

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PAM STEWART, AS COMMISSIONER OF  
EDUCATION,

Petitioner,

Case No. 17-3898SP

vs.

SILVA OF SOUTH FLORIDA, INC.,  
d/b/a NEW HORIZONS (7502), AND  
YUDIT SILVA

Respondents.

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RECOMMENDED ORDER

This case came before Administrative Law Judge John G.  
Van Laningham for final hearing on August 10, 2017, in  
Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Riley Michelle Landy, Esquire  
Jason Douglas Borntregor, Esquire  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

For Respondents: Christopher Norwood, J.D.,  
Qualified Representative  
The Governance Institute for  
School Accountability  
14844 Breckness Place, Suite 100  
Miami Lakes, Florida 33016

STATEMENT OF THE ISSUES

The issues in this case are whether Respondents, as the owner and operator of a charter school or a private school, or both, engaged in fraudulent activity or otherwise ran the school(s) in a manner contrary to the health, safety, or welfare of students or the public; and, if so, whether Petitioner should revoke Respondents' participation in several scholarship programs that provide financial assistance to eligible students who choose to attend private schools.

PRELIMINARY STATEMENT

On March 30, 2017, Petitioner Pam Stewart, as Commissioner of Education, issued an Administrative Complaint against Respondents Silva of South Florida, Inc., d/b/a New Horizons (7502), and Yudit Silva, which gave notice of Petitioner's intent to revoke Respondents' participation in the Gardiner Scholarship Program, the John M. McKay Scholarships for Students with Disabilities Program, and the Florida Tax Credit Scholarship Program. As factual grounds for this intended decision, Petitioner alleged as follows:

The Department of State, Division of Corporations indicates Silva of South Florida, Inc. managed Pathways Academy Charter School (Pathways), a former charter school in Broward County. According to the School Board of Broward County (the School Board), Silva of South Florida, Inc. violated Pathways' Charter School Agreement by failing to comply with applicable law.

Specifically, Pathways committed various performance failures in the areas of Reading, Exceptional Student Education (ESE), English for Speakers of Other Languages (ESOL), teacher records and grading procedures, and fiscal management. The violations included, but were not limited to falsifying documents, making improper expenditures, failing to pay wages, misrepresenting the school's enrollment to receive FTE funds to which it was not entitled, failing to secure signatures in student files, improperly hiring a relative of the principle, and failing to follow state guidelines on children's vaccinations.

The complaint further informed Respondents that, not only were they being accused of operating an educational institution in a manner contrary to the health, safety, or welfare of the public, but also probable cause existed to believe that Respondents had engaged in fraudulent activity, and therefore, Petitioner was suspending all scholarship payments to Respondents, effective immediately. Respondents timely filed a request for hearing, which the Department of Education received on April 14, 2017.

On May 2, 2017, before referring the matter to the Division of Administrative Hearings ("DOAH"), Petitioner issued an Amended Administrative Complaint, which added to the original charges the following allegations:

On March 29, 2017, the Broward County School District (BCSD) relayed to the Department that they had received faxes from Yudit Silva that included letters from the parents of at least eight McKay students. The letters asked BCSD to change the students' Individualized Education Program

(IEP) Matrix Level within five business days. Each letter requested BCSD contact the parent through email only. To verify the authenticity of the letter, BCSD contacted one of the McKay parents. The parent denied sending the letter and indicated that the email address given was erroneous.

Additionally, one of the not-for-profit scholarship funding organizations that administer FTC, Step Up for Students (SUFS), contacted the Department due to discrepancies found during a review of FTC applications. SUFS relayed that Yudit Silva had completed at least 30 FTC applications. Additionally, most of the associated emails listed for the applications ended with "@yandex.com," and all of the applications stated "no household income" and "live with family/relatives" as the documented explanation of no income. Due to these discrepancies, SUFS contacted a parent of one of the students whose application was filed by Yudit Silva. The conversation revealed that the parent had no knowledge of the application being submitted. The call verified that the information submitted on the application was not accurate. Attempts to reach other applicants revealed the telephone numbers on the applications were not in service.

Respondents again timely requested a hearing to determine their substantial interests.

On July 12, 2017, Petitioner forwarded the dispute to DOAH for further proceedings. The undersigned promptly scheduled the final hearing for August 10 and 11, 2017.

At the final hearing, which took place as scheduled, Petitioner called two witnesses to testify in person (Andrew

Ramjit and Yudit Silva) and presented the prior testimony of five more witnesses: E.M., Monique Harvey, Tara Rodger, Laura Mazyck, and Patrick Reilly. Petitioner's Exhibits 2A, 2B, 3A, 3B, 4A, 4B, 6A, 6B, 6C, 6D, 7, and 9 through 16 were received in evidence as well. Ms. Silva retook the stand in Respondents' case, and Respondents' Exhibits 2, 3, and 4 were admitted. At Petitioner's request, the undersigned took official recognition of the record in DOAH Case No. 16-2576.

The two-volume final hearing transcript was filed on September 7, 2017. The original deadline for presenting proposed recommended orders, October 9, 2017, was twice extended at Respondent's request, and the parties timely filed their respective papers on October 30, 2017.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2017.

#### FINDINGS OF FACT

1. Respondent Silva of South Florida, Inc. ("SSF"), is a Florida nonprofit corporation that, at all times relevant to this case, operated a private school known as New Horizons (the "School"). An employee of SSF, Yudit Silva ("Silva"), served as the School's principal or administrator at all times relevant.

2. The Department of Education ("Department") administers the Gardiner Scholarship Program and the John M. McKay

Scholarships for Students with Disabilities Program. See §§ 1002.385 & 1002.39, Fla. Stat. The Department has some administrative responsibilities in connection with the operation of the Florida Tax Credit ("FTC") Scholarship Program as well. See § 1002.395, Fla. Stat. Gardiner, McKay, and FTC scholarships defray tuition and other qualified educational expenses for eligible students who attend private schools in the state of Florida.

3. It is not necessary to make detailed findings about these scholarship programs. There is no dispute that, during the relevant time, the School participated in the three programs mentioned, and was therefore eligible to accept, and did receive, scholarship funds paid on behalf of its students on scholarships.

4. As will be discussed more thoroughly below, the Commissioner of Education possesses the authority to immediately suspend payment of McKay and FTC scholarship funds to a private school if he or she finds probable cause for believing that, inter alia, the school has engaged in "fraudulent activity." In addition, or alternatively, the commissioner may suspend or revoke a private school's continued participation in the McKay and FTC programs for wrongful conduct, including the operation of an "educational institution" by the private school's owner or operator "in a manner contrary to the health, safety, or welfare

of the public." Finally, the commissioner may suspend or revoke a private school's participation in the Gardiner Scholarship Program "for a violation of . . . section" 1002.385, Florida Statutes.

5. On March 30, 2017, Petitioner Pam Stewart, as Commissioner of Education (the "Commissioner"), issued an Administrative Complaint against Silva and SSF stating that she had determined there was probable cause for believing that Silva and SSF had engaged in fraudulent activity during the years 2013 through 2016 while operating a charter school known as Pathways Academy K-8 Center ("Pathways"). On May 2, 2017, the Commissioner issued an Amended Administrative Complaint wherein she expanded the original charges with new allegations that, in 2017, Silva and SSF had engaged in fraudulent activity while operating the School. Based on the alleged wrongdoing of Silva and SSF, the Commissioner immediately suspended payment of all scholarship funds to the School and gave notice of her intent to revoke the School's participation in the Gardiner, McKay, and FTC programs.

6. The Commissioner's immediate and intended actions rested substantially on allegations of misconduct that the Broward County School Board ("BCSB") had asserted previously as grounds for terminating the charter school agreement between BCSB and SSF under which SSF operated Pathways. BCSB had given

notice to SSF of its intent to terminate this agreement in April 2016, prompting SSF to request a formal administrative hearing. SSF's request had led, in turn, to the initiation of Broward County School Board v. Silva of South Florida, Inc., DOAH Case No. 16-2576 ("Pathways"). Over the course of several days in July and August 2016, Judge Robert E. Meale had conducted the Pathways hearing. In his Recommended Order dated January 9, 2017, Judge Meale had recommended that BCSB terminate SSF's charter.

7. SSF had submitted exceptions to the Recommended Order, but on February 27, 2017, before BCSB had taken final agency action, SSF filed a Notice of Voluntary Withdrawal of Petition for Hearing, stating that SSF planned not to renew its charter and would, instead, close Pathways. BCSB evidently accepted this notice as sufficient to conclude the Pathways litigation, for it failed to issue a final order. The upshot is that Judge Meale's findings of fact never achieved administrative finality.<sup>1/</sup>

8. The relevant BCSB allegations, as the Commissioner summarized them in the administrative complaints, were quoted above in the Preliminary Statement. To prove them, the Commissioner relied primarily on two witnesses: Andrew Ramjit and Patrick Reilly. Neither provided evidence persuasive enough to support findings confirming the BCSB allegations.



9. Mr. Ramjit is a former employee of SSF. He worked at Pathways as an assistant principal for a few months in the summer of 2015, between school years. His brief tenure at the charter school was apparently an unhappy one for all concerned, and when Mr. Ramjit left this job, he took with him (i.e., stole) original files belonging to SSF, to use as evidence of the wrongdoing he would accuse SSF of committing. He later filed several complaints against SSF with the Department, which in August 2015 referred the matter to BCSB to investigate, since BCSB was Pathways' sponsor. BCSB assigned the task of conducting the investigation to Mr. Reilly, a CPA who conducts audits for the school district.

10. Mr. Reilly's months-long investigation resulted in findings that were detailed in an Internal Audit Report presented to the school board in March 2016. Mr. Reilly concluded that Mr. Ramjit's allegations were "substantiated" and that BCSB had good cause to terminate Pathways' charter school agreement. BCSB agreed and, as already noted, took steps to do just that.

11. As a witness at hearing, Mr. Ramjit at times came across as a disgruntled ex-employee anxious to settle some scores. Despite the evident bias, however, the undersigned finds Mr. Ramjit's testimony to be more or less believable, as far as it goes. The problem is, Mr. Ramjit's testimony is

superficial or conclusory, or both. For example, he asserts that he observed SSF employees "forging" teacher and parent signatures on various documents, but none of these supposedly falsified documents was produced, no forgery "victim" testified, and no expert testimony about disputed signatures was adduced. Mr. Ramjit claims that Silva and another administrator directed him to "artificially lower" teacher evaluation scores—but, really, what does this mean? Mr. Ramjit, who worked at Pathways during the summer months only, could not himself have evaluated any teacher (for he had not been there to observe anyone teach at the charter school), and therefore, he cannot truly have known whether a particular score was "artificial" or not. Mr. Ramjit accuses SSF personnel of spending public funds on goods purchased for private use, but the items in question, insect repellent and plants, are not inherently personal in nature and could reasonably have been purchased for the school, as Silva testified.<sup>2/</sup> This testimony, at bottom, does not amount to much.

12. Mr. Reilly's testimony (which was presented in the form of a transcript from the Pathways hearing) has more substance but is deficient in a different way. Mr. Reilly related the granular findings of his investigation, but he, himself, possesses no personal, firsthand knowledge of the facts he had found. In other words, what he knows, he did not witness

or experience; rather, he searched for proof, as an investigator does, and reached conclusions based on the evidence obtained. To be sure, if Mr. Reilly's testimony had consisted in relevant part of expert opinions based on hearsay, such opinions might have been competent substantial evidence. His testimony, however, concerned matters of historical fact that did not require expertise to understand (or, at least, not expertise in accounting). Mr. Reilly's testimony, in short, establishes persuasively that he believes the BCSB allegations to be true, but, consisting largely of hearsay, is insufficient to prove to the undersigned the truth of the allegations.

13. The Commissioner alleged that, while working at the School in March 2017, Silva sent a handful of suspicious faxes to the Broward County School District's Office of Exceptional Student Education. These faxes transmitted eight letters, each of which purported to be from the parent of a student receiving a McKay scholarship. The letters were identical (a form, obviously) and unsigned. In them, the parent (or "parent") complained that the district had "illegal[ly]" changed his or her child's "IEP Matrix Level" from "level 4" to "level 1" "without notifying [the parent] and without an IEP meeting." The letter urged the district to "[p]lease change the IEP Matrix Level back to its correct level within 5 business days" and

requested that all future communications be in writing "only through email."

14. Without getting into unnecessary detail, the "IEP Matrix Level" reflects the intensity of services provided to a student with disabilities. The higher the level, the greater the number of services required. There is a correlation between the matrix level and the level of funding available under the McKay scholarship program, so that a reduction in the matrix level might affect a student's McKay scholarship. The requests to increase the matrix level from 1 to 4, therefore, might have been prompted by a concern that, without such action, the students in question would see their scholarships diminished.

15. There was nothing wrongful per se about the form letters at issue; sure, the contentions therein that the district had acted illegally and was preventing students from receiving necessary services might have been overblown or mistaken, but ultimately the decision whether to change the matrix level back to 4, as rather politely, if firmly, requested, was the district's alone to make. If there were a wrongful act, it would have been that Silva sent the letters on the parents' behalf without their approval.

16. On this charge, the only nonhearsay evidence of record is the deposition of E.M., a parent who supposedly sent one of the form letters. E.M. disclaimed knowledge of the letter and

denied having authorized the School to write and send it for him. At the same time, though, he professed to know nothing about the scholarship programs and freely acknowledged that he relied entirely upon the School to take care of all the paperwork required "to get that money." E.M.'s testimony persuades the undersigned that regardless of whether E.M. had any involvement in the form letter, he certainly would have expected the School to prepare and submit such "paperwork" if the School believed it necessary to "get that money." Based on this evidence, the undersigned cannot find that the School committed fraud.

17. The remaining allegations against SSF and Silva concern several dozen FTC scholarship applications submitted to Step Up for Students ("SUFSS"), a nonprofit scholarship funding organization that helps administer the FTC and Gardiner Scholarship Programs. FTC scholarships are intended to benefit students who, without financial assistance, would be unable to attend private school due to low household income. Because household income is an important factor in determining an FTC scholarship award, any knowingly false, misleading, or incomplete representations made in an application that bear on this material fact would constitute an act of fraud—a point that is stressed in the application forms. The Commissioner argues that, in at least 39 applications, Silva falsely

represented facts regarding the household income of students of the School.

18. The disputed applications were submitted, online, in several tranches. Six were submitted between 8:28 p.m. and 9:55 p.m. on February 22, 2017. Five were sent on February 24, 2017, between 11:15 a.m. and 3:48 p.m. On the night of March 12, 2017, from 7:20 p.m. through 11:59 p.m., 12 of these applications were submitted, followed by 13 more on March 13, 2017, sent between 9:22 a.m. and 2:53 p.m. A final group of three was submitted on the morning of March 14, 2017, between 11:29 a.m. and 11:52 a.m. Because it is unlikely that 39 parents acting independently would happen to file their applications in bunches like this, the reasonable inference, which the undersigned draws, is that the School's staff coordinated these submissions. SSF and Silva admit, at any rate, that the School's staff assisted the parents with these scholarship applications, providing them with email addresses and computer access.

19. Other details about these applications, however, suggest that the assistance provided by the School's staff was more hands-on than SSF and Silva have admitted. The application asks the parent completing the online form to identify his or her "birth city" as the answer to a security question. Every parent gave the same answer, "miami." While it is doubtful that

every parent was, in fact, born in Miami, the truth of this assertion is immaterial. Still, that every applicant typed in "miami" raises an eyebrow; that all of them failed, idiosyncratically, to capitalize the proper name strongly implies a common agency, the most likely being the School—an inference further reinforced by the probability that the School's staff did not know the actual birthplace of every parent, and thus would have found it convenient simply to make Miami the ubiquitous choice by default.

20. Another common denominator of the applications is that every parent reported his or her marital status as, "Single. I have never been married." This emphatic statement of lifelong singlehood seems peculiar, suggesting a common hand, but the response might have been a selection from a dropdown menu, a possibility which undermines the inference. Nevertheless, it would be unusual if, in this group of 39 single parents of young children, not one had ever been married—so unusual, in fact, that the undersigned deems that situation highly unlikely; *some* of these responses, it is inferred, were untrue. That being said, the materiality of the representation that the parent had never been married is unknown, for the record is silent on this point. Like the ubiquitous answer to the "birthplace" security question, however, the shared response to the martial status

inquiry implies a common agency—the most obvious candidate being, again, the School.

21. The evidence reviewed so far supports the inference, which the undersigned has drawn, that School personnel provided assistance to the parents in completing applications for FTC scholarships, including supplying requested information. In so doing, the School made each parent say he or she had never been married, making a representation of fact that was probably false in at least some instances. Because that fact was not shown to be material, however, it cannot be concluded, without more, that the School committed fraud. Unfortunately, there is more.

22. Each parent claimed in the application to have "zero" household income. This was a material representation. Obviously, to be a single parent without any income is to experience extreme poverty. While it is theoretically possible that all 39 of the subject parents were destitute, this is highly improbable,<sup>3/</sup> and, not surprisingly, the number of zero-income applications coming from the same private school caught the attention of SUFS, which in due course launched an investigation.<sup>4/</sup>

23. Meantime, however, SUFS sent the parents two forms, on paper, to be completed and returned. One was called Verification of Household Composition ("Verification Form"), and the other was titled Statement of No Household Income ("Explanation



Form"). The Verification Form needed to be filled out by someone neither related to nor living with the applicant, e.g., a friend or neighbor, who was capable of listing, as requested, the names of all adults and children residing in the applicant's household, together with their respective ages and relationships to one another. On the Explanation Form, the parent (applicant) was required to "explain in the space provided how you are able to pay for rent, food, and clothing, etc." with "a household income of zero (\$0.00)." Alternatively, if "the entry of a household income of zero (\$0.00) was a mistake," the applicant was to "provide proof of the most recent 30 days of income for each person receiving income in your household."

24. Silva completed, signed, and submitted to SUFS a Verification Form for each of the 39 parents. Every form she signed was dated March 15 or March 17, 2017, except for one dated March 21, 2017. The only adult listed on any of these completed forms is the parent or guardian (applicant). The only other members of the households at issue whom Silva listed are minor children. In other words, to be clear, every household Silva described in these 39 Verification Forms consisted of one parent or guardian plus that adult's minor child or children—and no one else. Above Silva's signature on these forms is a certificate, printed in boldface, which declares:

Under penalties of perjury, I certify that the information presented is true and accurate, the persons listed above are personally known to me and the household as shown above is accurate to the best of my knowledge and belief. I understand that providing false representations constitutes an act of fraud. False, misleading or incomplete information may result in the denial of the scholarship application or revocation of a scholarship award.

25. Each completed Explanation Form that SUSF received bears a signature purporting to be that of the parent or guardian and has the same date as the corresponding Verification Form. On every form, except one, the parent states that he or she is able to survive on zero income because "I live with family members" or similar words to the same effect.<sup>5/</sup> Above each signature on these forms is a certificate, printed in boldface, which declares:

Under penalties of perjury, I certify that the information presented is true and accurate to the best of my knowledge and belief. The undersigned further understands that providing false representations herein constitutes an act of fraud. False, misleading or incomplete information may result in the denial of the scholarship application or revocation of a scholarship award.

26. As an explanation for how one is able to get by with zero household income, the statement that "I live with family members" can only be read to mean that the income-less person and his or her dependents are residing in (and thus belong to)

the household of generous relatives who have the wherewithal to provide financial support for their impecunious kin; otherwise, it would be nonresponsive to the question posed by the Explanation Form. So understood, however, the statement—if true—logically refutes the applicant's assertion that his or her "household income" is zero because the family members supporting him or her must have had an income, which should have been reported and substantiated per the instructions on the Explanation Form. It seems impossible that not one of the 39 applicants noticed that SUFS was interested in *household* income as opposed to *parental* income, and thus likely that some of them (assuming any personally completed these forms) would have been aware that their responses (if true) were contradictory and incomplete to the point of being, arguably, fraudulent. But this inconsistency is of passing interest, as it does not necessarily inculcate the SSF, Silva, or the School.

27. A different discrepancy implicates the School in wrongdoing. The statements of household composition in the Verification Forms that Silva signed, all of which describe a household consisting of one adult (the applicant) and his or her minor dependent(s), belie the statements in the Explanation Forms claiming that the applicant lives with, and relies financially upon, his or her relatives—relatives who, in this context, cannot plausibly be understood as being the applicant's

minor children. These statements, clearly, are mutually exclusive and, therefore, cannot both be true.

28. If an applicant lived with family members who supported the applicant's family, as represented in every Explanation Form at issue, then Silva provided false information to SUFS in every Verification Form she executed. While a few instances of inaccurate reporting on Silva's part might be written off as honest mistakes, an error rate of 100 percent would suggest that something else was going on. The other possibility that must be considered, however, is that Silva was truthful, and the applicants (unknown to her) were not. In this scenario, the applicants—operating individually or in concert—falsely claimed to be living with family members (presumably to maintain the "zero income" fiction) without informing Silva of this deception.

29. The undersigned regards this latter possibility as incredible. There is no reasonable likelihood that 39 applicants *separately* decided to commit the exact same fraud using essentially the very same language; such a coincidence is simply inconceivable. As a practical matter, the applicants would have needed to conspire with one another. But to infer such a conspiracy, one must assume that all 39 applicants (not only the one(s) who came up with the scheme) were sufficiently

dishonest to participate *and* disciplined enough to keep their mouths shut about it. These assumptions defy credulity.

30. This is not to say that the statements in the Explanation Forms were likely truthful. To the contrary, the undersigned infers that they were false or intended to mislead. That is, in all likelihood, the applicants' households were, in fact, composed (for the most part) of the persons listed in the Verification Forms, and the false statements of material fact were that the applicants had no household income and were financially dependent upon family members with whom they lived. It is found, further, that Silva, not any applicant(s), was the driving force behind this deception, because, in view of all the circumstances, no other *reasonable* inference can account for the fact that 39 applicants happened to make the very same false statements in their applications. Whether the parents, or any of them, knowingly participated in Silva's fraudulent scheme is unclear—but is ultimately immaterial for purposes of this case.<sup>6/</sup>

#### Ultimate Factual Determinations

31. The greater weight of the evidence establishes that, to increase the chances that the School's students would receive the maximum amount of FTC scholarship funding, Silva engaged in fraudulent activity, to wit: Silva falsely represented to SUFS that 39 FTC scholarship applicants had "zero household income"

and were forced, as a result, to live with family members. Silva made these statements of material fact knowing they were false or in reckless disregard of the truth or falsity of the representations, which were in fact false.

#### CONCLUSIONS OF LAW

32. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1002.39(7), 1002.395(11), 120.569, and 120.57(1), Florida Statutes.

33. The burden of establishing the grounds for suspending or revoking a private school's participation in the scholarship programs at issue falls on the Commissioner, who must prove her allegations by a preponderance of evidence. Comm'r v. Muskateer's Academy, Inc., Case No. 06-5074, 2007 Fla. Div. Admin. Hear. LEXIS 191, \*20-\*21 (Fla. DOAH Apr. 2, 2007); 2007 Fla. Div. Admin. Hear. LEXIS 883 (Fla. DOE May 4, 2007); see also Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is usually upon party asserting the affirmative of the issue); cf. Fla. Dep't of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 415 (Fla. 4th DCA 1974) (agency must carry burden of proving grounds for dismissal of employee); cf. Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106, 109 (Fla. 1st DCA 1992) (party seeking to establish Medicaid overpayment has burden of proof); see also § 120.57(1)(j), Fla. Stat.<sup>7/</sup>

34. Pursuant to section 1002.39(7)(c), the commissioner is authorized to

immediately suspend payment of [McKay] scholarship funds if it is determined that there is probable cause to believe that there is:

1. An imminent threat to the health, safety, or welfare of the students; or
2. Fraudulent activity on the part of the private school.

The commissioner's order immediately suspending payments "may be appealed" by timely filing a request for hearing pursuant to sections 120.569 and 120.57. § 1002.39(7)(c), Fla. Stat.<sup>8/</sup>

35. Section 1002.39(7)(a)2., Florida Statutes, authorizes the commissioner to "deny, suspend, or revoke a private school's participation in the [McKay] scholarship program if the commissioner determines that an owner or operator of the private school is operating or has operated an educational institution in this state or in another state or jurisdiction in a manner contrary to the health, safety, or welfare of the public."

36. The commissioner's powers with regard to the suspension of FTC scholarship payments and revocation of participation in that program are almost identical to those conferred upon the commissioner vis-à-vis the McKay program. See § 1002.395(11)(c) (immediate suspension of payments); § 1002.395(11)(a)2. (revocation of participation).

37. The commissioner's authority to suspend or revoke a private school's participation in the Gardiner Scholarship Program, in contrast, is arguably narrower, for there is no "immediate suspension" provision in section 1002.385 (which governs the program), and the only stated ground upon which the commissioner may suspend or revoke Gardiner program participation is "a violation of this section," i.e., section 1002.385.

38. The essential elements of a fraud claim are: (1) a false statement concerning a material fact; (2) made (i) with knowledge that the representation is false and (ii) with the intention of inducing another's reliance thereon; and (3) consequent injury to the other party acting in reliance on the false representation. See, e.g., Cohen v. Kravit Estate Buyers, Inc., 843 So. 2d 989, 991 (Fla. 4th DCA 2003).

39. "[F]raudulent intent usually must be proved by circumstantial evidence and such circumstances may, by their number and joint consideration, be sufficient to constitute proof." Nally v. Olsson, 134 So. 2d 265, 267 (Fla. 2d DCA 1961). Therefore, as proof of fraud, "one may show 'a series of distinct acts, each of which may be a badge of fraud and when taken together as a whole, constitute fraud.'" Dep't of Rev. v. Rudd, 545 So. 2d 369, 372 (Fla. 1st DCA 1989) (quoting Allen v. Tatham, 56 So. 2d 337, 339 (Fla. 1952)). Further, "[s]cienter,



or guilty knowledge, [which] is an element of intentional misconduct [such as fraud], . . . can be established by showing actual knowledge, or that the defendant was reckless or careless as to the truth of the matter asserted." Ocean Bank of Miami v. INV-UNI Inv. Corp., 599 So. 2d 694, 697 (Fla. 3d DCA 1992).

40. The undersigned has found, as recited above, that the Commissioner carried her burden of proof regarding some allegations of fraudulent activity. Therefore, the Commissioner is legally authorized to immediately (and indefinitely) suspend payment of McKay and FTC scholarship funds to the School.

41. It is further concluded that the actions of SSF and Silva in connection with the fraudulent applications for FTC scholarships, which were designed to maximize the awards that the School's students would receive (by falsely minimizing their respective household incomes), constitute the operation of an educational institution in a manner contrary to the welfare of the public. Thus, the Commissioner may revoke Respondents' participation in the McKay and FTC scholarship programs.

42. Whether the Commissioner may revoke Respondents' participation in the Gardiner program is a bit less clear. Surprisingly, section 1002.398 does not explicitly require a private school *not* to engage in fraudulent activity or operate in a manner contrary to the health, safety, or welfare of the public. It could be argued (although Respondents have not) that

such misconduct does not violate section 1002.398. (Recall that violation of the section is the only cause for revocation of program participation.)

43. The Commissioner, seizing on the definition of "eligible private school" in section 1002.385(2)(g)—which conditions eligibility to participate in the Gardiner program on meeting the requirements "of a scholarship program under s. 1002.39 or s. 1002.395, as applicable, if the private school participates in a scholarship program under s. 1002.39 or s. 1002.395"—contends that the School surrendered its Gardiner program eligibility when Respondents engaged in fraudulent activity. This argument has some seams. To begin, section 1002.385(2)(g) is a curiously circular provision inasmuch as a school that fails to meet the requirements of the McKay or FTC program is, for that reason, unable to participate (or continue participating) in the program and hence would not need to satisfy such program's requirements for purposes of section 1002.385. Putting that aside, it would seem that before a private school can be found *ineligible* for Gardiner program participation based on its failure to meet either McKay or FTC program requirements, or both, the failure to meet the latter requirements must be *adjudicated with finality*; otherwise, the intended revocation of Gardiner program participation looks a lot like bootstrapping.

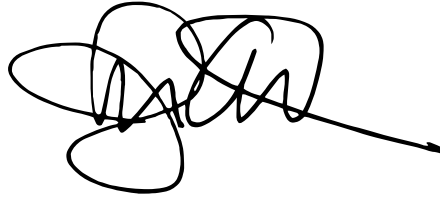
44. Nevertheless, the undersigned concludes, albeit with some reservations, that a private school which knowingly attempts to perpetrate a fraud to obtain FTC scholarship funds while it is participating in that program cannot reasonably consider itself an "eligible private school" under section 1002.385(2)(g); therefore, its simultaneous participation in the Gardiner Scholarship Program constitutes a "violation" of section 1002.385, which gives the Commissioner legal cause to revoke the school's program participation.

45. Accordingly, the Commissioner may revoke the School's participation in the Gardiner Scholarship Program.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commissioner enter a final order revoking Respondents' participation in the McKay, FTC, and Gardiner scholarship programs.

DONE AND ENTERED this 11th day of December, 2017, in  
Tallahassee, Leon County, Florida.



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Division of Administrative Hearings  
this 11th day of December, 2017.

ENDNOTES

<sup>1/</sup> BCSB should have disregarded SSF's belated attempt to withdraw its petition. See Wiregrass Ranch v. Saddlebrook Resorts, 645 So. 2d 374, 376 (Fla. 1994). Had BCSB adopted the Recommended Order, which was consistent with BCSB's proposed agency action, it is likely that the indisputable fact of a formal decision terminating Pathways' charter for cause pursuant to section 1002.33(8) would have given the Commissioner sufficient grounds for revoking SSF and Silva's participation in the scholarship programs, much the way that the fact of a prior criminal conviction is often grounds for imposing discipline upon a licensee without proof that the licensee actually committed the crime. Because SSF was not "convicted" in Pathways, however, the Commissioner needed to prove the allegations underlying BCSB's Notice of Proposed Termination of Charter School Agreement if she wanted to rely upon them as grounds for the actions at issue.

<sup>2/</sup> There was no persuasive proof, either, that the SSF employees used public funds, as opposed to, say, their personal credit cards, to purchase the subject items.

<sup>3/</sup> As defined for purposes of the FTC scholarship, the term "household income" "has the same meaning as the term 'income' as defined in the Income Eligibility Guidelines for free and reduced price meals under the National School Lunch Program in 7 C.F.R. part 210 as published in the Federal Register by the United States Department of Agriculture." § 1002.395(2)(h), Fla. Stat. The federal government defines "income" broadly for purposes of determining eligibility for free and reduced price school meals so that it includes the following:

- (1) Monetary compensation for services, including wages, salary, commissions or fees;
- (2) net income from nonfarm self-employment;
- (3) net income from farm self-employment;
- (4) Social Security;
- (5) dividends or interest on savings or bonds or income from estates or trusts;
- (6) net rental income;
- (7) public assistance or welfare payments;
- (8) unemployment compensation;
- (9) government civilian employee or military retirement, or pensions or veterans payments;
- (10) private pensions or annuities;
- (11) alimony or child support payments;
- (12) regular contributions from persons not living in the household;
- (13) net royalties; and
- (14) other cash income.

82 Fed. Reg. 17182, 17182-83 (Apr. 10, 2017).

<sup>4/</sup> An SUFS employee named Monique Harvey tried to call or email the parents but was able to reach only one, M.B., whose contact information SUFS had on file from a previous year's application. M.B. did not testify, and thus her statements to Ms. Harvey, which Ms. Harvey recounted in *her* deposition, are merely hearsay if offered as proof of the facts asserted. Although there is competent documentary evidence in the record showing that M.B. submitted a new application in July 2017, which reported her income from regular employment with Walmart, the complete original 2017 application filed under M.B.'s name was not offered. Consequently, the undersigned has not included M.B.'s first 2017 application with the group of 39 applications under consideration.

<sup>5/</sup> The one exception is the application of S.A., whose signed Explanation Form dated March 17, 2017, is otherwise blank. On a second Explanation Form dated May 31, 2017, S.A. states: "I

live with my sister and my stepmom. She's paying rent and helping me with food."

<sup>6/</sup> There is reason to suspect that Silva or other SSF employees forged the signatures of at least some of the parents on the application documents, including the Explanation Form. Even to the untrained eye, the signatures on many of the application forms do not match the signatures (which the undersigned assumes are genuine) on the passports and driver licenses submitted, as photocopies, with the applications. In the absence of expert testimony, however, or at least the original signatures to examine, the undersigned lacks sufficient evidence to make a finding that the suspicious signatures are, in fact, forgeries.

<sup>7/</sup> Respondents argue that the standard of proof should be clear and convincing evidence because, they contend, this is a "penal" proceeding. This argument is not without merit, for a proceeding to revoke a private school's participation in a scholarship program has punitive overtones, to say the least. But a school which is prohibited from receiving (through its students—the school's benefit is indirect) these scholarship funds is not precluded from operating as a private school; unlike a licensee whose license is revoked, the school may keep its doors open. Further, a decision to revoke a private school's participation in a scholarship program does not take scholarship benefits away from any of its students (to whom the scholarships are awarded); they are free to continue receiving their scholarships, so long as they transfer to another school. The undersigned concludes that participation by a private school in the Gardiner, McKay, and FTC scholarship programs is not a vested right or even an entitlement, but a kind of privilege, namely that of selling a product (education) to customers being subsidized by the state to make the purchase. Deprivation of participation, therefore, is not a sanction, but rather amounts to a loss of eligibility to continue enjoying an exceptional commercial advantage. Such deprivation determines the school's substantial interests, but is not punitive in character. Cf. Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (state has burden to prove by a preponderance of evidence grounds for discontinuing, suspending, or reducing public assistance such as Medicaid benefits).

<sup>8/</sup> That an aggrieved party can "appeal" the commissioner's order does not mean that, in a proceeding such as this, the administrative law judge sits in review of the commissioner's probable cause determination or otherwise substitutes his judgment for the commissioner's on the question of whether

probable cause exists. Clearly, the probable cause determination—which is investigative or prosecutorial, rather than adjudicative, in nature—is for the commissioner alone to make, and he or she may make this decision without necessarily, or even usually, first allowing the private school under suspicion to attack the evidence of wrongdoing via adversarial mechanisms such as cross-examination.

The commissioner's executive decision on probable cause is a necessary condition of immediately suspending payment of scholarship funds to a private school believed to be engaging in fraudulent activity (or to pose an imminent threat to students). However, probable cause is not a sufficient basis for entering a final order suspending payment to such school if the school requests a "substantial interests" hearing. If a formal administrative proceeding is initiated, as here, then the final order must be based, not on probable cause, but on findings of fact supported by the greater weight of the competent substantial evidence adduced at hearing.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.