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Case No. S_____

# IN THE SUPREME COURT

# OF THE STATE OF CALIFORNIA

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**CALIFORNIA CHARTER SCHOOLS ASSOCIATION,**

*Plaintiff and Respondent,*

v.

**LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.***

*Defendants and Appellants.*



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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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## PLAINTIFF AND RESPONDENT CALIFORNIA CHARTER SCHOOLS ASSOCIATION'S NOTICE OF MOTION AND MOTION REQUESTING JUDICIAL NOTICE; DECLARATION OF WINSTON P. STROMBERG AND EXHIBITS THERETO; *[PROPOSED] ORDER LODGED CONCURRENTLY HEREWITH*

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LATHAM & WATKINS LLP
James L. Arnone (Bar No. 150606)
Winston P. Stromberg (Bar No. 258252)
Evangeline A.Z. Burbidge (Bar No. 266966)
Michele L. Leonelli (Bar No. 280867)
355 South Grand Avenue
Los Angeles, California 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
Email: james.arnone@lw.com

CALIFORNIA CHARTER SCHOOLS ASSOCIATION
Ricardo J. Soto (Bar No. 167588)
Julie Ashby Umansky (Bar No. 183342)
Phillipa L. Altmann (Bar No. 186527)
250 East 1st Street, Suite 1000
Los Angeles, California 90012
Telephone: (213) 244-1446
Facsimile: (213) 244-1448
Email: paltmann@calcharters.org

Attorneys for Plaintiff and Respondent

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Facsimile: (213) 891-8763
Email: james.arnone@lw.com

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Phillipa L. Altmann (Bar No. 186527)
250 East 1st Street, Suite 1000
Los Angeles, California 90012
Telephone: (213) 244-1446
Facsimile: (213) 244-1448
Email: paltmann@calcharters.org

Attorneys for Plaintiff and Respondent

## NOTICE OF MOTION AND MOTION

**PLEASE TAKE NOTICE** that, pursuant to California Rules of Court Rules 8.520(g) and 8.252(a), and California Evidence Code Sections 452(b), 452(c), and 459, Plaintiff and Respondent California Charter Schools Association ("CCSA") hereby moves this Court to take judicial notice of the following true and correct documents, which are attached hereto as Exhibit A to the Declaration of Winston P. Stromberg.

**Exhibit A**: **Final Statement of Reasons Accompanying the Adoption of Proposition 39's Implementing Regulations.**

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities and Declaration of Winston P. Stromberg, Exhibit A attached thereto, the complete records and files of this Court, and the [Proposed] Order, lodged concurrently herewith, granting this Motion.

Respectfully submitted,

Dated: February 12, 2013

LATHAM & WATKINS LLP
James L. Arnone
Winston P. Stromberg
Evangeline A.Z. Burbidge
Michele L. Leonelli

By: _____
Winston P. Stromberg
Attorneys for Plaintiff and Respondent
California Charter Schools Association

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. THE SUPREME COURT SHOULD TAKE JUDICIAL NOTICE AS REQUESTED

### A. General Principles of Judicial Notice

Evidence Code Section 459 permits a reviewing court to judicially notice facts in the same manner as a trial court. (Evid. Code, § 459.) Judicial notice may be taken of "[r]egulations and legislative enactments issued by . . . any public entity in the United States," as well as "[o]fficial acts of the legislative, executive, executive, and judicial departments of . . . any state of the United States." (Evid. Code, § 452(b), (c).)

"Judicial notice is the recognition and acceptance by the court, for use . . . by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley* v. *Law Office of Cantrell, Green, Pekich, Cruz, & McCort* (2001) 91 Cal.App.4th 875, 882, citations and quotations omitted.) "The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*." (*Ibid.*, emphasis in original.)

## B. The Court Should Take Judicial Notice of The Final Statement of Reasons Accompanying the Adoption of Proposition 39's Implementing Regulations

A state agency's final statement of reasons[1] is the proper subject of judicial notice. (*Cal. Farm Bureau Federation v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 187-188 & fn. 8.)

Attached as Exhibit A to the Declaration of Winston P. Stromberg is a true and correct copy of the Final Statement of Reasons for regulations adopted by the State Board of Education in 2002 to implement Proposition 39.[2] Pursuant to California Rules of Court Rule 8.252(a)(2)(A), Exhibit A is relevant because it demonstrates the importance of the comparison group analysis in determining whether a school district has provided reasonably equivalent facilities to a charter school under Prop. 39. Exhibit A is also relevant because it demonstrates the State Board's intention to prevent school districts from using district-wide comparison groups when providing "reasonably equivalent" classroom space to charter schools.

A reviewing court is required to take judicial notice of any matter the trial court has properly judicially noticed. (Evid. Code, § 459, subd. (a).) In accordance with California Rules of Court Rule 8.252(a)(2)(B), the

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[1] When a state agency proposes the adoption of regulations, it must prepare a final statement of reasons to accompany that adoption. (See Gov't Code, § 11346.9(a).)

[2] The State Board of Education adopted the Proposition 39 Implementing Regulations in 2002 and amended them in 2008. (*Cal. School Boards Assn. v. State Bd. of Ed.* (2010) 191 Cal.App.4th 530, 542.)

matter to be judicially noticed was presented to the trial court, and on June 27, 2012, the trial court properly took judicial notice of the Final Statement of Reasons. (Reporter's Transcript, page 11, lines 7-8, attached hereto as Exhibit B; see also Appellant's Appendix, vol. 10, pages 2666-2694.)

Finally, in accordance with California Rules of Court Rule 8.252(a)(2)(D), the matter to be noticed does not relate to proceedings occurring after the trial court order that is the subject of the appeal.

## II. CONCLUSION

Based on the foregoing, CCSA respectfully requests that this Court grant CCSA's Motion Requesting Judicial Notice of the attached Final Statement of Reasons for Proposition 39's Implementing Regulations.

Respectfully submitted,

Dated: February 12, 2013

LATHAM & WATKINS LLP
James L. Arnone
Winston P. Stromberg
Evangeline A.Z. Burbidge
Michele L. Leonelli

By: _____
Winston P. Stromberg
Attorneys for Plaintiff and Respondent
California Charter Schools Association

## DECLARATION OF WINSTON P. STROMBERG

I, Winston P. Stromberg, declare as follows:

1. I am an associate with the law firm of Latham & Watkins LLP, counsel of record for Plaintiff and Respondent California Charter Schools Association ("CCSA"), and am a member in good standing of the State Bar of California. I have personal knowledge of the matters stated herein, and if called to testify could and would testify competently to them.

2. Attached hereto as Exhibit A is a true and correct copy of the Final Statement of Reasons accompanying the State Board of Education's adoption of Proposition 39's Implementing Regulations.

3. Attached hereto as Exhibit B is a true and correct copy of the reporter's transcript from the June 27, 2012, trial court hearing in *California Charter Schools Association v. Los Angeles Unified School District, et al.* (Super. Court, Los Angeles County, No. BC438336).

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 12, 2013, in Los Angeles, California.

Winston P. Stromberg

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## FINAL STATEMENT OF REASONS

### SPECIFIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THAT THE REGULATIONS ARE INTENDED TO ADDRESSS

Proposition 39, enacted by the voters on November 7, 2000, changed the required local voter approval of public school and community college general obligation bonds from two-thirds to fifty-five percent of the votes. It also amended Education Code section 47614, imposing a new requirement that school districts provide facilities to charter schools operating in their jurisdictions.

As amended, Education Code section 47614 contains the following specific provisions:

- It is the intent of the people that all public school facilities should be shared fairly among all public school pupils, including those in charter schools.
- School districts must make facilities available to charter schools that either are providing classroom education to at least 80 in-district students or have identified at least 80 in-district students meaningfully interested in attending the charter school in the next year.
- Facilities must be sufficient to accommodate the charter school's in-district students.
- The condition of the facilities must be reasonably equivalent to facilities other district students attend.
- Facilities must be contiguous, furnished, and equipped, and remain school district property.
- School districts must make reasonable efforts to provide facilities near where the charter school wishes to locate, and must not move the charter school unnecessarily.
- For use of the facilities, school districts may charge charter schools no more that a pro rata share of the school district's facilities costs paid from unrestricted general fund revenues.
- No school district is required to use unrestricted general fund revenues to rent, buy, or lease facilities for charter schools.
- Charter schools desiring facilities from a school district must provide reasonable projections of the average daily classroom attendance (classroom ADA) of in-district students.
- School districts must base facilities allocations on the projections supplied by the charter school.
- Charter schools must reimburse school districts for over-allocated space in the event that actual in-district classroom ADA is less than projected, based on reimbursement rates to be established by the State Board of Education.
- The measure takes effect on November 8, 2003—sooner in school districts holding successful local school bond elections.

Education Code section 47614 requires the State Department of Education (California Department of Education, CDE) to develop, for State Board of Education (State Board) consideration, regulations implementing the measure. The regulations must include, but are not limited to:

- Defining the terms "classroom ADA," "conditions reasonably equivalent," "in-district students," and "facilities costs."
- Defining procedures and establishing timelines for the request for, reimbursement for, and provision of, facilities.

In addition, Education Code section 47614(b)(2) requires the State Board to set reimbursement rates for over-allocated space.

## SPECIFIC PURPOSE OF THE REGULATIONS

The proposed regulations implement the requirements in Education Code section 47614 that CDE propose regulations defining terms and establishing procedures and timelines and the State Board set reimbursement rates for over-allocated space. In addition to addressing the items specifically identified in the measure, the proposed regulations define the terms "operating in the school district," "contiguous," and "furnished and equipped." They also specify responsibilities with respect to maintaining facilities provided to a charter school by a school district, and require reporting of classroom ADA to support the determination as to whether space has been over-allocated.

## AUTHORITY AND REFERENCE

Authority for the proposed regulations is provided in Education Code section 47614(b). Education Code section 47614(b) states that the State Board may adopt regulations implementing subdivision (b), including but not limited to, defining the terms "average daily classroom attendance," "conditions reasonably equivalent," "in-district students," and "facilities costs." The regulations may also define the procedures and establish timelines for the request for, reimbursement for, and provision of, facilities.

The reference for the proposed regulations is Education Code section 47614.

## NECESSITY

The proposed regulations are necessary to implement the requirements established by Education Code section 47614. Specifically, the proposed regulations clarify the circumstances in which charter schools are entitled to receive facilities from school districts, specify the obligations of school districts in supplying facilities to charter schools, and establish a process for school districts and charter schools to use in implementing Education Code section 47614.

The rationale for each specific regulation follows by section.

Section 11969.1. Purpose.

This section states that the group of sections that follow govern provision of facilities by school districts to charter schools under Education Code section 47614. This section serves as an introduction to the group of sections and also restricts the application of these proposed regulations to the provision of facilities under Education Code section 47614. Thus, charter

schools and school districts may continue existing facilities arrangements or develop new arrangements outside of Education Code section 47614, which would not be subject to the regulations.

Section 11969.2. Definitions.

Subdivision (a) defines "average daily classroom attendance," or "classroom ADA." This is one of the definitions that Education Code section 47614 requires CDE to develop. The regulation defines classroom ADA as ADA for classroom-based apportionments as used in Education Code section 47612.5. This section defines classroom-based instruction at a charter school as occurring only when charter school pupils are engaged in educational activities required of those pupils and under the immediate supervision and control of a certificated employee. The section references classroom-based instruction apportionments as used in Education Code section 47612.5, which was added by Senate Bill 740 (SB 740, Chapter 892, Statutes of 2001). SB 740 places restrictions on funding for non-classroom-based instruction provided by charter schools.

The State Allocation Board has developed a procedure for determining which students are students of the school district and which students need classroom space in connection with calculating school districts' entitlement to state bond funding for facilities. The definitions in this proposed regulation take a different approach than the approach taken by the State Allocation Board. The differences in the approach and the rationale for the differences are discussed together below under subdivision (c).

Subdivision (b) defines "operating in the school district" as it is used in Education Code section 47614. The definition of "operating" in Education Code section 47614(b)(5) focuses on the possibility that a charter school may or may not actually be serving students at the time of the facilities request; thus, a charter school that is not yet actually serving students may nevertheless be considered to be "operating." Clarification of the statutory definition is necessary because it does not address (1) whether the charter school requesting facilities must be physically located in the school district and (2) whether the charter school must have received its authorization (charter) from the school district from which it is requesting facilities.

Subdivision (b) clarifies that both the actual physical location of the charter school's facilities (if any) at the time of the request and whether or not the school district authorized the charter are irrelevant to the determination as to whether the charter school is entitled to request facilities from a given school district. With this clarification, the important factor in this determination remains the enrollment or likely enrollment of in-district students—the factor cited in the statutory definition.

Subdivision (c) defines "in-district student" to be a student who is both entitled to attend district-operated schools and could attend district-operated schools. This is one of the definitions that Education Code section 47614 requires CDE to develop. The entitlement to attend district-operated schools is set forth in various sections of the Education Code and is usually based on residence location. The requirement that an in-district student must be able to attend district-operated schools is intended to limit the definition of in-district students only to those students

that are in grades offered by the school district—thereby preventing charter high schools from requesting facilities from an elementary school district, for example.

The proposed regulations exclude from the definition of "in-district student" those students who attend district schools based on interdistrict attendance permits or based on parental employment. These students do not need special permission to attend the charter school because charter schools do not have attendance areas. Allowing these students to be considered in-district students would create an incentive for charter schools to encourage their students to apply for in-district status and would create an unnecessary workload pressure for the school district.

The State Allocation Board has developed a procedure for determining which students are students of the school district and which students need classroom space in connection with calculating school districts' entitlement to state bond funding for facilities. Students are considered to be students of the school district if the district includes the students in the counts it submits to the California Basic Educational Data System (CBEDS). Under CBEDS, charter school students are counted in the district that authorized the charter, regardless of where they live. Charter school students are assumed to need classroom space if they are in independent study programs but not if they attend a charter school via the Internet or by a home school program.

The definitions in subdivisions (a) and (c) take a different approach than the approach taken by the State Allocation Board. With respect to determining whether charter school students are considered to be students of the school district, subdivision (c) provides that charter school students are in-district students by virtue of their residence, while the State Allocation Board uses CBEDS reporting rules. This is based on interpreting Education Code section 47614 as intending to limit the obligation of school districts so that they are required to provide facilities only for charter school students that they would otherwise be required to house. A variety of individual provisions in the section support this interpretation; the primary support is that there would be no need to define "in-district students" if the proponents intended all students of the charter school to be included.

With respect to determining whether charter school students are entitled to classroom space, subdivision (a) provides that the students are entitled to classroom space only if they receive classroom-based instruction, as defined. The State Allocation Board procedure, in contrast, includes some students who do not now need classroom space, such as students in independent study programs, on the basis that these students may need classroom space eventually thus should be included for facility planning purposes. The approach taken by this regulation is more appropriate for purposes of short-term facility allocations.

Subdivision (d) defines "contiguous" as contained on the school site or immediately adjacent to the school site. Education Code section 47614 requires that facilities allocated to a charter school be contiguous. The main purpose of subdivision (d) is to provide guidance in the situation where no single school site operated by a school district is large enough to accommodate the charter school. Subdivision (d) states that contiguous facilities can also include facilities located at more than one site, provided that the school district shall minimize the number of sites assigned and shall consider student safety.

Subdivision (e) defines "furnished and equipped" to mean that a facility contains all the furnishings and equipment necessary to conduct classroom-based instruction, including desks, chairs, and blackboards. This subdivision has the effect of clarifying that school districts are not responsible for providing such items as computers and office machines.

Section 11969.2 specifically does not provide any guidance on what should be considered "reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate." This is because the statutory language provides a balance between favoring charter school students and favoring students in district-operated programs. The intent language in Education Code section 47614(a) states that public school facilities should be shared fairly among all public school pupils, including those in charter schools.

Section 11969.3. Conditions Reasonably Equivalent.

This section identifies the criteria for determining whether facilities provided to a charter school are sufficient to accommodate charter school students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending public schools of the district providing facilities, as required by Education Code section 47614. Education Code section 47614 requires CDE to develop a definition of "conditions reasonably equivalent."

The proposed regulation divides "conditions reasonably equivalent" into two parts: the capacity of a facility proposed for a charter school and the condition of that facility.

The first sentence provides an introduction to the three subdivisions. The first subdivision identifies a comparison group of school district facilities for use in determining whether a facility proposed for a charter school is reasonably equivalent to the school district facilities that charter school students would otherwise attend. The second subdivision specifies the method for determining whether the capacity of a facility proposed for a charter school is reasonably equivalent to the capacity of facilities in the comparison group (the number of students per classroom, for example). The third subdivision specifies the method for determining whether the condition of the facility is reasonably equivalent to the condition of facilities in the comparison group (the condition of the roof, for example).

Subdivision (a) identifies a comparison group of school district facilities for use in determining whether a facility proposed for a charter school is reasonably equivalent to the school district facilities that charter school students would otherwise attend. Specifically, the subdivision requires that the comparison group consist of schools with similar grade levels that serve students living in the high school attendance area in which the largest number of charter school students reside. The subdivision establishes a standard that is a middle ground between a comparison group that consists of all district-operated schools and a comparison group that consists of one to three schools. Using all district-operated schools as the comparison group would present administrative and data problems for school districts. In addition, for large school districts, using all district-operated schools as the comparison group would result in a standard that might be significantly different than the neighborhood schools the charter school students would otherwise attend. (This is because in large school districts the conditions in schools may

vary widely from neighborhood to neighborhood.) Using one to three schools would result in a group that is too small and would result in problems agreeing on the group selected.

Subdivision (a) uses the residence location rather than where the charter school wishes to locate because the statute refers to the schools in which the charter school students would be accommodated if they were attending other public schools of the district.

Subdivision (a) also provides an alternative method for choosing a comparison group in areas where student attendance at high school is not based on attendance areas: three schools in the school district with similar grade levels (or fewer if the school district has fewer than three schools) that the largest number of charter school students would otherwise attend.

Subdivision (b) specifies 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 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.

The second test is the availability of specialized teaching station space as determined based on the grade levels served, as part of the allocation of teaching station space. Subdivision (b) states that specialized teaching station space shall be available commensurate with the number of students attending the charter school. An example of a specialized teaching station space is a laboratory classroom.

The third test is the availability of non-teaching spaces. Subdivision (b) states that these spaces shall be available commensurate with the number of students attending the charter school. Examples of non-teaching space are administrative offices and cafeterias.

Finally, the subdivision specifies that the space allocated to a charter school may be shared with school-district-oriented programs, with the school district and the charter school using the shared space at the same or different times. This paragraph is needed to clarify that space need not be allocated for the exclusive use of the charter school. It is anticipated that shared space would be used most often for specialized classrooms such as laboratories, where the charter school might use the classroom for a period each day, or non-teaching spaces such as playgrounds, where the charter school would use it at the same time as the district-operated program.

Subdivision (c) specifies the method for determining whether the condition of a facility provided to a charter school is reasonably equivalent to the condition of facilities in the comparison group. Subdivision (c) lists factors to be considered rather that providing a detailed evaluation instrument because available instruments do not appear to capture the right variables for this

purpose. Also, they would have been difficult to implement locally because they were subjective in nature and/or required training to administer. The list of factors provides a balance between overly prescriptive instruments and leaving the process completely open at the local level.

The factors include school site size; the condition of surfaces; the condition of various building systems and conformity with applicable codes; the availability of technology infrastructure; suitability for learning (lighting, etc.); and the manner in which the building is furnished and equipped.

Subdivision (c) also states that the condition of facilities housing charter schools that have converted from previously existing district-operated schools shall be considered reasonably equivalent to public school facilities for the first year. This provision is intended to smooth and simplify the conversion process.

Section 11969.4. Operations and Maintenance.

This section first clarifies that furnishings and equipment supplied to a charter school shall remain the property of the school district, consistent with language in Education Code section 47614(b) that specifies that facilities allocated for use by a charter school shall remain the property of the school district. This clarification is consistent with the requirement that school districts be responsible for providing and replacing furnishings and equipment according to the school district's replacement schedules (the replacement requirement is later in this section).

This section specifies that the charter school is responsible for the ongoing operation and maintenance of the facility and the furnishings and equipment it uses. The school district is responsible for items funded through the deferred maintenance program (such as a new roof) and the replacement of furnishings and equipment supplied by the school district according to school district replacement schedules. The responsibilities outlined in this section are parallel to the definition of facilities costs in Section 11969.6. Section 11969.6 defines what is considered a facilities cost for purposes of developing a charge to be imposed on the charter school: the items considered part of a school district's facilities costs are also the school district responsibility; the items excluded from facilities costs are the charter school's responsibility.

This section also allows school districts to require charter schools to comply with school district policies regarding operations and maintenance. The purpose of this section is to allow school districts to protect the investment they have made in their facilities and furnishings and equipment by requiring, for example, regular maintenance of boilers and the use of certain products for cleaning floors. This section states that school districts may not require charter schools to comply with policies in situations where practices significantly differ from the policies.

Section 11969.5. Availability.

This section specifies that the space allocated for use by the charter school, subject to sharing arrangements, shall be available for the charter school's entire school year and may not be sublet or used for purposes that are inconsistent with district policies and practices without permission

of the school district. This section clarifies that a charter school may use the school facilities allocated to it in a manner that is similar to the way school district-operated programs may use facilities. It also prevents the charter school from using the facility in a manner that is inconsistent with school district policies.

Section 11969.6. Location.

This section clarifies that a school district may provide facilities that are outside its boundaries to satisfy its obligation to the charter school, but is not required to do so. The proposed regulations do not require provision of facilities outside a school district's boundaries because a school district should not be required to obtain facilities that it would not be able to use for its own students if the charter school ceases to exist. This is supported by language in Education Code sections 47614(a) and (b)(1) that states that public school facilities should be shared among all students including those in charter schools--implying use of existing facilities rather than acquisition of new ones--and language that states that school districts do not have to use unrestricted general fund revenues to rent, buy, or lease facilities for charter schools.

Section 11969.7. Charges for Facilities Costs.

This section defines the method for determining the pro rata share of facilities costs that must be paid by the charter school for use of the facilities allocated to it. Education Code section 47614 requires the California Department of Education to define the term "facilities costs." The introductory language provides the formula for the calculation of the pro rata share: (1) a per-square-foot amount equal to the facilities costs that the school district pays for with unrestricted general fund revenues divided by the total space of the district, times (2) the amount of space allocated to the charter school. This formula essentially repeats the language of the statute in a restructured way that clarifies that the calculation should be based on a per-square-foot rate.

Subdivision (a) defines facilities costs to include construction and similar capital outlay costs, plus rents and leases, consistent with definitions in the *California School Accounting Manual.* Because this definition does not capture all the facilities-related expenditures that must be incurred by the school district even though a charter school is occupying the facility, the regulation adds several other types of costs to "facilities costs." First, the regulation adds the contribution from unrestricted general fund revenues to the district deferred maintenance program, which funds such items as new roofs. The calculation uses the contribution to the deferred maintenance fund rather than the expenditures from the fund for administrative simplicity (the allocation of deferred maintenance expenditures by funding source is not readily available). Second, the regulation adds the costs of projects that could be funded under the deferred maintenance program but are not. Finally, the regulation adds the costs for replacement of furnishings and equipment according to district schedules and practices. As indicated earlier, the definition of facilities costs in this section is parallel to the responsibilities outlined in Section 11969.4.

The definition in subdivision (a) does not reflect any deduction from facilities costs for rent or lease payments collected by the school district from third parties. Some school districts collect a significant amount of revenue from this source. Such a deduction might be appropriate to the

extent that a school district is presently incurring facilities costs to construct or acquire a building that is being rented or leased to a third party. The regulation does not attempt to define such a deduction because of the administrative costs necessary to distinguish this situation from others in which the rent and lease payments are not associated with facilities costs.

Subdivision (b) clarifies that the cost of facilities financed with debt shall include debt service costs. Thus, if the cost of building a facility is spread out over time using debt, a charter school will pay a share of the annual debt service costs, to the extent that those costs are financed from unrestricted general fund revenues.

Subdivision (c) clarifies the method for calculating "space allocated by the school district to the charter school" in situations where there is shared space. Specifically, the amount of shared space to be included in the "space allocated by the school district to the charter school" shall be based on the proportion of space at the facility allocated for the exclusive use of the charter school.

Subdivision (d) identifies the data that shall be used in calculating the per-square-foot rate. The rate shall be based on data for the year preceding the fiscal year in which facilities are provided. In theory, the rate could be more accurate if it were based on the fiscal year the facilities are provided rather than the immediately preceding year, but the additional accuracy is not worth the administrative problems associated with a rate that would reflect budgeted figures rather than actual expenditures, and would need updating numerous times.

Subdivision (e) requires school districts to apply the per-square-foot charge to all charter schools receiving facilities under Education Code section 47614. Subdivision (e) is intended to prevent school districts from treating charter schools unequally with respect to charges for facilities.

Section 11969.8. Reimbursement Rates for Over-allocated Space.

This section specifies a methodology for determining when a charter school must make payments for over-allocated space and how much the payments must be. Education Code section 47614 requires the State Board to adopt a reimbursement rate for over-allocated space. Payments for over-allocated space are in addition to the pro rata share payments.

Subdivision (a) identifies how to determine when payments for over-allocated space are triggered. Specifically, space is considered to be over-allocated when the actual in-district classroom ADA is less than the projections upon which the allocation was based, and the difference is greater than a threshold amount. The purpose of establishing a threshold amount is to allow some difference between actual in-district classroom ADA and the projections before payments are imposed. The threshold amount is set equal to 10 percent of the projected in-district classroom ADA or 25 ADA, whichever is greater. The 25 ADA figure is set based on the ADA accommodated in one classroom.

Subdivision (a) also specifies the formula for determining the payment amount for over-allocated space. The payment is a per-pupil amount equal to the statewide average cost avoided per pupil under the year-round education program. The "cost avoided" under this program is set by the

Legislature and currently is around $1,300 per pupil. This figure is intended to approximate the annual per-pupil amount a school district must spend to house a student attending a school using a traditional calendar. (Thus, it is used as an estimate of the cost avoided by implementing a year-round education program instead of building new facilities). The rationale for using this figure is that the over-allocated space payments are intended to reimburse a district for the costs of housing those students who were originally projected to attend the charter school.

This reimbursement rate is applied to the difference between the actual in-district classroom ADA and the projections upon which the allocation was based. However, the reimbursement rate is halved for the amount of the difference that is less than the threshold amount. This methodology results in a lower reimbursement rate applying to smaller errors in projections.

Subdivision (b) requires the charter school to notify the school district if it anticipates it will have over-allocated space, so that the school district will have the option of using the space if it can. If the district decides it can use the space, it must notify the charter school within 30 days. The payments for over-allocated space and the pro rata share payments are reduced accordingly beginning with the date of the school district notification. The payments are reduced immediately rather than when the school district begins actually using the space so that a school district cannot effectively tie up a facility without relieving the charter school of payment obligations.

There is no precise timeline specified for the charter school notification because the charter school will have an incentive to release space as soon as possible to avoid payments. Subdivision (b) allows the school district to reduce the amount owed by the charter school for over-allocated space at its sole discretion.

Section 11969.9. Procedures and Timelines for the Request for, Reimbursement for, and Provision of, Facilities.

Education Code section 47614 requires CDE to develop procedures and establish timelines for the request for, reimbursement for, and provision of, facilities.

Subdivision (a) establishes timelines for steps that must be completed by new charter schools in order to request and obtain facilities. This section is intended to ensure that a charter school is or has a reasonable chance of becoming a viable concern before requiring the school district to plan modifications to its programs to accommodate the charter school. For example, accommodating a charter school might involve moving district-operated programs or changing attendance areas.

First, the subdivision requires that a charter school be operating in a school district before it submits a request for facilities (that is, a charter school must demonstrate that it is likely to enroll at least 80 in-district students). The subdivision further requires that, to receive facilities, new charter schools must submit a charter petition to a local education agency by November 15 of the year before the year for which facilities are requested and must receive approval of its petition by the following March 1. The purpose for requiring submission of the petition by November 15 is to allow the charter school sufficient time to incorporate in its facilities request any programmatic changes emerging from preliminary review of the petition. The deadline (see

below) for submitting a facilities request is January 1. The March 1 date provides some time for a charter school to re-submit a petition if necessary to obtain approval.

Subdivision (b) provides a timeline for submitting a facilities request to a school district: October 1 for already existing charter schools and January 1 of the previous fiscal year for new charter schools. These deadlines provide a balance between the competing demands of the school district for information early upon which to base program decisions and the charter school for more time to develop credible estimates of enrollment.

The final sentence of this subdivision states that, in the absence of a successful local school bond measure, a charter school complying with the procedures and timelines set forth in the regulations is entitled to receive facilities beginning on November 8, 2003. Under Education Code section 47614, "a school district's responsibilities" take effect on this date for school districts not holding successful bond elections. This sentence clarifies that the obligation to provide facilities takes effect on November 8, 2003, and that the procedures and timelines established in the regulations are effective before this date. This clarification is consistent with the language of Education Code section 47614, under which the thrust of a school district's responsibilities is providing facilities rather than accepting and reviewing facilities proposals.

Subdivision (c) specifies the material that must be included in the facilities request. The first item (A) is projections of in-district and total ADA and in-district and total classroom ADA. These projections will become the basis for determining the size of the facility the charter school must be allocated. Total ADA (in-district plus out-of-district, classroom plus non-classroom) is needed so that the school district can determine the impact on its own enrollment and on traffic and parking.

The second item (B) is a description of the methodology for the projections. This is to enable school district review of the reasonableness of the projections.

The third item (C) is documentation of the number of in-district students that are meaningfully interested in enrolling in the charter school, if relevant. The purpose of this requirement is to enable school district review of reasonableness of the projections and verification that the charter school is operating in the school district, as defined. Developing a list of meaningfully interested students is required by previously existing law as part of the process for obtaining approval of a charter petition.

The fourth item (D) is the charter school's instructional calendar. This information is needed to advise the district when a facility allocated to the charter school must be ready for occupancy.

The fifth item (E) is information regarding the general geographic area in which the charter school wishes to locate. The school district needs this information to comply with the requirement in Education Code section 47614 that the school district make reasonable efforts to provide facilities near where the charter school wishes to locate.

The sixth item (F) is information on the charter school's educational program that is relevant to assignment of facilities. This is any other information that the charter school wishes to convey

that might be helpful to the school district in providing facilities that meet the charter school's needs.

Subdivision (c)(2) requires information on where in-district students (in the projections and in the list of students who are meaningfully interested in enrolling) would otherwise attend school. This requirement is intended to provide information necessary for the school district to determine the comparison group of schools and to project its own enrollment.

Finally, subdivision (c)(3) allows school districts to require the charter school to submit its written facilities request on a standard form and to distribute a reasonable number of copies of the written facilities request for review by other interested parties, such as parents and teachers, or to otherwise make the request available for review. The purpose of the form requirement is to allow school districts to streamline processing of facilities requests. The purpose of the copy requirement is to facilitate input from interested parties on facilities proposals if desired by the school districts.

Subdivision (d) requires some interchange between the school district and the charter school before the school district transmits its formal offer for housing the charter school. Specifically, the subdivision identifies four steps in this interchange: school district review of the charter school's ADA projections, charter school response to school district concerns regarding the projections, school district preparation of a preliminary proposal regarding the space to be allocated to the charter school and the associated pro rata share amount, and charter school response to the proposal. The purpose of this subdivision is to encourage discussion and negotiation between the parties before a formal offer is prepared.

Subdivision (e) specifies the contents of the space allocation offer that must be submitted by a school district to a charter school requesting facilities. Subdivision (i) specifies that the information in this offer will become a major portion of the agreement between the school district and the charter school governing use of the facility. The offer must specifically identify the space exclusively allocated to the charter school and the space to be shared with district-operated programs, together with the proposed sharing arrangements. The offer must also contain the ADA assumptions upon which the allocation is based and, if there have been modifications to the projections submitted by the charter school, an explanation of the changes. The reason for including the ADA assumptions is to prevent any confusion later, because several sets of projections may have been discussed following the original submission of projections by the charter school. The ADA assumptions will be needed later to provide a basis for determining whether space has been over-allocated. Finally, the offer must provide the pro rata share amount and the payment schedule, to be based on the timing of revenues received by charter schools from the state and local property taxes. This information on payment is required so that the charter school has all the information it needs to evaluate whether to accept the offer.

The offer must be submitted to the charter school by April 1. This date is based on school district program and facility planning calendars, and charter school needs for facilities commitments as early as possible.

Subdivision (f) provides that the charter school must respond to the formal space allocation offer by May 1, or 30 days after the notice is provided, whichever is later. This provides a window for charter schools to decide whether the offer is acceptable. Charter schools must accept or reject the formal offer in its entirety (the intent is for negotiations to occur before the formal offer is provided, not after), although there is nothing to preclude the charter school and school district from negotiating after the formal offer is provided if acceptable to both parties. The length of the window (April 1 to May 1) for charter school consideration of the space allocation offer was determined by balancing the need of a charter school to carefully consider the offer against the school district's need for rapid determination of facility availability. The reason for the 30-day provision is to give the charter school some protection if the school district is late in providing the offer.

The subdivision also states that the charter school's decision to occupy the offered space commits the charter school to paying the pro rata share as identified. If a charter school rejects the offer or fails to respond, the school district can use the space and the charter school is not entitled to use school district facilities in the next fiscal year.

Subdivision (g) provides that the space allocated by the school district must be furnished, equipped and available for occupancy by the charter school at least seven days prior to the first day of instruction of the charter school. This subdivision provides a deadline for school districts to prepare the space for the charter school. The amount of time provided is comparable to, or even greater than, the amount of time school district space normally is ready for occupancy by district-operated programs.

Subdivision (h) provides that the school district and the charter school shall negotiate an agreement regarding use of and payment for the space. At a minimum, this agreement must consist of the information provided in the formal space allocation offer described in subdivision (e). This information includes such items as the ADA assumptions upon which the allocation is based, the specific space to be available to the charter school, and the amounts of and schedule for payments. Also, the agreement may include school district requirements for insurance and maintenance. The purpose of the insurance requirement is to protect school district investments in facilities in the event that a charter school is liable for damage to school district property. The purpose of the maintenance requirement is similar: to protect school district investments in facilities and furnishings and equipment by requiring charter schools to comply with school district maintenance standards.

Subdivision (i) requires the charter school to report actual ADA to the school district every time that it reports ADA to the state. The reports must break down ADA totals so the district can monitor whether the students are in-district students and whether they are in classroom-based programs. The purpose of these reports is to allow the school district to verify the accuracy of the projections upon which the facilities allocation was based (and calculate payments for over-allocated space, if appropriate), to project the impact of charter school's enrollment on the district's own enrollment, and to plan future facilities projects (including, for example, projects related to traffic and parking).

The subdivision provides that the charter school must keep records documenting the data contained in the reports. This allows verification in case questions arise.

Subdivision (j) provides that the charter school and the school district may negotiate separate agreements and/or reimbursement arrangements for specific services not considered part of facilities costs. This subdivision clarifies that separate arrangements may be made for items not covered in the regulations, and that these arrangements can involve reimbursements. These agreements might cover such things as sharing of a security patrol, allocation of utilities costs between the parties at a shared facility, or use of a copy machine.

Subdivision (k) specifies that charter school and a school district may mutually establish different timelines and procedures than provided in the regulations. This provision is intended to provide flexibility to charter schools and school districts in negotiating working relationships around the implementation of Education Code section 47614. The subdivision also allows school districts to set deadlines as much as two months earlier if they wish, provided that they notify charter schools of the deadline changes and do not change facility request deadlines or the time allowed for charter schools to respond to the school district's offer of space. This provision is intended to recognize the varying facility planning schedules of school districts.

**PUBLIC HEARING AND PUBLIC COMMENTS**

CDE received written comments from five organizations: Coalition for Adequate School Housing (CASH), California Network of Educational Charters (CANEC), Los Angeles Unified School District (LAUSD), San Diego Unified School District (SDUSD), and California School Boards Association (CSBA). CANEC submitted two letters, the first in response to the CASH comments and the second in response to the SDUSD comments. CANEC did not respond to the LAUSD and CSBA comments, which were submitted immediately before the hearing. LAUSD and CSBA, along with a sixth organization, Ridgecrest Charter School, provided oral testimony at the hearing. The State Board adopted five amendments to the regulations in response to the comments. Below is a section-by-section response to the comments.

Section 11969.1. Purpose.

Background: The regulations state "This article governs provision of facilities by school districts to charter schools under Education Code section 47614."

Issue: LAUSD requested additional language to clarify that existing arrangements between charter schools and school districts could be continued without being subject to the procedures set forth in these regulations.

Response: Clarification is not needed. There is nothing to preclude school districts from continuing to make arrangements with charter schools outside the Proposition 39 regulations.

Section 11969.2, subdivision (a). Definition of average daily classroom attendance (classroom ADA).

Background: The regulations define classroom ADA as ADA used for classroom-based apportionments under Education Code section 47612.5 (Education Code section 47612.5 was added by SB 740). There were comments on two issues.

Issue 1: CASH proposed adding "No independent study students shall be eligible for facilities pursuant to this article." CANEC opposed the CASH amendment, saying that the sentence is unnecessary because SB 740 already defines independent study as not included in classroom-based instruction and confusing because CASH's proposed amendment does not cover other types of non-classroom-based instruction that are mentioned in SB 740. Ridgecrest Charter School supported the use of the definition of classroom-based instruction under SB 740.

Response: This change is unnecessary and confusing for the reasons cited by CANEC. Also, classroom-based instruction will be reported by charter schools in conjunction with receiving funding and will be subject to audit; CASH's suggestion would require new reporting and record-keeping that is unnecessary.

Issue 2: SDUSD suggested using enrollment as the basis for allocating facilities rather than ADA. CANEC opposed this change.

Response: This is inappropriate because statute specifically requires the use of ADA for determining facility entitlements under Proposition 39. Using enrollment instead of ADA would require a definition of "classroom enrollment" and would be unnecessarily confusing.

Section 11969.2, subdivision (b). Definition of operating in the school district.

Background: The regulations define a charter school as operating in the school district "if the charter school meets the requirements of Education Code section 47614(b)(5) regardless of whether the school district is or is proposed to be the authorizing entity for the charter school and whether the charter school has a facility inside the school district's boundaries."

Issue: SDUSD suggested limiting "operating" charter schools to those approved by the local governing board. CSBA suggested requiring charter schools requesting facilities to be physically located in the district. CANEC opposed the SDUSD change.

Response: The definition of "operating" in statute focuses on the possibility that a charter school may or may not actually be serving students at the time of the facilities request; thus, a charter school that is not yet actually serving students (and thus has no physical location yet) may nevertheless be considered to be "operating." The reason for the regulatory section is to clarify that the identity of the chartering entity and the physical location of the charter school are not relevant. Doing otherwise would be inconsistent with statute. The thrust of the statutory language is to require provision of facilities for students the district would otherwise be serving—and this can occur whether or not the charter is approved by the district and where the charter school is physically located.

Section 11969.2, subdivision (c). Definition of in-district students.

Background: The regulations state that "a student attending a charter school is an 'in-district student' of a school district if he or she is entitled to attend the schools of the school district and could attend a school district-operated school."

Issue: SDUSD states that school districts will not have information on the residence of students and asks what penalty there will be for charter schools to misrepresent student residence. CANEC responded that a school district could reject a request for facilities that it does not find credible and, if it believes the charter school knowingly misrepresented the residence of students, it could pursue revocation of the charter.

Response: SDUSD is correct that school districts will not have information on the residence of students at the outset. However, they will have access to this information when charter schools submit ADA data for funding purposes. Only in-district students can be counted for purposes of determining whether facility space has been over-allocated, and over-allocations of space can result in substantial financial penalties being imposed on charter schools.

Section 11969.2(d). Definition of contiguous.

Background: The regulations define facilities as contiguous "if they are contained on the school site or immediately adjacent to the school site. If the in-district average daily classroom attendance of the charter school cannot be accommodated on any single school district school site, contiguous facilities also includes facilities located at more than one site, provided that the school district shall minimize the number of sites assigned and shall consider student safety."

Issue: CSBA proposed to modify "minimize" to "make every effort to minimize."

Response: This amendment is unnecessary and redundant. To minimize the number of sites means to make the number of sites as small as possible. This is not any different that making every effort to make the number of sites as small as possible.

Section 11969.2, subdivision (e). Definition of furnished and equipped.

Background: The regulations define "furnished and equipped" to mean that "a facility contains all the furnishings and equipment necessary to conduct classroom-based instruction, including desks, chairs, and blackboards."

Issue: SDUSD suggested further clarification that computers and office equipment are not required to be provided. CANEC opposed this change. CANEC says that computers and office equipment should be included.

Response: The language does not need clarification. School districts are not responsible for providing such items as computers and office equipment. There were lengthy discussions about the definition of "furnishings and equipment" in the meetings of a working group that was convened to discuss issues related to these regulations. There are many possible methods to distinguish between what must be supplied by the school district and what must be supplied by the charter school (useful life exceeding a certain number of years, funding source, whether

capitalized, value exceeding a certain amount, etc.)—and the chosen method affects which party is responsible for maintenance and replacement and the calculation of charges to be imposed on the charter school for use of the facility. The regulations seek to define "furnishings and equipment" in a minimal manner, solely as what is needed to provide classroom-based instruction, to make the method as clean as possible and to minimize possible disputes regarding, for example, selection, maintenance, and replacement of computers and copy machines; and calculation of facilities charges.

Section 11969.2, proposed new subdivision. Definition of "reasonable efforts"

Background: The statute says "The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily." The regulations do not provide any definition of reasonable effort.

Issue: LAUSD suggested language stating that (1) providing facilities within a two-mile radius of a point designated by the charter school shall be considered a reasonable effort, (2) school districts shall not be required to allocate space in situations where the school district would be required to increase involuntary busing or impose multi-track year-round education on additional students, and (3) school districts shall not be required to share space where fundamental differences between the educational programs of the charter school and the school district would disrupt education at either the charter school or the school district school.

Response: The reasonable effort issue was discussed at length in the working group meetings. The regulations are silent on this issue because the working group could not find a way to improve the language of the statute, which strikes a balance between favoring charter school students and favoring students in school district-operated programs. It is important to note that charter schools would suffer the same level of overcrowding that school district schools have; the facilities provided to charter schools would have the same number of classrooms per ADA as a group of school district comparison schools.

The provision regarding fundamental differences in educational programs could potentially eliminate the possibility of sharing of facilities altogether, which is inconsistent with statute. The very purpose of charters schools is to offer non-traditional educational approaches. This provision would allow school districts to deny facilities to a charter school if the charter school has a non-traditional approach.

Section 11969.3, subdivision (b). Definition of conditions reasonably equivalent with respect to capacity.

Background: Statute requires school districts to supply facilities sufficient to accommodate charter school in-district classroom ADA in "conditions reasonably equivalent to those in which they would be accommodated if they were attending other public schools of the district." The regulations state that facilities must be provided in the same ratio of teaching station space to ADA as available in a group of school district-operated comparison schools. The regulations also



**EXHIBIT A**
**22**

state that non-teaching station space must be available commensurate with the in-district classroom ADA of the charter school.

Issue 1: SDUSD cited a situation where incremental increases might be requested year after year as a charter school grows, and recommends that some limit be established to prevent an unreasonable and uneconomical burden. CANEC opposed any change.

Response: Statute does not allow such limits on a school district's responsibility.

Issue 2: SDUSD requested a clarification to specify the exclusion of teacher lounges and libraries in non-teaching space. CANEC opposed SDUSD's proposed change and requested a clarification to specify that non-teaching space to be provided by the school district shall include administrative space.

Response: The State Board adopted a change to clarify that non-teaching space includes administrative space. With respect to teacher lounges and libraries, there is an existing methodology for identifying teaching station and non-teaching station space that is cited in the regulation, and this proposed change would conflict with the existing methodology and would be confusing.

Section 11969.3, subdivision (c). Definition of conditions reasonably equivalent with respect to condition.

Background: Statute requires school districts to supply facilities sufficient to accommodate charter school in-district classroom ADA in "conditions reasonably equivalent to those in which they would be accommodated if they were attending other public schools of the district." The regulations provide a list of factors to consider in determining whether the condition of facilities provided to charter schools is reasonably equivalent. Among other things, the list includes "the availability and condition of technology infrastructure." There were two issues raised regarding facility condition.

Issue 1: SDUSD and LAUSD requested clarification that facilities supplied to charter schools need not comply with the Field Act. CANEC opposed this change.

Response: The Field Act was enacted to protect the children of the state against injury in an earthquake. Statute is not clear with respect to whether facilities provided to charter schools under Proposition 39 must comply with the Field Act. This is a matter where the regulations should not allow any lesser level of protection than the statute; consequently, the regulations are silent on the issue. Under the regulations, whether the facilities comply with the Field Act will be a matter decided in negotiations between the charter school and the school district.

Issue 2: CSBA proposes to delete the word "infrastructure." CSBA appears to be concerned that the section seems to mandate the duplication of district-wide infrastructure in situations where another configuration may be more appropriate.

Response: This section merely lists factors to be considered in determining the condition of a facility. There is no requirement that facilities have any particular configuration for technology. If duplicating the district-wide infrastructure would not work in a particular situation, there is nothing to preclude the parties from making other arrangements.

Section 11969.4, subdivision (b). Operations and maintenance.

Background: The regulations specify that the charter school is responsible for operations and maintenance of the facility provided, while school districts remain responsible for projects eligible for inclusion in the school district's deferred maintenance plan and replacement of furnishings and equipment. School districts may require charter school to comply with policies regarding operations and maintenance, although not when a school district's practices substantially differ from its policies.

Issue 1: CASH suggested that school districts should be responsible for projects actually included in the deferred maintenance plan, not just those eligible to be included. CASH stated that a charter school should be responsible for maintenance necessary due to inadequacies in ongoing maintenance. CANEC opposed the CASH amendment, saying that the school district will continue to own the facility and receives deferred maintenance funding from the state. Further, the charter school in fact pays a portion of general fund deferred maintenance costs through its pro rata share.

Response: The CASH language would make the charter school responsible for projects that the school district chooses not to fund although the projects are eligible for state deferred maintenance funding. For the reasons cited by CANEC, this section should not be changed.

Issue 2: CASH suggested clarifying that the school district responsibility for replacing furnishings and equipment only applies to furnishings and equipment supplied by the school district. CSBA suggested language stating that school districts should not have to replace furnishings and equipment if they are abused.

Response: The State Board adopted the CASH amendment but used different wording because the section reference proposed by CASH is to a definition section. The CSBA proposal is unnecessary; the school district is not required to replace furnishings and equipment more frequently than is required under school district replacement schedules and practices.

Issue 3: CASH suggested requiring charter schools to comply with policies regarding operations and maintenance, instead of giving school districts the option of requiring charter schools to do so. CANEC opposes the CASH amendment, saying that it might require charter schools to comply with unrealistic policies that the school district does not itself comply with.

Response: The CASH amendment is unnecessary and introduces confusion: it would be difficult to reconcile the sentence as proposed to be amended with the last sentence of the section, which states that districts may not require compliance in situations where school district practices differ substantially from written policies.

Issue 4: CSBA proposed to delete the final sentence, which provides that charter schools need not comply with operations and maintenance policies that the school district itself does not comply with.

Response: This proposal is not reasonable; charter schools should not be held to a higher standard than the school district itself.

Section 11969.5, subdivision (b). Availability.

Background: The regulations specify that facilities supplied to a charter school "may not be sublet or used for purposes other than those that are consistent with school district policies and practices for use of other public schools of the school district without permission of the school district."

Issue: CASH suggested amending the section to specify that facilities may not be sublet or used for purposes other than classroom instruction without permission of the school district. CASH believes that since the facilities are the property of the school district, the school district should control use of the space for purposes other than for classroom instruction. CSBA proposed requiring charter schools to secure prior permission to use the facility for any purpose not explicitly provided for in the charter. CANEC opposed the CASH amendment, saying that charter schools will need facilities for purposes other than classroom instruction (CANEC cited parent meetings, governance council meetings, school performances, and bake sales) and should be held to the same standard for using the space as school district schools, that is, school district policies regarding non-instructional uses of the space.

Response: This proposal is not reasonable; charter schools should not be held to a more restrictive standard than other schools in the school district regarding use of facilities.

Section 11969.7. Charges for facilities costs.

Background: The regulations specify a formula for calculating charges that may be imposed by a school district and specify that charges imposed by a school district must be applied equally to all charter schools. There were three issues raised regarding this section.

Issue1: CASH suggested that the per-square-foot charge imposed on charter schools should be calculated based only on the amount of reasonably equivalent classroom space in the school district inventory, not on the total space of the school district. CANEC opposed the CASH amendment because it will create disputes in its application.

Response: The statute refers to total space, not reasonably equivalent space or classroom space. In addition, the proposed change would result in unreasonable administrative costs as school districts seek to determine what amount of space is reasonably equivalent.

Issue 2: CASH proposed defining "unrestricted general fund revenues." CANEC opposes the CASH amendment because not every school district has implemented the standardized account code structure (SACS).

Response: The State Board adopted an amendment clarifying the term as requested by CASH, but in a simpler way that does not refer to SACS. The amendment is as follows: "The pro rata share amount shall not exceed (1) a per-square-foot amount equal to those school district facilities costs that the school district pays for with unrestricted general fund revenues, as defined in the California School Accounting Manual, divided by the total space of the school district times (2) the amount of space allocated by the school district to the charter school." All school districts must comply with the California School Accounting Manual.

Issue 3: CASH proposed an amendment stating that charges imposed on charter schools should be applied equally to all charter schools at a particular site, not to all charter schools across the school district. This is because district costs can vary among sites. CANEC opposed the CASH amendment because it would create confusion and "multiplicity of work."

Response: The statute requires the calculation to be performed school district-wide, and does not refer to a site-by-site determination of facility costs. Also, the calculation methodology proposed by CASH would result in unnecessary administrative costs to determine the correct amount of the charge.

Section 11969.8. Reimbursement rates for over-allocated space.

Background: The regulations specify that space is considered to be over-allocated when the actual in-district classroom ADA is less than the projections upon which the allocation was based, and the difference is greater than a threshold amount. The threshold amount is set equal to 10 percent of the projected in-district classroom ADA or 25 ADA, whichever is greater. The 25 ADA figure is set based on the ADA accommodated in one classroom.

The per-pupil reimbursement rate is applied to the difference between the actual in-district classroom ADA and the projections upon which the allocation was based. However, the reimbursement rate is halved for the amount of the difference that is less than the threshold amount. This methodology results in a lower reimbursement rate applying to smaller errors in projections.

The purpose of establishing a threshold amount using a lower reimbursement amount for smaller numbers of students is to allow some difference between actual in-district classroom ADA and the projections before payments are imposed.

Issue: CASH proposed amendments to reduce the threshold to 20 students and to eliminate the reduction in the reimbursement amount for some students. CASH states that the language as proposed allows an elementary charter school to take two classrooms for 40 students and pay for only one of them. CANEC opposed the CASH amendment because it believes the proposed regulation is sufficiently harsh to discourage over-estimation by charter schools.

Response: CASH is correct that under the proposed regulation, a charter school could receive more space than it may ultimately need without penalty. This could happen also under CASH's recommended amendment. Errors in projecting the number of students are inevitable; the issue is

how to allow small errors to be made without penalty while establishing a sufficient incentive to ensure that such errors are minimized. This issue was a matter of lengthy discussion in the working group. The regulations as proposed represent one method for striking a balance between allowing small errors while imposing penalties on larger errors; the CASH amendments represent another approach that increases the incidence and level of penalties imposed.

Section 11969.9, subdivisions (a), (b), and (k). Procedures and timelines—submission of facilities requests.

Background: The regulations specify timelines for submitting facilities requests. The timelines are different for new charter schools vs. existing charter schools. To receive facilities, a new charter school must have submitted its petition by November 15 and receive approval by March 1. It must be operating (i.e. have 80 signatures on a petition) before it submits its facilities request, and must submit the request by January 1. An existing charter school must submit its facilities request by October 1. The regulations further allow school districts and charter schools to mutually establish different timelines and procedures.

Issue: There were many comments about the timelines. CASH proposed amendments (1) eliminating the special consideration for new charter schools and (2) allowing school districts to provide non-equivalent space for 24 months. First, CASH believes the requirement that a charter school be operating before it submits its request is inconsistent with the requirement that its petition be approved by March 1. Second, CASH cites the difficulties school districts will have in providing facilities to charter schools under the timelines for both new charter schools and existing charter schools.

SDUSD stated that providing facilities according to the proposed timelines is unrealistic. LAUSD stated that timelines are unrealistic particularly for districts with large numbers of multi-track year-round schools, and suggested allowing districts to move timelines earlier in the year. CSBA proposed to allow a charter school to submit a facilities request only if it has an approved petition.

CANEC opposed the CASH amendments because they are in conflict with statute. In response to the SDUSD proposal, CANEC opposed any change to the timelines.

Response: The two requirements cited by CASH are not inconsistent as CASH states. Under the statute, a charter school is "operating"—and can submit a facilities request—if it has 80 signatures on a petition. This can occur before the charter school has been approved by its authorizing entity. Second, the statute clearly anticipates that school districts would be required to provide facilities along a short timeline (i.e. with requests submitted in the fiscal year before the actual provision of facilities, not 24 months beforehand). The statute also anticipates that providing facilities will not initially be a matter of building new facilities, but of sharing existing facilities.

Timelines were the subject of much discussion in the working group meetings. The timelines in the proposed regulations recognize facility allocation procedures in place in school districts, but

also recognize the problems a new charter school will have in developing accurate projections of ADA so early in the year.

The State Board adopted an amendment in subdivision (k) in response to LAUSD's concerns that allows school districts to move the process earlier in the year, provided that the school district notifies charter schools of the change and does not change the dates for submissions of requests and time periods for charter school responses to proposals. It is unreasonable to advance the facilities request any earlier because of the impossibility of developing pupil forecasts over one year before the start of school.

Section 11969.9, subdivision (b). Procedures and timelines—effective date.

Background: The regulations specify that "In the absence of a successful local school bond measure, a charter school making a request for facilities under this article in compliance with the procedures and timelines established in this section shall be entitled to receive facilities beginning on November 8, 2003."

Issue: LAUSD commented that these timelines are unrealistic and in effect, require that a school district start its process many months earlier than November 2003.

Response: LAUSD and other school districts have enough warning to put procedures in place before November 2003. The substance of the responsibilities referred to in the statute is the provision of facilities, not the receipt and processing of requests.

Section 11969.9, subdivision (c). Procedures and Timelines—request form.

Background: The regulations do not specify request forms for charter schools.

Issue: There was discussion during the public hearing regarding a requirement that charter schools to use standard forms for facilities requests.

Response: The State Board adopted an amendment saying that school districts can use standardized forms to be available from CDE if they wish.

Section 11969.9, subdivision (d). Procedures and timelines—period for review of preliminary proposal.

Background: The regulations require the school district to give a charter school a reasonable opportunity to respond to a preliminary facilities proposal before the school district issues a final proposal.

Issue: CSBA proposed to stipulate that the opportunity to review and comment shall not unduly delay the school district in providing final notification by the required date.

Response: This amendment is unnecessary. The school district must provide its proposal to the charter school in enough time that the charter school has an opportunity to respond. There is

nothing in the regulation to preclude a school district from setting a deadline for receipt of comments, provided that the deadline is reasonable.

Section 11969.9, subdivision (f). Procedures and timelines—notification of space acceptance.

Background: The regulations provide that "The charter school must notify the school district in writing whether or not it intends to occupy the offered space. This notification must occur by May 1 or 30 days after the school district notification, whichever is later. The charter school's notification can be withdrawn or modified before this deadline."

Issue: CSBA proposed to amend this section to say that the charter school may not modify or withdraw its notification if the school district has not already incurred costs to comply with the notification.

Response: The school district is already on notice that the charter school is permitted to withdraw or modify its proposal and should behave accordingly. The effect of the amendment would be to ensure that a charter school would not provide any indication of its intentions until April 30.

Section 11969.9, subdivision (g). Procedures and timelines—space availability.

Background:The regulations specify that space shall be made available no later than seven days prior to the first day of instruction.

Issue: CANEC proposes amendments to require provision of space "as soon as possible" but no later than seven *business* days before the first day of instruction. CSBA proposes to amend this section to say that if a majority of school district space is not ready by this time, the charter school must wait along with school district staff.

Response: First, "as soon as possible" is unnecessary and meaningless. Second, the original language was drafted in recognition of school district schedules in getting space ready for the start of a new school year. The timeline in the proposed regulation in fact will give charter schools their space before space is ready for most school district programs. Finally, charter schools must have a time certain to be able to move into new space. For them, it is not a matter of reopening classrooms that have been unoccupied all summer; in some cases it is a matter of moving a whole school.

Section 11969.9. Procedures and timelines—general.

Issue 1: The regulations do not address the use of developer fees for charter school facilities. SDUSD proposes amendments to allow school districts to use developer fees for charter school facilities.

Response: This change is unnecessary. There is nothing in current law to preclude using these funds for charter school facilities.

Issue 2: The regulations do not address the dispute resolution process. Ridgecrest Charter School and SDUSD referred to dispute resolution procedures in their comments.

Response: Dispute resolution is not addressed in these regulations. There is another set of regulations being considered that will address this issue.

**DISCLOSURES**

These proposed regulations do not impose a mandate on local agencies or school districts.

The State Board has determined that no alternative considered by the State Board or that has otherwise been identified and brought to the attention of the State Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to the affected private persons than the proposed action.

The State Board has made an assessment and determined that the adoption of the proposed regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT CE 14 HON. TERRY A. GREEN, JUDGE

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| CALIFORNIA CHARTER SCHOOLS ASSOCIATION, | ) | |
| PLAINTIFF, | ) | |
| vs. | ) | NO. BC438336 |
| LOS ANGELES UNIFIED SCHOOL DISTRICT, et al., | ) | |
| DEFENDANTS. | ) | |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, JUNE 27, 2012

9:43 A.M.

APPEARANCES:

(PLEASE SEE APPEARANCE PAGE)

PENELOPE E. NISOTIS, CSR 12625
OFFICIAL REPORTER

APPEARANCES:

FOR THE PLAINTIFF:

LATHAM & WATKINS, LLP
BY: JAMES L. ARNONE, ATTORNEY
355 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071

CALIFORNIA CHARTER SCHOOLS ASSN.
BY: PHILLIPA L. ALTMANN, ATTORNEY
250 EAST FIRST STREET
SUITE 1000
LOS ANGELES, CALIFORNIA 90012

FOR THE DEFENDANTS:

ORBACH, HUFF & SUAREZ, LLP
BY: DAVID M. HUFF, ATTORNEY
1901 AVENUE OF THE STARS
SUITE 575
LOS ANGELES, CALIFORNIA 90067

LOS ANGELES UNIFIED SCHOOL DISTRICT
BY: NATHAN REIERSON, ATTORNEY
333 SOUTH BEAUDRY AVENUE
23RD FLOOR
LOS ANGELES, CALIFORNIA 90017

LOS ANGELES UNIFIED SCHOOL DISTRICT
BY: MARK FALL, ATTORNEY
333 SOUTH BEAUDRY AVENUE
23RD FLOOR
LOS ANGELES, CALIFORNIA 90017

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| CASE NUMBER: | BC438336 |
| CASE NAME: | CHARTER SCHOOLS v. LAUSD |
| LOS ANGELES, CALIFORNIA | WEDNESDAY, JUNE 27, 2012 |
| DEPARTMENT CE 14 | HON. TERRY A. GREEN, JUDGE |
| APPEARANCES: | (AS HERETOFORE NOTED.) |
| REPORTER: | PENELOPE E. NISOTIS, CSR 12625 |
| TIME: | 9:43 A.M. |

--OOO--

THE COURT: California Charter Schools.

Counsel, please state your appearances.

MR. ARNONE: Good morning, Your Honor.

James Arnone, of Latham & Watkins, on behalf of plaintiff, California Charter Schools Association.

MS. ALTMANN: Good morning, Your Honor.

Phillipa Altmann, Senior Litigation Counsel for the California Charter Schools Association.

MR. HUFF: Good morning, Your Honor.

David Huff for the Los Angeles Unified School District, its Board of Education, and its Superintendent.

MR. REIERSON: Good morning, Your Honor.

Nathan Reierson, General Counsel for the Los Angeles Unified School District.

MR. FALL: Mark Fall, Associate General Counsel with the Los Angeles Unified School District.

THE COURT: Okay. Welcome. Have a seat.

MR. HUFF: Thank you, Your Honor.

THE COURT: Now, when we were here last, I said the last thing I want to do is micromanage the L.A. school system because I have neither the competence nor inclination to do that. But I'm still obligated to rule on motions that are filed.

Defense, what the plaintiff is concerned about is these norming ratios and whether that really is reasonably equivalent.

And I think what they're complaining about is, for whatever reason, if the School Board decides to shut half its classrooms in the city of Los Angeles for whatever reason and divide up all the students in the remaining half, that that prejudices the charter school students because the ratios would be skewed because it would not include the closed classrooms.

You know, it occurred to me in reading this -- I was not sure. I want to hear from the plaintiff what the comparison should be if not districtwide. But I understand their concern about exempting classrooms.

And your concern is that would lead to an anomalous result where you have charter schools having a better deal than the students in the public schools. But that's the wisdom of the law issue.

But I see their point when it is if you voluntarily close classrooms for your purposes, they contend that also shouldn't be closed for their purposes. And it's a tough situation.

We're all grappling with -- I don't know if

budget cuts is the right word. We seem to call things budget cuts because we can't make a budget, when, in fact, the budgets are greater each year.

However, the people who run the school system -- and they know best how to run the school system -- decide that what they need to do is to have the classrooms go fallow for whatever reason, or convert them to a lounge or meeting room or a storage room. I respect that decision, but that decision has consequences when it comes to the charter schools.

First of all, I would like to hear from the plaintiff. What is the comparison? I kept looking for this. If not districtwide -- could it be districtwide as long as you include all classrooms or what? What is it you're looking for?

MR. ARNONE: No, Your Honor. It can't ever be districtwide.

THE COURT: Okay.

MR. ARNONE: The regulations spell this out with some clarity. So you start with the statute itself, which was amended by Prop 39.

THE COURT: Right.

MR. ARNONE: It says that facilities should be shared fairly.

And then it says all of the charter schools' in-district students have to be in conditions reasonably equivalent to those in which students would be accommodated if they were attending district-run schools.

Then it says, in subparagraph 6, the State Board of Education may adopt regulations implementing the subdivision, including but not limited to defining the term "conditions reasonably equivalent."

09:47AM So then we see what did the State Board of Education do? They defined the term. So you check to see what "conditions reasonably equivalent" means. And that was what we had cited in the implementing rights.

In 11969.3, it's headed "Conditions Reasonably

09:48AM Equivalent." This is where the State Board of Education defined that term. And there it says, under (a)(1), which we cite in our papers:

"The standard for determining whether facilities are sufficient to accommodate charter school students in

09:48AM conditions reasonably equivalent to those in which the students would be accommodated if they were attending public schools of the school district providing facilities shall be a comparison group of district-operated schools with similar grade levels."

09:48AM So then it says, under sub (2), "The comparison group shall be" -- shall be -- "the school district-operated schools with similar grade levels that serve students living in the high school attendance area."

THE COURT: Does that mean, like, each high school? I

09:49AM went to Muir in Pasadena. Muir has boundaries. Is it in those Muir boundaries?

MR. ARNONE: Yes, Your Honor.

So in L.A. Unified -- and there's an option for

those that don't do it by geography. In L.A. Unified, they do it by geography.

So you take the individual charter school that is seeking facilities. You look at where the most of its in-district students would go to high school geographically, based on where they live. That high school then defines its attendance area. It defines it. Then you take all the schools there.

And this was a compromise. That's why we cite to this Final Statement of Reasons. The Final Statement of Reasons is what the State Board of Education used. It's a formal document to explain what they did. And they said that they considered doing districtwide and they considered doing just one to three schools. And they did this as a compromise.

And they specifically said that they are doing this because for large school districts using all the district-operated schools as the comparison group would result in a standard that might be significantly different than the neighborhood schools the charter school students would otherwise attend. This is because in large school districts, the conditions in schools may vary widely from neighborhood to neighborhood.

So that's all we want them to do.

THE COURT: What about counsel's point that if they are dividing students up -- say the District closed half its classrooms and the non-charter school kids were divided up into the now new half, which would be a much higher ratio,

student-teacher ratio, or higher number of students per classroom.

But if the charter schools got to take advantage of every classroom, fallow or not, that in the same campus or same locale the charter school kids would have a much better deal, theoretically perhaps, than the non-charter school kids.

MR. ARNONE: This is exactly the point of the Charter Schools Act, to create competition and to allow charter schools to operate differently than district-run schools.

Everybody gets money based on per-pupil calculations, your average daily attendance. The school district gets money that way. The charter schools get money that way. We get a citation to a report. It's supposed to be equivalent. A recent legislative report said charter schools actually get a bit less per pupil. But it's supposed to be equivalent.

What you do with that money is up to you. If you choose to make decisions with what benefits you pay people, what salaries you pay people, what you do with maintenance and administrative space and how many principals per kid, all of that is for any school operator to decide. You have the same pot of money.

But at the end of the day, what the school district does is it decides how many teachers it has. The limiting factor is teachers, not classrooms, the way they do it. So they don't look -- with this norming ratio, it's not about how many classrooms they have. It's about how many

teachers they have. And they assign the teachers.

For the reg, it's not about teachers. The regs don't say one word about teachers. It says you take the number of students, the number of classrooms. And it specifies how to take the inventory. There's a reg that specifies every single thing to count. It makes no difference if it's occupied or not.

You take the students. You divide it by the physical classrooms you have, whether they're used or not. And then the school makes its choice what to do with those classes. How many teachers to have, how many kids to put in a classroom, that's up to the schools.

So what the District is doing is it's taking its choices that result in a certain ratio of students per teacher and is pretending that's a facility constraint. It isn't. It's a teaching staff constraint. And then they want the charter schools to do the same thing.

I don't have to buy into the whole theory. I think it's perfectly fair that there be competition. Competition is what was intended by this statute.

But I don't even have to convince anyone of fairness. It's just the reg. The reg says you use comparison group schools in the high school attendance area for each and every charter school applicant. That's the reg. It says exactly what to count.

And school districts, large school districts -- this school district attempted to influence the implementing regulations, and the implementing regulations ended up with

a compromise. That's all we're asking for. Follow the reg as it was written.

THE COURT: You know, defense counsel makes a good point, as do you. The competition aspect did occur to me. I have a son-in-law who is from Holland. And in Holland there are Catholic schools. There are Protestant schools. Secular schools. And they're all called public schools. And they're all financed by the government.

But there is tremendous competition, then, among all of these schools for who can give the best education and attract the best students. I don't know if they're paid on how many students they get. But that occurred to me when he was telling me about this, that there will be tremendous competition.

One of the criticisms of public education is that there is no competition. It's a monopoly. And it could very well result in, on the same campus even, charter school kids getting a better deal than the non-charter school kids.

And I didn't write these regs. But it does seem to me to exclude the norming ratio, or whatever the word was used, because Jernigan's declaration admits they're using norming ratios.

And it seems that the norming ratios districtwide, or even some other kind of norming ratios, would be something that is prohibited by Prop 39. And it may very well lead to what the District may consider anomalous results.

MR. HUFF: Well, Your Honor, you can say something

different. And I think you will after we walk through this.

THE COURT: Okay.

MR. HUFF: With regard to the concept of competition, the concept of competition is not competition by facilities. It's competition by programs. It's competition by how they make their program rigorous as far as curriculum, as far as discipline. That is the competition that is intended to ensue.

It's not intended to be competition by virtue of who has the better facilities or not, who has the more facilities or not. That is not the competition element. It's the straw man in this argument.

I'd like to talk about the wisdom of the law because the wisdom of the law has answered this question, and it has answered it clearly. And the wisdom of the law has answered in a way that their argument cannot -- they cannot harmonize the statute and the regulation.

The District's interpretation does. So let's walk through it. And I'd like to walk through it very carefully.

THE COURT: Please.

MR. HUFF: You're familiar with 47614(a) of the Education Code. That's the general preamble that says the intent of Proposition 39 is to share all space fairly. We all agree as to that.

THE COURT: Right.

MR. HUFF: Now, my colleague here just went through 47614(b), which is where the wisdom of the law is found.

But he kind of glossed over the last -- he didn't truly emphasize the important part of the first sentence of this paragraph. So I want to go through it slowly.

Each school district shall make available to each charter school operating in the school district facilities sufficient for a charter school to accommodate all the charter schools' in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district.

THE COURT: Stop right there.

And it's the plaintiff's position that if the LAUSD chooses to close classrooms or assign teachers for whatever reason -- say that some people criticize the school as being excessively bureaucratic with too many layers of people who are not in the classroom.

If they choose to spend their money that way, if they choose to allocate their personnel that way, then we respect that choice. But they shouldn't be bound because they have no control over these choices.

MR. HUFF: Well, that's a nice wish, but that's not what the charter law provides. The charter law provides that they are bound by our school district's choices.

If we only build classrooms that have no windows, they cannot say, "We want to educate our kids in classrooms on your campuses that have windows." They are bound by our choices. They are bound by our choices of what we provide our children. They get the equivalent. That is what the

wisdom of the law says.

And that's why the regulation uses the very specific word "provided." And I want to turn to that in a second.

09:59AM But I want to talk about norming ratios. Again, as if that's something bad, norming ratios is what --

THE COURT: I'm sorry. I grant judicial notice and overrule the objection. I should say that.

Go head. Norming ratios?

09:59AM MR. HUFF: Norming ratios, Your Honor, are what the charter school students -- it's what they would occupy classrooms pursuant to if they were attending other public schools of the District. It is exactly that kind of equivalency.

09:59AM Because what does norming ratios result in? It results in seats. That's the by-product of norming ratios. Seats. Seats are the facility. Yeah, the roof matters. The gym matters. The library matters. But the core facility are the seats.

10:00AM And these are the conditions reasonably equivalent to what our children are attending. It's what their children get too. That's sharing the space fairly.

So let's think about what the statute mandates and then look at how it was implemented. Because Your Honor

10:00AM must recognize that a regulation can't be read in excess of the statute authorizing it.

THE COURT: Of course.

MR. HUFF: So turning to the regulation. The key

language: Facilities made available by a school district to a charter school shall be provided in the same ratio of teaching stations -- classrooms -- to ADA as those provided to students in the school district attending comparison group schools.

10:01AM

And that is precisely what norming ratios results in. Norming ratios result in how many classrooms are provided to our students on each comparison group campus. It's the beginning and the end of the analysis.

10:01AM

We have absolutely, without equivocation, for 100 percent of the eligible charter school students, provided precisely the same amount of seats per program that these students would enjoy if they otherwise attended District schools. They are not receiving anything less. We

10:02AM

are sharing our space fairly.

There is no obligation whatsoever in the Charter School Act or the regulations, in order to promote competition or otherwise, to provide them, these charter school operators, with facilities far in excess of what are

10:02AM

otherwise provided to our students attending District schools.

That number is determined by using the norming ratio. And as the declaration of Sean Jernigan made clear, using every example that was raised by CCSA, not one

10:02AM

example, that's the result. It results in sharing all of these classrooms very fairly. The standard deviation is less than one seat. That's in the evidence, Your Honor.

THE COURT: I follow your argument. And it's going to

come down to -- and you said the answer was yes. But do all the students, charter or otherwise, have to follow the unfettered discretion of the school district in how they allocate their personnel and resources?

10:03AM And I can see arguments on both sides. I mean, there was -- again, I cannot stress strongly enough how I do not want to get involved in managing the L.A. school system. I have no expertise nor do I have interest in doing that. You already have good people doing that.

10:03AM But if the purpose of the charter school law was to foster this competition -- and I think counsel is right -- wouldn't a ruling in the plaintiff's favor then force the District to reconsider how they deploy their personnel?

10:03AM I mean, I have been led to believe in the popular press, or whatever may be this urban myth, that there is a vast bureaucracy here; and talented people are not in the classrooms, and they can be moved into the classrooms without violating any kind of budget constraints.

10:04AM And the issue of does the school district have this unfettered discretion to do what they want and have everybody have to fall in line is not something that I saw addressed in the papers, in terms of is there a precedent to that as applied to charter schools. I mean, this is sort of a new area because usually you proceed in different legal context.

MR. HUFF: Your Honor, I think you must --

I'm sorry to interrupt.

THE COURT: Again, there was an issue of what standard I use, the writ issue or not, and I agree with the plaintiff that this is a breach of contract. So I would not apply the writ issue. We had that discussion before; so nothing has changed.

10:04AM

MR. HUFF: Your Honor, we're a public agency discharging our duty. We've done it extraordinarily this year. We've spent over $20 million this year in making provisions for charter schools.

10:05AM

I want to talk about that remark. And then I want to talk about the consequences, the real-world consequences, of not deferring to our interpretation of this statute and regulation.

With regard to our interpretation, I think you must -- and I think the wisdom of the law says that you must -- defer to our interpretation of the statute and the regulation if it is reasonable, if it is plausible.

If we have read this statute and this regulation in a meaningful and plausible way and we have implemented it in good faith, the wisdom of the law says that you must defer to us as a public agency. Because like you've amply said, you don't want to be the superintendent of the District.

10:05AM

And, Your Honor, I submit to you that if you take a step back and you study 47614(b) and study the implementing regulation of it that says that the charter schools get classrooms as they are provided to our students, you cannot conclude anything but our reading of that

statute. And our implementation of that regulation follows it.

They offer an alternative definition. But is there room in our discretion to have read and implemented the law the way we have and in good faith? I submit to you that there is only one conclusion with regard to that.

THE COURT: Well, you are correct in your broad-brush reading about what would be reasonably equivalent. But there are these regs that follow that which seem to define that.

And they have their own definition of "reasonably equivalent." It's not just what you provide the non-charter school kids. But they have a methodology of sorts. It was a little ambiguous when I was reading it about how they are to do this. And it's not at all clear to me that if you offer X to the non-charter school kids, then you offer X to the charter school kids.

MR. HUFF: Your Honor, I think it's important that you thought it was ambiguous because the *Bullis* Court recently talked about when faced with an ambiguous regulation, what deference should be given to the school district when interpreting it and implementing it. And the *Bullis* Court deferred to the school district with regard to its reading and implementation of an ambiguous paragraph. That occurs with simply one paragraph involving the regulations.

Your Honor, I urge you to think again about subparagraph (b) in the implementing of the regulations because the concept of how to calculate inventory is being

blurred improperly with what we are to share fairly, what we are to provide.

The number of classrooms is simply that. It's inventory. It's what may be counted. It's an arresting procedure that precludes us from not counting a classroom if we are otherwise using it as a classroom.

But that is different than the real core purpose of the statute and the regulation, which is these charter school students get the very same rights, but not more rights, than if they would otherwise attend our schools. That's what they get.

Let's talk about real-world consequences of your ruling. Let's talk about what's recently in the press, recently since we filed our opposition.

The school district on Thursday at its meeting is going to be deciding on its final budget for the next year. And one of the elements of that final budget unfortunately is going to be, as of yesterday, what's known as the Beyond the Bell program is going to be cut.

Beyond the Bell is a significant program here in urban Los Angeles because what it does is it provides a safe locality for students whose parents both have to work. It allows the students to stay on the campus until the evening when perhaps the single mother needs to stay at her job until she can ride the bus to the school and pick up her kid.

That program is very likely going to be cut in its entirety. 42,000 children currently utilize the Beyond

the Bell program. Let me tell you why it's extraordinarily relevant.

If we are required to allocate classrooms based upon 15 seats per child to charter schools rather than 24 seats or 28 seats, as they would enjoy if they otherwise attended our school, you will then force us to displace children from their neighborhood schools.

THE COURT: Why?

MR. HUFF: Because there's not enough classrooms. I now then have to house charter school students in classrooms at a ratio of 15 to 1 rather than 28 to 1. It takes two classrooms where it should take one. I run out.

THE COURT: Well, wait. What if there are otherwise empty classrooms?

MR. HUFF: It doesn't work that way, Your Honor. If there's 1 empty classroom but I have to house all 11 of their classrooms at 15 to 1, it naturally erodes the pool of classrooms that I have remaining to house my district's at our norming ratio.

So I will then necessarily have to forcibly dislocate children from their neighborhood schools in order to accommodate charter schools in conditions that they would not otherwise have if they attended our school, in conditions far superior.

And I have to take those neighborhood children, Your Honor, and instead of moving them two blocks from their apartment, I have to move them three miles. And it's a ripple effect.

THE COURT: Plaintiff, you make excellent points about this is competition and this is what America is all about, and, more importantly, it's what Prop 39 is all about.

But in the world, there has to be a leader and there has to be followers. And when counsel says a consequence of my ruling, if I were to rule your way, is that they're going to have to rearrange students and move students, this is exactly the type of micromanagement I did not want to get involved in because I actually lack the competence to do that.

At some point, shouldn't I just let a leader be a leader and the rest of us be followers and have it be a political question? That is a political question, about whether the citizens want the School Board to run a district this way. And if the people object, we have an elective process to either have new laws or remove the School Board.

But counsel made a good point about I have to be careful in what I do here, that I don't assume a level of insider knowledge that the collective wisdom of the School Board has. And I clearly do not have that.

And I wouldn't want to see people moved three miles from their apartment when they otherwise live a block from the school.

Is that something which is realistic? Because if it has that realistic consequence, then I feel I should defer to the School Board and, again, make it a political question, not a legal question.

MR. ARNONE: Your Honor, I'm not here arguing policy.

I'm here arguing the law.

Counsel, in his papers and in his argument, said -- I wrote it down because it's extraordinary. In addition to the fact that we have to be bound by their choices, which is an extraordinary false statement, he also said that you cannot harmonize the statute and the regulations.

Let's be clear here. The statute has this fairness concept, which I have argued a lot to this Court when I first made the motion for summary adjudication, that we won.

THE COURT: Right.

MR. ARNONE: It also defines. For this purpose it gives to the State Board of Education the power to define it.

What counsel said in his papers and here would require Your Honor to conclude that the regulations -- that all the school districts participated in and commented in and resulted in a compromise -- violate the law. He's asking for something big here. We shouldn't try to gloss it over.

The regulations -- and he picks and chooses the parts of the regulations that he likes. But it says clearly the comparison group shall be the school district-operated schools with similar grade levels that serve students living in the high school attendance area with the largest number of students in which the students of the charter school reside. That is clear. That is not districtwide.

THE COURT: What if they do a normalization within the high school district, then? What if they go back to the drawing board and say, "Okay. You win. We won't do it citywide or districtwide. We'll get into the Manual Arts district and then normalize all the schools, and then they can achieve the same thing that way." And then it would be legal?

MR. ARNONE: I think if they take the comparison group schools -- which means you find schools in the high school attendance area with similar grades -- and then you take their average daily attendance school by school divided by the facilities they have, not the ones they choose to put a teacher in, and then you norm them. Because it's not to take one. It's to take the group of them that are all similar. That's what they are to do.

And I don't know what that answer would be. They don't know. He used a 15 to 1 ratio in comments, which I thought was extraordinary. We'd love it.

THE COURT: In our dreams.

MR. ARNONE: So all I'm asking is that the regulation not be declared violative of the statute, which is what he's arguing.

Also, he says there is ambiguity. I think there is not a wit of ambiguity.

THE COURT: Well, you know, I read this. I read it a couple times --

MR. ARNONE: It does say "high school attendance area." And they admit they don't do that.

THE COURT: Okay. School boundaries. Now, those are words I understand.

MR. ARNONE: But it says "high school attendance area." And that's a term that means something because they have high school attendance areas. Then it says how to calculate the number of teaching stations.

And there's another false comparison that counsel is using.

THE COURT: Yes?

MR. ARNONE: He is saying, "This is what they would get if they attended the District school." Not quite true. If you attend a campus that has -- and I use this example in my reply papers. If you attend, let's say, a 200-student elementary school campus with 10 classrooms, you could allocate your resources to put 20 kids in each classroom.

But if you, for other choices, only decide to pay for 8 teachers, you can't use 10 classrooms. You have 8 teachers. That puts 25 per classroom.

Those kids, though, still attend a school with 10 classrooms. Maybe they do something else with them. Maybe it becomes an art room or a music room. The kids still benefit from the facility.

And all this (indicating) talks about is the facility. It doesn't talk about what they choose to do with it. It's a straight application of the regulation.

And every word counsel said, the parade of horribles -- and I would remind the Court every time we have been here, they have had a different parade of horribles.

They had declarations saying it is impossible to make an offer to everyone. And now they say they do it. They say the sky -- the sky is always falling on Beaudry Avenue. Every time I ask for anything, "We're going to kick kids out of their school. We're going to lay off people."

10:17AM

Every time I say follow the rules, they say it's impossible. They say it's a writ matter. They say it's impossible. They say I waive the right to the contract. These are the things they say every time we are here.

10:17AM

But then when Your Honor has ordered them to do it, because that's been what the law said, they then come back and they say, "We did it." They will do it again.

We can't tell them -- Your Honor can't, I can't, and no charter school can tell them -- what classrooms to offer. And it's about classrooms, not seats. He keeps saying seats. It's not seats. It's classrooms. So you can always put more seats in a classroom. They are not able to make us do that.

10:17AM

10:18AM

So I can't tell him which offers to make. I assume they will make an offer that is not the parade of horribles that counsel, without evidence, just spoke about.

I assume that they will make wise offers that follow the law like they did the last time that they claimed something was impossible. You ordered them to do it, and then they started doing it.

10:18AM

So all I'm asking is to follow the reg. They get to make the offers. We don't get to make the offers. They

do.

Then he mentions too that you should defer to the District's interpretation of the reg. Let's be clear. The cases generally about deference to governmental agencies talk about the agencies with expertise in the area that write the regs. Like you defer to the city over the city code.

THE COURT: Right.

MR. ARNONE: This is a reg that the State Board of Education adopted. Let's defer to it. It also told us what it meant. It said one option was a districtwide ratio, which is exactly what they do, and they rejected it.

THE COURT: What if they did a boundary-by-boundary-wide ratio?

MR. ARNONE: I think they could have. They didn't.

The statute itself says "conditions reasonably equivalent." The statute understands that that's vague; so the statute further specifically says "empowers the State Board of Education to define that." And it did.

THE COURT: Yeah. Okay.

MR. HUFF: Your Honor --

THE COURT: Wait.

It does say "high school attendance area." And, you know, I was thinking how I used to describe that they were high school boundaries or whatever. Now I understand what they are talking about.

But I think if you went to a high school boundary by high school and did a norming ratio, it probably would be

fine even if you close classrooms. Because at some point -- I don't want to tell the school district how to spend its money. As I said, I have no expertise in that.

But counsel was right. It does back off from the districtwide norming ratio. But I think if you did it on a school boundary by high school boundary, it would do the same thing on a Manual Arts, or whatever. I don't know L.A. Dorsey, or whatever. It probably would pass the statute.

MR. HUFF: And, Your Honor, look at Exhibit A to the declaration of Sean Jernigan.

THE COURT: I saw that. I didn't make any sense of that.

MR. HUFF: That's us doing exactly what they asked for. It's the same result. Theoretically you would think it would be the same result. If we use the norming ratio districtwide, then it applies by high school attendance areas too.

THE COURT: Those are just numbers to me. I looked at that and I --

MR. HUFF: What we demonstrated was is that doing it by high school attendance area results in the same result. It's the same thing. We have complied with the law. The analysis is the same. We have complied with the law.

If you look at the declaration of Alison Schoenbeck submitted in support of their motion, it results in 15 to 1. That is just an unrealistic result with very, very difficult consequences for our District, especially when we start school on August 14th. It has very

real-world consequences.

And if I may also say this, Your Honor, why are we here? The reason that we are under this Court's order currently is not because of a difference in interpretation and implementation in very good faith of a regulation and a statute.

It's because this District was suffering under different administrative constraints the last time around, two years around, rather. It was really two years ago. And this District admittedly failed to make offers.

And if you remember what Your Honor said from the bench, you said, "Just make an offer. Even if it's a crappy offer."

THE COURT: That's what I said? Did I use the word "crappy"?

MR. HUFF: You said, "Just make an offer." And you were right. And we did. And that's what --

MR. ARNONE: Crappy offers.

THE COURT: Crummy offer is what I said.

MR. ARNONE: I said crappy.

MR. HUFF: It's in the record.

Regardless, Your Honor, let's not let this thing mushroom to this kind of really microscopic degree to where -- I don't know if that sentence made sense. Let me restate it.

THE COURT: Mushroom to a microscopic degree.

MR. HUFF: I think you understand what I'm trying to say, Your Honor. You were right to order us to make offers.

We made those offers.

This process has improved dramatically. It has. And it's not just a result of your orders. The District was playing catch-up, and we were just putting the administration in place that year. That's how we were able to implement so successfully those orders.

This year it's just unrecognizable compared to years past. We shouldn't be here. It's not a case of we didn't make offers. It's not a case of we didn't give any seat to a charter school student. It's not a case that we gave less seats to a charter school student. It's not a case that we didn't give the art room to a charter school student.

We have shared our space identically. Charter school kids get the same space. If we take the art room, for example, this is what's so interesting is that if you just look at the regulations and parse them in the portion that my colleague relies on, on inventory, it would count the art room as a classroom.

Well, we don't put any kids in the art room. It's a shared-use space. And we've offered every charter school on every campus, to the extent we have an art room, shared use of the art room.

We have complied with these regulations to the letter. And I think more important, because this is a policy question -- it has your order -- if you order it, if you grant their order, it will have major real-world educational impacts, lifestyle impacts on children. It will

involve moving tens of thousands of children.

It is a policy question. And we have implemented the policy. We have shared our space fairly. We have done our job. We have discharged our duty. If the law needs to be changed, if it needs to be clarified, then it is a political question.

But for you, Your Honor, have we followed the law in a way that is not arbitrary or capricious? Absolutely. Have we shared our space fairly? Absolutely. Every kid gets a seat. Every program gets an opportunity to occupy our facilities and compete with us in a way that is in no way disadvantaged.

THE COURT: And in a perfect world -- by definition, is one which I create -- I would think that ruling for the plaintiff and forcing the school district to make tough choices and then to compete with 1 and 15 or 1 to 24 probably would result in better schools for everybody.

But, you know, the world we live in is not the one I create. I need to leave my personal beliefs in chambers when I make rulings, even though the result is something which I wouldn't write if I were writing a script or something.

But, you know, while I agree with the plaintiff that competition is important, and while I personally think it would dramatically improve education for everybody -- not that it's relevant here, but I believe in vouchers for that very same reason. I believe that we should have competition in the education arena. There should not be monopolies.

That being the case, I am bound to follow the law, though. And I think the plaintiff is right in that you can't use norming districtwide, but you can use norming on a school attendance boundary, or whatever the word is you used. The high school attendance boundary.

10:26AM

Because then, once you focus on the high school attendance boundaries and you do norming, then you leave it up to the School Board how to allocate resources.

My fear is if I would rule for the plaintiff across the board here, that I would be inadvertently making policy choices and administrative choices, which I cannot possibly appreciate the consequences of.

10:27AM

So I think the plaintiff is right initially that you have to focus on the high school districts, or whatever word you guys used. But I think once we do that, I think the norming ratio leaves the authority with those who have the expertise. I don't have that expertise.

MR. ARNONE: And we're not asking the Court to substitute its judgment for anyone. Just apply the regs.

10:27AM

I think there might be a little confusion with use of the word norming ratio the way Your Honor just used it.

THE COURT: Right.

MR. ARNONE: The way they use the norming ratio, it's a Board -- it's an LAUSD Board-approved ratio of how you assign teachers, how many students you assign to teachers.

10:27AM

THE COURT: Districtwide; right?

MR. ARNONE: Districtwide.

What is allowable is you look at the high school attendance area. You look at the schools with similar grade levels within the high school attendance area. You look at each school's average daily attendance. And you do it as a 10:28AM fraction of -- a ratio to classrooms, physical classrooms.

What I meant before, what I think might be causing some confusion, is you then take them for all of those schools in the high school attendance area and you average them.

10:28AM I think that's what Your Honor means when the word "norming" is being used. But I want to be clear because they don't use "norming" that way.

THE COURT: Okay. What I meant was to do on a high school attendance boundary area, or whatever words you use, 10:28AM to do there on what you are otherwise doing on a districtwide --

MR. ARNONE: See, what they're otherwise doing is they're not looking at the classrooms. They want to look at pupils per teacher. The rules are pupils per classroom.

10:29AM THE COURT: Whatever they're doing on a districtwide basis should be done on a high school boundary-wide basis. Then I think it would comply with the law.

MR. ARNONE: I just have to be clear here because I think that's not the case.

10:29AM THE COURT: Well, it might not be the case. But I'm saying that if the concern is not doing it districtwide, that you want to look at comparable schools within a certain geographical area. I think if they do that with schools in

a comparable geographical area, it probably passes the statute.

MR. ARNONE: Well, Your Honor, though, I think that's not quite right because you do look at it at the high school area. That part is correct. But you don't look at their norming ratio. Their norming ratio is based on how they assign teachers.

The reg says to take the number of teaching stations determined using the inventory in the regs. And you take the number of average daily attendance and you divide it by the number of teaching stations, classrooms, using the classroom inventory prepared pursuant to CCR Title 2, Section 1859.31. So that's what they must do.

If Your Honor just has them do the norming ratio, it will be the same result because they dictate that from the Board.

THE COURT: Okay. Wait. What I would like to do is give the Board -- I would defer to the Board in how they assign classrooms and teachers.

MR. ARNONE: They can do what they want.

THE COURT: Well, that's not what counsel said. Counsel said if I grant your motion, I will not be doing that.

But within a given high school district area, the norming ratios, or whatever, however you want to call it, assigning by teaching stations or classrooms.

But if they want to close classrooms and assign only 8 teachers to 10 classrooms, they can do that. And

then that can be the norm that would apply to charter schools. And that, then, would comply with the statute, wouldn't it?

MR. ARNONE: Well, I'm not quite sure what Your Honor means. What happens to the empty classrooms?

THE COURT: Exactly.

MR. ARNONE: For theirs, they can do what they want with them. They can close them if they want.

THE COURT: That's right.

MR. ARNONE: But we still get our share of them.

THE COURT: No. Wait. Wait. No.

I think that for whatever reason that the people who are in charge and running the show -- because they have before them all the facts, budgetary facts and whatever -- that if they want to close the classrooms, they can close the classrooms.

And then you have a norming to make sure that the charter school kids get the same as the public school kids within a given high school boundary. Manual Arts, Dorsey, L.A. High, things like that.

MR. ARNONE: Does Your Honor mean that they can choose to close their own classrooms or that they can choose to close classrooms generally and then pretend they don't exist?

Because the regs are clear. The regs say you must look at the classrooms that physically exist, not those that are occupied. So you take my hypothetical of the 200-student school with 10 classrooms. That is 20 to 1

because that's what 200 divided by 10 is.

If they choose to spend their money a different way so they only have 8 teachers, they can't close 2 and then just treat that as an 8-classroom campus. The regs are very clear that you look at the inventory as defined, and the inventory says precisely what to use.

THE COURT: The inventory is defined as?

MR. ARNONE: It says you look at the inventory in that section 1859. And then you look at section 1859, and it says, "The District shall prepare a gross inventory consisting of all classrooms owned or leased in the district. For purposes of this gross classroom inventory, the following shall be considered a classroom." And then there's a long list. It's (a) through (m).

So the reg is clear that their choice to close something is irrelevant. You look at, quote, the gross inventory consisting of all classrooms owned or leased in the district. It even includes -- oh. Yes. (g).

"Any classroom converted to any non-classroom purpose." It specifically includes that. That is subsection (g). Any classroom -- it includes classrooms, (g), converted to any non-classroom purpose.

So it couldn't be more clear. The inventory is the physical space. After they divide it -- they also talk about money. These are facilities that exist. We're not asking them to pay money. These are facilities that exist.

And I want to highlight the absurdity. I had prepared a roster. We didn't go through everything. We

don't have all their data. But I've got 12 examples here of charter schools where their average daily attendance went up this year to last year, and their number of classrooms stayed the same or went down.

10:34AM How can that happen when their total number of teachers and their total number of students is going down? The number of classrooms they have this year isn't going down. What they're doing is they are assigning their resources. Free to do it.

10:34AM Your Honor has been so clear about your lack of intention to micromanage this District. We were very careful in this motion. We were seriously considering about five different motions. And we decided that this one would be the one where Your Honor would not feel like we were 10:35AM asking you to micromanage anything because the regulation says you use the physical space.

It even says "classrooms converted to any non-classroom purpose." And then it says you take the actual average daily attendance for those schools in the 10:35AM high school area, and you divide it by that. So I thought this is clean and easy.

And I appreciate Your Honor doesn't want to tell them what to do. And I don't want to tell them what to do. They can do what they want. But still, when they decide 10:35AM what offers to give, they have to follow these rules.

THE COURT: Part of the fun of being a judge when you have excellent advocates is to listen to oral argument because you are all so good that I listen and, "Yeah. Good

point. I think you're right. No. I think you're right. No. I think you're right."

MR. ARNONE: Then why don't we go home now?

THE COURT: Yeah.

10:36AM Well, I have (g) before me. And it does say converted to any non-classroom purposes, including use by others.

MR. HUFF: Your Honor, if you're going to concentrate on that, can you concentrate on (a), please?

10:36AM THE COURT: Yeah. But, you see, you have to read this all together.

MR. HUFF: Right. And that's what's really important. Under their theory, we even have to count classrooms that don't exist yet. They're being built.

10:36AM MR. ARNONE: It's not our theory. It's the regulation.

MR. HUFF: No, it's not the regulation. It's provided versus existence. They read the regulation as if "provided" means gross classroom in existence. That's not sharing

10:36AM space fairly. That's not promoting competition.

THE COURT: Who wrote this?

MR. HUFF: The State Board of Education, Your Honor.

THE COURT: Well, they didn't consult me when they did this. "For which the construction work has commenced." So

10:37AM half-buildings count.

MR. HUFF: Right.

In fact, counsel has contradicted the declaration that they filed in support of their motion. In footnote 3

of their declaration, they themselves delete 16 classrooms from the inventory at Marina del Rey Middle School because in that example, they are already otherwise being used by a charter school.

10:37AM The reading that was just promoted of 1859.31, those classrooms would also have to count. So, Your Honor, we are following the law. We are doing it.

You know, they say that they were very careful in filing their motion. Well, I take them at their word. 10:37AM Please take me at our word when I say we were very caring in the way that we allocated our space this year. We have given a precisely level playing field to where the two teams can now compete.

THE COURT: Well, apparently the statute, while 10:38AM attempting to create that level playing field, actually has written it in a way that potentially is not a level playing field. And you have to read these things in conjunction.

And perhaps the intent of the statute was to elevate the game to everybody so that if you tilt the field 10:38AM a little bit -- if applying these regulations tilted the field a little bit to the charter schools, then the non-charter schools would come back and reallocate it.

But at the end of the day, I have to follow these regulations. I have great sympathy for your argument about 10:38AM let the District be the District, let the administration allocate students, let them decide what they need to do.

But unfortunately here, under these regs it does say that in counting inventory -- and it lists what

inventory you consider. This may not be a wise move. It may be a dumb statute. But --

MR. HUFF: We count the inventory, but the inventory is not what they get. That's not what they get. They get how they would be accommodated in that inventory if they otherwise attended the district school as a district student.

THE COURT: What does (g) mean?

MR. HUFF: (g) means if we take a classroom and we convert it to a parent center.

THE COURT: That no longer exists?

MR. HUFF: No. Then we share it. We share it. We offered them 100 percent shared use of parent centers, of the library, of the gymnasium, computer labs, science labs. They get it on a district pro rata share basis.

THE COURT: Where does it say that?

MR. ARNONE: It doesn't.

THE COURT: 1859.31 --

MR. HUFF: This is the implementing regulation, Your Honor. 1859 is not the Proposition 39 implementing regulations. It's incorporated as a way to determine inventory.

THE COURT: Right.

MR. HUFF: That's it. It has no more meaning than that.

THE COURT: That's an important meaning, though, isn't it?

MR. HUFF: Yes.

Okay. How do we provide these?

Your Honor, please focus on what is required by the regulation is that we have to provide this inventory to the extent we provide it to our students, not to the extent it exists. We provide it. That's what it says, Your Honor.

THE COURT: It says both.

MR. HUFF: No, it doesn't.

THE COURT: Yes, it does. Because it says to the extent you provide by both. But then when it defines how you do that, it says something different.

MR. HUFF: Your Honor, if it says both, then aren't we complying with the law?

THE COURT: Yeah, if that's all that existed. But when it defines how you make things equivalent and it defines it in a certain way, the answer is yes, but then no. You know, it's a --

MR. HUFF: You can't harmonize, respectfully, that reading of the regulation with Education Code Section 47614(b). You cannot read that sentence and harmonize it with that interpretation.

THE COURT: And I cannot take a blue pencil and cross it out either.

MR. HUFF: But you can take your blue pencil and set it down because you can read the implementing regulation the way we do and harmonize it with 47614(b). You can do that. It's rational. It's practical.

By the way, I think we've gone off the rails here. It's what I meant to begin my comments with. We're

not talking about empty classrooms. We're not. There's not really empty classrooms at these schools. What's going on --

THE COURT: Then there shouldn't be a problem.

10:42AM MR. HUFF: No. There is a problem because the way they want us to count things results in skewed math. It's in their declarations. It results in 15 seats per classroom that we have to give them.

So let's say we've got 20 classrooms on a campus. 10:42AM If we load them all at the same ratio, then we can house their students and we can house our students. Because it's seats in the classroom that really matters. That's the real-world result of all of this.

But if we can only put 15 seats in the classrooms 42AM but have to house all of their ADA, that then bumps over into our classrooms. Now we have to forcibly displace our kids out of those classrooms because we can't put 28 seats in their classrooms. We can only put 15. We have to forcibly displace our children, take them out of their 10:42AM neighborhood school, and move them miles away.

THE COURT: Wait a minute. Where do you get their kids/our kids? It's all public school.

MR. HUFF: You're right. And we can share the space fairly.

10:43AM THE COURT: Why don't you just give it to the charter school, then?

MR. HUFF: Well, then, what do we do with our kids?

THE COURT: If you say, "You, you, you, and you go

next door to the charter school," why can't you do that?

MR. HUFF: Because they have a constitutional right to attend a public school. We cannot compel them to attend a charter school.

10:43AM Your Honor, let's give them the same amount of seats that we give our kids. That's what the law requires. If you grant their motion -- well, a lot of things are going to happen. But if you grant their motion and it's implemented, it has real-world devastating effects on our 10:43AM programs. It compels us to forcibly dislocate children out of their neighborhood schools at a very trying time. That is not in the best interests of student safety.

Which when you read the Proposition 39 regulations, what is the foremost consideration in 1 .4AM allocating space? It's student safety. We have real-world issues of gang lines. We have real-world issues of urban transportation.

Your Honor, this ruling, if implemented, would force us to give them more classrooms so they can enjoy 15 10:44AM seats per classroom than our students would ever be able to enjoy.

And it would require us to move kids out of their neighborhood schools into other schools, causing a ripple effect because then I have to displace those kids that I'm 10:44AM making room for the new kids, put them in a farther away neighborhood school. It has a ripple effect. You want to call it a parade of horribles? Well, so will I. Because that's the real world.

You can issue a ruling here that is absolutely consistent with the law. Our reading is sound. It's not arbitrary. It's measured. It is not capricious. It is caring. It is equal. It is fair competition.

10:45AM If you look at paragraph 13 of Sean Jernigan's declaration, you'll see that we have given an example. The example of the 12 schools they cite, we normed them by high school attendance area just as they asked. It's a standard deviation of .7. It's going to result in the same -- it's 10:45AM the same analysis.

THE COURT: Then where is your parade of horribles?

MR. HUFF: No. No. No. No. No. If we used our norming ratio. They don't even want to let us use our norming ratio and provide them seats as if their students 1. .5AM were attending our schools. They want us to provide them seats because they've got more money per teacher. So it's just not fair, and it's not what the law requires.

MR. ARNONE: Your Honor, this is surreal.

There are schools where with higher numbers of 10:46AM kids, they are lowering the number of classrooms they offer. There's no reason that should happen. That might happen if you had skyrocketing L.A. Unified attendance. But you don't. L.A. Unified's attendance has been plummeting year after year for several years. So it doesn't make any sense 10:46AM that that would happen.

We are thinking, at most, there are maybe 40 new offers that they would have to make. It's probably a classroom or two. For some, it may be no difference at all.

For others, it may be a classroom or two.

I don't know how many total schools they run. I think it's got to be over a thousand. Maybe thousands. I mean, there's a huge number that they run. The sky is not going to fall.

Mr. Huff -- I was really happy that he likes the motion that he fought so hard against two years ago now. But he said the same -- worse even -- the parade of horribles then. And we had declarations then, I think even from Mr. Jernigan, if I'm not mistaken.

They will implement this in a rational way, no doubt. But they won't do anything, like they haven't before, without an order to follow the rules.

THE COURT: Now, you had one more thing you wanted to say.

MR. HUFF: Yeah. You bet, Your Honor.

Two points. One -- by the way, we did it this way last year.

THE COURT: Did what way?

MR. HUFF: The same allocation of space.

THE COURT: You pointed it out in your papers. But that's not a waiver.

MR. HUFF: It's not a waiver because there's nothing to waive. We've followed the law.

But, you know, Your Honor, let's come back to another favorite subject of yours from time past, and that's paragraph 5(b) of the settlement agreement. Remember that?

THE COURT: Yes.

MR. HUFF: And remember you ruled specifically that paragraph 5(b) is void as to public policy if it results in us not making an offer.

THE COURT: Right.

10:47AM MR. HUFF: But 5(b) is otherwise enforceable, and we may otherwise rely upon 5(b) in this breach of contract action if it results in us making offers. Remember that?

THE COURT: Yes.

MR. HUFF: Paragraph 5(b)(2) says LAUSD is not 10:48AM required to make an offer and our policy may be such if (2) LAUSD would not be required to make space available where doing so would require LAUSD students to involuntary ride the bus to school.

THE COURT: Yeah. Well, we had that discussion, and I 1 .8AM don't know that that's the case.

MR. HUFF: I'm just telling you, Your Honor, it's going to be a very important subject that's going to come up in the future if you actually grant their motion. This is going to result in involuntary bussing.

10:49AM THE COURT: I don't know that. Maybe if it does, we can revisit the issue.

But I can't help but think that in the real world this is going to be that big of a deal. I mean, if, in fact, there is this clamoring demand for charter schools and 10:49AM decreasing demand for the non-charter schools, well, then, just shift the kids who want to go to the charter school. I mean, you can get volunteers to go to the charter school. But that's not my concern.

I have to apply these statutes as written. I can't blue-pencil one out unless it's unconstitutional and voids public policy. But that doesn't apply here. Nothing here is void to public policy.

10:49AM And what it says under (g) is that you count as inventory -- or (a), for that matter -- half-completed buildings are ones that are converted to non-classroom purposes. That's what it says. And it may be silly and it may result in an anomalous result, but you have to call up 10:50AM the Board of Education and say, "What were you guys thinking?"

But at the trial court level, I look at these words. I understand why Prop 39 was passed. I understand what everybody was trying to accomplish. This does not by 10:50AM any means frustrate that.

So I have great faith in the L.A. school system that they will make this work, I mean, that they're not going to hurt their kids and they're not going to hurt their teachers. And maybe it's going to mean a more efficient use 10:50AM of their facilities or a different use of their facilities.

And the last thing I want to do is get into this where I tell them what to do because I don't know what they should do.

MR. HUFF: Your Honor, if I may.

10:51AM THE COURT: Please.

MR. HUFF: This order, if implemented, will result in the necessary elimination of what's called the Set Aside Program.

THE COURT: How do I know that?

MR. HUFF: You don't. And that's the whole point is that this order has such pervasive operational impacts on the school district.

10:51AM I'm just representing this to the best I am able is that it's going to be astounding to have to provide classrooms at 15 to 1. It's going to eliminate programs. It's going to force kids out of schools.

THE COURT: Why? Why eliminate programs? You have 10:51AM empty classrooms you're now going to be using. The budget stays the same. You're all paid out of the same pot anyway.

MR. HUFF: Let me give you an example. A kid is falling behind. He can't read well. So what do we do? Do we just continue to mainstream him, then? Do we continue to 10:52AM just have him fall farther behind in the classroom? What do we do?

We take him out of that classroom for an hour a day, and we put him in another classroom where he's by himself. Or maybe at a table over there, there's another 10:52AM kid, and a specialist over here. And we give him intensive training. That's a classroom that now has to be counted.

Now, we share that space. That's called shared-use space under our matrix. And we share that space. We give the same opportunity to the charter school operator 10:52AM to use that classroom for the same purpose.

But now we have to eliminate that program because we're giving our other regular-use classrooms that are housed at 28 to 1, for example. We've now got to eliminate

some of those to provide them more classrooms at 15 to 1.

So we have to make the choice. Do we take these 28 kids we no longer have a classroom for and stick them up in the reading room, and thereby eliminate that program we just talked about? Or maybe they can go read on the bench.

THE COURT: But none of this is before me.

MR. HUFF: But the thing of it is is that, actually, it is in that we've talked about how -- what the ratios of how we provide our students seats on our schools. And we're following the letter of the law.

I have to respectfully disagree with Your Honor in your conclusion. And I would urge you to take this under submission and think about how we read the law. And I know you already have.

But maybe with a little reflection upon our remarks this morning, think about the statute as it's written and think about how we read that regulation, which is we provide them classrooms to the same degree we provide our students classrooms. They use the word "provide." Let's infuse it with meaning.

Then in the next sentence, they talk about how we determine inventory. What is a classroom? But it's have we provided that inventory to our students? If we haven't, it's not counted.

THE COURT: Well, it doesn't say that.

MR. HUFF: Well, it does say that. You can read it that way. And you must read it that way when you read the statute. The regulation simply cannot trump the statute.

THE COURT: Well, that's true. But that means you have to harmonize and read them together.

To follow your interpretation, I would have to blue-pencil this and take out subsection (g), for example, take out subsection (a), for example. I have to take all that out and assume that the people who wrote it were crazy.

MR. HUFF: Your Honor, if the charter school students attended our school, they would be accommodated the way we are accommodating them. And I don't know how you can actually harmonize the suggested interpretation of the regulation that you are buying into with that statutory language which must be followed. It cannot be harmonized.

THE COURT: See, I have a question. And this is not part of my ruling. This is just for my own edification.

Why can't you take -- because they are all public school kids anyway, why can't you ask for volunteers to go to charter school? If they are being underutilized and you are being taxed to the max, why can't you ask for a show of hands? Go to their parents. "Do you want to go to the charter school? We have extra seats there."

MR. HUFF: But overall attendance has no relationship because it would only hurt us more under the consequences of your order.

Let's say instead of 100 kids going to the charter school, we show the raise of hands. The kids volunteer. Now 200 go. But now, instead of housing those kids at 28 to 1 in our classroom, as a consequence of your order, we would have to house those kids at 15 to 1. It has

even a more severe impact on our facilities.

THE COURT: No. Well --

MR. HUFF: Yes, it does. It means necessarily that more physical classrooms will now have to be given to charter schools than we would otherwise give to our own students. It would result in far less classrooms for the LAUSD students.

THE COURT: I understand. I see what you're saying.

One last thing and then we have to move on. I mean, you guys need to move on too and decide how you want to adjust to the Court's ruling here.

But you guys were very good. That's why it's so much fun to have you here. Because these cases are interesting. And you argue so well and you know the area so well. I do read these. Actually, it forces me to be a better judge. It forces me to come prepared and read this stuff and be prepared for your discussions.

But at the end of the day, all I can do is apply statutes and regulations that are intended to be harmonized together and to harmonize them together. And what I cannot do is I cannot add language to a statute or regulation, and I cannot summarily take language out of a statute or regulation. I'm just stuck with this the way they are.

And it's not clear to me that ruling for the plaintiff would have all these dire consequences. I would certainly hope not. But it is what the statute says.

Somebody wrote this statute. Somebody wrote these regs and had something in mind when they wrote them.

And it determines what equivalency is and what inventory is. They set it out very, very clearly. And I can see an argument for why they set it out very, very clearly.

But I think the school district is going to have to adapt to this. And for one thing, I don't think you'll have any vacant classrooms, and that's one way to get around the problem with overcrowding.

MR. HUFF: Your Honor, how about this?

THE COURT: Okay.

MR. HUFF: I think you appreciate that if you rule for the plaintiff, it's going to have some reverberation. Why don't you hold your ruling for --

THE COURT: A year or two.

MR. HUFF: No. Give us until Monday and let me come in with some evidence and an offer of proof of what actually the consequence of this request will have on our school district. I think you'll be shocked. I think it will give you some pause and perhaps reconsider whether or not our reading and interpretation and implementation of this law has been arbitrarily capricious.

I think you're going to be astounded if we have to take 42,000 charter school kids and house them in classrooms at 15 to 1, as opposed to the same seat ratio that they would enjoy if they otherwise attended our school, what actually would happen.

MR. ARNONE: Your Honor, I submitted a proposed order.

I think counsel's argument is to have a combined delay plus reconsideration on Monday.

What we're asking them for is all the regs call for. It's making new offer following these rules. They have flexibility with how they make the offer. I am certain they won't make the offer with a parade of horribles.

11:00AM We might end up having another fight over whether their offers are okay. But it's the end of June. And the school year starts soon. We set this for an earlier hearing, and it had to be continued. We need this moving.

And our proposed order, which I think we should 11:00AM turn to, asks them to go for just the relevant schools and make new offers in two weeks that then the charter schools get two weeks to either accept it or reject it so that this can get done by the end of July because some schools start at the end of August. I mean, we have to go.

11:00AM THE COURT: The order is in chambers. Hang on.

(A pause in the proceedings.)

THE COURT: Let me take a look at this.

(Review of document.)

THE COURT: Okay.

11:03AM Well, look. You know, I appreciate the excellent work you've all done, but I have no quarrel with the order as written.

You know, there's nothing that was on the record that shows a parade of horribles, and there's probably a 11:04AM good reason for that because, you know, you can always think of the worst case scenarios for not to do something. And worst case scenarios rarely come about because you have good people running these organizations.

I mean, we've had worst case scenarios about what's going to happen with the courts if something doesn't happen. And the current worst case scenario is that we close all civil courtrooms. I hope that doesn't happen.

11:04AM But that's just not going to come about --

MR. HUFF: I disagree with your characterization of the record, Your Honor.

THE COURT: Hang on. Let me finish.

I've been in and out of government in my life. 11:04AM I've been in private practice and then in government. And we've always seen these, "If this happens, then you're going to have these terrible things happen."

And it's always said in good faith, and there's always a rational basis for these doomsday predictions. I 11:05AM mean, it's not that people are making them up. It's not that they're lying or cheating. These are all rational explanations that are taken based on available evidence.

But, fortunately, we have great people running these organizations. We have great people running the 11:05AM courts, and we have great people running the school system.

And you find a way to tell people to deal with what is perceived as adverse. And then what you need to do is you need to go to the relevant authorities that write these implementing regulations and tell them that this 11:05AM doesn't work or this does work and change that.

But when you come to a trial court level, where we have limited ability to willy-nilly ignore the law or the evidence or whatever, and I'm given these regulations that

talk about how you calculate inventory for the purpose of making it equivalent, I can't just blue-pencil it because, theoretically, it might lead to a hardship. I don't know that it will lead to a hardship.

11:06AM And, regardless, if that's what the law says, this becomes a political problem, not a legal problem. And then it's up to the political process to solve it. But I'm not part of the political process.

So I appreciate your arguments. You guys, as I 11:06AM said, are fun to have here. And I really enjoy you, and I enjoy the case. I listen to you, and I go both ways. I almost get whiplash going back and forth after listening to your arguments.

But at the end of the day, I think the plaintiff 11:06AM has the right argument on the law, and, accordingly, I will sign the order.

MR. HUFF: So, Your Honor, when you sign that order, if you could refer to paragraph 18 of Sean Jernigan's declaration, you'll see that that's going to put us in 11:07AM breach of contract.

For example, with regard to the example of Valor Academy Charter School, that charter school has rejected our offer of space at Monroe High School. We now have to offer that space at Monroe High School again to Valor Academy 11:07AM Charter School.

However, after that rejection, that then cleared the availability of that space that we had earmarked for Valor Academy, and we then offered it to Valley Charter

Middle School, who has accepted it.

THE COURT: I saw that.

MR. ARNONE: They don't have to offer that space. They have to offer some other space. And maybe it will end up being unfortunate bad space, and it will be rejected again because it won't be good space.

They obviously don't have to breach the contract. They just have to offer some space. That's what we can't do. They have to make the offer. They don't have to make the same offer they made before if that space is no longer available.

THE COURT: Well, you know, this is all beyond my control. All I do is read the statutes and listen to the arguments and say yea or nay. What this means in the real world is not before me.

MR. ARNONE: Thank you, Your Honor.

MR. HUFF: Your Honor, we also have a case management conference. Your Honor, the Los Angeles Unified School District would request the stay be lifted and this case be able to proceed to final judgment.

THE COURT: Any reason I should say no to that?

MR. ARNONE: Well, I assumed that the stay wouldn't stay in effect. I discussed it with counsel. I asked him to call me if he was going to disagree with that. This is the first I'm hearing about it.

But if he wants to lift the stay, the stay will be lifted, and we'll have to proceed. I mean, the stay was stipulated in the first place.

THE COURT: What's going to happen, though, down the road?

MR. ARNONE: Frankly, I don't know. I mean, I was talking to Mr. Huff yesterday, I think it was, about this. And we were talking about what might happen. I don't think either of us gave it much thought yet. But I guess we'll have to figure it out now.

THE COURT: I look forward to working with you.

MR. ARNONE: May I get a copy of the order?

THE COURT: Sure. It's right here.

Do you want to set a status conference date, or what do you want to do?

MR. ARNONE: Maybe a status conference in a month?

THE COURT: I routinely revisit cases just to see what's going on. Do you want two months?

MR. ARNONE: How about two months for a status conference?

MR. HUFF: Sure.

THE CLERK: August 28th.

MR. ARNONE: Maybe we can do it a little bit earlier for co-counsel.

(A pause in the proceedings.)

MR. HUFF: August 17th, Your Honor?

MR. ARNONE: At 8:45, Your Honor?

THE COURT: That's a Friday. It will be at 1:30. Because you'll want a reporter, I assume.

MR. ARNONE: August 17 at 1:30 P.M. And that's a Friday. And that's a status conference.

Thank you, Your Honor.

THE COURT: Good to see you all.

(The proceedings were concluded.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT CE 14 HON. TERRY A. GREEN, JUDGE

| | |
|---|---|
| CALIFORNIA CHARTER SCHOOLS ASSOCIATION,<br><br>PLAINTIFF,<br><br>vs.<br><br>LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.,<br><br>DEFENDANTS. | NO. BC438336<br><br>REPORTER'S CERTIFICATE |

I, PENELOPE E. NISOTIS, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages 1 through 54 comprise a full, true, and correct transcript of the proceedings taken in the matter in the above-entitled cause on Wednesday, June 27, 2012.

Dated this 4th day of July, 2012.

PENELOPE E. NISOTIS, CSR NO. 12625
OFFICIAL COURT REPORTER

## PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 505 Montgomery Street, Suite 2000, San Francisco, CA 94111-6538.

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David M. Huff, Esq. *(dhuff@ohslegal.com)*
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067

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David M. Huff, Esq.
Marley S. Fox, Esq.
Joanna Braynin, Esq.
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, CA 90067
Attorneys for Appellants

Mark Fall, Esq.
Nathan A. Reierson, Esq.
Office of General Counsel
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 South Beaudry Avenue, 23rd Floor
Los Angeles, CA 90017
Attorneys for Appellants

Clerk/Executive Officer of the Court
Court of Appeal of the State of California
Second Appellate District, Division Five
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Clerk of the Court
Honorable Terry A. Green - Department 14
Superior Court of the State of California
County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

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 **February 13, 2013**, at San Francisco, California.

Elizabeth A. Alvarez