

NORTH CAROLINA
ORANGE COUNTY

OFFICE OF ADMINISTRATIVE HEARINGS
15 EDC 3643

PARTNERSHIP ACHIEVING COMMUNITY)
EDUCATION "PACE" ACADEMY)
)
Petitioner)
)
v)
)
NORTH CAROLINA STATE BOARD)
OF EDUCATION)
)
Respondent)
)

FINAL DECISION

This matter coming on to be heard and being heard July 7-9, 2015, and concluding on July 14, 2015, and it appearing that the Petitioner is represented by Attorney Mr. Philip S. Adkins, and the Respondent is represented by Special Deputy Attorney General Laura E. Crumpler and Assistant Attorney General Tiffany Y. Lucas, and based upon the evidence presented and the arguments of counsel, the undersigned makes the following findings of fact by a preponderance of the evidence:

1. The Petitioner is a charter school organized and existing under the laws of the State of North Carolina.
2. The Respondent is a body created by the North Carolina Constitution and subject to the laws of this state.
3. As more fully set forth herein, Respondent revoked the charter to operate a public school in this state issued to the Petitioner. The Petitioner subsequently filed a Petition for a Contested Case Hearing on May 20, 2015, alleging that the Respondent deprived the Petitioner of property without due process, substantially prejudiced the Petitioner's rights, exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule.

Charter Schools in North Carolina

4. Charter schools are public schools authorized by N.C. Gen. Stat. §115C-238.29A, and are intended to operate independently of traditional public schools. §115C-238.29A(a).
5. A public charter school is its own local education agency, and a board of directors governs the school's budget, curriculum, and operations. N.C. Gen. Stat. §115C-238.29E(d).

6. Pursuant to N.C. Gen. Stat. §115C-238A(a), the stated goals for these public schools are to:

- a. improve learning;
- b. expand learning opportunities for all children, but especially for those “who are at risk of academic failure” or those who are academically gifted;
- c. utilize “different and innovative teaching methods;”
- d. give teachers the ability to “create new professional opportunities” centered around program development;
- e. provide parents and students with greater choice in educational opportunities; and
- f. be accountable for meeting goals, while at the same time changing “from rule-based to performance based accountability systems.”

7. Charter schools are accountable to the Respondent for “ensuring compliance with applicable laws and the provisions of their charter.” N.C. Gen. Stat. 115C-238.29E(a).

8. The Charter School Advisory Board (hereinafter CSAB) oversees all public charter schools in North Carolina, and is charged with making recommendations to the Respondent for rules concerning charter schools, establishment, renewal, and revocation of charters, and other duties delegated by the Respondent. N.C. Gen. Stat. §115C-238(b)(10).

9. To become a charter school, Respondent must approve an application from a prospective school which sets forth, among other things, the educational program and goals of the school, budgetary information, and “the number of students to be served.” N.C. Gen. Stat. §115C-238.29B(b).

10. Respondent is authorized by statute to grant an initial charter for up to ten years, and may renew a charter for an additional ten year period. N.C. Gen. Stat. §115C-238.29D(d).

11. The Respondent is required to “review the operations of each charter school at least once every five years to ensure the school is meeting the expected academic, financial, and governance standards.” N.C. Gen. Stat. §115C-238.29D(d).

12. Public charter schools are required to operate within the parameters of their charter, and any material revision of the charter requires approval from the Respondent. N.C. Gen. Stat. §115C-238.29(e).

13. Public charter schools are required to provide a minimum of 185 days or 1025 hours of instruction, meet performance standards set forth by the state and the terms of their charters, perform student assessments, comply with the Individuals with Disabilities Education Improvement Act, and comply with state laws related to discipline. N.C. Gen. Stat. §115C-238.29F.

14. A charter may be subject to termination or non-renewal if the Respondent finds there is a failure to meet student performance goals set forth in the charter; “failure to meet

generally accepted standards of fiscal management;” a material violation of the terms of the charter, the faculty has requested such action, or other good cause exists. N.C. Gen. Stat. §115C-238.29G.

15. The Respondent and any public charter school should “make a good-faith attempt to resolve the differences that may arise between them.” N.C. Gen. Stat. §115C-238.29G(c).

Charter Application

16. In 2004, Petitioner was granted a ten-year charter by Respondent to operate a high school in Orange County, North Carolina.

17. PACE’s stated purpose, as set forth in its charter application, was to target and attract students “at-risk for academic failure.” (Resp. Ex. 3, p6).

18. The charter application is the underlying basis for the charter agreement issued by the Respondent.

19. Petitioner’s lengthy charter application included a number of seemingly standard provisions to follow applicable state and federal laws.

20. PACE’s application also included an explanation of their educational program, which was to “address the academic, social, and vocational needs” of their students through a “self-paced learning model.” Students would be encouraged “to work at their own pace to accomplish academic goals”. (Resp. Ex. 3, p2).

21. PACE sought “to create a personal education plan” for each of their students. (Resp. Ex. 3, p2).

22. PACE stated that to improve student learning, they would require students to “take progressively greater responsibility for their academic progress and career goals.” (Resp. Ex. 3, p6).

23. The application also stated that “many students of PACE will require remediation and academic support to acquire the prerequisite skills ... necessary for academic success.” (Resp. Ex. 3, p6).

24. While citing a flexible and structured curriculum, PACE was to utilize schedules that allowed for remediation and educational techniques that were individualized and success oriented. (Resp. Ex. 3, p7).

25. PACE’s application also specifically stated that new teaching opportunities would include individualized services that facilitate “self-paced learning with limited direct classroom instruction”. (Resp. Ex. 3, p8).

26. PACE also frequently references the North Carolina Standard Course of Study throughout the application, but focused on “self-paced learning,” “learner-centered instructional techniques,” and creation of “personal education plans.” (Resp. Ex. 3, p21-23).

27. PACE determined that various evaluations would be necessary to determine their success, including: improvement on standardized tests, increased graduation rates for at-risk students, and “sustained increase of individual student attendance rates.” (Resp. Ex. 3, p30).

28. The student handbook attached as Appendix F to the charter application stated that students would be required to be on time for school and “be in regular attendance in school and in class.” (Resp. Ex. 3, Appendix F, p1).

29. Further, students were required to “spend a certain number of hours on task in school.” (Resp. Ex. 3, App. F, p3).

30. Petitioner’s General Procedures of Operation, set forth in Appendix H of the charter application, touches on an independent study course, but has no details associated therewith. (Resp. Ex. 3, App. H, p2).

31. Petitioner’s application to operate a high school was approved by the Respondent effective July 1, 2004.

PACE Academy

32. Ms. Rhonda Franklin is the principal at PACE Academy. She testified about the positive impact PACE Academy has had on her students and faculty.

33. According to Ms. Franklin, PACE Academy was a school that was student-focused.

34. By all accounts, the school is welcoming and accepting of all students, especially students with special needs.

35. Many of the children who attend PACE Academy have had negative experiences in traditional public schools, but have thrived and succeeded at PACE.

36. In its 2012 Charter School Self Study, Petitioner stated that just under half of the students enrolled in PACE Academy were identified with disabilities. (Resp. Ex. 4, p19).

37. Evidence presented demonstrated that PACE’s demographic makeup was as follows:

- a. In the 2009-2010 school year was 48% African-American and 36% Caucasian, while nearly one-third of their students were eligible for free or reduced lunch.
- b. In 2010-2011, 34% of students were African-American and 42% Caucasian. Nearly one-third of students were eligible for free or reduced lunch.

- c. In 2011-2012, 33% of PACE students were African-American and 44% were Caucasian. Again, nearly one-third of students were eligible for free or reduced lunch.
- d. In 2012-2013, 34% of the students at PACE were black and 43% were white. No figures were provided for the free lunch program in this year. (Resp. Ex. 4, p22).

Charter Renewal Process

38. On December 1, 2012, Petitioner formally requested their charter be renewed by Respondent, and submitted a letter to OCS regarding the same.

39. As part of the renewal process, OCS conducted a site visit at PACE on May 2, 2013, which included interviews of parents, teachers, and students.

40. The site visit revealed that parents had a positive view of the school's impact on their children, teachers had a great deal of flexibility in teaching students, and the positive interaction between parents, teachers, and students fostered an inclusive atmosphere in which all kids were appreciated and felt included.

41. The site visit also revealed that PACE was "a school of second and third chances." (Resp. Ex. 4).

42. Petitioners acknowledged that there were problems they had encountered in educating and assisting their at-risk population, and that they were trying to save children through "flexible scheduling" and catering to student needs. (Resp. Ex. 4).

43. The site visit also revealed that there were issues with Individual Education Plans that were conducted in the past, but that a new process had been implemented by Ms. Franklin.

44. During this visit, Petitioner stated that "[m]ost students are enrolled in at least 3 courses in order to be considered full time students." (Resp. Ex. 4).

45. The board and administration conceded that PACE's biggest issue was meeting state EC requirements. (Resp. Ex. 4)

46. Renewal documents also revealed that PACE failed to meet the 95% participation requirement for testing students in 2010 and 2011, and only met growth once in five years. (Resp. Ex. 4, p25).

47. In November, 2013, a financial report issued by the Division of School Business found that PACE had been compliant in financial matters for the preceding five year period. (Resp. Ex. 4, p35).

48. In addition, PACE Academy's 2013-2014 financial statements were audited, and "no material weaknesses" were noted. (Resp. Ex. 8, p1).

49. Despite Petitioner's positive financial history, the Division of School Business noted they had "serious concerns" about the financial well-being of the school. (Resp. Ex. 4, p35).

50. On December 10, 2013, Petitioner's representatives appeared before the Charter School Advisory Board as part of the charter renewal process. At that time, the Charter School Advisory Board (hereinafter "CSAB") recommended that the Respondent not renew Petitioner's charter.

51. On February 6, 2014, Respondent followed the CSAB's recommendation, and voted not to renew Petitioner's charter.

52. Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings on February 7, 2014 in 14 EDC 1006, challenging Respondent's decision not to renew the charter.

Settlement Agreement

53. On June 30, 2014, the parties reached a settlement agreement disposing of the contested case.

54. By the terms of that agreement, the Respondent granted Petitioner a three-year charter, effective through and until June 30, 2017.

55. The Settlement Agreement required the Petitioner to meet certain conditions concerning board membership, board meetings, record keeping, compliance, and development of strategic plans. (Pet. Ex. 17).

56. Specifically, Petitioner's board of directors was to be expanded to 7 members and hold monthly meetings; a Secretary and Treasurer would be elected, and the board's attorney was required to attend all meetings; minutes of the board's meetings would be provided to OCS within a specified time frame; and the board would participate in training provided by DPI. (Pet. Ex. 17).

57. In addition, the Settlement Agreement mandated a board retreat and development of a strategic plan to be provided to the Respondent within a specified time frame. The strategic plan was to address participation in the state assessments and objective evaluation of the principal's performance. (Pet. Ex. 17).

58. Petitioner agreed that they would comply with all state and federal rules and regulations, "maintain accurate and verifiable student records", and that they would be fiscally responsible and audits would reveal "no material weaknesses." (Pet. Ex. 17).

59. The settlement agreement also provided that "[f]ollowing notice of a material failure to comply with this Agreement and a meaningful opportunity to be heard before the [Respondent] or a subcommittee of the [Respondent]" Petitioner would surrender its charter if they "failed to materially meet any of the conditions" set forth in the agreement. (Pet. Ex. 17)

2014 Charter

60. On August 6, 2014, Respondent issued a three-year charter to Respondent to operate a high school in Orange County, North Carolina.

61. Relevant to this discussion, paragraph 26.3 of the charter sets forth the procedure to be followed in the event of termination, including service of notice to the school.

62. Specifically, DPI is required to send by certified mail, return receipt requested, “written notice of its intention to recommend revocation of the Charter,” along with the grounds for said recommendation “in reasonable detail.” (Resp. Ex. 7, p9).

63. If the Respondent approves DPI’s recommendation, “notice will again be sent as specified in Paragraph (b) (1).” (Resp. Ex. 7, p9). There is no paragraph (b) (1) in the charter, nor is there a statutory reference for the same.

64. If the charter recipient objects to termination of the charter, the charter agreement states that OCS submits the request for review “to the appropriate Review Panel appointed by the Chair of the SBE.” (Resp. Ex. 7, p9).

65. Pursuant to the charter agreement, “[t]he Review Panel may review the matter with or without a formal hearing” and then must submit its recommendation to the Respondent in writing. (Resp. Ex. 7, p9).

66. The Respondent is then required to make a final decision on the Review Panel’s recommendation at the next regularly scheduled board meeting. (Resp. Ex. 7, p9).

67. The charter agreement also sets forth the grounds for amending the same, which include enrollment growth, relocation, transfer of the charter to another entity, and change in the mission, targeted population, management company, school lunch program, and/or transportation.

68. Changes in by-laws, school name, articles of incorporation, class size, length of the school day or academic calendar, and curriculum must be requested and can be approved by DPI without action from the board. Further, “potential changes” not specifically delineated in the charter agreement “must be reviewed and approved by the State Board of Education.” (Petitioner’s Exhibit 7, p9).

69. Petitioner opened for the 2014-2015 school year in late August, 2014.

Attendance

70. The first day of school for students at PACE Academy for the 2014-2015 school year was August 25, 2014.

71. The Division of School Business at DPI visited PACE Academy four times during the first month of the school year to conduct headcounts of students present at the school, including on the first day.

72. Scott Douglass, a former DPI employee with over two decades of student accounting experience, conducted headcounts of students present at PACE Academy during four visits to the school.

73. The purpose of the Fall, 2014 visits was to verify data the school certified in PowerSchool. (Resp. Ex. 8)

74. Mr. Douglass testified that PowerSchool is the authoritative student accounting data system used by all LEAs and charter schools in the state. PowerSchool is the definitive source for all student accounting information, including attendance and student schedules.

75. Mr. Douglass first visit to PACE Academy during the 2014-2015 school year was on August 25, 2015, the first day of school for students.

76. Mr. Douglass testified that upon arrival at the school, he requested class rosters from PowerSchool as part of his standard headcount procedure.

77. Mr. Douglass was escorted through the school by Ms. Jane Miller, an assistant principal, and they observed each classroom in the school.

78. Mr. Douglass would check students off from the class rosters to determine which students were absent from each class.

79. At the end of the visit, Ms. Miller signed off on the student count performed by the consultant and agreed to provide the sign in/sign out data so that students who arrived late could be included in the totals of the student counts. (Resp. Ex. 8).

80. On August 25, 2014, Mr. Douglass counted 66 students physically present in the school. (Resp. Ex. J, p3).

81. Mr. Douglass visited the school on August 28, 2014, September 5, 2014, and September 16, 2014. (Resp. Ex. J).

82. Mr. Douglass repeated the headcount procedure he followed during his earlier visit.

83. The student headcounts revealed there were 57, 72, and 58 students physically present in the school, respectively. (Resp. Ex. J, p3).

84. These counts are in line with the 70 students for which PACE was funded during the 2014-2015 school year, but below the approximately 90 students based on the average daily attendance certified by PACE Academy for the first month. (Resp. Ex. 8)

85. On September 3, 2014, Mr. Darrell Johnson, a regional consultant from the Office of Charter Schools visited PACE Academy.

86. During that visit, Mr. Johnson counted 67 students physically present in the school.

87. Mr. Johnson also stated that during the course of his monthly visits to the school, there were approximately 60-70 students there each time.

88. On October 31, 2014, Mr. Johnson went to the school and counted approximately 76 students in attendance with 32 students reported absent.

89. DPI reported that 74 students were present during a March 26, 2015 visit to PACE Academy, with 27 absences, and 29 students who were neither present nor marked absent in PowerSchool. (Resp. Ex. L).

Average Daily Membership and Funding

90. Charter schools in North Carolina are funded on a per pupil basis and funds are generated based upon student headcount. More specifically, charter schools are funded based on their Average Daily Membership (“ADM”) during their first twenty days of school. (N.C. Gen. Stat. § 115C-218.105).

91. In order to be counted as part of ADM, with few exceptions, a student must be present at school for at least half the instructional day, which amounts to three and a half hours. (Resp. Ex. E, p. 27).

92. At the end of the first twenty days of school for 2014-2015, PACE Academy certified an ADM of 103 students.

93. The average daily attendance for the first month was certified at 90 students; that is, on average 90 students were expected to be in attendance on any given school day. (Resp. Ex. 8).

94. Calculation of ADM, however, does not account for Respondent policies such as credit recovery courses, homebound instruction, etc.

95. To be included in the ADM, a student must physically be present in school; a student taking credit recovery courses (more fully discussed below), may not be included in the ADM even though he or she is still receiving educational instruction.

96. Initially, for the 2014-2015 school year, PACE Academy was provided access to funds for the first installment of the annual allotment based on 157 students. PACE contends this figure was determined by DPI, and Petitioner’s budget for 2014-2015 was developed using this figure.

97. Based on an enrollment of 157 students, the school was granted authority to draw down \$351,640.00.

98. On September 25, 2014, Respondent issued a notice of financial noncompliance to Petitioner, and placed the school on "Financial Disciplinary Status." This designation prevented the school from further utilizing state funds until issues concerning average daily membership ("ADM") were rectified and funding was recalculated based on a new ADM.

99. The Division of School Business pulled back \$90,000.00 of requested funds before those monies were received by PACE Academy.

100. This decision was based not upon the budgetary figures certified by DPI, but rather by the headcounts performed by DPI after the start of the school year.

101. The headcounts led DPI to recalculate the allotment for Petitioner based upon 70 students.

102. Dr. Alexis Schauss, Director of School Business Administration testified that Petitioner was funded based on the number of students attending the school that DPI determined to be fair and reasonably accurate in light of the number of students actually seen at the school during DPI's multiple visits and in light of the fact that DPI serves as a steward of taxpayers' dollars.

103. The Division of School Business then used the reduction in the number of students to reduce Petitioner's funding.

104. The reduction and recalculation had serious implications for Petitioner's budget.

105. DPI reduced Petitioner's funding by more than one-half based on the recalculation.

106. Respondent stated that the school had requested approximately 60% of the expected final annual allotment based on the school's actual student counts performed by DPI.

107. While Respondent is correct in this statement, it is misleading. Petitioner had requested, and DPI had approved, draw-downs by the Petitioner based upon a budget approved by DPI.

108. The draw-downs by Petitioner at the beginning of the 2014-2015 school year were presumably in line with Petitioner's approved budget, or DPI would not have allowed Petitioner to have access to that amount in the first place.

109. After Respondent reduced the number of students for which funding would be granted, the overall budget of the school for the year was significantly reduced and the Petitioner's expenditures were only then determined to be out of line.

110. This same issue occurred in 2013-2014, when funding was reduced in June, at the end of the school year.

111. Petitioner does not appear to have been irresponsible in its spending under the initial 2014-2015 budget.

112. No evidence was presented that Petitioner, or any of its employees or representatives, was investigated or prosecuted for a violation of criminal law associated with its budget, student accounting, or expenditures.

113. Petitioner's issues appear to stem from an inability to effectively communicate their use of credit recovery and other programs allowed by Respondent, and Respondent's apparent unwillingness to consider evidence of Petitioner's use of credit recovery courses.

114. Respondent requested PACE provide evidence that students who were not present in school during headcounts were in fact attending PACE.

115. In an effort to provide proof to Respondent, PACE gathered student work, teacher notes, and attendance rosters taken manually.

116. Petitioner produced two boxes of student work samples and other materials to Mr. Andrew Cox at DPI.

117. Cox told Bittner to take the material back, as no one was available to look at the information. Bittner subsequently made copies of the information and took it back to DPI.

118. Dr. Shauss testified that even though she knew the requested information had been produced by PACE, neither she nor her staff reviewed it.

119. There is no question that PACE is operating a school that a significant number of students attend in person on school days.

Credit Recovery

120. Every child in North Carolina between the ages of 7 and 16 are required to attend school. N.C. Gen. Stat. § 115C-378(a)

121. A principal, superintendent, or their designee has the authority to excuse a child from attending school on a temporary basis due to illness or other unavoidable cause. N.C. Gen. Stat. § 115C-378(c)

122. No child subject to the compulsory attendance law can be unlawfully absent from school.

123. Article 26 of Chapter 115C does not define the terms "student" or "attendance."

124. The North Carolina Administrative Code defines attendance as follows: “To be considered in attendance, a student shall be present in the school[.]” 16 N.C. Admin. Code 6E.0101.

125. Therefore, the rule in North Carolina is that to be considered “in attendance” for the purposes of state law, a child must be physically present in the school.

126. This definition would ordinarily end the inquiry; however, the Respondent has published policies which it holds out to the public as having the same force and effect as rules promulgated pursuant to the North Carolina Administrative Code.

127. One such policy concerns “credit recovery.”

128. There is no statute that defines credit recovery.

129. No rules concerning “credit recovery” have been promulgated or codified in the North Carolina Administrative Code.

130. The Respondent’s policy concerning “credit recovery” is set forth in the North Carolina State Board of Education Policy Manual, GCS-M-001.

131. Pursuant to Respondent’s policy, credit recovery is a “block of instruction that is less than the entirety of the Standard Course of Study” and is a subset of a regular, standard course. (Pet. Ex. 1, p4).

132. Credit recovery is designed to “address deficiencies in a student’s mastery of the course” and focus on specific areas which need to be completed by the student to obtain credit on a pass/fail basis. (Pet. Ex. 1, p4).

133. Paragraph 6.2 of the policy refers to these areas to be completed as “credit recovery courses.” (Pet. Ex. 1, p4).

134. There is no set time requirement or limitation for credit recovery courses; rather, the length of credit recovery courses are dictated by students’ knowledge. (Pet. Ex. 1, p4).

135. Respondent has published FAQs on its website concerning credit recovery courses. Interestingly, Respondent contradicts its own policy in FAQ number 8 in stating that credit recovery courses must be completed in one semester or one summer session, unless there are extraordinary circumstances. (Pet. Ex. 2, p2).

136. Further, there is no “fixed length of seat time” for credit recovery courses, and a school board “may not limit the number of credit recovery courses taken by a student prior to graduation.” (Pet. Ex. 1, p4).

137. Petitioner contends it utilized credit recovery courses extensively in an effort to assist their at-risk student population make progress towards graduating.

138. The policy adopted by Respondent is ambiguous and incongruent with the rule defining attendance. A reasonable person could read the policy on credit recovery as, in essence, an independent study. Students are not required to be in their seats for the “course” which, by policy has no fixed time requirements. The only requirement for credit recovery is that it address deficiencies in the original course and if the student does so, he or she will receive a Pass/Fail grade.

139. In addition, the policy specifically states that a school may “not limit the number of credit recovery courses” a student takes. Conceivably, a student could have an entire course load of credit recovery courses.

140. While Respondent contends that this is neither the intent nor the definition of what credit recovery is designed to be, the fact remains that Petitioner seeks to educate children who are at-risk of academic failure. In this effort, they chose to utilize a program adopted by the Respondent.

141. Also, the policy does not limit the number of students in a school that can take such courses. Conceivably, the entire student body at PACE could be engaged in credit recovery courses and not set foot in the school every day, and still be in compliance with the Respondent’s policy.

142. Respondent also contends that such use of credit recovery violates the terms of the charter it granted to the Petitioner.

143. Petitioner’s application is part of the charter. Petitioner’s charter specifically states that the school would utilize a “self-paced learning model” in which students would be encouraged “to work at their own pace to accomplish academic goals”. (Resp. Ex. 3, p2).

144. Further, the charter, through the application, also stated that “many students of PACE will require remediation and academic support to acquire the prerequisite skills ... necessary for academic success.” (Resp. Ex. 3, p6). This clearly stated understanding of the academic situation many of PACE’s students find themselves in appears to be in line with the goals of credit recovery: acquire the foundational knowledge to obtain credit in a course so that students can succeed in subsequent courses.

145. While citing a flexible curriculum, PACE indicated they would utilize schedules that allowed for remediation and educational techniques that were individualized and success oriented. (Resp. Ex. 3, p7).

146. PACE’s charter, through its application also specifically stated that new teaching opportunities would include individualized services that facilitate “self-paced learning with limited direct classroom instruction”. (Resp. Ex. 3, p8).

147. This is not to suggest that Petitioner’s liberal use of credit recovery is educationally sound or administratively workable.

148. Petitioner's use of credit recovery courses does not fit neatly in the box monitored by DPI. However, utilization of credit recovery courses as implemented by the Petitioner is consistent with their charter and within the boundaries established by Respondent.

149. This policy, intentionally or not, is an exception to the attendance requirement.

150. Petitioner cannot be punished for following Respondent's policy on credit recovery courses.

151. Such extensive use of this policy, however, requires a hands-on, organized administration, which PACE does not have. This failure on the part of the Petitioner has led to many of the student attendance issues.

Special Education

152. Ms. Carol Ann Hudgens with DPI's Exceptional Children's Division testified that her department performed an EC program assessment audit of student records at PACE Academy after referral by the Division of School Business and to assess compliance with recommendations made in 2013.

153. The Individual with Disabilities Education Improvement Act (IDEA), 20 U.S.C. 1400 (c)(1), provides federal funds to assist states in educating children with disabilities and requires each participating state to ensure that schools districts and other federally funded educational agencies in the state comply with the requirements of IDEA and its implementing regulations.

154. Further, section 616 of IDEA states that the primary focus of federal and state monitoring activities shall be on improving education results and functional outcomes for all children with disabilities and ensuring that states meet the program requirements that are most likely to closely relate to improving educational results for children with disabilities. (Resp. Ex. 17).

155. Article 9 of Chapter 115C of the General Statutes requires local school districts (including charter schools) to provide appropriate special education and related services and requires DPI to establish, monitor, and enforce regulations governing special education programs in North Carolina public schools and all institutions wholly or partially supported by the state. These functions are carried out through the EC Division. (Resp. Ex. 17).

156. The program assessment audit is a comprehensive monitoring activity where data are collected in multiple area to determine the effectiveness of a charter school's or LEA's EC program. (Resp. Ex. 17)

December 10, 2014 On Site Review

157. On December 14, 2014, a monitoring team consisting of 9 DPI representatives visited PACE.

158. The purpose of this visit was to conduct a program assessment, and the team reviewed five EC records, conducted eight interviews, observed four classrooms, and reviewed other school records and information.

159. Through classroom observation, the EC Division staff concluded that specially designed instruction was not properly delivered by school staff, and it was unclear how specially designed instruction was being provided to address IEP goals. (Resp. Ex. 17).

160. Consistent with the Division of School Business' earlier findings regarding attendance record-keeping, the EC Division also noted problems with the school's attendance record-keeping procedures. (Resp. Ex. 17).

161. The December 2014 program audit concluded that PACE Academy was noncompliant with the requirements of IDEA and that it was noncompliant in the provision of a free, appropriate, public education for all students. (Resp. Ex. 17).

162. Based on this visit, a corrective action plan was developed.

163. This plan required PACE to report on EC teacher licensure, offer compensatory education for licensure deficits, implement communication procedures concerning IEPs, set deadlines for updating IEPs and student schedules, and reconcile student records, among other things.

164. On January 27, 2015, a letter was sent to PACE from DPI indicating the Petitioner was noncompliant in issues relating to educating students with disabilities.

February 4, 2015 Letter from OCS

165. On February 4, 2014, Dr. Joel Medley with OCS sent a letter to Ms. Franklin outlining the January 27, 2015 letter, and he specifically delineated that PACE was in violation of sections 5 and 9 of the charter concerning educating children with special needs.

166. As a result, PACE was notified, they were being placed on Governance Probationary Status until the corrective action outlined from the December 10, 2014 visit was completed.

167. PACE was also notified that failure to remedy the violations would lead to them being placed on Governance Noncompliance Status.

168. The parameters of Governance Probationary Status are set forth in Section II of State Board Policy TCS-U-006: "The school remains on Governance Probationary Status for 30 calendar days and during that time must correct the exceptions that caused all of the governance warnings." If the exceptions are corrected within the 30-day limit, the probationary status is lifted. However, if a school fails to make the corrections within 30 days, the school placed on Governance Noncompliance Status.

169. Governance Noncompliance Status allows the school 10 calendar days to “immediately address all of the exceptions that caused the governance warnings.” Designation as a school in Governance Noncompliance Status also triggers funding adjustments and potential additional inquiry from DPI.

170. Dr. Medley’s letter, while clear, is contrary to the stated terms in Policy TCS-U-006 in that PACE was placed on “Governance Probationary Status until this issue is resolved.”

February 20, 2015 Letter

171. Dr. Medley sent another letter to Ms. Franklin and PACE Board Chair Paul Bedford on February 20, 2015, notifying Petitioner that they were included on the March 9, 2015 CSAB agenda. Officials from PACE were “requested to appear at this meeting.” (Resp. Ex. 20, p1).

172. Specifically, Petitioner was notified to “be prepared to answer questions” about finances, noncompliance in the EC program, enrollment, and “[p]rogress of the Settlement Agreement.” (Resp. Ex. 20, p1).

173. PACE received no notice of any specific purported violation concerning the schools finances the CSAB would consider at this meeting.

174. PACE received no notice of any specific purported violation concerning noncompliance with the EC program the CSAB would consider at this meeting.

175. PACE received no notice of any specific purported violation concerning the school’s current enrollment the CSAB would consider at this meeting.

176. PACE received no notice of any specific purported violation of the settlement agreement the CSAB would consider at this meeting.

177. PACE received no notice that any potential action would or could be taken affecting their charter to operate a school in North Carolina during the CSAB’s March 9, 2015 meeting.

178. Ms. Franklin testified that she had a conversation with Dr. Medley regarding this meeting, and that the meeting did not seem to be important because the CSAB was looking for an update on the settlement Agreement.

179. In fact, Dr. Medley provided an affidavit for this hearing in which he stated, “I had not informed the PACE board or administration that the CSAB would be voting.” (Pet. Ex. 16, paragraph 17).

Charter School Advisory Board Meeting – March 9, 2015

180. On March 9, 2015, the CSAB voted to recommend to the Respondent that Petitioner had not met all of the requirements set forth in the settlement agreement. (Resp. Ex. 21, p5).

181. Dr. Medley swore in his affidavit that “I had not anticipated a vote for ‘Material Breach’ of the Settlement Agreement”. (Pet. Ex. 16, paragraph 17).

182. While PACE was under the impression a vote would not be taken regarding their charter, a court reporter recorded and transcribed the portion of the meeting relating to the Petitioner. (Resp. Ex. 28).

183. In addition, representatives of DPI displayed a PowerPoint presentation which set forth some of their findings concerning PACE Academy.

184. During this meeting, Mr. Darrell Johnson with the Office of Charter Schools made a presentation to the CSAB outlining his findings from visits he had made to the school, including the following:

- a. The school had an ADM of 75 students.
- b. Petitioner’s board consisted of 7 members as required in the settlement agreement.
- c. The board attorney had attended all but 2 meetings, and his failure to attend those meetings was related to illness.
- d. Petitioner provided board minutes following approval.
- e. Petitioner had elected a Secretary and Treasurer to their board.
- f. Petitioner completed a board retreat in August, 2014.
- g. Petitioner submitted a strategic plan to OCS.
- h. Petitioner completed board training.

185. Mr. Johnson noted that the board had taken a more proactive approach to governing the school, and that the board chair was in frequent contact with him. (Resp. Ex. 28, p7).

186. Mr. Johnson observed that “PACE continues to adhere to their settlement stipulations.” (Resp. Ex. 28, p7).

187. In fact, Mr. Johnson presented a PowerPoint slide entitled “Recommendation” which stated, “OCS recommends that PACE Academy continues to adhere to settlement stipulations.” (Resp. Ex. 20, p6).

188. Mr. Johnson discussed issues with the number of students at the school. While the Petitioner’s representatives reported to him that the school claimed 115 students, head counts revealed actual students present in school were more in line with the ADM. (Resp. Ex. 28, p6).

189. Dr. Schauss also detailed her observations, which included:

- a. Results of an audit of student accounting conducted in 2013-2014 as part of the charter renewal process. As a result of that audit, Petitioner funding was reduced from approximately 150 students to 105 students.
- b. A subsequent audit was conducted for 2014-2015, and discrepancies continued in the headcount, reducing funding from 103 students to 75.

- c. The Petitioner's June 30, 2014 financial statement was "clean."
- d. Her concern over Petitioner's declining cash balance, which was \$26,000.00 on June 30, 2014.
- e. The Petitioner's fund balance on June 30, 2014 was \$151,000.00, which she characterized "about 10 percent of their expenditures, so it's still healthy."
- f. Her concern was with the 2014-2015 fiscal year because they were projecting a "significant deficit." Dr. Schauss did note that she believed the Petitioners could address the financial concerns.
(Resp. Ex. 28, pp10-15).

190. Ms. Hudgens presented to the CSAB on the Exception Children's (EC) program at the school. Ms. Hudgens set forth the following:

- a. Upon reviewing student files, there areas in which the school was noncompliant and "file corrections were needed."
- b. There were "deficits in understanding" Child Find and Individualized Education Plans.
- c. Issues concerning student schedules needed to be addressed to make certain EC students were receiving proper instruction from trained personnel.
- d. There was an issue with licensure for EC teachers, but that issue was rectified as set forth more herein below.
- e. Although it is unclear if this applied to EC students, Ms. Hudgens stated that "attendance records were not readily available" and the school did not appear to have a standard practice for taking attendance.
- f. The school submitted a corrective action plan on February 3, 2015, which was due on February 1, 2015. (February 1, 2015 was a Sunday.)
- g. The school submitted another corrective action plan in March, 2015.
- h. Her "next step with them would be to of course sit down with them and develop an action plan" concerning developments surrounding the licensure issue and compensatory education requirements.
- i. Even though the Petitioner had provided the corrective action plans which addressed issues of concern, she wanted to develop a "collaborative action plan."
(Resp. Ex. 28, pp15-21).

191. Following Ms. Hudgens presentation, CSAB member Mr. Steven Walker moved to go into closed session to "have some clarifications on some of the stuff that surrounds the legal part of this[.]" (Resp. Ex. 28, p22.)

192. The CSAB was in closed session for approximately 25 minutes. (Resp. Ex. 28, p22.)

193. Following the closed session, Petitioner had the opportunity to address the CSAB.

194. Ms. Franklin, responding to questions from members of the CSAB, explained that:

- a. PACE was not prepared to make a presentation, but would answer questions posed by the CSAB.
- b. PACE does not utilize a traditional school schedule, and that students at PACE have a variety of schedules. She also stated that “[w]e have some students that come for the statutory requirement of three and a half hours a day,”
- c. Some of their students can’t read or tell time, so they have implemented a computer-assisted sign-in process.
- d. Attendance at PACE is difficult to objectively measure, but they were attempting to address this area of concern.

(Resp. Ex. 28, pp23-47).

195. Ms. Franklin attempted to answer a number of questions from CSAB members, which, upon review of a transcript of that proceeding, can only be described as hostile.

196. Mr. Walker engaged in the following line of questioning:

Mr. Walker: So how many students were in attendance Friday?

Ms. Franklin: I don't know. I would--I don't know. I mean Friday was a two hour delay. That's an interesting question, so I don't--I don't know exactly. It was a two hour delay with--so I don't know.

Mr. Walker: And what percentage--I'm sorry.

Chairperson [Helen] Nance: That's okay.

Mr. Walker: Can I just have--just for a little while?

...

Mr. Walker: ---just trying to get a grip on everything here. I mean when is the last time you remember that you had 105 students on a day?

Ms. Franklin: Like all at the same time?

Mr. Walker: Uh-huh, all in attendance on that day.

Ms. Franklin: At some point during the day or all at the same time, probably the first---

Mr. Walker: (interposing) Total attendance for that day.

Ms. Franklin: But not all at the same time.

Mr. Walker: Well, just all during that same--during that same day.

Ms. Franklin: It would have been in the beginning of the school year.

Mr. Walker: Okay, so you haven't since then.

(Resp. Ex. 28, pp24-26).

197. Ms. Becky Taylor stated that “the attendance one is bothering me tremendously for a lot of reasons,” and then asked about the length of time a student was required to be in school to be counted as attending school for that day. Ms. Franklin responded “3.5 hours.” (Resp. Ex. 28, pp28-29).

198. The bulk of the questions to Ms. Franklin centered around North Carolina’s Compulsory Attendance Law.

199. CSAB member Mr. Joe Maimone also questioned Ms. Franklin about the Compulsory Attendance Law, leading to this exchange:

Mr. Maimone: Okay. Last question: what's your procedure when a student is missing ten days in a row and you're obliged to follow up? What do you do at PACE Academy to follow up a student who's been absent ten days in a row?

Ms. Franklin: Ten consecutive absences in a row--I don't--I can say very rarely. Now, see, it goes back to what Ms. Taylor asked: is it the entire day or is it per class? ...

Ms. Taylor: Right; one more attendance question and then I have some other questions.

Ms. Franklin: Okay.

Ms. Taylor: I know I keep hearing you talk about the number of consecutive absences. I may need to refer to another charter school or our attorneys. What about--I mean cumulative absences? Have students missed ten cumulative?

Ms. Franklin: Cumulative; well, our policy is, and we adopted this policy years ago. The students--our attendance policy, overall policy, is, you know, I guess the same as any, three unexcused--three unexcused tardies equal one absence. And we do a no distinction policy for attendance, 12 days--12 missed days--if you exceed 12 absences you automatically fail the class.

...

Ms. Taylor: Have you had to take or pursue any actions against parents for violating the number of absences?

Ms. Franklin: No, because typically it is not those students that are under the-- that are under the age of 16. It is the older students that tend to not make it important.

Ms. Taylor: So if they're over 16, they're not held to the policy?

Ms. Franklin: That was to my understanding, and I might be wrong and maybe we were not following the procedure that--I guess the legal age to drop out is 16, at least in Orange County. It's--those under 16 are reported to the magistrate. Like I said---

Ms. Taylor: (interposing) Do you know the answer to that? (Resp. Ex. 28, pp32, 39-41).

200. The Compulsory Attendance Law is set forth in N.C. Gen. Stat. §115C-378, and requires notification to parents that their student “may be in violation of the Compulsory Attendance Law” and could be subject to prosecution.

201. North Carolina’s Compulsory Attendance Law applies to parents, guardians, or custodians “having charge or control of a child between the ages of seven and 16 years.” N.C. Gen. Stat. §115C-378(a).

202. Ms. Franklin was correct in her answer regarding this matter, but continued to face interrogation with what was at the very least erroneous information as to when notification and action was required by the school.

203. While Dr. Medley’s February 20, 2015 letter noticed the Petitioner to be prepared to answer questions regarding enrollment, there was no indication Petitioner’s representatives would be interrogated regarding the nuances of the Compulsory Attendance Law.

204. Although there is considerable overlap in the issues of attendance and enrollment, the notification procedures required in N.C. Gen. Stat. §115C-378 are not related to the matters for which Petitioner was noticed.

205. Moreover, Respondent had not alleged Petitioner had violated reporting requirements for the Compulsory Attendance Law or even for the violations alleged against them.

206. Dr. Medley with the Office of Charter Schools had to step in and correct the questioning by CSAB member Maimone when he asked about the school’s failure to submit a corrective action plan:

Mr. Maimone: A couple of things: in the settlement stipulations it says if PACE modifies or intends to modify mission, practices, procedures, programs, strategies to address issues that it should submit those to DPI, yet you've not submitted anything.

Can you tell us why, given these issues that are ongoing, you've not submitted any corrective action plan or plan of action to help with some of these issues?

Ms. Franklin: We didn't--I didn't know--I didn't recognize or realize that corrective action plans--I didn't---

Mr. Maimone: Well, it's the second bullet point in your stipulation with the State Board of Education.

Dr. Medley: The--if I may, the charter school did submit the strategic plan that they held--from the retreat that they held in August. As far as modifying its mission, those kinds of things, that information has not come to us because that would require state board approval. So they have submitted a strategic plan on the things they're going to do in order to address some certain pieces.
(Resp. Ex. 28, p 30)

207. Ms. Franklin at one point stated the interrogation she was under was “like a pop quiz” and asked if she could check PowerSchool to assist her in answering questions about enrollment and attendance. (Resp. Ex. 28, p31, 39).

208. Petitioner was running the report during the questioning in an attempt to answer some of these inquiries, but the CSAB voted without this information. (Resp. Ex. 28, p44).

209. CSAB member Mr. Walker then made the following observation and motion to find the Petitioners had failed to comply with the Settlement Agreement:

Mr. Walker: If Ms. Gibbs and Ms. Reeves weren't here, I would think this was Groundhog Day, the movie, because this is the exact same song and dance as it was a year and a half ago. Nobody on this board had any confidence that y'all were going to be able to make it before and to do what was right. That's why everybody voted to not renew you, and the State Board felt the same way.

Through legal maneuvering, which I will applaud you for, you were able to get another three year renewal, but this is just--it's just not acceptable, not for---

...

Mr. Walker: I just--I'm ready to move on.

Chairperson Nance: Okay.

Mr. Walker: We're getting late in the day, and so I would like to make a motion. And I would make a motion that we recommend to the State Board that this school, PACE Academy has materially failed---

Ms. Franklin: (interposing) Oh, my--

Mr. Walker: ---in complying with---

Ms. Franklin: (interposing) What?

Mr. Walker: ---the settlement agreement and therefore is in violation of the settlement agreement, and following the hearings required in the stipulation agreement that they be required to turn in their charter.
(Resp. Ex. 28, p48-49).

210. A reading of the transcript of CSAB gives the appearance that some members had their minds made up without objectively looking at the terms of the settlement agreement, or considering the advice and recommendation of OCS staff.

211. Although unclear from the transcript who made the request, someone on PACE's behalf asked that the board attorney be allowed to address the CSAB, which led to the following exchange:

Ms. Franklin: (interposing) I just don't think we're answering the questions correctly. I think there has been a great deal of change and growth at PACE Academy. I just don't feel like we're answering the questions---

Chairperson Nance: (interposing) I will--I will allow you--you're the board chair?

Several Voices: He's the attorney.

Chairperson Nance: Oh, the attorney.

Mr. Walker: I just--I'm ready to move on.
(Resp. Ex. 28, p48).

212. Despite the finding and recommendation from the Office of Charter Schools that Petitioner was adhering to the settlement agreement, the CSAB voted to recommend to the Respondent that PACE had "materially failed in complying with the settlement agreement" and that they be required to turn in their charter.

213. That same day, Petitioner was sent a letter from OCS which summarized what had taken place during the CSAB meeting, and provided notice that the recommendation would be submitted to the Respondent at its April meeting.

Action by the Respondent State Board of Education

214. On April 1, 2015, the Leadership for Innovation Committee, a sub-committee of the Respondent State Board of Education met and discussed the CSAB recommendation.

215. Ms. Becky Taylor, a member of the CSAB who is also a member of the Respondent State Board of Education, chaired that meeting. (Resp. Ex. 22).

216. After hearing from DPI representatives, the committee voted to accept the CSAB recommendation regarding Petitioner's failure to comply with the settlement agreement. (Resp. Ex. 22, p5).

217. On April 2, 2015, Respondent met and voted, consistent with the recommendation of the CSAB and the Leadership for Innovation Committee, that PACE materially failed to comply with the settlement agreement. (Resp. Ex. 22, p39-40)

218. Respondent also voted to appoint a subcommittee "prior to the May State Board of Education meeting to hear from both parties" and make a final recommendation. (Resp. Ex. 22, p40).

219. According to the minutes of the April 2nd meeting, the next regularly scheduled meeting for Respondent was to be May 6, 2015 in Greenville, North Carolina. (Resp. Ex. 22, p47).

220. PACE Academy Chair, Mr. Paul Bedford, was sent a letter by certified mail on April 2, 2015 by OCS notifying Petitioner that Respondent voted and found that PACE had materially failed to comply with the settlement agreement. (Pet. Ex. 19).

221. The letter summarized the Respondent's actions, and provided notice that a subcommittee would be appointed upon a request for hearing. Any request for a hearing by the Petitioner was to be made within ten days of the date of the notice.

222. On April 10, 2015, Petitioner, by and through its attorney, submitted a letter to the Respondent's chairman, which:

- a. Timely requested a hearing pursuant to the settlement agreement;
- b. Expressed concern that the March 9, 2015 notice did not set forth the specific actions which constituted a material breach of the separation agreement;
- c. PACE would be prepared to address issues surrounding student records, consistent with Dr. Medley's March 9, 2015 letter, when Petitioner's representatives appeared before the appointed subcommittee;
- d. Requested an opportunity to question Dr. Schauss, Dr. Medley, Mr. Johnson, and Mr. Douglass;
- e. Requested the opportunity to present evidence "through testimony of some of its administrators" along with relevant documents.
(Pet. Ex. 20)

223. A two-member review panel consisting of Chair, Becky Taylor and Eric Davis was appointed.

224. Ms. Taylor is the same individual who serves on the CSAB, as Chair of the Leadership for Innovation Committee, and as a member of the Respondent State Board of Education.

225. Ms. Taylor was present for and participated in the March 9, 2015 CSAB meeting, the April 1, 2015 Leadership for Innovation Committee meeting, and April 2, 2015 State Board of Education meeting (via conference call).

226. Mr. Davis is a member of the Respondent State Board of Education, and was present for the April 2, 2015 State Board of Education Meeting. In addition, although not a member, Mr. Davis was noted as being present for the April 1, 2015 Leadership for Innovation Committee meeting. (Resp. Ex. 22, p1).

227. On April 20, 2015, DPI conducted another on-site visit, although the results of this visit do not appear to have been considered in decisions made by the Review Panel or the State Board of Education.

Review Panel

228. The Review Panel convened on May 12, 2015, and heard presentations by representatives from DPI as well as representatives from PACE.

229. Both Ms. Taylor and Mr. Davis stated on the record prior to the hearing that they could be fair and impartial in rendering their decision, and then heard information from Petitioner and Respondent.

230. Prior to presentations by the parties, Ms. Taylor emphasized that the subcommittee was not a court of law, not subject to Rules of Evidence, and that the hearing was intended to be informal. (Resp. Ex. 25, p7).

231. Counsel for the Petitioner objected to Ms. Taylor's participation in the hearing. (Resp. Ex. 25, p7-8). There was no objection to participation by Mr. Davis.

232. Ms. Taylor noted the objection, but made no further comments and took no further action on the request.

233. Over the course of a nearly two-and-one-half hour hearing, the majority of the questions and information presented centered around attendance issues and related implications on funding.

234. PACE presented information to the subcommittee which showed:

- a. "PACE does not look like a traditional school."
- b. OFB's counting of students was not correct because they "failed to count or to accept alternative evidence of students who attended half days, were homeless,

were engaged in credit recovery programs, or were completing occupational pathway credits.”

- c. OFB did not consider work samples, school attendance rosters, and sworn affidavits which PACE contended supported increased student enrollment and class attendance.
- d. Enrollment figures and funding in 2013-2014 and 2014-2015 resulted from compromises between Petitioner and individuals at DPI.
- e. PACE utilized Credit Recovery which allowed at-risk students, teen mothers, working students, homeless students, and students with poor parental support to help potential drop-outs have flexible schedules so they might be better positioned to graduate from high school.
- f. Difficulty PACE representatives had in obtaining information from OFB. Specifically, on August 21, 2014, Petitioner requested certain reports, information, and notes concerning OFB’s enrollment findings. That information was not provided until March 19, 2015.
- g. During the schools existence, Petitioner did not have a bad audit, nor had they run a deficit. In fact, PACE presented information from audits performed by Petway, Mills, and Pearson, PA which showed:
 - (1) In 2010, PACE had cash on hand in the amount of \$452,348.00.
 - (2) In, 2011, their cash on hand was \$447,575.00.
 - (3) In 2012, Petitioner had cash on hand of \$345,785.00.
 - (4) In 2013, they had \$100,762.00.
 - (5) In 2014, their cash on hand was \$87,425.00.
- h. The declining cash on hand, although a still a surplus, resulted from leasing and up-fitting a new school facility.
- i. PACE’s contention is that financial issues developed with OFB’s decision to reduce funding at the end of the 2014 school year. The decision to reduce funding retroactively had a \$234,000.00 impact on the school’s budget, which led to an end of the year deficit of \$9,120.00.
- j. Similarly, PACE contends that OFB’s decision to reduce funding in the 2014-2015 school year had a \$234,000.00 impact.

235. The subcommittee adjourned the meeting to discuss and to deliberate before issuing a recommended decision to the SBE.

236. The recommendation from the subcommittee to the Respondent was prepared on May 13, 2015. Their findings included:

- a. Detailed findings regarding student head counts on visits in August and September, 2015, which were initiated because of “past concerns with student counts at PACE Academy.”
- b. Petitioner certified 103 students for their ADM and an ADA of 90 students, despite a maximum headcount of 71 students on September 5, 2015.
- c. Generic findings that student attendance records were missing, along with sign in and sign out records.

- d. 23 students had perfect attendance in PowerSchool, but were not seen on at least one of the headcount visits by OFB.
- e. 12 students with perfect attendance in PowerSchool were not seen on any headcount visit by OFB.
- f. 29 students were included in the full ADM, even though they were not present on the first day of school.
- g. The school was funded for 75 students.
- h. PACE was placed on Financial Disciplinary Status on September 25, 2014 because they had depleted “more than 60% of the expected final, annual allotment.”
- i. A subsequent headcount was performed on March 26, 2015 found 74 students in class, despite an ADM of 113 students and an ADA of 93 students.
- j. There were students physically present in the school that were counted as absent in PowerSchool.
- k. Other school systems had denied payment to PACE for “some students due to lack of residential proof or other issues.”
- l. After April 14, 2015, based upon monthly visits to the school, OCS advised Petitioner to develop solutions to address concerns regarding daily operations, explain attendance issues, the need for a cohesive academic program, which “would require more professional development.” In addition, Petitioner was advised “to develop a plan due to the possibly precarious financial position.”
- m. Results of December 10, 2014 visit to the school showed that the EC program needed a “full continuum of services”, teachers needed more familiarity with IEPs, paperwork was not properly completed, more specifically designed services were necessary for IEPs, and collaboration was necessary between the EC program and the general educational program.
- n. PACE was placed on Governance Probationary Status on February 4, 2014.
- o. 49% of PACE students were EC students.
- p. PACE admitted IDEA violations (although those violations were not set forth).

(Resp. Ex. 26)

237. The final Finding of Fact set forth in the Recommendation of the State Board Review Panel included the following: “These findings do not purport to cover the entirety of the evidence presented to the Review panel or the entirety of the evidence relied upon by the Review Panel to make its determination and recommendation.” (Resp. Ex. 26)

238. In addition, the Review Panel indicated that it had considered “the statutes, regulations, and rules applicable to charter schools.” (Resp. Ex. 26)

239. The Review Panel supported the decision of the CSAB and recommended that the Respondent vote to revoke Petitioner’s charter.

240. At a specially called meeting on May 13, 2015, the SBE met to consider the subcommittee’s recommendation.

241. The meeting was a phone conference with ten of the Respondent's members participating by phone. (Resp. Ex. 27).

242. Minutes of that specially called meeting indicate that the only item on the agenda was revocation of Petitioner's charter. (Resp. Ex. 27)

243. After discussion and deliberation, at the conclusion of the meeting, the SBE voted unanimously to revoke PACE Academy's charter. (Resp. Ex. 27)

244. PACE Academy timely filed a Petition for Contested Case Hearing in the Office of Administrative Hearings on May 20, 2015.

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. Both parties received proper notice of hearing in this matter.

3. The Petitioner has the burden of proof by a greater weight or preponderance of the evidence in this matter.

4. It is not for the undersigned to determine whether Respondent's decision to terminate Petitioner's charter was correct or incorrect. The relevant inquiries for the undersigned to determine the applicability of N.C. Gen. Stat. §150B-23 to the facts herein.

5. Further, it is not for the undersigned to determine the remedies available to either party under the terms and conditions of the settlement agreement.

6. Respondent is entitled to a presumption that it acted in good faith in rendering the decision to terminate the charter. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619.

7. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm'r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

8. In weighing evidence which detracts from the agency decision, "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the

agency ruling, the ruling must stand" *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

9. The State Board of Education voted at a specially called meeting on May 13, 2015 to revoke the charter of PACE Academy for violating the terms of the Settlement Agreement. The charter issued to PACE specifically stated in clear and unambiguous terms the procedure to be followed in the event termination became necessary.

10. The Respondent was required to make its final decision regarding revocation of the Petitioner's charter "at its next regularly scheduled meeting" unless the Petitioner and Respondent agreed otherwise. No evidence was presented regarding an agreement that the decision could be made at a specially called meeting.

11. While the Respondent failed to follow the procedure for termination of a charter as set forth in the charter agreement, no evidence was presented that the decision to hold a specially called meeting was made in bad faith, or the reason it the decision was not made at a regularly called meeting.

12. In addition, there was no evidence presented that Petitioner was prejudiced by the Respondent's decision being made at the specially called meeting, and any procedural violation that may have occurred given the evidence against the Petitioner was harmless.

13. Further, substantial evidence exists that Petitioner did not comply with the terms and conditions of the Settlement Agreement.

14. While the Petitioner complied with five of the seven requirements in the Settlement Agreement, PACE Academy did not "comply with all federal and state laws and regulations" relating to the Exceptional Children's program, or with state reporting requirements.

15. In addition, Petitioner's failure to maintain accurate student records and have them accessible for review violated the Settlement Agreement. Multiple site visits to the school revealed a pattern of negligent, inconsistent, and careless student accounting.

16. While many of the alleged financial concerns levied against Petitioner by Respondent were questionable, as stewards of taxpayer dollars, Respondent had a duty to address the root cause for concern. Petitioner was unable to provide adequate answers or reasoning for their inability to maintain accurate and verifiable records for their students.

17. Petitioner has failed to meet its burden that the Respondent acted in bad faith in its decision to revoke Petitioner's charter.

18. Petitioner correctly asserted that it had a property right in the charter issued by Respondent.

19. Individuals may not be deprived of life, liberty, or property without due process of law. The parties do not dispute the existence of a property right in the possession of a charter to operate a public charter school.

20. A deprivation of property must be “preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Court reiterated the requirement for prior notice and opportunity to be heard in *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985) when it held that “some kind of a hearing” be provided prior to a property deprivation. *Id.* at 542.

21. However, central to the meaning of procedural due process is that parties are entitled to be heard and, in order that they may enjoy that right, they must be notified. *Parham v. Cortese*, 407 U.S. 67, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556. Reasonable notice and opportunity to be heard and present any claim or defense are embodied in the term “procedural due process.” *In re Nelson*, 78 N.M. 739, 437 P.2d 1008.

22. Petitioner was notified in February, 2015, to appear before the CSAB at its March 9, 2015, meeting to answer questions about finances, Exceptional Children non-compliance, enrollment, and progress of the Settlement Agreement. The notice also instructed Petitioner to send any materials it wished the CSAB to review by February 26, 2015.

23. Petitioner submitted no materials but did appear at the March 9, 2015, CSAB meeting during which time it was asked questions and provided answers to those questions.

24. While the tone of the meeting may not have been favorable to the Petitioner, they did have the opportunity to respond to questions and present information to the CSAB. That information was not convincing to members of the CSAB.

25. Respondent discussed the recommendation from the CSAB to terminate Petitioner’s charter at a public meeting held April 1-2, 2015, first at the Leadership for Innovation Committee, and then before the entire board.

26. Subsequently, upon Petitioner’s request, a subcommittee convened on May 12, 2015, to hear presentations from both DPI and Petitioner.

27. Petitioner claims that Becky Taylor’s participation on the subcommittee was a violation of due process is without merit.

28. “Whenever a government tribunal, be it a court of law or a school board, considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. ‘A fair trial in a fair tribunal is a basic requirement of due process.’” *Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit*, 326 N.C. 603, 613-14, 392 S.E.2d 579, 584 (1990), quoting *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955).

29. “An unbiased, impartial decision-maker is essential to due process.” *Id.* at 585.

30. “‘It is fundamental that both unfairness and the appearance of unfairness should be avoided.’ *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (6th Cir.1966); see *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982).” *Id.* at 590.

31. Taylor heard evidence at the March 9, 2015 CSAB meeting and then voted to recommend that PACE Academy had materially breached the terms and conditions of the Settlement Agreement. Taylor subsequently heard evidence and made decisions regarding these same allegations at the April 1, 2015 Leadership for Innovation Committee and the April 2, 2015 State Board of Education meeting.

32. No evidence was presented that Taylor had made statements or allegations regarding Petitioner outside open and public meetings.

33. Taylor then chaired the May 12, 2015 meeting of the Review Panel and stated on the record that she could be fair and impartial in rendering her decision.

34. Petitioner’s attorney requested that Taylor recuse herself from the proceedings, and that request was noted for the record.

35. In *Knight v. Higgs*, 189 N.C. App. 696 (2008), the Court of Appeals found that failure to properly consider a request to recuse a potentially biased member of a board carried the appearance of impropriety. Here, however, even though Taylor addressed the issue of bias prior to Petitioner’s request, it was considered and addressed by the Review Panel on the record.

36. Taylor’s participation in the specially-called May 13, 2015 meeting was not questioned by the Petitioner.

37. Respondent correctly asserts that this matter is similar to the employment law setting in *Cleveland Board of Education v. Loudermill et. al.*, 470 US 532 (1985). As stated in *Loudermill*, the pre-termination due process requirement depends in large part on whether there exists in state law an opportunity for a full and fair post-termination hearing. *Id.* at 546.

38. The pre-termination procedure Respondent followed were sufficient under state law, especially in light of the terms of the charter granted to Petitioner. The charter allowed for the Review Panel to render a recommendation without a hearing; here, Petitioner was given the opportunity to be heard before the panel and present information it contended supported their position.

39. In addition, under the terms of the Settlement Agreement, Petitioner had a meaningful opportunity to be heard before the Review Panel.

40. Petitioner, contrary to the terms of the Settlement Agreement, did not surrender its charter, but filed a petition with OAH. The undersigned makes no determination about the remedies available under the Settlement Agreement.

41. Over the course of a four-day hearing, Petitioner had a full hearing in which it presented evidence and cross-examined witnesses.

42. Petitioner's property interest was sufficiently protected by the pre-termination opportunity to respond, coupled with post-termination administrative procedures. *Owen v. UNC-G*, 121 N.C. App. 682, 686, 468 S.E. 2d 813,816 (1966).

43. Petitioner has produced insufficient evidence to prove that its right to due process has been denied.

44. Evidence showed that the Respondent collected information and evidence over the course of many months of work with the Petitioner. The decision finding a material breach of the Settlement Agreement and revoke Petitioner's charter was made after careful, open, and deliberate consideration of the facts.

45. While the Respondent failed to follow proper procedure, Petitioner presented insufficient evidence to meet its burden, and any such failure was harmless.

46. With regard to due process, Petitioner had adequate notice and the opportunity to be heard.

47. Petitioner has failed to meet its burden that Respondent exceeded its authority.

48. Petitioner has failed to meet its burden that Respondent acted erroneously.

49. Petitioner has failed to meet its burden that Respondent acted arbitrarily or capriciously.

50. Petitioner failed to overcome the presumption set forth by law that the State Board of Education's revocation of Petitioner's Charter was lawful and correct.

51. Petitioner has failed to carry the burden of proof assigned to it by law, and the Petitioner's claims should be denied.

Based upon the foregoing findings of fact and conclusions of law the Petitioner's claims are denied.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days

after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 13th day of August, 2015.

Philip E. Berger, Jr.
Administrative Law Judge