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Case No. S208611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUPREME COURT
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CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Plaintiff and Respondent,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.*

Defendants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B242601

Los Angeles Superior Court Case No. BC438336
Honorable Terry A. Green, Presiding Judge, Dept. 14

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I. INTRODUCTION

The Los Angeles Unified School District ("LAUSD") tries to obscure the simple legal question at the crux of this appeal: do the quasi-legislative implementing regulations[1] adopted by the State Board of Education ("Board") allow a school district to use district-wide "norming ratios" to allocate classrooms to charter schools under Prop. 39? *The answer is no.* The Implementing Regulations and their detailed regulatory history make no mention of "norming ratios" or any similar concept. As applied to Prop. 39's regulatory scheme, "norming ratios" are an LAUSD fabrication designed to short-change charter school pupils from receiving reasonably equivalent facilities under Prop. 39. LAUSD's application of "norming ratios" artificially caps the number of classrooms offered to charter schools, leaves space vacant or underutilized, and allows LAUSD to divert school facilities away from their primary purpose of educating K-12 students.

LAUSD accuses CCSA of promoting an "unfair" interpretation of the Implementing Regulations. To the contrary, it is not the role of LAUSD or any other school district unilaterally to change the Board's facilities sharing methodology under Prop. 39. In approving Prop. 39, the voters delegated that role to the Department of Education ("Department")

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[1] Cal. Code Regs., tit. 5, §§ 11969.1 – 11969.11 ("Implementing Regulations").

and the Board. (Ed. Code, § 47614, subd. (b)(6).) Understanding some school districts' inherent resistance to sharing facilities with charter schools, the Department and Board undertook two thorough rulemaking processes to develop regulations governing how school districts are to share public school facilities with charter schools. (Cal. Code Regs., tit. 5, § 11969.3.) The quasi-legislative rules the Board adopted are entitled to deference, and school districts may not violate them. (Ed. Code, § 35160; *Hartzell v. Connell* (1984) 35 Cal.3d 899 (*Hartzell*).)

In an attempt to evade review of its non-compliance with Prop. 39, LAUSD has fabricated an interpretation of the regulation at issue on appeal. LAUSD focuses solely on one word in the regulation—"provided"—but that singular focus contravenes well-established canons of construction dictating that a statute's or regulation's meaning should not be determined by analyzing just one word. (*People v. Shabazz* (2006) 38 Cal.4th 55, 67-68 (*Shabazz*).)

Further, having failed to submit any admissible evidence below showing how compliance with the clear methodology of Implementing Regulations section 11969.3, subdivision (b)(1), will cause the dire results it claims, LAUSD now seeks to make a new factual record in this Court. The time to create a factual record on this matter has long passed. LAUSD's inappropriate request for judicial notice should be denied.

This case boils down to the fact that LAUSD does not like the competition charter schools bring. LAUSD views students attending public charter schools as being no different than students attending private schools, and LAUSD views parents' and students' choices to attend charter schools as a problem it needs to restrict. (See CCSA's Conditional Request for Judicial Notice, Exh. A, at pp. 25-26.)

LAUSD may not fabricate its norming ratios concept and apply it to cap its offers to charter schools. The trial court was correct to order LAUSD to stop doing so. The Court of Appeal erred in reversing the trial court based on LAUSD's speculation that there might be "anomalous results" from following the rules as written.

II. ARGUMENT

A. The Implementing Regulations Do Not Allow LAUSD To Use District-Wide Norming Ratios When Allocating Classroom Space To Charter Schools Under Prop. 39

Despite LAUSD's oft-repeated assertion that its use of district-wide norming ratios to allocate classroom space to charter schools complies with Implementing Regulations section 11969.3, subdivision (b)(1) (e.g., Answer Brief ("AB") pp. 18-20, 44-45), the plain language of the regulation and its regulatory history provide *no support* for that position. Nowhere in the regulation or the Final Statements of Reasons is the concept of a "norming ratio," which is a classroom loading standard, or other similar district-wide averaging methods discussed. That is because the

Department and the Board did not intend to authorize school districts to use such shortcuts that fail to consider their entire classroom inventory when fulfilling their mandatory duties under Prop. 39 to provide reasonably equivalent facilities to charter schools.

Instead, the Implementing Regulations establish a precise methodology each school district *must* follow to ensure that the district provides reasonably equivalent facilities to each eligible charter school requesting facilities. Implementing Regulations section 11969.3 states that "[t]he following provisions *shall be used*" to determine whether a charter school is provided reasonably equivalent facilities as required by Prop. 39. (Cal. Code Regs., tit. 5, § 11969.3, emphasis added.) LAUSD has no discretion to deviate from that clearly outlined procedure. (See Ed. Code, § 75 ["'Shall' is mandatory and 'may' is permissive."]; *Governing Board of the Palos Verdes Unified School Dist. v. Felt* (1976) 55 Cal.App.3d 156, 163 ["The definition of 'shall' as mandatory in the pertinent provision of the Education Code itself requires that absent some indication that the statutory definition was not intended, it must be applied."].)

The plain language of section 11969.3, subdivision (b)(1), establishes that a school district (i) *must* calculate the comparison group schools' projected average daily attendance ("ADA") and (ii) *must* determine the number of teaching stations (classrooms) at the comparison group schools "using the classroom inventory prepared pursuant to

California Code of Regulations, title 2, section 1859.31, adjusted to exclude classrooms identified as interim housing." To determine the number of classrooms that must be provided to the charter school, the school district must calculate the classroom-to-ADA ratio by dividing the number of classrooms at the comparison group schools by the comparison group schools' projected ADA, and then multiply that ratio by the charter school's projected in-district ADA. (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).)

LAUSD criticizes CCSA for advocating a "mechanical approach" to implementing this clear regulation. (AB, p. 2.) CCSA's approach merely follows the regulation's plain language, which the Board promulgated and which the Department explained in the Final Statement of Reasons. It is LAUSD that takes an inappropriate mechanical approach, applying its district-wide norming ratios as a shortcut. The Department made clear that a school district *must* undertake the calculations described in section 11969.3, subdivision (b)(1), when determining whether the capacity of facilities offered to a charter school are reasonably equivalent to those of the comparison group schools.

The Final Statement of Reasons for the original Implementing Regulations states:

> The first test is the number of teaching stations; the subdivision *requires that charter schools be provided facilities that have the same ratio of teaching stations to ADA*

> *as comparison group schools.* To account for the possible addition of schools and classrooms to the school district's inventory, *the comparisons are calculated based on the projected number of teaching stations and projected ADA.* Charter school ADA is in-district classroom ADA because this ADA figure is the basis for the entitlement to facilities under Education Code section 47614. *Teaching stations are calculated* based on an established methodology in California Code of Regulations, Title 2, Section 1859.30, excluding portable classrooms that are temporarily available for renovation purposes.

(Final Statement of Reasons for Original Implementing Regulations, p. 6, emphasis added.)

Great weight should be given to the Final Statement of Reasons. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1000 (*Ridgecrest*).) Nowhere does the regulation or the Final Statement of Reasons state that if a school district uses district-wide norming ratios to assign students to classrooms at its own schools, that district may skip the comparison group schools' students-to-classrooms calculations and impose its norming ratios on charter schools. To the contrary, the Final Statement of Reasons states that the reasonable equivalency determination should not be based on district-wide averages. (Final Statement of Reasons for Original Implementing Regulations, pp. 5-6.)

LAUSD is free to use norming ratios to make its own staffing and budgetary decisions, thereby determining how many students it will assign on average to classrooms at the schools that it operates. But LAUSD may

not use its norming ratios instead of the regulation's specific methodology to limit how many classrooms it shares with charter schools.

B. Equitable Sharing Is The Heart Of Prop. 39, As Reflected In The Facilities Inventory Language Of Implementing Regulation Section 11969.3, Subdivision (b)(1)

Prop. 39 is anchored by the concept of sharing public school facilities fairly. (Ed. Code, § 47614, subd. (a).) That is especially so because prior to Prop. 39's passage charter schools struggled without equitable access to facilities and could only ask for leftover space after school districts satisfied their own needs. (*Ridgecrest, supra*, 130 Cal.App.4th at pp. 998-999.)

Prop. 39's requirement that school districts share facilities fairly with charter schools was designed to remedy that inequity. In adopting Prop. 39, the voters found that "[s]tudents in public charter schools should be entitled to reasonable access to a safe and secure learning environment." (Ballot Pamp., Gen. Elec. (Nov. 7, 2000), text of Prop. 39, § 2(e), p. 73, at http://vote2000.sos.ca.gov/VoterGuide/pdf/textproposedlaws.pdf.) Prop. 39's "reasonably equivalent" and "shared fairly" provisions mean that, "to the maximum extent practicable, the needs of the charter school must be given the same consideration as those of the district-run schools...." (*Ridgecrest, supra*, 130 Cal.App.4th at p. 1001.)

LAUSD claims that its "norming ratios approach" (which it calls the "Provided Approach") ensures that facilities are shared fairly. LAUSD

ignores the fact that it was up to the Department and the Board, not LAUSD, to determine *how* school districts must share facilities fairly.

In promulgating the Implementing Regulations, the Department and Board understood Prop. 39's mandate that public school facilities must be shared fairly among all public school pupils. (See Final Statement of Reasons for Original Implementing Regulations, pp. 1-2.) In exercising their delegated rulemaking authority (see Ed. Code, § 47614, subd. (b)(6)), the Department and Board undertook a rigorous process to craft detailed regulations governing how school districts must comply with Prop. 39.

The Department and Board chose to incorporate a regulation implementing another statute (the Leroy F. Greene School Facilities Act, Cal. Code Regs., tit. 2, § 1859.31) to specify how school districts must count classrooms at comparison group schools for Prop. 39 purposes, because that regulation already contained an "established methodology" that would be useful for counting classrooms under Prop. 39 (Final Statement of Reasons for Original Implementing Regulations, p. 6.) LAUSD and other school districts participated extensively in that rulemaking process, without raising any concern over incorporating by reference that classroom-counting method. (Final Statement of Reasons for Original Implementing Regulations, pp. 17-18; RJN in support of Opening Brief, Exh. D, pp. 191-193.)

Implementing Regulations section 11969.3, subdivision (b)(1), is a quasi-legislative rule promulgated under specific enabling legislation, so it is binding authority. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 10 Cal.4th 1, 10.) A subordinate governmental body, like LAUSD, has no discretion to ignore statewide regulatory commands simply because it subjectively believes that the regulation is inconsistent with the "intent" of the statute under which it was promulgated. (See, e.g., *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1080-1082.)

Moreover, it is LAUSD's use of "norming ratios" that is inherently inequitable. LAUSD's approach would mean that it would only share facilities based on what it actually chooses to use as a classroom, rather than on the classrooms it actually has and could use as classrooms. As CCSA explained in its Opening Brief, LAUSD's methodology itself leads to absurd results, allowing LAUSD to exclude classrooms it does not use on a full-time basis or that it uses to support classroom instruction, e.g., storage or staff lounges. (Opening Brief ("OB"), p. 41.) Conversely, there is nothing "unfair" about CCSA's position that LAUSD must comply with the regulation's plain language and not use norming ratios as an inequitable

shortcut.[2] That method is fair because it ensures that school districts do not have an incentive to put critically needed classroom space to marginal uses, and, in so doing, exclude them from charter schools' use.

To that end, LAUSD's claim that CCSA expects LAUSD to accommodate charter school students in conditions materially better than and unequal to those provided to students attending LAUSD-run schools is simply wrong.[3] CCSA asks only that LAUSD comply with the statewide Implementing Regulations that it is required to follow. Further, to try to bolster its claim that CCSA seeks "unfair" results, LAUSD states that charter schools are often already provided with facilities at more favorable ratios than LAUSD. (AB, p. 15.) LAUSD offers no evidence to support

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2 LAUSD cites repeatedly to a statement made by CCSA's counsel at oral argument before the trial court. (AB, pp. 1, 39 [citing Reporter's Transcript ("RT"), p. 7, lines 21-22].) That statement is taken out of context. In context, it is clear that CCSA's counsel argued that enforcing the regulation as written is fair, and added the point that because the regulation is also clear and mandatory it was not necessary to have an untethered argument about fairness. Contrary to LAUSD's disingenuous implication, CCSA's counsel did not argue that the regulation was unfair but had to be followed anyway.

3 LAUSD's citation to *Los Angeles International Charter High School v. Los Angeles Unified School District* (2012) 209 Cal.App.4th 1348 (*LAICHS*) is inapplicable. (AB, pp. 2-3.). *LAICHS* is about LAUSD's compliance with a writ, issued after LAUSD violated Prop. 39, and involved a facilities offer LAUSD made under judicial compulsion in the middle of a school year, rather than before the school year like the Implementing Regulations mandate. *LAICHS* notes the alleged burdens placed on the district when providing space to charter schools "in the midst of the school year." (*LAICHS*, *supra*, 209 Cal.App.4th at pp. 1359-1360, 1362.) Those considerations are not relevant here.

that claim, and indeed it is LAUSD that has the history of treating charter schools unfairly. For instance, in the past, LAUSD has offered facilities to charter schools with upwards of *80 to 135* students per classroom. (Appellant's Appendix, vol. 1, 22-23, 90 [hereinafter, [vol.] AA [pg.]].)[4]

C. LAUSD's Singular Focus On The Word "Provided" Contravenes Rules Of Construction

CCSA's interpretation of the regulation does not render meaningless the word "provided" as LAUSD contends. It is LAUSD's promotion of the use of norming ratios that renders portions of the regulation meaningless. CCSA's interpretation gives *all* of the regulatory language its proper meaning, without impermissibly "omit[ting] what has been inserted." (Code Civ. Proc., § 1858.) CCSA does so by reading and applying the language of the facilities inventory regulation at California Code of Regulations, title 2, section 1859.31, in conjunction with the rest of section 11969.3, subdivision (b)(1).

LAUSD claims that it interprets the Implementing Regulations faithfully, giving each word its plain meaning. (AB, pp. 15-18.) But LAUSD's "norming ratios" approach requires this Court to ignore a

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[4] LAUSD also misconstrues the Department's comment in the Final Statement of Reasons that charter schools would suffer the same level of overcrowding that school districts have. (AB, p. 33.) That statement relates to an actual lack of space when the unavailability of classrooms dictates how many students have to be put in a classroom. That statement does not relate to a school district's decision to place a larger number of students in a classroom because of budgetary constraints that limit the number of teachers it hires.

significant portion of section 11969.3, subdivision (b)(1). (See OB, pp. 24-26.) LAUSD's interpretation would give no meaning to the last two sentences of the regulation, which require a school district to determine the number of classrooms to put in the classroom-to-ADA ratio from the comparison group schools by using the specified classroom inventory.

LAUSD's approach boils a detailed regulatory scheme down to a misreading of the dictionary definition of the word "provided." (AB, p. 4.) LAUSD ignores canons of construction dictating that a statute or regulation's meaning should not be determined by analyzing only one word. (*Shabazz, supra,* 38 Cal.4th 55, 67-68 ["The meaning of a statute may not be determined from a single word or sentence...."].)

For reasons only LAUSD knows, it does not want to "us[e] the classroom inventory" as required by section 11969.3, subdivision (b)(1). Perhaps it would require what LAUSD considers too much work to deviate from its current practice, or maybe it would reveal disparities between district neighborhood schools that LAUSD would rather not highlight. Whatever the reason, LAUSD deals with it by bending over backwards to justify ignoring the language in the regulation altogether, or by offering interpretations to the language that have no legal basis.

1. LAUSD Erroneously Interprets The Word "Provided" To Mean Teachers Staffing A Classroom

Unlike LAUSD, which ignores the full text of the regulation, CCSA reads the regulation to give effect to all of its words. Children at LAUSD-run schools are *provided* all of the classrooms that must be accounted for under the facilities inventory regulation. It is LAUSD's choice to use some of them as classrooms and some for other purposes, which choices can change throughout the year. But LAUSD reads the regulation as if it applies to teacher staffing. LAUSD's norming ratios are based on the number of teachers LAUSD decides to hire for a school year, not on a calculation of the classrooms LAUSD actually has available for use. LAUSD ignores the fact that a classroom can be "provided" to students even if it does not have an assigned teacher (e.g., by using an unstaffed classroom as a study room). LAUSD wants the Court to ignore any classroom in which LAUSD's spending priorities have left that classroom without a teacher.

LAUSD misreads the "dictionary definition" of "provided" to narrow the word to mean "used as a classroom" and staffed with a teacher. (AB, p. 4.) LAUSD ignores the fact that the dictionary definition does not foreclose the possibility that a classroom can be "provided" to students even if it is used in some way other than having a teacher stationed in it. Classrooms can be "supplied" to students whether LAUSD actually assigns

a teacher to them or uses them in some other way to support students and their educational environment.

LAUSD's self-serving definition of "provided" also ignores the remainder of the regulation. The regulation must be read as a whole, not in isolated parts, and not by focusing on just one word. (*Shabazz, supra,* 38 Cal.4th at p. 67-68; *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1145-1146 (*Price*).)

Finally, recognizing that it cannot continue to ignore the regulation's explicit incorporation of the facilities inventory, LAUSD now claims the facilities inventory only defines what a classroom is, not whether that classroom should be counted in determining whether a classroom is "provided" to students attending comparison group schools. LAUSD ignores the fact that under LAUSD's newly created interpretation, the facilities inventory would serve no purpose.

2. LAUSD Defies The Carefully Designed Regulatory Scheme Developed By The Department And Board

LAUSD characterizes this case as involving two competing interpretive schemes: LAUSD's so-called "Provided Approach" and CCSA's approach, which LAUSD labels the "Inventory Approach." In fact, LAUSD's "Provided Approach" is just a short cut; a post hoc rationalization LAUSD concocted to try to defend its unlawful use of

norming ratios. The fiction of LAUSD's "Provided Approach" defies the regulatory scheme developed over two rulemaking cycles.

LAUSD ignores that the Department and Board intentionally included the Greene Act facilities inventory regulation (Cal. Code Regs., tit. 2, § 1859.31) as a key component of Implementing Regulation section 11969.3, subdivision (b)(1), and explicitly designated it as the means by which classrooms should be counted at comparison group schools. LAUSD dismisses the Department and Board's deliberate action, claiming that the Greene Act facilities inventory regulation is not a part of any regulatory scheme adopted to implement Prop. 39 and so somehow it must be given less weight. (AB, p. 5.)

That the Greene Act facilities inventory regulation originated outside of Prop. 39 does not impact its applicability to the Prop. 39 scheme, and LAUSD presents no authority to the contrary. If LAUSD objected to using the inventory regulation in determining how to allocate classrooms to charter schools, it should have said so when the Board was considering the Implementing Regulations. Now, years later, LAUSD does not want to follow the regulation, so it has created an unlawful method of reducing the number of classrooms it shares with charter schools.

Despite LAUSD's claims that it is reading the regulation faithfully, LAUSD interprets the regulation by admittedly inserting extraneous language. (See AB, p. 17.) If the regulation was written as LAUSD asserts

it is to be interpreted, it would state that whether a classroom is eligible to be counted depends on whether it is actually staffed with a teacher. The Board did not create such a limitation.

3. The Regulation's Title Supports CCSA's Position

LAUSD's misreading of the dictionary definition of "provided" also ignores that there are other meaningful words in the regulation that have a dictionary definition supporting CCSA's interpretation. The regulation here—section 11969.3, subdivision (b)(1)—is one of three subparts of subdivision (b) of Implementing Regulations section 11969.3. That subdivision, titled "Capacity," establishes the method for determining whether the capacity of a facility provided to a charter school is reasonably equivalent to the capacity of facilities in the comparison group.

The Department and Board chose the word "capacity" when they titled this subdivision. Merriam-Webster, the same dictionary LAUSD cites, defines "capacity" as "*the maximum amount or number that can be contained or accommodated.*" (Merriam-Webster's Online Dict. (2011) http://www.merriam-webster.com/dictionary/capacity, definition no. 2.b, emphasis added.)

As such, the "capacity" of a facility is its *maximum* potential use. The Implementing Regulations' use of the word "capacity" in this subdivision suggests that the Department and Board meant that this subdivision requires school districts to take a hard look at all of the

classrooms at the comparison group schools, not just those classrooms school districts decide to staff with a teacher.

D. LAUSD Inappropriately Manufactures A New Evidentiary Record At The Eleventh Hour And Misrepresents The Facts In This Case

Having failed to submit any admissible evidence below showing that compliance with the regulation's clear methodology will cause any dire consequences, LAUSD now inappropriately seeks to use judicial notice as a last-ditch attempt to manufacture an evidentiary record. As described in CCSA's opposition to LAUSD's motion requesting judicial notice ("RJN"), that is inappropriate. "[A]n appellate court generally is not the forum in which to develop an additional factual record...." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207 (*Peevy*).)

Nevertheless, LAUSD submits hundreds of pages of new information in its RJN, attempting to use those documents to prove the truth of the matters stated therein and make factual inferences from certain documents that are pure speculation. Both are improper. Judicial notice may only be taken of the existence of certain documents, not the truth of the matters stated within those documents. (E.g., *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1360, fn. 6.)

LAUSD's recitation of facts is inaccurate and disingenuous. LAUSD has attempted to paint a picture of past logistical and financial hardship that bears little resemblance to the enrollment and facilities

situation that exists at LAUSD today. Moreover, despite attempts to tug at heartstrings, LAUSD still cannot demonstrate that complying with the plain language of the regulation will cause any "unfair results." Finally, LAUSD repeatedly takes information CCSA presented to the trial court out of context, improperly implying nefarious motives.[5]

1. LAUSD's Attempt To Use Judicial Notice To Create A New Factual Record Is Improper

In support of its Answer Brief, LAUSD seeks judicial notice of (1) the text of ballot Measures Q and Y, bond measures passed by voters in 2008 and 2005, respectively; (2) LAUSD's Academic Performance Index ("API") Base Reports for 2005, 2011, and 2012; and (3) information from LAUSD's website purportedly listing LAUSD elementary school campuses where preschool programs operate.[6] LAUSD relies on information within those documents to introduce alleged facts to the record for the first time.

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[5] LAUSD refers to CCSA as "a registered lobbyist corporation," trying to imply something negative. (AB, p. 10.) LAUSD omits that CCSA registers that way because LAUSD requires it to do so. CCSA works on a daily basis with LAUSD on many charter school-related issues, and so is required to register as a lobbyist organization under LAUSD's Lobbying Disclosure Code.

[6] LAUSD also requests judicial notice of President Obama's 2013 State of the Union address, in which the President discussed the benefits of preschools. (LAUSD's RJN, Exh. 6; AB, p. 41.) A presidential speech touching on preschools is hardly relevant to the issue on appeal (i.e., whether LAUSD's use of norming ratios to allocate facilities to charter schools violates the Implementing Regulations). In any event, CCSA notes that President Obama has also touted the importance of charter schools. (CCSA's Conditional RJN, Exh. B.)

LAUSD's attempt to augment the record via judicial notice comes too late. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) LAUSD's improper citations cast a shadow on the entire recitation of LAUSD's "facts."

a. LAUSD Uses Ballot Measures Q And Y For The Truth Of The Matters Stated Therein

LAUSD cites to two ballot measures to assert that the overcrowding issues LAUSD had in the past are as much a problem as ever, despite LAUSD carrying out the largest school building program in the history of the United States at the same time its enrollment plummeted. LAUSD cites those ballot measures for the truth of the matters stated, quoting them nearly verbatim. (See CCSA's Oppo. to LAUSD's RJN, pp. 4-6.) While courts may take judicial notice of public records, they should not take judicial notice of the truth of factual matters stated therein. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

b. Correlating Increased API Scores To A Reduction In Classroom Size Is Pure Speculation

LAUSD also uses its flawed RJN to cite to its base API scores from 2005, 2011, and 2012, speculating without support that the modest increase in scores is tied to the increased space resulting from LAUSD's massive school construction program. (AB, pp. 9, 37; LAUSD's RJN, Exh. 3.) LAUSD offers no proof that the rise in API scores is connected to, let alone

the product of, its increased facilities capacity. The connection is speculative and thus irrelevant. (CCSA's Oppo. to LAUSD's RJN, pp. 6-8; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242 ["evidence which produces only *speculative* inferences is *irrelevant* evidence"], emphasis in original.)

c. Lists Of Preschools From LAUSD's Website Do Not Demonstrate That Preschools Use "Classrooms" They Would Lose To Charter Schools

LAUSD repeatedly asserts that CCSA's interpretation of the regulation could have dire consequences for preschool programs. However, as CCSA made clear in its Opening Brief, LAUSD has never presented any evidence to support that claim, relying only on the same "sky-is-falling" rhetoric it has often used to try to shield itself from any scrutiny of its Prop. 39 violations. (OB, pp. 49-51.) Now, for the first time, LAUSD seeks judicial notice of its own internet web pages discussing preschool programs in LAUSD, as well as lists of LAUSD elementary schools housing such programs. (LAUSD's RJN, Exhs. 4 & 5.) LAUSD's request is flawed.

First, as with the sample ballot measures, LAUSD seeks to augment the factual record at the eleventh hour. The time has passed to introduce new facts. (*Peevy, supra*, 17 Cal.4th at p. 1207.)

Second, citations to LAUSD's own website are self-serving, and in no way mean that the facts asserted in those documents are not reasonably

subject to dispute. (See CCSA's Oppo. to LAUSD's RJN, pp. 9-10; *Jolley v. Chase Home Finance, LLC* (2012) 213 Cal.App.4th 872, 889 [just because a document is on a public agency's website does not mean its content is not reasonably subject to dispute].) That is especially so given that the record demonstrates that LAUSD is in the process of building early education centers. (3 AA 674, 4 AA 866.) In any event, though preschool education is very valuable, it cannot take precedence over K-12 education. (Ed. Code, § 48200 [K-12 education is compulsory].)

Third, even if the web pages and lists of preschool locations were not reasonably subject to dispute, LAUSD impermissibly cites to the factual statements in those documents for the truth of the matters stated, i.e., the number of LAUSD campuses housing preschool programs. (See CCSA's Oppo. to LAUSD's RJN, pp. 9-10; see also AB, p. 9.)

Finally, LAUSD's web pages and lists say nothing about how many "classrooms" such programs occupy at the LAUSD elementary schools. LAUSD claims CCSA's interpretation of the regulation would require LAUSD to count classrooms actually used for preschools. But LAUSD cannot demonstrate that will occur because no evidence shows that preschool programs will occupy "classrooms" actually required to be counted in the inventory under California Code of Regulations, title 2, section 1859.31. Further, as discussed below, preschool classrooms built or acquired with funds specifically allocated for preschool purposes need not

be included in the inventory. (Cal. Code Regs., tit. 2, § 1859.32, subd. (f).) As such, the "hypothetical" LAUSD presents (AB, pp. 19-20), which assumes that 4 out of 20 classrooms at a typical elementary school are used by preschools, is speculative and has no factual foundation.[7]

LAUSD has failed to produce *any* evidence to support its speculation regarding impacts to preschools and, in any event, preschools although important cannot take precedence over K-12 education.

2. LAUSD's New Claim That CCSA's Interpretation Of The Regulation Will Harm Police Services At LAUSD Schools Has No Support In The Record

For the first time here, LAUSD states that CCSA's interpretation would impact LAUSD's provision of police services. (*Id.*) There is no support in the record or otherwise for LAUSD's assertion that police are operating out of LAUSD classrooms. LAUSD cites only to one page from a Prop. 39 offer for the 2012-13 school year which states that LAUSD police protect all children at LAUSD campuses, including those attending charter schools. (9 AA 2418.) CCSA recognizes the important role that LAUSD police play, but LAUSD has not demonstrated that police actually occupy its classrooms, or that there is no way to accommodate

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[7] Through that "hypothetical" and others, LAUSD draws the focus to preschools, adult education, and police services. This distracts from the fact that LAUSD's unlawful use of norming ratios means that *any* classroom not staffed with a teacher is not counted, allowing LAUSD to ignore even those classrooms that are simply left vacant, or used for storage or staff lounges.

police and charter school students. Further, even if LAUSD really does station police officers in classrooms that could be offered to charter schools, that fact would not let LAUSD disregard the facilities sharing regulation. (See *Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1567 (*Rao*); *Price, supra,* 192 Cal.App.4th at pp. 1145-1146.)

3. LAUSD's "Facts" Do Not Reflect Current Conditions

LAUSD paints a picture of past unbearable financial and logistical hardship resulting in overcrowding. Regardless of what happened in the past, the evidence indicates that current conditions are quite different. It is undisputed that at the same time LAUSD has been on an aggressive building spree over the past decade, its enrollment has plummeted. (2 AA 467-468.) At the same time, demand for charter schools has grown at a rapid pace, but not even close to the far greater pace at which LAUSD's enrollment has declined.

The narrative LAUSD constructs is based almost exclusively upon the state of affairs at LAUSD schools between ten and thirty years ago. (AB, pp. 6-8.) LAUSD enrollment may have increased between the mid-1980s and the mid-2000s, but since then, it has decreased dramatically. At the time LAUSD filed its summary adjudication motion in 2010, LAUSD projected its enrollment would drop by over 170,000 students

between the 2002-03 and 2012-13 school years—nearly 25 percent of its total enrollment. (2 AA 467-468.)

LAUSD's claim that its "enrollment decline has been offset by the 26,000 seats offered to charter school students" is incorrect. (AB, p. 7.) First, an offer that is so inadequate it is not accepted takes up no seats, and for the 2012-2013 school year only 16,000 seats in LAUSD-controlled campuses were actually occupied by charter school students. (AB, p. 12.) Second, the number of students attending charter schools on LAUSD campuses is just a small fraction of LAUSD's drastic loss of students.

LAUSD's enrollment continues to plummet at a rate far exceeding the increase in charter school enrollment. If this Court is willing to consider LAUSD's newly submitted evidence in its RJN, CCSA requests that the Court also consider recent LAUSD data showing projected enrollment at LAUSD-run schools and independent charter schools operating in LAUSD through the 2015-2016 school year. (See CCSA's Conditional RJN, pp. 4, 9-10.) The data reveals that LAUSD expects the trend of rapidly decreasing enrollment to continue, projecting a decrease of another 55,000 students between the 2012-2013 and the 2015-2016 school years, while charter schools are anticipated to add an additional 28,000 students during that same period. (See Conditional RJN, Exh. C, pp. 194-195.)

The following table illustrates these projected enrollment statistics:

School Type	2012-2013 School Year Enrollment (Actual)	2015-2016 School Year Enrollment (Projected)	Net Change From 2012-13 to 2015-16
LAUSD-Run Schools	566,604	511,776	- 54,828
Charter Schools[8]	89,112	117,722	**+ 28,610**

LAUSD claims that its facilities remain crowded. (AB, p. 8.) LAUSD's support of those claims is based on old facts from many years past. Since 1997, the voters in Los Angeles have approved billions of dollars in bonds for the construction of new schools and upgrades to existing schools in LAUSD, with over 130 new K-12 schools having been constructed. (4 AA 1074, 1089; Conditional RJN, Exh A, p. 25.)[9] When this facilities expansion is coupled with LAUSD's large drop in enrollment over the past decade, along with its projected future drop, LAUSD's claim

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[8] These statistics include charter schools occupying non-LAUSD facilities *and* LAUSD-controlled facilities. Most charter schools in LAUSD do *not* occupy LAUSD-controlled facilities. For the 2012-2013 school year, only approximately 16,000 charter school students occupied LAUSD-controlled facilities (AB, p. 12), which is less than 20 percent of charter school enrollment.

[9] LAUSD claims charter schools in LAUSD have benefitted from the direct allocation of bond funds. (AB, p. 7.) However, the funds allocated to charter school facilities under Measures K, R and Y pales in comparison to the billions of dollars allocated to building new and modernizing existing LAUSD-run schools. In addition, the $450 million allocated to charter schools' facilities under Measure Q cannot be accessed for several years due to a decline in assessed property values. (4 AA 1075.)

that it cannot comply with the plain language of the regulation without causing dire results to students attending LAUSD-run schools rings hollow.

4. LAUSD Disingenuously Claims That CCSA's Interpretation Will Require LAUSD To Offer Charter Schools Space At Ratios Approximating 10 To 15 Students Per Classroom

LAUSD asserts repeatedly that CCSA's interpretation of the Implementing Regulations will require charter school students to be accommodated at ratios of between 10 to 15 students per classroom. (AB, pp. 2, 5, 30, 34.) LAUSD makes this assertion based on a chart that CCSA submitted in support of the motion underlying this appeal. (10 AA 2663.)

The chart presented just one example of a Prop. 39 offer to demonstrate that the number of classrooms that the exemplar charter school was entitled to was significantly different from and much higher than those it was offered based on LAUSD's unlawful use of norming ratios. LAUSD cannot extrapolate from this single illustration to show that CCSA's interpretation of the regulation would require that charter school students be accommodated at 10 to 15 students per classroom every time a charter school occupies LAUSD facilities. Under the regulation's formula, the number of classrooms LAUSD must offer to a charter school must be based on an individualized calculation for each charter school dependent on the applicable comparison group schools.

In any event, contrary to LAUSD's claim (see AB, pp. 42-43), the record shows that LAUSD's use of norming ratios artificially reduces the number of classrooms that LAUSD offers charter schools. In letters responding to LAUSD's Prop. 39 offers, charter schools noted that the offers did not provide the charter schools with enough classrooms to serve their students. (See 9 AA 2336; 10 AA 2625 [charter school offered 5 fewer classrooms than currently using despite growth]; 10 AA 2608 [charter school offered 3 fewer classrooms than currently using]; 10 AA 2609-2610 [charter school increased by 63 students but was offered only one additional classroom].)

Further, LAUSD cites to a table purportedly showing average ratios of students to classrooms at the comparison group schools selected for the various charter schools CCSA used as exemplars in its motion. (AB, pp. 43-44.) LAUSD claims that this "evidence" demonstrates that LAUSD provided facilities to charter schools in the same ratio of classrooms to ADA at comparison group schools. However, LAUSD never provided any foundational support for these purported "average ratios," and merely included numbers in a chart attached to a conclusory declaration of LAUSD's Prop. 39 Program Manager. (10 AA 2719, 2724-2729, 2792, 2794.) The trial court correctly expressed skepticism with this information, noting "[t]hose are just numbers to me" (RT, p. 24, line 18), and did not rely on that information. As a trial court's evidentiary findings are

presumed correct, LAUSD's citation to those numbers have no probative value. (See e.g., *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 833 [an appellate court "must accept any reasonable interpretation of the evidence which supports the trial court's decision"].)

5. The Settlement Agreement Does Not Authorize LAUSD To Violate The Implementing Regulations

LAUSD also implies that the April 22, 2008, settlement agreement ("Settlement Agreement") it entered into with CCSA allows it to deviate from Prop. 39's legal requirements. (AB, pp. 9-10.) LAUSD misreads the Settlement Agreement and ignores the law. Even if LAUSD could dispense with its legal obligations in a settlement agreement, which it cannot, the Settlement Agreement clearly states at Paragraph 3 that LAUSD must make offers "that comply with Proposition 39 and any Proposition 39 implementing regulations in effect at that time." (1 AA 64.)

Moreover, the Settlement Agreement cannot reduce LAUSD's statutory obligations, as "[a] settlement agreement cannot override state law absent a specific determination that federal law has been or will be violated." (*League of Residential Neighborhood Advocates v. City of Los Angeles* (9th Cir. 2007) 498 F.3d 1052, 1053; see also *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 187.) LAUSD cannot avoid its Prop. 39 obligations by hiding behind its misreading of the Settlement Agreement.

E. Compliance With CCSA's Interpretation Will Not Yield Anomalous Results

LAUSD's assertion that complying with the Implementing Regulations will yield "absurd" results remains nothing more than speculation, which assumes without evidence that there is no non-absurd way LAUSD could make offers while following the rules. Even if the mandatory classroom inventory formula might, in limited situations, present situations LAUSD wants to avoid, the Court should interpret the regulation to ensure that all of its words are considered as a whole and harmonized to avoid any potential absurdity. (See *Rao, supra*, 233 Cal.App.3d at p. 1567.)

1. CCSA's Discussion Regarding Classrooms Occupied By Charter Schools At Comparison Group Schools Is Not Contradictory

Contrary to LAUSD's claims, CCSA's proposal for addressing those unique situations where a charter school might occupy space at a comparison group school is not "contradictory." First, there is only a limited potential for this situation to arise because most LAUSD campuses do not have both a charter school and a traditional LAUSD-run school. LAUSD has over 500,000 K-12 students enrolled in close to 1,000 traditional LAUSD-run schools, but just about 16,000 charter school students attend school at an LAUSD-controlled campus. (AB, p. 12; 4 AA 939, 1074; 9 AA 2540; 10 AA 2701.) Given LAUSD's abysmal

compliance record, in those rare instances where a charter school applies for and accepts space at an LAUSD campus that is then included as a comparison group school, CCSA offered the following options for calculating classroom space occupied by a charter school:

(1) LAUSD could exclude classrooms allocated exclusively to a charter school when determining the classroom-to ADA ratio at the comparison group school, and also exclude the charter school's ADA when calculating that comparison group school's classroom-to-ADA ratio; or

(2) LAUSD could count all classrooms at the comparison group school campus, and include the co-locating charter school's ADA as part of the comparison group school's ADA when calculating the comparison group school's classroom-to-ADA ratio.

Nothing about these options is inconsistent with CCSA's legal arguments, or with the regulations governing how school districts should use the inventory. CCSA is not proposing that the facilities inventory regulation be read differently than it is written, as LAUSD mistakenly claims. (AB, pp. 23-24.) CCSA is only proposing workable solutions to the extent an impractical situation arises after the Implementing Regulations have been faithfully construed. These solutions are only relevant in the limited instances where one of the few comparison group

schools might be accommodating charter school students in the upcoming school year.

2. CCSA's Interpretation Regarding Counting Unbuilt Classrooms Also Is Not Contradictory

LAUSD claims that CCSA's treatment of an unbuilt classroom at a comparison group school is also contradictory. LAUSD misreads CCSA's point.

CCSA's point about unbuilt classrooms that will not be finished by the next school year is straight-forward and based on the regulatory language. Because the classroom-to-ADA ratio at a comparison group school must be calculated using the *projected* number of classrooms at that school for the upcoming school year, an unbuilt classroom that will not be completed by that school year need not be counted. Unbuilt classrooms do not yet exist, so they are not "projected" to exist for the upcoming year. This common sense truth fits perfectly well within the regulation and does not contradict CCSA's primary argument that LAUSD must follow the regulatory mandate to make facilities offers based on an inventory of classrooms that actually exist.

3. Section 1859.32 Of The Greene Act Regulations Removes Certain Preschool And Adult Education Classrooms From Section 1859.31's Inventory

LAUSD claims that CCSA's interpretation of the regulation would require LAUSD to count classrooms as part of the comparison group

classroom-to-ADA ratio that are being used for purposes other than traditional K-12 education, such as preschools and pre-kindergarten centers, adult education centers, and parent centers. (AB, pp. 26-27.) LAUSD has not presented any evidence to support its claim that counting those classrooms in the ratio would actually cause negative impacts to students attending LAUSD-run schools. However, even if LAUSD could and did present evidence in support of its claim, principles of statutory and regulatory interpretation dictate that this cannot justify entirely disregarding the facilities inventory and instead using the fundamentally different methodology of norming ratios. (See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.) In addition, a key canon of construction is that regulations relating to the same subject matter should be construed together. (*Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 523-524 (*Hoitt*).)

Section 1859.31—the "Gross Classroom Inventory" regulation—cannot be read in isolation. The section that follows it, section 1859.32, is titled "Adjustments to the Gross Classroom Inventory," and states that "[a]fter the gross classroom inventory has been prepared pursuant to section 1859.31, *it will be reduced by the following*." (Cal. Code Regs., tit. 2, § 1859.32, emphasis added.) Section 1859.32 then lists classrooms to be *excluded* from the inventory. (*Id.*)

With respect to any classroom used exclusively for preschool, child care, and/or adult education programs, Section 1859.32 says that as long as that classroom "was built or acquired with funds *specifically available for those purposes*" it can be eliminated from the inventory. (*Id.*, § 1859.32, subd. (f), emphasis added.) So, although section 1859.31 requires classrooms used for preschool programs to be counted in the inventory, (*Id.*, § 1859.31, subd. (f)), to the extent those classrooms were built or acquired with funds made available for preschool purposes, section 11969.3, subdivision (b)(1), ensures that those classrooms are not counted when LAUSD determines the classroom-to-ADA ratio at the comparison group schools. The same applies to adult education centers. (*Id.*, § 1859.32, subd. (f).)

As far as classrooms used for non-traditional or non-teaching purposes, such as parent centers or administrative space, although classrooms "converted to any non-classroom purpose" are to be included in the inventory (*id.*, § 1859.31, subd., (g)), as CCSA discussed in its Opening Brief, this provision must be read together with Implementing Regulations section 11969.3, subdivision (b)(3), which governs the allocation and/or access to "non-teaching station space" to charter schools under Prop. 39. (OB, pp. 47-48.) To the extent that there is a conflict between the two provisions, the specific provision (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(3)) takes precedence over the general provision (Cal. Code Regs., tit. 2,

§ 1859.31, subd. (g).) (*Hoitt, supra*, 207 Cal.App.4th at p. 524.) When the provisions are so harmonized, classrooms converted to non-teaching station space—including parent centers—need not be counted when LAUSD calculates the classrooms-to-ADA ratio required by Implementing Regulations section 11969.3, subdivision (b)(1), as those will be shared with charter schools pursuant to section 11969.3, subdivision (b)(3).

F. *Bullis* Supports The Position That LAUSD Must Count All Available Classrooms At Comparison Group Schools

LAUSD claims that *Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022 (*Bullis*) supports its position. To the contrary, the *Bullis* court was clear: a school district satisfies its Prop. 39 obligations "only if it considers the entire nonclassroom space in the facilities offer." (*Bullis, supra,* 200 Cal.App.4th at p. 1047.) LAUSD cannot use its own decisions about how to use classrooms to limit how many classrooms it offers to charter schools.

In *Bullis*, the court did not distinguish between "space *available* to the students at the comparison group schools" and space otherwise in existence on their campuses, as LAUSD attempts to do. (AB, p. 46, emphasis in original; *Bullis, supra*, 200 Cal.App.4th at p. 1047.) Rather, the *Bullis* court found that the school district violated Prop. 39 precisely because its self-serving methodology failed to account for "*all* of the facilities of the comparison group schools," regardless of how that space

was being used. (*Bullis, supra*, 200 Cal.App.4th at p. 1030, emphasis in original.) *Bullis* directly supports CCSA's interpretation.

G. LAUSD's Reliance On *Hartzell* And *Ripon* Is Misplaced

This Court's decision in *Hartzell* is clear that when quasi-legislative Board regulations address a specific program, activity or matter, school districts have no discretion to deviate from the express requirements of that regulation. (*Hartzell, supra,* 35 Cal.3d at p. 916.) Nothing in Prop. 39, the Implementing Regulations, or their regulatory history allows a school district to skip the calculations required by section 11969.3, subdivision (b)(1), and use district-wide norming ratios to allocate classroom space to charter schools. Accordingly, LAUSD's actions contradict Education Code section 35160 and *Hartzell.*

LAUSD is wrong when it states that its use of norming ratios is sanctioned by Education Code section 35160 and case law interpreting that section, including *Hartzell.* (AB, pp. 47-48.) LAUSD also incorrectly relies on *Governing Board of Ripon Unified School District v. Commission on Professional Conduct* (2009) 177 Cal.App.4th 1379 (*Ripon*). In *Ripon*, the Education Code sections requiring public school teachers to be certified to teach English learner students were directly related to the school district's rule that all teachers become so certified, and the plaintiff failed to demonstrate that the district's rule was preempted by any conflicting state statute. (*Ripon, supra*, 177 Cal.App.4th at p. 1383, 1387-1390.)

Here, section 11969.3, subdivision (b)(1), imposes a specific methodology school districts must follow when determining how many classrooms must be offered to charter schools. Unlike *Ripon*, there is no direct correlation between norming ratios and the calculations mandated by the regulation.

Further, the broad grant of power LAUSD claims pursuant to Education Code section 35160 and *Ripon* is limited where a more specific law applies. (*California Teachers Assn. v. Governing Bd. Of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 649; cf. *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 526.) The Implementing Regulations are specific laws governing how school districts must allocate space to charter schools, and LAUSD's actions directly "conflict with" those laws. Section 11969.3, subdivision (b)(1), therefore limits LAUSD's purported authority under Education Code section 35160 to use norming ratios in making offers to charter schools.

III. CONCLUSION

LAUSD's interpretation of the Implementing Regulations does not faithfully read and assign meaning to all of the carefully chosen language that delineates the specific method a school district must employ to offer classrooms to charter schools under Prop. 39. LAUSD's norming ratios have no place in Prop. 39 law, and must not be used to avoid the calculations required by section 11969.3, subdivision (b)(1).

CCSA respectfully requests that this Court reverse the Court of Appeal's decision, restoring the trial court's order.

Respectfully submitted,

DATED: October 10, 2013

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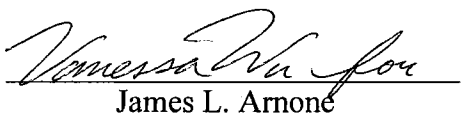
By: 
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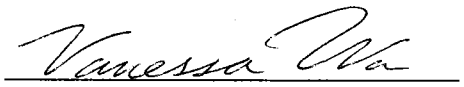
By: 
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 10, 2013**, at San Francisco, California.

Elizabeth Alvarez