Case No. S208611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Respondent and Plaintiff,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT; and RAMON C. CORTINES, in his capacity as Superintendent of Schools,

Appellants and Defendants.

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, Judge Presiding, Dept. 14

ANSWER TO PETITION FOR REVIEW

David M. Huff (State Bar No. 161607)
Marley S. Fox (State Bar No. 185947)
Joanna Braynin (State Bar No. 238563)
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, California 90067
Telephone: (310) 788-9200
Facsimile: (310) 788-9210
Email: dhuff@ohslegal.com

Mark Fall (State Bar No. 162497)
Nathan A. Reierson (State Bar No. 204129)
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 S. Beaudry Avenue, 23rd Floor
Los Angeles, California 90017
Telephone: (213) 241-7600
Facsimile: (213) 241-8386
Email: mark.fall@lausd.net

Attorneys for LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT; and RAMON C. CORTINES, in his capacity as Superintendent of Schools

Case No. S208611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Respondent and Plaintiff,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT; and RAMON C. CORTINES, in his capacity as Superintendent of Schools,

Appellants and Defendants.

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, Judge Presiding, Dept. 14

ANSWER TO PETITION FOR REVIEW

David M. Huff (State Bar No. 161607)
Marley S. Fox (State Bar No. 185947)
Joanna Braynin (State Bar No. 238563)
ORBACH, HUFF & SUAREZ LLP
1901 Avenue of the Stars, Suite 575
Los Angeles, California 90067
Telephone: (310) 788-9200
Facsimile: (310) 788-9210
Email: dhuff@ohslegal.com

Mark Fall (State Bar No. 162497)
Nathan A. Reierson (State Bar No. 204129)
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 S. Beaudry Avenue, 23rd Floor
Los Angeles, California 90017
Telephone: (213) 241-7600
Facsimile: (213) 241-8386
Email: mark.fall@lausd.net

Attorneys for LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT; and RAMON C. CORTINES, in his capacity as Superintendent of Schools

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

Rules

Regulations

I. INTRODUCTION

The issues framed by the California Charter Schools Association ("CCSA") do not resemble the issue presented to or unanimously decided in favor of the Los Angeles Unified School District ("District") by the Fifth Division of the Second Appellate District in *California Charter Schools Association v. Los Angeles Unified School District* (2012) 212 Cal.App.4th 689 ("*CCSA v. LAUSD*"). The issue before the Court of Appeal was whether the District complied with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), a regulation that identifies how a school district is to allocate classrooms to charter schools pursuant to Education Code section 47614 ("Proposition 39"). (*CCSA v. LAUSD*, *supra*, 212 Cal.App.4th at 691.) In the Court of Appeal, CCSA articulated a particular interpretation of the regulation and, based upon this interpretation, alleged the District's interpretation of the regulation and corresponding allocation of space to charter schools violated the law. The Court of Appeal, however, disagreed with CCSA's reading of the regulation, found the District's interpretation was consistent with the law, and held the District's methodology for allocating space to charter schools fully complied with the letter and intent of the law. (*Id.* at 695.)

CCSA now claims its reading of the regulation is the only plausible one, and contends the Court of Appeal was wrong to reject its interpretation. Consequently, CCSA characterizes the Court of Appeal's refusal to adopt its interpretation of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1) as, *ipso facto,* an invalidation of the regulation or a unilateral change to the regulation. On that basis, CCSA argues that *CCSA v. LAUSD* poses the following issues for resolution by the Court: Can a reviewing court ignore portions of a regulation and substitute its own language? Or can courts invalidate a quasi-legislative regulation by effectively striking a portion of the regulation? (CCSA's

Petition for Review ("Petition"), pp. 3, 5.) Based on these articulated issues, CCSA maintains this Court's intervention is necessary to resolve the conflict between legislative and judicial branches as well as the conflict in decisional law created by *CCSA v. LAUSD.*

The problem with the issues framed by CCSA is its underlying premise is entirely flawed. CCSA's argument that an interpretation of the regulation, other than CCSA's, amounts to invalidation, recession, or re-writing of the regulation is entirely contrary to the analysis in *CCSA v. LAUSD.*

CCSA v. LAUSD contains no language invalidating, rewriting, or excising portions of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), and CCSA does not point to any language within the opinion to suggest as much. The Court of Appeal did nothing novel in finding the District complied with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). Presented with two competing interpretations of the same regulation, the Court of Appeal applied canons of construction embedded in over 80 years of jurisprudence and unanimously determined the District's interpretation of the regulation: (1) is consistent with its plain meaning, (2) avoids anomalous results, and (3) is consistent with the intent of Proposition 39. (*CCSA v. LAUSD, supra,* 212 Cal.App.4th at 695.) The regulatory analysis conducted by the Court of Appeal poses no new questions for this Court to resolve and instead only applies precedent previously set by this Court.

Further, contrary to assertions made by CCSA in its Petition, the holding of *CCSA v. LAUSD* is consistent with prior appellate court decisions analyzing Proposition 39, particularly with a recent Sixth Appellate District decision, *Bullis Charter School v. Los Altos School District*:

> "[A] school district's Proposition 39 obligation is to provide its facilities to charter schools in a manner that will promote the intent of 'public school facilities [being] shared fairly among all public school pupils, including those in charter schools.'" (*Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022, 1059.)

Consistent with this view, the Court of Appeal observed:

> "We read regulation § 11969.3, subdivision (b)(1) as requiring the District to provide its facilities to charter schools in a manner that will promote the intent of Proposition 39 of public school facilities being shared fairly among all pupils, including those in charter schools." (*CCSA v. LAUSD, supra*, 212 Cal.App.4th at 695.)

As discussed in detail below, the issues articulated by CCSA are not properly before this Court as they were not presented in the *CCSA v. LAUSD* case. The actual issue posed in and decided by *CCSA v. LAUSD*, whether the District complied with a specific implementing regulation of Proposition 39, does not present a novel question for this Court or create a conflict in decisional law. Conversely, *CCSA v. LAUSD* is in line both with case law addressing regulatory and statutory interpretation generally, and with decisions analyzing Proposition 39 in particular. Therefore, CCSA's Petition must be denied.

II. FACTUAL BACKGROUND

On December 5, 2012, the Fifth Division of the Second Appellate District issued an opinion in *California Charter Schools Association v. Los Angeles Unified School District* (2012) 212 Cal.App.4th 689, unanimously holding that the District's allocation of exclusive use classroom space to

charter schools requesting use of school facilities under Proposition 39 complied with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1).

Proposition 39 is a voter-passed initiative, which among other things, amended Education Code section 47614 to require public school facilities to be shared fairly among all public school pupils, that is, both those attending district-run schools and those attending charter schools. (Ed. Code, § 47614, subd. (a); *California School Boards Association v. State Board of Education* (2011) 191 Cal.App.4th 530, 539.)

Proposition 39 is codified in Education Code section 47614 and implemented through regulations drafted by the California Department of Education ("CDE") and subsequently adopted by the State Board of Education. (See, California Code of Regulations, title 5, section 11969.1 et seq.) ("Implementing Regulations.") Proposition 39 sets forth criteria to be used to determine the type and quantity of facilities to be allocated to a charter school. Proposition 39 mandates that facilities provided to charter and district school children are "reasonably equivalent." Specifically, Education Code section 47614, subdivision (b), states, "[e]ach school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's 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.*" (Ed. Code, § 47614, subd. (b), emphasis added.)

The regulation at issue before the Court of Appeal, California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), was adopted by the State Board of Education to help define the meaning of "reasonably equivalent conditions" in determining the capacity of facilities allocated to a charter school by a school district. This regulation states, "[f]acilities

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." (*Id.*, emphasis added.)

The issue posed before the Court of Appeal in *CCSA v. LAUSD* was whether the District's exclusive use classroom space allocation to charter schools complied with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). In resolving this issue, the Court of Appeal was presented with two competing interpretations of the regulation.

The District interpreted the regulation in harmony with Education Code section 47614, subdivision (b), which requires the District to accommodate charter school students in the same manner they would be accommodated if they attended District public schools. Consequently, in strict compliance with the regulation, the District counted classrooms actually "*provided*" to students in the school district attending comparison group schools in determining the ratio of students to classrooms used to allocate space to charter schools. In other words, the District did not count classrooms not used for K-12 instruction purposes, such as classrooms used for preschool programs or adult education programs, otherwise occupied by a co-located charter schools, or obviously classrooms that do not even yet exist. In order to count classrooms actually "*provided*" to students in the school district attending comparison group schools, the District applied a "norming ratio." The District's "norming ratio" determined the number of students placed in every classroom by grade level in each charter school's comparison group schools. Providing facilities to charter school students based on the same norming ratios used to provide facilities to District students is a tool by which the District guaranteed compliance with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). The District's use of the norming ratio guaranteed the ratio of students to

classrooms at a charter school's comparison group schools is the same as the norming ratio used to allocate facilities to that charter school.

CCSA, however, advocated an anomalous interpretation of the regulations and argued that in determining the ratio of students to classrooms to be allocated to charter schools, the District must count classrooms that are not actually provided for K-12 instruction to District school students. Specifically, CCSA argued the District was required to count everything defined as a classroom under California Code of Regulations, title 2, section 1859.31, a regulation referenced in California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), but enacted pursuant to the Greene Act. The Greene Act is entirely distinct from Proposition 39, and defines the meaning of "classroom" for purposes of assessing total District inventory to determine funding eligibility from the state. This regulation, therefore, defines as a "classroom," among other things, classrooms that have been contracted for but not yet built, classrooms at closed school sites, and classrooms used by non-K-12 students attending district schools. (Cal. Code Regs., tit. 2 § 1859.31.)

California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), references the Greene Act in the following manner: "[t]he number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31." The District interpreted this reference to mean exactly what is says – the Greene Act defines *what is a classroom*. But whether that classroom should be counted for purposes of space allocated to a charter school is determined by whether it is actually *provided* to District school students. (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).)

Applying well-settled canons of statutory and regulatory construction, the Court of Appeal echoed the District's reading of the regulation and unanimously held the District's space allocation

methodology *complied* with the letter and intent of Proposition 39. (*CCSA v. LAUSD*, *supra*, 212 Cal.App.4th at 695.) The Court of Appeal did not add language to the regulation, excise language from the regulation or invalidate the regulation. The Court of Appeal's holding in *CCSA v. LAUSD* is merely a product of the application of time tested rules of statutory and regulatory construction, is in harmony with previous case law, and poses no important question of law to be decided by this Court.

III. CCSA'S PETITION FAILS TO MEET THE THRESHOLD FOR SUPREME COURT REVIEW

CCSA fails to meet the threshold for Supreme Court review for two reasons: (1) the issues framed by CCSA are not actually presented by *CCSA v. LAUSD*, and consequently are not ripe for adjudication by this Court; and (2) Supreme Court review is unnecessary to secure uniformity of decisions or to settle an important question of law.

A. The Issues Framed by CCSA are Not Presented by *CCSA v. LAUSD.*

California Rules of Court, rule 8.500(b)(1) provides the Court may grant review of an appellate court decision when necessary to secure uniformity of decision or to settle an important question of law. In an attempt to meet these minimum criteria for Supreme Court review, CCSA's Petition misleadingly articulates the following two issues:

> "CCSA requests that this Court determine whether courts can *ignore* significant and specific text of a regulation and give local governmental bodies the discretion to *substitute* in their own language. CCSA further requests that this Court consider whether courts can *invalidate* a quasi-legislative regulation by effectively *striking* a portion of the regulation..." (Petition, p. 5, emphasis added.)

Neither issue is actually presented by *CCSA v. LAUSD*. The Rules of Court identify three specific limits to traditional Supreme Court review, which CCSA's Petition requests this Court to exceed. First, "the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rules of Court, rule 8.500(c)(1).) Second, "the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2).) Third, and most importantly, the outside limit of the Supreme Court's power of decision extends to any issue actually *presented by the case*. (Cal. Rules of Court, rule 8.516(b)(2).)

The issues framed by CCSA were not raised by either CCSA or the District in the Court of Appeal and were not discussed in *CCSA v. LAUSD*.

The issue identified and presented by both parties before the Court of Appeal was whether the District's allocation of exclusive use classrooms to charter schools *complied* with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). (Appellant's Opening Brief, p. 17, Respondent's Brief, p. 22.) As CCSA readily admits in its Petition, the District "never explicitly challenged the validity of section 11969.3, subdivision (b)(1)." (Petition, p. 21.)

In order for the issues now articulated by CCSA to have any bearing on this case, the Court of Appeal would have needed to unilaterally invalidate the regulation, excise language from the regulation, or add language to the regulation of its own volition. As evidenced from the *CCSA v. LAUSD* opinion, the Court of Appeal did no such thing.

In its opinion, the Court of Appeal clearly identifies the issue presented by the case, the same central issue identified by the parties: "[a]t issue in this appeal is whether the trial court erred in finding that the Los

Angeles Unified School District ('District') violated California Code of Regulations, title 5, section 11969.3, subdivision (b)(1) when it used norming ratios as a method of assigning classroom space to charter schools." (*CCSA v. LAUSD, supra,* 212 Cal.App.4th at 692.)

The Court of Appeal explicitly found the District's method of assigning classroom space *complied* with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). (*CCSA v. LAUSD* (2012) 212 Cal.App.4th 689, 695.) The Court of Appeal did not ignore the text of the regulation, add language to the regulation, strike portions of the regulation, or invalidate the regulation. Instead, the Court of Appeal was presented with two competing interpretations of the regulation, and applying well established principles of statutory and regulatory construction, found the District's reading of the regulation and corresponding allocation of classroom space complied with both the letter and intent of the regulation. Simply because the Court of Appeal did not adopt CCSA's proposed construction of the regulation does not mean the Court invalidated the regulation. Markedly absent from the opinion is language about invalidation, excising portions of the regulation or adding language to the regulation.

The issues CCSA identifies for review by this Court have no bearing on the issue actually reviewed and decided by the Court of Appeal. CCSA's Petition requests this Court to exceed its traditional power of review, and consequently, must be denied.

B. Supreme Court Review is Unnecessary to Secure Uniformity of Decision or to Settle an Important Question of Law.

In deciding the issue actually presented in this case, the Court of Appeal did nothing novel. The Court of Appeal applied principles of regulatory and statutory construction, well-established by decades of

jurisprudence, and found the District complied with the letter and intent of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1). The Court of Appeal's application of entrenched canons of construction aligns with a long line of decisions issued by this Court and the appellate courts. An examination of each of the statutory principles of construction applied by the Court of Appeal demonstrates this Court's review is unnecessary to secure uniformity of decision or to settle an important question of law.

1. The Court of Appeal Afforded the Regulatory Language its Plain Meaning and Accorded Meaning to Every Word and Phrase

In determining that the District complied with California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), the Court of Appeal applied the following foundational canon of construction: "Courts must give the regulatory language its plain meaning and accord meaning to every word and phrase." This Court first articulated this sound principle of statutory construction 85 years ago in *In re Apline* (1928) 203 Cal. 731, 737. This Court reiterated the principle in *Chavez v. Sargent* (1959) 52 Cal.2d 162, 203, *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 918 and *Ste. Marie v. Riverside County Regional Park & Open–Space Dist.* (2009) 46 Cal.4th 282, 288–289. Likewise, a line of appellate court decisions has recently echoed this bedrock principle of statutory construction. (See, *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1145; *Hoitt v. Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 523.)

Applying this rule, the Court of Appeal in *CCSA v. LAUSD* examined California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), which states "[f]acilities 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." (*Id.*, emphasis added.) The Court of Appeal reasoned, "Webster's dictionary defines 'provide' as 'to supply' and 'provided' as 'supplied' or 'equipped.' (Webster's 3d. New Internat. Dict. (2002) p. 1827.)" (*CCSA v. LAUSD*, *supra*, 212 Cal.App.4th at 695.) Consequently, pursuant to California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), only if a classroom is "supplied or made available" to students attending a school district's comparison group schools, should it be counted in determining the number of classrooms to be "supplied or made available" to a charter school. As such, the Court of Appeal determined the District's construction of this regulation is in accordance with its plain meaning. (*Ibid.*)

2. The Court of Appeal Interpreted California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), Reasonably to Avoid Anomalous Results

In reaching its decision, the Court of Appeal applied a second, fundamental canon of construction: "[a] regulation should be interpreted to be 'made reasonable and workable.'" Stated another way, "[i]t is well-established that a statute open to more than one construction should be construed as to avoid anomalous or absurd results." (*Ludgwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18.) This basic principle of statutory interpretation has been repeatedly cited by this Court. (See, *Warner v. Kenny* (1946) 27 Cal.2d 627, 629; *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233; *In re Eric J.* (1979) 25 Cal.3d 522, 537, "[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.")

Based on this principle, the Court of Appeal found that CCSA's reading of the regulation leads to unreasonable and anomalous results. Specifically, the Court of Appeal stated,

> "If we were to adopt the analysis proffered by CCSA, it may well have anomalous results. For example, the District would have to count classrooms that have been contracted for but not yet built and classrooms at closed school sites. 'It is well established that a statute open to more than one construction should be construed as to avoid anomalous or absurd results.'" (*CCSA v. LAUSD*, *supra*, 212 Cal.App.4th at 695.)

3. The Court of Appeal Determined the District's Reading of the Regulation is Consistent with the Specific Intent of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), and the General Intent of Proposition 39

The Court of Appeal applied a third fundamental tenet of statutory interpretation: "[T]he aim of [statutory] construction should be the ascertainment of legislative intent so that the purpose of the law may be effectuated." (*Merrill*, *supra*, 71 Cal.2d at 918; *Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *California Toll Bridge Authority v. Kuchel* (1952) 40 Cal.2d 43, 53; *County of Alameda v. Kuchel* (1948) 32 Cal.2d 193, 199; *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 802.) The Court of Appeal looked to both the general intent of Proposition 39 as a whole and the specific intent of the regulation as articulated by its drafters in rejecting CCSA's erroneous interpretation.

a. The Court of Appeal Determined that the District's Reading of the Regulation, and Compliance with the Regulation Based on that Reading, Effectuated the Purpose of Proposition 39

The Court of Appeal analyzed the intent of Proposition 39 in order to construe California Code of Regulations, title 5, section 11969.3, subdivision (b)(1) in a manner that would effectuate this intent. The Court of Appeal explained:

> "The declared intent of Proposition 39 is 'that public school facilities should be shared fairly among all public school pupils, including those in charter schools.' (Ed. Code §47614, subd. (a).) 'Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's 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 ....'" (*CCSA v. LAUSD, supra*, 212 Cal.App.4th at 693-694.)

Finding that the stated intent of Proposition is to provide for a fair sharing of facilities such that both students attending charter schools and district schools are accommodated in reasonably equivalent conditions, the Court of Appeal held:

> "We read regulation § 11969.3, subdivision (b)(1) as requiring the District to provide its facilities to charter schools in a manner that will promote the intent of Proposition 39 of public school facilities being shared

> fairly among all pupils, including those in charter schools. We make a distinction between facilities that are 'provided' and 'classroom inventory.' Regulation 11969.3, subdivision (b)(1) states '[f]acilities 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.'" (*Id.* at 695.)

In analyzing whether the District's space allocation to charter schools complied with this articulated intent, the Court of Appeal found "[t]he District counts classrooms actually provided to the students in the school district attending comparison group schools in determining the ratio of students to classrooms used to allocate space to charter schools." (*Ibid.*) Consequently, the Court of Appeal determined:

> "The District's use of norming ratios is consistent with the intent of Proposition 39. It furthers the goal of ensuring that public school facilities are being shared fairly among all public school pupils and that the charter school's in-district students are being accommodated in conditions reasonably equivalent to those in which those students would be accommodated if they were attending other public schools of the District." (*Ibid.*)

Applying the well-established principle that a regulation must be construed so as to ascertain the legislative intent, the Court of Appeal concluded that the District's reading of the regulation, and actions in compliance with the regulation based on that reading, served to promote Proposition 39's intent to fairly share facilities and accommodate charter

school students in conditions reasonably equivalent to their counterparts in comparison group schools. In doing so, the Court of Appeal did not add language to the regulation, subtract language from the regulation, or invalidate the regulation.

b. The Court of Appeal's Decision Supports the CDE's Intended Meaning of California Code of Regulations, title 5, section 11969.3, subdivision (b).

In its Petition, CCSA maintains that the "*CCSA v. LAUSD* decision is in conflict with cases holding that courts are to recognize and defer to an administrative agency's interpretation of its own regulations." (Petition, p. 23.) In support of its argument, CCSA alleges the Court of Appeal "failed to consider and defer to the State Board's interpretation of the Implementing Regulations in the Final Statement of Reasons." (*Ibid.*) Plainly, this is not true.

In its assessment of the intent of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), the Court of Appeal both considered and deferred to the Final Statement of Reasons for the Implementing Regulations drafted by the CDE. Indeed, the Final Statement of Reasons was included in the administrative record before the Court of Appeal and its relevant portions were extensively briefed by both parties. (Appellant's Appendix ("AA"), Volume 10, pages 2666-2694 (hereinafter cited as "[Volume] AA [Page]").) In its Final Statement of Reasons, the CDE explicitly stated the intended meaning of California Code of Regulations, title 5, section 11969.3, subdivision (b). The CDE described the "reasonable equivalence" requirement of California Code of Regulations, title 5, section 11969.3 to be comprised of two considerations: the "the capacity of a facility proposed for a charter school and the condition of the facility..." (10 AA 2673.) The CDE explained, "The

second subdivision [California Code of Regulations, title 5, section 11969.3, subdivision (b)] specifies the method for determining whether the capacity of the facility proposed for a charter school is reasonably equivalent to the capacity of facilities in the comparison group (*number of students per classroom, for example.*)" (*Ibid.*, emphasis added.)

Thus, according to the drafters of the regulation, California Code of Regulations, title 5, section 11969.3, subdivision (b), is intended to ensure the same number of students per classroom in a charter school as in its comparison group schools. The District allocates classrooms to students attending District schools based on a ratio of students per classroom fixed by grade level. The District applied these exact same ratios when allocating classrooms to charter schools. This results in equalizing the number of students per classroom for both the charter schools and District schools, as intended by the CDE. Consequently, the Court of Appeal aptly determined "[t]he District's use of norming ratios is consistent with the intent of Proposition 39." (*CCSA v. LAUSD, supra*, 212 Cal.App.4th at 695.)

Contrary to CCSA's assertion, the Court of Appeal did not fail to consider or defer to quasi-legislative regulations or the administrative body that drafted them. Instead, based on the Court of Appeal's careful consideration of the intended meaning of California Code of Regulations, title 5, section 11969.3, subdivision (b), and its role in advancing the purpose of Proposition 39, the Court of Appeal found the District fully complied with the regulation.

C. ***CCSA v. LAUSD* is in Harmony with *Bullis Charter School v. Los Altos School District***

In an attempt to invent a conflict in decisional law, CCSA argues this Court's review is necessary because *CCSA v. LAUSD* is in conflict with a Sixth Appellate District decision in *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022 ("*Bullis*"). Again, this is simply

not true. No conflict exists between *CCSA v. LAUSD* and *Bullis*. To the contrary, *CCSA v. LAUSD* supports *Bullis* and the line of decisions interpreting Proposition 39 that came before *Bullis*.

In *Bullis,* a school district attempted to exclude shared space that was *made available to district school students* at some campuses from its Proposition 39 comparison group analysis, merely because the type of space (*e.g.*, a tennis court) was not common to all of a charter school's comparison group schools. The Sixth Appellate District found a comparison group school's subjective use determination of the space (such as whether to use space as a tennis court versus a basketball court) could not dictate the analysis. (*Id.* at 1047.) Rather, a school district had to consider the total amount of *non-classroom* space *available* to the students at the comparison group schools when conducting a comparison group analysis. (*Ibid.*)

Unlike the school district in *Bullis*, the District considered *all of the classrooms made available to District school students* attending a charter school's comparison group schools in determining the number of classrooms to allocate to that charter school. The District counted every single classroom actually "*provided*" (*i.e.*, made available) to students in the District attending comparison group schools and used those classrooms to determine the ratio of students to classrooms used to allocate space to charter schools. What CCSA asked the Court of Appeal to do is force the District to consider and provide classrooms to charter schools that are not provided (*i.e.*, made available) to other District K-12 students, such as those occupied exclusively by charter school students, pre-school students or adult education students. *Bullis* imposes no such requirement on school districts. Consequently, CCSA's assertion of a conflict between the two appellate districts is a false invention.

CCSA's argument is even more puzzling given the language of *CCSA v. LAUSD* mirrors the language of *Bullis*. The *Bullis* Court held, "[a] school district's Proposition 39 obligation is to provide its facilities to charter schools in a manner that will promote the intent of 'public school facilities [being] shared fairly among all public school pupils, including those in charter schools.'" (*Bullis, supra,* 200 Cal.App.4th at 1059, emphasis added.) Likewise, the Court of Appeal in *CCSA v. LAUSD* held, "[w]e read regulation § 11969.3, subdivision (b)(1) as requiring the District to provide its facilities to charter schools in a manner that will promote the intent of Proposition 39 of public school facilities being shared fairly among all pupils, including those in charter schools." (*CCSA v. LAUSD, supra*, 212 Cal.App.4th at 695.)

In addition, the holding and reasoning of *CCSA v. LAUSD* is in line with appellate court decisions preceding *Bullis*, which also focus on the intent and purpose of Proposition 39. In *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, a decision preceding *Bullis* by six years, the Fifth Appellate District similarly held a school district's exercise of its discretion in responding to a Proposition 39 facilities request must comport with the evident purpose of the Charter Schools Act to equalize the treatment of charter and district-run schools with respect to the allocation of space between them. That is, the terms "reasonably equivalent" and "shared fairly" mean that, "to the maximum extent practicable, the needs of the charter school must be given the same consideration as those of the district-run schools...." (*Ridgecrest Charter School v. Sierra Sands Unified School Dist., supra,* 130 Cal.App.4th 986, 1001, *emphasis added.*) *CCSA v. LAUSD* held the District's method for allocating space to charter school students afforded these students the same considerations afforded to district students.

Based on the foregoing, it is evident that *CCSA v. LAUSD* is in harmony with appellate court decisions analyzing a school district's compliance with Proposition 39, all of which focus on the intent behind the statutory scheme to share space *fairly* between charter school students and district students.

D. *CCSA v. LAUSD* is in Harmony With a Supreme Court Decision Analyzing a Regulation Adopted by the State Board of Education

CCSA v. LAUSD is also in line with a previous decision issued by this Court interpreting another regulation promulgated by the State Board of Education. In *Hartzell v. Connell* (*Hartzell*) (1984) 35 Cal.3d 899, this Court determined that a high school district could not require students to pay fees for participation in extracurricular music and sports activities because such a fee requirement violated California Code of Regulations, title 5, section 350. That section provides: "A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law." (*Hartzell*, *supra*, 35 Cal.3d at 913.)

In doing so, this Court, just as the Court of Appeal in *CCSA v. LAUSD*, looked to the plain language of the regulation and the constructions supplied by the Legislative Counsel and the CDE. (*Ibid.*) This Court determined, "[b]oth the plain language of the regulation and the constructions supplied by the Legislative Counsel and the Department of Education indicate that title 5, section 350 bars school districts from charging fees for educational extracurricular activities." (*Ibid.*)

Finding that school districts are authorized only to 'initiate and carry on any program, activity, or ... otherwise act in any manner which is not in conflict with ... any law ...," this Court determined the high school district's fee program was in clear conflict with California Code of Regulations, title 5, section 350. (*Id.* at 915-916.)

As discussed at length *infra*, in *CCSA v. LAUSD*, the Court of Appeal also looked to the plain meaning of the language of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1), the legislative intent as articulated in Education Code section 47614, and the Final Statement of Reasons. (*CCSA v. LAUSD*, *supra*, 212, Cal.App.4th at 693-695.) The Court of Appeal determined the District's allocation of space to charter schools was not in conflict with any law, but instead complied with both the letter and intent of California Code of Regulations, title 5, section 11969.3, subdivision (b)(1) and Proposition 39. (*Id.* at 695.)

IV. DISTRICT'S STATEMENT OF ADDITIONAL ISSUE PRESENTED FOR REVIEW

As CCSA has failed to meet the threshold requirements for review, this Court's review is not warranted. However, should this Court grant CCSA's Petition, the District requests review of the following additional issue presented to the Court of Appeal in *CCSA v. LAUSD*, but left unresolved by the opinion:

> *In a settlement agreement between a public agency and private party where the public agency has contractually agreed to follow the law, does a reviewing court determine whether the public agency has in fact followed the law by applying the deferential mandamus standard of review, or is the reviewing court restricted to application of a breach of contract analysis?*

The basis of CCSA's action against the District is the alleged breach of a provision of a settlement agreement between CCSA and the District. Pursuant to Paragraph 3 of the settlement agreement, the District agreed to "make a facilities offer...that complies with Proposition 39 and any Proposition 39 Implementing Regulations in effect at that time" to any

charter school that submits a legally sufficient Proposition 39 facilities request. (1 AA 64.)

In the Superior Court, the District argued that when a contractual provision requires a public agency to comply with a particular regulation, determining whether the agency's discretionary actions complied with that regulation necessitates the application of a mandamus standard of review. When reviewing the exercise of a public agency's discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency'." (*Stone v. Regents of the University of California* (1999) 77 Cal.App.4th 736, 745.) A court will uphold the agency action unless it is "arbitrary, capricious, or lacking in evidentiary support." (*McGill v. Regents of the University of California* (1996) 44 Cal.App.4th 1776, 1786.) Consequently, a court must affirm a public agency's discretionary actions in compliance with a statute or regulation if the "agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Sequoia Union High School Dist. v. Aurora Charter High School* (2003) 112 Cal.App.4th 185, 195.)

CCSA asked the trial court to consider the District's compliance with California Code of Regulations, title 5, section 11969.3, subdivision (b). The District's compliance with that regulation necessarily required the exercise of discretion. As such, the Superior Court was obligated to determine whether the District's actions were "arbitrary, capricious, or lacking in evidentiary support." (*McGill v. Regents of the University of California, supra,* 44 Cal.App.4th at 1786.)

Instead, however, CCSA argued that the Superior Court must perform a straightforward contract analysis because the District's obligation to follow the law was inserted into a provision in the settlement agreement.

CCSA based its position on *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44 ("*Shaw*"). In that case, the Third Appellate District stated "[w]hile it is true the University's administrative decisions regarding its faculty are properly reviewed by writ of mandate [citations omitted], Shaw does not challenge an administrative decision of the University. He seeks an interpretation of his existing written contract with the University." (*Id.* at 51-52.) Unlike *Shaw,* however, CCSA was *not* seeking an interpretation of its existing contract with the District. Instead, a provision of the settlement agreement required the District to comply with Proposition 39 and its Implementing Regulations. CCSA challenged the District's compliance with one of those regulations, Section 11969.3, subdivision (b)(1).

Consequently, the District argued to the Court of Appeal that the Superior Court erred in adopting CCSA's reasoning. However, the Court of Appeal remained silent on the issue, despite unanimously finding in the District's favor. Therefore, although the District maintains CCSA's Petition does not state a valid ground for this Court's review, should this Court grant CCSA's Petition, the District seeks review of this additional issue so that the Superior Court's factual findings of whether the District has complied with the law may be made under the appropriate standard of review following remand.

V. CONCLUSION

CCSA's Petition seeks review of issues that are not presented by *CCSA v. LAUSD* and, therefore, are not properly before this Court. The Court of Appeal's holding in *CCSA v. LAUSD* is consistent with a well-developed body of case law already considered and decided by this Court regarding foundational rules of statutory and regulatory interpretation, and is in harmony with appellate court decisions analyzing Proposition 39.

Accordingly, CCSA's Petition does not raise any valid grounds for Supreme Court review and must be denied.

If this Court grants review of CCSA's Petition, the District respectfully requests this Court to also take up review of the Superior Court's expansion of *Shaw* to preclude a mandamus standard review of administrative actions to comply with a law simply because those actions are also contemplated by a contract.

Dated: March 4, 2013

Respectfully submitted,

ORBACH, HUFF & SUAREZ LLP

By: _____

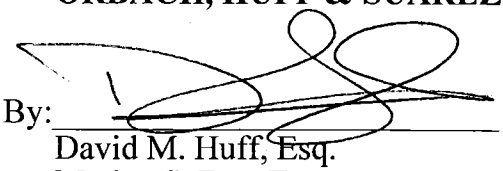
David M. Huff, Esq.
Marley S. Fox, Esq.
Joanna Braynin, Esq.
Attorneys for Appellants LOS ANGELES UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT, and RAMON C. CORTINES

CERTIFICATION PURSUANT TO RULE 8.204(c)

I hereby certify that the foregoing brief contains 6,350 words and thereby complies with California Rules of Court, Rule 8.204(c). In making this certification, I have relied on the word count of the computer program used to prepare this brief.

Dated: March 4, 2013

ORBACH, HUFF & SUAREZ LLP



By: _____
David M. Huff, Esq.
Marley S. Fox, Esq.
Joanna Braynin, Esq.
Attorneys for Appellants LOS ANGELES UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION OF THE LOS ANGELES UNIFIED SCHOOL DISTRICT, and RAMON C. CORTINES

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Miriam Lopez, am an employee in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1901 Avenue of the Stars, Suite 575, Los Angeles, California 90067-6007.

On March 5, 2013, I served the foregoing document described as:

ANSWER TO PETITION FOR REVIEW

on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

_X_ (By Mail) I placed the envelope for collection and mailing on the date shown above, at this office, in Los Angeles, California, following our ordinary business practices.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the United States Postal Service in a sealed envelope with postage fully prepaid on the same day that the correspondence is placed for collection and mailing in the ordinary course of business. I am aware that a motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing of affidavit.

_X_ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2013, at Los Angeles, California.

Miriam Lopez

SERVICE LIST

California Charter Schools Association v. Los Angeles Unified School District, et al.

California Supreme Court Case No. S208611
Court of Appeal Case No. B242601
Los Angeles Superior Court Case No. BC438336

James L. Arnone, Esq.
Winston P. Stromberg, Esq.
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, California 90071-1560
(213) 485-1234 / Fax (213) 891-8763
james.arnone@lw.com
winston.stromberg@lw.com
Attorneys for Respondent/Plaintiff
CALIFORNIA CHARTER SCHOOLS ASSOCIATION

Phillipa L. Altmann, Esq.
CALIFORNIA CHARTER SCHOOLS ASSOCIATION
250 East 1st Street, Suite 1000
Los Angeles, California 90012
(213) 244-1446 / Fax (213) 244-1448
paltmann@calcharters.org
Attorneys for Respondent/Plaintiff
CALIFORNIA CHARTER SCHOOLS ASSOCIATION

Mark Fall, Esq.
Nathan A. Reierson, Esq.
Office of the General Counsel
LOS ANGELES UNIFIED SCHOOL DISTRICT
333 South Beaudry Avenue, 23rd Floor
Los Angeles, California 90017
(213) 241-4969 / Fax (213) 241-8386

Clerk of the Court
Hon. Terry A. Green
Department 14
Los Angeles Superior Court
111 N. Hill Street
Los Angeles, California 90012

Clerk of the Court
California Court of Appeal
Second Appellate District, Division 5
300 S. Spring Street, 2nd Floor
Los Angeles, California 90013