

Case No. C087996

COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

CALIFORNIA SCHOOL BOARDS ASSOCIATION and its EDUCATION
LEGAL ALLIANCE and SAN JOSE UNIFIED SCHOOL DISTRICT,

Petitioners/Plaintiffs and Appellants,

v.

STATE BOARD OF EDUCATION, CALIFORNIA DEPARTMENT OF
EDUCATION, AND DOES 1-100,

Respondents/Defendants and Respondents.

PROMISE ACADEMY aka PROMISE PUBLIC SCHOOLS,

Real Party in Interest.

APPELLANTS' OPENING BRIEF

Appeal from a Judgment of the Superior Court of California
In and For the County of Sacramento,
Case No. 34-2018-80002834-CU-WM-GDS
Hon. Richard K. Sueyoshi
Phone: 916.874.6695

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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons that must be listed in this certificate. (Cal. Rules of Court, rule 8.208(e)(3).)

Dated: August 6, 2019 DANNIS WOLIVER KELLEY
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I. INTRODUCTION

On January 18, 2018, the State Board of Education (“SBE”) broke the law by materially revising and simultaneously approving Promise Academy’s charter petition (“Charter Petition”). In order to cure fatal deficiencies with Promise Academy’s proposed graduation requirements, SBE bluntly severed the entire high school program from the K-12 Charter Petition, ignoring procedural requirements, answering no questions and providing no guidance regarding the educational and legal consequences of its decision on numerous other aspects of the proposed charter school program. Severing the high school program detailed in the Charter Petition necessarily impacts countless other provisions within the Charter Petition while leaving in place all of the obsolete text outlining the non-existent high school program. In doing so, SBE effectively created a charter school without an operative charter while simulateously circumventing numerous requirements for the vetting and approval of a public charter school as set forth in the Charter Schools Act of 1992 (“CSA”) and its implementing regulations.

SBE’s ultra vires action was taken during Promise Academy’s appeal from San Jose Unified School District’s (“District”) initial denial of Promise Academy’s original Charter Petition pursuant to Education Code section 47605(j). As dictated by its own regulations, SBE was charged with reviewing the Charter Petition on appeal, “as denied,” first by the District’s governing board (“District Board”) and subsequently by the Santa Clara County Board of Education (“County Board”). (Cal. Code Regs., tit. 5, § 11967(b)(1).) Instead, SBE materially revised the proposed educational program and immediately approved the revised Charter Petition, despite the lack of any supporting petition signatures for the as-revised Charter Petition as required by Education Code section 47605(a)(2); without any public hearing for the as-revised Charter Petition

as required by Education Code section 47605(b); without following the material revision procedure under Education Code section 47607(a); and without consideration of the as-revised Charter Petition by the local school district in the first instance as required by Education Code section 47605(a)(1).

SBE has been repeatedly advised of the impropriety of approving charter petitions in a form different than presented to the lower administrative agencies but has consistently disregarded this directive, continuing to violate the CSA and its implementing regulations by simultaneously approving charter petitions with material changes.

California School Boards Association and its Education Legal Alliance (“CSBA”) and the District filed claims for mandamus, declaratory, and injunctive relief seeking to vacate SBE’s revision/approval of Promise Academy’s Charter Petition and to further enjoin SBE and its operative body, the California Department of Education (“CDE”), from similarly revising and approving charter petitions on appeal. On August 6, 2018, the superior court denied the petition for writ of mandate and complaint for declaratory and injunctive relief.

Chartering authorities (i.e., school districts, county offices of education, and SBE) all independently review a charter petition under the procedure and requirements set forth in Education Code section 47605(b). (Cal. Code Regs., tit. 5, § 11967(f).) As a general proposition, this appeal challenges SBE’s ability to materially revise a charter school petition after receiving the necessary supporting petition signatures and after holding the required public hearing because neither the signatories nor the public are afforded an opportunity to consider the impact of the proposed revision. And more specifically, this appeal challenges SBE’s material revision of Promise Academy’s Charter Petition as this similarly divests the District

Board and County Board of an opportunity to consider the Charter Petition as materially revised.

II. BACKGROUND

A. The Establishment of Charter Schools

California's Constitution provides for the creation and organization of school districts at the local level and gives power to the local electorate to control these districts. (Cal. Const., art. IX, § 14.) "[U]nder the Constitution, the public schools themselves exist at the district level and are governed by the school districts." (*Mendoza v. State* (2007) 149 Cal.App.4th 1034, 1041 ("*Mendoza*").) The Education Code builds on this, requiring that "[e]very school district shall be under the control of a board of school trustees or a board of education." (Ed. Code, § 35010(a).) Charter schools are part of the Public School System, but are privately operated. (Ed. Code, §§ 47601, 47615 (a)(1); *Anderson Union High School District v. Shasta Secondary Home School* (2016) 4 Cal.App.5th 262, 267 ("*Anderson*").)

Charter schools are created by submitting a charter school petition to a school district (Ed. Code, § 47605), county office of education (Ed. Code, §§ 47605.5, 47605.6), or to SBE (Ed. Code, § 47605.8). The applicable petitioning procedure and requirements vary depending on the type of charter school that is proposed. Most often, and as applicable here, a charter school petition is submitted in the first instance to a local school district. (Ed. Code, § 47605.) The petition is only eligible for submittal *if* it has met the petition signature requirements set forth in Education Code section 47605, subdivision (a). Within thirty days of receiving a petition, a school district's governing board must "hold a public hearing on the provisions of the charter, at which time the governing board of the school district shall consider the level of support for the petition by teachers employed by the district, other employees of the district, and parents."

(Ed. Code, § 47605(b).) The board must “either grant or deny the charter within 60 days of receipt of the petition.” (Ed. Code, § 47605(b).)

The governing board must grant a charter “if it is satisfied that granting the charter is consistent with sound educational practice.” (Ed. Code, § 47605(b).) Nevertheless, a governing board may deny a petition for the establishment of a charter school if it finds that the particular petition fails to meet enumerated statutory criteria and it adopts written findings in support of its decision to deny the charter. (*Ibid.*)

If granted, a charter school is established and the school district becomes the authorizing agency over the charter school. If denied, the charter school petitioners may appeal the denial to the local county office of education. (Ed. Code, § 47605(j)(1).) On appeal from a school district’s denial, the petitioner must submit:

(1) A complete copy of the charter petition *as denied*, including the signatures required by Education Code section 47605.

(2) Evidence of the governing board’s action to deny the petition (e.g. meeting minutes) and the governing board’s written factual findings specific to the particular petition, when available, setting forth specific facts to support one or more of the grounds for denial set forth in Education Code section 47605(b).

(3) A signed certification stating that petitioner(s) will comply with all applicable law.

(4) A description of any changes to the petition necessary to reflect the county board of education or the SBE as the chartering entity, as applicable. (Emphasis added.)

(Cal. Code Regs., tit. 5, § 11967(b).) The governing board for the local county office of education then considers the charter school petition under the same standards used by the local school district, which are set forth in Education Code section 47605(b). The county board of education’s review

of a previously denied charter school petition is “not limited to a review based solely on the reasons for denial stated by the school district, but must review the charter school petition pursuant to Education Code section 47605(b).” (Cal. Code Regs., tit. 5, § 11967(f).) If approved, the charter school is established and the county office of education becomes the authorizing agency over the charter school. If denied, the charter school petitioners may again appeal the denial to the SBE. (Ed. Code, § 47605(j)(1).)

On appeal to the SBE, a charter school petition is subject to the same procedure and standards governing its appeal to the county office of education. (Ed. Code, § 47605(j)(1); Cal. Code Regs., tit. 5, § 11967.) On appeal, the charter petition *as denied* is submitted. (*Ibid.*)

B. Summary of Relevant Facts

1. Promise Academy’s Charter School Petition

On April 6, 2017, Promise Academy submitted its Charter Petition to the District. Promise Academy’s Charter Petition proposed to establish a charter school that would serve students in TK through grade 12. (Clerk’s Transcript (“CT”), v.1, p. 98, ¶ 3.) Prior to submitting the Charter Petition, Promise Academy gathered 316 parent signatures, reflecting support for the educational program detailed in Promise Academy’s Charter Petition. (CT, v.2, p. 419; Ed. Code, § 47605(a)(1)(A).) Here, Promise Academy relied upon the signatures of parents whose signatures reflect support for the TK – 12 educational program as set forth in the Charter Petition submitted to and considered by the locally elected District Board. (CT, v.1, p. 101, ¶ 12.)

2. District’s Consideration of the Charter Petition

On June 1, 2017, following a public hearing and comprehensive review and analysis of the Charter Petition, the District Board denied the Charter Petition. (CT, v.1, p. 98, ¶ 5; CT, v.2, pp. 336-345.) In accordance with Education Code section 47605(b)(1)-(5), the District Board made written

factual findings to support its determination that the Charter Petition presented an unsound educational program; Promise Academy was not demonstrably likely to successfully implement the program promised in the Charter Petition; the Charter Petition was not supported by the requisite number of signatures; and the Charter Petition did not contain a reasonably comprehensive description of the statutorily required elements of a charter petition. (CT, v.1, p. 99, ¶ 6; see generally, CT, v.2, pp. 351-408.) These findings identified and addressed significant deficiencies with the Charter Petition's financial plan, governance structure, and educational program, including Promise Academy's plan for serving English learners and students with disabilities, among other things. (*Ibid.*) Notably, the District's Board President encouraged Promise Academy to make changes to the Charter Petition to address the District's findings and to bring a revised petition back with modifications to be considered. (*Ibid.*)

Following the District's denial of the Charter Petition, rather than make changes and resubmit the Charter Petition, Promise Academy appealed the District Board denial to the County Board pursuant to Education Code section 47605(j). (CT, v.1, p. 99, ¶ 7; see generally, CT, v.2, pp. 410-494.)

3. Promise Academy's Appeal to the County Board

The County Board held a public hearing on September 6, 2017, to consider whether to grant or deny the Charter Petition. (*Ibid.*) The County Board's staff recommended denial on the grounds the Charter Petition presented an unsound educational practice, the petitioners lacked the ability to successfully implement the intended program, and the Charter Petition did not contain reasonably comprehensive descriptions of all required charter elements. (*Ibid.*) Those findings identified and addressed significant deficiencies with the Charter Petition's financial plan, teacher training and credentials, educational program including the plan for serving English learners and students with disabilities, as well as high school graduation

requirements which created barriers to students including those with disabilities. (*Ibid.*)

The County Board was deadlocked and did not approve the Charter Petition. (*Ibid.*)

4. Promise Academy’s Appeal to SBE

On September 28, 2017, Promise Academy appealed to SBE. Prior to consideration by SBE, CDE reviewed the Charter Petition. (CT, v.1, pp. 99-100, ¶ 8; CT, v.2, pp. 496-508.) Like the County Board staff, CDE also recommended denial of the Charter Petition:

The CDE finds that the PA [Promise Academy] petitioner is demonstrably unlikely to successfully implement the program set forth in the petition and that the PA does not provide a reasonably comprehensive description of multiple required charter elements, including a description of the educational program, measurable pupil outcomes, employee qualifications, and health and safety procedures.

(CT, v.1, pp. 99-100, ¶ 8; CT, v.2, p. 498.) CDE further found that “[t]he charter petition is not ‘consistent with sound educational practice.’” (CT, v.1, pp. 99-100, ¶ 8; CT, v.2, p. 514.)

Like the District and County Office staff, CDE concluded that the Charter Petition did not adequately address the plan for serving English learners and students with disabilities, the means to measure pupil performance, the governance structure, the suspension and expulsion procedures, or provide a viable financial plan. (CT, v.1, p. 100, ¶ 9; see generally, CT, v.2, pp. 496-556.) CDE also raised the concern that the high school graduation requirements were improper in that they required a pupil fee in violation of the constitutional right to a free public education and otherwise created barriers to graduation for students, including those with disabilities, among others. (*Ibid.*)

5. SBE’s Material Revision and Approval of the Charter Petition

On January 18, 2018, SBE opened a public hearing on the appeal of the Charter Petition. (CT, v.1, p. 102, ¶ 2; see generally, CT, v.3-4, pp. 558-651.) CDE presented its report and recommendation to the SBE addressing a variety of concerns with the Charter Petition. (*Ibid.*) Thereafter, the District and members of the District’s community addressed the Board to urge SBE to deny the Charter Petition based upon the deficiencies identified by the District, County Board, and CDE. (*Ibid.*) Charter Petitioner and supporters then addressed SBE to urge approval. (*Ibid.*)

After public comment concluded, the public hearing was closed and SBE deliberated. (CT, v.3, p. 615:17-19.) Questions were asked by SBE members regarding high school graduation requirements, student discipline, English language learners, and students with disabilities – noting problems in each of these areas and the concern for discriminatory impact. (CT, v.1, p. 102, ¶ 3.) SBE member Bruce Holaday was clear in his belief that the Charter Petition could not be approved in the form presented:

On its face value right now, the high school requirements could impede a number of deserving and appropriate students to be a part of this school. ... I’m not comfortable with the current graduation requirements as stated in this documents without some alternative option, path, route for a child to for one reason or another, cannot make that final cut.

(CT, v.1, pp. 102-103, ¶ 4; CT, v.3, pp. 641:17 to 642:7.)

SBE member Williams then made a similar statement, acknowledging that “the board is not comfortable with the lack of clarity around – the alternative paths – the multiple paths getting there [graduation].” (CT, v.3, p. 646.) She went on to state:

You [Promise Academy] make it clearer about how the ILP [individualized learning plan] is like an IEP and a 504 and how that will dictate what – as you go through – what options

should be encouraged and available for, uh, kids and what kinds of support the kids could have. So, uh, what I'm going to do is make this motion. Member Holaday – Member Holaday and I both, uh, are, uh, support this petition and I move to approve Promise Academy *as a grade TK-8 school* for a five year term effective July 1st through 2018 – effective July 1, 2018 through June 30, 2018¹ upon fulfillment of the following ...that the Promise board will provide the CDE with a revised budget with positive three year ending fund balance, a revised petition that reflects the state board as authorizer and a fully executed facilities lease agreement by June 15, 2018. So it would be an approval, if the board approved, for the TK-8 portion of the school with the opportunity for you to come back, uh, at any time, including later in 2018, with a revised description of the high school in the areas of concern that we've raised and ask for a material amendment.

(CT, v.3, pp. 646:19 to 648:8, emphasis added.) The motion was immediately made without further comment, discussion, or public hearing and was passed unanimously. (CT, v.1, p. 100, ¶ 10, & p. 103, ¶ 5; CT, v.3, pp. 648:9 to 650:10.)

C. Procedural History

On March 19, 2018, CSBA and the District filed suit against SBE, CDE, and Promise Academy, asserting causes of action for traditional mandamus (Code Civ. Proc., § 1085) and declaratory relief (Code Civ. Proc., § 1060). (CT, v.1, pp. 1-18.) CSBA's and the District's petition for writ of mandate and complaint for declaratory and injunctive relief challenged SBE's material revision and approval of Promise Academy's charter petition appeal. (*Ibid.*)

On July 5, 2018, the trial court issued its ruling, denying the petition for writ of mandate and complaint for declaratory relief. (CT, v.5, pp. 1361-70.) The trial court determined that the CSA and its implementing

¹ This statement was later corrected to reflect a five year term, July 1, 2018 through June 30, 2023. (CT, v.3, pp. 680-81.)

regulations did not preclude the SBE from simultaneously revising and approving Promise Academy's charter school petition. (*Ibid.*) The trial court further determined that SBE's last minute revision to Promise Academy's educational program did not negate or offend the CSA's requirement for parent signatures in support of a charter school petition, the public hearing process, or the public policy favoring local school district priority in the charter petition approval process. (*Ibid.*)

On August 6, 2018, the trial court issued an order denying petition for writ of mandate and complaint for declaratory relief. (CT, v.5, pp. 1373-87.)

CSBA and the District noticed this appeal on August 24, 2018. (CT, v.5, p. 1390.)

III. STATEMENT OF APPEALABILITY

After noticing this appeal, the trial court signed a judgment dated September 14, 2018. (CT, v.5, pp. 1401-04.) The parties dispute whether the trial court's August 6, 2018 order was final and immediately appealable.

The verified petition and complaint included two causes of action—one for traditional mandamus and a second for declaratory relief. (CT, v.1, pp. 1-18.) The trial court's August 6, 2018 order fully disposed of both causes of action on the merits, stating:

After oral argument, the Court took the matter under submission. The Court, having examined and considered the evidence and the arguments presented by the parties issued, on July 5, 2018, its' final ruling, which is attached hereto as Exhibit A and is incorporated herein by reference.

THE COURT ORDERS, ADJUDGED AND DECREED:

1. The Petition for Writ of Mandate is DENIED.
2. The Complaint for Declaratory Relief is DISMISSED.
3. Judgment is entered in favor of Respondents.

4. Pursuant to Government Code section 6103.5, Respondents shall recover from Petitioner any fees that would have been paid but for Government Code section 6103 in the sum of \$435.00.

IT IS SO ORDERED.

(CT, v.5, p. 1374.) The trial court's September 14, 2018 judgment repeated its disposition of Appellants' two claims, verbatim, providing the same exact relief and disposition. (CT, v.5, p. 1402.) The trial court's September 14, 2018 judgment neither modified nor ratified the August 6, 2018 order in any respect. (*Ibid.*) The trial court's subsequent entry of an admittedly redundant judgment does not render Appellant's appeal premature. Regardless, as the trial court's final disposition was expressly set forth in its August 6, 2018 Order and expressly directed that "Judgment is entered in favor of Respondents," Appellants' notice of appeal "is valid and is treated as filed immediately after entry of judgment." (Cal. Rules Court, rule 8.104(d)(1).)

A final judgment is one that terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697 [order denying writ of mandate was a final judgment because it effectively disposed of all causes of action].) It is irrelevant whether the word "judgment" is used in the title of the document. Where an "order" denying a writ of mandate disposes of all claims, it is regarded as a final judgment. (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.) Similarly, an order dismissing claims is likewise a final judgment and immediately appealable. (*City of Los Angeles v. City of Los Angeles Employment Relations Board* (2016) 7 Cal.App.5th 150, 157.) Here, the trial court's August 6, 2018 Order disposed of both causes of action on the merits – denying the writ of

mandate claim and dismissing the declaratory relief claim. (CT, v.5, p. 1374.)

Respondents agreed that the trial court’s judgment was entirely “redundant” (CT, v.5, p. 1407), but expressed concern as the trial court’s ruling called for Respondents and Real Party in Interest to submit “an order incorporating this ruling as an exhibit to the order and a judgment.” (CT, v.5, p. 1406.) Here, the trial court further directed the parties to utilize the procedures for submission of a proposed order set forth in California Rules of Court, rule 3.1312. (CT, v.5, p. 1387.) Notably, the trial court did *not* direct the parties to utilize the procedures for submission of a proposed judgment set forth in California Rules of Court, rule 3.1590.

The proposed order submitted by Respondents and signed by the trial court served as both a final appealable order and judgment—fully complying with the trial court’s July 5, 2018 ruling directing the prevailing parties to submit a proposed order and judgment. (CT, v.5, pp. 1373-87.) The August 6, 2018 Order not only resolved the underlying writ motion, it expressly and finally disposed of both causes of action and further directed the entry of judgment in favor of Respondents. (CT, v.5, p. 1374.) At that point there was no issue left for future consideration and the trial court’s decision was final and immediately appealable under Code of Civil Procedure section 904.1(a)(1).

IV. QUESTION PRESENTED

When considering a petition to establish a charter school (“charter petition”) on appeal from local denial, does the SBE have the authority to materially revise the charter petition in order to cure defects in the charter petition without restarting the petition process set forth in Education Code section 47605 or is SBE required to either grant or deny the charter petition “as denied” by the local district?

V. DISCUSSION

A. Standard of Review

Generally, the approval of a charter school petition is a discretionary, quasi-legislative act, appropriately challenged through a petition for traditional writ of mandate under Code of Civil Procedure section 1085. (*Cal. Sch. Bds. Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1314 n.12, 1324 (“*CSBA v. SBE*”).)

Although an agency’s approval of charter school petition is a discretionary act, “[a]gency discretionary power is always confined at the margins by statutes and constitutional provisions.” (Asimow, et al., *Cal. Practice Guide: Administrative Law* (The Rutter Group 2018) ¶ 17:635.) Thus, at the outset the court must determine whether an agency’s action is within the range of the agency’s delegated authority – a question of law subject to independent (i.e., *de novo*) review. (*Id.* at ¶ 17:636; see also, *Association of Irrigated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1494 [“[T]he court must first determine whether the administrative action is ‘within the bounds of the statutory mandate’” ... and “[i]n answering this question, the court exercises its independent judgment.”], citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 16 (conc. opn., Mosk., J.).

Only after first assuring that an agency’s challenged action falls within the permissible scope of the agency’s authority does the reviewing court turn to the reasonableness of the agency’s decision, reviewed under the arbitrary and capriciousness standard. Abuse of discretion review is “limited to a determination of whether the agency’s decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” (*CSBA v. SBE, supra*, 186 Cal.App.4th 1298, 1314, citing *Mike Moore’s 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.)

An agency also has a ministerial duty to comply with its own rules and regulations that is enforceable by writ of mandate. (*Pozar v. Department of Transportation* (1983) 145 Cal.App.3d 269, 271.) “In reviewing the action of a public agency in an ordinary mandamus proceeding, both the trial court and [the court of appeal] must ensure that 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.*’ (Citations omitted.)” (*Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.* (2005) 130 Cal.App.4th 986, 1006, italics in original.)

Here, CSBA and the District’s petition for writ of mandate and complaint for declaratory and injunctive relief challenged SBE’s authority to simultaneously revise and approve Promise Academy’s Charter Petition. (CT at p. 1, ¶ 1.) Thus, at the outset, this Court must independently determine whether the SBE’s material revision and approval of Promise Academy’s Charter Petition was within the permissible range of SBE’s authority. The answer turns on this Court’s independent interpretation of those statutes and regulations applicable to Promise Academy’s appeal from the District’s denial of its Charter Petition.

“The ultimate interpretation of a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body.” ... [¶] Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency’s interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency’s interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [] Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative.

(Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7–8, citations omitted.)

Accordingly, this Court must first independently review whether SBE has the authority to materially revise and immediately approve a charter petition presented on appeal from a local school district’s denial of same. And, if SBE is found to have such authority, this Court is then to evaluate whether SBE abused its discretion in materially revising and immediately approving Promise Academy’s charter petition on appeal.

B. SBE’s Decision to Sever Promise Academy’s High School Program from the TK-12 Charter Petition Was Material

In unilaterally moving to sever Promise Academy’s entire high school program from its Charter Petition, SBE gutted a significant and fundamental aspect of Promise Academy’s proposed educational program. According to the Charter Petition, it was explicitly written to address specific needs identified by parents and the community, chief among which was the desire for a single, uninterrupted educational program from TK through grade 12:

- “Parents in San Jose have expressed that at each major grade level transition in their child’s educational experience (i/e/ Kindergarten, 6th Grade, 9th Grade) is a significant cause of family stress.” (CT, v.1, p. 153.)
- “This feedback has been considered and incorporated into the design for Promise Academy. As a result, Promise Academy will be a school where there is a focus on student growth and development in continuous, TK-12th grade model.” (CT, v.1, p. 155.)
- “This longer runway and smaller population of students will allow us to stay in relationship with families and eliminate the typical transitions in educational experience as students move through elementary school to middle school and then to high school.” (CT, v.1, pp. 159-60.)
- “The structure of Promise Academy will be advantageous in that we will monitor student growth and development from

transitional kindergarten through high school graduation.” (CT, v.1, p. 150.)

- Promise Academy’s instructional model is to provide “a consistently excellent academic program for students from grade TK through 12.” (CT, v.1, p. 133.)
- “When parents enroll in Promise Academy they can be assured of a consistent experience and the development of an ongoing, family-like relationship with the school from the time their student enters kindergarten through their high school graduation.” (CT, v.1, pp. 153-54.)

Thus, an essential and material aspect of Promise Academy’s proposed charter school program was the ability to serve elementary, middle, and high school grade levels all through a single school program. Promise Academy’s own Charter Petition identified this as a “core element” of its program. (CT, v.1, p. 133.) Promise Academy cannot perform its intended purpose of reducing stressors related to major grade level transitions without a high school program. (CT, v. 1, pp. 150-154.) Promise Academy students graduating from Promise Academy’s 8th grade will necessarily matriculate to other high school programs to complete their secondary education. SBE’s revision/approval did not even address or consider the unique enrollment plan for Promise Academy, leaving in place a first year cohort without grade 3 and grade 4, but including grade 5 and grade 6 despite the fact that those students will not be able to stay at the charter school beginning in years 2 and 3 respectively. (CT, v.1, p. 104, ¶ 6; CT, v.3, pp. 680-81.)²

One of the material elements required in a charter school petition is a description of the grade levels to be served. Education Code section 47605(b)(5)(A)(i) establishes that each charter petition must contain a reasonably comprehensive description of “[t]he educational program of the

² Promise Academy continues to operate as a TK-8 charter school. (<https://www.promisepublicschools.org>)

charter school” as a required material element. Code of California Regulations, title 5, section 11967.5.1(f)(1)(A), further states that a “reasonably comprehensive” description of the proposed charter school’s educational program is one in which “[t]he description of the educational program of the school, as required by Education Code section 47605(b)(5)(A), at a minimum: ... [i]ndicates the proposed charter school’s target student population, including, at a minimum, *grade levels*, approximate numbers of pupils, and specific educational interests, backgrounds, or challenges.” (Emphasis added.) Here, the Charter Petition states that its fundamental educational design is to offer an uninterrupted program from TK through grade 12.

Yet SBE’s own board members recognized that the high school graduation deficiencies in Promise Academy’s Charter Petition were unsalvageable. As stated by SBE member Holaday:

On its face value right now, the high school requirements could impede a number of deserving and appropriate students to be a part of this school. ... I’m not comfortable with the current graduation requirements as stated in this documents without some alternative option, path, route for a child to for one reason or another, cannot make that final cut.

(CT, v.3, pp. 641:17 to 642:6.) SBE member Williams echoed this concern:

[T]he board is not comfortable with the lack of clarity around – the alternative paths – the multiple paths getting there [graduation]...

(CT, v.3, p. 646:19-22.) In fact, SBE member Williams expressly acknowledged that a material revision was needed to cure the defects.

So it would be an approval, if the board approved, for the TK-8 portion of the school with the opportunity for you to come back, uh, at any time, including later in 2018, with a revised description of the high school in the areas of concern that we’ve raised and ask for a *material revision*.

(CT, v.3, p. 648:3-8; emphasis added.) These conclusions support the District’s denial of the Charter Petition and should have ended the appeal. Instead, SBE conjured a new charter – an action far beyond the scope of the *appeal* process.

It is readily apparent and uncontested that SBE’s severance of Promise Academy’s high school program was a material change to the educational program as described in the Charter Petition.

C. Materially Revising and Immediately Approving Promise Academy’s Charter Petition Exceeded SBE’s Authority and Amounts to an Abuse of Discretion

1. The CSA Favors Local Community Support and Local Oversight of Charter Schools

The Constitution provides for the provision of public education through “a system of common schools” and vests control and delivery of education at the most local level, the school district. (Cal. Const., art. IX, §§ 5, 14; *Mendoza, supra*, 149 Cal.App.4th 1034, 1041.) Article IX, section 16 of the Constitution provides citizens with the constitutional right to an elected governing board running their local school district. These elected boards have the right and responsibility to control and oversee public education in their boundaries to the benefit of, and consistent with, the needs of the residents they serve.

In 1969, by Proposition 4, the voters adopted article IX, section 14, in order to delegate increased authority over the public schools to “the governing boards of all school districts.” In 1972, the voters approved Proposition 5 enacting Education Code section 35160 which provides, “On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.”

These voter enactments demonstrate the public’s invocation of local control over education within the school district’s boundaries. Local control is the policy of the State of California as further evidenced by enactment in 2013-14 of the Local Control Funding Formula and the Local Control Accountability Plan (Ed. Code, §§ 2574, 42238.01 and 52060 et seq.)

Under the CSA’s statutory scheme, charter schools are public schools that operate independently from local school districts but are subject to oversight by their authorizers. “[T]he statutory scheme reflects an intent to promote district chartered schools and local oversight while allowing for limited exceptions.” (*CSBA v. SBE, supra*, 186 Cal.App.4th 1298, 1320.) “‘By placing a geographic restriction on a charter school’s operations, [AB 1994] would help clarify a district’s sovereignty over public education provided within its boundaries and [would] enhance oversight of charter schools.’ (Sen. Com. on Appropriations, Dept. of Finance, Analysis of Assem. Bill No. 1994 (2001-2002 Reg. Sess.) as amended Aug. 15, 2002, p. 1 (Sen. Finance Analysis of Assem. Bill No. 1994).)” (*Id.* at 1308; see also, *Anderson, supra*, 4 Cal.App.5th 283.) This underscores the Legislature’s directive that, subject to limited exception, charter schools are to be authorized by, overseen by, and located within, local school districts.

Education Code section 47605 calls upon the educational expertise of the local school district to evaluate, among other things, whether the charter petition presents a sound educational program, whether petitioners are demonstrably likely to successfully implement the program, whether the charter petition sets forth a reasonably comprehensive description of the elements reflecting the educational and operational program of the proposed charter school, and whether the charter petitioner has a viable fiscal plan for the proposed school(s). (Ed. Code, § 47605, subds. (b)(5)(A)-(P), (g).)

A local school board evaluates these factors in the context of the local school district and, through the public hearing process, considers “the level of

support for the petition by teachers employed by the district, other employees of the district, and parents.” (Ed. Code, § 47605(b); see also, § 47605(b)(5)(G) [requiring racial and ethnic balance to be “reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted”].) These CSA provisions emphasize the legislative policy fostering locally approved charter school programs. Even where a charter school is authorized by the county or state board of education on appeal, it must still operate within the district boundaries where it first submitted its charter petition:

A charter school that receives approval of its petition from a county board of education or from the state board on appeal shall be subject to the same requirements concerning geographic location to which it would otherwise be subject if it received approval from the entity to which it originally submitted its petition.

(Ed. Code, §§ 47605(j)(1); see also, Ed. Code, § 47605(k)(3) [when approved by SBE on appeal, in order to renew its charter for another term, the charter petition must be submitted to the local district, not SBE.]

The CSA intends to ensure the local community has input regarding whether it supports the proposed charter school operating within its school district and the voices of local electors are heard. Through the petition and public hearing process, the local community voices its opinion to the locally elected board regarding the proposed charter and whether it supports the proposed charter school operating within its community.

2. SBE Violated the CSA by Failing to Grant or Deny the Charter Petition as Required by Statute

Education Code section 47605(b), provides that “[f]ollowing review of the petition and the public hearing, the governing board of the school district shall either *grant or deny the charter...*” (Emphasis added.) In the case of denial, the governing board must adopt written factual findings “specific to the

particular petition, setting forth specific facts to support one or more” of the required statutory findings. (*Ibid.*) Nothing in the CSA authorizes the SBE to make material changes to the charter petition and/or identified educational program in order to approve the charter just as it does not authorize SBE to make changes in order to deny the charter. (Ed. Code, § 47605(b).) Rather, SBE is to consider the charter document as presented by the charter petitioner and either grant or deny that charter petition.

By deleting the high school portion of the Charter Petition *after the public hearing and without any discussion* of possible impacts to the remaining educational program, SBE upended the educational program actually described in the Charter Petition and disregarded the entire petition process. (CT, v.3, pp. 643-650; CT, v.3, pp. 680-81.) Not only did the SBE’s action divest the District, County, CDE, and general public of any opportunity to review and comment on the charter program that was ultimately approved, but what remains is an obsolete Charter Petition that refers to major aspects of Promise Academy’s educational program that may or may not continue to exist. For instance, the Charter Petition proposes to provide “academic and college counseling” and it is unclear if Promise Academy is required to provide these services. (CT, v.1, p. 150.) The charter document is the centerpiece of an authorizer’s oversight responsibilities. “The sole relationship between the charter school operators and the chartering districts in this case is through the charters governing the school’s operation.” (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1201.) The promises and requirements of the charter must be clear to allow for meaningful oversight.

Strict charter compliance is a constitutional mandate. (*Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1136 (“*Wilson*”).)

The Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of

education. Indeed, it bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation – the Legislature has plotted all aspects of their existence.

(*Ibid*, emphasis in original.) Central to the *Wilson* court’s determination that the CSA was constitutional was the extent to which the Legislature dictated “all aspects of their existence” and their operation under the control of elected boards of education. (*Id.* at p. 1136.) Accordingly, a charter school’s strict compliance with the CSA and its charter are critical to the charter school’s constitutionality. (*Id.* at 1135-42; see also, *Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ.*, 57 Cal.4th 197, 206 (“*Today’s Fresh Start*”); *CSBA v. SBE*, *supra*, 186 Cal.App.4th 1298, 1326.) The same is true for SBE – it must respect the requirements of the CSA and the policies behind these statutes. By severing the entire high school program detailed in Promise Academy’s Charter Petition, SBE rendered the Charter Petition obsolete. Promise Academy was effectively approved without a charter, making compliance with any charter an impossible task. In doing so, SBE violated the CSA and subverted the very constitutionality of Promise Academy.

Given SBE’s unilateral material revision of the charter during the appeal process, there is no fixed and static “charter document” that forms the centerpiece of the accountability model upon which charter schools are based. Here, contrary to Education Code section 47605, SBE materially modified the Charter Petition – eliminating the entire high school program – and further required compliance with several conditions to “approve” the Charter Petition. (CT, v.1, p. 103, ¶ 5; CT, v.3, pp. 647:17 to 648:8.) As such, SBE failed to “*grant or deny* the charter...” as it and any other chartering authority would be required to do under Education Code section 47605, subdivisions (b) and (j).

3. SBE Violated the Regulations by Failing to Consider the Charter Petition “as Denied”

On appeal from denial by the local school district and the county board of education, the SBE considers a charter petition by applying the statutory requirements of Educational Code section 47605(b). (Cal. Code Regs., tit. 5, § 11967(f).) On appeal, SBE is to consider the charter petition “as denied” by the local school district and county board of education. (Cal. Code Regs., tit. 5, § 11967(b)(1).) Changes to the charter petition on appeal are limited to those “necessary to reflect ... the [SBE] as the chartering entity” and must be identified. (Cal. Code Regs., tit. 5, § 11967(b)(4).) In other words, the only change that may be made to the charter petition is clerical – to identify the SBE as the authorizer rather than the local district or county office of education.

The regulations confirm that Education Code section 47605(j) allows an appeal of only the same charter petition that was denied by the local school district board, and not one materially different from the petition supported by parent signatures, subjected to public hearing, and vetted first by a local school district and subsequently by a local county office of education. (See, Cal. Code Regs., tit. 5, §§ 11967(b)(1), (4) [appeal of charter denial to county board and SBE limited to consideration of petition “as denied” by the local board].) Nothing in the statute or the regulations authorizes SBE or any other chartering authority to make material changes to the charter document in order to approve or deny the charter petition.

SBE has asserted that because they review charter petitions on appeal “de novo” that they may make these material changes. (CT, v.1, p. 104, ¶ 8; CT, v.3, pp. 643:16 to 644:15.) But this misunderstands the meaning of de novo review and ignores the statutory direction to approve or deny a charter in the form it was presented when it received the requisite signatures and was submitted to the local board. While de novo review affords SBE the

opportunity to draw conclusions different than those reached by the lower tribunals with regard to the content of the charter petition. SBE may not *materially change* the charter school petition in order to reach a specific conclusion. Such action by the SBE is not de novo review; it is re-starting the process of petitioning for the establishment of a charter school during the appeal process, with the SBE illicitly assuming the role of co-petitioner.

Notably, SBE does not refute the District's conclusions as to the defect of the Charter Petition. Indeed it is undisputed that the Charter Petition "as denied" was unsalvageable. (CT, v.3, pp. 641:17 to 642:7; CT, v.3, p. 646:19-22; CT, v.3, p. 648:3-8.) There is no difference of opinion on the merits of the Charter Petition. The "de novo" review did not lead to different conclusions and, as such, the appeal should have ended there with the denial of the Charter Petition.

The requirement to consider the charter petition "as denied" reflects the intent of the CSA that charter school authorization be primarily at the local district level. (*CSBA v. SBE, supra*, 186 Cal.App.4th 1298, 1318 [holding the structure of the CSA reflects preference for locally chartered schools].) Charter petitioners may not go directly to SBE for authorization under Education Code section 47605(b). Recourse following local district denial is an "appeal" in statute and regulation, meaning that the local district's denial is subject to "de novo" review on the existing record. (See, e.g., Black's Law Dictionary (10th ed. 2014), appeal.) California courts have made it clear that the Legislature only intended that SBE have original jurisdiction over granting charters in "limited exceptions" (i.e., statewide benefit charters under Ed. Code, § 47605.8) and that SBE is limited to an appellate role on appeal with respect to the charter "as denied" by the local district and county board:

This statutory scheme, we conclude, reflects an intent to promote district chartered schools and local oversight while allowing for limited exceptions. Section 47605.8 is one such exception, permitting the establishment of a charter school

with no geographic restrictions *only if* it offers instructional services of a statewide benefit and *only if* that benefit would be frustrated if it operated its schools under district (or county) charters.

(*CSBA v. SBE, supra*, at 1320, emphasis added.) To conclude that SBE has authority to modify charter petitions erases the core principal of local input and local control from the carefully designed statutory scheme.³

SBE's material revision and approval of Promise Academy's Charter Petition violates the applicable regulations governing review of denied charter school petitions.

4. Materially Revising a Charter Petition Frustrates the Purpose of Supporting Parent and Teacher Signatures

By materially revising and concurrently approving Promise Academy's "revised" Charter Petition, SBE divested the public of its right to support or not support a proposed charter school program. That is, of course, the entire legislative purpose in requiring petition signatures.

³ It is worth noting that in the wake of the filing of this lawsuit, SBE Board Member Rucker publicly acknowledged concern with the legality of modifying charters at the SBE's March 14, 2018 meeting. (CT, v.1, p. 104, ¶ 10)

But what always presents a conflict for me, and it's been an ongoing concern during my tenure on the board, has been how in doing the de novo review, how significantly different the content or additional information that the board uses in its review, that substantially changes the application that the county office or the local district school board would have reviewed in their process to either approve or deny the charter petition. And I remain concerned that a lot of the information that is often added to a petition that is reviewed in the Department's process is more than merely technical, and is more material than technical... Because it seems to change every single time to fit the circumstance with pretzel like acumen to make it work for the purpose of approving it. (CT v.3, p. 842:1 to 843:19.)

In detailing how charter schools may come into existence, the CSA requires that signatures of teachers or parents be obtained in support of the charter petition. Education Code section 47605 provides that a charter petition must be “signed by a number of parents or legal guardians of pupils that is equivalent to at least one-half of the number of pupils that the charter school estimates will enroll in the charter school for its first year of operation.” (Ed. Code, § 47605(a)(1)(A).) Alternatively, the petition may be “signed by a number of teachers that is equivalent to at least one-half of the number of teachers that the charter school estimates will be employed at the charter school during its first year of operation.” (Ed. Code, § 47605(a)(1)(B).) Additionally, the petition “shall include a prominent statement that a signature on the petition means that the parent or legal guardian is meaningfully interested in having his or her child or ward attend the charter school, or in the case of a teacher’s signature, means that the teacher is meaningfully interested in teaching at the charter school. The proposed charter *shall* be attached to the petition.” (Ed. Code, § 47605(a)(2); emphasis added.)

In other words, the locally obtained petition signatures demonstrate support for the school as set forth in the attached charter document. Here, Promise Academy’s Charter Petition expressly contemplated a comprehensive TK-12 school, repeatedly stressing the fundamental importance of that structure to both the school’s design and mission. Promise Academy’s charter school program as set forth in the Charter Petition (i.e., for a school covering the full grade span of TK through grade 12) was the foundation for supporting signatures. (CT, v.1, p. 101, ¶ 12 and p. 130.) Material modifications to the original petition, such as changing a TK -12 school to a TK-8 school, divests the charter petitioner of the authority conferred by its signatories to submit the petition on their behalf.

The purpose of the CSA’s signature requirement is to provide information to local parents and potential teachers about a proposed charter

school in order to measure local support. Where, as here, the charter petition is revised such that the program as finally approved is materially different from the charter program proposed, it can no longer be said to reflect the support of the signatories. And, in analogous circumstances, new petition signatures would be required where a charter school petition is materially revised after signatures are obtained.

Under certain circumstances, parents may petition to convert a poorly performing district school to a charter school. (See, Ed. Code, § 53100 et seq.) This type of charter school is known colloquially as a “parent trigger” charter school. In submitting the petition for these charter schools, the applicable regulations provide that if material changes are made to a petition after its initial submission, the lead petitioner will need to obtain new signatures. (Cal. Code Regs., tit. 5, § 4802.1(j) [“The resubmitted petition may not contain substantive changes or amendments. If substantive changes are made to the petition, it must be recirculated for signatures before it may be submitted to the LEA and it shall be deemed a new petition.”].) This makes sense as the petition is a direct reflection of community support (or lack of support) for a particular program.

Where the purpose of the statutory requirement is to give information to the public to assist the voters in deciding whether to sign or oppose the petition, the substantial compliance argument is often rejected and strict compliance held essential. [Citations.]

(*Smith v. Board of Supervisors* (1989) 216 Cal.App.3d 862, 875-76, citations omitted.)

The purpose of the parent/teacher signatures, if it has any purpose at all, is to represent support from the local community for the type of charter school set forth in the charter document attached to the petition. Here, SBE cavalierly overrode the intent of the signatories by rewriting a new charter petition that was not supported by any parent signatures and which had never

been subjected to a public hearing. This is an indirect contravention of Education Code sections 47605(a) and (b) and the Legislative intent of the CSA. (See, Ed. Code, § 47601.)

5. SBE’s Simultaneous Revision and Approval of Promise Academy’s Charter Petition Undermines the CSA’s Legislative Intent and the State’s Policy Favoring Locally-Supported, District Authorized Charter Schools

When examined collectively, the applicable CSA and regulatory provisions present a charter petition, review, and appeal process that is consonant with the policy favoring local support and control of charter schools. SBE’s material revision of Promise Academy’s Charter Petition and simultaneous approval of same, undermines the CSA’s signature requirement, public hearing process, appeal procedure, and its general policy favoring local review and approval of charter schools.

In their arguments, Respondents improperly regard the CSA’s charter petition and appeal requirements as independent requirements, completely divorced from one another. According to Respondents, signatures in support of a charter petition are nothing more than a rote act of no significance beyond the fact that the CSA’s plain language requires them. (Ed. Code, § 47605, subds. (a)(1)(A) & (a)(2).) Similarly, Respondents remove any context for the procedures detailed in Education Code section 47605(j), contending this provision does not establish an administrative appeal process but, rather, merely outlines the prerequisites to SBE approval of a local charter school.

Under Education Code section 47605, subdivision (j), an entity seeking to operate a charter school in a local school district’s geographical jurisdiction, with SBE as its “chartering authority,” cannot petition the SBE – and SBE cannot grant a charter to operate the school – until certain prerequisites are met.

(CT, v.4, p. 1018.) Similarly, Respondents contend that the regulatory requirement that a denied petition be submitted to SBE, “as denied” means only that a charter petitioner needs to give SBE a copy of the charter school petition, rendering the words themselves unnecessary and redundant. Respondents’ interpretation of the CSA’s requirements ignores the broader statutory scheme in which they exist. (*People v. Acosta* (2002) 29 Cal.4th 105, 112 [“We do not, however, consider the statutory language in isolation, but rather examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.”].) And while it is black-letter law that courts first look to the plain meaning of the statutory text, it is equally settled that a literal interpretation of statutory texts necessarily yields to the overall purpose of a statute when examined as a whole.

[T]he “plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations] An interpretation that renders related provisions nugatory must be avoided [Citation]; each sentence must be read not in isolation but in the light of the statutory scheme [Citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [Citation].

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, citations omitted.)

The CSA’s requirement that a locally-operated charter school first submit its charter petition to the local school district is not merely a “prerequisite” to getting the petition in front of SBE. (Ed. Code, § 47605(j).)

Education Code section 47605(j) sets forth an administrative appeal procedure reflective of a broader statutory preference for local school district consideration of a proposed charter school. And the regulatory requirement that a petitioner provide “[a] complete copy of the charter petition *as denied*” is supportive of that same local preference. (Cal. Code Regs, tit. 5, § 11967(b)(1).)

The CSA’s requirement that charter petitions be supported by parent signatures is similarly a reflection of local support for a proposed charter school from the parents of children meaningfully interested in attending the proposed charter school, or teachers meaningfully interested in teaching at the proposed charter school. (Ed. Code, § 47605, subds. (a)(1)(A) & (a)(2).) This requirement and the underlying policies are undermined when SBE materially revised Promise Academy’s Charter Petition as the charter school ultimately approved was materially different than the program the signatories supported. SBE’s act of materially revising and approving Promise Academy’s Charter Petition denies the local community and school district any opportunity to actually consider the charter school program as revised as there was never any public hearing on the revised charter program at *any level*.⁴ (Ed. Code, § 47605(b).)

6. SBE’s Material Revision and Approval of Promise Academy’s Charter Petition Violates the Material Revision Procedure Set Forth in the CSA.

Although a chartering authority may generally approve a material revision to the charter of a charter school it has authorized (see, Ed. Code, § 47607(a)(1)), the procedure for approval of a material revision is “governed by the standards and criteria in Section 47605....” (Ed. Code,

⁴ Recall SBE materially revised the charter petition even after the public hearing before SBE. (CT, v.3, p. 615; CT, v.3, pp. 643-650; CT, v.3, pp. 680-81.)

§ 47605(a)(2).) Education Code section 47605 sets forth a number of straightforward requirements that here were never complied with – necessarily undermining any argument that SBE acted within its authority by approving and immediately revising Promise Academy’s Charter Petition. In failing to follow these requirements, the SBE violated the due process rights of students, parents, teachers, community members, and the District.

The procedures for approving a charter petition in the first instance and materially revising an existing charter are distinct and governed by different statutes. (Ed. Code, §§ 47605, 47607.) For a petition to establish a charter school, Education Code section 47605 requires: (1) a petition supporting the charter revision (§ 47605(a)(1)); supporting signatures (§ 47605(a)(2)); and a public hearing (§ 47605(b)). California courts have distinguished the charter approval process from the material revision process:

As relevant to this case, there are three categories of approval governing charter schools: an initial petition for the establishment of a charter school; a petition to renew an existing charter; and a petition for approval of a material revision to an existing charter. Although the standards and criteria in section 47605 apply to all three types of approval, the procedure applicable to each is different.

(Today’s Fresh Start Charter School v. Inglewood Unified School District (2018) 20 Cal.App.5th 276, 281-82.)

The CSA contemplates a material revision only *after* the initial charter approval. (Ed. Code, § 47607(a)(1) [“A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter”].) Here, SBE did the opposite – materially revising the Charter Petition *before* it was approved. SBE’s truncated approval/material revision circumvents all of these requirements

and effectively precludes the public, the local community, and local school district from even commenting on the proposed revision. In so doing, the SBE violated the due process rights of all constituents affected by the potential charter school: students, parents, teachers, community members, and the District. SBE violated the due process rights of the District, its constituents, and the signers of the original petition by unilaterally forcing a material change to the charter without any notice or opportunity to be heard by all affected parties. By unilaterally truncating the petition after the appeal had been filed and the public had an opportunity to comment on the appeal, the SBE essentially robbed all interested parties an opportunity to comment on their proposed material revision of the petition before approved.

The SBE's unilateral revision of the Charter Petition renders the material revision procedure set forth in Education Code section 47607(a) nugatory. "We will not interpret a statute to eliminate a necessary provision where the Legislature has not done so expressly." (*Anderson, supra*, 4 Cal.App.5th 262 at 276.) Therefore, the SBE's act of revising and approving Promise Academy's Charter Petition violated the material revision procedure set forth in Education Code section 47607(a).

7. SBE's Material Revision and Approval of Promise Academy's Charter Petition Are Subject to Mandamus Relief

SBE's motion to materially revise and simultaneously approve Promise Academy's Charter Petition is subject to mandamus relief as an act beyond SBE's authority and/or in breach of its ministerial duty to comply with the CSA and its own regulations.

SBE must comply with its statutory mandate and actions taken by SBE in violation of the CSA are beyond its authority. (See, *Association of Irrigated Residents v. State Air Resources Bd.*, *supra*, 206 Cal.App.4th 1487, 1494.)

Similarly, a public entity has a ministerial duty to comply with its own rules and regulations. (*Pozar v. Department of Transportation, supra*, 145 Cal.App.3d at 271.) SBE's regulations have "the force and effect of law." (*Graham v. State Bd. of Control* (1995) 33 Cal.App.4th 253, 258.)

California courts have recognized that mandamus relief is available where an agency action exceeds its statutory authority. In *City of Colton v. City of Rialto* (1964) 230 Cal.App.2d 174, the court held that writ of mandate was proper where a city ordinance purporting to approve an annexation of certain territory was void where it was passed within five days of its introduction, in violation of Government Code section 36934. As the court stated:

It must be noted that in the present case the trial court's decision was that Rialto Annexation No. 52 was void in its inception and in view of the additional finding that No. 52 met with a majority protest, the writ of mandate was properly issued declaring the proceedings void and requiring appellants to take no further action.

(*Id.* at 181.)

In *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, the court held that writ of mandate was proper where a county failed to meet the requirement set forth in Government Code section 65302 to "have a general plan that encompasses all of the requirements of state law." In rejecting the county's argument that the county's adoption of the general plan was subject to judicial deference, the court stated:

The County's argument ignores the language we have emphasized in the foregoing quotation. The petitioners in these two actions ... did not undertake to "probe the merits" of the Mendocino County General Plan. They sought relief in mandamus, and by way of injunction, because of specific defects in elements of the plan which allegedly made it "inadequate" and void for lack of compliance with law. The remedy of mandamus is available "to compel the performance

of an act which the law specially enjoins, as a duty resulting from an office, trust or station ...”

(*Id.* at 348.)

In affirming that writ relief was available to petitioners, the court in *CSBA v. SBE* recognized that “[t]he chartering of a school and the charter school’s compliance with the law, the regulations, and the conditions imposed on its charter can be matters of serious concern to the public and to our public school system.” (*CSBA v. SBE, supra*, 186 Cal.App.4th 1298, 1326.) “Local school districts and county boards of education, as well as parents and teachers, have a right to expect that charter schools will hew not just to the law, but to their charters and the conditions imposed upon them through official action taken at a public hearing.” (*Ibid.*)

SBE has a ministerial duty to take action on the Charter Petition in the form it was in when it received supporting signatures when it was subject to public hearing, and as denied by the local governing board. The action of SBE to approve the Charter Petition in a form materially different than the Charter Petition as signed by parents and as considered/voted upon by the local governing board is a violation of statutory and regulatory law, in excess of the SBE’s jurisdiction, and therefore void.

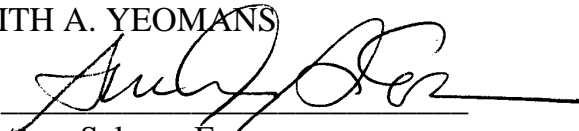
VI. CONCLUSION

SBE did not “approve or deny” Promise Academy’s Charter Petition as required by the CSA. Instead, SBE materially revised Promise Academy’s Charter Petition by severing the entire high school program, leaving only an obsolete and incomprehensible charter document in its place. In the absence of an operative and complete charter, Promise Academy is not constitutionally tethered to the public school system. And by unilaterally revising Promise Academy’s Charter Petition, SBE effectively created a new charter school that circumvents all of the public and local input required by the CSA and its regulations, including the

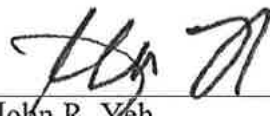
requirement for supporting signatures, the requirement for a public hearing, and the requirement for initial consideration of a local charter school by the local school district. In so doing, SBE violated the due process rights of students, parents, community members, and the District, as SBE unilaterally made a material revision to the petition after its submission to the District, and after its rejection by the District and County Board. Though it did not come to different conclusions as to the deficiencies of the Charter Petition, SBE grossly exceeded its authority on appeal by materially revising the Charter Petition in order to approve it. SBE's approval of the Charter Petition must be set aside and SBE/CDE should be enjoined from continuing violations.

Respectfully submitted,

Dated: August 6, 2019 DANNIS WOLIVER KELLEY
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Opening Brief of Petitioners/Plaintiffs/Appellants CALIFORNIA SCHOOL BOARDS ASSOCIATION and its EDUCATION LEGAL ALLIANCE and SAN JOSE UNIFIED SCHOOL DISTRICT is proportionally spaced, has a typeface of 13 points or more, and contains 11,977 words, excluding the cover, the tables, the signature block and this certificate, which is less than permitted by the Rules of Court. Counsel relied on the word count feature of the word processing program used to generate the brief.

Dated: August 6, 2019 DANNIS WOLIVER KELLEY
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
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: 115 Pine Avenue, Suite 500, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **APPELLANTS' OPENING BRIEF** on interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

- ☒ (VIA OVERNIGHT MAIL) I caused such envelope to be deposited at an authorized “drop off” box on that same day with delivery fees fully provided for at 115 Pine Avenue, Suite 500, Long Beach, CA 90802, in the ordinary course of business.
- ☒ (VIA ELECTRONIC SERVICE) [Code Civ. Proc. Sec. 1010.6; CRC 2.251] by electronic mailing a true and correct copy through DANNIS WOLIVER KELLEY’s electronic mail system from ifriend@DWKesq.com to the email address(es) set forth above, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6 and CRC Rule 2.251. The transmission was reported as complete and without error.

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

Executed on August 6, 2019 at Long Beach, California.

Ila Friend

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