board action. Unless exempt, all administrative agencies must abide the APA. The School Board is an administrative agency which must comply with the APA when terminating charters unless it is exempted from the APA.

Survivors has a substantial interest in its charters. Survivors has a substantial interest because (a) it suffers an injury in fact when its charters are terminated and (b) the immediate termination provision of the Charter School Statute requires a showing of good cause before termination. Therefore, APA provisions regarding decisions affecting substantial interests must be followed by the School Board.

The School Board is not exempt from the APA. APA exemptions cannot be implied. There is no express exemption for school boards when terminating a contract immediately. Additionally, the Charter School Statute provides express exemptions for the SBE and the CSAC when each considers termination decisions on appeal which supports an interpretation that school boards are not exempt.

Survivors did not waive its right to a hearing. The School Board's notices of the emergency meeting failed to describe the jurisdictional basis and the rights of Survivors to a due process hearing as required by the APA. Survivors had no duty to request a hearing; it was the School Board's obligation to notify Survivors that it

had a right to do so. Moreover, the plain language of General Provision J of the charters makes clear that a notice of termination can only be issued on 24 hours notice after "good cause has been shown" at a hearing. This provision confirms Survivors right to a proper notice of a hearing prior to termination.

Survivors has a right to a quasi-judicial hearing to contest the evidence. The School Board terminated Survivors' charters on the basis of an Audit Report without giving Survivors an opportunity to cross examine the auditor, any witnesses discussed in the audit report or to otherwise provide a contrary audit report. The School Board acted here solely on the basis of the Audit Report which was not introduced into evidence at a quasi-judicial hearing. It is a violation of a party's right to due process of law for an agency to act upon hearsay written reports.

Survivors appropriately appealed the actions of the School Board. The School Board argues that its actions are immune from review by the Fourth District because the SBE's final orders constitute final action. If this were the state of the law, then the School Board's actions could never be reviewed by a court. The appeal to the SBE is simply an administrative procedure to be exhausted prior to appealing to the district court.

An emergency meeting cannot be used to terminate substantial interests. Although there are two emergency meeting provisions in the APA, neither is

applicable to charter terminations. A complete termination of contractual rights is not envisioned by these emergency meeting provisions. The School Board's termination orders failed to comply with these "emergency" meeting provisions by not reciting specific facts showing a continuing threat to the public. More importantly, the School Board members specifically noted that no emergency existed.

The SBE and the CSAC do not provide due process of law. The SBE argues in its amicus brief that it provided due process of law to Survivors through its "hearings." This argument contradicts the statements of the Chairman of the CSAC that what occurs at the CSAC is not a hearing and contradicts the Charter School Statute and the Florida Administrative Code that define the SBE and CSAC meetings as "meetings" not "hearings."

Survivors is entitled to attorneys' fees. The Fourth District correctly awarded Survivors its attorneys' fees because of the School Board's flagrant disregard for Survivors' right to due process of law.

ARGUMENT

I. The APA Applies To The School Board.

Unless exempted, the APA applies to all administrative agencies. *See Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So.2d 982, 986 (Fla. 1996)("[An administrative agency is] subject to the provisions of the Administrative Procedure Act except where specifically provided otherwise.") § 120.50, Fla. Stat. (1978)("This chapter shall not apply to: (1) The Legislature [and] (2) The courts."). "'[The School] Board is an agency for purposes of Florida's Administrative Procedure Act, Chapter 120, Florida Statutes.' *Witgenstein v. School Board of Leon County*, 347 So.2d 1069 (Fla. 1st DCA 1977)." *Mitchell v. Leon County School Bd.*, 591 So.2d 1032, 1033 (Fla. 1st DCA 1991); *see also* § 120.52(1)(b)7., (6), Fla. Stat. (2003); *Survivors* at 42. Thus, unless otherwise exempted, the School Board is an agency which must abide by the APA.

II. Survivors Has A Substantial Interest In Its Charters Which Are Protected by The APA From Being Terminated Without Adequate Notice and Hearing.

The School Board's decision to terminate Survivors' charters was a rash decision affecting a substantial interest of Survivors in its contractual rights. To establish that the substantial interests of a party will be determined by an agency "requires a showing that (1) the proposed action will result in injury-in-fact which

is of sufficient immediacy to justify a hearing; and (2) the injury is of the type that the statute pursuant to which the agency has acted is designed to protect." *Fairbanks, Inc. v. State, Dept. of Transp.*, 635 So.2d 58, 59 (Fla. 1st DCA 1994); *Survivors* at 42. In this case, the School Board acted under the Charter School Statute to immediately terminate Survivors' charters. Such termination is an injury in fact. The Charter School Statute protects Survivors from termination until a showing of good cause before immediate termination. *See* § 1002.33(8)(d), Fla. Stat. (2004) . Therefore, the School Board is required to hold a hearing noticed and conducted in accordance with the APA prior to termination.

The School Board argues that Survivors' substantial interests are not affected because the School Board assumes operation of the schools temporarily while the charter school appeals the School Board's decision. I. Br. at 17. This argument is absurd. Loss of complete operational control impacts the substantial interests of Survivors, including denuding Survivors of any assets to support its challenge of the School Board's termination decision on appeal.

III. The Fourth District Decision Correctly Held That The School Board Is Not Exempt From The APA.

Both the CSAC and the SBE are expressly exempted from the APA by § 1002.33(6), Fla. Stat. (2004). *See* § 1002.33(6)(c) and (6)(f)(2), Fla. Stat. (2004). If the Legislature intended to exempt school boards it could have done so when it revised section 1002.33 in 2004, 2006 and 2007. It did not provide the

exemption. Therefore an exemption should not be implied. This longstanding Florida Public Policy was recently applied by the First District:

> The Administrative Procedure Act presumptively governs the exercise of all authority statutorily vested in the executive branch of state government. . . . There are, to be sure, exceptions and special requirements stated in the Administrative Procedure Act itself. *See* §§ 120.80-.81, Fla. Stat. (2003). But other statutes are construed, whenever possible, "*in pari materia* with," *Big Bend Hospice, Inc. v. Agency for Health Care Admin.*, 904 So.2d 610 ([Fla.] 2005), **not as repealers by implication of, the Administrative Procedure Act.**

Gopman v. Fla. Dept. of Ed., 908 So.2d 1118, 1120 (Fla. 1st DCA 2005)(emphasis added).

A. There Is No Expressed Legislative Intent That The School Board Is Exempt From The APA When The School Board Acts To Immediately Terminate A Contract.

The School Board argues in its brief that the APA does not apply to the School Board because the language of the Charter School Statute ought to be interpreted in accordance with CSAC Guidelines created in 2003 (not approved as part of the Florida Administrative Code) and with a Florida House Staff Analysis created in 2001. I. Br. at 13, 19 & 28. The CSAC Guidelines should be ignored because they do not reflect the SBE's interpretation of the Charter School Statute. It is simply a staff person's perspective on the procedure used by the CSAC, not school boards. With respect to the House Staff Analysis, it is unrealistic in today's political environment to believe that such an analysis represents legislative intent:

> It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 99 (1989)(Justice Scalia specially concurring).

1. The Fourth District Held That The Charter School Statute And The APA Are Not In Conflict.

The School Board erroneously argues that the Fourth District noted a "clash" between the Charter School Statute and the APA. I. Br. at 10. However, the Fourth District actually noted that there was only a "seeming clash." *Survivors* at 45. The Fourth District explained that no conflict exists because "immediate termination is cognizable under the charters with twenty-four hours notice only after the School Board has determined that good cause for termination has been shown following fourteen days notice and a hearing." *Id.*

2. Determining Legislative Intent Is Unnecessary **Because** Section 1002.33(8)(d) Is Unambiguous**.**

The School Board's argument that this Court must resort to a House Staff Analysis of the Charter School Statute places the "cart" before the "horse." Longstanding Supreme Court precedent requires an ambiguity to exist prior to resorting to legislative intent:

> The plain meaning of the statute is always the starting point in statutory interpretation. *See Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). As explained in Holly and recited many times by the Court:
>
> > . . . However, [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.
>
> *Id.* (*quoting A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)). Thus, if the meaning of the statute is clear then this Court's task goes no further than applying the plain language of the statute.

GTC, Inc. v. Edgar, 967 So.2d 781, 785 (Fla. 2007).

Section 1002.33(8)(d) provides: "A charter may be terminated immediately if the sponsor determines that good cause **has been shown** or if the health, safety, or welfare of the students is threatened." *See* § 1002.33(8)(d), Fla. Stat. (2004)(emphasis added). The requirement for a "showing" of "good cause" is unambiguous. There is no procedural guidance in section 8(d) instructing school boards on how to make a showing of good cause. Thus the APA provides the missing procedural guidance, s*ee* § 120.569(2), Fla. Stat. (2003), including the right to at least 14 days notice prior to any hearing, *see* § 120.569(2)(b), Fla. Stat. (2003)("All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days . . . .").

The School Board argues that a showing is made by simply presenting documents to the School Board at a meeting. I. Br. at 14. It supports its position

by reference to an internet definition of the word show. I. Br. at 14. The definition of show does not elucidate any issue pertinent to this appeal. The question is not how documents are shown to the School Board. Instead, the question is in what forum the documents must be shown to the School Board.

The School Board then relies upon meeting provisions of the APA to argue that a showing could occur at a School Board meeting. I. Br. at 14. This argument dodges the issue squarely addressed by the Fourth District in its opinion regarding the meeting provisions of the APA. The Fourth District was correct in holding that Survivors' substantial interests required a formal hearing as opposed to a meeting under the APA. *Survivors* at 43 ("Other provisions of the APA apply more generally to agency action outside the realm of decision making that determines substantial interests.").

3. The Charter School Statute Expressly Exempts The SBE And The CSAC, But Not The School Board, From The APA.

The School Board argues that school boards should be exempt from the APA because APA hearings are authorized for claims of employee retaliation and for negotiation of contract terms subsequent to charter application approval. I. Br. at 11. This argument should be ignored because these provisions are inapplicable to charter terminations.

With respect to charter terminations, the SBE is exempt from the APA. *See*

§ 1002.33(6)(c), Fla. Stat. (2004) ("The decision of the SBE is not subject to the provisions of the Administrative Procedure Act, chapter 120."). The CSAC is also exempt. *See* § 1002.33(6)(f)(2), Fla. Stat. (2004) ("The decision of the CSAC is not subject to the provisions of the Administrative Procedure Act, chapter 120."). There is no express exemption for the School Board. Thus, the APA applies to the School Board's termination decisions. *See* § 120.50, Fla. Stat. (1978).

The inclusion of exceptions for the SBE and the CSAC absent an exception for school boards should be construed by this Court to mean that the School Board is not exempt. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."); *Mosher v. Anderson*, 817 So.2d 812, 816 (Fla. 2002) ("Under the doctrine of '*expressio unius est exclusio alterius*' the mention of one thing implies the exclusion of another."); *Rivera v. Singletary*, 707 So.2d 326, 326 (Fla. 1998) (Noting that the Latin maxim "*Inclusio unius est exclusio alterius*" teaches that the inclusion of one thing implies the exclusion of another.); *Indus. Fire & Cas. Ins. Co. v. Kwechin*, 447 So.2d 1337, 1339 (Fla. 1983) ("The express authorization of deductibles in the enumerated situations implies the prohibition against them in all other situations according to the rule of statutory construction *inclusio unius est exclusio alterius."*); *Prewitt Management*

Corp. v. Nikolits, 795 So.2d 1001, 1005 (Fla. 4th DCA 2001) (". . . when a law expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.").

Moreover, implying an exemption from the APA would fail to recognize Legislative discretion to choose when it will act:

> The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms.

Mayo v. Bossenbury, 10 So.2d 725, 726 - 727 (Fla. 1942). Thus, the charters should not be interpreted to take them outside the realm of the APA absent express legislative authority for such an exemption. *See Graham Contracting, Inc. v. Department of General Services*, 363 So.2d 810, 812-13 (Fla. 1st DCA 1978) ("The Department's contract with Graham does not purport to exempt the Department from the Administrative Procedure Act; and, if it did, no such contract could be given supervening effect over the Act, which disciplines this and all other agency action not specifically exempted.").

The School Board argues that *Graham* is inapplicable based on the rationale of *Vincent J. Fasano, Inc. v. School Bd. of Palm Beach County*, 436 So.2d 201

(Fla. 4th DCA 1983). I. Br. At 24. Section 8(d) of the Charter School Statute allows the School Board to make an administrative decision which is then reviewable by the SBE and thereafter by the district not the circuit courts:

> We, therefore, distinguish *Graham*, without expressing a view as to the correctness of its rationale, because in the case at bar Fasano is not precluded from pursuing his cause of action in circuit court.

Fasano at 203.

The Legislature certainly knows how to craft exceptions. One example exists in § 1012.33, Fla. Stat. (2004) which provides specific guidance concerning contracts between school districts and staff. An exemption could have also been provided in § 120.81, Fla. Stat. (2002) where school boards are exempted in other contexts. Again, the Legislature chose not to do so.

4. Inclusion Of Special Hearing Procedures For 90-day Terminations Actually Supports Survivors' Position That Immediate Termination Proceedings Travel Under The APA Hearing Procedures.

The School Board argues that by providing a detailed termination procedure for 90 day terminations under section 1002.33(8)(c), that the legislative intent is that no hearing is required for an immediate termination under section 8(d). I. Br. at 28. This argument ignores the APA's requirement that agencies must adhere to the APA when making decisions that affect substantial interests unless otherwise exempted.

Section 1002.33(8)(c) is an example where the Legislature provided specific

procedural guidance for 90 day terminations. In contrast, the Legislature chose not to delineate any procedures for immediate terminations under section 1002.33(8)(d). Thus, the Legislature left section 1002.33(8)(d) immediate terminations within the realm of the APA. Having chosen to make an express exception to the APA procedures in section 1002.33(8)(c), such an exception should not be implied in section 1002.33(8)(d). *See Leisure Resorts* at 914; *Mosher* at 816; *Rivera* at 326; *Indus. Fire & Cas. Ins. Co.* at 1339; *Prewitt Management Corp.* at 1005.

B. The Legislature Has Pronounced Its Policy By Enacting The Charter School Statute, Providing No Exemption From The APA For The School Board, And Has Thereby Appropriately Struck The Balance Of Power Between School Boards And Charter Schools.

The School Board argues that it should not be held to task for failing to comply with the APA. The thrust of its argument is that it should be exempt like the SBE and CSAC are exempt. I. Br. at 42. However, it can point to no exemption in support of its argument. So, instead, the School Board goes back twenty-five (25) years in jurisprudence to cite employment law cases that have nothing to do with contracts between an entity and a public agency.

The Charter School Statute grants school boards broad enforcement powers in regard to charter school operations. Specific to this case is the power to terminate immediately pursuant to section 1002.33(8)(d) which clearly guides

school boards to determine good cause before terminating a charter. As the Fourth District held, the APA provides the procedure for making that determination. Consequently, a proper statutory scheme exists to avoid agency action based on whim, favoritism, or unbridled discretion:

> Under separation of powers principles and the "nondelegation of duties doctrine," 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). 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." *Dep't of Ins.[v. Southeast Volusia Hosp. Dist.]*, 438 So.2d [815,] 819 [(Fla. 1983)]. . . . :
>
> > 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).

Imhotep-Nguzo Saba Charter School v. Department of Educ., 947 So.2d 1279, 1282 -1283 (Fla. 4th DCA 2007).

IV. Survivors Had No Opportunity To Request And Then Be Heard At A Properly Noticed Hearing.

The School Board's two notices of its emergency meeting do not provide

sufficient information such that Survivors would have a duty to request a hearing. (R.0332, R.0335) In fact, case law supports that Survivors did exactly what it was supposed to do here. File an appeal and contest the lack of notice and hearing (i.e. due process) that the School Board failed to provide to Survivors.

A. Survivors Did Not Have A Duty To Request A Formal "Hearing" Because The School Board's Notices Were Defective.

The notices issued by the Superintendent did not notify Survivors of its right to request a full due process hearing. (R.0332, R.0335) Therefore, the notices were defective. *See* § 120.569(1), Fla. Stat. (2003)("Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section . . . ."). Thus, Survivors was not required to request a hearing.

The School Board obfuscates the issue as to the requirement to request a hearing. The provisions of the APA providing for emergency meetings do not require the party with a substantial interest to request a hearing. *See* § 120.569(2)(n), Fla. Stat. (2003) ; § 120.525, Fla. Stat. (2003) . An emergency meeting is designed to allow an agency to take limited action to cure an emergency, not final action to terminate the substantial interests of a party.

In any event, the School Board failed to comply with the requirements for calling a "meeting" on an "emergency" basis:

> In order to satisfy due process, "an immediate final order must contain factual allegations demonstrating the following:

1. The complained of conduct was likely to continue.

2. The order was necessary to stop the emergency.

3. The order was sufficiently narrowly tailored to be fair."

> [citation omitted] . . . "[I]t is not sufficient merely to allege a statutory violation; instead, the order must contain a factual recitation sufficient to demonstrate the existence of an **imminent threat of 'specific incidents of irreparable harm to the public interest' requiring use of the extraordinary device afforded by section 120.569(2)(n)."** [citation omitted] **Past acts may be sufficient to allege a danger of future misconduct if the conduct alleged is sufficiently serious and is likely to be repeated.** [citation omitted]

Kodsy v. Department of Financial Services, 972 So.2d 999, 1002 (Fla. 4th DCA 2008)(emphasis added). Here, the School Board did not make the requisite findings of fact to support an emergency order. Nor could it make such findings as School Board members specifically noted the absence of any emergency. (R.0353)

B. The Charters Provide For A 24 Hour Notice Of Termination After An Immediate Termination Decision Has Been Made At A Hearing Where Evidence Is Introduced And Cross-Examination Occurs.

The School Board argues in its brief that general provision J of the Survivors WPB and Survivors BB charter contracts allow the termination of the charters immediately without hearing. I. Br. at 20-25. The language of the charters is plain and unambiguous. Survivors disagrees with the School Board as to the meaning of the immediate termination provisions.

The pertinent language of each contract is identical: “This charter may be

terminated immediately upon twenty-four (24) hours notice **if the Sponsor determines** that good cause **has been shown** . . . .” *See* General Provision J of the Survivors WPB and BB Charters (emphasis added). (R.0126, R.0172) The plain language of this provision clearly means that the School Board first holds a hearing and if good cause is shown at the properly noticed hearing, then termination can be ordered on just 24 hours notice thereafter.

The School Board argues that a showing may occur at a meeting relying upon a School Board Policy that allows the School Board to convene at a meeting to make decisions. I. Br. at 21. The School Board’s argument is erroneous because Survivors’ charters are not subject to School Board Policies. *See* § 1002.33(5)(b)(4), Fla. Stat. (2004)(“ The sponsor's policies shall not apply to a charter school.”).

V. Survivors Was Never Given An Opportunity To Contest The School Board’s Contrived “Documentation” At The School Board’s “Emergency Meeting.”

The School Board argues that it provided Survivors with the minimum due process required by the Florida Constitution and U.S. Constitution. The School Board supports its argument by arguing that Survivors received adequate notice and opportunity to be heard as to immediate termination through the audit process.

The School Board used an “audit process” in this case to create “audit documentation” that it then attempted to use in an “immediate termination”

proceeding. However, the School Board has no authority by statute to conduct the immediate termination proceeding as part of the audit proceeding. What the School Board cannot do is to conduct an "immediate termination proceeding" at an "emergency meeting" instead of holding the "hearing" required by the APA for a proceeding under section (8)(d).

The Fourth District's decision holds that neither section 120.525 nor section 120.569(2)(n) are applicable to a termination proceeding because Survivors' substantial interests required a formal hearing under the APA. This decision reflects the different purposes of the "meeting" and "hearing" provisions of the APA. The "action" allowed at a meeting pursuant to either section 120.525 or section 120.569(2)(n) is a limited "action" that can only apply a "cure" to the "immediate danger" identified during the "emergency meeting" and, further, the agency must make findings of fact that an "emergency" exists, define its scope, and then identify the limited "cure" necessary to eliminate just the "emergency." The School Board failed to do any of the things required by the foregoing provisions of the APA because "emergency meetings" are conducted "hurriedly" by the School Board and are only necessary to cut out a small problem, not to end contracts immediately.

There are no "emergency order" provisions in the Charter School Statute. Instead, the Charter School Statute provides an "immediate termination" provision

at section (8)(d) that provides no procedural guidance. Although, the APA applies, section 120.569(2)(n) is inapplicable because it supplies procedures for conducting an "emergency meeting" to address health, safety and welfare issues, not contract terminations on an immediate basis.

The final orders of the School Board each state that the School Board terminated the charters "because of the severity of the Audit Findings." (R.0359, R.0362) The audit findings then form the basis of the School Board's action. Those findings only exist in the Audit Report which was never introduced into evidence nor was the auditor examined under oath in front of the School Board. Thus, the School Board's reliance solely on the hearsay Audit Report violated Survivors right to due process because Survivors never had the chance to cross examine the auditor to explore the basis of the hearsay statements in the audit report or to confront any other witness. In *Morfit v. University of South Florida*, 794 So.2d 655 (Fla. 2d DCA 2001), the Second District held that reliance upon hearsay statements in a written report violated Morfit's right to due process:

> The complaining witnesses were never called. **In fact, the only statements from the alleged victims were contained in the investigation report written by an officer who talked with them. Morfit was entitled to have the witnesses make their statements directly to the hearing officer, and he was entitled to question them. This is a fundamental ingredient of due process in any judicial or quasi-judicial proceeding.** . . . We must conclude that the school denied Morfit his right to due process, and, therefore, this decision must be reversed. **Not only did the initial hearing deny him his due process rights, but the appeals determination, finding as it**

> **did that he had been afforded due process, was also in error.** Accordingly, we reverse.

Morfit at 656 (emphasis added); *see also Winters v. Florida Board of Regents,* 834 So.2d 243, 250 (Fla. 2d DCA 2002)("Because the report was both unsworn and hearsay, the [administrative law judge] committed no error in failing to admit or to consider its contents. Conversely, the agency erred by concluding that the report constituted competent evidence upon which it could base its conclusion.").

The School Board argues that it need not present evidence at a quasi-judicial proceeding quoting the Fifth District's decision in *School Bd. of Osceola County v. UCP of Central Florida*, 905 So.2d 909, 914 (Fla. 5th DCA 2005) that "good cause contemplates a legally sufficient reason." I. Br. at 13. The next sentence of the quote shows that the Fifth District, in keeping with *Morfit* and *Winters*, required the record to contain "evidence" not just a "reason." *UCP* at 914 ("good cause contemplates a legally sufficient reason. **Here, the record is completely devoid of empirical evidence** . . . .")(emphasis added); *see also Orange Avenue Charter School v. St. Lucie County School Board,* 763 So.2d 531 (Fla. 4th DCA 2000)("the school board should have conducted a full informal evidentiary hearing prior to its initial decision.").

It is a fundamental right of any party whose contractual rights are at stake to TEST the evidence:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even thought he is unable to state to the court what fact a reasonable cross-examination might develop. **Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test** without which the jury cannot fairly appraise them.

See Alford v. U.S., 282 U.S. 687, 692 (1931)(emphasis added). The APA protects this right of cross examination:

> The first hearing, which produced Milliken's statement that Altimeaux quit, was not conducted pursuant to section 120.569(2)(j), because that section requires that a "party shall be permitted to conduct cross-examination when testimony is taken." Because Altimeaux did not have the opportunity to cross-examine Milliken at that hearing, the appeals referee should have rejected Milliken's testimony there as incompetent.

Altimeaux v. Ocean Const., Inc., 782 So.2d 922, 924 -925 (Fla. 2d DCA 2001); *see also* § 120.569(2)(j), Fla. Stat. (2003). Survivors has certainly suffered prejudice here from the School Board's failure to give Survivors a hearing before termination at which Survivors could have contested the hearsay Audit Report.

VI. The Fourth District Has Jurisdiction Over The School Board As The Lowest Tribunal Below.

The School Board argues that its termination order cannot be the subject of Survivors' appeal to the Fourth DCA because only the SBE's final orders are appealable. This argument ignores that the School Board did take "agency action" when it terminated Survivors' two charters. *See* § 120.52(2), Fla. Stat. (2003) ("'Agency action' means the whole or part of a rule or order . . . ."). The "agency

action" taken by the School Board in this case violated Survivors' right to due process of law because the School Board failed to adhere to the APA by not giving Survivors a hearing at which it could contest or introduce evidence.

Although the School Board's orders are not final in terms of appealing to the District Court under section 120.68, they were final and dispositive because the School Board immediately took possession of Survivors' properties and assets:

> Though they do not meet the requirements for orders imposed by Sections 120.57 and 120.59, they are orders nonetheless, and final in the sense of being dispositive in the absence of judicial review.

Graham at 813; *Polar Ice Cream & Creamery Company v. Andrews*, 146 So.2d 609, 612 (Fla. 1st DCA 1962).

In *Imhotep,* the Fourth District considered another charter school's complaint that the Palm Beach County School Board failed to allow the charter school an opportunity to be heard and to introduce evidence at a hearing. The Fourth District denied the charter school relief because it failed to make a proffer of evidence at any level or complain about its denial of due process:

> There is no evidence in the record to support this claim. . . . The charter schools did not make this argument in the hearing before the SBE and, in fact, point to no instance where they actually sought to present evidence but were denied the opportunity to do so.

Imhotep at 1284-1285. In this case, Survivors preserved this error by proffering evidence to the CSAC and the SBE, and both refused to consider it.

Specifically, the CSAC refused to allow Survivors to introduce the

deposition of the School Board's auditor that was taken the day before the CSAC hearing. The CSAC denied Survivors' proffer of this and other evidence stating that the Commission would only consider the "documents" that the School Board considered when it terminated Survivors two charters. (R.1015, R.1206-1208) Survivors was thus denied due process by the School Board and then by the CSAC and SBE.

Having failed to afford Survivors due process by failing to provide a proper notice and hearing, the School Board never obtained any jurisdiction to take any action. Thus, Survivors needed to do nothing to appeal that error first to the SBE and then to the Fourth District. *Cf. Dept. of Revenue v. Daystar Farms, Inc.*, 803 So.2d 892, 896 (Fla. 5th DCA 2002)(lack of jurisdiction can be raised at any time on appeal).

A. Survivors Has Always Preserved Its Right To Contest The Violation Of Its Right To Due Process Of Law By Exhausting Its Administrative Remedies Through Taking An Appeal To The SBE.

A common error made by public employees and public entities is their failure to exhaust administrative remedies prior to seeking assistance from the courts by filing a civil action to redress the wrong done by the administrative agency. Here, Survivors chose to do what the Charter School Statute required, appeal to the SBE. After Survivors lost its appeal at the SBE, Survivors appropriately entered the court system by appealing to the Fourth District pursuant

to § 120.68, Fla. Stat. (2003).

In *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1037 (Fla. 2001) this Court announced the public policy of this state is that courts should have the benefit of the administrative agency's experience prior to reviewing a dispute between the agency and a party with substantial interests. *See id.* at 1037 ("The doctrine of primary jurisdiction enables a court to have the benefit of an agency's experience and expertise in matters with which the court is not as familiar, protects the integrity of the regulatory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy.").

The Fourth District recently affirmed the public policy of Florida that administrative remedies must be exhausted by reversing a trial court's final judgment in a public employee's breach of contract action:

> . . . Caldwell essentially argues that she was not required to exhaust administrative remedies because the process of her termination was so flawed. We do not agree that the Board's errors excused Caldwell from the responsibility to exhaust her administrative remedies. **The failure to exhaust administrative remedies deprived the trial court of subject matter jurisdiction** over the breach of contract claim.

District Bd. Of Trustees Of Broward Community College v. Caldwell, 959 So.2d 767, 770 -771 (Fla. 4th DCA 2007)(emphasis added).

Unlike Dr. Caldwell, Survivors exhausted its administrative remedies by appealing to the SBE. When the SBE denied Survivors' appeals, Survivors had exhausted its administrative remedies and appropriately appealed to the Fourth

District to seek relief from the School Board's violation of Survivors right to due process of law. Survivors has preserved its rights by raising due process first on appeal to the SBE and then on appeal to the Fourth District.

B. The School Board's Failure To Accord Due Process To Survivors Requires The Fourth District To Reverse The School Board And Remand To The School Board To Conduct The Proper APA Hearing.

The Fourth District was clear in its holding that (a) Survivors had a substantial interest in its two contracts and (b) that the School Board failed to accord Survivors due process:

> In the case at bar, it is clear that the notice and procedures provided for by the APA were not observed in Survivors' case, as its charters were terminated at a school board meeting that was not conducted like a hearing determining substantial interests which would involve the submission of evidence and cross-examination. The School Board may have very well complied with the requirements for calling a special meeting of the school board, but it did not follow the requirements for conducting a hearing to determine whether good cause had been shown to terminate Survivors' charters. **As such, we reverse and remand this case so that the termination of Survivors' charters based on a determination of good cause shown can be considered following proper notice and subject to the due process protections of the APA.**

Survivors at 45-46(emphasis added). The Fourth District thus cured the error of the School Board by reversing for a proper administrative hearing pursuant to the APA.

The appellate process created by section 1002.33(6) is not designed to give due process of law. *See* § 1002.33(6), Fla. Stat. (2004). It is an appellate

administrative review of the due process that should have been afforded by the School Board that must be exhausted prior to entry into the judicial system. *Cf. Peterson v. Dept. of Environmental Regulation*, 350 So.2d 544, 545 (Fla. 1st DCA 1977)(". . . . the review action by the Commission must be exhausted before judicial review can commence here.").

Requiring the School Board to use APA procedure is logical because termination of a charter contract is a primary decision of the School Board:

> [W]e do not read this provision [of the Charter School Statute] to prohibit the School Board from adopting and enforcing policies related to the creation, renewal or termination of the charter schools they sponsor. This is true because the legislature has delegated primary decision-making authority to the school boards over these basic decisions.

See Imhotep at 1282.

The School Board, not the SBE or the CSAC, must provide due process at its level of decision-making because of the constitutional division of responsibilities between local school boards and the SBE. *See School Bd. of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186, 1193 (Fla. 5th DCA 2008)(". . . 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 [SBE] has supervision over the system of free public education as provided by law."). The CSAC and SBE meetings to review School Board action regarding a contract controlled by the School Board is simply not the place

for extensive evidence presentation. *See* § 1002.33(6)(c), Fla. Stat. (2004); § 1002.33(6)(f)(4), Fla. Stat. (2004) ; Fla. Admin. Code § 6A-6.0781(2) (1997)). If the School Board were exempt from the APA, then Survivors would have no forum in which to defend itself or create a record for review.

In cases involving complex financial issues between a public body like the School Board and a private contracting party like Survivors, the APA demands that the public body hold an evidentiary hearing prior to taking action:

> The Department, as the state's contracting agency for millions of dollars of public works, contends in effect that its contracts may exempt Department action from the Administrative Procedure Act. . . . We reject that position in its entirety. The Department's contract with Graham does not purport to exempt the Department from the Administrative Procedure Act; and, if it did, no such contract could be given supervening effect over the Act, which disciplines this and all other agency action not specifically exempted. **The legislature has not authorized the Department to contract to itself the power to decide its own monetary disputes with contractors and to place its decisions, and the proceedings in which they are made, beyond the discipline of Chapter 120.**

Graham at 812-13 (emphasis added). Thus, the Fourth District correctly held that the School Board violated Survivors' rights to due process by not holding an evidentiary hearing under the APA.

Moreover, fundamental due process requires the School Board to give Survivors a meaningful opportunity to defend itself. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"). An

emergency meeting called on 24 hours notice, that lasted less than an hour, and that did not provide a means for Survivors to put on testimony by an accountant of its own, present other witnesses, and argue its case does not comport with fundamental due process. (R.0340-357)

Consequently, the School Board's terminations of Survivors' two charters constituted a departure from due process and are legal nullities:

> When the school board undertook to reduce plaintiff's salary without regard to the procedures set forth in Section 231.36, its action was in derogation of Section 231.36 and hence a nullity. **The exhaustion of administrative remedies presupposes that the administrative agency obtained jurisdiction of the subject matter upon which it purported to act.** The purported reduction of plaintiff's salary was a *brutum fulmen*; **no further action was required by the plaintiff to preserve his right to seek judicial review**.

Burns v. School Bd. of Palm Beach County, 283 So.2d 873, 876 (Fla. 4th DCA 1973).

The School Board's argument that Survivors received due process through its appeal to the SBE is contrary to the Charter School Statute and the relevant Florida Administrative Code provisions governing appeals. First, the CSAC holds a meeting, not a due process hearing. *See* § 1002.33(6)(c), Fla. Stat. (2004) ("the Commissioner of Education shall convene a **meeting** of the [CSAC]")(emphasis added); § 1002.33(6)(f)(4), Fla. Stat. (2004) ("The chair shall convene **meetings** of the [CSAC]")(emphasis added). Second, the SBE holds a meeting at which it does not consider evidence or testimony. *See* Fla. Admin. Code § 6A-6.0781(2)

(1997) ("No evidence or testimony, only oral argument, will be heard by the [SBE]"). Thus, there is no opportunity on appeal to introduce evidence before the CSAC or the SBE.

C. The SBE's Final Action In This Case Was Erroneous Because It Failed To Require The School Board To Conduct A Due Process "Hearing" That Complies With The APA.

The administrative appellate review of the final orders of the School Board by the SBE consisted of a two-tier review that did not result in any orders that contain the substance of what is being reviewed by this Court. First, the CSAC held a non-evidentiary meeting at which it considered documents and statements not made under oath of witnesses and counsel. The CSAC is not bound by rules of evidence and is not required to conduct an evidentiary hearing. *See* § 1002.33(6)(f)(2), Fla. Stat. (2004) ("The decision of the [CSAC] is not subject to the provisions of the Administrative Procedure Act, chapter 120.") It is simply a chance to put more hearsay in front of a different group of decision makers.

At the conclusion of its meeting, the CSAC makes a recommendation to the SBE to either accept or reject the appeal of the Charter School. The SBE then meets and considers the CSAC recommendation. However, the SBE is not required to adhere to the APA. *See* § 1002.33(6)(c), Fla. Stat. (2004)("The decision of the SBE is not subject to the provisions of the Administrative Procedure Act, chapter 120."). The SBE also exercises unfettered discretion to

either accept or reject the appeal of a charter school regardless of the CSAC recommendation. *See* § 1002.33(6)(e)(2), Fla. Stat. (2004)("The state board must consider the commission's recommendation in making its decision, but is not bound by the recommendation."). This administrative appellate review simply allows the SBE the prerogative to over-rule a school board.

Because neither the SBE nor the CSAC held an evidentiary hearing, neither body made any findings of fact. At both levels of review, the CSAC and the SBE simply inquire as to whether good cause existed for an immediate termination. As such, the CSAC recommendations and the SBE final orders are simply intermediate steps in the process of seeking judicial review of a school board action.

D. The School Board's Action Should Be Quashed Directly By This Court And The Fourth District Decision Affirmed Because The SBE And The CSAC Are Intermediate Appellate Panels Which Do Not Consider New Evidence.

This appeal, like the appeal to the Fourth District, concerns not the perfunctory final orders of the CSAC or the SBE. Instead this appeal concerns the decision maker with primary authority over charter school operators, School Boards. *See Imhotep* at 1282. It is thus the School Board's final orders that are the subject matter of the appeal here. *See Phillips v. Santa Fe Community College*, 304 So.2d 108, 110-111 (Fla. 1st DCA 1977)(holding that final agency action occurred at the Board level with the affected party required to appeal to SBE prior

to a party obtaining a right to appeal to the District Court under section 120.68.) .

VII. The Fourth District Correctly Held That The Emergency Meeting Provisions Of Section 120.569 Are Inapplicable To A Termination Under The Charter School Statute.

The School Board argues that substantial interests may be determined at an emergency meeting under section 120.569(2)(n). I. Br. at 38. The School Board's argument misses the point because the only action an agency can take under section 120.569(2)(n) is that which is necessary to alleviate an emergency. The Fourth District was correct in its holding that Survivors' substantial interests could not be terminated using an emergency meeting provision of the APA.

A. The Failure to Find A Need for Immediate Action At The January 25th Emergency Meeting Violated Survivors' Right to Due Process.

Assuming, *arguendo*, that an emergency meeting could be held under section 120.569(2)(n), the School Board failed to comply with the requirements for conducting such a meeting:

> The present orders conclusorily allege an immediate threat to the public health, safety or welfare, **yet the allegations do not identify any specific company whose wrongful actions constitute this supposed immediate danger**. In *Commercial Consultants*, which involved an emergency cease-and-desist order, we stated that **"[t]o satisfy the statute, the Division's order must allege facts showing that specific incidents of irreparable harm to the public interest will occur without an immediate cease and desist order."** [citations omitted] **All elements necessary to the validity of an agency's emergency order must appear on its face.** Department's emergency orders purport to be final, binding, and permanent, yet they fail to satisfy the minimum statutory requirements. Additionally, the orders

> do not include the particularized findings that are contemplated in section 624.310(3)(f) as a predicate to lifting the statutory confidentiality protection. **We cannot "accept a general conclusory prediction of harm as support for an emergency order."**

United Ins. Co. of America v. State, Dept. of Ins., 793 So.2d 1182, 1184 -1185 (Fla. 1st DCA 2001) (emphasis added); *see also Unimed v. State*, 884 So.2d 963, 964 (Fla. 1st DCA 2004)("Because the Immediate Final Order does not recite facts sufficient to demonstrate the existence of 'an immediate danger to the public health, safety or welfare' as required by section 120.569(2)(n), we reverse."). In this case, the School Board's termination orders did not recite the required facts showing a need for an emergency order. (R.0359, R.0362)

In fact, the School Board Members noted that there was no emergency: "Dr. Benaim: . . . there isn't an urgency here, it's an exasperation." (R.0356) "Dr. Robinson: . . . I'm not aware of any children in danger. I don't see any health, safety, welfare issues." (R.0353) Thus, there was no factual basis for an emergency order under section 120.569(2)(n).

B. The School Board Failed To Make Any Findings Of Fact Or Conclusions Of Law That It Could Recite In Its Final Action (The Immediate Termination Notices) And Thus Good Cause Was Never SHOWN.

To **find** "good cause" for an immediate termination, a hearing must be held where "good cause" is "shown." *See* § 1002.33(8)(d), Fla. Stat. (2004) ("A charter may be terminated immediately if the sponsor determines that **good cause has**

been shown . . . .") The requirements of § 120.569(2)(n), Fla. Stat (2003), and § 120.525(3), Fla. Stat., must be followed to call a "meeting" where good cause for an "emergency," not an "immediate" action can be shown. Thereafter, the agency can act on a limited basis to take "emergency action" to cure the "emergency" "found at the emergency meeting."

The Fourth District recently ruled on a case with a similar factual scenario where an agency failed to comply with the APA when taking emergency action:

> When issuing an emergency order with no right for a hearing, an agency must specify facts and reasons which support a finding that an immediate danger to the public health, safety and welfare requires an immediate final order. *See* § 120.569(2)(n), Fla. Stat. (2006). "Every element necessary to the order's vitality must appear on its face." *Crudele v. Nelson*, 698 So.2d 879, 879-80 (Fla. 1st DCA 1997) (citing *Commercial Consultants Corp. v. Dep't of Bus. Reg.*, 363 So.2d 1162, 1164 (Fla. 1st DCA 1978)). On appellate review, the court will not accept a general conclusory prediction of harm as support for an emergency order. *Id.* The reviewing court must determine whether the emergency order "sufficiently identif[ies] particularized facts which demonstrate an immediate danger to the public." *Witmer v. Dep't of Bus. & Prof'l Reg.*, 631 So.2d 338, 341 (Fla. 4th DCA 1994).

Kodsy v. Department of Financial Services, 972 So.2d 999, 1002 (Fla. 4th DCA 2008).

School Boards must be required to convene a "hearing" where "good cause" can be "shown" because to hold otherwise makes the 90-day procedure under § 1002.33(8)(c), Fla. Stat. (2004), meaningless. Why use the 90 day procedure when the zero day procedure can be used? For superintendents intent on

exercising unrestricted power the answer is "there is no reason to give an opportunity to be heard." This Court should not allow school boards to operate on whimsical notions of due process at the leisure of a superintendent. Instead, hearings must be required to ensure due process of law occurs.

The law regarding emergency meetings was not changed by the Fourth District in this case. *See Survivors* at 43. The Fourth District provided the same interpretation it applied here to a prior case involving the APA:

> Section 120.569, Florida Statutes (2000), applies in all proceedings in which the substantial interests of a party are determined by an agency. "All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days." *See* § 120.569(2)(b), Fla. Stat. (2000). As conceded by the Board, Ryan was only given four days notice of the Board's meeting in violation of section 120.569.
> In accordance with section 120.57(1)(b), all parties shall have an opportunity to respond, present evidence and argument on all issues involved, to submit proposed findings of fact and orders, to file exceptions to the presiding officer's recommended order and to be represented by counsel. Ryan was never afforded that opportunity.

Ryan v. Florida Department of Business and Professional Regulation, 798 So.2d 36, 38 -39 (Fla. 4th DCA 2001). The Fourth District's decision here is simply another in a long line of decisions that require hearings at which a party's substantial interests may be determined.

VIII. The Charter School Statute And The Florida Administrative Code Bely The SBE's Position In Its Amicus Brief That It Provided The Necessary Due Process Protection To Survivors.

The SBE argues throughout its Amicus Brief that Survivors was afforded

"hearings" by the School Board, the CSAC and the SBE. This argument is not supported by the Florida Administrative Code nor the Charter School Statute which expressly contradict the SBE's characterization of the CSAC and the SBE "meetings" as "hearings."

The Charter School Statute authorizes the CSAC to hold a "meeting," not a "hearing":

> (6) (c) . . . the Commissioner of Education shall convene a **meeting** of the Charter School Appeal Commission to study and make recommendations to the State Board of Education regarding its pending decision about the appeal.
>
> * * *
>
> (f) 4. The chair shall convene **meetings** of the commission

See § 1002.33(6)(c) & (6)(f)(4), Fla. Stat. (2004)(emphasis added). With respect to the SBE, the SBE's duly adopted rules set forth in the Florida Administrative Code show that it functions as an appellate body:

> Upon receipt of a timely filed notice of appeal . . . the Agency Clerk shall immediately schedule the matter on the next public meeting agenda of the State Board of Education . . . . **No evidence or testimony, only oral argument, will be heard by the State Board at this time.**

See Fla. Admin. Code § 6A-6.0781(2) (1997) (emphasis added).

The Florida Administrative Code is the logical place for the SBE to place its interpretation of its statutory duties. The only administrative code provision that it

has implemented in regards to Charter School appeals shows that the SBE does not conduct a hearing at which it considers evidence or testimony. The SBE is purely an appellate panel.

Interestingly, the SBE asks this Court to defer to the SBE's purported interpretation of the Charter School Statute citing the case of *Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146, 1153 (Fla. 2000). That case actually supports Survivors' position in this appeal that the SBE could not "cure" the School Board's failure to "accord Survivors' due process" through a charter school appeal:

> We likewise reject Donato's contention that we must strictly defer to the Florida Commission on Human Relations' interpretation of the statute. **The Commission is the administrative body created by the Legislature to administer the Florida Civil Rights Act.** *See* § 760.03, .05, Fla. Stat. (1997); *see supra* note 1. **As part of its duties, the Commission is permitted by the Legislature to hold hearings and render decisions on claims alleging discrimination.** In administering this **quasi-judicial function**, **the Commission has given meaning to the term "marital status" by defining it broadly** to include one's relationship to one's spouse, rather than narrowly to include only the fact that one is married, single, divorced, or widowed.

See Donato v. American Tel. & Tel. Co., 767 So.2d 1146, 1153 (Fla. 2000)(emphasis added). Unlike the Commission in *Donato*, the SBE is not performing a "quasi-judicial" function.

Interestingly, the CSAC's refusal to allow the introduction of new evidence at its proceedings (R.1015, R.1206-1208), which implicitly is a refusal by the SBE to consider any new evidence, supports Survivors' position that the CSAC and the

SBE are not capable of holding a due process hearing that would cure the failure of the School Board to provide a proper evidentiary hearing. Thus, the Charter School Statute, the SBE's rules in the Florida Administrative Code, and the CSAC's refusal to consider new evidence leave no doubt that neither the CSAC nor the SBE are quasi-judicial bodies convening "hearings" or taking "evidence." It is simply an administrative appeal at which only the record below and argument are considered. The School Board's violation of Survivors' right to a due process hearing before termination is thus not curable on appeal.

IX. The Fourth District's Award Of Attorneys' Fees And Costs Should Be Affirmed.

The School Board callously ignored Survivors' right to due process when it terminated Survivors. Therefore, the Fourth District properly awarded Survivors its attorneys' fees and costs pursuant to § 120.595(5), Fla. Stat. (2003).

Section 57.111 also allowed the Fourth District to award up to $50,000 in fees for the underlying administrative action preceding this appeal. *See* § 57.111, Fla. Stat. (2006) . Survivors has no assets, therefore the Fourth District properly awarded Survivors fees and costs under the aforementioned statutes.

Additionally, Survivors is entitled to its attorneys fees as the prevailing party pursuant to Section 26(F)(2) of both charters. Therefore, as an additional basis for awarding fees, this Court should affirm on the grounds that Survivors is the prevailing party in this Appeal.

CONCLUSION

For the reasons set forth repeatedly above, this Honorable Court should affirm the Fourth District decision in all respects. Additionally, it should require the Fourth District to issue its mandate and remand directly to the School Board. The Fourth District has already released jurisdiction for the School Board to conduct the due process hearing required in this case. Therefore, the Fourth District has already cured all the ills occasioned upon Survivors by the School Board. An affirmation of the Fourth District by this Honorable Court sends a resounding ring throughout the state that government must adhere to the restrictions imposed by law.

The Founding Fathers of the United States set up our constitutional guaranties to ensure that the citizens of this country and this state receive due process of law before their rights are taken from them. So, too, the Florida Legislature enacted the APA in furtherance of such protection of parties' substantial interests by requiring a hearing prior to those substantial interests being terminated. Those constitutional rights continue today and should be enforced by the Supreme Court of Florida affirming the Fourth District in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the following via delivery by U.S. Mail on the date indicated in the Certificate of Compliance.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this appendix is in 14 point Times New Roman Font and thus complies with Fla. R. App. P. 9.210(a)(2).

Dated:_____

_____
Bryan J. Yarnell, Esq.