

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF BREVARD
COUNTY, FLORIDA,

Petitioner,

Case No. 20-5422FC

vs.

LEGACY ACADEMY CHARTER, INC.,

Respondent.

_____ /

FINAL ORDER ON APPELLATE ATTORNEY'S FEES

This matter arises from Appellee/Petitioner School Board of Brevard County's (School Board) Motion for Appellate Attorneys' Fees, filed January 12, 2021, concerning Appellant/Respondent Legacy Academy Charter, Inc.'s (Legacy) appeal of the Final Order entered on August 18, 2020, in the underlying matter, DOAH Case No. 19-6424, to the Fifth District Court of Appeal, in Case No. 5D20-1762. The undersigned did not conduct a final hearing in this matter because: (a) Legacy failed to respond to the School Board's Motion for Appellate Attorneys' Fees at the Fifth District and in this proceeding; (b) Legacy failed to comply with a January 4, 2021, Order in which the undersigned provided Legacy an opportunity to respond to the School Board's Motion for Appellate Attorneys' Fees, and to jointly confer with the School Board and inform the undersigned of a need for a hearing; and (c) Legacy failed to respond to a February 3, 2021, Order to Show Cause, in which the undersigned provided Legacy until February 15, 2021, to show cause, in writing, why the undersigned should not grant the School Board's Motion for Appellate Attorneys' Fees.

STATEMENT OF THE ISSUES

The issues presented, as framed by the Fifth District’s December 16, 2020, Order are: (1) whether the School Board is entitled to appellate attorney’s fees pursuant to section 1002.33(8)(b), Florida Statutes; and (2) the amount of attorney’s fees to which the School Board is entitled.

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 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)¹. 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.

¹ All statutory references are to Florida Statutes (2019), unless otherwise noted.

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., and 1002.33(8)(a)1., Florida Statutes, 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 sections 1002.33(2), 1003.571(1)(a), and 1002.33(16)(a)3., Florida Statutes, 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, Florida Administrative Code 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 and sections 286.011, 1002.33(2), 1002.33(7), 1002.33(9)(c), 1002.33(12)(f), and 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.

Legacy appealed the underlying matter to the Fifth District on August 19, 2020. Legacy also filed a Motion to Stay on an Expedited Basis on August 19, 2020. The court entered an Order on August 20, 2020, providing the School Board with seven days to respond to the Motion to Stay. That same day, Legacy filed an Emergency Motion for Clarification or, in the Alternative, Motion for Temporary Stay (Emergency Motion). The School Board filed a Preliminary Response in Opposition to Legacy's Emergency Motion on August 20, 2020, and then, on August 27, 2020, it filed a Response in Opposition to Legacy's Motion to Stay on Expedited Basis, which included an

affidavit. On September 1, 2020, Legacy filed a Reply in Support of Motion to Stay on Expedited Basis. On September 2, 2020, the court entered an Order that denied the stay on September 2, 2020. Legacy's appellate counsel withdrew from representation, and the court ordered Legacy to obtain new counsel by November 4, 2020. When no new counsel appeared, the court entered an Order to Show Cause on November 5, 2020, providing Legacy 10 days to show cause why the appeal should not be dismissed. Legacy failed to respond to the court's Order to Show Cause, and on November 24, 2020, the court entered an Order dismissing the appeal.

On December 3, 2020, the School Board filed a Motion for Appellate Attorneys' Fees with the court. On December 16, 2020, the court entered the following order:

BY ORDER OF THE COURT:

ORDERED that Appellee's Motion for Appellate Attorney's Fees, filed December 3, 2020, is granted contingent upon the lower tribunal determining Appellee is entitled to attorney's fees pursuant to section 1002.33(8)(b), Florida Statutes. If so determined, the lower tribunal shall determine and assess reasonable attorney's fees for this appeal.

On January 4, 2021, the undersigned issued an Order that: (a) directed the School Board to file, no later than January 15, 2021, any pleadings it deemed necessary and appropriate to support its request for appellate attorney's fees and that would be responsive to the court's December 16, 2020, Order, as well as any pleadings previously filed with the Fifth District in Case No. 5D20-1762 that it felt the undersigned should consider; (b) provided Legacy the opportunity to respond to the School Board's pleadings, no later than January 25, 2021; and (c) directed the parties, on or before January 29, 2021, to confer to determine whether a final hearing in this

matter was necessary, and if necessary, directed the parties to advise the undersigned in writing, no later than January 29, 2021, as to the estimated length of time necessary to conduct a hearing, whether the parties agree to conducting this hearing utilizing the Zoom web-conference platform, and all dates more than 30 days and less than 70 days from the date of this Order on which all parties were available for the hearing. On January 11, 2021, the undersigned entered an Order Granting Second Amended Motion to Withdraw of Legacy's qualified representative. At the time of that Order, the docket of the Division of Administrative Hearings (Division) indicated that Jonathan Clark, Esquire, who filed a notice of appearance in the underlying proceeding, remained counsel of record in this proceeding.

On January 12, 2021, the School Board filed a Motion for Appellate Attorneys' Fees, as well as a Notice of Filing Affidavit of Attorney's Fees. On January 27, 2021, the School Board filed a Proposed Recommended Order. Having received no response from Legacy, the undersigned, on February 3, 2021, entered an Order to Show Cause, which ordered Legacy to show cause, in writing, no later than February 15, 2021, why the undersigned should not grant the School Board's Motion for Appellate Attorneys' Fees, and further noted that failure to timely respond may result in the undersigned granting the School Board's Motion for Appellate Attorneys' Fees without any further action from the parties. As of the date of this Final Order on Appellate Attorney's Fees, Legacy has filed no response with the Division.

FINDINGS OF FACT

The Underlying Matter (DOAH Case No. 19-6424)

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). A detailed

recounting of the underlying matter can be found in *The School Board of Brevard County v. Legacy Academy Charter, Inc.*, DOAH Case No. 19-6424 (DOAH Aug. 18, 2020), which concluded that the School Board met its burden, by clear and convincing evidence, that it may terminate the Amended Charter.

Attorneys' Fees and Costs for Underlying Matter (DOAH Case No. 20-3911F)

2. On August 28, 2020, the School Board filed a Motion for Attorneys' Fees, Costs, and Sanctions, which was assigned DOAH Case No. 20-3911F.

3. The undersigned conducted a final hearing in DOAH Case No. 20-3911F on November 6, 2020. The School Board's expert on attorneys' fees at that hearing, Nicholas A. Shannin, Esquire, testified that the hourly rate of \$200 for partners and associates at the School Board's Orlando-based law firm of Garganese, Weiss, D'Agresta & Salzman, P.A. (GWDS), was "incredibly reasonable."

4. The undersigned held that the \$200 hourly rate GWDS charged the School Board for its attorneys was reasonable, and ultimately ordered Legacy, pursuant to section 1002.33(8)(b), to pay the School Board a total of \$312,147.80, broken down as follows: (a) \$271,162.00 in attorneys' fees; and (b) \$40,985.80 in costs. *See The School Bd. of Brevard Cty. v. Legacy Academy Charter, Inc.*, DOAH Case No 20-3911F (DOAH Dec. 4, 2020).

Attorney's Fees for Appeal (Case No. 5D20-1762)

5. The School Board's Affidavit of Attorneys' Fees details the attorney's fees that the School Board seeks in the appeal, and includes the detailed billing records of GWDS. This affidavit avers that the hourly rate actually billed by counsel was \$200 for attorney Erin O'Leary, Esquire, who is Board Certified in Appellate Practice by The Florida Bar, and who handled the appeal. The affidavit further avers that Ms. O'Leary's total number of hours billed in the appeal was 42.5 hours.

6. Although GWDS attorney Debra Babb-Nutcher, Esquire, participated as counsel in the appeal, including supervising Ms. O'Leary and assisting in

case strategy, preparation of documents, and communications with the School Board and opposing counsel, the School Board only seeks to recover the total amount of attorney's fees charged by Ms. O'Leary.

7. In DOAH Case No. 20-3911F, the undersigned found that the \$200 hourly rate GWDS charged the School Board of its attorneys was reasonable, and the undersigned finds that a \$200 hourly rate charged by Ms. O'Leary for representing the School Board on appeal is reasonable.

8. The hours expended in this matter are reasonable given the time and labor required, the unique arguments raised by Legacy in attempting to stay the closure of its school, the lack of legal precedent, the multiple factual claims that required rebuttal, the short time frame in which to respond making other work impossible, the significant effort required to defend against the stay, as well as the ultimate success achieved in defeating Legacy's attempted stay.

9. The School Board has demonstrated that the attorney's fees sought are reasonable based upon the reasonable rate charged and the reasonable hours expended in the appeal. Legacy has filed nothing to dispute the School Board's request for appellate attorney's fees.

10. The Lodestar figure (*i.e.*, the fees charged and hours expended) by Ms. O'Leary in this appeal is \$8,500.00 for the work performed between August 19, 2020, through December 3, 2020. The undersigned finds that this Lodestar figure is reasonable in light of the factors enumerated in the Rules of Professional Conduct, found in Rule 4-1.5 of the 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).

11. The undersigned finds that the total fee amount of \$8,500.00 for the appeal of the underlying matter, Case No. 5D20-1762, shall be recoverable by the School Board, as prescribed in section 1002.33(8)(b).²

CONCLUSIONS OF LAW

12. 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.

13. 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.”

14. As the prevailing party, the School Board is entitled to an award of its reasonable attorney’s fees incurred during the appeal of the underlying matter. § 1002.33(8)(b), Fla. Stat.; *see also Arango v. United Auto Ins. Co.*, 901 So. 2d 320 (Fla. 3d DCA 2005)(reversing circuit court appellate decision and holding that appellee in an appeal that was dismissed without a decision being rendered was the prevailing party and was entitled to recover appellate attorneys’ fees); *United Svcs. Auto Ass’n v. Manso*, 54 So. 3d 498 (Fla. 2d DCA 2011)(granting appellee’s motion for appellate attorney’s fees following appellant’s voluntary dismissal of appeal).

15. The Florida Supreme Court has accepted the Lodestar approach as a suitable foundation for an objective structure in setting reasonable attorney’s fees. *Rowe*, 472 So. 2d at 1150. 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.

² The School Board incurred no costs in the appeal.

16. 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; *Quanstrom*, 555 So. 2d at 830. These eight factors are set forth in rule 4-1.5(1)(b) 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.

17. 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.

18. As found above, Ms. O’Leary expended a reasonable number of hours in the appeal. It is undisputed that Legacy’s attempt to stay the closure of its school involved a complex and novel issue. In consideration of these circumstances, and based upon a review of the hours expended by Ms. O’Leary, the undersigned concludes that the number of hours expended in this appeal—42.5 hours—were reasonable.

19. 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.

20. The undersigned concludes, consistent with the underlying fees and costs matter, DOAH Case No. 20-3911F, that the \$200 hourly rate GWDS charged the School Board for Ms. O’Leary’s work on appeal is reasonable.

21. 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, the total Lodestar figure is \$8,500.00. Legacy has not disputed this requested amount, and further, has not filed anything in opposition to the School Board’s request for appellate attorneys’ fees.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Appellant/Respondent Legacy Academy Charter, Inc., pay

Appellee/Petitioner The School Board of Brevard County a total of \$8,500.00 for appellate attorney's fees, as the prevailing party in Case No. 5D20-1762.

DONE AND ORDERED this 25th day of February, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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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.