Supreme Court Case No. S195852

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TODAY'S FRESH START, INC.,

Plaintiff, Respondent, and Cross-Appellant,

vs.

LOS ANGELES COUNTY OFFICE OF EDUCATION, et al.,

Defendants, Appellants, and Cross-Respondents.

After A Decision By The Court Of Appeal
Second Appellate District, Division One
2d Civil Case No. B212966 c/w B214470
Los Angeles County Superior Court Case No. BS 112656

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In a unanimous decision, the Court of Appeal has held that the due process rights of petitioner Today's Fresh Start (TFS) were not violated by the procedures employed by the Los Angeles County Board of Education (County Board) when it revoked TFS's charter to operate a school. (Opn. 27, 29, 39.) In so doing, the Court of Appeal reversed the trial court's ruling that due process required two procedures before a vote to revoke: (1) the formal presentation of all the evidence in support of revocation at the public hearing before the County Board, and (2) "an evidentiary hearing before an unbiased hearing officer," before the matter was put to the County Board for a vote. (Opn. 20.) Neither of these procedures is required by the relevant section of the Education Code, and neither was employed by the County Board. The Court of Appeal concluded that neither is necessary to satisfy due process. TFS seeks review because it does not agree, but the court was right.

Review by this Court is in order where it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review is not necessary in this instance. There is no conflict in the law, despite TFS's attempt to create one by introducing an issue not raised below—a purported financial interest in the outcome on the part of the County Board based on competition for student funding. Indeed, the court's thorough and carefully-reasoned opinion is entirely consistent with settled law on the subject of due process,

a key principle of which is that "due process is flexible and calls for such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334 [96 S.Ct. 893, 47 L.Ed.2d 18], internal quotations and citations omitted.)

In this case, TFS was fully apprised of the evidence against it well before the vote on revocation, and it was able to present its own documentary rebuttal evidence as well as the oral presentations of individuals who advocated its cause in multiple hearings. (Opn. 3-7.) Subsequently, it invoked its right to appeal to the State Board of Education. (Opn. 8-10.) No additional procedures were needed to protect TFS from the risk of the erroneous deprivation of its charter. The petition should be denied.

STATEMENT OF THE CASE

A. Background.

In 2003, the County Board granted TFS's petition to operate a charter school, and it renewed the charter for a period of five years in 2005. (Opn. 2.) Under the terms of the charter, the Los Angeles County Office of Education (LACOE) had the task of monitoring TFS's operations. (Opn. 2.)

In June 2007, LACOE began an investigation into TFS operations based on concerns that included the legal rights of students, parents, and employees, student attendance procedures, professional development, and California Department of Education (CDE) testing procedures. (Opn. 3.) In July 2007, LACOE provided TFS with its report and a corrective action plan listing what needed to be remedied with dates for completion. (*Ibid.*) The County Superintendent of Schools wrote TFS expressing concerns about its governance and requesting materials. (Opn. 3-4.)

The revocation process began in October 2007. LACOE provided the County Board and TFS with three binders of materials pertaining to LACOE's analysis of TFS's operations. (Opn. 4.) TFS provided the County Board with extensive written rebuttal materials, and individuals, including TFS's counsel, TFS students and administrators, and a member of the State Assembly, addressed the County Board on TFS's behalf over the course of multiple hearings. (Opn. 4-7.)

The County Board voted four to three to revoke the charter on December 11, 2007, adopting the factual findings of LACOE regarding improprieties in student testing, violations of the charter, the Brown Act, and the Corporations Code, and the failure to correct numerous items on the corrective action plan. (Opn. 7-8.)

TFS appealed to the State Board of Education. (Opn. 8.) The Charter School Division of CDE recommended that the revocation be reversed, based on its review of five binders of materials from TFS and seven from LACOE. (Opn. 8-9.) On a motion to accept CDE's recommendation, the State Board tied four to four, leaving the revocation in place. (Opn. 10.)

B. Procedural History.

TFS filed a petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5. (Opn. 10.) TFS then filed a motion for judgment seeking reinstatement of the charter on the ground that it had been deprived of due process. (Opn. 12.) TFS contended its due process rights had been violated because, among other things, LACOE had not formally presented the evidence against it in a public hearing and because the County Board was not an impartial decisionmaker. (*Ibid.*)

The trial court granted the motion, ruling that the evidence supporting revocation had to be introduced during the public hearing. (*Ibid.*) In addition, although Education Code section 47607, subdivision (e) required only a public hearing "in the normal course of business," the trial

court concluded due process required a separate evidentiary hearing before an unbiased hearing officer, who would then present his or her findings to the County Board for acceptance or rejection. (Opn. 12-13.)

Judgment was entered against LACOE and the County Board, and they appealed. (Opn. 13.) The Court of Appeal reversed, holding that the revocation procedure did not violate due process. (Opn. 20-39.) Noting that TFS did not contend that it had not been apprised of all the evidence against it or that the County Board had relied on evidence not disclosed to TFS, the court held that "the lack of a formal introduction of evidence did not render the revocation process unfair." (Opn. 27.) Rejecting TFS's allegations of bias on the part of the County Board, it further held that due process did not require adding another layer of fact-finding and adjudication to that provided by the Education Code. (Opn. 25-37.)

TFS did not petition for rehearing.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CASE LAW.

To justify review, TFS contends the Court of Appeal's opinion "is in direct conflict with the precedent established by this Court that where a decision-maker exhibits a significant pecuniary interest in the case at hand, the mere probability of such a bias is simply considered constitutionally unacceptable." (Petn. 3.) That precedent is presumably *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, in which this Court held that the disqualification of a hearing officer, on appeal from a license revocation, was constitutionally mandated where the officer had a "direct, personal, substantial, pecuniary interest" in reaching a certain outcome. (*Id.* at pp. 1024-1025, internal quotations and citations omitted.)[1/] Under such circumstances, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Id.* at p. 1027.)

TFS contends the same holds true here, casting the County Board as a "financial competitor" because "charter schools and traditional public schools must vie for the same limited public funds." (Petn. 1; see Petn. 12-16.) This alleged pecuniary interest is too tenuous "to offer a possible temptation to the average person as adjudicator" not to be fair. (*Haas v. County of San Bernardino*, *supra*, 27 Cal.4th at p.1034.) This is

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[1/] In *Haas*, the County selected and paid the hearing officer whose income from future work depended on the County's goodwill. (*Id.* at pp.1020, 1024.)

particularly so when the same supposedly biased agency had also granted and then renewed TFS's charter. (Opn. 2.)

In any event, TFS faults the Court of Appeal for "not specifically consider[ing] the ramifications of financial bias in its decision." (Petn. 16.) There was good reason for that: alleged financial competition is a brand new issue in this case. As the Court of Appeal stated, "There was no evidence of a financial or personal interest on the part of the County Board, nor did TFS show 'concrete facts' giving rise to an unacceptable probability of actual bias." (Opn. 32.) Because it is a new issue and one that is fact dependent, it should not be considered now. (See Cal. Rules of Court, rule 8.500(c)(1) ["on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the court of appeal].)

Moreover, if TFS believed the Court of Appeal omitted or misstated facts pertaining to the County Board's alleged financial interest in revocation, it should have brought the alleged omissions or misstatements to the Court of Appeal's attention with a petition for rehearing. Because TFS did not petition for rehearing, a prerequisite to this Court's consideration of the issue has not been met. (See *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 53, fn. 2 [declining to address an argument for failure to raise any alleged misstatement of fact in the opinion of the court of appeal in a petition for rehearing]; see also *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 952 [where neither party petitions the court of appeal for

rehearing, the Supreme Court "take[s] [its] facts largely from that court's opinion"]; see Cal. Rules of Court, rule 8.500(c)(2) [". . . the Supreme Court normally will accept the court of appeal opinion's statement of the issues and facts unless the party has called the court of appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing."].)

The purported conflict in the case law urged by TFS to justify review does not exist. The petition should be denied on this basis.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEAL APPLIED SETTLED LAW TO HOLD THAT THE PROCEDURES LEADING UP TO THE VOTE TO REVOKE TFS'S CHARTER COMPORTED WITH DUE PROCESS.

The Charter Schools Act of 1992 (Ed. Code, § 47600, et seq.) governs the establishment and operation of charter schools in California, and provides substantial protections for a charter school facing revocation. (Opn. 14-15.) It requires the authorizing agency give the charter school notice of any violation of charter or law and a reasonable opportunity to remedy; it requires a written notice of intent to revoke, as well as of the facts supporting revocation once a reasonable time to remedy has expired; it requires a public hearing; it requires revocation to be based on written factual findings supported by substantial evidence; it provides for appeal. (Ed. Code, § 47607, subd. (d), (e), and (g).)

The trial court in this case determined that due process required more, specifically the introduction of the evidence supporting revocation during a public hearing and a preliminary evidentiary hearing before an unbiased hearing officer who would then make findings to be accepted or rejected by the County Board. (Opn. 12-13, 28-29.)

The Court of Appeal disagreed. Applying settled principles of the law pertaining to due process to the facts before it, the Court of Appeal held that due process did not require either the formal introduction of evidence supporting revocation at the public hearing on revocation, nor did it require a separate evidentiary hearing before the revocation vote was taken. (Opn. 27-29.) Because the court analyzed and decided the question in a manner consistent with the law on this subject and the facts of this case, there is no need for this Court to address it. The petition should be denied.

A. Legal Principles.

The Court of Appeal's analysis is not controversial. Rather, it is firmly within the parameters of settled principles of law pertaining to due process, including the following:

- "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 286; Opn. 24.)

- "[T]here is no precise manner of hearing which must be afforded; rather the particular interest at issue must be considered in

determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross examination is not necessarily required." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565; *Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 286; Opn. 24.)

- "The judicial model of an evidentiary hearing is neither required, nor even the most effective method of decision-making in all circumstances." (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 348; Opn. 25.)

- What process is due depends on weighing the private and governmental interest involved. (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390; *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 335; Opn. 22.)

The Court of Appeal simply applied these principles to the facts before it and found, correctly, that the revocation procedures in this case complied with due process. There is no need for this Court to review its decision.

B. The Court Of Appeal Correctly Determined That Due Process Does Not Require The Formal Introduction Of Evidence At The Revocation Hearing.

Reviewing cases relied on by TFS in the lower court, the Court of Appeal acknowledged that "it would violate due process for an administrative agency to conduct a hearing while failing to disclose evidence to the party before it, and to make a decision in which it reveals

the undisclosed evidence for the first time." (Opn. 26, citing *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158.) But that did not happen here.

> TFS did not contend in the trial court and does not argue on this appeal that TFS was not apprised of all the evidence against it, or that either the County Board or the State Board relied on evidence not disclosed to TFS during the revocation process. Unless evidence received by the Administrative Board making the decision was not disclosed, due process is not violated. (*Candlestick Properties, Inc. v. San Francisco Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 570 [*English* does not apply where there was no concealment].) The lack of a formal introduction of evidence did not render the revocation process unfair.

(Opn. 27; see Opn. 4 [TFS was provided the same three binders of materials provided the County Board for the initial study session on the question of revocation].) As the court noted, "[p]rocedural informality is the hallmark of administrative proceedings as opposed to judicial proceedings . . . . It is settled that strict rules of evidence do not apply to administrative proceedings." (Opn. 27, citing *Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 291, internal quotations and citations omitted.)

The gist of TFS's response to the opinion is that without a formal presentation of evidence at a public hearing, there will be so much evidence of wrong-doing that a charter school in its position will not know what evidence will turn out to be important to the authorizing agency. (See, e.g., Petn. 10 ["the revoking entity need only produce all the relevant evidence and leave it to the charter school to sort out the details, including divining the revoking entities arguments . . ."]; see also Petn. 21-22 ["as long as the

necessary evidence has been produced, a charter school has been apprised of the case against it; the burden is therefore on the charter school to sort through the evidence, determine which violations a revoking agency may rely on, and address those issues on its own . . .].)

What evidence will turn out to be decisive is rarely, if ever, known until a decision is made and factual findings are issued. (See Opn. 8 ["The County Board adopted factual findings regarding improprieties in student testing, material violations of the charter, the Brown Act, and the Corporations Code, and TFS's failure to correct numerous provisions of the corrective action plan . . ."].)[2/] TFS does not make clear how repeating, at a formal hearing, the evidence already provided in three binders at the start of the revocation process, would make it more possible for a charter school to understand the basis of the decision against it.

As the Court of Appeal noted, due process is a "flexible" process. (Opn. 21, citing *Mathews v. Eldridge, supra*, 424 U.S. at p. 334; see also *Saleeby v. State Bar, supra,* 39 Cal.3d at p. 563). TFS had notice of the allegations against it from the beginning when it was sent a report of LACOE's investigative findings and a corrective action plan. (Opn. 3.) TFS was able to marshall its own documents in rebuttal ("roughly 700 pages"), as well as individuals to speak on its behalf at County Board meetings in 2007 on October 16, November 6, November 20, December 4

[2/] TFS complains of "fifty-three allegations of wrongdoing." (Petn. 23.) LACOE reported TFS had failed to correct forty-seven of fifty-three items on the corrective action plan. (Opn. 6.)

and December 11. (Opn. 3-7.) The process provided under the Education Code was a full and fair opportunity for TFS to rebut the charges against it.

Given these facts, the lack of the formal introduction of evidence at the revocation proceeding does not, and did not in this case, create an unacceptable risk of an erroneous deprivation of a protected interest. (Opn. 27.) Review is unnecessary, and the petition should be denied on this basis.

C. The Court Of Appeal Correctly Determined That Due Process Does Not Require A Separate Preliminary Evidentiary Hearing Before A Neutral Hearing Officer.

1. There was no evidence of bias.

Education Code section 47607, subdivision (e) provides for a public hearing "in the normal course of business." The Court of Appeal rejected the trial court's conclusion that the statute does not meet the minimum requirements of due process because it does not provide for an additional, preliminary evidentiary hearing before an unbiased hearing officer. (Opn. 28-39.) TFS contends the opinion cannot stand because it "expresses a high tolerance of bias," manifest in the purported fact that Sheri Gale, general counsel to LACOE and the County Board, "specifically instructed [the County Board] that it was not to be impartial" and in the evidence of "overlapping functions" by which, for example, Gale advised both LACOE and the County Board.[3/] (Petn. 17.)

[3/] The County is the governing board of LACOE. (Opn. 2.)

Rather than tolerating bias as TFS charges, however, the Court of Appeal carefully examined the actual evidence from which TFS's allegations take flight and rightly found no bias existed.

First, the court found that "there was no evidence of a financial or personal interest on the part of the County Board. (Opn. 32.)[4/] Then, relying on established case authority, the court went on to explain that, absent a pecuniary interest, one must show, with specific facts, the probability of actual bias. (Opn. 31.) TFS's facts—Gale's remark that the County Board was "not neutral" and the "overlapping functions"—did not measure up as "'concrete facts' giving rise to an unacceptable probability of actual bias." (Opn. 32.)

In its petition, TFS lifts Gale's remark out of context to convey the impression she was "instructing" the County Board to be unfair, "not to be impartial" or honest in its assessment of the evidence. (Petn. 17.) But context is important, and the opinion repeats her remarks in their entirety before explaining:

> Paraphrased and summarized, Gale's remarks explained that the County Board, the authorizer of the charter, was charged by section 47607 with the revocation decision. LACOE would advise the County Board on the revocation, just as it made recommendations to the County Board on new charter petitions. The statute also provided for an appeal to the State Board which required independent counsel for both sides and

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[4/] Hence, TFS's belated attempt in its petition to enhance its evidence of purported bias by arguing that the manner in which schools are financed establishes a pecuniary interest, an argument that must be rejected for the reasons stated above. (See § I, *ante*.)

> disclosure of all communications. The County Board, as the entity initially granting the charter, was "not neutral."

(Opn. 29.)

Concluding, the court stated:

> The statement that the County Board was 'not neutral,' seized upon by TFS and relied upon by the trial court, is both accurate and constitutionally acceptable. The County Board was 'not neutral' because it had initially authorized TFS's charter, and later renewed it. To say that the County Board was 'biased' against TFS because it was the authorizing authority is nonsensical. (It would make just as little sense to conclude that the County Board was biased in *favor* of TFS, because it had decided to grant TFS's charter in the first case and subsequently renewed it.)

(Opn. 36, original emphasis.)

With respect to overlapping functions, the Court of Appeal found these did not establish the probability of actual bias either:

> What took place at the revocation hearing was the unexceptional circumstance of general counsel and other LACOE staff advising the County Board regarding the initial decision whether to reverse TFS's charter. It cannot be said to violate due process for the County Board, the governing board of LACOE, to rely on LACOE staff to investigate and make recommendations regarding revocation of TFS's charter. At the State Board appeal, the CDE performed similar functions for the State Board (which is the CDE's governing and policy-making body) by reviewing the entire record, corresponding with TFS and LACOE, and preparing an analysis which recommended reversal of the revocation, without (understandably) any objection from TFS.

(Opn. 35-36.)

2. The balancing test required by law confirmed that no process beyond that provided by Education Code section 47607 was due.

As mentioned (§ II.A., *ante*), to determine what process is due in a given circumstance, courts weigh the private and governmental interests involved. (*Oberholzer v. Commission on Judicial Performance*, *supra*, 20 Cal.4th at p. 390; *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 335.) In this case, the trial court imposed the requirement of an additional evidentiary hearing without performing any balancing test. (Opn. 30.) It had erroneously concluded there was evidence of bias, specifically, Gale's "not neutral" remark.

In *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th 1017, this Court held that the balancing test applies only where allegations turn on insufficient procedural safeguards and not when there is evidence of a personal or financial interest in the outcome on the part of the decision-maker. (*Id.* at p. 1024-1025, 1035.) In *Haas*, the government unilaterally selected and paid for the hearing officer whose income and future work depended entirely on government good will. (*Id.* at p. 1024.) There was no such evidence here, and so the issue *is* one about the sufficiency of procedural safeguards.

Thus, having concluded that "the record does not show circumstances to 'overcome a presumption of honesty and integrity in those serving as adjudicators' [Citation],'" the Court of Appeal proceeded to

perform the required balancing of interests, as the law requires. (Opn. 36-37.) It found that the additional procedural safeguard of a preliminary evidentiary hearing provided little additional protection, since the ultimate decision whether to revoke remains with the chartering authority (where the Legislature put it), "the very fact of which TFS complains." (Opn. 37.) Further, "there can be no question that the government's interests would be greatly burdened by an additional hearing, which would entail an entirely new layer of fact finding and adjudication, with the attendant cost and further delay in revocation proceedings." (*Ibid.*) The statute itself provides all the additional protection required—the right to appeal revocation to the State Board. (Opn. 38-39.)

In sum, the Court of Appeal correctly concluded that TFS received, as Education Code section 47607 provides, all the process that was due.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

DATED: September 8, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached ANSWER TO PETITION FOR REVIEW is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 3,833 words.

DATED: September 8, 2011

Alison M. Turner

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 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **September** 8, **2011**, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by serving:

******* SEE ATTACHED SERVICE LIST *******

(✓✓) By Envelope - by placing () the original **(✓✓)** a true copy thereof enclosed in a sealed envelope addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices:

(✓✓) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States 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 party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **September** 8, **2011**, at Los Angeles, California.

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

Pauletta L. Herndon

Today's Fresh Start, Inc. v. Los Angeles County Office of Education, et al.
Supreme Court Case No. S195852

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