

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EDC 04160

Next Generation Academy Inc., Petitioner, v. N.C. State Board of Education, Respondent.	FINAL DECISION
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THIS MATTER came on to be heard before the Hon. J. Randolph Ward, Administrative Law Judge, on September 30, 2015, in High Point, North Carolina.

APPEARANCES

For the Petitioner: Philip S. Adkins, Atty.
Adkins Law Group
Snow Camp, N.C.

For the Respondent: Tiffany Y. Lucas, Asst. Attorney General
NC Department of Justice
Raleigh, N.C.

ISSUES

Whether the Respondent arbitrarily or erroneously denied Petitioner's application to open a Charter School.

STATUTES AND RULES AT ISSUE

N.C. Const. art. IX, sec. 5; N.C. Gen. Stat. §§ 115C-2; 115C-12(9); 115C-218 - 115C-218.110; 115C-218(a); 115C-218(b)(1) & (10)a.; 115C-218.1(b) (1), (2) & (3); 115C-218.2(a); 115C-218.5; 115C-218.5(a); 115C-218.5(b); 115C-238.29A - 115C-238.29J (repealed); 150B-1(e); 150B-2(7a) & (8a)c.; 150B-23(a); 150B-23(f); 150B-29(a); 150B-33(b)(11); 150B-34(a); and, 150B-51(c).

WITNESSES

For Petitioner: Dr. Samuel W. Misher, Board Chair
Next Generation Academy, Inc.

 Fmr. Sen. W. Edward Goodall, Jr., Executive Director
N.C. Public Charter Schools Association

For Respondent: Mr. Eric Sanchez, Member
Charter School Advisory Board

 Ms. Becky Taylor, Member
N.C. State Board of Education

 Dr. Deanna Townsend-Smith, Lead Education Consultant
Office of Charter Schools

 Ms. Helen Nance, Fmr. Chair
Charter School Advisory Board

EXHIBITS

For Petitioner: Petitioner’s Exhibits 3 through 8

For Respondent: Respondent’s Exhibits 2 through 21

UPON DUE CONSIDERATION of the arguments of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS OF FACT

1. On September 26, 2014, an application to open a Charter School in August 2016 was submitted to the Office of Charter Schools (hereinafter, “OCS”) of the North Carolina Department of Public Instruction (“DPI”) by the Petitioner Next Generation Academy, Inc. (“Petitioner”), a nonprofit corporation organized for this purpose. *See*, “North Carolina Charter School Application [of] Next Generation Academy,” Petitioner’s Exhibits 3 and 4 (hereinafter, “P Ex 3 & 4”).
2. At all times pertinent hereto, the work of the Charter School Advisory Board (“CSAB”) was staffed by OCS. CSAB was housed in the Department of Public Instruction, but

made recommendations to the State Board of Education on charter school issues, including whether to approve Charter School applications. *See*, “Transcript of Administrative Hearing,” page 10 (hereinafter, “Tr p 10”).

3. OCS staff reviewed Petitioner’s application in October 2014, and deemed it “incomplete.” (Tr p 15.)

4. Based on OCS’s recommendation, and following a review by its own committee, the Charter School Advisory Board (“CSAB”) voted to deny the application on November 13, 2014, because it was considered “incomplete.”

5. The Chair of CSAB sent the Petitioner a “Notification of Incomplete Application,” dated November 14, 2014, indicating that its application would not be further considered during the 2014 “round” of evaluations. *See*, Petitioner’s Exhibit 5 or Respondent’s Exhibit 17 (hereinafter, “P Ex 5 or R Ex 17”).

6. CSAB’s November 14, 2014 letter did not include any statement or notice of Petitioner’s appeal rights, or an opportunity to seek administrative remedies for the denial of its application. However, Petitioner sent a letter to CSAB on December 3, 2014, encouraging reconsideration of the adverse decision. (R Ex 17 & 18.)

7. CSAB did not meet to consider Petitioner’s appeal. (Tr p 59 & 181-82.) Without consulting the remainder of the Board, the Chair of CSAB sent Petitioner an “Incomplete Application Appeal Notification,” dated December 15, 2014, stating that the “CSAB stands by its decision to deem the application incomplete.” (R Ex 19.)

8. In its Pretrial Statement, Respondent contended that CSAB’s December 15, 2014 letter was the “document constituting agency action.” However, this letter did not include any statement or notice of Petitioner’s appeal rights, or an opportunity to seek administrative remedies for the denial of its application.

9. At its June 3, 2015 meeting, the Respondent North Carolina State Board of Education (hereinafter, “SBE” or “Respondent”) discussed and voted on eighteen (18) charter school applications recommended for approval by CSAB, and considered various other matters brought forward by CSAB. (R Ex 21, pgs. 35-41.) SBE did not approve Petitioner’s application to open a charter school, and effectively acquiesced in its rejection. SBE did not provide Petitioner with a notice of its appeal rights, nor an opportunity to seek administrative remedies for the denial of its application.

10. Next Generation Academy, Inc. filed the Petition initiating this contested case hearing on June 8, 2015.

11. Dr. Samuel Misher, Chair of Petitioner’s Board of Directors, testified that he and other volunteers spent “hundreds” of hours in research and planning to submit Petitioner’s application. (Tr p 73.) Former State Senator W. Edward Goodall, Jr., the Executive Director of

the N.C. Public Charter Schools Association, testified that his organization devoted approximately one hundred hours assisting Petitioner with the preparation of the application. (Tr p 101.)

12. The revised application form used by Petitioner, and the “2015 Charter Application Timeline and Process” (“Timeline”), were approved by SBE on June 5, 2014. These required the submission of applications, with a \$1,000 nonrefundable fee, by September 26, 2014 for new charter schools seeking to open in August 2016.

13. The Timeline indicates that an “Application Completeness Screening” would take place in October, prior to “Application Initial Review,” during the period “November 2014 - January 2015 (Tentative).” Referring to the “completeness screening,” the Timeline states that, “The initial screening rubric used by OCS ensures all parts of the application is complete (*sic*).” There is no suggestion in the Timeline that a clerical error will result in an irreparable rejection of an application. (R Ex 6 p 1, and R Ex 8 p 4.)

14. CSAB’s “Sample Application Preliminary Evaluation Packet” furnished to applicants describes the characteristics of passing and failing applications as follows:

Pass: The response demonstrates an understanding of key issues and the ability to start a charter school successfully *although minimal clarification may be needed in places*. It addresses the topic with clear, specific and accurate information that reflects thorough preparation. The application meets the minimum components as evidenced by the checkboxes of the rubric [evaluation packet].

Fail: The response *either fails to entirely address the selection criteria or addresses some of the criteria*. The responses lack adequate detail and/or raise substantial concerns about the applicant’s preparation for and ability to start or operate a charter school successfully. The application *fails to address all of the minimum components* as evidenced by the check boxes of the rubric.

(Emphasis added.) R Ex 10, p 1.

15. Respondent’s evidence shows that applications considered “incomplete” by OCS were evaluated by CSAB only to determine that question, and if CSAB agreed that an application was incomplete, it was rejected before the “Preliminary Evaluation” stage, without any opportunity to correct even a minor oversight or clerical error.

16. CSAB’s “Notification of Incomplete Application” of November 14, 2014, and “Incomplete Application Appeal Notification” dated December 15, 2014, each stated that Petitioner’s application was deemed “incomplete,” because, “All board member resumes and criminal background checks are not included,” and “The applicant identified a facility and did not include the required Appendix Q.” The evidence presented at the hearing shows that neither of these statements are true.

17. Applicants were statutorily required to provide “the names of the initial members of the board of directors.” N.C. Gen. Stat. §115C-218.1(b)(3). In addition, Respondent required

that each member complete a “Charter School Board Member Information Form” questionnaire that asked for resume information, and “encourage[d] members to reflect” on their responsibilities; a criminal background check report; and, “a one-page resume” (emphasis original), which essentially restated the highlights of the education and career descriptions included in the “Member Information Form,” i.e., a “brief [listing of] education and employment history,” and “knowledge and experience that [the member] would bring to the board.” (P Ex 4, “Appendix G” p 2 & 4.)

18. A criminal background check report and a one-page resume were prepared for each member of the board. However, due to a clerical error when Petitioner’s 152-page application package was being assembled or electronically submitted, the one-page resume of board member Dr. Craig Rhodes was accidentally omitted from Appendix G. (Tr p 86.) It was sent to OCS after Petitioner was notified that it had been left out of the application package. However, no facts concerning Dr. Rhodes sought in the application process were omitted from Petitioner’s original application.

19. OCS did not notify the Petitioner when the omission of Dr. Rhodes’ resume was discovered in October, because it was the policy of that office and CSAB not to permit an applicant to correct a problem that they concluded made the application “incomplete.” (Tr p 33-34, 59-60 & 65-66.) Petitioner learned of it only after receiving the CSAB’s “Notification of Incomplete Application,” dated November 14, 2014. When Petitioner submitted Dr. Rhodes’ resume in early December 2014 -- approximately 10 weeks into the 23 month process -- CSAB failed to reconsider Petitioner’s application. (Tr p 181-82.)

20. There was no evidence or allegation offered at the hearing that, “All board member resumes and criminal background checks are not included” in Petitioner’s application. The person who drafted the notification testified that she was using the phrase “board member resumes and criminal background checks” to refer to any of these documents. (Tr p 168-69.)

21. Petitioner’s application proposed to have a board consisting of “at least five” members -- an acceptable number, according to DPI’s Charter School Applications Resource Manual (“Manual”) -- but actually had a “preferable” seven members. (R Ex 8, p 18; R Ex 11, p 24.) Petitioner submitted documents for all seven of their members, including six packages that were not found to be complete in every respect. Another 2014 applicant stated “a couple times in their application” that its board of directors had six members, but included Appendix G materials for only five members. OSC recommended rejection of the application for incompleteness. CSAB accepted the application for further consideration at the “Preliminary Evaluation” stage, and the charter it sought was ultimately approved by SBE. (R Ex 18, p 2; Tr p 25-26, 194-95 & 205; R Ex 21, p 28.)

22. Charter school applicants were not required to have final arrangements for facilities to house their proposed charter school nearly two (2) years in advance of opening, but were asked to project revenue and operating costs, including “the cost per square foot for the proposed facility.” Petitioner had not entered into a lease, but had identified four locations that might be suitable. Petitioner’s representatives reached a “verbal agreement,” on the rent for a church facility currently being used by a charter school on a temporary basis, which enabled them to generate the

estimate of “approximately \$8.09 per foot for a year (with utilities),” although the owner reserved “some flexibility.” (R Ex 11, p 38-39 & 44; Tr p 74-75.)

23. The application contained the following, printed together as a single query: “What is your plan to obtain a building? Identify the steps that the board will take to acquire a facility and obtain the Educational Certificate of Occupancy. If a facility has been identified please fill out the Facilities Form (Appendix Q).” Below a space that would accommodate a name and address, the form also makes this request: “Please attach copies of Facilities Inspections as Appendix R.” Petitioner’s application did not state that it had “identified” a facility, or entered into a lease, or mention the name, address or location of any of the four facilities they described in the application. (R Ex 11, p 38-39.) In accordance with the instructions, Petitioner did not attach Appendices Q and R.

24. Referring to the “verbal agreement,” Petitioner put in this facility identity blank that, “We have entered into a contract with the church with a facility that used to be a school” before describing its facilities. Below the cost estimate, Petitioner also described the facilities of the three other properties in the space for the “Facility Contingency Plan.” (R Ex 11, p 38-39.) Despite the absence of identifying information, OCS and CSAB erroneously assumed that this “contract” was a lease, and that therefore Petitioner should have attached Appendices Q and R. Consequently, Petitioner’s application was deemed “incomplete” due to the absence of Appendices Q and R. (Tr p 167.) There is no evidence of that OCS or CSAB made any effort to substantiate this assumption, by allowing Petitioner to provide “minimal clarification,” or otherwise.

25. During the same November 13, 2014 CSAB meeting at which Petitioner’s application was found deficient for failing to attach Appendices Q and R, another application that OCS deemed to be incomplete on the same grounds was considered. In that instance, the applicant had “identified a facility, a specific facility,” but had not attached Appendices Q and R. CSAB did not find that application to be “incomplete.” (Tr p 180-81; R Ex 16, p.2; R Ex 18, p.2.)

26. Petitioner’s application had no material omissions. The evidence does not demonstrate any rational relationship between the omission of a one-page resume, or Appendices Q and R, and the Petitioner’s qualifications to operate a charter school.

27. On December 3, 2014, Dr. Misher sent CSAB a letter on behalf of Petitioner protesting the decision to deny its charter school application, and citing inconsistencies in its application of their “completeness” policy. (R Ex 18.) The Chair of the CSAB recognized Petitioner’s letter as an “appeal,” but denied it in an “Incomplete Application Appeal Notification,” dated December 15, 2014, without discussing it with the membership of CSAB, and without offering Petitioner an opportunity to present its arguments for reconsideration. (Tr. 181-82; R Ex 19; P Ex 6.)

28. No effort to consider the statutory criteria for approval of charter schools was involved in the rejection, with finality, of applications in the “completeness” phase of the process. OSC resolutely did not “look at it for quality” when something was deemed missing from an application, in order to give “consistent” treatment to all applicants. (Tr p 147-48 & 180.) One

member of the CSAB thought that absence of Appendices Q and R, as well as the resume, made a stronger case for denying its application; but, he agreed that the omission of Dr. Rhodes' resume alone was enough reason to reject the application. (Tr p 27, 60 & 64.)

29. When the applications that were reviewed for content were considered deficient, applicants were given written notification and five working days to "provide clarifying information." (R Ex 6.) In 2014, "each applicant group" that was not eliminated for submitting an "incomplete" application "received five days to provide written clarification on each of the main sections within the application." (R Ex 21, p 36.) However, if CSAB accepted OSC's characterization that an application was "incomplete," it was rejected before the "Preliminary Evaluation" stage, without any opportunity to correct even a minor oversight or clerical error. (Tr p 59-60 & 65-66.) Respondent's evidence shows that applications considered "incomplete" by OCS were evaluated by CSAB only to determine whether they were "incomplete," regardless of their merits.

30. In its post-hearing submissions, Respondent noted that, DPI "has established a stringent process" for reviewing charter applications, and that, "Modifications to the procedures have been implemented over the years as circumstances" changed, "including in 2011 after the General Assembly passed Senate Bill 8" that "remove[d] the cap on the number of charter schools in the State which, until then, had limited the number of charter schools ... to 100." When asked on direct examination "why there is this part of the process ... I mean a completeness screening?," OCS's Lead Education Consultant, who headed the application evaluation process for that office, discussed the Legislature's 2011 decision to remove the "cap," and that there was then "no limit on the number of applications that the Office of Charter Schools might be required to consider in any given year." (Tr p 158-60.) The former Chair of CSAB recalled that after "the cap for the charter schools in North Carolina had been lifted" that, "there was some new ways of trying to design the way that this [Charter School Advisory] Board was going to administer its duties" regarding the increase in applications, including greater reliance on the Office of Charter Schools. (Tr p 191-92.)

31. Senator Goodall testified that the prevalence of rejections of charter school applications on similar trivial grounds led to the legislation, effective for applications submitted in 2016, that added N.C. Gen. Stat. § 115C-218.2(a) to the Charter Schools Act to require that SBE and CSAB "shall provide timely notification to an applicant of any format issues or incomplete information in the initial application and provide the applicant at least five business days to correct those issues in the initial application."

32. Petitioner's application stated its aspiration to fulfill the "purpose" of the charter school program that the statute gives "special emphasis", i.e., to provide "expanded learning experiences for students who are identified as "at risk of academic failure." N.C. Gen. Stat. § 115C-218(a)(2). In the "Mission and Purposes" section of Petitioner's application, it is observed that the school's proposed service area, "the East Greensboro community" with 52,000 residents, was "often defined by its statistics," and cited this socioeconomic data: 60% African-American, 25% poverty rate, families headed by single females outnumbering two-parent families, and that the community encompassed ZIP Codes in which 31% of the households had \$20,000 or less in income per year. (P Ex 3, p. 7.)

33. DPI's Manual explains that SBE may grant a charter school applicant a "preliminary planning year" once the organization submits information demonstrating the ability to properly operate a school that would meet one or more statutory purposes, and that it could authorize the school "before the applicant has secured its space, equipment, facilities, and personnel," if assured that the applicant showed the ability to raise the necessary capital to fund their acquisition. (R Ex 8, p 6.) Thus, the people involved with starting the school, and their plans and vision for their school, were a major focus of the application.

34. The following background information about the members of Petitioner's founding Board of Directors, and their responses to CSAB's "Charter School Board Member Information Form" questionnaire, were submitted on the application form's "Appendix G" (P Ex 4, Appendix G):

a. Mr. Brian L.G. Moore, CPA

Mr. Moore was the Assurance Senior Associate and Assurance Manager at PriceWaterhouseCoopers' office in Greensboro. He had obtained a B.S. in accounting from North Carolina A&T, and a Masters in accounting from Michigan State, with a concentration in Financial Reporting and Assurance Services. He specialized in healthcare organizations, and had experience preparing quarterly reports for both public and private organizations. A Greensboro native, Mr. Moore had a history of volunteering with local youth and education groups, and his employer supported its executives' efforts to provide professional expertise assisting nonprofit organizations, including providing training on serving effectively on a board of directors. In response to a question on the application form, he indicated that student advancement, teacher retention, and enrollment growth as projected in the school's five-year plan were useful measures of success.

b. Dr. Queenie Sellers-Dalcoe

In addition to her Doctorate in Education, and principal and superintendent's licensure, Dr. Sellers-Dalcoe held a Masters in Secondary Reading, a B.S. in Social Sciences, and certifications in Learning Disabilities and Cross Categorical Education. She worked for 19 years in Guilford County schools as a special education teacher, reading specialist, curriculum facilitator, and school district academic coach. Since 2006, she has been employed as field manager for a Johns Hopkins University project, launching reading programs in various school districts around the State. (Tr p 70) She also held an appointment as an adjunct Professor at the University of the Cumberlands. In the community, she had served as a member of the Board of the State Employees Credit Union for over fourteen (14) years. She envisioned Next Generation Academy as a school that would "meet the needs of all students," with "the STEM model as well as individualized instruction," proceeding from the premise that, "every child is capable of success."

c. Judge James S. Pfaff

Judge Pfaff was educated at Phillips Academy, Andover, MA; the University of North Carolina at Chapel Hill (B.A., History, 1966); and, Wake Forest University School of Law (J.D., 1970). Professionally, he has been Director of Greensboro Legal Aid; a prosecutor, rising to Chief Assistant District Attorney; District Court Judge for the 18th Judicial

District; in private practice for 25 years; and since 2005, Magistrate Judge of Small Claims Court in Guilford County. His service to the community includes leadership positions in legal, artistic, charitable, fraternal, youth, political, consumer, educational, athletic and church organizations, including Greensboro C.A.R.E.S., Gov. Hunt's Commission on Youth, Consumer Credit Counseling Service, First Offenders Program, Republican National Committee, Pony League Baseball, Sunday School Superintendent, Guilford County Board of Elections, Women's Resource Center, and the Moravian Southern Province Board of Christian Education. He served on the founding Board of Greensboro Montessori School as Secretary and Legal Counsel. On his questionnaire Judge Pfaff noted that his wife was a schoolteacher, and wrote: "I have always dreamed of this kind of school."

d. Dr. Samuel W. Misher

Dr. Misher chairs the Board of Next Generation Academy. He has "retired" after 34 years as an educator, beginning as a teacher in 1982, and serving as assistant principal or principal for his last 24 years in the schools. Two of the three schools he served as principal are in the area "where Next Generation is to be located, working with the students of high needs." (Tr p 68 -69) His final assignment was as the first principal of the new Northern Guilford Middle School, which he saw through its start-up phase, and led to "exemplary" status on the statewide measures. Dr. Misher is a graduate of Appalachian State University (B.S. in Mathematics, 1982), North Carolina A & T (Masters in Education Administration, 1991), UNC-Chapel Hill (Assistant Principals Executive Program, 2005), and Nova Southeastern University (Doctorate of Education: Educational Leadership, 1999). He began teaching in 1982, served as an Assistant Principal in the Guilford County and Burlington City Schools 1991-1999, and served as Principal of Allen Middle School, Ben L. Smith High School, and Northern Guilford Middle School, between 1999 and 2014. He is motivated by "a passion for making sure students have the opportunity to have an excellent education experience," and anticipates that New Generation Academy will focus on developing reading skills and "personalizing instruction according to the needs of each child."

e. Dr. Barbara H. Zwadyk

Dr. Zwadyk joined the board to be "involved with a charter school that would support all students, providing equity and 21st century learning." After graduation from UNC-Greensboro, she served as a Teacher, Assistant Principal, Principal, and Instruction Improvement Officer for High Schools in the Guilford County Schools between 1984 and 2005. She obtained Masters degrees in French and Educational Leadership; and, in 1993, was awarded a Doctorate of Education from UNC-G. (Her dissertation concerned the "Impact of Class Size on Retention.") She went to Winston-Salem/Forsyth County Schools in 2006 as Assistant Superintendent of Instructional Services. She returned to the Guilford County Schools in 2009 as Chief Officer for Curriculum and Organizational Development, and retired from that system in 2012 as High School Curriculum Officer. She served the Chatham County schools as Interim Assistant Superintendent for Academic Services and Instructional Support Services for approximately a year. In 2013, she became Director of North Carolina New Schools, and has done leadership coaching on behalf of that organization. She has taught Masters and Doctoral level courses as an adjunct professor at Salem College, UNC-G, Gardner Webb, the University of the Carolinas, and High Point University. Dr. Zwadyk had previous experience on the Boards of the N.C. Association for Supervision and Curriculum Development, and other non-profits.

f. Dr. Craig Rhodes

Dr. Rhodes has a Bachelors degree in Electronic and Computer Technology, a Masters degree in Technology Education, and his Ph.D. from the University of Minnesota, in Workplace, Community and Family Education. Dr. Rhodes is a former public school teacher, and a former university education professor instructing future teachers. Dr. Rhodes had served since 2002 as the special assistant to the Provost at North Carolina A&T State University. In that role, he was the University's liaison with early college and middle college principals. His personal mission was to bring to New Generation Academy's Board "knowledge and opportunities for partnership with higher education institutions," to help create "a robust and innovative learning environment" for acquiring "21st century skill sets."

g. Mr. David L. Crandall

Mr. Crandall was serving as Chairman of the Board of the National Association of Middle School Principals when Petitioner's application was filed. He had done public relations work for many years with the Washington, D.C. office of this organization. He held a B.S. in Marketing from Clemson University. He had 22 years of experience serving schools through his positions with photography firms, currently as Director of Sales for Strawbridge Studios since 2012. In his responses to the Appendix G questions, Mr. Crandall knowledgeably discusses the role of the various stakeholders and the governance of successful schools. He explained his desire to serve on the board as a new way to "give back to the community," in an area the city that presently lacked education options. He was also motivated by associating with the school's founders. "The current leadership of NGA is composed of a dream team of educators and professionals, all led by one of the most passionate men in education I have ever met," a reference to Dr. Misher.

35. The OCS, the CSAB, and the Respondent State Board of Education did not evaluate the Petitioner's purpose, Board of Directors, education plan, financial viability, or other merits in reaching the decision to disallow its application.

36. There are several mentions of denying applications for being "incomplete" in CSAB literature, the application, and a SBE Policy, No. TCS-U-012, none of which define the term as including trivial clerical errors. This policy does clearly state that, "The SBE may request information from applicants, their officers, agents or employees ..."; and, that "SBE may give priority consideration to applications that demonstrate the capability to provide comprehensive learning experiences to students identified as at risk of academic failure."

37. While Respondent is ultimately responsible for the disposition of Petitioner's application, the Minutes of SBE's June 3, 2015 meeting fails to show that the general membership of the State Board of Education made a conscious decision to deny it for the reasons given at the hearing. (R Ex 20, p 1; R Ex 21, p 35-41.)

38. The preponderance of the evidence of record shows that Respondent erred in failing to evaluate Petitioner's application to determine whether Next Generation Academy would achieve one or more of the purposes of charter schools, would likely be educationally and economically sound, and would meet the requirements of the Charter Schools Act and SBE.

39. The preponderance of the evidence of record shows that Respondent arbitrarily rejected the Petitioner's charter school application while accepting other applications with substantially similar "incompleteness."

40. The Respondent's rejection of the Next Generation Academy's application substantially harmed Petitioner by, at a minimum, delaying the opening of the school for a year, and forcing it to at least partially repeat the time-consuming process of submitting a charter school application with current information.

41. Next Generation, Inc. timely filed a Petition for a contested case hearing on June 8, 2015 in the Office of Administrative Hearings, challenging the Respondent's denial of Petitioner's application for a school charter.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *In re Helms*, 127 N.C.App. 505, 510, 491 S.E.2d 672, 675 (1997); *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. All actions of agencies taken pursuant to N.C. Gen. Stat. Chapter 115C, Elementary and Secondary Education, including the approval of applications to open charter schools pursuant to § 115C-218.5, are subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes. N.C. Gen. Stat. § 115C-2. The Respondent State Board of Education is subject to the contested case provisions of the Administrative Procedure Act. N.C. Gen. Stat. §150B-1(e).

3. Respondent was required to give Petitioner notice in writing of its right to appeal the denial of its application to the Office of Administrative Hearings in order to limit the time within which Petitioner could file a contested case petition. N.C. Gen. Stat. § 150B-23(f). It is axiomatic that this period of limitation does not begin to run until such notice is given as required by statute. Consequently, the Petitioner was entitled to file its petition at any time. *Clay v. Employment Sec. Com'n of North Carolina*, 340 N.C. 83, 87, 457 S.E.2d 725, 728 (1995); *Jordan v. N.C. Dep't of Transp.*, 140 N.C.App. 771, 774, 538 S.E.2d 623, 625 (2000), *disc. rev. den.*, 353 N.C. 376, 547 S.E.2d 412 (2001); *CM v. Bd. of Educ. of Henderson County*, 241 F.3d 374, 386 (4th Cir.), *cert. denied*, 534 U.S. 818, 122 S.Ct. 48, 151 L.Ed.2d 18 (2001).

4. The Petition was timely filed on June 5, 2015, within 60 days of the State Board of Education's *de facto* final agency decision on June 3, 2015. However, as Respondent failed to give Petitioner due notice of its appeal rights, no limit on the time to file the Petition was imposed, regardless of when the final agency decision may be deemed to have been given. N.C. Gen. Stat. §150B-23(f).

5. The parties and the controversy are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 115C-2, 150B-1 and 150B-23(a).

6. An administrative law judge must decide a contested case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency, and determine whether the petitioner is entitled to the relief sought. N.C. Gen. Stat. §§ 150B-34(a); 150B-51(c). The Petitioner bears the burden of establishing facts required by G.S. 150B-23(a) by the preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). No exercise of what could reasonably be characterized as the agency's expertise in the field of education was a material factor in the decision to deny Petitioner's application.

7. The finder of facts need not make a finding as to every fact which arises from the evidence, but rather only those facts which are material to the resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993); *Green v. Green*, 54 N.C.App. 571, 284 S.E.2d 171 (1981); *In re Custody of Stancil*, 10 N.C.App. 545, 549, 179 S.E.2d 844, 847 (1971).

8. The Respondent North Carolina State Board of Education ("SBE") was created by the Constitution to "supervise and administer" the State's system of free public schools, "and shall make all needed rules ... subject to the laws enacted by the General Assembly." Article IX, Sec. 4 and 5. It "establish[s] policy for the system ..., subject to laws enacted by the General Assembly." N.C. Gen. Stat. § 115C-12(9). SBE has been tasked with the general administration of the charter schools by the Charter Schools Act, initially codified at N.C. Gen. Stat. §§ 115C-238.29A - 115C-238.29J, and recodified effective August 6, 2014 as Chapter 115C, Article 14A, §§ 115C-218 - 115C-218.110.

9. At all times pertinent hereto, the Charter School Advisory Board ("CSAB") was "located administratively within the Department of Public Instruction," but "report[ed] to the State Board of Education" and "ma[de] recommendations to the State Board." N.C. Gen. Stat. § 115C-218(b)(1) & (10)a. The State Board of Education is responsible for making the "final decisions on the approval or denial of applications" to open charter schools. N.C. Gen. Stat. § 115C-218.5(b). SBE's decision or acquiescence in the rejection of Petitioner's application was the final agency decision on this matter. The Respondent State Board of Education is ultimately responsible for the actions prejudicial to Petitioner.

10. The Legislature enacted the "Charter Schools Act of 1996" with the stated "purpose" to:

... authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools, as a method to accomplish all of the following:

- (1) Improve student learning;

- (2) Increase learning opportunities for all students, **with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure** or academically gifted;
- (3) Encourage the use of different and innovative teaching methods;
- (4) Create new professional opportunities for teachers, including the opportunities to be responsible for the learning program at the school site;
- (5) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and
- (6) Hold the schools established under this Article accountable for meeting measurable student achievement results, and provide the schools with a method to change from rule-based to performance-based accountability systems.”

(Emphasis added.) N.C. Gen. Stat. § 115C-218(a).

11. SBE may approve an applicant if it would achieve one or more of the above purposes, would “be likely to operate a school in educationally and economically sound manner,” and meets requirements set out in the Charter Schools Act or promulgated by SBE. N.C. Gen. Stat. § 115C-218.5(a). Applicants were statutorily required to give “names of the initial members of the board of directors,” and descriptions of a “program that implements one or more of the purposes,” and “student achievement goals.” N.C. Gen. Stat. § 115C-218.1(b) (1), (2) & (3).

12. Respondent’s Policy TCS-U-012, was not adopted as a Rule pursuant to the N.C. Administrative Procedures Act. As a “policy,” it is a “nonbinding interpretive statement.” N.C. Gen. Stat. § 150B-2(7a) and (8a)c. Neither may be used as an exception to statutory directives. *Anderson v. North Carolina Dept. of Human Resources*, 109 N.C.App. 680, 682, 428 S.E.2d 267, 269 (1993).

13. Petitioner was not offered administrative remedies or a meaningful opportunity to be heard prior to the final agency decision and, although the SBE, Department of Public Instruction and CSAB are subject to the Administrative Procedures Act, no notice of its right to appeal that decision pursuant to N.C. Gen. Stat. § 150B-23(f) was given at any stage of the agency’s process.

14. An agency action is considered “arbitrary and capricious” when its decision indicates the absence of careful consideration, a course of reasoning, and the exercise of judgment, under circumstances in which the law requires analysis and the application of measured discretion. *State ex rel. Comr. of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980); *Watson v. N.C. Real Estate Com'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987). A decision “without adequate determining principle,” is arbitrary. Black’s Law Dictionary 134 (rev. 4th ed. 1968).

15. Respondent erred by applying a “completeness” standard that contradicted the Charter Schools Act by preventing some applications from being considered under the statutory criteria for selecting charter school applicants. N.C. Gen. Stat. §§ 115C-218(a); 115C-218.5(a).

16. Respondent erred by failing to consider Petitioner’s application to open a charter school under the statutory criteria of the Charter Schools Act.

17. Respondent erred by imposing, or permitting the imposition, of requirements for approving charter schools designed to reduce the pool of applicants allowed to be considered under the criteria specified by the Charter Schools Act following the repeal the “cap” limiting the number of charter schools in the State. Session Law 2011-164; N.C. Gen. Stat. § 115C-105.37B(a)(2).

18. Respondent arbitrarily applied its “completeness” screening by rejecting the Petitioner’s application while accepting other applications with substantially similar perceived defects.

19. Respondent’s decision substantially prejudiced the Petitioner's rights to timely consideration of its application under the criteria specified in the Charter Schools Act.

20. An administrative law judge may assess reasonable attorneys' fees and witnesses' fees against the State agency upon finding that the respondent agency has acted arbitrarily and substantially prejudiced the Petitioner's rights. N.C. Gen. Stat. § 150B-33(b)(11).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

FINAL DECISION

The Petitioner is entitled to have its application evaluated by Respondent for the opening of Next Generation Academy in August 2016, or at such time as Petitioner may otherwise agree, under the same statutorily authorized criteria used in considering those applications received by September 26, 2014 that were not deemed to be “incomplete.”

Counsel for Petitioner shall submit to the undersigned an affidavit concerning his time, services, and expenses in this case, the normal and reasonable fees charged in cases of this nature by attorneys with his relevant skills and experience, and a copy or description of his contract with Petitioner, including any contingencies he wishes to be considered in the determination of a reasonable attorney’s fee pursuant to N.C. Gen. Stat. § 150B-33(b)(11).

Respondent shall compensate Petitioner for a reasonable attorney’s fee, when such is approved by Order of the Office of Administrative Hearings.

So Ordered.

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. Gen. Stat. § 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 4th day of March, 2016.

J Randolph Ward
Administrative Law Judge