No. S195852
(Court of Appeal Nos. B212966, B214470)
(Los Angeles County Sup. Ct. No. BS112656)

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TODAY'S FRESH START, INC.,

Plaintiff and Appellant,

vs.

LOS ANGELES COUNTY OFFICE OF EDUCATION

Defendants and Appellants.

After A Decision By The Court Of Appeal Second Appellate District, Division One.

REPLY BRIEF ON THE MERITS

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I.
PRELIMINARY STATEMENT

As Today's Fresh Start expressed in its Opening Brief, the ultimate question here is whether one's property interest can be taken without due process. It is undisputed that Today's Fresh Start has a significant property interest in its charter, and it is undisputed that revocation would not only impact the school, but the entire community that relies on it as well. Thus, it is crucial that before revocation is made, a charter school must be granted a fair and impartial hearing with a meaningful and effective opportunity to address the charges against it.

These important rights, however, were not afforded to Today's Fresh Start. Instead, it was given a hearing where the adjudicators worked closely with those accusing Today's Fresh Start of misconduct. Indeed, the lack of impartiality was so blatant that the decision-makers were even instructed by its counsel not to be neutral.

Further, instead of being afforded the opportunity to be reasonably apprised of the evidence against it, Today's Fresh Start was instead bombarded with hundreds of pages of documents and told that such evidence should be sufficient to give notice of the material charges. Indeed, examining and deciphering that evidence was so burdensome that the California Department of Education ("CDE") found it "unclear" and

"incomplete", the trial court likened it to a discovery "dump," and even one of the decision-makers admitted that she did not fully examine all the evidence. Clearly, such a hearing cannot be considered fair under the law.

In opposition, much of LACOE's arguments focus on the claim that because it did all that was explicitly required by the Education Code, Today's Fresh Start is not entitled to any additional protection. In essence, LACOE contends that because the fact-finding hearing mandated by the Education Code does not explicitly contemplate that the hearing must be impartial, and because the fact-finding hearing mandated by the Education Code does not explicitly contemplate the introduction of evidence, such procedural protections simply do not apply.

However, due process rights cannot be construed in such a limited fashion. Although the Legislature has the prerogative to create and define a liberty or property interest by statute, once that interest is created—regardless of what the statute provides—that interest cannot be deprived without conforming to constitutionally adequate procedures. As held by the U.S. Supreme Court:

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest ... it may not constitutionally

> authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

(*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 541.)

Given the substantial and undisputed property interests involved in shutting down a public charter school, all that Today's Fresh Start asks is that it be given a fair and meaningful hearing guaranteed by the Constitution. Such a hearing must at minimum include a hearing before an impartial decision-maker, and further must include the right to be adequately apprised of the material claims against it.

II.
ARGUMENT

A. LACOE's Attempt To Characterize The Trial Court's Opinion As Requiring A Separate Hearing Is Erroneous.

As an initial matter, LACOE attempts to claim that the trial court's imposition of a fair hearing is overly burdensome because it requires a ***separate*** preliminary hearing. (*See* Answer Brief ("Ans."), 32.) However, whether purposefully or not, LACOE misconstrues the holding of the trial court.

Particularly, after the trial court held that due process requires that the hearing mandated under the Education Code include a neutral and impartial decision-maker and the presentation of evidence, the question turned to what

must be done ***for this particular case***. Specifically, the trial court found that since LACBOE has already been tainted with bias in this case, it would be inappropriate to simply remand the case back to LACBOE—instead, for this particular case, another impartial decision-maker should be used. As explained by the trial court:

> ***In this particular circumstance*** since the board has made a decision where they were advised that they were not to be impartial, ***I don't see how you can go back*** and have the board act as the neutral decision maker. I think ***in this particular case***, it has to be somebody else who is at least the initial decision maker.

(Clerk's Transcript ("CT") 2012, 16:22-27 (emphasis added).)

Thus, the trial court did not hold that due process requires a separate evidentiary hearing in every instance. Instead, the trial court merely held that in this particular situation, due to the bias of LACBOE, a hearing with a separate hearing officer was necessary. Thus, the proper issue addressed by the trial court, and what must be addressed here, is ***not*** whether due process requires a ***separate*** fair and impartial evidentiary hearing, as LACOE contends, but instead whether the hearing mandated by the Education Code must be fair and impartial, and whether evidence supporting revocation must be introduced at that hearing. As demonstrated below, the answer to both of these questions is clearly "yes."

B. Due Process Requires A Neutral Decision-Maker At The Initial Revocation Hearing.

Revocation of a charter school's charter is a serious matter, as it not only implicates the charter school's very existence, but also significantly impacts the community, parents, teachers and students that have come to rely on it. Therefore, it is crucial that before such a substantial interest is taken away, a fair and impartial hearing must be provided: "When due process requires a hearing, the adjudicator must be impartial." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025; *see also Tumey v. State of Ohio* (1927) 273 U.S. 510, 535 ("No matter what the evidence was against him, he had the right to have an impartial judge").)

Determining lack of neutrality and bias is an objective inquiry. As explained by the U.S. Supreme Court, "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." (*Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 129 S.Ct. 2252, 22643.) Thus, the question is whether, "based on objective and reasonable perceptions," the factual circumstances of the case create "a serious risk of actual bias." (*See id.*; *see also Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 825 ("justice must satisfy the appearance of justice").)

The facts of this case, taken together, clearly create an objective and

serious risk of actual bias. It is undisputed that several members within LACOE had many overlapping functions within LACBOE. (*See* July 12, 2011 Court of Appeal-Second District Opinion ("Opn."), 33[1].) Further, when LACBOE asked its legal counsel, Ms. Sheri Gale if Today's Fresh Start is entitled to a neutral and impartial decision-maker, she explicitly instructed that LACBOE need not be neutral. (Opn., 29.)

The risk of bias was compounded by the fact that LACBOE board members admitted that they held the work and capabilities of the LACOE staff in high regard[2], creating the very real risk of giving improper deference to LACOE's arguments, findings, and conclusions. (*See Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 816 (In invalidating hearing, finding relevant the fact that "Board members, who have looked to Halford for advice and guidance, [may] give more credence to his arguments when deciding plaintiff's case.").) In fact, this undue deference is exemplified by a board member admitting that she did not fully examine the evidence before rendering her decision. (*See* Administrative Record ("AR") 235, 12:3-6 ("I

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[1] For example, Ms. Gale has on numerous occasions advocated for Today's Fresh Start's revocation, (*See* AR 187-188, AR 307-310 (discussing the bases on which "we are seeking revocation.") while at the very same time, advising the Board in her capacity as general counsel to the Board. (AR 269, 271, 272, 320-323).

[2] For example, during deliberations, one board member stated "I value the work and the responsibility of the staff that spent all this time looking – compiling three books of what they discovered." (*See* AR 236, 13:12-16.)

must admit that I did not pile through those three books").)

Thus these facts, taken together, clearly demonstrate that there is a substantial and objective risk that LACBOE was biased against Today's Fresh Start. Although LACOE makes several arguments as to why these biases were permissible, as explained below, each argument lacks merit.

1. As An Adjudicative Decision-Maker, LACBOE Is Required To Be Impartial.

Much of LACOE's arguments appear to hinge on one premise: that LACBOE's decision to revoke a charter does not constitute adjudicative decision-making, and as a result, it is permissible for LACBOE to be partisan during the revocation proceedings.[3] Based on this premise, LACOE excuses Ms. Gale's "not neutral" comment as simply "explaining the respective roles of the County Board and the State Board." (*See* Ans., 23-24.) Further, LACOE uses this premise to rationalize why Today's Fresh Start is not entitled to any due process protections at the County Board level, claiming that such protections only apply at the State Board level. (*See id.*)

This premise is simply erroneous. The fact of the matter is that

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[3] The argument that LACBOE should be allowed to be partisan is the same argument LACOE relied upon at the trial court. As explained by the court, "What you're really arguing is that the initial decision to revoke ... is partisan, if you will. And then there is a nonpartisan evidentiary hearing after that." (CT 2006, 10:9-13.)

LACBOE is an adjudicative decision-maker in the first instance, and thus impartiality on its part is required. (*See Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 ("When ... an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party."(citations omitted)).)

LACBOE is charged with gathering the evidence, reviewing LACOE's recommendation for revocation, reviewing Today's Fresh Start's arguments opposing revocation, holding a public hearing, and making written factual findings supported by substantial evidence. (*See* Cal. Educ. Code § 47607(e).) Furthermore, the burden is on LACBOE to create the appellate record upon which subsequent tribunals will rely. As expressed by CDE's counsel, Eileen Gray, on appeal CDE relies on the record created by LACBOE, and does not conduct its own fact-finding process:

> The Court: [T]he State Board of Education doesn't consider the appeal to be any kind of evidentiary hearing; is that correct?
> Ms. Gray: That would be our position. We review the evidence that's already in the record to determine whether or not substantial evidence supported the findings of revocation.

(CT 2001, 5:11-17.) Given these facts, it is clear that the initial revocation hearing before LACBOE constitutes an administrative adjudication. As

such, an impartial decision-maker is required. (*See Morongo*, *supra*, 45 Cal.4th at 737.)

i. Adopting The Recommendation Of Its Own Staff Does Not Allow LACBOE To Be Partisan.

In arguing that LACBOE is allowed to be partisan, LACOE attempts to distinguish the cases cited by Today's Fresh Start by claiming that all of the cited cases "concern fairness problems *on appeal* where purportedly unbiased review boards turned out not to be so; here in contrast, it is the fairness of the initial adverse decision that is at issue." (Ans., 29.) Thus, LACOE appears to argue that if an agency is merely deciding whether to adopt the recommendation of its own staff (and not the appeal of that decision), this initial decision need not be impartial.

The cases cited by Today's Fresh Start make no such distinction. Indeed, the cited cases make no mention of whether the fact of an appeal is significant or not; instead, the cases focus on the ***roles*** and ***functions*** of the individuals participating in the investigative and decision-making process. (*See Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92 ("Thus, when, as here, 'counsel [ ] performs as an ***advocate*** in a given case [he or she] is generally precluded from ***advising a decision-making body*** in the same case.'" (emphasis in original).) Thus, *Nightlife* makes clear

that impartiality is required whether it be at the ***initial*** decision or appellate ***review*** of that decision: "an employee engaged in prosecuting functions for an agency in a case may not, in the same or a factually related case, participate or advise in either the ***decision***, ***or*** the agency ***review***'s [sic] ***of that decision***." (*See id.* (emphasis added).)

Thus, LACOE's contention that impartiality does not apply to the initial decision—and only to the appeal of that decision—is without merit. Indeed, although LACOE claims that all the cases cited by Today's Fresh Start only involve bias on appeal, and not bias at the initial decision-making level, that contention is simply false. (*See Golden Day Schools, Inc. v. State Dept. of Educ.* (2000) 83 Cal.App.4th 695, 701.)

For example, in *Golden Day*, the staff of the administrative agency in that case (CDE) recommended to discontinue funds provided to Golden Day Schools. (*Id.*) As a result, the staff issued a notice of proposed action (NOPA) to discontinue funding, and a hearing was subsequently held to determine whether to accept or reject the proposed action. (*Id.*) One of the panel members adjudicating the hearing was also a staff member who initiated the proposed action in the first place. (*Id.*) Golden Day claimed that the staff member was impermissibly biased, but the objection was ignored and the proceeding continued with that staff member as an

adjudicator. (*Id.* at 702.)

The administrative panel subsequently adopted the proposed action, but that decision was ultimately set aside by the *Golden Day* court. (*See id.* at 710.) In particular, the *Golden Day* court found that having the staff member accept or reject the proposed action placed that staff member "in the position of judging the correctness of his own decision," and thus he was impermissibly biased. (*Id.*) As a result, the *Golden Day* court held that a fair hearing required an "arbiter that ***has not participated in staff decisions*** concluding, or leading to a conclusion, that appellant's audit reports are deficient." (*Id.* 711 (emphasis added).)

Thus, like *Golden Day*, the bias here occurred at the initial decision-making process. Just as the staff for CDE in *Golden Day* issued a proposed action that must be accepted or rejected by the agency, LACOE issued a recommendation that also must be accepted or rejected by LACBOE. Therefore, just as in *Golden Day*, that acceptance or rejection of the initial decision must comport with due process, including requiring an impartial decision-maker.

It must be noted that LACOE again points out that because the charter revocation procedures appear similar to the procedures for granting a charter under the Education Code, and because procedures for granting a charter

allow LACOE to be partisan, LACOE claims that Education Code must equally allow it to be partisan during revocation as well. (*See* Ans., 31-32, 32 n. 17.) However, as Today's Fresh Start explained in its opening brief, although due process concerns do not apply when a property interest has yet to be created, once that interest is created, due process protections control, and deprivation of that property interest must comport with the minimum constitutional requirements of due process. As one court explained, "[a]lthough the state (or one of its subdivisions) has the ***prerogative to create a property interest*** in an entitlement in the first instance, ***it does not have the prerogative to diminish*** the minimum procedural guarantees of the Constitution ***once the property interests it created have attached.***" (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 576-77 (emphasis added); *see also Cleveland Bd. of Educ., supra*, 470 U.S. at 541.) Therefore, although LACOE has the prerogative to create and grant a property interest in a charter school's charter without the use of a fair and impartial tribunal, once that property interest is created, due process must apply, and a fair and impartial tribunal must be given. As a result, LACOE's argument is without merit.

ii. The Existence Of An Impartial Appeal To The State Board Does Not Allow LACOE To Be Partisan.

Given that due process requires an impartial tribunal, and an impartial tribunal was not given at the initial decision-making level, the question arises as to whether the lack of an impartial tribunal at the County Board may be remedied by an impartial tribunal at the State Board. However, as even LACOE admits in its opposition, the answer is "no." (*See* Ans., 39.)

As explained in the Opening Brief, an impartial hearing at the initial decision-making level may not "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. ***Petitioner is entitled to a neutral and detached judge in the first instance.***" (*Haas*, *supra*, 27 Cal. 4th at 1034 (emphasis in original).) Thus, because a biased decision-maker was used here in the first instance, this fact alone warrants setting the decision aside. (*See id.*)

Further, this due process violation is compounded by the fact that under the statutory framework, great deference is given to to the initial decision maker. (*See* Cal. Educ. Code § 47607(e) ("The chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence").) Indeed, in this case, CDE expressed that it does

not conduct its own evidentiary hearings, but instead it "review[s] the evidence that's already in the record to determine whether or not substantial evidence supported the findings of revocation." (CT 2001, 5:11-17.) Furthermore, considering that CDE acknowledged that there is a difference between merely reviewing evidence already submitted (which it stated it did in this case) and conducting a de novo review (*see* CT 2014, 18:14-18 (asking the court whether, going forward, it contemplated "a hearing de novo ... or would that be a ... review of the evidence that's already been [submitted]")), it is unlikely that CDE applied a de novo standard in this case, and instead applied a highly deferential standard of review.[4]

Therefore, the facts of this case clearly create an objective appearance of bias. An objective and reasonable observer may clearly conclude that the

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[4] LACOE argues at length that the common, legal understanding of the "substantial evidence" cannot be read into the Education Code, and instead seeks to apply a dictionary definition of the term. (*See* Ans., 39-40.) However, given that "substantial evidence" generally entails a deferential standard—even in the context of administrative matters (*see Schutte & Koerting, Inc. v. Regional Water Quality Control Bd., San Diego Region* (2007) 158 Cal.App.4th 1373, 1383-84.)—this deferential standard is likely the intent of the Legislature. As explained by this Court, "[i]n the absence of some indication either on the face of [a] statute or in its legislative history that the Legislature intended its words to convey ***something other than their established legal definition***, the presumption is almost irresistible that the Legislature intended them to have that meaning." (*See Trope v. Katz* (1995) 11 Cal. 4th 274, 282 (emphasis added).) Thus, considering that "substantial evidence" in this particular case is used in the context of appellate review by another entity, it is likely the same deferential standard was intended here as well.

overlapping functions of various members of LACOE and LACBOE, combined with Ms. Gale's instruction not to be neutral, and combined with the fact that LACBOE members even admitted to not fully examining the evidence prior to rendering a decision, create an objective and substantial risk of bias. Indeed, the trial court itself came to this reasonable conclusion[5] when examining the facts. As a result, the facts demonstrate an impermissible and substantial risk of bias clearly exists in this case, and the Court of Appeal below must be reversed on this basis alone.

C. Pecuniary Bias Presents An Additional Reason Why LACBOE's Review Was Improper.

1. This Court In Its Discretion May Properly Consider The Issue Of Pecuniary Bias.

Although this Court generally does not consider issues not briefed in the courts below, the rule prohibiting parties from raising new issues is not absolute. Under California Rules of Court, Rule 8.516(b), the Court in its

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[5] To the extent LACOE argues that certain statements demonstrating bias in fact had different subjective meanings or intentions, again it must be emphasized that the test is objective, and subjective intent is irrelevant. Thus, even if a decision-maker subjectively (and in fact) had no idea that he or she was biased, if an objective viewer may reasonably conclude that a substantial risk of bias exists, that bias is impermissible. (*See Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 864-65 (disqualifying judge even though he in fact had no knowledge of his interest in the case, finding the objective appearance of impropriety impermissible).)

discretion may decide "any issues that are raised or fairly included in the petition or answer" and also "an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, Rule 8.516(b)(1) & (2).) Issues that have sufficient statewide importance and are fully briefed often warrant consideration by the Court. (*See People v. Braxton*, (2004) 34 Cal. 4th 798, 809; *Cedars-Sinai Med. Ctr. v. Super.Ct.* (1998) 18 Cal. 4th 1, 6.)

Today's Fresh Start respectfully requests that this Court exercise its discretion and take into consideration the issue of pecuniary bias in this case. As this issue deals with setting forth the basic rights (namely, a fair hearing) that must be afforded to all charter schools across the state during revocation proceedings—proceedings which may result in the deprivation of significant property interests—this issue is clearly of great statewide importance. Furthermore, because the source of pecuniary bias (the financial relationship between charter school authorizer's and charter schools) can be seen based on undisputed facts and statutory framework, and further considering both parties have briefed the issue, Today's Fresh Start respectfully submits that this issue is appropriate for adjudication.

2. The Undisputed Facts Demonstrate That LACBOE Has A Pecuniary Interest In The Revocation Proceedings.

The appearance of financial bias clearly exists in the charter school revocation context. LACOE does not dispute that statutory scheme of the Education Code creates a situation where the more students a school attracts, the more funding it receives, as funding is based on average daily attendance. Nor does LACOE dispute that there exists a finite number of students, and thus, a student enrolled in one school may not generally enroll in another. Instead, LACOE claims that (1) pecuniary bias does not apply because the schools LACBOE operates are high school level, whereas Today's Fresh Start currently serves K through 8, (2) pecuniary bias does not apply because LACBOE has a financial incentive to ***grant*** charter schools (as opposed to revoke them), and (3) pecuniary bias does not apply because revocation is not a foregone conclusion—that is, a review board may reverse the decision, or other chartering authorities may decide to pick up the revoked charter school. (Ans., 20-22.) These contentions are without merit.

First, LACOE's contention that Today's Fresh Start cannot compete for the same pool of students as LACBOE because it only currently serves K through 8 is incomplete. Indeed, when Today's Fresh Start's charter was

initially revoked, Today's Fresh Start was originally chartered to serve K through 12, and thus includes the high school students that LACBOE now serves. (*See* AR 3 ("[Today's Fresh Start] is an independent, public and site based start-up K-12 charter school.").)

Second, the fact that LACOE may in fact be biased in favor of granting charters does not make that bias acceptable. After all, bias is impermissible whether for or against a party. (*Morongo*, *supra*, 45 Cal.4th 737 ("A fair tribunal is one in which the judge or other decision maker is free of bias ***for or against*** a party." (emphasis added)).) Indeed, the concern of bias is the distortion of fair and neutral decision-making process, and that distortion affects the process regardless of whether it is for or against the party. For example, a biased individual may attempt to overcompensate for that bias by slightly favoring the opposing the side, impermissibly distorting the decision-making process. As a result, financial bias is impermissible, regardless of whether it is for or against a party.[6]

Finally, the fact that revocation is not a foregone conclusion does not

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[6] Regarding paid services that LACOE provides, it should also be noted that it provides additional services to public schools as well, including personnel, payroll, and retirement processing. (*See* http://lacdcfs.org/edu/directories/documents/2009-2010PSdirectory.pdf, at vii (last accessed February 16, 2012).) However, as a charter school, Today's Fresh Start has no obligation to retain LACOE for these additional services (*see* Cal. Educ. Code § 47613(d)), and as a result, creates another source of financial incentive as well.

make bias permissible. Naturally, any bias at a lower tribunal is not a foregone conclusion, as any appellate court may eventually overturn the decision below. However, such a fact does not make the bias permissible. Indeed, as this Court demonstrated in *Haas*, a party is entitled to an impartial decision-maker in the first instance especially where, as here, the appellate review is deferential to the initial decision-maker. Thus, the fact that other remedies may lie in the future is of no moment.

For the foregoing reasons, Today's Fresh Start respectfully requests that this Court find that the pecuniary bias that exists between charting authorities who compete with its charter schools impermissible. In these cases, determination of revocation should be given to an impartial third-party.

D. Due Process Of A Fair Hearing Is Not Satisfied By Merely Dumping Evidence On A Charter School.

Finally, due process requires that Today's Fresh Start be given a meaningful opportunity to address the charges levied against it. As held by the U.S. Supreme Court, the opportunity to be heard must "permit the recipient to ***mold*** his argument to the issues the ***decision maker appears to regard as important***." (*Goldberg v. Kelly* (1970) 397 U.S. 254, 268-69.) Thus, "[a]bsent a full, fair, potentially ***effective*** opportunity to defend against

the State's charges, the right to a hearing would be 'but a barren one.'" (*Gray v. Netherland* (1996) 518 U.S. 152, 181-82.)

Such a full, fair, and effective opportunity was lacking in this case. As Today's Fresh Start demonstrated in its motion, LACOE simply saddled Today's Fresh Start with hundreds of pages of documents. Based on those documents, LACOE claims Today's Fresh Start should be adequately surprised of the material allegations. (*See* Ans., 45.)

LACOE grossly overstates the clarity of its evidence. At least one board member admitted that the multiple binders of evidence were too daunting to read completely through. (*See* AR 235, 12:3-6 ("I must admit that I did not pile through those three books").) Even CDE, represented by competent attorneys, found the documentation unclear and incomplete, forcing them to request clarification:

> The CDE Staff has noted general references to the LACOE staff report by the LACBOE in the materials supplied, but the CDE finds the LACOE staff report to be a ***conglomerate of material and immaterial elements.***[7] It would be inappropriate for CDE staff to sort through these elements and select those that appear material and to determine the substantial evidence intended to support those elements, as to do so might misrepresent the positions of LACOE staff and the LACBOE.

(AR 1684-85 (emphasis added).)

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[7] This statement makes clear that LACOE's claim that "there is no evidence that all the allegations of wrongdoing were not material to the decision to revoke" is questionable at best. (*See* Ans., 45.)

Thus, the burden of sifting through LACOE's multiple binders of evidence to determine the material allegations is clearly too high. To be sure, as explained by the trial court in response to LACOE's contention that all the necessary documentation can be found in the binders:

> In the civil world ... we probably had a dump. That is, you provided a dump to Today's Fresh Start and to the State Board of Education. And how are they supposed to know what you're relying on to revoke their charter?
> You have to not only supply the evidence but supply the analysis that this supports a revocation for the following reason.
> ***
> "In the binders." I don't like the sound of that. I really think this is a prosecution, not a – we've got the evidence, you find the pony in this file kind of situation.

(CT 2011-12, 15:7-16:3; *see also Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 784-85 (in a discovery context, "[a] broad statement that the information is available from a mass of documents is insufficient.").)

LACOE argues that because Today's Fresh Start was able to submit a large amount of documents in response, Today's Fresh Start must have naturally understood the claims against it. However, such a claim is disingenuous. Although Today's Fresh Start was able to provide a lengthy response, it was simply doing the best it could to address the issues. As Today's Fresh Start repeated multiple times throughout the administrative proceedings, the allegations were far from clear, and what Today's Fresh Start truly needed was a clarification of the ***material*** issues of revocation:

> We submitted everything that we felt that was there. Every time we submit something, there is something else. We would be willing to sit down with [LACOE] and sit down and say ***tell us exactly what you want***. We didn't submit 1,700 pages of paper with the intent in saying just go fly a kite LACOE. What we did, we tried to basically submit the documents that we felt that would basically meet each one of the CAPs.

(AR 974-75, 72:25-73:8.)

Considering that Today's Fresh Start, CDE, a LACBOE board member, and even the trial court found LACOE's three binders of evidence too burdensome to adequately examine, there can be no doubt that due process requires at least some form of presentation of evidence where Today's Fresh Start can meaningfully and effectively address the charges against it. Indeed, in conducting the *Mathews* balancing test, LACOE makes little effort to explain why presenting evidence would be unduly burdensome in light of the significant interests involved and the risk of erroneous deprivation. Instead, LACOE only claims that it has an interest in ensuring the safe and lawful operation of a charter school, yet makes no connection or explanation on how requiring a presentation of evidence harms this interest in any significant way. (*See* Ans., 38.) Indeed, the fact is that CDE subsequently required LACOE to clarify and streamline its allegations anyway, and LACOE complied without incident, and thus, there appears little reason (and LACOE has presented none) why LACOE could not have

done so ***before*** Today's Fresh Start's charter was revoked. Considering that LACOE (and the general public) also has a significant interest in ensuring that revocations are warranted in the first place, and that needless litigation is avoided, requiring a presentation of evidence is clearly necessary in this case.

V.
CONCLUSION

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

Dated: February 16, 2012

DOLL AMIR & ELEY LLP

By: _____

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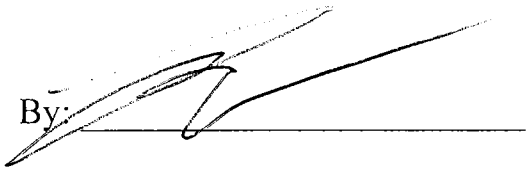
CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 5,249 words as counted by the Microsoft Office WordPerfect 2003 word processing program used to generate this brief.

Dated: February 16, 2012

DOLL AMIR & ELEY LLP

By: 

MICHAEL M. AMIR
MARY TESH GLARUM
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Attorneys for Plaintiff
TODAY'S FRESH START, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On February 16, 2012, I served the foregoing document(s) described as **REPLY BRIEF ON THE MERITS** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Envelope - by placing ( ) the original (**X**) a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes.

() **By Mail:** I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

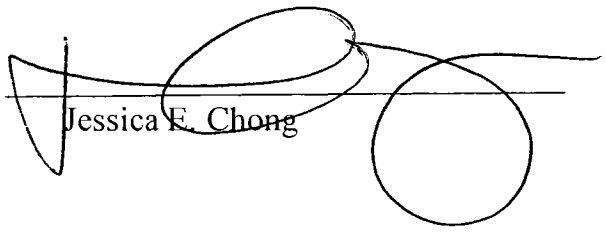
( ) **By Personal Service:** I caused such envelope to be delivered by hand to the offices of the addressee(s) by delivering such envelope to First Legal Messenger service for personal delivery.

(X) By Overnite Express: I caused the envelope(s) to be delivered to the Overnite Express office for delivery on the next-business-day basis to the offices of the addressee(s).

( ) **By Facsimile Transmission:** On _____, I caused the above-named document to be transmitted by facsimile transmission to the offices of the addressee(s) at the facsimile number(s) so indicated above. The transmission was reported as complete and without error.

Executed on February 16, 2012, at Los Angeles, California.

(X) STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Jessica E. Chong

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