

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF BREVARD
COUNTY, FLORIDA,

Petitioner,

Case No. 20-3911F

vs.

LEGACY ACADEMY CHARTER, INC.,

Respondent.

_____ /

FINAL ORDER

On November 6, 2020, Administrative Law Judge (ALJ) Robert J. Telfer, III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing utilizing the Zoom web-conference platform.

APPEARANCES

For Petitioner: Debra S. Babb-Nutcher, Esquire
Catherine T. Hollis, Esquire
Garagnese, Weiss, D'Agresta & Salzman, P.A.
111 North Orange Avenue, Suite 2000
Orlando, Florida 32801

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

STATEMENT OF THE ISSUES

The issues presented are: (1) the amount of attorneys' fees and costs to which Petitioner School Board of Brevard County (School Board) is entitled as the prevailing party in the underlying matter, DOAH Case No. 19-6424 (underlying matter); and (2) whether sanctions are warranted.

PRELIMINARY STATEMENT

On May 18 through 22, and 26, 2020, the undersigned conducted a duly-noticed hearing utilizing the Zoom web-conference platform, to determine whether Respondent, Legacy Academy Charter, Inc.'s (Legacy), school charter for the Legacy Academy Charter School should be terminated for the reasons set forth in the School Board's November 20, 2019, 90-Day Notice of Proposed Termination of Charter, pursuant to section 1002.33(8)(b), Florida Statutes (2019). Section 1002.33(8)(a) and (b) provides:

(8) CAUSES FOR NONRENEWAL OR
TERMINATION OF CHARTER.—

(a) The sponsor shall make student academic achievement for all students the most important factor when determining whether to renew or terminate the charter. The sponsor may also choose not to renew or may terminate the charter if the sponsor finds that one of the grounds set forth below exists by clear and convincing evidence:

1. Failure to participate in the state's education accountability system created in s. 1008.31, as required in this section, or failure to meet the requirements for student performance stated in the charter.
2. Failure to meet generally accepted standards of fiscal management.
3. Material violation of law.
4. Other good cause shown.

(b) At least 90 days before renewing, nonrenewing, or terminating a charter, the sponsor shall notify the governing board of the school of the proposed action in writing. The notice shall state in reasonable detail the grounds for the proposed action and stipulate that the school's governing board may, within 14 calendar days after receiving

the notice, request a hearing. The hearing shall be conducted by an administrative law judge assigned by the Division of Administrative Hearings. The hearing shall be conducted within 90 days after receipt of the request for a hearing and in accordance with chapter 120. The administrative law judge's final order shall be submitted to the sponsor. The administrative law judge shall award the prevailing party reasonable attorney fees and costs incurred during the administrative proceeding and any appeals. The charter school's governing board may, within 30 calendar days after receiving the final order, appeal the decision pursuant to s. 120.68.

The undersigned entered a Final Order in the underlying matter on August 18, 2020. The Final Order held that the School Board established, by clear and convincing evidence, the following grounds for termination of Legacy's school charter: (1) Legacy failed to meet academic achievement and requirements of student performance under sections 1002.33(2), 1002.33(7)(a)4., 1002.33(8)(a)1., and sections (2) and 9(C) of the First Amended Charter School Agreement between the School Board and Legacy (Amended Charter); (2) Legacy failed to comply with all applicable laws, ordinances, and codes of federal, state, and local governance, as found in section 1002.33(2), 1003.571(1)(a), and 1002.33(16)(a)3., Florida Administrative Code Rules 6A-6.030191(4)(d) and 6A-6.030191(7), and section 3(J) of the Amended Charter; (3) Legacy failed to meet generally accepted standards of fiscal management and/or willfully or recklessly failed to manage public funds in accordance with the law and promote enhanced academic success and financial efficiency by aligning responsibility with accountability, as set forth in sections 218.503, 1002.33(9), 1002.33(7)(a)9., 1002.33(2)(a), and 1002.345(1)(a)3., Florida Statutes, rule 6A-1.0081, and sections 4(H), 4(G)(3)(a), and 9(A) of the Amended Charter; and (4) Legacy failed to comply with the law and/or cure material breaches of terms or conditions of the Amended Charter after receiving the School District's

written notices of noncompliance, and that Legacy failed to promote enhanced success and financial efficiency by aligning responsibility with accountability as set forth in chapter 1012, sections 286.011, 1002.33(2), 1002.33(7), 1002.33(9)(c), 1002.33(12)(f), 1002.33(16)(b)1., Florida Statutes, and sections 1(D)(1)(d)(i), 10(C), and 12(F) of the Amended Charter.

The Final Order also held that the School Board failed to establish, by clear and convincing evidence, that Legacy failed to comply with requirements for background screening of its employees and Governing Board members, as set forth in sections 1002.33(12)(g), 1012.32, 1012.465, 1012.467, and 1012.468, and sections 10(I) and (J) of the Amended Charter.

Additionally, the Final Order reserved the right to address whether attorneys' fees, costs, and sanctions were awardable to the School Board, and provided that "[a]ny such request shall be by motion within 10 days of this Final Order."¹

The School Board timely filed a Motion for Attorneys' Fees, Costs, and Sanctions, a Motion to Tax Costs, a Notice of Filing Affidavit of Attorneys' Fees and Costs, and a Notice of Filing Affidavit of Amounts Due, on August 28, 2020 (Petitioner's Motions). In an Order dated September 1, 2020, the undersigned notified the parties that Petitioner's Motions would be considered in the instant case number (DOAH Case Number 20-3911F), ordered that Legacy may respond to Petitioner's Motions within 10 days, and directed the parties to provide the undersigned with available dates for a hearing on these Motions. On September 28, 2020, Legacy (after moving for and receiving an extension) filed its "Response to Petitioner's: Motion for

¹ Legacy has appealed the Final Order to the Fifth District Court of Appeal, Case No. 5D20-1762. After a review of the docket in that appeal, it appears that the district court of appeal dismissed this appeal on November 24, 2020.

Attorney’s Fees, Costs, and Sanctions, Motion to Tax Costs, Notice of Affidavits for Attorney’s Fees and Response to Motion for Sanctions.”

The undersigned conducted an evidentiary hearing utilizing the Zoom web-conference platform on November 6, 2020. The undersigned granted the School Board’s Motions for Official Recognition of: (a) the entire record of the underlying matter; and (b) the entire record of *Manatee County School Board v. Lincoln Memorial Academy, Inc.*, DOAH Case No. 19-005307F, which involved the award of prevailing party attorneys’ fees under section 1002.33(8). Additionally, after questioning from the undersigned, the parties stipulated to the amount of taxable costs that the School Board incurred.

The School Board called one witness: Nick Shannin, Esquire, as its expert on attorneys’ fees. The undersigned accepted into evidence the School Board’s Exhibits P1 through P4. Legacy called one witness: Debra Babb-Nutcher, Esquire, the attorney for the School Board. The undersigned accepted into evidence Legacy’s Exhibits R1 through R4.

Neither party ordered a copy of the transcript of the proceeding. Both the School Board and Legacy timely filed proposed final orders on November 16, 2020.

All statutory references are to Florida Statutes (2019), unless otherwise noted.

FINDINGS OF FACT

The Underlying Matter

1. The underlying matter concerned whether Legacy’s school charter for the Legacy Academy Charter School should be terminated for the reasons set

forth in the School Board’s November 20, 2019, 90-Day Notice of Proposed Termination of Charter, pursuant to section 1002.33(8)(b).

2. The Division received the Petition for Administrative Hearing on December 5, 2019, and provided notice to the parties that this underlying matter was before the Division on December 9, 2019. The Division assigned the undersigned ALJ to the underlying matter.

3. After conducting a telephonic pre-hearing conference on December 13, 2019, the undersigned scheduled the final hearing in this matter for a four-day live hearing, March 2 through 4, and 6, 2020, in Titusville, Florida. Section 1002.33(8)(b) provides that “[t]he hearing shall be conducted within 90 days after receipt of the request for a hearing and in accordance with chapter 120.”

4. The parties have attempted to make an issue of the initial scheduling of the final hearing in this matter—and in particular, Legacy has contended that scheduling this hearing outside of a 45-day period provided in the First Amended Charter between the School Board and Legacy (Amended Charter), executed September 11, 2018, caused unnecessary expense on the School Board’s behalf—but the undersigned, with the agreement of the parties at the December 13, 2019, telephonic pre-hearing conference, scheduled a final hearing in this matter that complied with the section 1002.33(8)(b) requirement that the hearing be conducted within 90 days.

5. The School Board immediately thereafter began engaging in discovery to which Legacy did not timely respond. On February 12, 2020, Legacy filed its first “Opposed Motion to Continue with Good Cause,” which requested a continuance of the final hearing because of health issues confronting Legacy’s interim principal and intended client representative, Charlene Montford, in North Carolina. Additionally, on February 12, 2020, the School Board filed a Motion to Compel Depositions and Opposition to Respondent’s Motion to Continue, where it argued that it had not had the opportunity to depose Ms. Montford and another Legacy board member. The undersigned conducted

a telephonic hearing on this motion on February 18, 2020, and entered an Order Denying Respondent's Motion to Continue and Requiring Joint Status Update that same date.

6. The parties filed a Joint Status Report on February 20, 2020, and reported that the parties could not agree on dates for depositions of Ms. Montford and the board member, and requested another hearing on this issue. Then, on February 21, 2020, Legacy filed a Motion to Reconsider Denial of Continuance, which provided additional details about Ms. Montford's health issues and medical appointments in North Carolina. The undersigned conducted a telephonic status conference on February 21, 2020, and on February 26, 2020, entered an Order Granting Respondent's Motion to Continue, Rescheduling Hearing and Requiring Status Conferences, in which the undersigned determined that Legacy had established good cause for a continuance of the final hearing, and rescheduled it for May 18 through 21, 2020, in Titusville.

7. The School Board, on February 28, 2020, filed motions to compel. On March 10, 2020, the undersigned entered an Order that granted in part, these motions to compel, and provided Legacy with additional time to respond to pending discovery. On March 12, 2020, the School Board filed a Notice of Production from Non-Party, which Legacy opposed in a response filed March 25, 2020. Additionally, Legacy filed an Emergency Opposed Motion of Continuance and Emergency Opposed Motion to Extend Discovery on March 20, 2020, which requested a continuance of the final hearing and an extension of discovery due to the impacts of COVID-19. On March 20, 2020, the undersigned entered an Order requesting that the parties be prepared to discuss, at a March 27, 2020, telephonic status conference, any critical deadlines that may be relevant to the consideration of a continuance.

8. On March 26, 2020, a day before the first of two previously-scheduled pre-hearing telephonic status conferences, the parties filed the following pleadings: Petitioner's Opposition to Respondent's Emergency Motion for

Continuance and Emergency Opposed Motion to Extend Discovery; Petitioner's Motion for Sanctions for Failure to Comply with Order Compelling Discovery; Respondent's Motion for Protective Order; and Respondent's Response to Petitioner's Motion for Sanctions for Failure to Comply with Order Compelling Discovery and Request for Fees. After the telephonic status conference on March 27, 2020, the undersigned entered, on March 30, 2020, an Order on Pending Pleadings, which: (a) denied Legacy's request to continue the final hearing; (b) granted Legacy an extension (until April 13, 2020) to respond to all outstanding discovery; (c) denied the School Board's motion for sanctions; and (d) directed the parties to mutually agree to schedule the deposition of Legacy's corporate representative.

9. Additionally, on March 27, 2020, the undersigned entered an Order on Petitioner's Notice of Production from Non-Party, which overruled Legacy's objections to the documents that the School Board sought from non-parties, and allowed the School Board to serve the subpoenas attached to its Notice of Production from Non-Party.

10. On April 6, 2020, Legacy filed a Motion for [sic] Limine and Motion to Strike, which argued that the undersigned should not consider evidence of, or should strike grounds or allegations, relating to two categories: (1) evidence, including all underlying financial information, concerning Legacy's alleged "deteriorating financial condition," because jurisdiction for deciding how to proceed when a charter school experiences a "deteriorating financial condition" lies with the Florida Department of Education, pursuant to section 1002.345; and (2) evidence or grounds for termination that predate the Amended Charter, including allegations contained in a previous termination proceeding (DOAH Case No. 18-2778) that resulted in Legacy withdrawing its request for a final hearing. The School Board opposed Legacy's motion in two separate pleadings.

11. On April 23, 2020, the School Board filed a Motion to Compel Respondent's Production in Response to Petitioner's Request to Produce, and

on April 24, 2020, filed a Motion to Compel Respondent's Answers to Petitioner's Interrogatories.

12. On April 24, 2020, the undersigned conducted the second of two pre-hearing telephonic status conferences. On April 29, 2020, the undersigned entered an Order Denying Respondent's Motion in Limine and Motion to Strike. Additionally, the undersigned issued an Amended Notice of Hearing, which moved the hearing in the underlying matter to the Zoom web-conference platform, due to the COVID-19 pandemic.

13. On May 1, 2020, Legacy filed: (1) Response to Motion to Compel Respondent's Second Amended Response to Interrogatories (Unverified due to COVID-19); (2) Response to School Board's Motion to Compel Additional Production; and (3) Motion to Reconsider Denial of Motion for [sic] Limine and Motion to Strike Evidence and Grounds for Termination Based Upon Financial Information. Also on May 1, 2020, the School Board filed an Opposition to Legacy's Motion to Reconsider Denial of Motion in Limine and Motion to Strike Evidence and Grounds for Termination Based Upon Financial Termination.

14. On May 4, 2020, the undersigned issued an Order Denying Motion to Reconsider, as well as an Order Granting Motions to Compel. The Order Granting Motions to Compel ordered Legacy to provide verified answers to its second amended responses no later than May 8, 2020, and that if Legacy failed to provide responsive answers to those interrogatories, the undersigned would consider, at the final hearing, whether such failure should result in the imposition of sanctions. The Order Granting Motions to Compel also ordered Legacy to provide all responsive documents requested no later than May 8, 2020, and that if it failed to provide responsive, non-privileged documents as ordered, the undersigned would consider, at the final hearing, whether such failure should result in the imposition of sanctions.

15. On May 11, 2020, Legacy filed a Motion to Compel Production. Thereafter, on May 14, 2020, the School Board filed a Renewed Motion for

Sanctions, noting that Legacy did not submit its answers to interrogatories or responsive documents until May 11, 2020—after the deadline imposed in the May 4, 2020, Order Granting Motions to Compel.

16. Although originally scheduled for four days (May 18 through 21, 2020), the final hearing in the underlying matter actually lasted six days, from May 18 through 22, and 26, 2020.

17. At the outset of the hearing, counsel for the School Board informed the undersigned that Legacy failed to timely provide witness and exhibit lists, and then filed an amended exhibit list (after filing its untimely exhibit list) that included additional exhibits. During counsel's arguments on this issue, it became apparent that Legacy's amended exhibit list contained not only untimely and previously-undisclosed exhibits, but also exhibits that contained material that Legacy did not provide during discovery. The undersigned excluded from evidence the undisclosed exhibits.

18. As noted previously, the undersigned entered a Final Order in the underlying matter on August 18, 2020, that concluded that the School Board met its burden, by clear and convincing evidence, that it may terminate the Amended Charter.

Attorneys' Fees and Costs

19. As the preceding paragraphs demonstrate, the parties engaged in vigorous pre-hearing motion practice, finding little agreement on even minor issues both before and during the final hearing. As additional context to the parties' disinclination to cooperate during the underlying matter, each party filed its own pre-hearing stipulation. And, in a continuation of the spirit of non-cooperation, the parties filed separate pre-hearing stipulations in the instant matter.

20. At the outset of the hearing in this case, and with the absence of a joint pre-hearing stipulation, the undersigned conciliated agreement on one of the taxable costs in this matter: Legacy agreed that it did not contest the

School Board’s taxable cost for its expert witness in auditing (Laura Manlove) of \$15,000.²

21. Petitioner’s Affidavit of Attorneys’ Fees and Costs details both the attorneys’ fees and costs that the School Board seeks in this matter. With respect to attorneys’ fees, it avers that the hourly rate actually billed by counsel was \$200 for partners and associates. The affidavit includes the detailed billing records of the School Board’s Orlando-based law firm of record—Garganese, Weiss, D’Agresta & Salzman, P.A. (GWDS)—and the attorneys who worked on this matter. The summary of total attorneys’ fees requested is:

Attorney	Hours	Rate	Total Fees
Debra S. Babb-Nutcher	728.30	\$200.00	\$145,660.00
Suzanne D’Agresta	1.50	\$200.00	\$300.00
Kate T. Hollis	776.40	\$200.00	\$153,000.00
Total:	1,506.20	\$200.00	\$298,960.00

22. At the November 6, 2020, final hearing, the School Board’s expert on attorneys’ fees, Nicholas A. Shannin, Esquire, testified to the reasonableness of the hours that the GWDS attorneys expended in this matter. Mr. Shannin has practiced law for 25 years, is board-certified in appellate practice, is the past President of the Orange County Bar Association, has previously represented governmental entities in litigation matters, and has been previously qualified in various courts and tribunals as an expert on attorneys’ fees.

23. Mr. Shannin opined that the number of hours that the GWDS attorneys expended in this matter (1,506.20) was “reasonable, related, and necessary” in the “prosecution” of this case. He further opined that the hourly

² The School Board presented the expert witness testimony of four other experts, who were also Brevard County School District employees and fact witnesses, during the underlying matter. The School Board does not seek to recover any expert witness costs for these other expert witnesses.

rate of \$200 for GWDS partners and associates was “incredibly reasonable,” and that, in fact, he felt \$250-\$350 per hour, for a government client, would be a more appropriate range.

24. Mr. Shannin testified that, in his opinion, the foregoing totals (of fees and costs) are reasonable in light of the factors enumerated in the Rules of Professional Conduct, found in rule 4-1.5, Rules Regulating The Florida Bar, as well as *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), and *Standard Guaranty Insurance Company v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). Mr. Shannin noted the time and labor required, novelty, and skills needed in this matter as factors in the reasonableness of the fees, as the GWDS attorneys expended over 1,500 hours in approximately nine months of litigation, where much was fought or contested, and since charter termination matters do not have a “well-worn path” of past precedent to guide parties. He also noted that Ms. Babb-Nutcher and Ms. Hollis likely were precluded from other employment during the pendency of this matter. Mr. Shannin stated that the rate was reasonable, that the results were absolute, and that this matter was significant, noting that it involved “public policy matters at the highest level.”

25. Legacy disputed the reasonableness of the School Board’s requested fees on several grounds: (a) the School Board failed to assert the 45-day hearing requirement in the Amended Charter, thus, prolonging this matter and adding additional fees that the undersigned should not award; (b) the use of “block billing” is an improper billing practice that makes it difficult to determine the reasonableness of the requested fees; and (c) because the undersigned found that the School Board failed to establish, by clear and convincing evidence, one of the five asserted grounds for termination, the undersigned should reduce the amount of fees awarded by 20 percent.

26. With regard to the 45-day hearing requirement in the Amended Charter, as previously discussed, the undersigned, with the agreement of the parties at the December 13, 2019, telephonic pre-hearing conference,

scheduled a final hearing in this matter that complied with the section 1002.33(8)(b)'s requirement that the hearing be conducted within 90 days. Respondent made no contemporaneous objection to the hearing being scheduled within the 90-day statutory timeframe. And, as detailed in paragraphs 5-15 above, Respondent requested (and received) continuances of the final hearing, and, unfortunately, COVID-19 played a part in the process. The undersigned does not find that the School Board's behavior in the underlying matter caused an unreasonable delay that resulted in an unreasonable or unnecessary expenditure in attorneys' fees.

27. With regard to "block billing," which is the practice of including multiple tasks within a single billing entry,³ Legacy provided two examples of GWDS billing entries that undoubtedly fall within this definition, one of which was:

Date	Description	Hours	Amount	Lawyer
4/6/20	Review latest ESE report for trial; prepare outline of ESE issues in preparation for trial; review Legacy's "Motion for Limine" to prohibit evidence of financial issues, and to prohibit prior issues; e-mail exchange with S. Archer regarding depositions and DOE letter; review information regarding R. Moreno; strategize regarding effect of DOE process for corrective action plan and relevance to termination process; e-mails with S. Archer regarding same; review Building Hope corporate information; legal research regarding basis for Motion in Limine in DOAH cases; e-mails with C. Norwood regarding	7.20	1,440.00	DSB

³ See *Kearney v. Auto-Owners Ins. Co.*, 713 F. Supp. 2d 1369, 1377-78 (M.D. Fla. 2010) (defining block billing as the practice of including "multiple tasks in a single time entry."); *Wise v. Kelly*, 620 F. Supp. 2d 435, 450 (S.D.N.Y. 2008) ("Block billing is the practice of aggregating multiple tasks into one billing entry.") (internal quotation marks omitted); *Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC*, 549 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) ("A reduction is also warranted where counsel engages in 'block billing,' such that multiple tasks are aggregated into one billing entry.").

	deposition schedule; e-mail exchange with C. Norwood regarding false statements in Motion and contradictions; review replies; prepare draft notices of depositions with tentative dates; e-mail to C. Norwood requesting home addresses.			
4/6/20	Exchange e-mails with S. Archer regarding financial statements and analysis/comparison; research regarding Building Hope and proposed representative for deposition; prepare memorandum and deposition notes regarding same; continued review of financial reports and update comparison spreadsheet with revenue from profit & loss information attached to December 10, 2020, Legacy board meeting minutes; review file and documents provided at March 31, 2020, meeting, prepare for April 7, 2020, meeting.	4.50	900.00	KTH

28. The vast majority of the entries in the GWDS billing records are block entries. Although Mr. Shannin testified that these entries reflected each day being separated, with each entry containing sufficient detail as to the tasks completed, the undersigned finds that including multiple tasks within a single billing entity makes it difficult to assess the reasonableness of the totals on an hour-by-hour basis.⁴

29. The undersigned credits much of Mr. Shannin’s testimony as to the reasonableness of the hourly fee, as well as many of rule 4-1.5’s factors that

⁴ Legacy also introduced into evidence some of the billing records relied on in *Lincoln Memorial Academy*, which reflected that Manatee County School Board’s outside attorneys did not engage in block billing, at least during the attorneys’ fees phase of that matter. ALJ Robert Cohen found that these attorneys “maintained detailed records of all services rendered as evidence of the extensive time and effort dedicated to this matter.” F.O. at 6. Additionally, ALJ Cohen found that the respondent “did not dispute or otherwise offer any evidence disputing the reasonableness of the hourly rates charged[.]” F.O. at 11.

he relied on to opine as to the reasonableness of claimed fees in this matter. However, though Mr. Shannin’s testimony as to the reasonableness of the hours devoted to this matter was credible and is generally accepted, due to the pervasiveness of the block entries, the undersigned is unable to perform an independent reasonableness assessment on an hour-by-hour basis. As an alternative approach, the undersigned shall apply an across-the-board percentage cut of 10 percent to the total hours of the GWDS attorneys, recognizing that its hourly rate of \$200 per hour is reasonable. Such a reduction yields the following totals:

Attorney	Hours	Rate	Total Fees
Debra S. Babb-Nutcher	655.47	\$200.00	\$131,094.00
Suzanne D’Agresta	1.35	\$200.00	\$270.00
Kate T. Hollis	698.76	\$200.00	\$139,752.00
Revised Total:	1,355.81	\$200.00	\$271,162.00

30. As to Legacy’s contention that the undersigned should reduce fees by 20 percent to reflect Legacy prevailing on four of the five bases for termination in the underlying matter, the undersigned finds that Legacy “prevailed” in the underlying matter, and is entitled to attorneys’ fees and costs, as prescribed in section 1002.33(8)(b).

31. Turning to costs, the School Board’s Motion to Tax Costs, which detailed various costs incurred in the underlying matter, and the Affidavit of Attorneys’ Fees and Costs, which additionally provided supporting documentation for these costs, requests the following recoverable costs:

Cost	Amount
Deposition Transcripts	\$5,282.55
Final Hearing Transcripts	\$15,501.50
Copy Costs	\$1,201.75

Trial Expert Witness Costs (Manlove)	\$15,000.00
Total:	\$36,985.80

32. At the final hearing, Mr. Shannin testified that his agreed hourly fee for providing expert testimony was \$400 per hour. He further testified that he spent 10 hours in total (nine hours of preparation, and one hour for testimony at the final hearing), and expected to submit an invoice to the School Board for \$4,000.00. The undersigned finds that this fee is an additional recoverable cost for the School Board.

33. The undersigned finds that the foregoing expenditures total \$40,985.80 in taxable costs, and shall be recoverable by the School Board, as prescribed in section 1002.33(8)(b).

Sanctions

34. As detailed in paragraphs 5-14 above, the School Board filed multiple motions to compel, for Legacy’s failure to timely and properly respond to the School Board’s discovery requests. The undersigned entered multiple Orders concerning these motions, the latest being a May 4, 2020, Order Granting Motions to Compel, which ordered Legacy to provide verified answers to its second amended responses to interrogatories no later than May 8, 2020, and that if Legacy failed to provide responsive answers to those interrogatories, the undersigned would consider, at the final hearing, whether such failure should result in the imposition of sanctions. The Order Granting Motions to Compel also ordered Legacy to provide all responsive documents requested no later than May 8, 2020, and that if it failed to provide responsive, non-privileged documents as ordered, the undersigned would consider, at the final hearing, whether such failure should result in the imposition of sanctions.

35. Legacy actually e-filed its responsive answers to interrogatories and documents with the Division on May 9, 2020, which was a Saturday, and the School Board did not receive them until Monday, May 11, 2020, through the Division’s e-filing system. Legacy’s qualified representative and attorney did

not attempt to timely provide these remaining responsive answers and documents utilizing methods other than the Division's e-filing system.

36. In essence, to respond to the School Board's discovery (interrogatories and requests for production) served on January 20, 2020, it took multiple extensions, motions to compel, hearings on motions to compel, Orders on motions to compel, and, ultimately, the May 4, 2020, Order Granting Motions to Compel, to get Legacy to provide full responses, which even then ran afoul of the deadline provided in that May 4, 2020, Order Granting Motions to Compel.

37. At the final hearing in the underlying matter, the undersigned excluded from evidence documents that were not provided pursuant to the May 4, 2020, Order Granting Motions to Compel. Significantly, the undersigned excluded progress monitoring reports related to ESE students, because the School Board requested these progress monitoring reports during discovery, but Legacy failed to produce them. Although the School Board provided clear and convincing evidence that Legacy failed to provide significant compensatory education service minutes to its students, the undersigned also found:

Although [Legacy ESE teacher Jamie Luna's] testimony that Legacy has completed regular and compensatory ESE services for the 2019-2020 school year was persuasive, it is not clear, because of the lack of admissible progress monitoring reports, that Legacy's ESE students received the services required under their IEPs.

F.O. at 33.

38. The School Board requests additional monetary sanctions against Legacy, its Qualified Representative, and its counsel of record, for its conduct in failing to respond to discovery and the undersigned's Orders.

39. Legacy argues that sanctions are not warranted because Ms. Montford, its corporate representative, interim principal, and "designee"

of the Governing Board to facilitate discovery requests, was diagnosed with serious, documented health issues during the pendency of this matter, which required immediate treatment by healthcare providers in North Carolina, and these serious health issues should be considered in understanding any delays in discovery. The undersigned previously found, in the underlying matter, that Ms. Montford's serious health issues constituted good cause for a continuance of the final hearing.

40. Legacy also argues that the COVID-19 pandemic further complicated its ability to respond to the School Board's discovery.

41. Legacy's Qualified Representative, Mr. Norwood, contends that any discovery delays were beyond his control, and were the responsibility of Legacy, not him. Legacy's counsel of record, Mr. Clark, who did not appear at the final hearing or at the final hearing in the underlying matter, but whose signature appears on Legacy's pleadings, did not make any argument in Legacy's Proposed Final Order, but would presumably similarly contend that any discovery issues were beyond his control.

42. The undersigned finds that Legacy's failure to timely provide discovery, after numerous motions to compel and Orders from the undersigned, warranted the imposition of sanctions at the final hearing in the underlying matter, in the form of the exclusion of evidence Legacy wished to introduce. *See Fla. R. Civ. P. 1.380(4)(b)(2)(B)*. The undersigned declines to impose additional sanctions.

CONCLUSIONS OF LAW

43. The Division has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57, and 1002.33(8), Florida Statutes.

44. The ALJ has final authority to resolve this dispute pursuant to section 1002.33(8)(b), which provides, in pertinent part, that "[t]he administrative

law judge shall award the prevailing party reasonable attorney fees and costs incurred during the administrative proceeding and any appeals.”

45. As the prevailing party, the School Board is entitled to an award of its reasonable attorneys’ fees and costs incurred during the administrative proceeding and any appeals. *Id.*

46. Additionally, the School Board is entitled to an award of prejudgment interest on the costs incurred. *See R.J. Reynolds Tobacco Co. v. Lewis*, 275 So. 3d 747, 751 (Fla. 5th DCA 2019).

47. Expert witness fees may be taxed as costs for a lawyer who testifies as an expert as to reasonable attorneys’ fees. *Travieso v. Travieso*, 474 So. 2d 1184, 1184-85 (Fla. 1985); *see also In re Amends. to Unif. Guidelines for Taxation of Costs*, 915 So. 2d 612 (Fla. 2005) (identifying expenses associated with expert witnesses and court reporter services as costs that should be taxable).

Attorneys’ Fees

48. The Florida Supreme Court has accepted the Lodestar approach as a suitable foundation for an objective structure in setting reasonable attorneys’ fees. *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). The Lodestar approach requires the undersigned to: (a) determine the number of hours reasonably expended on the litigation; (b) determine a reasonable hourly rate for the services of the prevailing party’s attorney; and (c) once determined, multiply the reasonable hourly rate by the reasonable number of hours expended. *Id.* at 1150-51.

49. In assessing reasonable fees pursuant to the Lodestar approach, courts should apply those factors enunciated in The Florida Bar Code of Professional Responsibility. *Id.* at 1150; *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d at 830. These eight factors are set forth in rule 4-1.5(1)(b) of the Rules Regulating The Florida Bar, and include:

- a. The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skills requisite to perform the legal service properly;
- b. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- c. The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
- d. The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
- e. The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
- f. The nature and length of the professional relationship with the client;
- g. The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skills, expertise, or efficiency of effort reflected in the actual providing of such services; and
- h. Whether the fee is fixed or contingent, and, if fixed, as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

50. The first step in calculating the Lodestar figure is to determine the number of hours reasonably expended on litigation. *Rowe*, 472 So. 2d at 1150. In making this assessment, courts generally consider records detailing the amount of work performed and the novelty and difficulty of the questions involved.

51. As discussed in detail in paragraphs 26-28 above, GWDS attorneys' use of block billing, with multiple tasks within a single billing entity, makes it difficult to assess the reasonableness of the total number of hours reasonably expended on an hour-by-hour basis. *See Moore v. Kelso-Moore*, 152 So. 3d 681, 682 (Fla. 4th DCA 2014) (noting that the use of block billing made it impossible to determine the reasonableness of the hours expended as to certain matters).⁵

52. Although Florida courts have yet to address the question, federal decisional authority generally holds that where the use of block billing precludes an hour-by-hour analysis, it is appropriate to apply an across-the-board percentage cut to the total number of hours claimed. *Dial HD, Inc. v. Clearone Comm'ns, Inc.*, 536 Fed. Appx. 927, 931 (11th Cir. 2013) (holding lower court "reasonably applied a 25% across-the-board reduction to the fees charged ... based on its conclusion that the firm used block billing, making it difficult to ascertain how much time was spent on each task."); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971-73 (D.C. Cir. 2004) (applying a 50 percent reduction where the time records suffered from multiple deficiencies, including block billing).

53. The undersigned notes that some of the billing records contain non-block entries. However, this fact does not invite both a percentage cut to the hours included within the block entries and an hour-by-hour analysis of the non-block entries. As the Eleventh Circuit persuasively explained:

[I]n arriving at the lodestar, the court conducted both an hour-by-hour analysis *and* applied an across-the-board reduction of the requested compensable hours. Our circuit's precedent states that the district court is to apply either method, not both. The reason for this is easy to understand: by

⁵ The undersigned has reviewed authority provided by the School Board for the proposition that block billing may be acceptable. However, one case provided by the School Board, *Machado v. Da Vittorio, LLC*, 2010 WL 2949618 (S.D. Fla. July 10, 2010), actually reduces the requested fees because of block billing.

requiring the district court to conduct either analysis instead of both, we ensure that the district court does not doubly-discount the requested hours, as was the case here.

Bivins v. Wrap It Up, Inc., 548 F.3d 1348, 1351-52 (11th Cir. 2008).

54. Pursuant to the persuasive authority cited above, the undersigned concludes that, because of the use of block billing, an across-the-board percentage reduction of the GWDS fees is warranted. The undersigned concludes that a 10 percent reduction of the total hours of the GWDS attorneys is appropriate (though other reviewed fee cases involving block billing involved larger reductions, 10 percent is reasonable based in part on Mr. Shannin's persuasive testimony), given the time and labor required, the novelty, complexity, and difficulty of the questions involved, the preclusive effect this representation had regarding other potential employment by the GWDS lawyers involved, the significance of the subject matter of this litigation, the special time demands necessary for the underlying matter, and the experience, diligence, and ability of the GWDS lawyers involved.

55. The second step in calculating the Lodestar figure is to determine a reasonable hourly rate for the services of the prevailing party's attorneys. *Rowe*, 472 So. 2d at 1150. In reaching this determination, courts generally consider the "market rate," *i.e.*, the rate charged in the community by lawyers of reasonably comparable skill, experience, and reputation for similar services. *Id.* at 1151.

56. The undersigned concludes that the \$200 hourly rate GWDS charged the School Board for its attorneys is reasonable, and as supported by Mr. Shannin's expert testimony, was "incredibly reasonable."

57. The third, and final, step in the Lodestar approach is to multiply the reasonable hourly rates by the reasonable hours expended. Based on this calculation, which includes the 10 percent across-the-board reduction in hours, the total Lodestar figure is \$271,162.00.

58. Once the tribunal arrives at the Lodestar figure, the tribunal may adjust this amount to account for other considerations that have not yet figured in the computation—the most important being the relation of the results obtained to the work done. *Smith v. Sch. Bd. of Palm Beach Cty.*, 981 So. 2d 6, 69(Fla. 4th DCA 2007) (quoting *Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000)). See also *Rowe*, 472 So. 2d at 1151. If the results obtained were exceptional, then some enhancement of the Lodestar might be appropriate. *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988). Exceptional results are results that are out of the ordinary, unusual, or rare. *Id.*

59. While the undersigned agrees with the School Board that it proved multiple violations of law and other good cause to terminate the Amended Charter with Legacy pursuant to section 1002.33(8)(b), after a grueling pre-hearing process that involved vigorous discovery and motion practice, delays due to documented health issues of Legacy’s corporate representative and the COVID-19 pandemic, and an equally-grueling six-day final hearing, the undersigned declines to enhance the Lodestar figure.

Costs

60. To determine the reasonableness of costs, rule 4-1.5(b)(2) sets forth six factors that may be considered:

- a. The nature and extent of the disclosure made to the client about the costs;
- b. Whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;
- c. The actual amount charged by third party services to the attorney;
- d. Whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

e. The reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

f. The relationship and past course of conduct between the lawyer and the client.

61. In determining which costs are taxable, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (Uniform Guidelines) may also be considered. *See In re Amends. to Unif. Guidelines for Taxation of Costs*, 915 So. 2d at 612. The Uniform Guidelines specifically identify those costs that the undersigned should tax, may tax, and should not tax. *Id.* at 616-17. The Uniform Guidelines are advisory only, and the taxation of costs remains within the undersigned's broad discretion. *Id.* at 614.

62. As set forth in the Uniform Guidelines, litigation costs that should be taxed include, but are not limited to:

- Depositions – to include (i) the original and one copy of the deposition and court reporter's per diem for all depositions; (ii) the original and/or one copy of the electronic deposition and the cost of the services of a technician for electronic depositions used at trial; (iii) telephone toll and electronic conferencing charges for the conduct of telephone and electronic depositions.
- Witnesses – to include costs of subpoena, witness fee, and service of witnesses for deposition and/or trial.
- Court reporting costs other than for depositions – to include reasonable court reporter's per diem for the reporting of evidentiary hearings, trial, and post-trial hearings.
- Expert witnesses – to include a reasonable fee for trial testimony.

63. As set forth in the Uniform Guidelines, litigation costs that should not be taxed include, but are not limited to:

- Any expenses relating to consulting non-testifying experts.
- Costs incurred which were not reasonably calculated to lead to the discovery of admissible evidence.
- Travel expenses of attorneys.

64. As discussed in detail above, the undersigned concludes that the School Board has met the rule 4-1.5(b)(2) factors in this matter. A fee agreement between GWDS and the School Board governs their professional relationship, and requires that GWDS maintain documents that itemize all costs incurred. GWDS maintains such documentation and entered into evidence at the final hearing documentation as evidence of all taxable costs accrued.

65. Based on the foregoing, the undersigned concludes that the School Board has established taxable costs in the amount of \$40,985.80.

Sanctions

66. As found above, Legacy's failure to timely provide discovery, after numerous motions to compel and Orders from the undersigned, warranted the imposition of sanctions at the final hearing in the underlying matter, in the form of the exclusion of evidence Legacy wished to introduce. *See Fla. R. Civ. P. 1.380(4)(b)(2)(B)*.

67. The imposition of any additional sanctions rests within the discretion of the undersigned. *See Belle Glade Chevrolet-Cadillac Buick Pontiac Oldsmobile, Inc. v. Figgie*, 54 So. 3d 991, 996 (4th DCA 2010). The undersigned declines to award any additional sanctions against Legacy, its Qualified Representative, or counsel of record.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent, Legacy Academy Charter, Inc., pay Petitioner, The School Board of Brevard County, a total of \$312,147.80, broken down as follows: (a) \$271,162.00 in attorneys' fees; and (b) \$40,985.80 in costs. Prejudgment interest shall be taxed at 6.03%. See § 55.03(1), Fla. Stat.

DONE AND ORDERED this 4th day of December, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 4th day of December, 2020.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.