

TODAY'S FRESH START, INC., Plaintiff and Appellant, vs. LOS ANGELES COUNTY  
OFFICE OF EDUCATION, Defendants and Appellants.

S195852

SUPREME COURT OF CALIFORNIA

*2011 CA S. Ct. Briefs 95852; 2011 CA S. Ct. Briefs LEXIS 1300*

August 23, 2011

(Court of Appeal Nos. B212966, B214470). (Los Angeles County Sup. Ct. No.  
BS112656). After A Decision By The Court Of Appeal Second Appellate District,  
Division One.

Petition for Appeal

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**TITLE: Petition for Review**

**TEXT: I.**

**ISSUE PRESENTED**

Is it constitutional to revoke a charter school's charter under Education Code § 47607 through a public proceeding that lacks both an evidentiary hearing and a neutral and impartial decision-maker-particularly when the decision-maker is a financial competitor of the charter school?

**II.**

**INTRODUCTION**

It has long been understood that the establishment of charter schools constitutes an implicit criticism of and challenge to the existing traditional public school system. The movement for charter schools has been fueled by the belief that public schools have failed in certain respects, and that at least part of the reason they have failed is because of their monopoly on providing public education. Charter schools thus serve to break and challenge the monopoly of traditional public schools, offering alternatives that empower parental choice in their children's education. Furthermore,

by placing competitive pressures [\*2] on traditional public schools, charter schools shock traditional public schools out of complacency and force them to change for the better. Given that charter schools and traditional public schools must vie for the same limited public funds, charter schools have been competing with public schools on both a policy and financial level since their acceptance into the education system.

Given what many termed as an "acrimonious relationship" between charter schools and the current educational establishment, when the revocation of a school's charter is at issue-and thus it's effective elimination from competition-it is imperative to provide charter schools with a fair hearing that comports with due process. Indeed, as revocation of a charter school's charter will directly increase the amount of public funds available to a public school, the potential for abuse is clear and the need for a neutral and impartial adjudicator is apparent. As Governor Schwarzenegger noted when signing a charter school revocation bill into law, "revocation is a serious matter that causes a disruption in instructional services for the school's students, the need for a charter school to have its case heard before [\*3] a more disinterested body is clear." Exactly how disinterested, however, has been unclear.

Nevertheless, in this case, the Court of Appeal, in a published opinion, held that despite the institutional bias existing between charter schools and traditional public schools-as they directly compete for students and funds-and further despite the lack of neutrality specifically admitted by the school district itself in this case, traditional public school districts may nevertheless adjudicate the revocation of the charter school's charter without violating due process. The court further held that a full and fair hearing was not even required for revocation proceedings, holding that a traditional public school district is under no obligation to even present its evidence and arguments in order to give a charter school an adequate opportunity to rebut. The court held that neither due process nor Education Code § 47607 require anything more.

This opinion must not stand. As an initial matter, construing both due process and section 47607 in such a restrictive myopic manner effectively prevents charter schools throughout California from having the benefit of a neutral and impartial adjudicator [\*4] during revocation proceedings. Further, this holding is in direct conflict with the precedent established by this Court that where a decision-maker exhibits a significant pecuniary interest in the case at hand, the mere probability of such a bias is simply considered constitutionally unacceptable.

Thus, if this published opinion is allowed to stand, it will create confusion among the courts and education system alike as to the permissible amount of bias due process actually permits. Specifically, this opinion will hold that despite this Court's acknowledgement of the dangers inherent in pecuniary biases, an entity with a direct financial interest in the revocation itself may nevertheless oversee and determine the revocation of its own competitors without violating due process. Such a result must not come to pass.

The issue in this case is ideal for review. The facts necessary to resolve the issues are simple and undisputed. There is no question that the charter school here has a substantial property interest in its charter, entitling it to procedural due process. There is also no question that the charter school and public school agency in this case necessarily compete for public [\*5] funding. Thus, the primary question is whether the public school agency can constitutionally adjudicate a hearing involving the revocation of the charter school's charter-that is, whether an entity may fairly determine the fate of its financial competitor.

### **III.**

#### **STATEMENT OF FACT**

##### **A. Background On Charter Schools**

A charter school is a publicly funded, nonsectarian, tuition-free school that operates under a charter negotiated between the school's organizers and a public authorizer. The charter is a performance contract that details the school's mission, program goals, methods of measuring success, and the types of students it will serve. By their establishment,

charter schools provide families with an opportunity to choose an education for their children in public schools that are separated from the local public school system. This type of choice is especially geared towards families who believe that the traditional public schools are not well suited for their children but are unable to afford private schools or the ability to relocate to more highly regarded school districts. Thus, if families are dissatisfied with the traditional public schools of their [\*6] local school district, they may seek placement of their children in available public charter schools. Thus, "charter schools represent a challenge to the monopoly on public schooling long enjoyed by the traditional 'educational establishment.'" (Sandra Vergari, *Charter Schools: A Significant Precedent In Public Education* (2003) 59 *N.Y.U. Ann. Surv. Am. L.* 495, 497.) Indeed, in enacting the Charter School Act (1992), Education Code § 47600 *et seq.*, the California Legislature stated: "[i]t is the intent of the Legislature, in enacting this part,... to accomplish ... the following: (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools." (Educ. Code § 47601(g).)

The competition between both charter schools and traditional public schools is apparent. This is particularly true when it comes to public funding. For both public schools and charter schools, funding is determined largely by the average daily attendance ("ADA") of students. In passing the Charter Schools Act, the legislature intended "that each charter school be provided with operational funding that is equal to the total funding [\*7] that would be available to a similar school district serving a similar pupil population." Educ. Code § 47630(a). Thus, because public money follows the student, public schools and charter schools must compete for students in order to obtain funding.

#### **B. The Parties.**

Today's Fresh Start, Inc. ("Today's Fresh Start") is a county-wide charter school serving economically underprivileged areas of Los Angeles County. (Opn. 2.) Los Angeles County Office of Education ("LACOE") is a regional education agency under the leadership of Los Angeles County Board of Education ("LACBOE"). (*Id.*) LACBOE was Today's Fresh Start's chartering authority and a signatory to the charter petition agreement between the parties. (*Id.*) LACBOE initially granted the charter in 2003 and renewed the charter in 2005 for a five-year term. (*Id.*)

#### **C. The Revocation of Today's Fresh Start's Charter.**

On or about June of 2007, LACOE began expressing concerns about Today's Fresh Start's operation. (*Id.* at 3.) The parties subsequently attempted to work through LACOE's concerns, but those efforts did not bear fruit. (*Id.* at 3-4.) On or about October of 2007, Dr. Darline [\*8] Robles, the Superintendent of LACOE and CEO of LACBOE, formally recommended to LACBOE that it revoke Today's Fresh Start's charter. (*Id.* at 4.) LACBOE approved this recommendation, and revocation proceedings were initiated against Today's Fresh Start. (*Id.* at 4-5.)

On or about November of 2007, LACBOE held a public hearing on its intent to revoke Today's Fresh Start's charter. (*Id.* at 5.) While Today's Fresh Start presented substantial evidence demonstrating why the revocation was improper, LACOE remained noticeably silent, and in fact presented no evidence or arguments in support of revocation at the hearing. (*See id.* at 5-6.)

One thing that LACBOE did make clear at this hearing, however, was that LACBOE was not a neutral entity. Particularly, when Today's Fresh Start objected to the proceedings on the grounds that LACBOE was not neutral, LACOE and LACBOE's general counsel, Ms. Sheri Kim Gale, publicly agreed, and explicitly instructed LACBOE on this lack of neutrality. (*See id.* at 6.) Specifically, when one of the LACBOE Board Members asked Ms. Gale about the issue of impartiality, Ms. Gale stated that there was no need for the revocation to be decided by an [\*9] impartial body: "In this matter, in this process, you are not neutral." (*See id.*) Ms. Gale also stated that Today's Fresh Start was not entitled to an impartial decision-maker until it appealed the revocation to the State Board of Education. (*See id.*) Ms. Gale's interpretation was expressly adopted by LACBOE. (*See id.*)

On December 11, 2007, LACBOE voted 4 to 3 to revoke Today's Fresh Start's charter. (*Id.* at 7-8.) Though Today's Fresh Start would seek further administrative remedies, including appellate review by the State Board, and despite the

fact that even the California Department of Education ("CPE") would ultimately side with Today's Fresh Start-finding that LACBOE's findings were unclear and not supported by substantial evidence and thus recommending reversal-due to misunderstandings with the applicable law the revocation was nevertheless ultimately upheld. (*See id.* at 8-10.)

#### **D. The Due Process Debates Among The Courts Below**

On or about December of 2007, Today's Fresh Start filed a petition for a writ of administrative mandamus in the superior court. (*Id.* at 10.) During this proceeding, Today's Fresh Start moved for judgment, arguing [\*10] that Today's Fresh Start was deprived of due process. (*Id.* at 12.) The trial court granted the motion. (*Id.*)

First, the trial court found that because LACBOE was not a neutral decision-maker, the trial court ruled that Today's Fresh Start had been deprived of its right to a fair and impartial tribunal. (*Id.* at 12-13.) Second, the trial court found that Today's Fresh Start's due process rights were also violated by LACOE's failure to introduce any evidence supporting the revocation at the hearing, thus depriving Today's Fresh Start of an adequate opportunity to rebut. (*Id.* at 12.)

LACOE and LACBOE appealed, and the Court of Appeal reversed. (*See id.* at 42.) In essence, the Court of Appeal held that even though LACBOE may not in fact be neutral, Today's Fresh Start did not present sufficient concrete evidence of bias to overcome the presumption of honesty and integrity in those serving as adjudicators. (*See id.* at 36.) The court further noted Today's Fresh Start is afforded additional protection due to the fact that section 47607 (g) provides for review by the more impartial State Board of Education. (*Id.* at 37-39.) Finally, the court reasoned that an evidentiary [\*11] hearing is not required as long as Today's Fresh Start has been generally apprised of the facts in existence against it. (*Id.* at 25-29.)

#### **IV.**

##### **REASONS FOR GRANTING REVIEW**

Granting review is critical in this case. The Court of Appeal's published decision has significantly impacted, and will continue to impact, a charter schools' ability to have their revocation proceedings heard by a neutral and impartial decision-maker in a full and fair manner. First, the Court of Appeal's opinion restricts charter schools' rights to truly neutral and impartial decision-makers in the revocation proceedings-indeed, under the Court of Appeal's holding, not only may an entity with a direct pecuniary interest act as a decision-maker in the revocation proceeding without offending due process, but that decision-maker may also be explicitly instructed not to act with neutrality, and according to the Court of Appeal due process is still satisfied.

Second, the Court of Appeal establishes that a revoking entity need not present any evidence or arguments at the revocation hearing under Education Code § 47607. Instead, the Court of Appeal holds that due process is satisfied as long as the [\*12] charter school had in its possession the ultimate facts that the revoking entity relied upon, regardless of whether the charter school actually knew such a fact would be used or even the basis of its use. In essence, the revoking entity need only produce all the relevant evidence and leave it to the charter school to sort out the details, including divining the revoking entities arguments determining for itself what assertions are still relevant and material.

Each of these due process holdings by the Court of Appeal will have deep ramifications for charter schools going forward, as they directly impact a charter school's ability to remain in business and continue servicing its students and the community. As explained below, review must be granted to ensure that, at a minimum, charter schools are given a full and fair hearing before neutral and unbiased decision-maker, and in particular, a decision-maker who lacks a financial incentive to shut down the very charter schools it is competing against.

#### **A. The Decision Below Deprives Charter Schools Of Neutral And Impartial Adjudicators**

California law is clear that in any administrative action, procedural due process requires [\*13] that the hearing take

place before an impartial adjudicator. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 814 ("In an administrative action, procedural due process entitles a party to a hearing 'before a reasonably impartial, noninvolved reviewer....'").) "A fair trial in a fair tribunal is a basic requirement of due process. This is true of administrative adjudication as it is of courts." (*Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695, 709, internal citations and quotations omitted); *Nasha L.L.C. v City of Los Angeles* (2004) 125 Cal.App.4th 470, 483, internal citations and quotations omitted). Thus, in *Haas*, this Court discussed in detail the due process rights a party has in connection with an administrative evidentiary hearing. Paramount in the discussion was the right to an impartial adjudicator.

When due process requires a hearing, the adjudicator must be impartial. Speaking of administrative hearings, and articulating the procedural requirements demanded by rudimentary due process in that setting, [\*14] the court has said that, '*of course an impartial decision maker is essential.*

(27 Cal.4th at 1025 (emphasis added).) Indeed, impartial decision-makers are so vital to a fair hearing that the usual cost-benefit analyses applicable to most due process procedural safeguards do not apply. (*Id.* at 1035) ("[t]he unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures. In Justice Holmes' famous phrase, 'even a dog distinguishes between being stumbled over and being kicked.'")

### **1. The Decision Below Permits Financial Competitor To Adjudicate The Rights Of Their Competitors, And Conflicts With Established Precedent Regarding Pecuniary Bias**

"Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny." (*Id.* at 1025.) "Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, *adjudicators challenged for financial interest* [\*15] *have not.*" (*Id.* (citations omitted, emphasis added).) This rule applies in full force to both judicial and administrative hearings. (*Id.* at 1026-27 ("It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes... It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators'").) As this Court explained, "the adjudicator's financial interest in the outcome presents a 'situation[] ... in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (*Id.* at 1027.) Thus the risk of bias caused by financial interest need not manifest itself in overtly prejudiced rulings, but instead "[t]he 'possible temptation' not to be scrupulously fair, alone and in itself, offends the Constitution." (*Id.* at 1030 (citations omitted).)

The possible temptation to be unfair clearly exists in the charter school revocation context. As discussed above, charter [\*16] schools such as Today's Fresh Start and public school institutions such as LACBOE must necessarily compete for students in order to obtain funding. As described by one author, "[c]harter schools present not only a policy challenge to the authority of the traditional education establishment but also a financial challenge. Students who leave a traditional public school to attend a charter school are followed by per pupil funding that would otherwise go to the traditional public school." (Sandra Vergari, *Charter Schools: A Significant Precedent In Public Education* (2003) 59 *N.Y.U. Ann. Surv. Am. L.* 495, 499.) Thus, the financial tension between charter schools and public schools have been well-known and documented; because each school must compete for students in order to obtain funding, there essentially exists a zero-sum game between charter schools and public schools. See Michael M. Amir, *Charter Fights, The Competing Rights of Charter Schools and Local School Districts Are Triggering Myriad Legal Disputes*, (2008) 31-AUG L.A. Law. 24, 27 ("While this funding system can promote competition among charter and traditional school districts to attract students [\*17] and teachers, it can also create a tension between the two groups. After all, a local school district is not only a charter school's competition but also frequently its chartering authority."). Indeed, considering that public schools stand to lose millions when students switch to charter schools, the desire of public schools to limit charter schools is apparent. (*See id.* ("The loss of funding can further strain local districts because

schools have fixed costs that do not decrease commensurately with the loss of each student. In 2006, for example, the Los Angeles Unified School District lost an estimated \$ 114 million after losing 20,000 students, but saved only \$ 40 million from no longer having to serve those students.".)

Given this direct competition between charter schools and public schools, and the potential for millions of dollars in public funds at stake, there can be no doubt that public school agencies such as LACOE and LACBOE have a direct pecuniary interest in the revocation of charter schools such as Today's Fresh Start. Simply put, the more charter schools LACBOE can permissibly revoke, the more funds become available for its own schools. Clearly, this presents a [\*18] situation where the likelihood of bias is very real. Given that school districts stand to gain potentially millions of dollars as a direct consequence of a revoking a charter school's charter, the probability of bias is constitutionally unacceptable. (*See Haas, 27 Cal. 4th at 1033* ("an adjudicator's financial stake in the outcome of a dispute, create exceptional situations 'in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party.'").)

Thus, not only does the Court of Appeal's opinion deprive charter schools such as Today's Fresh Start of neutral and impartial adjudicators, the court's opinion also lies in direct conflict with the principles this Court set forth in *Haas*. Though the Court of Appeal did not specifically consider the ramifications of financial bias in its decision, the simple reality is that charter schools and public school districts do compete on both a policy and financial level. As a result of this reality, this opinion will inevitably stand [\*19] as an example that public school agencies may permissibly eliminate the competing charter schools in revocation proceedings without running afoul of due process. Further, this opinion may stand for the proposition that, in certain situations, decision-makers may have a substantial pecuniary interest in a proceeding but may still nevertheless adjudicate that proceeding without violating due process, an idea currently in conflict with this Court's opinion in *Haas*. Therefore, review is necessary to clarify the rights regarding revocation charter schools may have going forward, particularly when chartering authorities have a pecuniary interest in revocation.

## 2. The Decision Below Expresses A High Tolerance Of Bias In Revocation Proceedings

Pecuniary bias is not the only bias that the Court of Appeal condoned in charter school revocation proceedings. The Court of Appeal also expressed a high tolerance for other forms of biases as well, further inhibiting charter schools' ability to obtain a neutral and impartial decision-maker.

For example, it is undisputed that several members within LACOE had many overlapping functions within LACBOE. (*See* Opn. at 33.) Indeed, the Superintendent [\*20] of LACOE, and the individual who recommended revocation, is also the CEO of LACBOE. (*See id.*) Similarly, the general counsel for LACOE, Ms. Sheri Gale, also advised LACBOE. (*See id.*) As such, there can be no surprise that LACBOE expressed deference to LACOE's findings. Indeed, LACBOE members who voted on Today's Fresh Start's revocation even admitted having deference to LACOE's findings, deference to the point where certain individuals even admitted that they did not fully go through the evidence before siding with LACOE and voting in favor of revocation. (*See id.*)

Further, and more astonishingly, the Court of Appeal found nothing wrong with the fact that LACOE general counsel Ms. Gale *specifically instructed LACBOE that it was not to be impartial*. Particularly, when LACBOE asked Ms. Gale whether it was required to act impartial, and whether it should provide Today's Fresh Start with a neutral decision-maker, Ms. Gale's answer was clear:

The [Education Code] provides for an appeal to the State Board of Education, and that is the due process stage. It is at that stage where there should be no one-sided communications, each side should have independent [\*21] counsel. And most important, the adjudicator is the State Board of Ed, and it is neutral. In this matter, in this process, *you are not neutral*.

(*Id.* at 29 (emphasis added).)

Notably, in the decision below the Court of Appeal dismissed most of these concerns of bias by noting the presumption of honesty and integrity among adjudicators. (*Id.* at 32.) Importantly however, the Court of Appeal did not take into account the institutional and pecuniary bias inherent in allowing a financial competitor to determine the fate of another competitor. Further, though there may be a presumption of honesty, integrity, and impartiality among adjudicators, where an adjudicator is *specifically instructed by its own counsel not to be neutral*, such a presumption must surely be rebutted. Indeed, it can hardly be surprising that an entity would act in accordance with its attorney's advice, and thus, in this situation, allow neutrality to fall by the wayside.

Thus, considering that the Court of Appeal's analysis allows even a decision-maker specifically instructed not to be neutral to nevertheless be considered an impartial decision-maker, it is clear that the Court of [\*22] Appeal has established a very permissive view of biases with respect to revocation proceedings. Given the strong policy in favor of obtaining an unbiased decision-maker, and given that the Court of Appeal's opinion will significantly affect a charter school's ability to disqualify biased decision-makers going forward, it is necessary for this Court to grant review to determine the true extent of permissible biases in charter school revocation proceedings.

Therefore, considering that the decision below not only finds financial competitors acceptable as revocation proceeding decision-makers, but also finds permissible decision-makers who are explicitly instructed not to be neutral, this Court must grant review to clarify the rights of charter schools to impartial decision-makers going forward. n1

n1 Notably, the Court of Appeal appears to partially rely on the fact that there is a subsequent impartial appellate review with the State Board of Education under Education Code § 47607(g). (Opn. 37-39.) However, this Court in *Haas* squarely rejected the notion that due process violations can be cured by review, de novo or otherwise.

Particularly, in *Haas*, the county contended that any possibility of bias on the part of the hearing officer was cured when the Board conducted an independent review of the decision. (27 Cal. 4th at 1034.) The *Haas* court rejected that argument, holding that the trial court procedure may not "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance.*" (*Id.*, emphasis original.) (See also, *Hackenthall v. California Medical Assn.*, (1982) 138 Cal.App.3d 435, 445-446 (rejecting argument that independent review cured any prejudice due to the involvement of biased adjudicators at a lower level).)

Furthermore, the insufficiency of this appellate review is demonstrated by the fact that the appellate review under section 47607(g) only provides that the State Board of Education "may" reverse a revocation only if it finds that the chartering authority's findings are not supported by "substantial evidence." See Educ. Code § 47607(g)(1). See also *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128-1129 (noting "highly deferential" standard provided in "substantial evidence" review.).

Finally, it is unclear whether the State Board appellate review under section 47607 may adjudicate anything other than whether the decision below was supported by substantial evidence. Indeed, section 47607(g) makes no mention of any additional adjudicatory capabilities, nor is it apparent that appellate review under section 47607(g) may properly address and adjudicate due process violations. In light of the holding in *Haas*, due process concerns are unlikely to be cured in any event.

[\*23]

## **B. The Decision Below Trivializes The Public Hearing Requirement Under Education Code § 47607.**

Finally, the Court of Appeal's opinion substantially limits and trivializes the value of any public revocation hearings

owed to charter schools under Education Code § 47607. Before revocation can occur, a public hearing must be held in the ordinary course of business. Educ. Code § 47607. Ordinarily, evidence must be presented at a hearing in order to support a subsequent administrative action or decision; allowing an administrative body to issue decisions based on evidence the parties were not apprised of generally violates due process. (*See English v. City of Long Beach (1950) 35 Cal.2d 155, 158* ("The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing."); *see also, La Prade v. Department of Water and Power (1945) 27 Cal.2d 47, 51-52* (administrative agency must base decision on evidence properly introduced at hearing).) The rationale for requiring presentation at the hearing [\*24] is clear: "A hearing requires that the party be apprised of the evidence against him so that he may have an **opportunity to refute, test, and explain it**, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced." (*English, 35 Cal.2d at 159.*)

However, the Court of Appeal's opinion in this case substantially limits the right of charter schools to be adequately apprised of the facts and be provided an opportunity to rebut. Particularly, in this case, LACOE presented **absolutely no evidence or arguments** at the revocation hearing whatsoever. (*See* Opn. 25-26.) Indeed, after Today's Fresh Start presented its position on the revocation, LACOE simply remained silent. (*See id.*) However, despite the lack of any kind of presentation or opposition, LACBOE nevertheless voted for revocation. (*See id.*)

In holding that due process was not violated, the Court of Appeal explained that Today's Fresh Start technically had the necessary evidence in its possession, as LACOE produced all the relevant documentation to Today's Fresh Start, including the facts ultimately relied upon by LACBOE. (*See id.* [\*25] 27.) Thus, the Court of Appeal holds that as long as the necessary evidence has been produced, a charter school has been apprised of the case against it; the burden is therefore on the charter school to sort through the evidence, determine which violations a revoking entity may rely on, and address those issues on its own. (*See id.*)

This holding is problematic for many reasons. As an initial matter, this construction appears to contradict the very words of the statute. Specifically, the statute calls for "a public hearing, in the normal course of business, **on the issue of whether evidence exists to revoke** the charter." Educ. Code § 47607(e). Thus, it appears the appropriate inquiry for the hearing should be **whether affirmative evidence exists to revoke**, placing the burden on LACOE to make its case, not the other way around.

Furthermore, by its opinion, the Court of Appeal has essentially issued a blank check for revoking entities to avoid setting forth or explaining any details regarding its arguments or facts in support of revocation. Instead, the revoking entity need only produce the information to the charter school and leave it to the charter school to [\*26] connect the dots. Such a holding not only fails to ensure a fair hearing, but in fact encourages the obfuscation of relevant facts.

Just because a party may be in possession of the facts does not entail that a party is in fact adequately aware of the case against it such that the party can fairly and adequately address and rebut the issues. This is particularly true where, as here, the revoking entity essentially threw the proverbial kitchen sink at the charter school and refused to state which if any of those issues were relevant, material, or even cured by the time of the hearing. Specifically, in this case LACOE claimed **fifty-three allegations** of wrongdoing against Today's Fresh Start, and produced hundreds of pages of evidence in its possession. LACOE made no effort to explain what it believed were the material violations justifying revocation, and even in voting to revoke, LACBOE made no effort to specify which of the many allegations it found to be sufficient to support revocation. Indeed, as noted by the CDE during appellate review with the State Board, the CDE was unable to ascertain which of the purported violations were seen by LACBOE as material to the revocation [\*27] decision. (*See id.* at 8-9.) And in fact, during the State Board appellate review, LACBOE actually **abandoned all but five** of the purported violations, demonstrating that the bulk of the allegations and evidence submitted to Today's Fresh Start served only to cloud the true, material issues.

Thus, it is clear that the Court of Appeal's holding poses significant dangers to charter school revocation going forward. First, it explicitly excuses revoking entities from presenting the primary facts or arguments supporting

revocation-indeed, as long as the revoking entity produced enough evidence to cover its bases beforehand, it is under no obligation to actually explain its evidence or the evidence's materiality to revocation. Second, this ruling may in fact actually promote abuse, as the more allegations and evidence asserted by the revoking entity, the more the revoking entity obfuscates the true material issues, and the harder it will be for the charter school to actually determine the relevant points to address. Indeed, it may encourage the revoking entity to bury a charter school in accusations and evidence, and discourage the actual analysis and debate of relevant and [\*28] material arguments for and against revocation. As such, the charter school will be effectively denied its opportunity to refute, test, and explain. As a result, review should be granted to clear this dispute and afford charter schools a full and fair opportunity to address revocation.

**V.**

### **CONCLUSION**

The petition for review should be granted. The decision below not only presents significant barriers to charter schools obtaining neutral and impartial decision-makers going forward, but also hinders a charter school's ability to obtain a full and fair proceeding by adequately being apprised of the case against it and having the opportunity to controvert and explain it.

Dated: August 22, 2011

### **DOLL AMIR & ELEY LLP**

By: /s/ [Signature]  
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### **CERTIFICATE OF WORD COUNT**

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 5,256 words as counted by the Microsoft Office WordPerfect 2003 word processing program used to generate this brief.

Dated: August 22, 2011

### **DOLL AMIR & ELEY LLP**

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**PROOF OF SERVICE****STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1888 Century Park East, Suite 1850, Los Angeles, California 90067.

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Jessica E. Chong

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