Supreme Court Case No. S195852

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TODAY'S FRESH START, INC.,

Plaintiff, Respondent, and Cross-Appellant,

vs.

LOS ANGELES COUNTY OFFICE OF EDUCATION, et al.,

Defendants, Appellants, and Cross-Respondents.

After A Decision By The Court Of Appeal
Second Appellate District, Division One
2d Civil Case No. B212966 c/w B214470
Los Angeles County Superior Court Case No. BS 112656

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case arose when the Los Angeles County Board of Education ("County Board") revoked the charter of Today's Fresh Start, Inc. ("TFS"), a charter school providing educational services to students in the County. TFS challenged the procedures employed to reach the revocation decision, not its merits, as a violation of due process. TFS contends, among other things, that due process requires a trial-type evidentiary hearing before a neutral hearing officer prior to the public hearing "in the normal course of business" that the controlling statute, Education Code section 47607, requires. The trial court agreed with TFS. The Court of Appeal did not. The Court of Appeal's ruling was correct.

"'Lawyers and judges have a systematic tendency to overestimate the benefits of trial-type procedures and to underestimate the costs of those procedures'" in the administrative context. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 288, quoting 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 9.5, p. 61.) TFS has attempted to by-pass the weighing of interests and cost/benefit analysis normally used to assess the requirements of due process by accusing the County Board of bias. Indeed, TFS goes so far as to invent a new theory of bias just for this Court—purported competition for limited school funds between the County Board and TFS. But it is too late to assert such a theory which is necessarily fact-dependent. The theory is meritless in any event, not the least for its inability to explain how an agency which grants and renews a

charter, and does not even operate traditional public schools, is suddenly biased by pecuniary interest when it revokes the charter.

When the record in this case is examined, it is plain that, within the parameters of Education Code section 47607, TFS was afforded a full opportunity to make its case prior to the decision to revoke. The Education Code, together with recently issued regulations regarding the revocation process, provide all the process that is due a charter school in TFS's position. There is no constitutional need to read additional procedures into the statute.

For these and other reasons discussed in detail below, the Court of Appeal's judgment reversing the trial court should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties.

TFS is a countywide charter school in Los Angeles County. (6 CT 1208.)[1/] It is organized as a nonprofit public benefit corporation. (6 CT 1207.) It began serving pupils under county auspices in September 2003. (I AR 1:4.)

The Los Angeles County Office of Education ("LACOE") is a regional education agency. (6 CT 1208.) The County Board is the governing board of LACOE. (6 CT 1241.)

B. The Charter.

In 2005, TFS submitted a charter renewal petition to LACOE for approval by the County Board. (I AR 1:1-59.)[2/] TFS's charter was renewed on July 1, 2005 for a term of five years. (I AR 1:53; III AR 32:1434.)

The charter renewal petition provided for LACOE oversight of TFS. (See I AR 1:30 [costs for oversight]; see I AR 1:51 ["Pursuant to Education Code Section 47604.3 LACOE may investigate complaints and monitor [TFS's] operations."]; see Ed. Code § 47607, subd. (a)(1) ["The authority that granted the charter may inspect or observe any part of the charter

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[1/] In this brief, the Clerk's Transcript is referred to as "CT" and the Reporter's Transcript as "RT," preceded by volume number and followed by page number. The Administrative Record is referred to as "AR" preceded by volume number and followed by tab number and page number. Petitioner TFS's opening brief is referred to as "POB."

[2/] The petition, once approved, is the charter agreement or contract between the parties. (See 6 CT 1208).

school at any time"].) TFS in turn was required to "respond promptly to requests made by LACOE for operational and fiscal concerns." (I AR 1:51.) The charter renewal petition also provided:

> The charter granted pursuant to this Petition may be revoked by LACOE if the county finds that [TFS] did any of the following:
>
> - Committed a material violation of any of the conditions, standards, or procedures set forth in this Petition.
> - Failed to pursue any of the student outcomes identified in this Petition.
> - Failed to meet generally-accepted accounting principles, or engaged in fiscal mismanagement.
> - Knowingly and willfully violated any provision of law.
>
> [¶] Prior to revocation, the county will notify [TFS] of any violation (as set forth above) in writing, noting the specific reasons for which the charter may be revoked, and give the school a reasonable opportunity to cure the violation.

(I AR 1:52.)

C. LACOE's Investigation Of TFS.

In June 2007, LACOE initiated an investigation of TFS, pursuant to Education Code section 47604.4. (See I AR 5:108 [response by TFS's counsel to letter advising of investigation].) LACOE advised TFS that concerns had been raised about (1) the legal rights of students, parents, and employees, (2) student attendance procedure, (3) professional development, and (4) California Department of Education ("CDE") testing procedures. (*Ibid*.) The investigation was based on document review and interviews

with staff members and others. (III AR 24:1380.) TFS responded that the planned investigation was unlawful and contrary to the charter. (I AR 5:108, 110.)

On June 18, 2007, Darline Robles, County Superintendent of Schools ("Robles"), wrote TFS requesting documents pertaining to its compliance with governance provisions of the Corporations Code. (III AR 32:1434-1435.)[3/]

On July 19, 2007, LACOE issued its findings and recommendations for improvements in the four areas of concern it had previously identified. (III AR 24:1376-1406.) On July 31, 2007, it followed up with a "Corrective Action Plan" that listed the corrective action needed with due dates for the various tasks. (III AR 25:1407-1412.) The letter transmitting the corrective action plan to TFS stated that a failure to effect corrections by their due dates would be grounds for LACOE to recommend revocation of TFS's charter. (See III AR 41:1571 [warning quoted in subsequent analysis of events by the CDE].)

On August 24, 2007, after receiving materials from TFS, Robles wrote again expressing "serious concerns" she shared with LACOE staff about the governance of TFS and attaching a staff report that analyzed materials provided by TFS and a request for additional information needed to complete the review of TFS's governance. (III AR 33:1436.) The letter

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[3/] The Superintendent of Schools and head of LACOE is by statute (Ed. Code, § 1010) the chief executive officer of the County Board. (9 CT 1970; see 8 CT 1698 [referring to "LACOE's Superintendent"].)

stated, "Whether you are able to provide sufficient evidence that your board is fulfilling its governance responsibilities, holding sufficient meetings to conduct charter school business as needed, complying with the Brown Act,[4/] and demonstrating conclusively that Board members are protecting public funds and not using their positions improperly to the end of personal enrichment, will determine whether I recommend that the County Board of Education take action to revoke the Today's Fresh Start Charter School Charter." (*Ibid*.)

D. The County Board Begins The Revocation Process.

The County Board met for a study session on October 9, 2007. (I AR 14A:168, 15A:187-188.) TFS was one of the topics of discussion. (*Ibid*.) LACOE presented a two-part written report regarding TFS's responses to governance issues and the corrective action plan. (*Ibid*.) County Board members received three binders of written materials from LACOE. (*Ibid*.) TFS also received the three binders of materials provided to County Board members. (I AR 15A:188.)

At a County Board meeting on October 16, 2007, the attorney for TFS, the chairman of its Board of Directors, and others, addressed the County Board and urged it not to proceed with the revocation process. (I AR 15B:192-193.) Robles recommended that the County Board give notice of its intent to revoke TFS's charter, adding that if the County Board did decide to revoke, TFS would stay open during the appeal to the State

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[4/] The Ralph M. Brown Act is found in Government Code section 54950, et seq.

Board of Education ("State Board") and that LACOE would recommend TFS stay open until the end of the school year when alternate placement could be found. (I AR 15B:196-197.) The County Board voted to approve Robles' recommendation to begin the revocation process based on LACOE's report and confirmation by CDE of improprieties in pupil testing which were not corrected as required by the corrective action plan. (*Ibid*.) A public hearing was set for November 6, 2007, before which time TFS could submit its written response; at the hearing TFS would have the opportunity to make an oral presentation to supplement any documents previously submitted. (I AR 15B:196-198; III AR 34:1468.) The final decision of the County Board would be made at its December 4, 2007 meeting (the date was later moved to December 11, 2007). (I AR 15B:198, 15D:215.) By letter dated October 17, 2007, LACOE gave notice to TFS of the County Board's decision and advised TFS that it could submit materials to support its oral presentation on November 6, 2007. (III AR 34:1468.)

E. The Public Hearing On November 6, 2007, And Subsequent County Board Meetings.

At the public hearing conducted by the County Board on November 6, 2007, Jeanette Parker (TFS's Superintendent and Administrator), Clark Parker (TFS's Board Chairman), Mary Glarum (TFS's general counsel), Gayle Windom (a consultant), and Mervyn Dymally (a California Assemblyman) spoke on behalf of TFS. (I AR 15C:203; 8 CT 1693; see also I AR 16B:243-263 [transcript of November 6 meeting].) Six students also spoke on behalf of TFS. (I AR

16B:244-246.) TFS had provided each member of the County Board with three binders of "substantial evidence against revocation," and had distributed additional documents at the hearing. (8 CT 1693; I AR 16B:247, 15C:202-203, 2:60-88, 3:89-100.)

On November 20, 2007, speakers on behalf of TFS, including its counsel, again addressed the County Board about the proposed revocation and raised due process concerns, in particular the lack of neutrality on the part of the County Board insofar as LACOE staff was both advocating revocation and advising the County Board about it; Clark Parker urged there be an impartial adjudicator to make a recommendation to the County Board instead of LACOE staff. (I AR 16C:267-270.)[5/] Upon being asked by a County Board member to speak on the subject of due process, Shari Kim Gale, general counsel for the County Board and LACOE, advised that the hearing before a neutral adjudicator is the hearing of the appeal before the State Board as provided by the Education Code. (I AR 16C:271.)

> [T]hat is the due process stage. It is that stage where there should be no one-sided communications, each side should have independent counsel. And most important, the adjudicator is the State Board of Ed[ucation], and it is neutral. In this matter, in this process, you are not neutral. You are the authorizer.

(*Ibid*.)

[5/] Parker explained that he was relying on general administrative law rather than on Education Code provisions pertaining to charter schools. (I AR 16C:270.)

On December 4, 2007, Jeanette Parker again addressed the County Board regarding TFS's compliance and other matters. (I AR 15E:218, 16D:285-286.) LACOE presented a final report addressing TFS's responses to the proposed revocation which concluded, among other things, that TFS had failed to meet 47 of 53 items on the corrective action plan. (I AR 16D:286.) LACOE advised the County Board that, after review and analysis of TFS's rebuttal materials, it stood by its recommendation to revoke. (*Ibid*.)

In addition to appearances before the County Board, TFS had communicated with the County Board in writing about its responses to the corrective action plan and governance issues, as well as about what it deemed were procedural deficiencies in the revocation process. (I AR 2:60-88, 3:89-100, 7:116-124, 8:126, 9:138-143; III AR 23:1342-1350.)

F. The Revocation Of TFS's Charter.

On December 11, 2007, speakers again addressed the County Board on behalf of TFS, including Jeanette Parker, who defended testing procedures, and Assemblyman Mervyn Dymally, who asked that the school be kept open at least another year. (I AR 15F:226, 16E:296-301.) The County Board voted four to three to revoke TFS's charter. (I AR 15F:228-230, 16E:323.) The County Board adopted the factual findings regarding improprieties in pupil testing, violations of the charter, the Corporations Code, and the Government Code including the Brown Act, and failure to comply fully with the corrective action plan. (I AR 15F:229; see also III AR 35:1473-1478 [notification of TFS].)

G. TFS's Appeal To The State Board.

On January 9, 2008, TFS appealed to State Board, submitting five binders of materials to support for its position. (III AR 41:1566; see III AR 36:1479-1507 [TFS's letter brief]; 1 CT 20-21.) The appeal was first reviewed by staff in the Charter Schools Division of CDE. (See III AR 41:1565-1574.) CDE requested LACOE to provide it with all the documents the County Board had relied on in making the revocation decision; LACOE provided seven binders of documentation, including the list of fifty-three items in the corrective action plan that LACOE contended were violations of the law or the charter. (III AR 41:1566.) Subsequently, CDE requested additional information from LACOE as to which of the fifty-three violations the County Board found were material violations and the evidence supporting the violations, as well as the documents providing TFS notice and opportunity to remedy and a notice of intent to revoke with the facts supporting the latter. (*Ibid.*) LACOE responded, identifying five of the most significant violations, and subsequently TFS replied to refute LACOE's contention that it had complied with the statutory requirements for revocation. (*Ibid.*)

On July 8, 2007, CDE recommended the State Board reverse the revocation, having concluded that only a violation of the Brown Act was supported by substantial evidence and that the County Board had failed to provide TFS with notice of that violation and the opportunity to remedy it in a manner that complied with the statute. (III AR 40:1562-1563.)

Earlier, on May 19, 2008, the State Board's Advisory Commission on Charter Schools had also considered TFS's revocation appeal in a meeting at which both sides presented argument. (III AR 40:1563.) The vote of the Commission was four to two in favor of recommending reversal, one vote short of the number needed to support a recommendation, so none was given. (*Ibid.*)

On July 10, 2008, eight members of the State Board heard argument on TFS's revocation appeal; the vote on whether to accept CDE's recommendation and reverse the revocation was a tie—four to four—leaving the revocation in place. (III AR 42:1678-1679.)

H. The Petition For Writ Of Administrative Mandamus.

On December 27, 2007, before appealing to the State Board, TFS filed a petition for writ of administrative mandamus, pursuant to Code of Civil Procedure section 1094.5, in the superior court, naming LACOE and CDE as respondents. (1 CT 11.) An amended petition adding the County Board and the State Board as respondents was filed on July 21, 2008. (6 CT 1205.) TFS alleged the decision to revoke the charter was invalid because, among other things, the County Board had not appointed an independent, impartial decisionmaker. (1 CT 23; 6 CT 1213.)

On August 21, 2008, TFS filed a motion for judgment against LACOE and the County Board pursuant to Code of Civil Procedure section 1094. (8 CT 1686-1706.) It sought reinstatement of the charter on three procedural grounds: the County Board had violated Education Code section 47607, subdivision (d), by failing to provide it with proper notice and

opportunity to cure any violation;[6/] the hearing prior to revocation failed to comport with due process because LACOE had submitted no evidence to support the revocation during the hearing; the hearing violated due process because the County Board was not impartial. (8 CT 1697-1704.) TFS invoked both the Fourteenth Amendment of the United States Constitution, and California Constitution, Article I, section 7. (8 CT 1700 & fn. 7.)

The trial court heard the motion on September 15, 2008 and on September 19, 2008, granted it. (9 CT 1951.) It found that the County Board had substantially complied with the notice requirement of the Education Code by acting through LACOE, based on evidence that LACOE employees comprise the staff of the County Board and LACOE's Superintendent of Schools is the chief executive officer of the County Board. (9 CT 1970-1971; 1 RT J25.) However, the trial court also found that TFS's due process rights had been violated in that the evidence supporting revocation had not been presented during the hearing and TFS was entitled to a hearing before an impartial decisionmaker before revocation. (9 CT 1971-1974.) Noting Education Code section 47607 was silent on the issue of an evidentiary hearing, the trial court also found that "[t]o the extent *arguendo* that it contemplates merely a hearing before the [County Board], it does not meet the minimum requirements of due process." (9 CT 1974.) "An evidentiary hearing before a unbiased hearing officer is required." (*Ibid*.) The hearing officer could be an employee of

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[6/] TFS alleged notice was defective because it was not given by the County Board, the chartering authority, but by LACOE. (8 CT 1697-1699.)

LACOE otherwise uninvolved in the revocation process or a third party. (*Ibid*.) The hearing officer's findings must then be accepted or rejected by the County Board in a public hearing. (*Ibid*.)

On October 21, 2008, judgment was entered requiring the County Board to set aside its December 11, 2007 decision to revoke TFS's charter and to reinstate the charter "with all rights and privileges . . . ." (10 CT 2108-2109.)

The Court of Appeal reversed. It found the revocation procedure did not violate due process. (Opn. 25-39.) Specifically, noting that TFS had never contended it was not apprised of all the evidence against it or that the County Board had relied on undisclosed evidence, it held that the lack of a formal introduction of the evidence at the revocation proceeding did not render it unfair or create an unacceptable risk of erroneous deprivation of a protected interest. (Opn. 27.) Nor did due process require an additional evidentiary hearing before an unbiased hearing officer whose findings would then be presented to the County Board. (Opn. 28-29.) TFS had failed to establish either the probability of bias or actual bias on the part of the County Board, only "the unexceptional circumstance of general counsel and other LACOE staff advising the County Board regarding the initial decision whether to reverse TFS's charter." (Opn. 35.) Moreover, the appeal to the State Board provided additional safeguards to charter schools facing revocation. (Opn. 37-39.)

This Court granted review.

ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE AN EVIDENTIARY HEARING BEFORE A NEUTRAL HEARING OFFICER PRIOR TO THE INITIAL DECISION TO REVOKE A CHARTER.

Throughout this litigation, TFS has equated due process with a trial-type hearing before a neutral hearing officer. Anything short of that is, in its view, a denial of due process. The law is otherwise.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citation]." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [96 S.Ct. 893, 47 L.Ed.2d 18] ("*Mathews*").) It is well settled that due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." (*Id.* at p. 334, internal quotations and citations omitted; see also *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 563 ["The requirements of due process . . . are not inflexible"].) What process is due depends upon weighing the various interests involved. (*Saleeby v. State Bar*, *supra*, 39 Cal.3d at p. 565; *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390 [California Constitution].)

The federal test for evaluating the scope of a pre-deprivation due process hearing turns on the consideration of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used,

and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews, supra,* 424 U.S. at p. 335; *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1119.) Courts consider the same three factors for purposes of due process analysis under the California Constitution, as well as an additional fourth factor: "'the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official.' [Citations.]" (*Oberholzer v. Commission on Judicial Performance, supra,* 20 Cal.4th at pp. 390-391.)[7/] "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." (*Mathews, supra,* 424 U.S. at p. 348.)

This court has determined that the *Mathews* test does not apply "when the due process claim involves an allegation of biased decisionmakers." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1035.) The trial court in this case declined to apply the *Mathews* test because TFS convinced it that the County Board was biased. While the

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[7/] As the Court of Appeal noted, TFS did not emphasize the fourth factor. (Opn. 22, fn. 23.)

statute requires only "a public hearing, in the normal course of business" on the issue of revocation (Ed. Code, § 47607, subd. (e)), the trial court imposed the requirement of an *additional* hearing, a preliminary hearing before a neutral hearing officer, purportedly to remedy the alleged bias; then "[t]he Board can sit and review that decision, and it may do so on a partisan basis . . . and then the State Board of Education sits in review of that. That's the way I think we go." (1 RT J24; 9 CT 1974.) The Court of Appeal correctly determined that such a preliminary hearing was constitutionally unnecessary.

A. TFS Failed To Demonstrate Bias On The Part Of The County Board.

TFS contends that actual bias or an unacceptable risk of actual bias tainted the revocation proceedings before the County Board, rendering them a violation of due process. (POB 13-22.) TFS's purported evidence to support this contention is three-fold: (1) The County Board's alleged pecuniary interest in revoking TFS's charter insofar as revocation removed a purported competitor for limited school funds (POB 13-18); (2) LACOE's function as both prosecutor and advisor to the County Board on the question of revocation (POB 19-21); and (3) general counsel Sheri Kim Gale's "instruction" to the County Board that it was "not neutral" (POB 21-22). TFS falls short of establishing any bias rendering the revocation procedures unfair.

1. TFS failed to preserve any argument of bias based on pecuniary interest by failing to raise it below; the argument is meritless in any event.

TFS raises as a source of bias that charter schools and traditional public schools "must compete for students in order to obtain funding." (POB 15.) "[T]he more charter schools [the County Board] can permissibly revoke, the more funds become available for its own schools." (POB 18.) From this purported pecuniary interest, TFS asks the Court to infer the County Board could not give it a fair hearing. The Court should decline to do so.

TFS did not make this argument in the trial court. The argument is dependent on evidence regarding the funding of charter schools and traditional public schools, a complicated issue (see, e.g., Ed. Code, §§ 47633, 47634.1, 47634.4), and one involving whether and the degree to which, if at all, charter schools, such as TFS, may vie with traditional public schools, such as those overseen by the County Board, for "the same limited funds" (POB 2). Because the issue was not addressed in the trial court, the appellate record is devoid of any such evidence. (See Opn. 32 ["There was no evidence of a financial or personal interest on the part of the County Board"].) To the extent TFS is attempting to develop an additional factual record in this forum, it falls short, merely relying on journal articles, such as one written by its own counsel. (POB 15.) Interestingly, according to its citation, that article was issued in August 2008, the same month TFS

brought its motion for judgment on the due process issue (8 CT 1686); yet the motion never mentioned any alleged bias based on pecuniary interest.

This Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Court, rule 8.500(c)(1).) Moreover, this Court has stated, "[I]t is our policy not to review issues that are dependent upon development of a factual record when those issues have not been timely raised in the Court of Appeal or not reached in that court, when the latter omission was not brought to the attention of the Court of Appeal by petition for rehearing." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1205.) The issue here is fact-dependent. It needed to be raised, if at all, in the trial court so that it could be addressed in the Court of Appeal. It is raised here for the first time. The Court should decline to consider the issue of bias based on pecuniary interest for this reason. In addition, as review of the Education Code reveals, the charges of pecuniary interest could not be supported in any event.

TFS asserts that "the more charter schools [the County Board] can permissibly revoke, the more funds become available for its own schools," in its words, "a zero-sum game." (POB 15, 18.) The assertion does not withstand scrutiny. As a preliminary matter, charter schools are "part of the Public School System" and are deemed to be "under the exclusive control of the officers of the public schools." (Ed. Code, §§ 47615, subd. (a), 47612, subd. (a); *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1186; see also *Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1136-1142.) Thus, charter schools are the County

Board's "own" schools insofar as the County Board grants or renews the charters and exercises oversight. (Ed. Code, §§ 47607, 47604.3.)

Moreover, by statute, the primary function of LACOE, of which the County Board is the governing board, is not to operate schools but to oversee and coordinate among school districts in Los Angeles County, including charter schools. (Ed. Code, § 1700; see *id*. at § 47612, subd. (c) [charter school is a "school district" for purposes of funding and academics].) The schools that the County Board, indeed all county boards, do operate are highly specialized and do not draw on the general student population that TFS draws on.[8/] (See, e.g., Historical and Statutory Notes, 28B West's Ann. Ed. Code (2003 ed.) foll. § 58801.6, p. 462 [Legislature's findings and declaration referring to Los Angeles High School for the Arts "operated" by LACOE]; see also, e.g., Ed. Code, § 48645.2 [county boards operate juvenile court schools or contract with school districts to do so].) Hence, the County Board does not compete for students or funds with TFS or any other charter school.

Additionally, chartering authorities are compensated for the actual costs of their oversight of the charter schools, typically not to exceed 1 percent of the charter school's revenue. (Ed. Code, § 47613, subd. (a).) If anything, chartering authorities have a financial incentive to *grant* charters, rather than to revoke them.

[8/] According to its website, <http://www.todaysfreshstartcharter school.org> (accessed Jan. 18, 2012), TFS offers classes for students in grades K through 8.

When decisionmakers are challenged for financial interest, the standard is whether there exists "the objective appearance [of bias] that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator." (*Haas v. County of San Bernardino*, *supra*, 27 Cal.4th at p. 1034.) There are no financial circumstances in evidence here to create an objective appearance of bias on the part of the County Board when it revoked TFS's charter.[9/]

The same is true for any other chartering agency, such as a school district which does operate schools offering classes for children in grades K through 8. The Education Code undercuts any notion that revocation takes money from the pockets of the charter school and puts it directly into the pocket of the revoking agency such that the revoking agency would be tempted to revoke for monetary gain. For example, funds remain with the charter school until the appeal to another agency is completed (Ed. Code, § 47607, subd. (i)), and the outcome of any appeal is not a foregone conclusion (see § I.B.2, *post*). And again, school districts are compensated for their oversight. (Ed. Code, § 47613.)

It must be noted that both statute and regulation strictly limit any discretion a chartering authority may have with respect to revocation, leaving little room for the operation of financial incentive. (Ed. Code,

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[9/] Significantly, the trial court determined that the unbiased hearing officer could in fact be a LACOE employee otherwise uninvolved in the revocation proceedings. (9 CT 1974.) In defending the trial court's ruling in the Court of Appeal and in seeking its reinstatement here, TFS in essence concedes LACOE's lack of bias based on pecuniary interest, as well as that of its governing board.

§ 47607, subds. (c)-(e); see Cal. Code Regs., tit. 5, § 11965, subds. (d)-(f) [defining in detail the required content of notices of intent to revoke, of revocation, and of violation].)[10/]

Moreover, a charter school can go elsewhere for authorization. (See Ed. Code, § 47605, subd. (j)(1) [if a school district denies petition, petitioner may go to the county board of education, and failing there, may go to the state board].) There is nothing in the statute to prevent a charter school from doing the same in the event of nonrenewal or revocation. For example, after being denied renewal by the County Board, TFS was renewed by the State Board to operate under its oversight. (See State Board of Education Final Minutes, Item 5 (Aug. 24, 2010) <http://www.cde.ca.gov.be/mt/ms/documents/finalminutes 082410.doc> [accessed Jan. 18, 2012].)[11/]

In sum, it cannot credibly be said that the County Board and TFS (or chartering authorities and charter schools, generally) were competing for "the same business opportunities" (POB 16) or that the County Board "disproportionately represent[ed] one interest group over another (POB 17). The circumstances of this case are a far cry from those in *Haas v. County of*

[10/] Portions of Education Code section 47607 and the implementing regulations may be found in the Appendix to this brief.

[11/] The State Board's Agenda with supporting documents detailing history of events is at <http://www.cde.ca.gov/be/ag/ag/yr10/agenda20100824.asp> (accessed Jan. 18, 2012). TFS also was granted a charter by the Inglewood Unified School District. (See California Department of Education, State Numbered Charter Schools in California <http://www.cde.ca. gov/ds/si/cs/ap/rptresult.asp?name=TOd&Submit> [accessed Jan. 24, 2012].)

San Bernardino, supra, 27 Cal.4th 1017, where the hearing officer resolving the appeal of a license revocation had a "direct, personal, substantial, pecuniary interest" in reaching a certain conclusion. (*Id.* at p. 1025.)[12/] The County Board granted TFS's petition and subsequently renewed it. (I AR 1:4, 53; III AR 32:1434.) That evidence is in itself wholly inconsistent with any notion of a financial incentive to revoke TFS's charter. If this Court decides to consider TFS's claim of bias based on pecuniary interest, it should do so only to reject the claim as unfounded.

2. Gale's "not neutral" remark was not an admission of actual bias.

This Court has stated that "adjudicators challenged for reasons other than financial interest have . . . been afforded a presumption of impartiality." (*Haas v. County of San Bernardino, supra*, 27 Cal.4th at p. 1025, citing *Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].) To overcome the presumption, a plaintiff asserting a claim of bias must demonstrate with concrete facts an unacceptable probability of actual bias on the part of decisionmakers. (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) TFS contends that Gale, general counsel to the County Board and LACOE, instructed the County

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[12/] In *Haas v. County of San Bernardino*, the government unilaterally selected and paid the hearing officer whose income from future work depended entirely on government goodwill. (27 Cal.4th at pp. 1020, 1024.) The possible temptation posed by the economic reality of outcome dependent compensation was deemed to offend the Constitution. (*Id*. at pp. 1027-1032.)

Board not to be impartial, that is, to be unfair. (POB 21.) Read in context, Gale's remarks do not establish an unacceptable probability of actual bias on the part of the County Board.

At the November 20, 2007, board meeting, TFS had raised due process concerns, asserting that an impartial hearing officer, rather than LACOE staff, was required to determine the facts and make a recommendation to the County Board. (I AR 16C:267-270.) Asked by a board member for her analysis of the issue, Gale responded:

> Today's Fresh Start has a fundamental misunderstanding of your role as the board and as the authorizer of this charter school. This is your charter school. [¶] In this matter the superintendent and staff are not the authorizer, and in our capacity we all advise the board in making this very important decision. It is not LACOE staff versus TFS's staff. The legal burden is on you, the board of LACOE, to determine whether there is substantial evidence to revoke your charter school. [¶] 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 counsel. And most important, the adjudicator is the State Board of Ed[ucation], and it is neutral. In this matter, in this process, you are not neutral. You are the authorizer. [¶] Essentially this is the same process we use to evaluate new petitions that come to this board. We use literally the same spectrum of expert—technical expert staff, there is a public hearing, there is a report of staff, and then there is a recommendation upon which our board votes. [¶] So with all due respect, we do disagree and still maintain that our process is entirely legal.

(I AR 16C:271; see Opn. 29.)

Gale was explaining the respective roles of the County Board and the State Board in the revocation process, and in that context, her statement that

the County Board was "not neutral" means that it was not an arms-length third-party adjudicator—"You are the authorizer." That is, the County Board had been involved with TFS from the start when it initially authorized TFS's charter and later renewed it, and so was charged with the responsibility of revoking it. If the decision was adverse to TFS, TFS could appeal to the State Board, at which level the proceedings were "adjudicative," that is, before neutral decisionmakers who would make the final decision based on evidence presented by the two parties represented by independent counsel. Gale was not conceding *bias* in any constitutionally significant sense, and the Court of Appeal correctly determined that "Gale's statements were not an admission (or a description) of actual bias." (Opn. 30.) As the Court of Appeal pointed out, "To say that the County Board was 'biased' against TFS because it was the authorizing authority is nonsensical. (It would make just as little sense to conclude that the County Board was biased *in favor* of TFS, because it had decided to grant TFS's charter in the first case and subsequently renewed it.)" (Opn. 36.) Gale's remarks simply do not establish the County Board was incapable of being fair as a fact-finder and decisionmaker.

3. LACOE's overlapping functions do not create an unconstitutional risk of biased decision-making.

TFS contends it established an unacceptable probability of actual bias with evidence of an "impermissible overlap of prosecutorial and adjudicative roles in this case" and evidence of Gale's purported dual role as "prosecutor" before the County Board and advisor to the County Board.

(POB 18, 20, 22.) The overlap was manifest in the fact that the County Board, which TFS deems "the adjudicative body," is the governing board of LACOE, which TFS deems to be "the prosecutorial body." (Opn. 2; POB 20; 6 CT 1241.) Further, LACOE employees function as the County Board's staff with the responsibility of performing investigations and preparing reports. (See, e.g., Opn. 3-4; 9 CT 1970.) Darline Robles, who recommended revocation, was county superintendent of schools and head of LACOE, as well as chief executive officer of the County Board by statute. (Opn. 33; Ed. Code, § 1010.) Gale was general counsel to both LACOE and the County Board. (Opn. 33; see Ed. Code, § 35041.5.) According to TFS, this overlap of roles caused the County Board to give excessive deference to LACOE's findings. (POB 20.)[13/]

However, it is not an exceptional circumstance—much less evidence of bias—for a local agency to receive reports from and adopt recommendations of staff when there is a decision to be made. Indeed, this Court rejected an argument similar to that made by TFS in *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93 ("*Griggs*"). In *Griggs*, a teacher challenged the school board's decision not to rehire her. The court stated it was permissible to rely primarily on the superintendent, the board's chief executive officer. (*Id*. at p. 97.) "The members of the board admit they

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[13/] TFS claims deference to a point where "certain individuals even admitted that they did not fully examine the evidence prior to siding with LACOE and voting in favor of revocation." (POB 20-21.) It cites the Court of Appeal's Opinion, page 33, for this "fact." The citation does not support the assertion.

were inclined to presume that the recommendations of their superintendent were correct, subject to reevaluation on the basis of what would appear at the hearing, but this does not show they were prejudiced against Mrs. Griggs or that they could not give her a fair hearing." (*Id*. at p. 98.) Hence, a hearing officer was unnecessary. (*Ibid*.)

As the *Griggs* court stated, "In an administrative proceeding . . . the combination of adjudicating functions with prosecuting or investigating functions will ordinarily not constitute a denial of due process." (61 Cal.2d at p. 98; see also *Withrow v. Larkin*, *supra*, 421 U.S. at pp. 46-47 [combination of investigative and adjudicative functions insufficient to overcome "a presumption of honesty and integrity in those serving as adjudicators"].) TFS's attempt to show this case is somehow different relies on a number of cases involving counsel who performed dual roles of advocate and advisor before administrative review boards. Those cases are *Golden Day Schools Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695 ("*Golden Day Schools*"); *Nightlife Partners v City of Beverly Hills* (2003) 108 Cal.App.4th 81 ("*Nightlife Partners*"); *Quintero v. City of Santa Ana* (2004) 114 Cal.App.4th 810 ("*Quintero*"), and *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 ("*Howitt*"). (POB 19-20.) However, none of the cases stands for the proposition that accepting the recommendations of those who have done the ground-work of investigation preliminary to a decision is constitutionally impermissible or that purportedly overlapping functions under the circumstances presented here offends due process.

- *Golden Day Schools* arose from the State's refusal to renew the contract of a nonprofit corporation that was operating child care programs. An individual who initiated the decision served as a member of the panel determining the corporation's appeal. (83 Cal.App.4th at p. 701.) The reviewing court determined that the circumstance did not pass due process muster insofar as the individual "was in the position of judging the correctness of his own decision." (*Id*. at p. 710.)

- *Nightlife Partners* arose in the context of an administrative appeal from a decision to deny the operators of a cabaret a renewed permit. The city attorney, who had advised the city in the first instance to deny the permit, then acted as the advisor to the hearing officer on the appeal. (108 Cal.App.4th at pp. 84-85.) The reviewing court found the overlap of the role of advocate and decisionmaker was a violation of due process. (*Id*. at p. 94.)

- *Quintero* involved procedures on the appeal of a decision to discharge, not the initial decision itself. (114 Cal.App.4th at p. 812.) Moreover, it is interesting to note that this Court in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731 ("*Morongo*"), disapproved of *Quintero* to the extent its language suggested a *per se* rule barring an agency's attorneys from simultaneously exercising advisory and prosecutorial functions. (*Id.* at p. 740, fn. 2.) It is plain TFS advocates exactly the sort of *per se* rule the *Morongo* court disapproved.

- *Howitt*, too, involved an appeal of a disciplinary action by a deputy sheriff in which the county counsel would advise the appeals board and prepare its decision, while his subordinate would represent one of the parties—the sheriff's department. Again, the proceeding at issue was not a decisionmaking proceeding but an adjudicatory one after the decision had been made insofar as the board was "a quasi-independent administrative *tribunal* established by county ordinance . . . charged with *adjudicating* certain disputes between the county and county employees."

(3 Cal.App.4th at p. 1578, emphasis added.)

All of the foregoing cases concern fairness problems *on appeal* where purportedly unbiased review boards turned out not to be so; here, in contrast, it is the fairness of the initial adverse decision that is at issue.[14/] Here, the County Board is not a "tribunal" deciding a dispute between two parties, but the authorizing agency deciding whether or not to revoke a charter it granted. In addressing LACOE's attempts to investigate complaints and the potential grounds for revocation, and recommending revocation, Gale was not advocating in the sense of prosecuting one of two sides to a dispute but simply fulfilling her advisory role as general counsel.

In a lengthy footnote, TFS faults the Court of Appeal for ignoring the law requiring a fair tribunal with a judge or other decisionmaker free of

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[14/] A situation comparable to the cases TFS cites would exist if Gale were to advise and represent the County Board on appeal and also to advise the State Board as to TFS's revocation; but that is not what happened, and Gale specifically advised there could be no such one-sided communications on the State level. (Opn. 35; I AR 16C:271.)

bias either for or against a party. (POB 23, fn. 3.) TFS relies on *Morongo*, *supra*, 45 Cal.4th at p. 737. *Morongo* sheds light on what was *not* required in this case by virtue of its distinguishable facts. *Morongo* concerned an adjudicatory proceeding under the Administrative Procedures Act (Gov. Code, § 11425.10, et seq. ("APA")), which expressly requires the adjudicative function to be separated from the investigative, prosecutorial, and advocacy function. (Gov. Code, § 11425.10, subd. (a)(4).)[15/] The specific issue was whether the attorney prosecuting a license revocation before the state water board, who also advised the board on other matters, had to be disqualified. (*Morongo*, *supra*, 45 Cal.4th at p. 734.)[16/] In that setting, there was an actual "prosecution." (See *ibid*. [referring to the enforcement team "prosecuting" the license revocation]; *id*. at p. 735 [the enforcement team was treated "'like any other party,'" and the APA rules governing ex parte communications strictly applied].) There is no higher administrative review of this type of adjudicatory proceeding. (See Wat. Code, § 1126, subd. (a) ["[i]t is the intent of the Legislature that all issues relating to state water law decided by the board be reviewed in state courts"].)

[15/] In the same lengthy footnote, TFS cites *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, another case under the APA, illustrating the separation of adjudicative and prosecutorial functions.

[16/] The Court determined disqualification was not necessary on the facts of the case. (*Morongo, supra*, 45 Cal.4th at p. 734.)

In contrast, here the Legislature did not intend the hearing before the County Board to be a "prosecution" by the plain language of the Education Code—"public hearing, in the normal course of business"—and higher administrative review is part of the statutory scheme. (Ed. Code, § 47607, subds. (e) & (g).)

Further, the controlling statute here, unlike the APA, actually contemplates the combination of functions—the chartering authority, implicitly through staff, investigates complaints of potential violations and then holds an informal hearing, also as part of the fact-finding process, before making its decision, and that decision is then subject to higher administrative review by an independent agency. (Compare Ed. Code, § 47607, subds. (c), (d) & (g) with Gov. Code, § 11425.10, subds. (a)(4) & (b).)

In the same footnote, starting from the premise that the process involved in authorizing a charter is effectively the same as that involved in revoking a charter,[17/] TFS appears to be saying that a protectible interest only arises after authorization and so the process to revoke should be different. (POB 23, fn. 3.) But TFS does not explain why, and in any event the key question is: What process is due? TFS's nonsequitur does not answer that question. In fact, TFS received all process that was due, as next discussed.

[17/] (See I AR 16C:271 [Gale explaining the similarity of the authorization and revocation processes, each of which entails staff evaluations and recommendations].)

B. The County Board Conducted A Hearing That Comported With Due Process; An Additional Fact-Finding Hearing Is Unwarranted.

Because there is no evidence or allegation sufficient to overcome a presumption of honesty and integrity, the adequacy of procedures in affording due process requires a consideration and weighing of the respective interests involved and an examination of the risk of erroneous deprivation, pursuant to *Mathews, supra,* 424 U.S. at p. 335 and *Oberholzer v. Commission on Judicial Performance, supra,* 20 Cal.4th at pp. 390-391. The burden that an additional preliminary fact-finding hearing would impose on the revocation process in terms of cost and delay is not justified by any risk of erroneous deprivation under the statutory scheme as written and as applied in this case.

1. The cost/benefit analysis weighs against TFS.

A consideration of the *Mathews* factors demonstrates that TFS received a fair hearing that complied with due process requirements.

- TFS's interest. It is not disputed in this case that a charter school has a property interest in its charter entitling it to due process. (See Opn. 23-24.) Here, TFS is a nonprofit public benefit corporation, and as a charter school is eligible for a share of state and local funds for public education. (Ed. Code, § 47612; see also *id.* at § 47630 et seq.) The safeguards provided by Education Code section 47607 are a recognition of the fact that charter schools have a legitimate interest in the financial stability of their operations. However, that does not mean their interest is of

such weight as to compel an additional layer of fact-finding and adjudication to that provided by the statute.

That there are students, parents, and teachers involved does not lend more weight to the interest than it otherwise has, TFS's contentions notwithstanding. (POB 31.) Revocation is not necessarily an abrupt termination of a student's charter school education; absent a violation of law or fiscal mismanagement, the charter school can continue to qualify for funding, pending the appeal of the revocation decision, to minimize disruption. (Ed. Code, § 47607, subd. (i).) If funding is ultimately discontinued, students may return to a mainstream public school, or for that matter enroll in another charter school or a private school. (See *Wells v. One2One Learning Foundation*, *supra*, 39 Cal.4th at p. 1202.)

In any event, TFS's interest in the continued receipt of state funding, even if a legitimate interest, is not weighty enough *in and of itself* to mandate an additional hearing before a neutral hearing officer prior to revocation, as the trial court in this case appeared to believe. (See *Mathews*, *supra*, 424 U.S. at pp. 342-343 [plaintiff's interest in uninterrupted receipt of a source of income does not require an evidentiary hearing prior to

termination].)[18/] Rather, the other factors must be considered, and they are determinative that due process does *not* require such an additional hearing.

- Risk of erroneous deprivation. In terms of a hearing, Education Code section 47607, subdivision (e), requires only "a public hearing, in the normal course of business." That requirement in no way signifies a cursory process which would deprive a charter school of a meaningful opportunity to convince the chartering authority that revocation would be unjustified. Such opportunity was certainly provided in this case.

First, the statute itself contemplates evidence supporting revocation will be in the hands of both the chartering authority and the charter school before the public hearing insofar as it requires, as part of its notice procedure, that the chartering authority provide "notice of facts in support of revocation." (Ed. Code, § 47607, subd. (e); see also Cal. Code Regs., tit. 5, §§ 11965, 11968.5.2.)

Second, by the time of the study session on October 9, prior to the notice of intent to revoke, TFS had full access to the information that would

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[18/] The trial court analogized the circumstances of this case to the public employment context. (9 CT 1973.) But even in that context, a trial-type hearing before a neutral hearing officer is not constitutionally mandated *before* the initial decision to terminate. (See, e.g., *Flippin v. Los Angeles City Bd. of Civil Service Comrs.* (2007) 148 Cal.App.4th 272, 281 [there is no authority disqualifying the official who initiates discipline against an employee from presiding over the employee's prediscipline *Skelly* hearing].) In *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, the court held public employees are entitled to "preremoval safeguards" of "notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing the discipline." (*Id*. at p. 215.)

be relied upon by the County Board; TFS had been provided with the same three binders of evidence provided to board members. (See I AR 15A:188 [minutes reflect director of TFS had received three binders provided to board members].) By the time of the hearing on November 6, TFS was sufficiently informed about the evidence in support of revocation to be able to present, in its own words, "voluminous documents (close to 1000 documents)" detailing its compliance efforts and position with respect to the specific allegations against it. (8 CT 1693; see I AR 16B:247 [TFS presented three binders of documentation to each board member regarding governance issues and the corrective action plan]; I AR 15C:202-203 [TFS distributed additional documents at hearing]; I AR 2:60-88 [corrective action plan with TFS responses]; I AR 3:89-100 [TFS responses to governance issues].) After the November 6 hearing and before the December 11 vote, TFS continued providing written responses to the various charges against it. (I AR 7:116-124, 8:126-127, 9:138-143; III AR 23:1342-1350.)

Third, at the November 6 hearing, TFS presented "[m]any witnesses" against revocation, one of whom "explained in great detail why [TFS] had not violated any provisions of its charter and that there was no cause for revocation." (8 CT 1693; I AR 16B:250-252.) Indeed, TFS had multiple opportunities to speak on specific issues before the December 11 vote on revocation. (See, e.g., I AR 15B:192 [minutes reflecting topics addressed by witnesses at October 16 board meeting]; I AR 16C:267-268 [TFS raised due process concerns at the November 20 board meeting]; I AR 16E:296-

301 [TFS witnesses again addressed the County Board before the vote at the December 11 board meeting].)

Fourth, from the outset, as the investigation of TFS got underway, TFS had the professional assistance of counsel, a further safeguard against mistake. (I AR 5:108-110 [June 19, 2007 letter from counsel to LACOE challenging LACOE's right to investigate]; see I AR 15B:192 [minutes of October 16 the County Board meeting indicating counsel asked it to allow continued operation of TFS, stating facts in support of his argument].) At the November 6 hearing, additional counsel with "in-depth experience on government issues" also addressed the County Board to analyze the allegations against TFS and to demonstrate that TFS had not violated the Brown Act, the Corporations Code, the Government Code, or its charter. (I AR 16B:247-250.)

Given these facts, it simply cannot be said that TFS did not have an ample and meaningful opportunity to put LACOE's evidence in support of revocation to the test. Requiring a preliminary hearing, such as that the trial court would impose, would add nothing in the way of procedural safeguards. In fact, as the Court of Appeal correctly observed, "[u]nder the trial court's formulation, even after the initial evidentiary hearing, the final decision whether to revoke the charter would remain with the County Board. . . . This still leaves the ultimate decision whether to revoke the charter in the hands of the chartering authority, which is the very fact of which TFS complains." (Opn. 37; 1 RT J24.)

- The County Board's interest. Despite a high degree of independence, charter schools are part of the public school system for funding and academics. (Ed. Code, § 47615, subd. (a); see *id*. at § 47607, subd. (c) [charter may be revoked for failing to meet pupil achievement goals or fiscal mismanagement]; see *id*. at § 47612, subd. (c) [charter school is a school district for funding purposes].) A chartering authority, such as the County Board, has oversight responsibilities, including, among others, the duty to monitor the fiscal condition of the school and its operations and to investigate complaints. (See e.g., Ed. Code, § 47604.3 [duty to investigate complaints and monitor operations].) A chartering authority's immunity from liability for the acts and obligations of a charter school is in fact dependent on the chartering authority's compliance with its statutory oversight responsibilities. (Ed. Code, § 47604, subd. (c).)

Thus, the County Board had a compelling interest in ensuring that TFS, charged with providing additional educational options to students, did so safely, effectively, and within the law, so as to further the legislative goals in establishing the option of charter schools in the first instance. (See Ed. Code, § 47601 [legislative intent in establishing charter schools to improve pupil learning, expand learning experiences, and hold schools accountable for meeting measurable pupil outcomes, among other things]; cf. *California Assn. of Private Special Education Schools v. California Department of Education* (2006) 141 Cal.App.4th 360, 374 ["the financial stability of a nonpublic, nonsectarian school providing educational services to disabled children, is a serious matter" but that interest was outweighed by

the government's interest in ensuring safe and lawful operation of the school].)

While adding nothing in the way of procedural safeguards, an additional evidentiary hearing before a neutral hearing officer—"an entirely new layer of fact finding and adjudication" (Opn. 37)—would substantially burden the chartering authority in terms of cost and delay, and that burden is unwarranted by due process concerns.

2. Appeal to the State Board provides an additional safeguard against error.

TFS contends the Court of Appeal erroneously held that the hearing before the chartering authority does not have to be impartial—by which TFS means "fair"—because due process violations can be cured by appellate review. (POB 23-24.) But that is not what the Court of Appeal held. It *agreed* appeal would not cure a due process violation, but found no violation occurred. (Opn. 38.) Specifically, it held that "the record does not show circumstances to 'overcome a presumption of honesty and integrity in those serving as adjudicators' [citations]." (Opn. 36.) The function of the appeal in this statutory scheme is to "provide[] an additional safeguard against the risk of erroneous deprivation of [a charter school's] property interest in its charter." (Opn. 39.)

TFS contends review by the State Board is not a safeguard because its review is "'highly deferential'" and "extremely limited," since Education Code section 47607 calls for a "substantial evidence" standard of review. (POB 25-26.) In so doing, it assumes the Legislature's word choice reflects

the *judicial* standard of review. Both the rules of statutory construction and the facts of what happened here do not support that assumption.

Substantial evidence is defined as "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651, internal quotations and citations omitted.) The substantial evidence rule of appellate review requires a judgment to be affirmed if on the basis of the entire record there is substantial evidence, contradicted or uncontradicted, to support a factual determination. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) That standard of *judicial* appellate review cannot be read into the Education Code.

Education Code section 47607 provides in pertinent part:

- "The chartering authority shall not revoke a charter, unless it makes written factual findings supported by *substantial evidence*."

(Ed. Code, § 47607, subd. (e), emphasis added.)

- "The state board may reverse the revocation decision if the state board determines that the findings made by the chartering authority under subdivision (e) are not supported by *substantial evidence*."

(*Id*. at subd. (g)(2), emphasis added.)

The trial court read the phrase, "substantial evidence," in subdivision (g)(2) as descriptive of the standard of review the State Board should employ, equating it to the substantial evidence standard of review employed by appellate courts. (9 CT 1973; 1 RT J10.) That is, the trial court in effect concluded that the State Board would assume the facts as

found by the chartering authority and would simply apply the substantial evidence test: is there substantial evidence, contradicted or uncontradicted, to support those findings.

But there is nothing in subdivision (g)(2) that indicates the State Board may not reweigh the evidence or that precludes an independent and thorough review of the evidence. What occurred in this case strongly suggests that an independent review may well be intended. [19/] There was first a detailed review by CDE which in no way suggests that the County Board's decision was presumed to be correct, as would be the case of a judgment under review by an appellate court. (See, e.g., *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 822.) Indeed, CDE elicited further documentation supporting the County Board's position before making its recommendation *against* the County Board, and rather than deferring to the County Board's view that, for example, there were fifty three violations of the law or charter supporting revocation, directed LACOE to narrow them down to "material" violations. (III AR 41:1566, 40:1562-1563.) Then there was a review by the State Board's Advisory Commission which included the opportunity for both sides to present argument. (III AR 40:1563.) Finally there was a hearing before the State Board itself. (III AR

[19/] As yet there is no regulation regarding the standard of review to be employed by the State Board in the context of revocation decisions. (See 1 RT A34-A35 [counsel for CDE advises that scope of review by State Board is an "open question"].)

42:1678-1679.) So much scrutiny at the State level does not suggest deference to the chartering authority's decision.

It is a basic rule of statutory interpretation that similar words or phrases in statutes *in pari materia*, i.e., statutes dealing with the same subject matter, be given the same interpretation. (See, e.g., *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 589.) Plainly, the phrase "substantial evidence" appearing in subdivision (e) has nothing to do with an appellate standard of review; it has to do with the decision itself and simply means that facts must be supported by evidence that is reasonable, credible, and of solid value. The same meaning must be given the same words in subdivision (g)(2). It does not make sense and it does not comport with the rules of statutory interpretation that the phrase "substantial evidence" should mean something more and different in subdivision (g)(2)—evidence of solid value and also a standard of review applied by appellate courts—than it means in subdivision (e). Thus, as the record bears out, the administrative appellate process most certainly is an additional safeguard to the rights of charter schools.

In sum, the Court of Appeal got it right. Due process does not require an evidentiary hearing before a neutral hearing officer prior to a chartering authority's decision whether to revoke. The County Board and LACOE provided TFS all the process that was due. The Court of Appeal's judgment on this point should be affirmed.

II. NEITHER THE EDUCATION CODE NOR DUE PROCESS REQUIRES THE FORMAL PRESENTATION OF EVIDENCE AT THE PUBLIC HEARING.

TFS contends that both Education Code section 47607 and due process require the evidence supporting revocation to be formally presented at the public hearing. (POB 27.) Because LACOE did not do so at the November 6 public hearing, TFS claims it was "deprived of the opportunity to be adequately apprised of the facts and be provided with an opportunity to rebut." (POB 28.)

As a threshold matter, the Education Code does not expressly require the formal presentation of evidence at the public hearing on revocation, as the trial court recognized. (9 CT 1971-1972; see Opn. 27 [trial court acknowledged the plain language of statute does not require formal presentation of evidence at the revocation hearing].) TFS attempts to imply such a requirement based on the fact that the chartering authority may revoke only upon "a showing of substantial evidence" of violation. (POB 29.) However, the fact that LACOE must "make its case" for revocation says nothing about when or how it must present the evidence supporting a recommendation to revoke.

Due process requires only the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" (*Mathews, supra,* 424 U.S.

at p. 333.) TFS's claim it was denied that opportunity does not comport with the record as discussed (*ante*, § I.B.1), and the cases upon which TFS relies for the proposition that due process mandates the introduction of evidence at the hearing have no application to the circumstances of this case.

Those cases are *La Prade v. Department of Water and Power* (1945) 27 Cal.2d 47 ("*La Prade*") and *English v. City of Long Beach* (1950) 35 Cal.2d 155 ("*English*") (POB 27-28), and each involves *undisclosed* evidence relied upon by the respective boards when they affirmed decisions to discharge the plaintiff employees.[20/] In *La Prade* the board made its decision without providing the required adjudicatory hearing insofar as *no* evidence supporting discharge was *ever* made available to the employee. (See 27 Cal.2d at p. 49 [at the hearing, the representatives of the department which discharged the employee "stood mute"].) An investigative report finding insufficient cause for discharge was never provided to the employee. (*Id*. at pp. 49-50.) In *English* there was an evidentiary hearing, but the board approved the action of the city manager on the basis of evidence board members obtained later, outside the hearing, which the employee had no opportunity to refute. (35 Cal.2d at pp. 157, 159.)

[20/] Both cases also addressed civil service *appeals* to administrative tribunals pursuant to municipal codes and are irrelevant on that basis alone.

In contrast, before the hearing in this case, LACOE had provided both the County Board and TFS with three binders of written materials, including the corrective action plan and TFS's responses. (I AR 15A:187-188.) As the Court of Appeal stated: "TFS did not contend in the trial court and does not argue on this appeal that TFS was not apprised of all the evidence against it, or that either the County Board or the State Board relied on evidence not disclosed to TFS during the revocation process." (Opn. 27.) Since the cases upon which TFS relies involve concealment and nondisclosure, they are inapplicable. (*Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 570.)

In fact, the gist of TFS's complaint is simply that LACOE found too many violations—fifty three allegations of wrongdoing—increasing the risk of erroneous deprivation to the point that even CDE needed clarification and asked it to narrow down its charges. (POB 32.)[21/] TFS's apparent theory is that the need to present evidence at a formal evidentiary hearing would have caused LACOE to "distill its allegations" in favor of only those "material" to the revocation, thereby limiting the opportunity of erroneous deprivation. (POB 32-33.)

[21/] See III AR 41:1566 regarding CDE's difficulties with the record: TFS had submitted 5 volumes; upon request of CDE, LACOE submitted 7 volumes. It may be noted that there were as yet no regulations in place regarding the format and content of the record (the notices in particular) and there had only been two prior other revocation appeals. (III AR 40:1562.) Clearly, CDE was not as experienced as TFS asserts (POB 32.)

But there is no evidence that all the allegations of wrongdoing were not material to the decision to revoke. To accommodate CDE, LACOE simply identified the five "most significant violations." (III AR 41:1566.) It is pure speculation that a full-blown evidentiary hearing would have caused the alleged violations to be reduced in number.

Most significantly, TFS cannot pretend confusion or that it was denied opportunity to respond to the five "most significant allegations" prior to revocation, in light of the record of its detailed responses to *every* allegation. (See, e.g., I AR 2:60-88 [TFS matrix in response to the "Corrective Action Plan"]; I AR 3:89-100 [TFS matrix in response to governance issues]; see III AR 43:1682-1683 [referencing three volumes received by State containing TFS's written response to intent to revoke charter].)[22/] It is clear that, by the time of the hearing, TFS was informed about the evidence in support of revocation and was able to present "voluminous documents" of its own, as well as many witnesses detailing its compliance efforts and its position with respect to every allegation against it. Running a school is a complex matter involving a host of obligations all

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[22/] Without citation to the record, TFS asserts the County Board was so confused it made no effort to specify which of the many allegations it found sufficient to support revocation, implying there were no findings of fact supporting the revocation decision. (POB 30.) The County Board adopted LACOE's findings of fact in support of its recommendation to revoke, incorporating by reference LACOE's reports. (III AR 35:1475-1476.) TFS failed to include the reports in the Administrative Record. (Opn. 41, fn. 29.)

of which must be addressed by both the operator of a school and the agency charged with oversight. Complexity is not by definition a denial of due process.

TFS asserts that "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." (POB 29.) Not so. Moreover, regulations have now issued which provide detailed guidance as to the form and content of notices and other documentation involved in revocation. (See Appendix 2-4 [Cal. Code Regs., tit. 5, §§ 11965, 11968.5.2].) The new regulations reinforce the point that the formal presentation of evidence at the public hearing is unnecessary.

"'Procedural informality is the hallmark of administrative proceedings as opposed to judicial proceedings.' [Citation.] . . . . '[I]t is settled that strict rules of evidence do not apply to administrative proceeding[.]'" (*Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 291.) An evidentiary hearing at which LACOE formally proffered the documentation supporting revocation and its content (and TFS formally recited the detailed rebuttal it had put on paper) would have added nothing in the way of procedural safeguards against the erroneous deprivation of TFS's property interest and would have imposed a pointless administrative burden far out of proportion to any speculative benefit. There is no basis on which to conclude due process requires that the public hearing on the issue of

revocation be turned into a trial-type of proceeding with the formal presentation of evidence.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

DATED: January ___, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the attached ANSWER BRIEF ON THE MERITS is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents, authorities, and appendix signature block and this certificate, it contains 10,978 words.

DATED: January ___, 2012

_____
Alison M. Turner

APPENDIX

RELEVANT STATUTES AND REGULATIONS

Education Code

§ 47607

. . .

(c) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds, through a showing of substantial evidence, that the charter school did any of the following: [¶] (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the chapter. [¶] (2) Failed to meet or pursue any of the pupil outcomes identified in the charter. [¶] (3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement. [¶] (4) Violated any provision of law.

(d) Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to remedy the violation, unless the authority determines, in writing that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

(e) Prior to revoking a charter for failure to remedy a violation pursuant to subdivision (d), and after expiration of the school's reasonable opportunity to remedy without successfully remedying the violation, the chartering authority shall provide a written Notice of Intent to Revoke and notice of facts in support of revocation to the charter school. No later than 30 days after providing the Notice of Intent to Revoke a charter, the chartering authority shall hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter. No later than 30 days after the public hearing, the chartering authority shall issue a final decision to revoke or decline to revoke the charter. . . . The chartering authority shall not revoke a charter, unless it makes written factual findings supported by

substantial evidence, specific to the charter school, that support its findings.

. . .

(g)(1) If a county office of education is the chartering authority and the county board revokes a charter pursuant to this section, the charter school may appeal the revocation to the state board within 30 days following the decision of the chartering authority.
(g)(2) The state board may reverse the revocation decision if the state board determines that the findings made by the charter authority under subdivision (e) are not supported by substantial evidence.

California Code of Regulations, title 5 (effective 12/16/2011)

§ 11965

. . .

(d) "Notice of Intent to Revoke" means the written notice of a chartering authority's decision to pursue revocation of a school's charter due to the charter school's failure to remedy one or more violations identified in the Notice(s) of Violation. This Notice shall identify all of the following: [¶] (1) All evidence relied upon by the chartering authority determining that the charter school failed to remedy a violation pursuant to this section;

. . .

(f) "Notice of Violation" means the written notice of a chartering authority's identification of one or more specific alleged violations by the charter school based on the grounds for revocation specified in Education Code section 47607(c). This notice shall identify all of the following: [¶] (1) The charter school's alleged specific material violation of a condition, standard, or procedure set out in the school's charter pursuant to Education Code section 47607(c)(1); the specific pupil outcome(s) identified in the school's charter that the charter school allegedly failed to meet or pursue pursuant to Education Code section 47607(c)(2); the charter school's alleged fiscal mismanagement or specific failure to

following generally accepted accounting principles pursuant to Education Code section 47607(c)(3); or the specific provision(s) of law that the charter school allegedly failed to follow pursuant to Education Code section 47607(c)(4), as appropriate. [¶] (2) All evidence relied upon by the chartering authority in determining the charter school engaged in any of the acts or omissions identified in subdivision (f)(1) including the date and duration of the alleged violation(s), showing the violation(s) is/are both material and uncured, and that the alleged violation(s) occurred within a reasonable period of time before a Notice of Violation is issued; . . .

§ 11968.5.2

. . .

(a) At least 72 hours prior to any board meeting in which a chartering authority will consider issuing a Notice of Violation, the chartering authority shall provide the charter school with notice and all relevant documents related to the proposed action. . . . [¶] (c) Upon receipt of a Notice of Violation, the charter school's governing body . . . if it chooses to respond, shall take the following actions: [¶] (1) Submit to the chartering authority a detailed, written response addressing each identified violation which shall include the refutation, remedial action taken, or proposed remedial action by the charter school specific to each alleged violation. The written response shall be due by the end of the remedy period identified in the Notice of Violation. [¶] (2) Attached to its written response is supporting evidence of the refutation, remedial action, or proposed remedial action, if any, including written reports, statements, and other appropriate documentation.

(d) After conclusion of the reasonable opportunity to remedy, the chartering authority shall evaluate the response of the charter school's governing body as described in the school's charter response to the Notice of Violation and any supporting evidence, if submitted, and shall take one of the following actions: [¶] (1) If the chartering authority has substantial evidence that the charter school has failed to refute to the

chartering authority's satisfaction, or remedy of violation identified in the Notice of Violation, continue revocation of the school's charter by issuing a Notice of Intent to Revoke to the charter school's governing body as described in the school's charter; or [¶] (2) Discontinue revocation of the school's charter . . . . [¶] (f) On the date and time specified in the Notice of Intent to Revoke, the chartering authority shall hold a public hearing concerning revocation. No more than 30 calendar days after the public hearing (or 60 calendar days by written mutual agreement with the charter school) the chartering authority shall issue a Final Decision.

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