

**BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
for the
STATE OF OREGON**

**In the Matter of the
Termination of the Charter
of the Blue Mountain School**

FINAL ORDER

HISTORY OF THE CASE

On July 12, 2007, South Lane School District 45J3 (District) notified the Blue Mountain School, Inc. and the Blue Mountain Assembly that the District's Board had voted to terminate the District's Charter School Contract with Blue Mountain Charter School (BMS). After a hearing before the District's Board that affirmed the earlier decision to terminate, on August 27, 2007, BMS filed a request for review of that decision with the State Board of Education (Board). The Board has authority to hear this matter under ORS 338.105 and has delegated that authority to the Superintendent of Public Instruction, who appointed William D. Young the hearings officer to preside over this matter and to prepare a Proposed Order. OAR 581-020-0365.

On December 18, 2007, a contested case hearing was held under the Administrative Procedures Act, ORS 183.413 through ORS 183.470, in Cottage Grove, Oregon. BMS appeared by its attorney, Matthew D. Lowe. Dr. Hal Sadofsky, Leslie Stine, and Cory Kirshner-Lira testified on behalf of BMS. The District appeared by its attorney Richard Cohn-Lee. Dr. Krista Parent, Dr. Christine Parra, Dr. Julie DePauw, and Dr. Sue Wickizer testified on behalf of the District.

After the conclusion of testimony on December 18, the parties agreed to hold the hearing record open until January 7, 2008, to file written closing argument. The parties' memoranda were received on January 7, 2008, and the hearing record closed on that date. A proposed order was issued by William Young, hearings officer, on January 15, 2008. Matthew Lowe on behalf of BMS filed exceptions to the proposed order on January 24, 2008. The District did not file any exceptions to the proposed order. Another proposed order was issued on April 30, 2008. On May 12, 2008 both Matt Lowe on behalf of BMS filed and Richard Cohn-Lee on behalf of the District filed exceptions to this proposed order dated April 30, 2008.

EVIDENTIARY RULINGS

Pursuant to the agreement of the parties in a prehearing conference held November 21, 2007, the parties jointly offered exhibits J-1 to J-103,¹ which were admitted without objection. Neither party offered additional exhibits.

ISSUES

Did Blue Mountain School:

¹ At the hearing the Hearings Officer misspoke and identified exhibits J-1 to J-123.

- Fail to meet terms of its approved charter or requirements of ORS Chapter 338 not waived by the State Board of Education;
- Fail to meet requirements for student performance stated in its charter; or
- Fail to correct violations of federal or state law described in ORS 338.115?

See, ORS 338.105; OAR 581-020-0380.

FINDINGS OF FACT

1. BMS is a K-12 school accredited by the Northwest Association of Accredited Schools. It opened in September 1998 as a publicly funded alternative school based on self-directed education and participatory democracy with students, staff and parents having equal voices in developing long term policies and in the day-to-day operations of the school, including discipline. The District and other local school districts utilized BMS as an alternative school for several years before the school sought status as a charter school. (Stine testimony; exhibit J-2.)
2. BMS students are responsible for directing their own education and determining what and when they learn and how they are taught. Adult staff supports students by offering passive and active facilitation according to each student's interests. There are no required classes, no requirement to take classes at all, and no testing to determine what students have or have not learned. Students are free to choose almost any activity they desire, and are free to continue those activities for as long or short a time as they see fit. (Sadofsky testimony; Stine testimony; exhibits J-2 and J-50.)
3. All students, parents and staff are members of the Assembly, BMS' governing body. The Assembly has the power to change its Bylaws and has final approval of the school budget. Students and staff constitute the School Meeting, which is responsible for the day-to-day management of the school including managing and spending the budget, hiring staff, approving volunteers, etc. (Exhibit J-2.)
4. Discipline at BMS focuses on self-regulated behavior meeting the mutual expectations of the school community. When individuals do not meet these expectations, BMS' Judicial Committee (JC) is the school body that addresses complaints from students, staff, parents and public members. JC policies stipulate that forms be available for people to document their complaints, which generally pertain to alleged infractions of the laws and rules of the school, and that they be filed with the JC clerk. The JC investigates the facts of the complaint, holding regular meetings to ensure it addresses the 600-700 complaints they receive each year. (Stine testimony; exhibit J-2.)
5. In 2003, BMS began the process of applying to the District to be a charter school, which would allow it to obtain public funding for each student. In its proposal, BMS emphasized the apparent conflict between various state and federal laws requiring standardized test results, including the No Child Left Behind Act (NCLB), and its educational philosophy of self-directed

education. It pointed out, however, its position that NCLB sanctions would not apply to BMS since it would not receive Title I funds. (Exhibit J-2.)

6. BMS' charter proposal was presented to the District's Board on December 8, 2003. Some District Board members were skeptical of the proposal because of concerns regarding student testing and accountability. The District did not make an immediate decision on the proposal, tabling it to allow additional research on the proposal. After an additional District Board meeting and research, District staff recommended approval of the charter proposal. Despite that recommendation on January 12, 2004, the District Board voted to deny the charter application, with an invitation to reapply within 180 days. The District's Board's problems with BMS' charter proposal included supervision of younger students, student participation in state-wide assessment, accountability for student learning and the length of the agreement. (Exhibits J-3, J-7, J-8 and J-9.)

7. BMS and District staff worked together to address the District's Board's concerns. On May 18, 2004, BMS amended its charter proposal in which it addressed issues identified in the District's Board's denial, including shortening the length of the charter agreement for the proposed five years to two. The Board approved the amended charter proposal in its meeting on June 7, 2004. (Exhibits J-12 and J-13.)

8. The District performed its annual on-site visit on January 24, 2005. District staff noted no significant deficiencies in the new charter school, although they noted that the "Standards Matrix" was incomplete and that student records had to be moved to a 1-hour fireproof safe. (Exhibit J-14.)

9. On February 24, 2006, BMS submitted an application for renewal of its charter. (Exhibit J-18.)

10. On February 27, 2006, District staff conducted an annual on-site visit. Based upon that visit, the District found that BMS was "substantially meeting" provisions set out in the contract and application for its charter. (Exhibit J-16.)

11. The 2005 Legislature amended statutes relating to charter schools and imposed requirements on charter schools that had not been required when the District approved BMS' initial application. Largely because of those changes District staff recommended that the District's Board renew BMS' charter for another two years but that the charter be amended as follows:

- BMS commitment to minimum Oregon State Assessment Test (OSAT) student participation rates of 50% at each grade level in all content areas assessed.
- Agreement that a minimum of 80% of the students would develop learning goals and annual written plans to support self-directed learning and that students would review progress on their plans at least two (2) times per year.
- Agreement that each student would select a minimum of two different assessment methods to track progress on the annual learning plan.

- Agreement that the percent of students who meet or exceed State Benchmarks in a content area should show a positive increase from the prior year, with the 2006- 2007 academic year as the first year of increased participation.
- Agreement regarding the level of staff supervision needed to ensure student safety in areas regarded as potentially dangerous.

(Exhibit J-19.)

12. District staff did not communicate or discuss their recommendations with BMS. The then-District Board Chair called BMS the night before the March 6, 2006, District Board meeting and informed BMS that the Board’s meeting packet contained a memorandum recommending that BMS’ renewal be approved only with staff-recommended conditions to be added to the contract. (Stine testimony.)

13. The next day, the District’s Board discussed the renewal. Lesley Stine, BMS’ Administrator, attempted to incorporate the proposed conditions into her presentation to the Board but could not address them in detail since she had learned of their existence only the night before. The Board approved BMS’ charter unanimously, subject to inclusion of staff-recommended conditions into the charter agreement. (Stine testimony; exhibit J-21.)

14. Ms. Stine felt frustrated and sensed a less cooperative environment between BMS and the District than previously. These feelings were aggravated by the District’s decision to use a new template for charter renewal than had been used for the initial charter, and a subsequent decision to use yet another template. Because of the participatory nature of the decision making process at BMS, it was difficult for her to coordinate BMS’ review of the old charter, comparison with the new templates, and incorporation of the District’s amendments. (Stine testimony.)

15. Despite these difficulties, on June 6, 2006, the District and BMS signed a “Charter School Contract” setting forth a two year agreement between the District and BMS. The recitals of the contract included a statement that the District had “determined that the Corporation is either in compliance or working towards compliance with renewal criteria set forth in ORS 33.065 [sic] and required in the renewal process. (Exhibit J-28.)

16. Among the items set out in Section 2 of the Charter School Contract were the following “Conditions Precedent to Operation of Charter School”:

Commitment of Blue Mountain School governing body to a minimum OSAT student participation rate of 50% of the total number of students eligible to be assessed in each of the content areas; and

Agreement between the District and BLUE MOUNTAIN CHARTER SCHOOL that the percent of students who meet or exceed State Benchmarks in a content area should show a positive increase from the prior year. Baseline year will occur 2006-2007 with the first year of increased participation. Data will be summarized

to reflect both the total percent of students who meet or exceed State Benchmarks and the percent of the intact student group (students who have been enrolled for a minimum of one school year) who meet or exceed Benchmarks in a content area; and

Agreement between the District and BLUE MOUNTAIN CHARTER SCHOOL that a minimum of 80% of the students will show evidence of self-directed learning. In addition, agreement between the parties that students will review the evidence of their learning at least one (1) time midway through the school year. BLUE MOUNTIAN CHARTER SCHOOL will use an array of formats, including, but not limited to

A. Goal Setting Conferences. These conferences will be offered to all Blue Mountain families twice every school year. Goals will be recorded and placed in student files;

B. Resume Building. Students will document all activities, positions held, and classes taken in order to build their Blue Mountain School Resume;

C. Staff Documentation. Staff will document student projects, skills, interests and activities without the participation of the students except for their approval at the beginning of the year. This information will be placed in student files. Examples of class work and work samples will be included in files when deemed appropriate by staff; and

Agreement between the District and BLUE MOUNTAIN CHARTER SCHOOL that 80% of the students will participate in a self-assessment reflection activity concerning the learning and growth documented in their files or resumes on an annual basis at the end of the school year; and

Agreement between the District and the applicant that BLUE MOUNTAIN CHARTER SCHOOL will collect data on former students who had been enrolled for a minimum of one (1) year. The study will collect descriptive data on the current activities of former students. The data will be reported to the District in the annual report due October 15, 2007; and

Agreement between the District and the applicant regarding the level of staff supervision needed to ensure student safety in areas regarded as potentially dangerous; and

The ability of the applicant to comply with all state and federal laws regarding services for special education students including making students available to receive their special education services in accordance with their IEP and at a location, date and time identified by the district. Further, all special education services will be provided within the district adopted student calendar;

* * * * *

(Exhibit J-28.)

17. Conditions set out in Section 4 of the contract related to Educational Programs, Student Assessment and Curriculum included:

Curriculum

- The District waiving its curricular requirements, to the extent allowed by law, and authorizing BMS to design and implement its educational program.
- BMS having available for its students a full range of educational resources encompassing the state's required content areas noted in ORS 329.045, and including specifically the "Blue Mountain School Standards Matrix" reflecting the content of the Oregon Common Curriculum Goals and the Grade-Level Foundations and Standards for English, science, social science and mathematics.
- That BMS seek and obtain prior approval from the District before making a fundamental change to the educational program outlined in its application.

Student Assessment

- That all students enrolled and attending third grade through the CIM level participate and take part in all statewide assessments developed by the Oregon Department of Education under ORS 329.485, as well as any assessment developed by the Oregon Department of Education, the United States Department of Education or the Oregon Legislature to implement NCLB assessment requirements.

Records

- That BMS comply with all record keeping requirements of state and federal law pertaining to student records and cooperate with the District by providing any reports or records to the District, required to meet the District's reporting obligations to the Oregon Department of Education or the U.S. Department of Education.

Low Achieving Students

- That BMS identify low achieving students and provide its educational program to these students in a manner that best serves their needs, as set forth in the Charter School Application.

Alternative Educational Model

- That subject to state and federal law and the terms of the contract, BMS is allowed to promote and implement learning situations that are flexible with regard to

environment, time, structure and pedagogy.

(Exhibit J-28.)

18. Section 5 of the contract, related to Evaluation of Student Performance and Procedures for Corrective Action stated, in relevant part:

A. BLUE MOUNTAIN CHARTER SCHOOL shall pursue and make reasonable progress toward achievement of the goals, objectives and student performance standards consistent with those set forth in Exhibit A., Exhibit B. and Section 2 of this contract, provided that such goals, objectives and student performance standards shall at all times remain in compliance with Oregon law and the provisions of this Contract.

* * *

C. If the Meet and Exceed percentage of all students at BLUE MOUNTAIN CHARTER SCHOOL in each content area is not above the percents established during the Baseline Year, then BLUE MOUNTAIN CHARTER SCHOOL shall develop, subject to the District's approval, a written Plan of Correction describing the actions that BLUE MOUNTAIN CHARTER SCHOOL will undertake to successfully meet the goal of exceeding the baseline percentages.

(i) BLUE MOUNTAIN CHARTER SCHOOL shall deliver the written Plan of Correction to the District within sixty (60) days of BLUE MOUNTAIN CHARTER SCHOOL receiving the assessment scores.

(ii) If BLUE MOUNTAIN CHARTER SCHOOL does not develop a written Plan of Correction within sixty (60) days of receiving the assessment scores then the District may take action to terminate this Contract under Section 8, paragraph I of this Contract.

D. If BLUE MOUNTAIN CHARTER SCHOOL fails to follow any of the actions stated in any of the Plans of Correction as stated above the District shall issue a written notice to BLUE MOUNTAIN CHARTER SCHOOL that it must comply with the terms of the written Plan of Correction immediately. If, after 15 business days, BLUE MOUNTAIN CHARTER SCHOOL is not in compliance with the written Plan of Correction the District may begin the process of terminating BLUE MOUNTAIN CHARTER SCHOOL's operation as a public charter school under Section 8, paragraph I of this Contract.

19. A few years ago, all BMS school students went to a commercial paintball establishment for a field trip. Younger students played Laser Tag and older students played paintball, but only for an hour because of the expense. Many older students wanted to repeat the paintball experience but were mindful of the expense and the short play period at the commercial establishment. They organized a paintball field trip on the BMS campus, obtaining funds to rent paintball guns and safety equipment for students who did not have their own, and finding

experienced paintball enthusiasts to explain the rules and act as umpires. These volunteers did not undergo criminal records checks. Student participants identified the goals of the activity as team building, large motor skill development, and blowing off steam in a socially acceptable way. The paintball games lasted from about for about three hours on April 24, 2007. After school, several of the participants transported their paintball guns home on the District's school bus. BMS staff had not warned students that District policy forbade them from taking paintball guns on school buses despite having been reminded of the policy that morning by the Transportation Director.
(Exhibits J-37 and J-57.)

20. On the same day as the paintball game, a District Board member telephoned the District Office regarding BMS students transporting paintball guns on school busses. On that same date two residents of Cottage Grove who live near BMS complained regarding paintball activity on school grounds. They reported seeing barricades in the ball field and students wearing camouflage clothing with face masks firing the guns at each other. The complainants questioned the appropriateness of this kind of activity in a public school during the school day, especially one week after the killings at Virginia Tech. The complainants also reported that while the paintball activity was going on, the South Lane kindergarten bus drove by with kinder students inside the bus, with the paintball activities visible to the students. After discussing their complaints with the District Superintendent, they filed written complaints regarding the paintball activities. (Exhibits J-37 and J-38.)

21. District policy regarding weapons states, in relevant part:

Weapons and replicas of weapons are forbidden on district property. Weapons shall include, but not be limited to firearms, knives, metal knuckles, straight razors, explosives, noxious, irritating or poisonous gases, poisons, drugs or other items fashioned with the intent to use, sell, harm, threaten or harass students, staff members, parents and patrons.

(Exhibit J-39, emphasis added.)

22. District staff investigated the circumstances surrounding the paintball game and determined:

- a. That BMS staff assisted to organize an activity that was intended to be a positive one and that they followed BMS policies regarding criminal history checks of volunteers, weapons on campus, and violence and that those policies do not conflict with ORS Chapter 338 or the BMS contract with the district.
- b. That BMS staff failed to use sound professional judgment when making the decision to organize paintball games when that activity could potentially have endangered the health and safety of students, citing ORS 339.353's findings related to harassment, intimidation and bullying, and the literature on school

violence. Additionally, District staff cited the timing of the paintball games as especially inappropriate in an open and public place, only days after the events at Virginia Tech, indicating insensitivity to the needs of older students and to the community. Based on the Districts' opposition to any activities involving the use of weapons during school time, the District directed BMS staff to stop scheduling any event that includes the active use of weapons or mock weapons on school property.

- c. That BMS failed to follow the state laws and district policies applying to charter schools including: 1.) District policy on Weapons, regarding District busses and failed to later implement this district policy even though they were reminded of it by the Transportation Supervisor on the morning of the paintball activity; and 2.) ORS 339.353(1) & (3), state law regarding the provision of a safe and civil school environment and learning by positive example, civility and respect. The District required BMS to review all school activities for alignment with this state directive and include the requirement for such a review in their Law book.
- d. That BMS' policy of not conducting criminal history checks on volunteers who have staff-supervised contact with students, while consistent with state law (ORS 326.607), provided insufficient protection to students in situations in which large numbers of students participate and observe, resulting in a high probability of "direct, unsupervised contact," as defined by contact with students that provides the person opportunity and probability for personal communication or touch. The District directed BMS to institute criminal history checks on all volunteers who work directly with students and who could potentially not be under the direct supervision of a staff member at all times.

(Exhibit J-37.)

23. In the spring of 2007 BMS redesigned its process for resolving complaints to eliminate the paper complaint process and use a computer-based system. Because of difficulties with that transition, a backlog in processing disciplinary complaints resulted. In mid-April, complaints were made by the District's Transportation Director and by several students regarding various students' behaviors on the school bus, some of which involved abusive language to the bus driver, to other students and to passersby. Other behaviors directly related to safety, such as threatening to open the emergency door were reported. Because of delays in the disciplinary process characteristic of BMS' democratic model (JC investigation, meeting, and determining appropriate sanctions), the backlog resulting from transition difficulties, and the essential difference between District disciplinary policies and the more fluid BMS model, the District's Transportation Director had extreme difficulty in dealing with the sanctions imposed (or not imposed) compared to sanctions at District schools. BMS did not request and the Charter School Agreement does not require the District to use BMS' disciplinary system to deal with disciplinary problems that arise on District buses. (Stine testimony; exhibits J-40, J-46, J-59.)

24. An annual site visit required by state law and the Charter School Agreement took place on May 2, 2007. A three person team of administrators familiar with BMS conducted the three and a half hour site visit, of which BMS had about two weeks prior notice. The District's team examined documents, interviewed staff, board members, parents and students during the course of their evaluation. Based on their review the District found several positives at BMS including:

- Teachers, parents and board members are clear about the school philosophy and work towards implementing the school's mission on a daily basis.
- Teachers feel there are adequate resources for their professional development and that their participation in the school is professionally rewarding.
- Students interviewed clearly enjoy attending the school.
- The operation of the school's Judicial Committee appears to effectively teach students problem-solving skills.

There were also areas in which the District found BMS noncompliant with the Charter School Agreement or state or federal statutes. These items, which the District characterized as needing immediate attention, included:

- Insuring that criminal history checks are conducted on all paid staff.
- Completing student supervision walkabouts in a manner that meets school policy and procedures.
- Developing a medication administration policy that meets state requirements (OAR attached).
- Updating at least 2 staff First Aid cards and institute, training regarding bloodborne pathogens.
- Reviewing and updating records maintenance procedures to address noncompliance issues, including maintenance of confidentiality and developing a list of persons who can access each type of record.
- Insuring that midyear student reflection reviews of learning and growth are conducted by 80% of the students and occur sometime during the winter months, as per contract.
- Reviewing ORS 329.045 and adjust school instruction to meet the law's requirements.
- Reviewing documentation of learning folders and adjust to include evidence of learning as well as evidence of participation in an activity.
- Implementing methods to identify low achieving students and differentiated support strategies to assist these students at BMC, as per charter proposal amendment.

(Parra testimony; exhibit J-50.)

25. The District's concern about criminal history checks had been triggered by a custodian at the school. He is a parent and the school had obtained a criminal history check so that he could

volunteer at the school. His only contact with students (other than his children) was as a volunteer. He had not had a fingerprint-based criminal history check because he was not an employee of BMS, but was employed by the Blue Mountain School Foundation, a separate entity that owns and maintains the school property and which leases it to BMS. Subsequent to the District raising the issue, he obtained a fingerprint-based criminal records check. Additionally, in its May 21, 2007 response, BMS agreed to expand its policy so that anyone paid to work on the site of the school will have a fingerprint-based criminal records check. (Stine testimony; exhibit J-56.)

26. One of the District Board's concerns at BMS' initial application was supervision for younger students. In response to that concern, BMS amended its application to provide for "responsible individuals" to make hourly "walkabouts" throughout the school, to account for every student on each walkabout. In its May 21, 2007 response, BMS acknowledged that its procedures were not working and established a new policy of assigning one person to do the hourly walkabouts for the entire day, rather than using several people during the day. In this way, they hoped to reduce the possibility of individuals forgetting their responsibility to do the walkabout. (Stine testimony; exhibits J-12 and J-56.)

27. The June 2006 Charter School Agreement attempted to reduce District concerns regarding assessment of self-directed student learning by requiring eighty percent of students to engage in self-reflective activities, and that eighty percent review evidence of their learning, at least one time midway through the school year. Sixty-one percent of students had completed the required review, which were initiated in February and March, too late to be useful for a mid-year review. In its May 21, 2007 response, BMS acknowledged difficulties in implementing mandatory activities for the first time, especially in the first year of such a requirement. To assure compliance with the contract BMS committed to a two day period at the end of the 2006-2007 school year to the self-reflection exercise and, with the first year experience behind them, was in a better position to plan for this activity to begin in mid-winter in following years. (Stine testimony, Parent testimony; exhibits J-12 and J-56.)

28. The District's site visit team found that BMS' math matrix aligned with state standards and OSAT practice tests with textbook and review activities. Writing notebook that they found had state standards listed without correlated materials or activities identified. They did not find notebooks available for reading/English, or the content areas of science, social studies, PE, health, the arts, and second language. Matrices for language arts and science were available to students and staff in the general area of the room that had been pointed out to the site visitors as the matrices' location, but were not right next to the math matrices. Use of the state's matrices were a new requirement under the Charter School Contract and the social science matrices had not been completed, although research had been done and resources ordered to make those matrices available for the 2007-2008 school year. The District's site visitors did not ask for further direction when they were unable to locate the matrices for science, social science and language arts. Observations of District staff during the site visit did not accurately reflect the matrices actually available to students and staff. (Stine testimony; exhibits J-50, J-56 and J-71.)

29. When the District Board denied BMS' initial application for certification BMS amended

its proposal to specify how it would address and remediate low achieving students, even though BMS' educational model does not recognize "low achieving" students, but seeks to meet individual students' educational needs at their own pace. Generally, BMS agreed to have staff identify students low achieving during the Individual Goal Setting Conferences and the Family Orientations, through observation of their level of engagement, psychological cues they give off, their use of skills and knowledge, and the level of success they achieve. Additionally, according to the agreement, students may identify themselves as low achieving and in need of special attention. That policy has remained in continuous operation and is the focus of BMS' educational model, providing individualized educational services to students at their own pace when they're ready for them and allowing students to do what they are interested in and want to be doing. BMS staff were not, by and large, able to discuss how low achieving students were to be identified or provided educational services. (Stiner testimony, Parent testimony; exhibit J-12.)

30. The District's site visitors found problems with BMS' handling of records such as: not having the cabinet locked during the school day; active files on students who had changed schools; incomplete records on a student who appeared to remain eligible for special education and related services; and commingling of behavior records with other records such as health and cumulative records. In its May 21, response BMS acknowledged the need for records improvement but pointed out that it had improved record keeping since the 2006 site visit (in which the only suggestion was to use a fire proof safe). The school also noted that District feedback from the site visit had allowed it to improve the school's record keeping systems so that students no longer had access to student cumulative files. It also reported that all record keeping issues raised by the site visit had been corrected. (Exhibit J-50.)

31. Other concerns such as medication administration policy, first aid and bloodborne pathogen training, *etc.*, identified as needing immediate in the site visit report were addressed in the May 21, 2007, response with specific detail regarding how they had been rectified or when and the manner in which they would be rectified. (Exhibit J-56.)

32. After the site visit and before she left school grounds, one of the District evaluators informed BMS about a complaint had been made that the District would be investigating on May 4. She did not inform BMS of the nature of the complaint or what would be involved in the investigation. (Stine testimony.)

33. The complaint had been made by a District psychologist who had been at BMS on April 23, 2007, to observe a special education student. While there, she observed eight students playing a "very violent" medieval war game that involved killing opponents with different weapons. Through the 40 minute observation there was no evidence of staff supervision. Several of the students, boys ranging in age from about 9-16, used swear words and vulgar obscenities. The psychologist also observed a young child, who appeared to be about five years old, in the room throughout her observation. (Exhibits J-41 and J-42.)

34. On May 4, 2007, District staff visited BMS to investigate BMS students' computer use by auditing some of the computers, interviewing students, and reviewing parental permission regarding computer use. The audit of approximately half the student computers showed 14

percent (9 games) with a Mature rating; 48 percent (31 games) with a Teen rating; and 20 percent (13 games) with an Everyone rating. Record-keeping regarding some software licenses was unavailable. Two students' parents had not given permission for them to watch PG movies or play Teen rated games (subsequent to the inquiry the parent gave written permission) and another student's parent had not given permission for her to watch PG movies or play Teen rated games, but the student had watched PG movies. BMS staff did not permit students to be interviewed without prior notice to parents. (Exhibits J-41 and J-43.)

35. Pursuant to its Charter School Agreement, BMS policy does not allow students to play Mature rated games. Everyone rated computer and video games and G rated movies may be used without parental permission. Teen rated computer and video games and PG and PG13 rated movies may be used by students only with written permission of their parents. This policy is affected by student self-regulation and BMS disciplinary procedures. In the winter of 2006-2007 BMS rented the school to a community group for weekend use of the school's computers. The Mature rated games were installed by this group but not removed by BMS. Of the Mature rated games, one was apparently never played and the others were played when school was not in session. In its May 21, 2007 letter, BMS agreed to assure that its software licensure was reorganized, up to date, and in full compliance with copyright laws and licensure agreements. (Exhibits J-12, J-41 and J-58.)

36. On May 10, 2007, two students brought their dirt bikes to BMS. In the afternoon, a group of 6 students, including the bike owners, signed out to go off campus. The students took the dirt bikes. When the students came to government land both students rode their bikes with helmets. The younger boy, an 8th grader, hit a rut and fell off his bike. He walked back to school, laid down, and his mother was called. When he continued to complain of stomach pains after being picked up, his mother took him to the emergency room in Cottage Grove. He was transported to Sacred Heart that night with a torn spleen. Doctors drained his stomach cavity and decided not to remove the spleen because of the student's age and athleticism. He was discharged from the hospital the next day and recovered at home. As a result of the accident the student was not permitted to engage in any physical activity for 2 months while his spleen healed. (Exhibit J-49.)

37. BMS students, including these students, have brought motorcycles to school enough so that the school has adopted a rule regarding motorcycle use on campus. It reads, "Anyone using a motorcycle may only ride around the edge of the field. Users may not ride on the asphalt or parking lot. Users must have a spotter on the side of the gym if going up the hill. Users may not ride unless ground has been dry for 2 days before riding. Anyone riding must wear a helmet." (Exhibit J-49.)

38. BMS students and staff followed their policies regarding allowing students off campus, using motorcycles at school and handling the accident, except the other students allowed the injured student to walk back to the school alone, in violation of school rules. The offending students were "written up" and disciplined by the Judicial Committee. (Exhibit J-49 and J-60.)

39. BMS understood that it had until June 1, 2007, to respond to the District's findings regarding the dirt bike incident. On May 16, 2007, the District's Superintendent informed BMS

of an “administrative hearing” scheduled for May 21, 2007 to address two formal complaints filed with the District, the results of the site visit, and two other concerns. She identified the issues to be discussed as very serious and “which could lead to the termination of the Blue Mountain School’s Charter.” (Exhibits J-51 and J-52.)

40. BMS and the District agreed to postpone that meeting until May 25, 2007. A wide-ranging discussion of the District’s concerns took place, with the District assuring BMS that no motions were before the Board, although the Board had voiced concerns and questions regarding BMS. (Exhibit J-62.)

41. The District’s Board met on June 4, 2007. The Board spent considerable time discussing BMS among its members, with counsel and District staff, and with BMS representatives. Although District staff had reported and the agenda showed that there was no motion before the District Board, a motion to “table the Blue Mountain School decision until the July 9 regular session” Board meeting was made, seconded and passed. (Exhibit J-66.)

42. On June 16, 2007, BMS provided an additional written explanation to the District Board regarding unanticipated difficulties BMS had experienced getting students to engage in self-reflection activities, and corrective steps planned for the 2007-2008 academic year to correct the low and late participation. She also reported that of the 67 students enrolled at the end of the school year, 55 (82 percent) had completed self-reflection activities. (Exhibit J-70.)

43. BMS provided another written explanation to the District Board on June 20, 2007, this one dealing with the matrices. BMS staff explained that the school has eight binders in the Language Arts organized by skill set, not by level; and the same texts used in District high schools to use with the science matrices. (Exhibit J-72.)

44. The following day, BMS provided a written explanation to the District Board addressing operational issues pointed out in the site visit. BMS staff basically reiterated the points raised in its May 21 response, but addressed issues that had not been specifically addressed in May. BMS reported that a mandatory school meeting had been held toward the end of May in which staff explained the District’s bus and hazardous materials rules in detail. School staff also reported that all the Mature rated software had been removed from school computers and that computer usage is stored to aid in Judicial Committee investigations. Staff training in first aid, CPR, and bloodborne pathogens was scheduled for August 29, 2007. BMS also reported that staff would work with the District’s Transportation Director to develop a consistent agreement for disciplining students who misuse or abuse District transportation. BMS also pledged to review its policy regarding motorized vehicles, provide the product of that review to the District, and to implement its policy at the start of the 2007-2008 school year. BMS provided the Board with written explanations for every issue raised by the site visit and other concerns raised by the Board, with specific proposals for meeting District concerns. (Stiner testimony; exhibits J- 69 through J-74.)

45. By early July 2007, a District Board member had asked District for advice on how to phrase a motion to terminate BMS’ charter. When the Board met on July 9, 2007, the Board

continued the discussion of BMS it had begun on June 4th, took additional testimony, and turned the discussion to termination of BMS' charter. A vote on termination had not been published in the agenda published for the meeting. A District Board member made a motion to terminate the charter which, after additional Board discussion, passes. (Exhibit J-77.)

46. On July 12, 2007, the District sent BMS formal notice of the Board's decision to terminate its contract with the school, basically reiterating concerns raised in the site visit and regarding other issues discussed above. BMS filed a request for a hearing before the District Board on July 27, 2007. A hearing before the District Board was held on August 16, 2007, that resulted in the District Board's affirmation of its July 9, 2007, termination decision. (Exhibit J-81, J-94.)

47. BMS graduated four students in 2007. They have worked, taken community college classes while still in high school, are articulate and seem to be goal directed. A recent graduate of a District High School was valedictorian of her class, which she attributes in large part to her experience at BMS. Parents, students and staff are deeply attached to BMS and the educational model it provides. (Kirshner-Lira testimony; exhibits J-69, J-93.)

CONCLUSIONS OF LAW

- BMS did NOT FAIL to meet material terms of its approved charter and requirements of ORS Chapter 338 not waived by the State Board of Education;
- BMS did NOT FAIL to meet requirements for student performance stated in its charter; and
- BMS did NOT fail to correct violations of federal or state law described in ORS 338.115.

OPINION

ORS 338.105(1) provides the grounds under which a sponsor may terminate a charter. The District terminated the charter of BMS based on three of these grounds:

(a) Failure to meet the terms of an approved charter or this chapter.

(b) Failure to meet the requirements for student performance stated in the charter.

(c) Failure to correct a violation of a federal or state law that is described in ORS 338.115.

ORS 338.105(3) allows a charter school governing body to appeal a decision made by a sponsor under subsection (1) of this section to the State Board of Education. The role of the Board is to review the decision of the sponsor. This review is limited to the grounds specified in

the District's July 12, 2007 termination notice and to the specific reasons given by the District in the termination notice that serve as the basis for those grounds. The board has delegated to the Superintendent of Public Instruction all administrative functions necessary or reasonable relating to the review. See OAR 581-020-0385.

Although BMS' prehearing memorandum provided citation to case law suggesting that the District had the burden of persuasion, the memorandum was filed after the Hearings Officer had met the requirements of ORS 183.415 and informed the parties of the burdens of presenting evidence and the burden of persuasion. Despite the cases cited by BMS, I am convinced that the *status quo* in this proceeding is that the contract has been terminated. The party seeking to change the *status quo* is BMS which, therefore, has the burden of proving by a preponderance of the evidence that none of the circumstances set out in the statute exist. See ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the finder of fact is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). BMS met its burden in some areas, but failed in others:

Some partnerships are meetings of like minds with the parties sharing similar goals and agreeing on how to achieve those goals. Other partnerships are troubled, with similar goals but with constant disagreement on how to achieve those goals. The partnership between BMS and the District is among the latter group. Even with the shared goal of providing the best educational experience possible for BMS students, the relationship between the school and the District was troubled before it was formalized. Nonetheless, the partnership was made and ratified in contract. Neither the contract nor ORS 338.105 allow the District to dissolve the partnership without fault. The evidence presented in the hearing was not sufficient to allow the District to terminate its charter relationship with BMS based on the grounds set forth in the notice of termination sent by the District to BMS on July 12, 2007 and the specific reasons given by the District in the termination notice that serve as the basis for those grounds.

The District and BMS began their relationship in 1998. BMS students, parents and staff are troubled by what they perceive as increasing District interference in an educational model that has remained unchanged over the years. BMS staff acknowledged difficulties the school has had as it attempted to accommodate testing and other requirements to evidence student learning. The BMS community grown increasingly frustrated by what they feel is District staff to "understand" the school's educational model – and has shown increased resistance to District inquiries into the school's operations.

On their part, District Board members and staff are understandably troubled by their own and the public's reaction to the behaviors of some BMS students. The language some students use can be vulgar, obscene and age-inappropriate. Such language does not violate BMS rules. Students use dirt bikes and organized a paintball game during school hours. They have been

observed “off-task” and seem to wander at will through school grounds and throughout the country-side, coming and going as they please. There is little in the way of traditional teaching, and none of the most traditional model with a teacher standing at the head of the class lecturing students on the what, when, how, where and why of the subject being taught. Students are free to learn or not learn at any particular time.

This is the educational model the District bought into when it agreed to make BMS a charter school. It is a model BMS has faithfully adhered to. It is a school that seems to work well for some students, even for some of the area’s most troubled students, but would not work for all, as no single educational model works for all. But whether BMS’ educational model is suitable for a publicly funded charter school is not at issue. Rather, the issue is whether circumstances set out in District’s July 12, 2007, letter informing BMS of the grounds upon which the District’s decision to terminate exist, as proven by evidence presented in the hearing.

BMS contends that the District wrongfully terminated the charter and that it is in material compliance with the terms of its charter and state and federal law and that to the extent that it had been noncompliant, all defects were cured before the District’s Board acted to terminate the contract. BMS also seems to argue that the portion of ORS 338.015 that requires liberal interpretation to support the goals of the statute should result in liberal construction of the Charter School Contract. The liberal interpretation called for by the legislature applies to statutory interpretation, in this case most appropriately to ORS 338.105. It does not apply to the contract or to the facts of the case.

The District’s Posthearing Brief sets out the District’s arguments regarding allegations set out in the District’s July 12, 2007, termination notice. Evidence and arguments presented by both parties also includes disagreement not directly related to specifics set out in the July 12 termination notice. Those issues, some of which are set out in the findings, will not be addressed in the opinion. The notice, in addition to providing a statement of the issues to be determined, also, provides a template for discussion of the issues raised by the hearing request.

Compliance with Charter School Agreement.

Computer/video use. Regarding computer use, there is no evidence that BMS students accessed Mature rated video games installed on the computer by an outside group. The greater weight of the evidence established, however, that two students (sibling) whose parents had not authorized access to Teen rated games accessed those games and that another student whose parent had not authorized her to view PG rated films was allowed to view those films. A requirement of written permission to view PG films and play Teen rated games were part of the Charter School Contract. BMS did not meet its burden of proving that it complied with this term of its contract.

Walkabouts. The greater weight of the evidence also shows that BMS did not live up to its responsibility to have responsible individuals walk through the school to assure the whereabouts and safety of its students, particularly the younger students. Hourly walkabouts were

part of the Charter School Contract. BMS did not meet its burden of proving that it had complied with this term of its contract.

Compliance with ORS Chapter 338.

Weapons on school bus. The District contends that BMS students violated District policy and OAR 581-053-0010 regarding weapons when some of those students transported paintball guns on the school bus. It is unclear whether a paintball gun may properly be deemed a weapon or a replica of a weapon under the District’s published policy. It is the District’s policy and, for the purposes of this hearing, I accept the District’s interpretation of its own policy that a paintball gun is a weapon or replica. The District’s argument does not suggest, and I am unable to ascertain, what terms of the Charter School Contract BMS violated when some of its students violated District bus policies, which the District was entitled to enforce through its own disciplinary proceedings. BMS met its burden of proving that the paintball game and unfortunate transportation of paintball guns on District buses did not violate its Charter School Contract or provisions of state law.

Fingerprinting employees. This issue arose when the District’s site visit team discovered that a parent volunteer, who had undergone a criminal records check, was also employed as a part-time custodian after school hours and had not had a fingerprint-based criminal records check. ORS 326.603 states in relevant part, that “(1)(a) A school district shall send to the Department of Education for purposes of a criminal records check any information, including fingerprints, for each subject individual described in ORS 181.539(5)(d)(D), (E), (F), (H) or (I).”²
* * * * *

The greater weight of the evidence established that the custodian was employed by the Blue Mountain School Foundation, a legal entity separate from BMS. ORS 326.603(1) (a) does not apply. The evidence also established that when acting as custodian, the parent worked after school and had no contact with students. Although this individual may have had unsupervised student contact as a volunteer, he had undergone a background check for that purpose, a greater protection than required by statute.³ BMS met its burden of proving that it did not violate state or federal statutes or violate the Charter School Contract when it did not have the custodian undergo a fingerprint-based criminal records check.

Bloodborne pathogen and first aid training. BMS acknowledged that it was deficient and

² * * * (I) An individual who is an employee of a public charter school.

³ ORS 326.607(1) states: “Upon request from a school district, a private school or a public charter school or a school district, private school or public charter school contractor and with consent from the individual, the Department of Education may conduct an Oregon criminal records check using the Law Enforcement Data System for screening an individual who is a volunteer for the school district, private school or public charter school and who has direct, unsupervised contact with school children, or for screening applicants for employment.”

needed staff training in first aid and bloodborne pathogens. ORS 338.115(1) (j)⁴ makes OAR 581-022-0705(4), which requires each school to have at least one staff member with a current first aid card for every 60 enrolled students, applicable to charter schools. That same statutory subsection makes another portion of the rule, requiring training in bloodborne pathogens standards for all persons who are assigned to tasks that might put them at risk for exposure to body fluids. BMS did not meet its burden of proving that it had complied with this statutory requirement.

Dirt bike incident. The District’s investigation of this incident showed that BMS staff followed school policy when they allowed students to go off campus and when they allowed students to use dirt bikes. The investigation also showed that these policies did not conflict with ORS Ch. 338 or the Charter School Contract. The school’s policy was violated when the injured student’s companions continued with their dirt bike activity and allowed him to return to school alone. They were written up and sanctioned by the Judicial Committee for this violation.

The District’s perception of a public relations problem related to students being off campus and using dirt bikes during school hours is understandable. Accidental injury to a student in this activity was regrettable but the District acknowledges that BMS has violated neither statute nor its Charter School Contract in its handling of the dirt bike incident.

School system of self-governance and self-regulation. This stated ground for termination simply rejects the educational model set out in the Charter School Contract. The District agreed to allow BMS to implement learning situations that were flexible with regard to environment, time, structure and pedagogy. BMS agreed to seek and obtain prior approval from the District before making fundamental changes to the educational program outlined in its application. The school has maintained a consistent educational philosophy of student directed education in the years since the school’s founding, through its initial application, and through previous site reviews. BMS has met its burden of proving that it has not violated state or federal statutes, or the terms of its Charter School Contract with its educational model of self-governance and self-regulation.

Student Records. The documentary evidence shows and BMS acknowledge problems with student record keeping. The greater weight of the evidence shows, however, that those problems had been rectified by May 21, 2007, well before the District’s decision to terminate BMS’ charter school status. BMS met its burden of proving that it did not violate state or federal

⁴ “(1) Statutes and rules that apply to school district boards, school districts or other public schools do not apply to public charter schools. However, the following laws do apply to public charter schools:

* * *

“(j) Health and safety statutes and rules;

law or violate the Charter School Contract.

Student Performance.

There is considerable evidence of the District's ongoing concerns of insufficient documentation of learning complying with the requirements of ORS 329.045. The District's ongoing concerns are not, of themselves, evidence that the statutory requirements were not being met.

Requirements of Section 2 of the Contract. The District contends that BMS failed to comply with Section 2 of the Charter School Agreement regarding evaluation of student performance in that it failed to comply with the requirement that 80 percent of students would show evidence of self-directed learning with a review of student learning at least once, midway through the school year. BMS acknowledges that this was not accomplished. The District's argument, however, misses a key element of the contract that allows for considerable slippage in performance from the 80 percent standard. Under Section 5.A. of the contract BMS was required to "pursue and make reasonable progress toward" the 80 percent goal.

"Reasonable progress" must be viewed within the context of the educational setting. Students and parents choose BMS *because* it doesn't teach in a traditional manner and has *no* formal requirements. Students and staff are constantly monitoring where students interests lie, where they may lead, and the best way of getting there. The imposition of a new *requirement* in the 2006-2007 school year that students create and maintain self-assessment folders and engage in self-reflective activities was, understandably met with a lack of enthusiasm. Additionally the contract requires self-reflective activities to be documented *on an annual basis at the end of the school year*. The evidence is uncontroverted that 82 percent of students completed a self-reflective activity before the end of the school year. Considering that these were new requirements and that they were met by the end of the school year, the greater weight of the evidence shows that BMS made reasonable progress toward meeting these requirements. BMS met its burden of proving that it did not violate the Charter School Contract

Correction of Violations of Federal or State Law Described in ORS 338.115.

ORS 338.105(1) (c) allows a sponsor to terminate a charter school based on the failure of the school to correct a violation of federal or state law described in ORS 338.115. These statutory grounds for termination require the sponsor to conclude that a charter school has violated federal or state law described in ORS 338.115. But unlike the other possible statutory grounds for which a charter may be termination, these statutory grounds also require that the sponsor notify the charter school of the violation and give the charter school reasonable opportunity to cure the violation. These requirements must all be met prior to terminating the charter school based on these statutory grounds.

Failure to Correct a Violation of ORS 329.045.⁵

⁵ The statute states, in relevant part: "(3) School districts and public charter schools shall offer students

In the District's notice of termination, the District cited to the failure of BMS to provide a comprehensive education that meets the state's academic content standards as the reason for terminating the charter under the grounds cited. The District goes on to describe the history of school district board discussions and other interactions with BMS.

Matrices. The Board described a requirement that BMS have curriculum mapping matrices in reading, math and writing. The evidence showed that the math matrix aligned with state standards. The evidence showed that the District's site visit team did not find matrices and workbooks for several areas, including reading and writing, that the team anticipated being in place and being used by students and staff. The evidence is uncontroverted that several of the matrices and workbooks were at the school and available to students and staff and that no member of the site visit team asked for the items when they were not obviously available. Based on this evidence, BMS met state law regarding reading, math and writing. The evidence is also uncontroverted that one of the matrices, social science, was not available to or in use by students. Section 4.B.(ii) of the Charter School Agreement required BMS to have available for its students a full range of educational resources encompassing the content areas identified in ORS 329.045, "including the 'Blue Mountain School Standards Matrix' reflecting the content of the Oregon Common Curriculum Goals and the Grade-Level Foundations and Standards for English, science, social science and mathematics."

BMS told the District that staff had underestimated the amount of time necessary to implement the language arts matrices, thereby delaying implementation of the social science matrices, and that the social science matrices would be implemented in the 2007-2008 school year. The site visit occurred in May, weeks before the end of the 2006-2007 school year. Failure to make social science matrices available to students for an entire school year evidences a willful disregard of its obligations under the Charter School Contract and could have served as a basis for termination. The District notified BMS of its finding based on the site visit on May 16, 2007 that BMS had not met the social science requirement required by statute and the charter school agreement. BMS agreed to cure this violation prior to the beginning of the 2007-2008 school year. This was a reasonable amount of time to cure this violation and if BMS did not cure this violation during this time period the District could have based its termination decision on this failure to correct a violation of laws. However, the District did not cite to the lack of a social science matrix as a reason for termination in its notice of termination and did not give BMS adequate time to cure the violation after providing notice of the violation to BMS. Therefore, I may not use this as grounds to uphold the termination and BMS has met its burden of proof.

instruction in mathematics, science, English, history, geography, economics, civics, physical education, health, the arts and second languages that meets the academic content standards adopted by the State Board of Education and meets the requirements adopted by the State Board of Education and the board of the school district or public charter school."

Participation requirements for Oregon State Assessments. Section 4.C of the Charter School Contract requires all students enrolled in and attending third grade through CIM level at BMS take “all statement assessments developed by the Department of Education and Section 2 of the Charter School Contract specifies that 50 percent of the students take the OSAT in each of the content areas. OSAT participation rates are not available until summer (Stine testimony), so no records were available to determine the extent of student participation when the District Board acted to terminate the contract. Even though the District identified low participation OSAT rates, there is an insufficient factual basis in this record to make a determination whether BMS violated this term of the contract in 2007.⁶

The 2006 participation rates are part of the record and establish that BMS did not meet state law or the charter agreement. However, the District did not give notice to BMS of this violation of law and did not cite to this violation of law in its notice of termination. Therefore, I may not use this as grounds to uphold the termination and BMS has met its burden of proof

Good faith, material compliance and cure.

BMS contends that the District has failed to cooperate with and has not acted with good faith with the school. Oregon courts have long held that every contract contains an implied obligation that the parties will perform it in good faith. *See Comini v. Union Oil Co.*, 277 Or. 753, 756 (1977); *Perkins v. Standard Oil Co.*, 235 Or. 7, 16 (1963). At its heart, good faith is interpreted as “each party's obligation to perform the contract, including exercising any discretion that the contract provides, in a way that will effectuate the objectively reasonable contractual expectations of the parties.” *Pollock v. D. R. Horton, Inc.*, 190 Or. App. 1 (2003). The evidence overwhelmingly supports a conclusion that the District has acted in good faith at all times. The communication difficulties both parties experienced were largely a result of a clash of cultures and did not result from a lack of good faith on either party’s behalf.

BMS also contends that Oregon contract law requires that the District give notice of alleged breaches of the Charter School Contract and a reasonable opportunity to cure such breaches. The greater weight of the evidence established a pattern of the District informing BMS of difficulties it was having with BMS’ performance of the contract, particularly regarding student assessment, and working with BMS staff to find solutions that worked for both parties. BMS had prior notice of many of the issues relied upon by the District in making its termination decision.

The evidence also shows significant effort by BMS to correct or cure performance deficits, with the exception of problems related to student assessment. The evidence suggests that by the beginning of the 2007-2008 all performance deficits set out in the termination notice had

⁶ I give little weight to 2006 participation rates since those records were available to the District long before it acted to terminate the contract. The evidentiary record does not include the 2007 participation rates.

been corrected. BMS' three year history of nonperformance in student assessment may have resulted in a conclusion that the school significantly breached the contract in that area if the District had cited to this nonperformance as a basis for termination. The question remains whether BMS' performance deficits were material so that the contract may be terminated under Oregon contract law.

The Court of Appeals has determined that a breach is material if it goes to the very substance of the contract and defeats the object of the parties in entering into the contract. In *Pollock v. D. R. Horton, Inc.*, 190 Or.App.1, 17 (2003), the Court applied the criteria in *Restatement (Second) of Contracts* § 241 (1981) to make that determination. Those criteria are:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

At the time of the District's termination notice, BMS had worked with the District since before the initial Charter School Contract in 2004 to come up with solutions to the problem of student assessment in a school with a pedagogical model that does not recognize typical forms of assessment as valid educational tools. Over the next three years the District explored various strategies with BMS to increase its confidence that students were learning. Those efforts were taken to a higher level with the 2006 renewal of the Charter School Contract due to legislative changes and clarification from the federal government that the NCLB applied to charter schools.

The evidence established that there were two violations of the Charter School Contract that by themselves was a significant breach of the contract. Despite the District's efforts to emphasize the importance of assessing student learning, BMS either failed or refused to recognize the importance of the issue to the District and to its fulfillment of the Charter School Contract. The history of BMS' repeated and continuing failures to meet assessment requirements under the contract is troubling. BMS' willful disregard of its obligation to assure student and staff access to a social studies matrix was also a significant breach of the terms of the contract. However, not assessing students and the lack of a social studies matrix as required by the contract was not cited to in the notice of termination as a basis for termination and therefore I may not insert these as reasons that the District based its termination.

BMS has agreed to cure both of these deficiencies. Regardless of the education philosophy of student directed learning and self-governance which BMS is based upon, BMS is expected to meet state legal requirements relating to student assessment and offering a comprehensive

education which includes social studies. And it is my hope that BMS fulfills its promises to meet the terms of the charter and all state legal requirements. BMS did not comply with the Charter School Agreement regarding computer and video usage, walkabouts and offering bloodborne pathogen and first aid training to employees. Each of these was cited to by the District as reasons for the termination of the charter. However, these three reasons taken on their own are not a material breach of the Charter School Agreement and do not form a reasonable basis for terminating the charter.

Other Issues: The hearing record is replete with testimony and documents evidencing increasing distrust and misunderstanding on both sides. There are factual disputes set out in the findings (e.g. criminal records checks on volunteers) that were not among the bases for the District's decision to terminate, at least as set out in the July 12, 2007, termination notice. As stated above, those issues will not be addressed.

As stated above, there is evidence that BMS violated state law and its charter agreement. Although I am unable to base my decision on these violations because they were either not cited to by the District as grounds for termination or proper notice was not given to BMS about the violation, I expect that all charter schools will comply with state and federal law. This includes BMS. It is the responsibility of the charter school governing body to ensure that this happens and the responsibility of the sponsor to hold the charter school accountable to meeting state and federal legal requirements. I commend BMS for making strides toward meeting its obligations under state law and the charter school agreement. I also commend the District for working with BMS to ensure that this happens and for holding BMS accountable.

Remedy. BMS contends that ORS 338.105 is silent regarding the proper remedy in the event a termination is determined wrongful. I disagree. If a putative termination is determined not to meet the requirements of ORS 338.105(1) the termination is ineffective and the charter school contract between the sponsoring school district and the charter school is reinstated. If the charter school is unsuccessful in the hearing regarding termination, the charter agreement remains terminated.

FINAL ORDER

Based on the Findings and Conclusions above:

IT IS HEREBY ORDERED that the Charter School Agreement between South Lane School District 45J3 and Blue Mountain School, Inc. is NOT terminated and remains in effect until the expiration date specified in the agreement unless otherwise extended by joint agreement of the District and BMS.



Ed Dennis, Deputy Superintendent of Public Instruction

NOTICE TO THE PARTIES

RIGHT TO APPEAL: You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days from the service of the final order. Judicial review is pursuant to ORS 183.482.

Date of Service: July 15, 2008