IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2402
Lower Tribunal Nos.: 4D06-2378 & 4D06-2379 (Consolidated)

THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,

Petitioner,

vs.

SURVIVORS CHARTER SCHOOLS, INC.,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER,
THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

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PREFACE

The 2005 statutes were in effect at the time of the State Board of Education's final orders that were appealed to the Fourth District. The following abbreviations and designations are used in this brief:

- "CSAC" refers to the Charter School Appeal Commission, an advisory commission appointed by the state Commissioner of Education, established to review documentation and make recommendations to the State Board of Education about charter actions under § 1002.33(6)(d), (e), Fla. Stat. (2005).
- "SBE" refers to the State Board of Education, which issues the final orders in charter terminations under § 1002.33(8)(d), (6)(d), Fla. Stat. (2005).
- "School Board" or "Board" or "Sponsor" refers to the Petitioner, The School Board of Palm Beach County, Florida, which serves as the "sponsor" of dozens of charter schools in Palm Beach County and has the statutory duty to provide certain administrative and educational services to charter schools and to monitor their finances and other areas of compliance.
- "Survivors" refers to Survivors Charter School, Inc., whose governing board had entered charter contracts to operate charter public schools in West Palm Beach (in 2001 under § 228.056, Fla. Stat.) and Boynton Beach (in 2003 under § 1002.33).

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case

This case involves the security of public funds and implicates the safety of students in charter schools—public schools funded with public money, but operated privately under a contract with a school board. The case arose from Survivors' challenge to the immediate termination of its charter contracts due to the severity of audit findings of systemic financial mismanagement and alarming deficiencies in fiscal controls.[1] (R. 0252-72; 786-97.)

The School Board conducted the audit after Survivors' own CPA exposed abuses so serious that Survivors' own lawyer referred to "errors in judgment, some monumental," a "public scandal," and a "crisis" (R. 0682)—and warned that the

[1] A summary of just *a few examples* (which were detailed in the School Board's Answer Brief in the Fourth DCA) would include: the school principals were using public resources for personal gain; public monies were used inappropriately for large purchases such as a $1,691-per-month lease reimbursement for a principal's BMW, a principal's personal credit card purchases, a sizeable auto allowance for the bookkeeper (a principal's father), and a 10-year contract for season tickets to professional football games; a principal's son received over $6,000 in public money through unauthorized ATM withdrawals, facilitated by a lack of proper fiscal controls and with no proof of repayment; and other public funds were deposited into bank accounts of private for-profit corporations controlled by the school principals. The complete list of violations covers several pages. In sum, numerous, serious abuses were discovered, along with deficient internal controls to safeguard public funds or detect fraud or accounting errors. There were other kinds of violations, as well, such as hiring several educators who were not certified teachers, failing to conduct mandatory criminal background screening on one or more employees, and failing to comply with personnel and payroll procedures and fiscal reporting requirements.

violations had "the potential for destroying everything [the founders] had worked for over the past five years." (R. 0547.)

The Board's auditor interacted with Survivors frequently throughout the audit, kept them informed of the findings, and provided the draft report (substantially identical to the final Audit Report) to Survivors for a response. (R. 0398; 0273-89.) Survivors was invited to, but did not attend, the Board's Audit Committee meeting on January 13, 2006, at which the Report was reviewed and approved. (R. 398.) Because of the severity of the findings, the Audit Committee recommended that the report be submitted to the IRS and State Attorney's Office. (R. 398.) A Survivors principal discussed the outcome with the auditor after the Audit Committee meeting. (R. 398.)

School District staff had met with Survivors several times to discuss the crisis, but Survivors' governing body seemed recalcitrant. The School Board noted that Survivors' board was well-aware of the findings but had shown a lack of willingness to take full corrective measures—a situation that was already exasperating and now grew urgent in light of the audit report that had just been issued. (R. 0352; 0355-56.)

Due to the crisis revealed by the alarming audit findings, the School Board decided that it must take immediate action to stem further mismanagement and abuse of public funds. (R.0260-72; 0359-60; R.0362-63.)

The Board gave notice that it would consider immediate termination under the charter school law and contracts, due to the severity of the audit findings. The Board heard argument by Survivors' lawyer and others at a special meeting on January 25, 2006, before deciding immediate termination was necessary. (R. 0340–0357.) The Board then provided the contractual 24-hours' notice of termination. (R.0359-63.) The District assumed operation of the schools under Section 1002.33(8)(d) while Survivors appealed to the State Board of Education.

B. Course of Proceedings in the Lower Tribunal

Pursuant to Section 1002.33(6)(e), Fla. Stat. (2005), the State Board of Education ("SBE") first referred the parties' briefs and documentation for review by the Charter School Appeal Commission ("CSAC"). (R. 1011-1250.) The CSAC devoted over six hours to the "fair and impartial review" mandated by § 1002.33(6)(e)1, Fla. Stat. (2005). Survivors' lawyer had the opportunity for several hours of argument and presentation of documentation. The SBE then considered the CSAC's recommendations, along with independently reviewing the voluminous documentation and hearing further argument of Survivors' lawyer and a school principal. (R. 1311-29.)

C. Disposition in the Lower Tribunal

On May 16, 2006, the State Board of Education found that the severity of the audit findings constituted good cause for immediate termination of Survivors'

charters. The SBE issued final orders approving and finalizing the terminations. (R. 1425-26.) Survivors appealed to the Fourth DCA, where the basic underlying issue was whether the Legislature really meant that the sponsoring school board may terminate a charter "*immediately* if the sponsor determines that good cause has been shown or if the health, safety, or welfare of the students is threatened." § 1002.33(8)(d), Fla. Stat. (2005) (e.s.).

The District Court surprisingly held that immediate termination of a charter contract is subject to the notice and quasi-judicial hearing procedures of the Administrative Procedure Act (APA), and remanded the case for such proceedings. *Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County*, 968 So. 2d 39, 46 (Fla. 4th DCA 2007), *reh'g, etc., denied* Dec. 4, 2007.

Since 1996 school boards have been able to terminate charter contracts right away to protect the students or for other urgent good cause. *See* § 228.056(10)(d) (1996). But under the Fourth District's decision, school boards can no longer terminate a charter even to halt *gross mismanagement, abuse of public funds*, or *threats to students' health, safety, or welfare*, until after quasi-judicial proceedings have taken their course for "something less than *ninety days*."[2] Ironically, that is what the decision called "immediate." 968 So. 2d at 45 (e.s.).

[2] The kind of quasi-judicial proceedings to which the decision apparently refers can realistically consume several months, as the Uniform Rules of Procedure under the APA provide for pleadings, motion practice, discovery, quasi-judicial hearing, post-hearing submittals, a final order, etc. *See* Chapter 28-106, Fla. Admin. Code.

SUMMARY OF THE ARGUMENT

The Plain Language Must Be Given Effect. "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." § 1002.33(8)(d), Fla. Stat. (2005).[3] Such plain language must be given its full effect. *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931).

Section 1002.33(8) Preempts the APA. A school board's initial decision is preliminary in nature. The school remains open during the appeal to the State Board of Education (SBE), and no substantial interests are affected under the APA. The special termination procedures were intended protect charter school students and public funds. "Statutes should be construed in light of the manifest purpose to be achieved by the legislation." *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 929 (Fla. 1983).

The Legislature intended these procedures to create an exception to, and control over, the more general procedures of the Administrative Procedure Act, which conflict with the Charter Statute's procedures. *Cf., e.g., Floyd v. Bentley*, 496 So. 2d 862, 864 (Fla. 2d DCA 1986). Furthermore, the Charter School Statute's procedures must prevail because that law was enacted more recently than the APA and represents the last expression of legislative intent. *McKendry*, 641 So. 2d at 46.

[3] The 2005 statutes were applied primarily in the appellate proceedings below.

Termination Requires "Documentation," Not Quasi-Judicial Evidence. The 2006 amendment of Section 1002.33 made it clear that school districts will show good cause for termination through "*documentation* supporting the reasons." *See* § 1002.33(8)(c) (2006) (e.s.). A school district need only "*identify the specific issues* that resulted in the immediate termination." *Id*. § 1002.33(6)(d) (2006). Likewise, the Charter School Appeal Commission reviews "the *materials* presented to them [as] . . . *documentation*." § 1002.33(6)(e)5, Fla. Stat. (2005). Here, the reasons for termination were copiously documented in an official government audit.

In Any Event, Survivors Expressly Agreed to Immediate Termination Without a Hearing. Survivors knowingly entered contracts provide for immediate termination upon 24 hours' notice, with only the right of appeal to the SBE. This Court should enforce the contract. Moreover, Survivors did not request a hearing.

Yet, Survivors Received Ample Due Process. The appropriate due process for immediate terminations is defined by the Charter Statute: an appeal to the SBE, which includes a lengthy informal hearing before the Charter School Appeal Commission. § 1002.33(6)(e). Further, Survivors provided extensive written and oral commentary to the School Board, and a brief and oral argument to the SBE.

Deference Must Be Afforded to the State Board of Education's Interpretation and Its Final Orders. The Florida Department of Education and SBE, the agencies charged with enforcing the Charter Statute, have long interpreted immediate

termination as really being immediate. That reasonable construction is entitled to great deference and should be upheld. *See Florida Dep't of Educ. v. Cooper,* 858 So. 2d 394, 396 (Fla. 1st DCA 2003). Under a 2002 amendment, a school board's initial decision to terminate is preliminary in nature. Although the District Court reviewed only the School Board's initial determination, the SBE's final orders the only "final action subject to judicial review." § 1002.33(6)(d). As the SBE found good cause for immediate termination due to the severe audit findings, and the District Court did find any error in the SBE's orders, its orders should be affirmed.

The District Court Erroneously Denied the Existence of Immediate Orders Under the APA. Because the District Court denied the existence of emergency orders, it insisted on a full quasi-judicial hearing. However, Section 120.569(2)(n) expressly provides for *immediate orders* to address "an immediate danger to the public health, safety, or welfare." If any APA order is required, it should be under that section. However, the better view is that the APA does not apply at all.

The Practical Consequences Militate Against a Quasi-Judicial Hearing. An APA hearing may take months. The District Court interpreted "immediate" as only "something less than ninety days"—which vitiates the intent of the Statute. This Court uphold the SBE's orders and protect charter school students and public funds by holding that *immediate* means "immediate" and that the special procedures of Section 1002.33(8) are exclusively applicable in charter terminations.

ARGUMENT

I. Contrary to the Fourth DCA's Opinion, the Immediate Charter Contract Termination Should Be Upheld Because the Legislature Intended that Charter Contract Terminations Proceed Under the Charter School Statute, Not the APA.

Standard of Review: *De Novo*. The applicability of the Charter School Statute, rather than the Administrative Procedure Act (APA), involves an issue of law, reviewed *de novo*. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) (which law applies is a pure question of law, reviewed *de novo*. Thus, "no deference is given to the judgment of the lower courts."); *Talbott v. American Isuzu Motors, Inc*., 934 So. 2d 643, 644 (Fla. 2d DCA 2006) (whether one statute preempts another is a question of law that is reviewed *de novo*).

A. Interpretation of the Charter School Statute Must Honor the Legislative Intent of Taking Instant Action to Protect Students' Health, Safety, or Welfare, or the Safety of Public Funds, from Imminent Threats.

"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." § 1002.33(8)(d), Fla. Stat. (2005). "Statutes should be construed in light of the manifest purpose to be achieved by the legislation." *Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc*., 444 So. 2d 926, 929 (Fla. 1983). For the intent, the Court "looks first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900

(Fla. 1996). "The plain meaning of statutory language is the first consideration of statutory construction." *State v. Bradford*, 787 So. 2d 811, 817 (Fla. 2001).

The plain language of Section 1002.33(8)(d) indicates the Legislative intent of protecting students and public funds immediately[4] in emergencies and for other good cause. "[T]he statute must be given its plain and obvious meaning." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931).

A school board would be seriously negligent if it were to stand by idly waiting 14 days for notice and several weeks or months for a quasi-judicial APA hearing when the life, health, or safety of students is at risk, or there is fraud, waste, or abuse of public funds. Such delay would defeat the purpose of the immediate-termination provision. Thus, the APA's procedures cannot apply.

B. The Special Termination Procedures of the Charter School Statute Take Precedence Over the General Procedures of the APA.

1. A Specific Statute Controls Over a More General Law.

As this Court explained in *McKendry v. State*, 641 So. 2d 45, 46-47 (Fla. 1994), to determine which statute applies, this Court begins by noting: "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *Adams v. Culver*, 111 So. 2d

[4] The common meaning of *immediately* is: "without the intervention of another object, cause, or agency . . . occurring, acting, or accomplished without the loss of time." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1129 (1981). Thus, "*immediately*" cannot mean "only something less than ninety days" as surprisingly concluded by the court below.

665, 667 (Fla. 1959); *McKendry*, 641 So. 2d at 46. Here, the Charter School Statute provides special, specific procedures tailor-made for charter contract terminations.

2. A Specific Statute Constitutes an Exception to Procedures in a More General Law.

A more specific statute is an exception to the general terms of the more comprehensive statute. *Floyd v. Bentley*, 496 So. 2d 862, 864 (Fla. 2d DCA 1986). Here, the Charter Statute provides special, explicit procedures for terminating a charter contract, which do not mention the APA, and which conflict with the APA. *See* § 1002.33(8)(d), (6)(c)-(e), Fla. Stat. (2005). Thus, the Charter Statute's specific termination procedures are an exception to the general terms of the APA.

3. The Conflict Between the Charter School Statute and the APA Must Be Resolved in Favor of the Charter Statute.

The District Court noted a clash between Section 1002.33(8)(d) and Section 120.569(2)(b). *Survivors*, 968 So. 2d at 45. The Charter Statute must control, because where two statutory provisions are in conflict, the specific statute controls over the general statute *See State v. JM.*, 824 So. 2d 105, 112-13 (Fla. 2002); *accord Bryant v. State*, 876 So. 2d 623, 624 (Fla. 4th DCA 2004). Accordingly, the Charter School Statute preempts the more general APA.

4. The Charter School Statute, as the More Recent Pronouncement, Must Prevail Over the Older APA.

As this Court declared in *McKendry*, "when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent."

McKendry, 641 So. 2d at 46 (citations omitted) (applying a more-recently enacted sentencing statute instead of a law that was enacted "long before mandatory minimum sentences were known. . . ."). The APA was enacted more than 25 years before charter schools were known through enactment of the Charter School Statute in 1996. The statute was most recently amended in 2007 and still expresses the intent of taking instant action when "the sponsor determines that good cause has been shown or if the health, safety, or welfare of the students is threatened." § 1002.33(8)(d), Fla. Stat. (2007). The Charter Statute's procedures must prevail.

5. Certain Parts of § 1002.33 Were Amended to Be Subject to the APA, but the Legislature Purposefully Omitted Any Mention of the APA as to the School Board's Termination Decision.

The Legislature has amended the law to include APA-hearing requirements in certain portions of the Charter School Statute, such as where an employee suffers retaliation. *See id*. §§ 1002.33(4)(a) and 1002.33(6)(h) (2005); but the Legislature has never made such amendments to Section 1002.33(6)(c)-(e) and (8).

"[W]hen 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." *Prewitt Management Corp. v. Nikolits*, 795 So. 2d 1001, 1005 (Fla. 4th DCA 2001).

The District Court emphasized that "any provision exempting the School Board's termination decision from the provisions of the APA" was allegedly

"[c]onspicuously absent" from Section 1002.33. However, the Legislature did not need to specify that exemption so expressly because the School Board's preliminary decision is not final agency action; only the State Board's final order holds that status under Section 1002.33(6)(d); and the State Board's final action is expressly exempt from the APA. *See* § 1002.33(6)(c), Fla. Stat. (2005).

The District Court also assumed that the APA should prevail because the Charter School Statute "does not discuss any requirements or timelines for notice or hearings in cases of immediate charter termination." However, the reason Section 1002.33(8)(d) does not mention any hearing before immediate charter terminations for emergencies of health, safety, welfare, or other urgent good cause, must be because the Legislature did *not intend* any hearing prior to such emergency/urgent-good-cause action. The delay quasi-judicial proceedings would defeat the intent of the emergency provisions and further endanger students' life, health, safety, or welfare, or the safety of public funds.

C. The Legislature Did Not Provide for any Hearing Before the Sponsor in Cases of Immediate Termination Under § 1002.33(8)(d), Fla. Stat.; that Process Is Distinct from the Regular 90-days' Termination Process in § 1002.33(8)(c).

Florida's original charter school legislation in 1996, codified at Section 228.056, provided for immediate termination under paragraph 228.056(10)(d). The only substantial difference between the 1996 and 2005 editions is the charter governing body's current ability to appeal the immediate termination decision

within 14 days to the State Board of Education. That ability was added in 2001. The House Staff Analysis of 2001 CS/CS/HB 269 explained the situation for immediate termination as it had been from 1996 through 2000:

> "Section 228.056 (10)(d), F.S. authorizes a sponsor to terminate a charter immediately if it determines that *good cause* has been shown or if the health, safety, or welfare of the students is threatened. Under such a scenario, current law does not provide a charter school with the opportunity to request an informal hearing before the sponsor or appeal the decision to the State Board of Education." [e.s.] [(R. 977.)]

The House understood that the forerunner of Section 1002.33(8)(c) (2005) (which provides for an *informal* hearing before the Board in cases of *regular* 90-days' termination)—did not apply to the forerunner of paragraph (8)(d) (which does *not* provide for such hearing). If the Legislature had intended the "informal hearing" provision of paragraph (8)(c) to apply to immediate terminations under (8)(d), it would have said so. "[W]hat is not included by specific reference was intended to be omitted or excluded." *Nikolits*, 795 So. 2d at 1005. Thus, no informal hearing before the sponsor is contemplated for an immediate termination.

D. Charter School Terminations Must Be Founded Upon "Documentation"—Not Quasi-Judicial Evidence.

In the proceedings below, Survivors misquoted *School Board of Osceola County v. UCP of Central Florida*, 905 So. 2d 909, 914 (Fla. 5th DCA 2005), as requiring "legally sufficient *evidence*" for termination. (Survivors' I. Br. 45.) In reality, *UCP* said: "good cause contemplates a legally sufficient *reason*." *Id*. at 914.

"A charter may be terminated immediately if the *sponsor determines* that good cause has been shown. . . ." § 1002.33(8)(d), Fla. Stat. (2005). The Superintendent can *show* good cause to the Board in any kind of Board meeting, because "to *show*" simply means to "set forth," "allege," "plead," "inform," or "enabl[e] another to see or examine." MERRIAM-WEBSTER ONLINE DICTIONARY, available at www.merriamwebster.com/dictionary/shown.

In charter terminations, good cause is "shown" through *documentation*. *See* § 1002.33(8)(c) (2006). Accordingly, the Superintendent informed the School Board of the basis (the severity of the audit findings and Survivors' systemic flaws), and the Board had examined the Audit Report. (R. 0327-30; 0354-55; 0253-89; 407-09.) The CSAC found that the School Board had competent substantial evidence for its determination of good cause. (R. 1252, R9. 1252.)

The Legislature has provided for "taking evidence, testimony, and argument at [any] public *meetings* . . . and workshops"—not only at quasi-judicial hearings. § 120.54(5)(b)2, Fla. Stat. Recognition of competent substantial evidence does not require the formalities of introduction of testimonial or documentary evidence under the rules of evidence. Thus, sworn testimony and formal introduction of evidence are not required. *See Marion County v. Priest*, 786 So. 2d 623, 626-27 (Fla. 5th DCA 2001); *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). A school board need only review "*documentation supporting the reasons*." *Cf.* §

1002.33(8)(c), Fla. Stat. (2006) (a clause regarding regular terminations, but which should be even more true for immediate terminations, where time is critical).

Thus, under the Charter School Statute, the basis for a charter contract termination need not be fact-finding under the judicial rules of evidence. As the statute was clarified in 2006, the sponsor must simply "*identify the specific issues* that resulted in the immediate termination" when giving notice of the termination.[5] *Id*. § 1002.33(6)(d) (2006). Similarly, the CSAC's "fact-based justification for [its] recommendation" is based on "thoroughly review[ing] the *materials presented* to them from the [charter school] and the sponsor. . . . [and] . . . request[ing] information to clarify the *documentation*." § 1002.33(6)(e)5, Fla. Stat. (2005).

The School Board relied on extensive documentation of accounting data in a well-researched Audit Report that had been reviewed and endorsed by the Audit Committee. Written reports by professionals are sufficient basis for most administrative actions. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Further, Survivors' written responses were included in an appendix to the Audit Report. Thus, the CSAC determined the School Board *had* competent substantial evidence based upon the severity of the audit findings. (R. 1252; R9. 1252.)

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[5] Interestingly, the 2006 statute does not even require any prior notice, much less a quasi-judicial hearing. The notice comes *after the fact* and contains only a list of issues. *Id*. (And any other due process must be requested in the form of an appeal to the State Board of Education. *See id*.) Obviously, an official government Audit Report fulfills the requirement to "clearly identify the specific issues."

E. The School Board's Notices of Termination Were Executive Contractual Notices, Not Agency Final Orders. The School Board's Preliminary Decision Took on Finality Only by an Order of the State Board of Education.

After the January 25 Board meeting, the Superintendent provided notification letters regarding the Board's vote. These were merely letters informing Survivors of the School Board's executive decision under the charter contracts. (R. 0359-63.) Neither the charters nor Section 1002.33 contemplates a final order in such circumstances. At page 48 of its Initial Brief to the Fourth DCA, Survivors admitted that the "School Board members [were] acting in an executive capacity." The 2006 amendment made it even clearer that only notification—not final orders—are required: "The sponsor shall *notify* . . . the charter school's governing body . . . if a charter is immediately terminated." § 1002.33(8)(d) (2006).

Inapplicable case law argued by Survivors below cannot overcome the plain language of the statute. For example, *Graham Contracting, Inc. v. Department of General Services*, 363 So. 2d 810 (Fla. 1st DCA 1978) involved a dispute with a building contractor. No statute governed the dispute except the APA, and no law exempted the process from the APA. Thus, the agency's orders (though in the form of letters) were subject to the APA because the contract called for an administrative hearing and the letters were "dispositive in the absence of judicial review." *Id*. at 813. By contrast, the School Board's notice of termination was *not* dispositive. The *schools remained open* (as the District assumed operations) while Survivors

appealed to the State Board of Education (which *could have* ordered that the charters be retained). The School Board's action was temporary in nature, analogous to a suspension.[6] Only the State Board of Education takes final action subject to judicial review. *Id.* § 1002.33(6)(c), (d) (2005). As the school remains "in escrow" for the charter body, which resumes operation if the State Board of Education rejects the school board's determination of good cause or emergency. Thus, no "substantial interests" are implicated under the APA.

F. The Final Orders of the State Board of Education—the Only Final Agency Action in this Case—Are Entitled to Great Deference and Should Be Upheld.

Since January 7, 2003, the final orders of the State Board of Education have been the only final agency action in charter terminations, as discussed in Section V. This amendment was recognized in *School Board of Osceola County v. UCP of Central Florida*, 905 So. 2d 909, 911 (Fla. 5th DCA 2005. Survivors attempted below to distinguish *UCP*, but such attempts must fail. It is immaterial that *UCP* involved review of a charter application. The Charter Statute dictates that the same special process applies to all appeals. *See* § 1002.33(6)(c), (8)(c) & (d), Fla. Stat.

Survivors also tried to rationalize that charter terminations involve

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6 If Survivors had not appealed to the State Board of Education within 14 days, the Board's emergency action would have become final as a matter of contractual agreement and acquiescence by Survivors, and it would not have been subject to judicial review, since Section 1002.33(6), (8)(d) provides for only one kind of review: an appeal to the State Board, whose orders are solely reviewable in a court.

substantial interests under the APA while application denials do not. However, the Legislature dictated otherwise by mandating the exact same appeal procedure for both decisions. The only reasonable conclusion is that the APA does not apply to *either* an application denial or a termination.

Survivors also ignored the fact that *either* the charter school or the sponsor can appeal the State Board's order under Section 1002.33(6)(d) (2005). The State Board's Final Orders say: "*Any party* to this order has the right to seek judicial review of this Final Order. . . ." (e.s.) (R. 1426; R9. 1426.) If the School Board's decision is the final order for judicial review as Survivors claimed, then school boards would be in the absurd position of appealing their own decisions in cases where the State Board of Education orders reinstatement of the charter contract. Statutes should not be interpreted in a way that "lends to an unreasonable or ridiculous conclusion." *State v. Sullivan*, 116 So. 255, 261 (Fla. 1928). The Court can avoid such absurd results by holding that the statute means what it says: that the State Board of Education takes the only final action subject to judicial review.

The District Court actually found no flaw in the State Board's final orders—the only final action the court had jurisdiction to review—and should have affirmed them. *Cf. Suburban Med. Hosp., Inc. v. Department of Health & Rehab. Servs.*, 600 So. 2d 1195, 1197 n.3 (Fla. 3d DCA 1992) (the order of an administrative agency will be affirmed if it is correct for any reason).

G. The Interpretation of the Florida Department of Education and State Board of Education—that Immediate Termination Really Is Immediate—Is Subject to Great Deference.

The Department of Education and State Board of Education's longstanding interpretation of Section 1002.33(8)(d) indicates that any due process will come *after* the immediate termination through an appeal to the State Board of Education (which includes an informal hearing before the CSAC), while the School District temporarily assumes operation of the school.[7] That interpretation should receive great deference. *See Florida Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003) (if an agency's "interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed.").

H. Public Policy and the Practical Consequences Militate Against Requiring a Quasi-Judicial Hearing Before Immediate Charter Termination.

The District Court's interpretation could cause irreparable harm to students or public funds. For example, if documentation indicates that the charter school is

[7] The Florida Department of Education issued the *Charter School Appeal Commission Guidelines* for termination appeals, adopted by the State Board of Education on August 19, 2003. (*See* R. 405.) Page 4 of the *Guidelines* states: "In the case of an Order for Immediate Termination, the District is charged by statute to 'assume operation' of the school *while the due process requirements are being satisfied*." In other words, the termination is immediate, and due process occurs afterwards through the ability to appeal within 14 days to the State Board of Education. Page 17 of the *Guidelines* explains that the "good cause . . . . [for] an immediate termination . . . [may depend on] . . . . the immediacy of the District's concerns, the extent of those concerns," *inter alia*, which "will justify the District's decision to *forego* . . . [a] *hearing and terminate immediately*." (e.s.)

failing to report cases of child abuse, or the charter principal is using his position to sexually abuse the students, or the school has illegally replaced its certified teachers with unqualified lower-paid substitutes, or the administration has embezzled public money and left the students without textbooks or computers, or the school refuses to correct squalid unsanitary rodent-infested conditions: the statute says the sponsoring School Board can terminate the charter *immediately* and immediately take over operations while due process is afforded by the charter school appealing the decision to the State Board of Education. But the District Court's Opinion would tie the hands of school boards for weeks or months while quasi-judicial proceedings take their course under Section 120.57 and the Uniform Rules of Procedure (which require a process of pleadings, motion practice, discovery, a court-like hearing, post-hearing submittals, etc.). Such result cannot be what the Legislature intended when it provided for emergency terminations.

II. The Immediate Contract Termination Should Be Affirmed Because Survivors Did Not Request a Hearing; Survivors Had Expressly Agreed to Immediate Termination With Nothing But 24 Hours' Notice and the Statutory Right of Appeal to the State Board of Education.

Standard of Review: *De Novo*. The interpretation of a contract is a question of law, reviewed *de novo* without deference to the lower court. *Whitley v. Royal Trails Property Owners' Ass'n, Inc*., 910 So. 2d 381, 383 (Fla. 5th DCA 2005);

Limehouse v. Smith, 797 So. 2d 15, 17 (Fla. 4th DCA 2001). "The parties' intention governs contract construction and interpretation; the best evidence of intent is the contract's plain language." *Whitley*, 910 So. 2d at 383 (citation omitted). "When a contract is clear and unambiguous, the court is required to enforce the contract according to its *plain meaning*." *Limehouse*, 797 So. 2d at 17 (e.s.).

A. In Both Charter Contracts, Survivors Knowingly and Expressly Agreed to Binding Contractual Terms of Cancellation Upon 24 Hours' Notice

Survivors expressly agreed, in Section J of both of its charter contracts, that: "This Charter may be terminated *immediately* upon twenty-four (24) hours notice if the Sponsor determines that good cause has been shown or the health, safety, or welfare of the students is threatened or impaired." (e.s.) (R. 126; 172.) In that binding agreement, "immediately" obviously means "within 24 hours."[8]

The parties' plain intent of instantaneous action is consistent with the emergency charter-termination section of the local rule governing charter schools: "The Superintendent or designee shall have the right to *immediately take action* for good cause or in the event the health, safety or welfare of the students is threatened. The School Board may take further action at the next Board meeting."

[8] Notably, the contract's 24-hour timeframe is more generous than the statute, which does not require *any* prior notice at all. *See* § 1002.33(8)(d), Fla. Stat. (2005). In 2006 the statute was amended to require a notice, but only *post facto* or contemporary. The sponsor provides written notice "if" (when) the charter is immediately terminated, and the notice must "identify the specific issues that *resulted* [past tense] in the immediate termination." *Id*. § 1002.33(8)(d) (2006).

School Board Policy 2.57 (2000).[9] Both the contract and the Policy are founded upon the plain language of Section 1002.33(8)(d) (2005). Therefore, the intent of the contracting parties is clear and unambiguous and must be enforced. *Limehouse*, 797 So. 2d at 17.

B. Survivors Voluntarily, Knowingly, and Expressly Agreed in Both Contracts to Immediate Termination Without a Hearing

The contracts, like the charter school statute, distinguished between regular terminations and urgent/emergency immediate terminations. Tracking the regular 90-days' (non-urgent/non-emergency) termination provisions of Section 1002.33(8)(c) (2005), both charter contracts provided for 90 days' notice of a regular termination and an opportunity to request an informal hearing.

The statute, however, does not provide for any hearing before the sponsor in cases of immediate termination; the sole remedy is an appeal to the State Board of Education. Whereas section K of the charter contracts allow for a substantial prior notice and an "informal hearing" before the sponsor School District for a regular termination, Survivors expressly agreed that "This section K *does not apply* to this Charter being terminated [immediately] pursuant to Section J of this Charter." (R. 0126; 0172.) Accordingly, the charter contracts expressly *excluded immediate terminations* from the contract's hearing procedures for regular terminations in

[9] Available at: http://www.palmbeach.k12.fl.us/policies/2_57.htm. This rule has the force and effect of law. *See Graham v. Swift*, 480 So. 2d 124, 125 (Fla. 3d DCA 1985).

section K. (R. 126; 172.) The contracts made it crystal clear that no hearing is available in cases of immediate termination.

C. Survivors Should Be Estopped from Violating or Disavowing the Terms It Willingly Agreed To; the Terms Should Be Enforced

Survivors entered the charter contract as the "full, entire, and complete agreement between the parties," and Survivors cannot disavow what it agreed to by "voluntary, mutual written consent." (R. 0126; 0172 and WBP Charter § 33.0(C); BB Charter § 35.0(C) (R. 155; 210).)

The contract, like the statute, provided only for an appeal to the State Board of Education. Survivors knowingly waived any alleged right to an APA hearing when it agreed to the charter contract terms that interpreted § 1002.33(8)(d) as *not* including a hearing. Survivors willingly, knowingly, and solemnly agreed to those binding contract terms. Thus, those terms should be enforced and Survivors should be estopped from demanding a hearing.

Before the Fourth DCA, Survivors in effect tried to disavow its binding agreement by arguing that *Graham Contracting*, 363 So. 2d at 812, prevents agency contracts from providing for final action without an opportunity for an APA hearing. *Graham Contracting* is inapposite, and reliance upon it was misplaced.

Graham Contracting simply held that the APA required state agencies to conduct a hearing on a contractor's claims for additional compensation and extensions of time for performance because, at *Graham*'s time 30 years ago, there

was no other means of redress for contract matters; sovereign immunity had not yet been waived to allow judicial suit over contract disputes. *See id*. at 812, 813-14. A different court later pointed out: "An agency has *no authority* to *administratively adjudicate* claims made against it by persons with whom it has contracted for the purchase of materials or the rendition of services." *Vincent J. Fasano, Inc. v. School Bd. of Palm Beach County, Fla*., 436 So. 2d 201, 203 (Fla. 4th DCA 1983) (citations and internal quotes omitted). "We do *not* agree that the Administrative Procedure Act is implicated in a breach of contract situation involving an agency and an outside contracting party . . . ." *Id*., 436 So. 2d 202 (e.s.).

Survivors wrongly relied on a sentence taken out of context: "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." *Id*., 363 So. 2d at 813.

As another court later pointed out, the building contractor's agreement with the State in *Graham Contracting* "specifically provided for dispute resolution by means of an administrative hearing. There is no such provision in the contract between Fasano and the School Board." *Vincent J. Fasano, Inc.*, 436 So. 2d 203. Likewise, there certainly was no such provision in the contract with Survivors. To

the contrary, Survivors specifically agreed to the availability of an appeal to the State Board of Education, rather than an informal hearing before the sponsor.

Moreover, the *Graham* contract called for an agency final order, 363 So. 2d at 812-13, whereas the contract with Survivors only provides for an executive notice of termination, to be followed by an appeal to the State (which, under Section 1002.33(6)(c), is the only agency authorized to take final action).

Further distinguishing *Graham*, the dispute there involved payments Graham believed were owed under the contract, or avoiding penalties by extending time for performance—standard breach-of-contract subject matter. By contrast, termination of Survivors' charter was a matter of critical urgency under the Charter School Statute, the applicable School Board Rule, and terms of the contract—all of which allow immediate termination for good cause or an emergency threatening students' health, safety, or welfare.

No statute governed *Graham*'s breach-of-contract action except the APA, back in the legal landscape of 1978. By contrast, the contracts with Survivors were specifically founded upon the charter school statute, and the contracts' termination provisions cited and tracked the language of the statute. The contract does not provide for such hearings because the *contract tracks the statute*. As discussed in section I.B above, the specific, custom-tailored procedures of the Charter School Statute must control over the general procedures of the APA.

Even if, *arguendo*, there was allegedly a right to request an APA hearing, it is well settled that "the hearing required by due process is subject to waiver." *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971). And "it is settled . . . that parties to a contract may agree in advance . . . even to waive notice altogether." *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-316 (1964). Thus, Survivors voluntarily and knowingly waived any such alleged right when it agreed to the charter terms that expressly interpreted § 1002.33(8)(d) as not including a hearing (other than an appeal to the State Board of Education). (R. 0126; 0172.)

D. The Fourth District Erred in Believing that One of the Charter Contracts Omitted that Agreement.

The District Court's opinion stated: "The Survivors BB charter does not contain the final clause of General Provision K regarding non-applicability of General Provision K if termination is pursuant to General Provision J." 968 So. 2d at 41. However, the clause actually *is* contained in the BB charter, albeit with a typographical error that might have confused the Opinion's drafter.

The BB charter provides: "Note: Section L does not apply to this Charter being terminated pursuant to Section K of this Charter." (R. 172.) The placement of that sentence, and a comparison of the two charter contracts, and the language of Section K.1 of the BB charter, make is obvious that the intent of the BB charter was to state (just like the WPB charter) that "Section K does not apply to this Charter being terminated pursuant to Section J of this Charter." The "L" and "K"

clearly were scrivener's errors, obviously intended to say "K" and "J."[10]

Thus, Survivors BB expressly agreed that the hearing procedures for regular terminations do not apply to immediate terminations—in the same way that Survivors WPB had expressly agreed that the informal hearing procedures for regular terminations do not apply to immediate terminations. (R. 126.)

Furthermore, through binding contract terms, both Survivors WPB and BB expressly agreed that no hearing would be available in cases of immediate termination: "*. . . unless the Sponsor seeks immediate termination pursuant to Section J*, the Sponsor shall . . . stipulate that a request for an informal hearing before the Sponsor may be requested within fourteen (14) calendar days of receipt of the notice." (R. 126 [WPB Charter § K.1]; and R. 172 [BB Charter § K.1].)

E. The Fourth District Also Erred in Suggesting that a Lack of "Magic Words" Referring to the APA Would Void the Plain Meaning of the Contracts.

The District Court strongly implied that it would have deemed any alleged APA rights to be waived if the charter contracts had expressly used certain magic words: "Furthermore, the charters do not indicate that the termination process is excluded from the Administrative Procedure Act." *Survivors*, 968 So. 2d at 41.

[10] A later part of the Opinion actually recognizes that both of "the charters expressly exclude immediate terminations from the procedures governing terminations in general as set forth in Section 1002.33(8)(b) and the charters. These general provisions include ninety days' notice and informal hearings upon request prior to termination." *Id*. at 44.

Obviously the contracts were entered with the same understanding under which school boards have operated since 1996 (and as interpreted by the Florida Department of Education and State Board of Education): that no hearing is contemplated under Section 1002.33(8)(d). *See Charter School Appeal Commission Guidelines* (2003) at 4 and 17 (exigent circumstances will justify foregoing a hearing, and terminating the charter immediately, as the School District assumes operation of the school while the due process requirements are being satisfied through appeal to the State Board of Education). (R. 405.)

Thus, it is irrelevant that "the charters do not [expressly] indicate that the termination process is excluded from the Administrative Procedure Act" with those exact words. 968 So. 2d at 41. There was no need for the contracts to cite the APA when the immediate-termination provisions of the contracts are expressly excluded from the hearing provisions of the regular-termination procedures. (R. 126 and 172 at J and K.1.) The terms are clear and unambiguous. "The parties' intention governs contract construction and interpretation; the best evidence of intent is the contract's plain language." *Whitley*, 910 So. 2d at 383 (citation omitted).

F. Survivors Did Not Request a Hearing, and Thus Waived Any Such Alleged "Right."

Even in regular terminations upon 90 day's notice, the sponsor does not have to convene an informal hearing automatically. Rather, the charter school "*may*, within 14 calendar days after receiving the notice, *request* an informal hearing

before the sponsor." § 1002.33(8)(c), Fla. Stat. (2005).

Even if APA hearing procedures had applied, under Section 120.569(2)(a), (c) (2005), the party desiring a hearing must file a petition with the agency, and the petition must include all information specified by Section 120.54(5)(b)4.a-g. (2005) and Fla. Admin. Code Rules 28-106.201, 28-106.111(2), or 28-106.301. Besides the fact that no hearing is provided for in the Charter Statute paragraph governing immediate terminations (§ 1002.33(8)(d)), Survivors *did not request* a hearing for the School Board. Rather, Survivors willingly availed itself of the remedy provided by statute: an appeal to the State Board of Education. Any alleged right to a hearing before the School Board was waived.

III. The Contract Termination Should Be Upheld Because Survivors Was Amply Notified and Heard by the School Board, the Charter School Appeal Commission, and the State Board of Education, Thus Receiving Appropriate Due Process.

Standard of Review: *De Novo*. "[D]ue process issues [are] reviewed *de novo*." *State v. Florida*, 894 So. 2d 941, 945 (Fla. 2005) (internal quotes and citations omitted).

A. Survivors Did Not Establish a Constitutionally-Protected Property Interest in Operating These Public Schools.

Survivors never established, and the Fourth DCA did not hold, that Survivors had a constitutionally-protected property interest in its contracts that

would entitle it to due process under the U.S. and Florida Constitutions. The Fourth DCA simply decided that Survivors had a "substantial interest" under the APA, thus triggering the APA's procedures. *See Survivors*, 968 So. 2d at 42.

As shown in Section I, a charter governing body's "substantial interests" are not implicated in an immediate termination, as the school remains open, operated by the school district, as if in escrow for the charter body in case the State Board of Education decides the termination was unwarranted. There is not even a "substantial interest" under the APA, much less a property right under substantive law and the Constitution.

Even some government employees do not have constitutionally-cognizable property rights in their employment—which is a matter more momentous than the question of who operates a public school that happens to be a charter school:

> An individual may . . . establish entitlement to procedural due process under the United States and Florida Constitutions, [only] by showing a *property interest in his or her position*. The concept of a property interest has been defined by the United States Supreme Court as a *legitimate expectation of continued employment*. Such legitimate expectations of continued employment establishing property interests are not created by the United States Constitution, rather, they are *created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law*. Consequently, [the appellant] had to sufficiently allege a property interest in his position under Florida law in order to establish his entitlement to any procedural due process safeguards.

McRae v. Douglas, 644 So .2d 1368 (Fla. 5th DCA 1994) (internal citations and quotations omitted) (e.s.). Similarly, Survivors could not have any "legitimate

expectation of continued employment" (continued contracting) because the Charter School Statute, School Board Rule, and charter contracts all specified that the contracts could be cancelled for a wide variety of reasons, either standard or urgent in nature.

As shown above, the degree of a charter school's property interest is defined by state law and contracts, specifically by § 1002.33, Fla. Stat., and the charters, which recognize only minimal interests and minimal due process. *Cf. Metropolitan Dade County v. Sokolowski*, 439 So. 2d 932, 934 (Fla. 3d DCA 1983), citing *Bishop v. Wood*, 426 U.S. 341, 345 (1976) (where a "permanent" employee held a position at the will and pleasure of the city, with removal being conditioned only on certain specific procedures, an officer could be discharged without a hearing).

Similar to the officers in *Bishop*, charter schools hold their charters at the pleasure of the government. Charter schools are public schools, and the sponsoring "district school board[ ] shall operate, control, and supervise all free public schools in [its] respective district[ ]." § 1001.32(2), Fla. Stat. (2007).

Upon immediate termination in an emergency or other good cause, the School District must assume operation of the school, and eventually "the school shall be dissolved . . ., and any unencumbered public funds . . . from the charter school shall revert to the district school board." § 1002.33(8)(e), Fla. Stat. (2005). Thus, whatever property interest the charter school corporation may have is

extremely minimal—more of a privilege than a right. Once that privilege is abused, only minimal process is due.

Even assuming, merely *arguendo*, that Survivors had a property interest capable of triggering constitutional due process protections, it is clear that Survivors *received* adequate due process, including ample notice and opportunity to be heard in several ways, in several fora, and at various levels.

B. If Applicable at All, Constitutional Due Process Is a Variable and Flexible Concept, Appropriate to the Context and Situation.

"[T]he standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Nash v. Auburn University*, 812 F.2d 655, 663 (11th Cir. 1987) (internal quotes and citations omitted).

Thus, what process is due is measured by a flexible standard that depends on the practical requirements of the circumstances. *Mathews*, 424 U.S. at 334; *Goss v. Lopez*, 419 U.S. 565, 578 (1975). Here, the charter school statute and charter contract make it clear that the School Board has the right to take immediate action to cancel a charter in exigent circumstances such as emergencies and other good-cause situations, without taking time for an evidentiary hearing before the Board.

Notably, "the ordinary principle, established by [U.S. Supreme Court] decisions, [is] that something less than an evidentiary hearing is sufficient prior to

adverse administrative action." *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). A brief oral appearance is generally sufficient. *Id*. Survivors made a *substantial* oral appearance before the School Board at the meeting on Jan. 25, 2006. (R. 340-48.)

As a school board's initial termination decision is comparable to a suspension because the school remains open pending the State Board's ruling, due process only requires giving the school's governing board "an opportunity to explain;" that is, "at some meaningful time . . . an opportunity to persuade the [decision-maker] otherwise." *Goss*, 419 U.S. at 580 n.9 (1975). Due process may require only a brief meeting: "an opportunity to present his side of the story," *id.* at 581, or "an opportunity to explain his version of the facts." *Id.* at 582. Survivors took advantage of such opportunities both orally and in writing.

The Supreme Court has recognized "situations in which prior notice and hearing cannot be insisted upon." These situations include a "danger to . . . property" (such as public funds). *Goss*, 419 U.S. at 582-83. The due process contemplated by the charter school statute is a post-decision appeal to the State Board of Education, which includes an informal hearing before the Charter School Appeal Commission. § 1002.33(8)(d), (6)(c)-(e), Fla. Stat. (2005). Such timely post-termination procedures properly provide due process. *Sokolowski*, 439 So. 2d 932, 934 (Fla. 3d DCA 1983) (an immediate post-suspension hearing is not necessary; the important factor is compliance with timelines specified in the

applicable code or statute). The code in that case specified 60 days, and likewise, the State Board of Education's decision occurs promptly, within 90 days of the notice of appeal. § 1002.33(6)(c), Fla. Stat. (2005).

Thus, any due process requirements were fulfilled by the CSAC and State Board of Education hearings—which were provided promptly—as well as by Survivors' oral presentation to the School Board at the January 25, 2006 special meeting, and by Survivors' written responses to the audit findings and its brief and voluminous appendix carefully reviewed by the CSAC and State Board.

Cases that *Survivors* argued below, like *Burns v. School Bd. of Palm Beach County*, 283 So. 2d 873, 876 (Fla. 4th DCA 1973), are irrelevant, as they deal with failure to follow procedures specified in statutes *other than* the charter school law. For instance, *Burns* involved a statute governing discipline of teachers, which is inapposite to charter terminations, where the charter school law and the charter contracts set forth a special procedure custom-tailored to charter terminations.

C. Survivors Received the 24-Hours' Notice to Which It Was Contractually Entitled, Although the Charter Schools Statute Does Not Require Any Advance Notice Before Immediate Termination.

The School Board gave its termination notice in compliance with the charter agreements and Charter School Statute, which do not require formal findings of fact as to an emergency. (R. 0126; 0172.) Even as amended in 2006, the statute simply requires the sponsor to "clearly identify the *specific issues* that resulted in

the immediate termination," § 1002.33(8)(d), Fla. Stat. (2006), which the Board did when it pointed out the severity of the audit findings and catalogued the numerous, persistent violations within the report. Thus, Survivors received the notice to which it was contractually entitled (R. 0126; 0172), before the School Board's decision took effect, although no prior notice is required before an immediate termination under Section 1002.33(8)(d) (2005).

Further, Survivors' actual knowledge of the likely consequences of the audit findings is further demonstrated by the emergency action it took two days before the School Board's January 25 meeting in a last-minute attempt to save its charters: placing the WPB principal on probation and accepting the BB principal's resignation. (R. 0838-39; 0842.) Survivors was obviously concerned about the likelihood of immediate termination, and Survivors took advantage of numerous opportunities to be heard on that issue before the School Board, the Charter School Appeal Commission, and the State Board of Education.

In reality, Survivors effectively had several days or weeks of notice, as it must have sensed the inevitable when it held a series of emergency meetings after receiving the draft audit report. Most telling, Survivors held an emergency meeting on the night of January 18, 2006, after its representatives attended the regular School Board meeting and heard the Audit Committee's report and the Superintendent's remarks. On January 23—the day that the School Board

published notice of the January 25 special meeting—Survivors held another emergency meeting. (R. 0837-42.)

Actual notice is also demonstrated by Survivors' taking advantage of extensive opportunities to be heard throughout the audit and termination processes. In addition, Survivors received personal notice. Survivors was obviously well-prepared for the January 25 meeting, where it was represented by counsel and numerous public speakers, including the principals, the governing board chair, a CPA, several teachers and staff, parents and students, and even a landlord. (R. 0340–0357.) Notice was clearly sufficient.

D. The Fourth DCA Correctly Recognized that the School Board Meeting Was Properly Noticed; the Emergency-Meeting Provisions of § 120.525(3) Were Inapplicable.

Survivors' arguments below about emergency meetings under Section 120.525(3) failed, as the Fourth DCA recognized that the School Board meeting was properly noticed (although it held there should have been a formal hearing with an APA notice). *See Survivors*, 968 So. 2d at 45. Thus, Survivors' citations to cases such as *United Insurance Co. of America v. State, Department of Insurance*, 793 So. 2d 1182, 1184-85 (Fla. 1st DCA 2001) were inapposite. In *United Insurance*, emergency cease and desist orders were improperly issued to 28 insurance companies under a statute in the insurance code without complying with specified criteria for such emergency orders.

By contrast, the School Board gave its termination notice in compliance with the charter agreements and Charter School Statute, which do not require formal findings of fact as to an emergency. Even as amended in 2006, the statute simply requires the sponsor to "clearly identify the *specific issues* that resulted in the immediate termination," § 1002.33(8)(d), Fla. Stat. (2006), which the Board did.

E. Survivors Took Full Advantage of Numerous Opportunities to Be Heard, Including a Lengthy Informal Hearing Before the CSAC.

Survivors received an ample "explanation of the evidence the authorities ha[d] and an opportunity to present [their] side of the story." *See Goss v. Lopez*, 419 U.S. 565, 581 (1975). Survivors submitted substantial written responses to the draft audit report (and was invited to attend the Audit Committee meeting but did not); presented commentary and argument to the School Board at its meeting on January 25, 2006; and participated in a lengthy informal CSAC hearing, as well as speaking to the State Board of Education at its meeting. Further, Survivors submitted a brief and voluminous documentation to the Charter School Appeal Commission and State Board of Education.

Thus, Survivors had multiple opportunities to be heard throughout the audit and termination processes, taking full advantage of the due-process provisions of Section 1002.33(8)(d), (6)(c)-(e) (2005) and additional opportunities not even contemplated by the statute.

IV. The Fourth DCA's Decision Is Erroneous Because, Among Other Reasons, It Relied on Denying the Existence of Immediate/ Emergency Orders Under the APA, Thus Contradicting § 120.569(2)(n) and Conflicting with All Other Districts.

Standard of Review: *De Novo*. Whether the APA provides for an abbreviated procedure in cases of emergency where substantial interests are to be determined by an agency, is a question of law, which is reviewed *de novo*. The applicability of such emergency APA procedures to immediate charter contract terminations is an issue of statutory interpretation, subject to *de novo review*. *See Daniels v. Florida Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005).

A. The District Court's Holding Relied on a False Premise.

In reaching its implausible holding that "immediate" means only "something less than 90 days" and that a full notice and quasi-judicial hearing are required by the APA before an immediate termination, the District Court relied on the erroneous belief that the APA does not provide for emergency orders:

> Under the statute, *immediate* means only *something less than ninety days*, which clearly encompasses the fourteen-day notice requirement of section 120.569(2)(b). . . . The APA does not provide for an abbreviated procedure in cases of emergency where substantial interests are to be determined by an agency; the *only* emergency procedure is set forth in the section governing agency *meetings in general* [under § 120.525(3)].

Survivors, 968 So. 2d at 45. The District Court then applied that false premise (which completely ignores and contradicts the emergency/immediate order

provisions of the APA in Section 120.569(2)(n)), to reach its primary holding:

> As such, it seems that if substantial interests are affected and the APA applies, as we have determined, *immediate* termination *can only mean* termination following a determination of good cause subject to the *fourteen-day notice requirement and accompanying APA [quasi-judicial hearing] procedures*. . . .

Id., 968 So. 2d at 45.

Because the District Court ignored the emergency/immediate order provisions of Section 120.569(2)(n), the Opinion required school boards to go through a quasi-judicial hearing for "something less than ninety days" (and such hearings under the Uniform Rules generally *do* take weeks or months[11]) before taking action upon a danger to public funds or students' health, safety, or welfare.

[11] An APA hearing involving disputed issues of fact under Sections 120.569 and 120.57(1) and the Uniform Rules of Procedure implementing those statutes involves: 1) the School Board issuing an administrative complaint with a notice of intended action under Fla. Admin. Code Rule 28-106.111; 2) the charter school requesting a hearing using a particular petition format specified in Section 120.54(5)(b)4.a.-g. and Fla. Admin. Code Rule 28-106.201; 3) the charter school having an opportunity to file an Answer and various motions (to dismiss, etc.) under Fla. Admin. Code Rules 28-106.203 and 28-106.204; 4) discovery under Fla. Admin. Code Rule 28-106.206; 5) the Board giving notice of a hearing at least 14 days in advance, under Fla. Admin. Code Rule 28-106.208; 6) the opportunity for a pre-hearing conference, continuances, and subpoenas under Fla. Admin. Code Rules 28-106.209, 28-106.210, and 28-106.212; 7) a hearing conducted with sworn testimony and cross-examination (which may take at least several weeks or months) under Fla. Admin. Code Rule 28-106.213; 8) post-hearing submittals (e.g. proposed findings and conclusions, orders, and memoranda of law) within a time set by the Board under Fla. Admin. Code Rules 28-106.215 (and possibly a recommended order, exceptions, and an exceptions hearing under Rules 28-106.216 and 28-106.217); and 9) a final order under Section 120.57(1)(*l*), Fla. Stat. That cannot be what the Legislature had in mind when it provided for "immediate" action to protect health, safety, or welfare, or other good cause.

B. Contrary to that False Premise, the APA *Does* Provide for Instant Action in Response to an Immediate Danger.

The District Court's false premise flatly contradicts the APA itself:

> If an agency head finds that an *immediate danger* to the public health, safety, or welfare requires an *immediate final order*, it shall recite with particularity the facts underlying such finding in the final order, which shall be *appealable* or enjoinable from the date rendered.

Section 120.569(2)(n), Fla. Stat. (2007) (e.s.). *Accord* Uniform Rule of Procedure 28-106.501(1), "Emergency Action" (providing for "*summarily* . . . taking . . . such emergency . . . action" to protect health, safety, or welfare, without a hearing; any due process can be provided afterwards through an appeal).

As a treatise explains: "The Florida Administrative Procedure Act (APA) authorizes the issuance of an *immediate* final order—that is, an order determining the *fundamental rights* of a party *prior to* giving the party notice and opportunity to be heard—in emergency situations." 2 Fla. Jur 2d *Administrative Law* § 310 (emphasis added; footnotes omitted). The Uniform Rules of Procedure under the APA makes it clear that any hearing or appeal will come *after* the immediate summary action. Fla. Admin. Code Rule 28-106.501(1).

The Fourth District's holding thus directly and expressly conflicts with the numerous decisions of the First, Second, Third, and Fifth Districts that all explicitly recognize and apply Section 120.569(2)(n) or its predecessor, Section 120.59(3), as allowing instant action to protect against immediate dangers. *E.g.*,

State v. Sun Gardens Citrus, LLP, 780 So. 2d 922 (Fla. 2d DCA 2001), *inter plures alia* from all other districts besides the Fourth.

C. The Immediate/Emergency Order Provisions of the APA Parallel the Immediate Termination Procedures of the Charter School Statute.

The immediate charter termination provisions of Section 1002.33(8)(d), Fla. Stat. (2005) use language nearly identical to the summary-action language in Section 120.569(2)(n) and Fla. Admin. Code Rule 28-106.501(1). In both statutes, "immediately" means "without lapse of time; without delay; instantly; at once"—it cannot reasonably mean "only something less than ninety days," as the Fourth District concluded. *See* DICTIONARY.COM UNABRIDGED, "immediately," Random House, Inc. *Cf. Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) ("[T]he plain and ordinary meaning of the word can be ascertained by reference to a dictionary.").

If, *arguendo*, the APA were to apply at all to emergency/good-cause immediate charter terminations under Section 1002.33(8)(d), it should be through § 120.569(2)(n) and Uniform Rule 28-106.501(1), with their virtually identical language about immediacy, health, safety, and welfare as the Charter School Statute, and likewise providing due process through an appeal.

D. Although § 120.569(2)(n) Allows for Instant Action Under the APA, the Better View Is that the APA Does Not Apply, as the Charter School Statute Exclusively Provides Its Own Special Procedures.

The APA final order provisions should not apply to charter terminations at all, especially since the State Board of Education's final orders are the only final

action subject to judicial review, and those orders are expressly excluded from the APA. *See* § 1002.33(6)(c), (d), Fla. Stat. (2005). Thus, the analogy between Section 120.569(2)(n) and Section 1002.33(8)(d) breaks down due to the 2002 amendment to Section 1002.33(6)(c), Fla. Stat.

Notably, Fla. Admin. Code Rule 28-106.501(1) makes it clear that due process after immediate action under the APA is satisfied through an appeal. Arguably, that provision would encompass a charter school's appeal to the State Board of Education as provided in § 1002.33(8)(d), Fla. Stat. (2005). However, the better view is that, if the APA's emergency-order provisions govern a school board's preliminary decision, the charter school would have a right to seek immediate judicial review. *See* § 120.569(2)(n), Fla. Stat. (2007).

Yet, Section 1002.33(6), (8)(d) provides special procedures for an appeal to the State Board of Education *instead of* judicial review. The final order of the State Board of Education is the *only* charter-termination action that a court has jurisdiction to review. *See id*. § 1002.33(6)(d), (8)(d). *Accord School Bd. of Osceola County v. UCP of Cent. Fla.*, 905 So. 2d 909, 911-12 (Fla. 5th DCA 2005). This contrast should indicate that the Charter School Statute's special procedures for a school board's initial termination decision are not subject to the APA—just as the CSAC's and State Board of Education's portions of the charter termination process are expressly excluded from the APA. *See* § 1002.33(6)(c),

(6)(e)2, Fla. Stat. (2005).

If the APA applies at all to charter terminations—although there are many cogent reasons why it should not—then the immediate order provisions of § 120.569(2)(n) should apply, to give effect to the immediacy of action provided in the charter school statute. Such holding would also cure the conflict between the Fourth District and all other appellate districts, which recognize immediate orders.

However, it is more reasonable to conclude that the charter termination procedures in § 1002.33(8)(d) were intended to be a special process apart from the APA. For the many reasons discussed in Section I and in the School Board's Brief to the Fourth DCA, this Honorable Court is urged to hold that the APA hearing or final order provisions simply do not apply to charter contract terminations.

V. Alternatively, the District Court's Decision Should Be Reversed or Quashed for Lack of Jurisdiction Over the School Board's Preliminary Charter-Termination Decision.

Standard of Review: *De Novo*. The Fourth DCA's Opinion ignored the merits of the State Board of Education's final decision that the severe fiscal mismanagement was good cause for immediate contract termination. The court reviewed only the School Board's preliminary decision, which, by statute, is not subject to judicial review—and has not been since January 7, 2003. Lack of jurisdiction is a fundamental error of law. *Watson v. Schultz*, 760 So. 2d 203, 204

(Fla. 2d DCA 2000). Lack of jurisdiction can, and should, be raised at any time when it becomes apparent. *Department of Revenue v. Daystar Farms, Inc*., 803 So. 2d 892, 896 (Fla. 5th DCA 2002).

A. Jurisdiction in Charter Appeals Is Defined by Statute.

A district court's jurisdiction to review charter terminations is defined by statute. "District courts of appeal shall have the power of direct review of administrative action, *as prescribed by general law*." Art. V, § 4(b)(2), Fla. Const. (e.s.). *Cf. Eckert v. Board of Com'rs of North Broward Hosp. Dist*., 720 So. 2d 1151, 1154 (Fla. 4th DCA 1998) ("No provision of general law confers jurisdiction on this [Fourth District] court to review the District's decision."). Section 1002.33 does not confer jurisdiction upon district courts to review a school board's preliminary decision to terminate charter contracts.

B. By Law, Only the State Board of Education's Final Action Is Subject to Judicial Review.

From 1996 to 2000, district courts had no jurisdiction to review any aspect of immediate terminations, which obviously were not deemed "final agency action" under the APA. The statute simply provided that a school board could terminate immediately and assume operation of the school. *See* § 228.056(10)(d) (1996 - 2000). There was no provision for administrative *or* judicial review.

In 2001, the statute was amended to provide for an appeal to the State Board of Education. *Id*. § 228.056(11)(d) (2001). The State Board of Education would

issue a recommendation that the school board either maintain or change its preliminary decision. *Id*. § 228.056(4)(b). "The district [school] board's action on the state board's recommendation [was] a final action subject to judicial review." *Id*. § 228.056(4)(c) (2001). The same statute applied throughout 2002. Thus, in 2001 and 2002, the *school board* took final action on an immediate termination, and district courts had jurisdiction to review the school board's final action.

In 2003, however, the Legislature removed district courts' jurisdiction to review the school board's decision. The charter school statute was amended and renumbered as Section 1002.33, Fla. Stat. (2002) (effective Jan. 7, 2003), and the school board's decision became only a preliminary step, appealable to the State Board of Education. *See* § 1002.33(8)(d) (2002).

Now the State Board of Education was to make the final decision and issue the final order. "The State Board of Education's decision is a *final action subject to judicial review*." *Id*. § 1002.33(6)(c) (2002). Even that final action was expressly *excluded from the APA*. *Id*. § 1002.33(6)(c). *See School Bd. of Osceola County v. UCP of Cent. Fla.*, 905 So. 2d 909, 911 n.1 (Fla. 5th DCA 2005) (noting the change in the appeal process under the 2002 amendment).

Thus, since January 7, 2003, school boards' termination decisions have been only preliminary in nature; and district courts have had jurisdiction to review only the State Board of Education's final action.

Moreover, as only the State Board of Education's final action could be reviewed, the State Board of Education should have been given an opportunity to support its policy-based decision before the Fourth DCA (which did not even allow the State Board to file an amicus brief on the motion for rehearing). *See Johnson v. Superintendent and School Bd. of Hernando County*, 349 So. 2d 832, 833 (Fla. 1st DCA 1977) (the State Board of Education is automatically a party to judicial appeals of school board actions that it has reviewed, as such reviews involve matters of state policy, and the "State Board must therefore be in a position to establish or defend its policies before the reviewing district court of appeal.").

C. The District Court's Lack of Jurisdiction Over the School Board's Preliminary Decision Should Result in Quashing or Reversal.

The Fourth DCA committed fundamental error by acting outside of its jurisdiction—by directly reviewing the School Board's preliminary decision rather than the merits of the State Board of Education's final action.

This Honorable Court should either quash the Fourth DCA's decision and remand for entry of an order of dismissal for lack of jurisdiction, *Isley v. Askew*, 372 So. 2d 66, 67 (Fla. 1979), or review and reverse the decision in spite of the lack of jurisdiction (which is the preferred course according to *Skipper v. Schumacher*, 118 Fla. 867, 873; 160 So. 357, 359 (Fla. 1935)). The School Board seeks an affirmative ruling in its favor by reversal of the Fourth District's decision and upholding the SBE's final orders. Alternatively, however, the Fourth District's

decision should be quashed and remanded for an order of dismissal for lack of jurisdiction.

VI. In any Event, the Order Granting Attorney's Fees to Survivors Under § 57.111(4)(a) Should Be Vacated, Because the School Board's Preliminary Decision and State Board of Education's Final Action Were Justified by Law and Fact.

Standard of Review: *De Novo*. Entitlement to attorneys' fees under Section 57.111, Fla. Stat., "is a matter of statutory interpretation and is a question of law subject to *de novo* review." *Daniels v. Florida Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). Statutes providing for attorneys' fees—especially government's payment of fees—are in abrogation of the common law and must be strictly construed. *See id*. at 65.

A. By Erroneously Interpreting § 57.111, the Fees Award Assumed, in Effect, that the Termination Was Frivolous.

On July 11, 20007, the Fourth DCA ordered that Survivors should receive attorney's fees under Section 57.111(4)(a), Fla. Stat. (2007) if Survivors was determined to be the prevailing appellate party. Section 57.111(4)(a) provides:

> Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding *pursuant to chapter 120* [and] initiated by a state agency, *unless the actions of the agency were substantially justified* or special circumstances exist which would make the award unjust. [e.s.]

It was error to apply this section to charter contract terminations, because this

section is relevant only to administrative proceedings "pursuant to chapter 120," which does not govern charter terminations and charter appeals. It was also error to assume that the charter termination process was not "substantially justified."

B. The School Board and State Board of Education Demonstrated that Their Actions Were Fully Justified Under § 57.111(3)(e) and (4)(a).

Fees cannot be awarded to a small business under Section 57.111(4)(a) if the agency action was substantially justified; i.e., non-frivolous. "A proceeding is '*substantially justified*' if it had a *reasonable basis* in law and fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat. (2007) (e.s.). The official audit demonstrated serious, persistent fiscal violations placing taxpayer's money in jeopardy and requiring immediate corrective action, as contemplated in Survivors' charter contracts and Section 1002.33(8)(d), Fla. Stat.

The State Board of Education likewise found that the violations were so serious as to require immediate termination. The Commissioner of Education's designee advised the State Board of Education that the School Board "had no option but to close [both of] these schools," which were "equally egregious." (R. 1327-28.) The State Board of Education ruled that the School Board had good cause due to the severity of the audit findings of Survivors' flagrant, persistent, systemic fiscal violations. The Fourth District's Opinion acknowledged that "the audit report findings . . . reflected *serious financial transgressions*." 968 So. 2d at 45 (e.s.). Thus, the School Board certainly had a *reasonable* basis for its decision.

As the State Board of Education is the agency responsible for enforcing the charter statute, its interpretation that the severity of the audit findings constitutes "good cause" is entitled to great deference and should be affirmed. *See Florida Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003); *Imhotep-Nguzo Saba Charter School v. Department of Education*, 947 So. 2d 1279, 1285 (Fla. 4th DCA 2007).

Given the School Board's good faith reliance on the contract terms, Charter Statute, and published SBE interpretations, the contract termination certainly "had a *reasonable basis* in law and fact at the time it was initiated." § 57.111(3)(e), Fla. Stat. Thus, it was *substantially justified* under Section 57.111(4)(a), Fla. Stat. (2007).

Accordingly, "special circumstances exist[ed] which would make [an] award [of attorneys fees for Survivors] unjust." *See* § 57.111(4)(a), Fla. Stat. (2007), which must be construed strictly in favor of the School Board. *See Daniels*, 898 So. 2d at 65 ("Because statutes providing for attorney's fees are in abrogation of the common law, such statutes are to be strictly construed.")

Therefore, regardless of any other outcome of this Court's review, the District Court's award of attorneys' fees should be vacated.

CONCLUSION

The state has a "paramount duty" to provide for a "safe, secure" public school system. Art. IX, § 1(a), Fla. Const. The safety of students and security of public funds can be preserved if this Honorable Court allows the statute to mean what it says: that school boards can terminate a charter contract "*immediately* if the sponsor determines that *good cause* has been shown or if the *health*, *safety,* or *welfare* of the students is threatened." § 1002.33(8)(d), Fla. Stat.

WHEREFORE, the School Board respectfully requests that this Honorable Court vacate the Fourth District's opinion and reinstate the State Board of Education's Final Orders, which were based on extensive documentation, and thus preserve the rights and duties of Florida's 67 district school boards, the security of public funds, and the health, safety, and welfare of charter school students.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief has been served by U.S. Mail this 21st day of April, 2008, upon the Court and upon:

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CERTIFICATE OF COMPLIANCE

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

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