**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 SCHOOL, INC.,

*Respondent*.

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

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# AMENDED REPLY 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:

- "A.Br." refers to Survivors' Amended Answer Brief.
- "APA" refers to the Florida Administrative Procedure Act.
- "Charter Statute" or "Charter School Statute" or "the Statute" refers to § 1002.33, Fla. Stat. (2005).
- "CSAC" refers to the Charter School Appeal Commission.
- "I. Br." refers to the Petitioner School Board's Initial Brief on the merits.
- "SBE" refers to the Florida State Board of Education.
- "School Board" or "Board" or "Sponsor" refers to the Petitioner, The School Board of Palm Beach County, Florida.
- "Survivors" refers to the Respondent, Survivors Charter School, Inc.

## SUMMARY OF THE ARGUMENT

At a properly-noticed special meeting, the School Board chose in good faith to issue notices of contract termination because immediate action was necessary to prevent further abuse of public funds. The Board recognized the gravity and urgency of the audit findings. Good cause for immediate termination was shown by the severity of the documented audit findings.

The Legislature intentionally omitted any prior-hearing requirements for immediate terminations for emergencies or other good cause under Section 1002.33(8)(d), Fla. Stat. The delay involved in a formal hearing would defeat the manifest purpose of the immediate-termination provision: to swiftly protect students and public funds from imminent danger.

The giving of a contractual immediate-termination notice is not a quasi-judicial function to be governed by the APA; it is an executive function governed solely by the Charter Statute. Temporary assumption of a charter school's operation is also outside the scope of the APA, as the school is held "in escrow" for the charter operators in case the SBE should order reinstatement. Such notices and assumption of operations do not affect cognizable substantial interests; there is no final action until the State Board of Education issues a final order after a review by the CSAC. Survivors received ample due process, including multiple opportunities to be heard orally and in writing. The SBE's final orders should be affirmed.

## ARGUMENT

### I. The School Board Acted Advisedly and in Good Faith.

The only issue in Survivors' appeal to the Fourth District should have been whether the Florida State Board of Education abused its discretion in ruling that good cause existed for immediate termination of Survivors' contracts due to the severity of the audit findings. *See* § 1002.33(6)(d), Fla. Stat. (2005). *Cf. Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 402 (Fla. 5th DCA 2002) (a court reviews issues of good cause to determine whether the lower tribunal abused its discretion in making its decision). The District Court bypassed that question, instead focusing on the School Board's procedures.

Survivors tries to divert attention from the urgent nature of the audit findings and portray itself as the victim of a "contrived" audit report (A.Br. 23) leading to a "rash decision" (A.Br. 10) by a confused Board (A.Br. 4). In reality, Survivors' own accountants uncovered alarming flaws as early as 2002, and many of those findings still had not been corrected when the Board conducted the audit in late 2005. (R. 786–89.) Survivors' CPA had also uncovered "critical financial issues" in February 2005. (R. 0545–48; 0558–66.) The School Board's external auditors had also put the Board on notice that the violations were severe. (R. 0353–54.) *See also* pp. 1–6 and 20–22 of the School Board's brief in the Fourth DCA.

Thus, the Board provided notice that it would consider immediate

termination. (R. 0255–59; 0332–33; 0335–36.) Survivors was represented at the meeting 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.) The Board deliberated intelligently upon the Superintendent's recommendation. Several members' comments demonstrated the sense of gravity and urgency arising from the severity of the audit findings. (R 0352; 0353–54.) The Board chose to issue notices of termination, as immediate action was necessary to protect the integrity of public funds.

## II. Survivors Recognizes that Regular Termination Under Section 1002.33(8)(c) Is Excluded from the APA; It Should Be Even Clearer that Immediate Termination Under Section 1002.33(8)(d) Is Excluded from the APA.

At A.Br. 19, Survivors acknowledges that the regular-termination provisions of Section 1002.33(8)(c) are excluded from the APA. It should be even more obvious that the APA does not apply to the immediate-termination provisions of Section 1002.33(8)(d). It would be irresponsible to conduct a quasi-judicial hearing for several weeks or months before taking action to quell imminent danger to students or public funds.

Survivors misses the point completely when it contends that immediate terminations must proceed under the APA simply because "the Legislature chose not to delineate any procedure" under Section 1002.33(8)(d). (A.Br. 18–19.) In

reality, "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) (e.s.). The Legislature meant what it said: charter contracts can be terminated *immediately* in case of emergency. The APA does not apply.

## III. The Giving of a Contractual Notice and Temporary Assumption of a Charter School's Operation Are Matters Outside the Scope of the APA.

Survivors erroneously assumes that the decision to issue a contract-termination notice under Section 1002.33(8)(d), Fla. Stat. (2005), is within the scope of the APA. In reality, that preliminary action is an *executive* function, similar to a suspension, while the school remains open "in escrow" for the charter corporation as it seeks a final ruling from the SBE. The School Board's issuance of notices is not a quasi-judicial function based on the rules of evidence. *See* § 1002.33(8)(c), Fla. Stat. (2006) (good cause for termination is shown through "*documentation* supporting the reasons." [e.s.]). If a notice of contract termination were subject to the APA, then agencies would have to hold formal hearings before exercising a simple termination-for-convenience clause—a ridiculous result. Survivors argues that the Charter Statute does not explicitly say that a school board's role in contract termination is exempt from the APA. However, there was no need to state the obvious.

Survivors argues that the Florida SBE is just a hoop to jump through to

exhaust administrative remedies on the way to judicial review. (A.Br. 29–31.) However, the SBE is the only agency with authority to take final action in the termination process. Prior to 2003 school boards made the final decision; but since January 2003, the final action of termination is that of the SBE. *See* § 1002.33(6)(d), Fla. Stat. (2005) and I.Br. 43–46. The APA would not be triggered until the SBE makes the final decision and takes final agency action. Yet, the Legislature chose to exclude even that final action from the APA. *See* § 1002.33(6)(d), Fla. Stat. (2005). Thus, the entire termination process is exempt.

Contrary to Survivor's misguided argument at A.Br. 12, the CSAC Guidelines are not "simply a staff person's perspective." The Guidelines were adopted by the SBE in August, 2003, and thus express the interpretation of the SBE: that 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 SBE. (R. 405.) That 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).

## IV. The School Board's Notices of Contract Termination Did Not Affect Cognizable "Substantial Interests."

Survivors argues that immediate termination of its contracts under Section 1002.33(8)(d) affected substantial interests protected by the APA. (A.Br. 10–11.)

Its reliance upon a standing test in *Fairbanks, Inc. v. State, Department of Transportation*, 635 So. 2d 58, 59 (Fla. 1st DCA 1994) is misplaced. The test was first enunciated in *Agrico Chemical Co. v. Department of Environmental Regulation,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981) (denying party status to competitors of a construction-permit applicant). That standing test only defines who can be a party to a proper APA proceeding; it does not make the APA apply to matters that are outside of its intended scope.

In *Fairbanks*, the Department issued a final order denying Fairbanks' request for a hearing, for lack of standing under the construction-services bidding statute. But the First District reasoned that Fairbanks (which wanted to supply materials to the awarded services bidder) had standing to challenge alleged frustration of competition for materials, because the hearing would protect the public's interest.

Here, by contrast, Survivors did not request a hearing before the School Board, and there was no order denying a hearing. In fact, in Survivors' contracts it had expressly agreed that no Board hearing was available in case of immediate termination. *See* I.Br. 21–27. Rather, Survivors appealed to the SBE and was heard at length by the CSAC, as contemplated by the Statute and its contracts.

Survivors could not have satisfied the first prong of the *Agrico* test; it did not suffer cognizable immediate injury by the School Board, because the schools remained open after the School Board's notices of termination (as the District

temporarily assumed operation), and there could be no final decision until after Survivors had been heard by the CSAC and the Florida SBE, which takes the only final action. *See* § 1002.33(6)(d), Fla. Stat. (2005) and I.Br. 16–18, 44–46. The School Board's action was temporary in nature, analogous to a suspension.

Further, Survivors failed to satisfy the second prong of standing: the alleged "injury" was not the kind that Section 1002.33(8)(d) was designed to protect. The immediate-termination provision of the Charter School Statute is expressly intended to *protect the students, not the school operators*. § 1002.33(8)(d), Fla. Stat. (2005). In fact, the Statute can protect students and public funds from abuse by the school operators—opposite of the situation in *Fairbanks*.

Moreover, the *Agrico* standing test cannot make the Charter Statute's special procedures subject to the APA. In fact, such subjection would endanger the health, safety, and welfare of students and the safety of public funds, thus vitiating the urgent protective purpose of Section 1002.33(8)(d). That statute's process must control over the more general procedures of the APA, as explained at I.Br. 9-11.

## V. The Meeting Where the School Board Chose to Issue Notices of Termination Was a Properly-Noticed Special Meeting—Not a Deficiently-Noticed Emergency Hearing.

Survivors argues at A.Br. 20–25 and 37–40 that the special meeting where the Board chose to issue notices of termination was an improperly-noticed

emergency hearing. Even the Fourth District rejected that claim, finding that the Board satisfied the laws governing special meetings. *Survivors Charter Schools, Inc. v. School Bd. of Palm Beach County*, 968 So. 2d 39, 44–45 (Fla. 4th DCA 2007). Further, Survivors received ample notice and opportunity to tell its side of the story at the meeting (R. 0340–57), besides submitting written responses to the audit. Thus, the School Board gave Survivors ample opportunity to be heard.

Contrary to Survivors' contentions at A.Br. 20–21, Survivors was also capable of at least *requesting* a separate, formal hearing before the School Board. Yet, it did *not* request one, apparently because it knew it should proceed under the contractual provisions (that it now seeks to disavow) in which it had agreed that the only process for challenging a notice of immediate termination is by appealing to the State Board of Education. (R. 126, 172.) Thus, Survivors waived its alleged "right" to a formal School Board hearing by failing to timely request it.

## VI. Good Cause Was Shown by the Severity of the Audit Findings.

Survivors erroneously argues that the Charter Statute gives no procedural guidance on how the Superintendent can show good cause. (A.Br. 14.) Actually, 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 the urgency of immediate terminations).

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

Here, the School Board relied on extensive documentation of accounting data in a well-researched government audit report that had been reviewed and endorsed by the Board's expert Audit Committee. Further, Survivors' written responses were included in an appendix to the Audit Report. The CSAC correctly recognized that such documentation constituted competent substantial evidence for the Board's determination that the severity of the audit findings was good cause for immediate termination. (R. 1252; R9. 1252.)

Survivors misconstrues *School Board of Osceola County v. UCP of Central Florida*, 905 So. 2d 909, 914 (Fla. 5th DCA 2005), claiming that it requires "empirical evidence" for charter termination. (A.Br. 26.) In reality, the opinion said: "good cause contemplates a legally sufficient *reason*." *Id*. at 914. In *UCP*, the Osceola board did not have educational research data to support its belief that reduced funding results in reduced achievement. *Id*. at 914. Thus, the Osceola

board's decision, "based on conjecture," was capricious. *Id*.

Here, by contrast, the School Board of Palm Beach County relied on hard 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). A federal court has recognized that audit findings constitute empirical evidence. *State of Ohio, Dep't of Human Servs. v. Sullivan*, 789 F. Supp. 1395, 1410 (S.D. Ohio 1992). Therefore, although documentation constitutes a sufficient showing of good cause, the audit report also would have qualified as empirical evidence if that standard had been applicable.

## VII. Cross-Examination Was Unnecessary.

To bolster its theory that it should have cross-examined the auditor or Superintendent, Survivors claims that "any party whose contract rights[1] are at stake [has a fundamental right to] TEST the evidence." A.Br. 26. However, Survivors' reliance on *Alford v. U.S.*, 282 U.S. 687, 692 (1931) and *Altimeaux v. Ocean*

[1] Survivors' "contract rights" theory is contradicted by *Board of Trustees Sabis Int'l Sch. v. Montgomery*, 205 F.Supp.2d 835, 850–51 (S.D. Ohio 2002) (a charter school claimed a property interest in its contract. Although the court found that the school's governing body had a property interest in its position as governing body under Ohio law, the court said "one does not have a property interest . . . *in a contract*" itself (e.s.); it held that "the Plaintiff's assertion that it was improperly denied its property right *in contract* must fail, as the Plaintiff has *no such property right*." (e.s.)). *Accord* I.Br. 29–32.

*Const., Inc.*, 782 So. 2d 922, 924–25 (Fla. 2d DCA 2001) is misplaced.

*Alford* related to witnesses in judicial trials under the federal Criminal Code. It had nothing to do with contracts or immediate terminations. *Altimeaux* was an unemployment benefits case where the supervisor stated that Altimeaux voluntarily quit his job, but Altimeaux stated that he did not quit. 782 So. 2d at 924–25. Unemployment benefits hearings are clearly subject to the APA, whereas the Charter School Statute provides a special process for immediate charter terminations and excludes the termination process from the APA. Thus, the cross-examination APA provisions discussed in *Altimeaux* are inapposite.[2]

As noted in *Cafritz*, 798 A.2d at 542 and 545, charter contract terminations are generally rooted in public records, which are reliable. The well-researched audit report speaks for itself, and Survivors had an opportunity to provide written responses. "[W]itness reliability is rarely at issue during this type of proceeding [charter terminations]. Rather, the overwhelming majority of factual issues will ordinarily be addressed by consulting the documentation that the charter schools are statutorily required to provide. . . ." *Cafritz*, 798 A.2d 531, 546 (D.C. 2002).

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[2] Even if, *arguendo*, a protected property interest had existed, such interest would not have required a quasi-judicial hearing with cross-examination. *See Richard Milburn Public Charter Alternative High Sch. v. Cafritz*, 798 A.2d 531, 542 (D.C. 2002). *Cafritz* held that no formal hearing was required under the Constitution even though the parties agreed under D.C. law that the charter school had a protected property interest. The court found there is *no place for quasi-judicial evidence, sworn testimony, and cross-examination.*

Accordingly, quasi-judicial hearings and cross-examination of witnesses is out of place in an charter contract termination. As the SBE's CSAC Guidelines recognize, due process is provided by an appeal to the SBE, which includes extensive opportunity to be heard by the CSAC. (R. 405.)

## VIII. Survivors Received Ample Due Process Without Reception of New Evidence.

Survivors argues that the Florida SBE's amicus brief wrongly refers to Survivors as having received due process at "hearings" before the School Board, CSAC, and SBE. (A.Br. 40–41.) However, the SBE's brief at 9–13 correctly and forcefully shows that due process is provided by the appeal to the SBE and hearing-type meeting with the CSAC.

Survivors claims at A.Br. 33 that, if the School Board's giving of termination notices is excluded from the APA "then Survivors would have no forum in which to defend itself or create a record for review." That theory conflicts with the facts. Survivors filed an extensive brief and appendix that were reviewed by the CSAC and SBE. The CSAC devoted over six hours to an informal hearing-type meeting where Survivors and the School Board were both represented by counsel and both had an opportunity for several hours of commentary, argument, and presentation of documentation for the Commission's thorough study (R. 1011–1250). In conjunction with the multiple occasions when Survivors was heard orally and in

writing before the School Board and Survivor's appearance before the SBE, the CSAC's lengthy hearing-type meeting certainly provided due process.

Contrary to Survivor's view at A.Br. 34–35 and 40–43, due process does not occur solely at functions officially labeled "hearings" with cross-examination and formal introduction of new evidence. Due process only required giving Survivors "an opportunity to explain," *see Goss v. Lopez*, 419 U.S. 565, 580 n.9 (1975)—i.e., "an opportunity to present [its] side of the story," *id.* at 581—which Survivors did multiple times.

The U.S. Supreme Court has long recognized that an evidentiary hearing generally is not required prior to adverse administrative action; a brief oral appearance is generally sufficient. *See Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). Survivors made a *substantial* oral appearance before the Board at the meeting on Jan. 25, 2006. (R. 340–48.) There can be no question that Survivors already received due process.[3]

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[3] *See also Cafritz*, 798 A.2d at 542 n.11 (noting that "the Supreme Court has made clear that '[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances,'" quoting *Mathews v. Eldridge*, 424 U.S. 343, 348 (1976)). In holding that a formal hearing is not required for charter terminations, the *Cafritz* court also noted the Supreme Court's view that the submission of *written materials constitutes a constitutionally adequate hearing* in such settings, citing *Mathews*, 424 U.S. at 343–44. *Cafritz*, 798 A.2d at 542 n.10. *Cafritz* concluded that *documentation* and an informal question-and-answer session (such as the Florida CSAC hearing-type meeting) satisfy due process requirements. Thus, the Florida Charter Statute's immediate-termination process, including a CSAC hearing, satisfies due process requirements.

## IX. The Court Can Properly Discern Legislative Intent.

Survivors contends, in effect, that the Court cannot discern legislative intent in resolving the conflict between the Charter Statute and the APA, because Survivors finds no ambiguity and thus no need for the rules of statutory construction. (A.Br. 13–14.) However, legislative intent is manifest in the plain language of the Charter Statute. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996).

The School Board simply asks the Court to hold that the plain language of the Statute governs immediate charter terminations. "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 expressly allows *immediate* contract termination and the Board's immediate assumption of the school's operation to deal with emergencies or other exigent good-cause situations. *See* § 1002.33(8)(d), Fla. Stat. (2005).

The APA's formal hearing procedures can take weeks or months. The Legislature could not have intended that school boards spend up to 89 days ("something less than 90 days," as the Fourth District put it) mired in quasi-judicial hearings before taking "*immediate*" *emergency* action. Forcing those lengthy procedures into the Charter Statute's special immediate-termination process would nullify the very measures provided to protect students in emergencies, where

instant action is required. Such result would violate the rule against interpreting statutes in a way that "lends to an unreasonable or ridiculous conclusion." *State v. Sullivan*, 116 So. 255, 261 (Fla. 1928).

## CONCLUSION

The Legislature provided for "*immediate*" action when "the *health*, *safety*, or *welfare* of the students is threatened" or for other urgent good cause. § 1002.33(8)(d), Fla. Stat. (2005) (e.s.). To give effect to that language and protect students or public funds, school boards must quickly give an executive notice of contract termination and assume operation of the school in emergencies. *See id*.

Forcing the APA's quasi-judicial hearing procedures upon the Charter Statute's immediate-termination procedures would vitiate the manifest purpose of the Statute: to instantly protect against fiscal abuse or imminent danger to students.

A teacher would not depose witnesses, cross-examine experts, and file motions before dialing 911 when the school is on fire. Nor should school boards delay their response to emergencies or other exigent circumstances at charter schools. "Immediately" means "*immediately*" . . . not just "something less than 90 days." The Statute must be allowed to mean what it says.

WHEREFORE, the Court should vacate the Fourth District's opinion and reinstate the State Board of Education's Final Orders to preserve the security of public funds and the health, safety, and welfare of Florida's charter school students.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of this Amended Reply Brief was timely served by U.S. Mail on the 18th day of August, 2008, 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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