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

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

TODAY'S FRESH START, INC.,

Plaintiff and Appellant,

vs.

LOS ANGELES COUNTY OFFICE OF EDUCATION

Defendants and Appellants.

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

OPENING BRIEF ON THE MERITS

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II.
INTRODUCTION

Affirming the Court of Appeal's decision would constitute the reversal of the long-standing, venerable principle that one's property interest cannot be taken without due process. Revocation of a charter school's charter is a serious matter; not only does it implicate the charter school's very existence, but also significantly impacts the community, parents, teachers and students that have come to rely on it. As one commentator noted, it "creates instability in the lives of the teachers, students, and parents, the threat of which may overshadow the [chartering authority's] need to define the standard of performance accountability."[1] Given these serious consequences, it is imperative that—prior to revocation—a hearing must be granted that is not only free of biased decision-makers, but also provides for a presentation of evidence that effectively apprises the charter school of the

[1] (Suzanne E. Eckes *et al*, *Charter School Accountability: Legal Considerations Concerning Nonrenewal And Revocation Procedures* (2006) 2006 B.Y.U. Educ. & L.J. 551, 554.)

charges levied against it. As codified in the Education Code, it is the "intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged."[2] In order to further this goal, these due process protections must be established.

It has long been understood that the establishment of charter schools constitutes an implicit criticism of and challenge to the existing traditional public school system. The movement for charter schools has been fueled by the belief that public schools have failed in certain respects, and that at least part of the reason they have failed is because of their monopoly on providing public education. Charter schools thus serve to break and challenge the monopoly of traditional public schools, offering alternatives that empower parental choice in their children's education. Furthermore, by placing competitive pressures on traditional public schools, charter schools shock traditional public schools out of complacency and force them to change for the better. Given that charter schools and traditional public schools must vie for the same limited public funds, charter schools have been competing with public schools on both a policy and financial level since their acceptance into the education system.

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[2] (Educ. Code § 47605(b).)

Given what many termed as an "acrimonious relationship" between charter schools and the current educational establishment, when the revocation of a school's charter is at issue—and thus it's effective elimination from competition—it is imperative to provide charter schools with a fair hearing that comports with due process. Indeed, as revocation of a charter school's charter will directly increase the amount of public funds available to a public school, the potential for abuse is clear and the need for a neutral and impartial adjudicator is apparent. As Governor Schwarzenegger noted when signing a charter school revocation bill into law, "[a]s revocation is a serious matter that causes a disruption in instructional services for the school's students, the need for a charter school to have its case heard before a more disinterested body is clear."

Nevertheless, in this case, the Court of Appeal's decision allows authorizers to revoke charters without even the minimal requirements of due process. Despite the institutional bias existing between charter schools and traditional public schools—as they directly compete for students and funds—and further despite the lack of neutrality publicly admitted by the adjudicating entity in this case, the Court of Appeal reversed the trial court's grant of a new and impartial hearing. Instead, the Court of Appeal held that an impartial hearing is not required prior to revocation, nor is any

presentation of evidence and arguments needed in order to give a charter school an adequate opportunity to rebut the charges against it. The appellate court held that neither due process nor Education Code § 47607 require anything more.

This opinion must be reversed. As an initial matter, construing both due process and section 47607 in such a restrictive manner effectively strips charter schools throughout California of a fair and impartial hearing during the revocation proceedings. Specifically, despite this Court's warnings of the dangers inherent in pecuniary biases, the opinion below enables an entity with a substantial financial interest in the revocation itself to nevertheless oversee and determine the revocation of its own competitors. Further, despite the well-established principle that impartial decision-makers are ***essential*** to a fair hearing, the underlying opinion holds that a decision-maker may nevertheless be instructed to be biased. Finally, despite the serious consequences of revocation—including the closing of an educational institution, the unemployment of educators, and the displacement of hundreds families and children—the Court of Appeal's decision means that due process does not require an evidentiary hearing. If undisturbed, the Court of Appeal decision will have a drastic impact on the viability of charter schools everywhere—stifling the charter school movement explicitly

encouraged by the Legislature. For these reasons, the Court of Appeal's decision must be reversed.

III.
STATEMENT OF FACT

A. Background On Charter Schools.

A charter school is a publicly funded, nonsectarian, tuition-free school that operates under a charter negotiated between the school's organizers and a public authorizer. The charter is a performance contract that details the school's mission, program goals, methods of measuring success, and the types of students it will serve. By their establishment, charter schools provide families with an opportunity to choose an education for their children in public schools that are separated from the local public school system. This type of choice is especially geared towards families who believe that the traditional public schools are not well suited for their children but are unable to afford private schools or the ability to relocate to more highly regarded school districts. Thus, if families are dissatisfied with the traditional public schools of their local school district, they may seek placement of their children in available public charter schools. Thus, "charter schools represent a challenge to the monopoly on public schooling long enjoyed by the traditional 'educational establishment.'" (Sandra

Vergari, *Charter Schools: A Significant Precedent In Public Education* (2003) 59 N.Y.U. Ann. Surv. Am. L. 495, 497 (hereafter *Charter Schools*).) Indeed, in enacting the Charter School Act, the California Legislature stated: "[i]t is the intent of the Legislature, in enacting this part,... to accomplish ... the following: (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools." (Educ. Code § 47601(g).)

The competition between both charter schools and traditional public schools is apparent. This is particularly true when it comes to public funding. For both public schools and charter schools, funding is determined largely by the average daily attendance ("ADA") of students. In passing the Charter Schools Act, the legislature intended "that each charter school be provided with operational funding that is equal to the total funding that would be available to a similar school district serving a similar pupil population." (Educ. Code § 47630(a).) Thus, because public money follows the student, public schools and charter schools must compete for students in order to obtain funding.

B. The Parties.

Today's Fresh Start, Inc. ("Today's Fresh Start") is a county-wide charter school serving economically underprivileged areas of Los Angeles

County. (July 12, 2011 Court of Appeal-Second District Opinion "Opn." 2.) Los Angeles County Office of Education ("LACOE") is a regional education agency under the leadership of Los Angeles County Board of Education ("LACBOE"). (*Id.*) LACBOE was Today's Fresh Start's chartering authority and a signatory to the charter petition agreement between the parties. (*Id.*) LACBOE initially granted the charter in 2003 and renewed the charter in 2005 for a five-year term. (*Id.*)

C. The Revocation of Today's Fresh Start's Charter.

In or about June of 2007, LACOE began expressing concerns about Today's Fresh Start's operation. (Opn. 3.) The parties subsequently attempted to work through LACOE's concerns, but those efforts did not bear fruit. (*Id.* at 3-4.) In or about October of 2007, Dr. Darline Robles, the Superintendent of LACOE and CEO of LACBOE, formally recommended to LACBOE that it revoke Today's Fresh Start's charter. (*Id.* at 4.) LACBOE approved this recommendation, and revocation proceedings were initiated against Today's Fresh Start. (*Id.* at 4-5.)

In or about November of 2007, LACBOE held a public hearing on its intent to revoke Today's Fresh Start's charter. (Opn. 5.) While Today's Fresh Start presented substantial evidence demonstrating why the revocation was improper, LACOE remained noticeably silent, and in fact presented no

evidence or arguments in support of revocation at the hearing. (*See id.* at 5-6.)

One thing that LACBOE did make clear at this hearing, however, was that LACBOE was not a neutral entity. Particularly, when Today's Fresh Start objected to the proceedings on the grounds that LACBOE was not neutral entity and thus not a proper decision-maker, LACOE and LACBOE's general counsel, Ms. Sheri Kim Gale, publicly agreed, and explicitly instructed LACBOE on this lack of neutrality. (*See* Opn. 6.) Specifically, when one of the LACBOE Board Members asked Ms. Gale about the issue of impartiality, Ms. Gale stated that there was no need for the revocation to be decided by an impartial body: "In this matter, in this process, you are not neutral." (*See id.*) Ms. Gale also stated that Today's Fresh Start was not entitled to an impartial decision-maker until it appealed the revocation to the State Board of Education. (*See id.*) Ms. Gale's interpretation was expressly adopted by LACBOE. (*See id.*)

On December 11, 2007, LACBOE voted 4 to 3 to revoke Today's Fresh Start's charter. (Opn. 7-8.) Though Today's Fresh Start would seek further administrative remedies, including appellate review by the State Board, and despite the fact that even the California Department of Education ("CDE") would ultimately side with Today's Fresh Start—finding that

LACBOE's findings were unclear and not supported by substantial evidence and thus recommending reversal—due to misunderstandings with the applicable law, the revocation was nevertheless ultimately upheld. (*See id.* at 8-10.)

D. The Due Process Debates Among The Courts Below.

In or about December of 2007, Today's Fresh Start filed a petition for a writ of administrative mandamus in the superior court. (Opn. 10.) During this proceeding, Today's Fresh Start moved for judgment, arguing that Today's Fresh Start was deprived of due process. (*Id.* at 12.) The trial court granted the motion. (*Id.*)

First, the trial court found that because LACBOE was not a neutral decision-maker, the trial court ruled that Today's Fresh Start had been deprived of its right to a fair and impartial tribunal. (Opn. 12-13.) Second, the trial court found that Today's Fresh Start's due process rights were also violated by LACOE's failure to introduce any evidence supporting the revocation at the hearing, thus depriving Today's Fresh Start of an adequate opportunity to rebut. (*Id.* at 12.)

LACOE and LACBOE appealed, and the Court of Appeal reversed. (*See* Opn. 42.) In essence, the Court of Appeal held that even though LACBOE may not in fact be neutral, Today's Fresh Start did not present

sufficient concrete evidence of bias to overcome the presumption of honesty and integrity in those serving as adjudicators. (*See id.* at 36.) The court further noted Today's Fresh Start is afforded additional protection due to the fact that section 47607(g) provides for review by the more impartial State Board of Education. (*Id.* at 37-39.) Finally, the court reasoned that an evidentiary hearing is not required as long as Today's Fresh Start has been generally apprised of the facts in existence against it. (*Id.* at 25-29.)

IV.
ARGUMENT

A. A Hearing On The Revocation Of A Charter School's Charter Requires Neutral And Impartial Adjudicators.

1. Today's Fresh Start Is Entitled To Due Process Protections During The Administrative Revocation Process.

There is no dispute that Today's Fresh Start is entitled to due process protections in this case. As held by the U.S. Supreme Court, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." (*Board of Regents v. Roth* (1972) 408 U.S. 564, 576.) Such property interests include, for example, the continued receipt of benefits from a contract. (*See id.*; *see also Slochower v. Board of Education* (1956) 350 U.S. 551, (regarding dismissal during tenure); *Wieman v. Updegraff*

(1952) 344 U.S. 183 (regarding dismissal during terms of contract).) As explained by the Court in *Roth*, the purpose of the rules of property is "protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." (*Board of Regents v. Roth*, *supra*, at 577.) As a result, continued operation of a school has also been considered a substantial property interest entitled to due process protection. (*California Assn. of Private Special Education Schools v. Department of Education*, (2006) 141 Cal.App.4th 360.)

Therefore, there can be little doubt that Today's Fresh Start has a substantial protectable property interest in this case. When Today's Fresh Start was granted a charter in 2003, and had that charter renewed in 2005 for a five year term, Today's Fresh Start had a legitimate claim of entitlement to the continuation of its charter at least until 2010. (Opn. at 23-24.) Thus, when revocation proceedings were initiated in 2007—before the natural expiration of the charter term—Today's Fresh Start was entitled to due process protections in the administrative revocation process. (*Id.*)

2. A Revocation Hearing Requires Neutral And Impartial Decision-Makers.

As it cannot be disputed that Today's Fresh Start is entitled to due process, it now must be determined what process is due. Education Code §

47607(e) requires that, prior to revoking a charter a chartering authority must "hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter.... The chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that support its findings." (Educ. Code § 47607(e).)

"When ... an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law ***requires*** a ***fair*** tribunal. A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party." (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 (citations omitted, emphasis added); *see also Quintero v. City of Santa Ana* (2003)114 Cal.App.4th 810, 814 ("In an administrative action, procedural due process entitles a party to a hearing 'before a reasonably impartial, noninvolved reviewer....'").)

Thus where, as here, an adjudicative hearing is required, an impartial adjudicator is mandatory:

> When due process requires a hearing, the adjudicator must be impartial. Speaking of administrative hearings, and articulating the procedural requirements demanded by rudimentary due process in that setting, the court has said that, '***of course an impartial decision maker is essential***'.

(*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.)

Indeed, impartial decision-makers are so vital to a fair hearing that the usual cost-benefit analyses applicable to most due process procedural safeguards do not apply. (*Haas v. County of San Bernardino, supra, 27 Cal.4th* at 1035) ("[t]he unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures. In Justice Holmes' famous phrase, 'even a dog distinguishes between being stumbled over and being kicked.'".)

Thus, it is clear that before revocation can occur, due process requires a hearing before a neutral decision-maker. However, as explained below, not only did the Court of Appeal permit the revocation hearing to be adjudicated by an entity that presented an impermissible appearance of pecuniary bias, but an entity that also presented an unacceptable risk of actual bias as well.

i. Pecuniary Bias Exists Due To The Competition For Limited State Funding Between Public Schools And Charter Schools.

"Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least

forgiving scrutiny." (*Haas v. County of San Bernardino, supra, 27 Cal.4th* at 1025.) "Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for financial interest have not." (*Id.* (citations omitted).) As this Court explained, "the adjudicator's financial interest in the outcome presents a 'situation[] ... in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (*Id.* at 1027.) The risk of bias caused by financial interest need not manifest itself in overtly prejudiced rulings, but instead "[t]he 'possible temptation' not to be scrupulously fair, alone and in itself, offends the Constitution." (*Id.* at 1030 (citations omitted).)

As a result, even the mere objective ***appearance of bias is impermissible***. (*Haas v. County of San Bernardino, supra, 27 Cal.4th* at 1034.) Indeed, the appearance of bias may invalidate a decision even when the decision-maker himself is unaware of the facts giving rise to the appearance of bias. (*Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847.) For example, in *Liljeberg*, the Court noted that "Judge Collins did not have actual knowledge of Loyola's interest in the dispute," facts which constituted the basis for finding bias. (*Id.* at 864.) Nevertheless, the *Liljeberg* court invalidated the decision due to impermissible bias,

explaining that even though the decision-maker was unaware of the pertinent facts, "[t]he problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (*Id.* at 864-65.)

The appearance of financial bias clearly exists in the charter school revocation context. As discussed above, charter schools and traditional public school institutions necessarily compete for students in order to obtain funding. (*See* Educ. Code § 47630(a).) As described by one author, "[c]harter schools present not only a policy challenge to the authority of the traditional education establishment but also a financial challenge. Students who leave a traditional public school to attend a charter school are followed by per pupil funding that would otherwise go to the traditional public school." (*Charter Schools, supra* 59 N.Y.U. Ann. Surv. Am. L. at 499.) Thus, the financial tension between charter schools and public schools have been well-known and documented; because each school must compete for students in order to obtain funding, there essentially exists a zero-sum game between charter schools and public schools. (*See* Michael M. Amir, *Charter Fights, The Competing Rights of Charter Schools and Local School Districts*

Are Triggering Myriad Legal Disputes, (2008) 31-AUG L.A. Law. 24, 27 (hereafter *Charter Fights*) ("While this funding system can promote competition among charter and traditional school districts to attract students and teachers, it can also create a tension between the two groups. After all, a local school district is not only a charter school's competition but also frequently its chartering authority.").)

This scenario (that is, having the adjudicator compete for the same business opportunities as the adjudicated) clearly creates the appearance of bias—bias that courts have repeatedly held as improper. For example, in *Gibson v. Berryhill*, the U.S. Supreme Court was presented a situation where there were two competing classes of optometrists—those that were in private practices, and those employed by corporation. ((1973) 411 U.S. 564, 578.) In *Gibson*, the question was whether impermissible bias existed where a tribunal composed solely of optometrists in private practice may adjudicate license revocation matters regarding optometrists employed by corporations. (*See id.*) The Court answered in the affirmative, holding that, because decisions by the board to revoke the corporate optometrists' licenses would increase business opportunities for the private practice board members, the tribunal was impermissibly biased. (*See id.*)

California courts have similarly recognized the impropriety of

allowing administrative tribunals that disproportionately represent one interest group over another. (*See, e.g.*, *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109 (holding substantial likelihood of appearance of bias where there existed a disparity in representation between manufacturers and dealers); *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533 (same).) As explained by one court, "[t]he state may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another." (*University Ford Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796.)

Thus, the appearance of financial bias is clearly present in this case. Considering that public schools stand to lose millions when students switch to charter schools, the incentive of public schools to limit the number of charter schools is apparent. (*See Charter Fights*, 31-AUG L.A. Law at 27. ("The loss of funding can further strain local districts because schools have fixed costs that do not decrease commensurately with the loss of each student. In 2006, for example, the Los Angeles Unified School District lost an estimated $114 million after losing 20,000 students, but saved only $40 million from no longer having to serve those students.").)

Given this competition between charter schools and public schools,

and the potential for millions of dollars in public funds at stake, there can be no doubt that public school agencies have a pecuniary interest in the revocation of charter schools. Similar to the situation presented in *Gibson*, the more charter schools LACBOE can permissibly revoke, the more funds become available for its own schools. Given that school districts stand to gain potentially millions of dollars as a direct consequence of a revoking a charter school's charter, this ***appearance*** of bias is constitutionally unacceptable—regardless of whether the LACBOE was in fact considering its financial incentives when it rendered its decision.

Therefore, because revocation proceedings fail to provide charter schools with a fair and impartial hearing, and instead skewed in favor of one group over another, the Court of Appeal's decision must be reversed, and Today's Fresh Start must be granted a new and impartial hearing.

ii. The Administrative Tribunal Below Posed An Unacceptable Risk Of Bias.

Unfortunately, pecuniary interest was not the only form of bias that was permitted in this case. Indeed, not only did the Court of Appeal permit LACOE to impermissibly act as both prosecutor and advisor in this case—a situation that has been repeatedly held impermissible due to the risk of bias—the court permitted LACOE to further ***instruct*** the decision-maker in

the administrative proceeding ***not to be neutral***. Thus, for the additional reasons below, the decision below must be reversed.

As described above, imperative in any fair hearing is a decision-maker free from bias. (*Morongo v. State Water Resources*, *supra*, 45 Cal.4th at 737.) In order to prove bias (other than personal or financial), a party must establish with clear averments "an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims." (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) For example, explicitly advocating a position in favor of one side prior to the hearing is sufficient to create an unacceptable probability of bias. (*See id.*)

Further, where an individual prosecuting an action simultaneously acts as an advisor to the decision-maker in that same action, such a scenario creates an unacceptable risk of actual bias. (*See, e.g.*, *Golden Day Schools, Inc. v. State Dept. of Educ.* (2000) 83 Cal.App.4th 695, 709-10 ("no employee involved in investigating or prosecuting a case may participate as an adjudicator"); *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 (city attorney's assistance and advice to hearing officer at administrative review hearing constituted an impermissible "overlapping of advocacy and decisionmaking roles" in violation of due process, as attorney had taken an active and significant role as advocate for the city in prior

proceedings); *Quintero v. City of Santa Ana* (2004) 114 Cal.App.4th 810 (city attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness).) As one court explained, "[t]o allow an advocate for one party to also act as counsel to the decisionmaker creates a substantial risk that advice given to the decisionmaker 'perhaps unconsciously' ... will be skewed." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585-86.)

Thus here, the unacceptable risk of bias is apparent. As an initial matter, there are many instances of impermissible overlap of prosecutorial and adjudicative roles in this case. For example, it is undisputed that several members within LACOE (the prosecutorial body) had many overlapping functions within LACBOE (the adjudicative body). (*See* Opn. at 33.) Indeed, the Superintendent of LACOE, and the individual who recommended revocation, is also the CEO of LACBOE. (*See id.*) Similarly, the general counsel for LACOE, Ms. Sheri Gale, also served as legal counsel to LACBOE. (*See id.*) As such, there can little doubt that the relationship between LACOE and LACBOE is "skewed." Indeed, LACBOE members who voted on Today's Fresh Start's revocation even admitted having deference to LACOE's findings, deference to the point where certain individuals even admitted that they did not fully examine the evidence prior

to siding with LACOE and voting in favor of revocation. (*See id.*) These undisputed facts present sufficient averments of unacceptable bias, for as explained by the *Howitt* court, "the attorney's dual role as both advocate for a party and adviser to the tribunal ... does violence to [the] constitutional ideal" of due process. (*Howitt v.Superior Court, supra*, 3 Cal.App.4th at 1586.)

Further, these averments are buttressed by the fact that LACOE general counsel Ms. Gale ***specifically instructed LACBOE that it was not to be impartial***. Particularly, when LACBOE asked Ms. Gale whether it was required to act impartial, and whether it should provide Today's Fresh Start with a neutral decision-maker, Ms. Gale's answer was clear:

> The [Education Code] provides for an appeal to the State Board of Education, and that is the due process stage. It is at that stage where there should be no one-sided communications, each side should have independent counsel. And most important, the adjudicator is the State Board of Ed, and it is neutral. In this matter, in this process, ***you are not neutral***.

(Opn. at 29 (emphasis added).) Thus, Ms. Gale in essence claimed that even though the Education Code requires an adjudicative hearing before Today's Fresh Start can be deprived of its charter, and even though this Court has required that all adjudicative hearings provide a fair tribunal before a neutral and impartial decision-maker, at in this hearing, due process and neutrality are not required—apparently because those rights only apply to the appellate

proceeding before the State Board. As a result, Ms. Gale instructed LACBOE to blatantly take one side over the other and not be neutral.

Clearly, these undisputed facts create a substantial and unacceptable risk of bias in this case. Not only did a prosecuting attorney advise the decision-making body in the same case as to the substantive legal issues (advice that is substantially likely to be skewed), but also advised that body on the procedural issues as well—to the point of specifically instructing that body not to be neutral. Clearly, these concrete and undisputed facts rebut any presumption of impartiality of the adjudicator. To be sure, it can hardly be surprising that an entity would act in accordance with its attorney's advice, and thus, in this situation, allow neutrality to fall by the wayside. Indeed, this lack of impartiality explains why certain panel members apparently felt it unnecessary to fully examine the evidence before siding with LACOE and voting in favor of revocation. Certainly, these undisputed facts establish an unacceptable risk of bias in this case, depriving Today's Fresh Start of due process protection required under the law.

3. The Court Of Appeal Erroneously Held That Today's Fresh Start Is Not Entitled To A Fair Hearing In The First Instance.

In holding that due process was not violated in this case, the Court of

Appeal relies on the fact that the Education Code grants a subsequent impartial appellate review with the State Board of Education under Education Code § 47607(g). (Opn. 37-39.) Thus, the Court of Appeal held that despite requiring a public, adjudicative hearing where LACBOE must examine and rule upon competing allegations of fact and law, the Education Code does not require that this hearing be impartial.[3] (*Id.*) Instead, the court

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[3] Specifically, the Court of Appeal characterizes the advice and interaction between LACOE and LACBOE as "unexceptional circumstance of general counsel and other LACOE staff advising the County Board regarding the initial decision whether to reverse TFS's charter," thus rationalizing that LACBOE need not be neutral. (Opn. 35.)

However, this contention must be rejected, as it ignores the fact that "[w]hen ... an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law ***requires a fair tribunal*** ... one in which the judge or other decision maker is free of bias for or against a party." (*Morongo v. State Water Resources*, *supra*, 45 Cal.4th at 737 (citations omitted, emphasis added); *see also Wolff v. McDonnell* (1974) 418 U.S. 539, 557-58 ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests").) As Education Code § 47607 clearly evinces an intent to provide an adjudicative hearing—requiring the decision-making entity to review evidence of both parties and make written findings of fact and law—there can be little dispute that impartiality is anticipated and required in such a process.

In holding that impartiality is not required, the Court of Appeal further relies on the idea that the administrative process to grant a charter is effectively the same as the administrative process to revoke the charter, and thus, an impartial decision-maker is not required. (Opn. 36.) However, this position is erroneous. Though a party who has not yet obtained a protectable property interest (such as a school petitioning for a charter) may not be entitled to due process protection, a party who ***has*** obtained a protectable interest (such as a school whose charter is being revoked) is entitled to such protection, and thus the revocation must comport with due process.

holds that the "additional" safeguard provided by appellate review to the State Board is sufficient. However, this Court in *Haas* squarely rejected the notion that due process violations can be cured by review, de novo or otherwise—instead, due process requires a neutral decision-maker in the first instance.

In *Haas*, the county contended that any possibility of bias on the part of the hearing officer was cured when the Board conducted an independent review of the decision. (27 Cal. 4th at 1034.) The *Haas* court rejected that argument, holding that the trial court procedure may not "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. ***Petitioner is entitled to a neutral and detached judge in the first instance***." (*Id.*, emphasis original; *see also, Hackenthanl v. California Medical Assn*, (1982) 138 Cal.App.3d 435, 445-

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Finally, the Court of Appeal holds that because the chartering authority is involved in both the grant/renewal, and denial of a charter, it naturally cannot be a neutral entity. However, that statement is incorrect. Indeed, administrative agencies are routinely involved in disputes, such as the grant, renewal, or denial of licenses, and yet nevertheless are capable of composing a neutral tribunal. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 10-11 ("Procedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality.").)

As a result, the Court of Appeal's attempt to dismiss the impartiality requirement must be rejected.

446 (rejecting argument that independent review cured any prejudice due to the involvement of biased adjudicators at a lower level).) Indeed, courts have held that a biased decision-maker's mere ***participation*** in the administrative process may violate due process. For instance, one case found a due process violation even though the decision-maker "did not serve as factfinder, participate in the deliberations, or issue a decision recommending action by the administrative board," and even though that decision-maker's rulings were subject to review by an administrative board in that same proceeding. (*See Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 485.) Thus, even if a biased decision-maker is not the primary or even substantive decision-maker in the process or proceeding, that biased decision-maker's participation itself may nevertheless offend due process. Therefore, even if Today's Fresh Start is provided an impartial review at the State Board, Today's Fresh Start's due process rights have nevertheless been violated by the initial lack of neutrality by LACBOE.

Finally, the insufficiency of the State Board appellate review is demonstrated by the fact that the appellate review under section 47607(g) only provides that the State Board of Education "may" reverse a revocation only if it finds that the chartering authority's findings are not supported by "substantial evidence." (*See* Educ. Code § 47607(g)(1); *see also Hub City*

Solid Waste Services, Inc. v. City of Compton (2010) 186 Cal.App.4th 1114, 1128-1129 (noting "highly deferential" standard provided in "substantial evidence" review.).)[4] As even the Court of Appeal notes, the State Board's authority to review a case appears extremely limited. (*See* Opn. 19-20 (noting the statutory language "does not contemplate independent factual findings by the State Board. The State Board is required only to determine whether the County Board correctly performed its function.").) It is unclear whether the State Board can even consider issues such as defenses raised by a charter school, address preliminary rulings (such as admissibility of evidence) or even address due process violations. Thus, it is clear that having this extremely limited review cannot substitute for having a fair and impartial hearing in the first instance.

Therefore, because Today's Fresh Start was deprived of a fair and impartial hearing in the first instance, the decision of the Court of Appeal must be reversed, and the trial court order granting a new administrative hearing must be reinstated.

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[4] Although the Court of Appeal asserts that there is no evidence that the State Board utilized this deferential standard, the fact is that because there had been no promulgated regulations regarding the matter, the parties were only guided by the statute itself, resulting in confusion as to the exact authority of the State Board. (*See* Opn. 19, n. 21 (noting that "CDE's counsel described the State Board's scope of review as 'an open question' regarding 'a relatively new statute'").)

B. Education Code § 47607 And Due Process Require That LACOE Present Evidence In Support Of Revocation At The Mandated Public Hearing.

Finally, Education Code § 47607 and due process require that LACOE present evidence in support of revocation at the public hearing under section 47607(e). As discussed above, before revocation can occur, a public hearing must be held in the ordinary course of business. (Educ. Code § 47607.) Ordinarily, evidence must reasonably be presented to a party in order to support a subsequent administrative action or decision; allowing an administrative body to issue decisions based on evidence the parties were not apprised of generally violates due process. (*See English v. City of Long Beach* (1950) 35 Cal.2d 155, 158 ("The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing."); *see also*, *La Prade v. Department of Water and Power* (1945) 27 Cal.2d 47, 51-52 (administrative agency must base decision on evidence properly introduced at hearing).) The rationale for requiring presentation at the hearing is clear: "A hearing requires that the party be apprised of the evidence against him so that he may have an ***opportunity to refute, test, and explain it***, and the requirement

of a hearing necessarily contemplates a decision in light of the evidence there introduced." (*English v. City of Long Beach, supra*, 35 Cal.2d at 159.)

In this case, Today's Fresh Start was deprived of the opportunity to be adequately apprised of the facts and be provided an opportunity to rebut. Particularly, at the revocation hearing mandated by the Education Code, LACOE presented ***absolutely no evidence or arguments*** whatsoever regarding its bases for revocation. (*See* Opn. 25-26.) Indeed, after Today's Fresh Start presented its position on the revocation, LACOE simply remained silent. (*See id.*) However, despite the lack of any kind of presentation or opposition from LACOE, LACBOE nevertheless voted for revocation. (*See id.*)

However, in holding that due process was not violated, the Court of Appeal explained that Today's Fresh Start technically had the necessary evidence in its possession, as LACOE produced all the relevant documentation to Today's Fresh Start, including the facts ultimately relied upon by LACBOE. (*See* Opn. 27.) Thus, the Court of Appeal held that 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 entity may rely on, and address those issues on its own. (*See id.*)

This holding is problematic for many reasons. As an initial matter, this construction appears to contradict the very words of the statute. Specifically, the statute calls for "a public hearing, in the normal course of business, on the issue of whether evidence ***exists*** to revoke the charter." (Educ. Code § 47607(e) (emphasis added); *see also* Educ. Code § 47607(c) ("A charter may be revoked by the authority that granted the charter under this chapter if the authority finds, ***through a showing*** of substantial evidence, that the charter school did any of the following....") (emphasis added).) Thus, it appears the appropriate inquiry for the hearing should be ***whether affirmative evidence exists to revoke***, placing a burden on LACOE to make its case, not the other way around.

Furthermore, by its opinion, the Court of Appeal has essentially issued a blank check for revoking entities to avoid setting forth or explaining any details regarding its arguments or facts in support of revocation. Instead, the revoking entity need only produce the information to the charter school and leave it to the charter school to connect the dots. Such a holding not only fails to ensure a fair hearing, but in fact encourages the obfuscation of relevant facts.

Just because a party may be in possession of the facts does not ensure that a party is in fact adequately aware of the case against it such that the

party can fairly and adequately address and rebut the issues. (*See Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 784-85 (in a discovery context, "[a] broad statement that the information is available from a mass of documents is insufficient.").) This is particularly true where, as here, the revoking entity essentially threw the proverbial kitchen sink at the charter school and refused to state which if any of those issues were relevant, material, or even cured by the time of the hearing. Specifically, in this case LACOE claimed ***fifty-three allegations*** of wrongdoing against Today's Fresh Start, and produced hundreds of pages of evidence in its possession. LACOE made no effort to explain what it believed were the material violations justifying revocation, and even in voting to revoke, LACBOE made no effort to specify which of the many allegations it found to be sufficient to support revocation. Indeed, as noted by the CDE during appellate review before the State Board, ***even CDE was unable to comprehend LACOE's allegations,*** finding LACOE's evidence "unclear and/or incomplete," and required that LACOE narrow its claims to material allegations, "asking for specific information identifying the five most significant violations, and evidence of the violations and of notice to TFS and opportunity to cure." (*See* Opn. 9, n. 11.)

Given the importance of allowing a charter school (and appellate

bodies) to sufficiently understand the charges against the school, due process requires that LACOE be required to present evidence of its claims at the hearing—not simply overwhelm a party with production evidence. Under the cost-benefit analysis described in *Mathews v. Eldridge* (1976) 424 U.S. 319, 333, it is clear that at a minimum, LACOE should have introduced the evidence purportedly supporting revocation at the hearing.

First, it is undisputed that Today's Fresh Start has a substantial property interest in its charter. (*See* Section IV.A.1, *supra.*) The revocation threatens Today's Fresh Start's very existence. The school has been in operation since 2003, and before revocation proceedings were initiated, the school had a legitimate expectation to continue operation for at least another three years. Further, it bears noting that families have come to rely on the school to provide their children with quality education and experiences, and teachers and employees' livelihood rely on the continued operation of the school. As one commentator noted, revocation may "uproot[] a community which has formed around a school" and "create[] instability in the lives of the teachers, students, and parents, the threat of which may overshadow the [chartering authority's] need to define the standard of performance accountability." (Suzanne E. Eckes *et al*, *Charter School Accountability: Legal Considerations Concerning Nonrenewal And Revocation Procedures*

(2006) 2006 B.Y.U. Educ. & L.J. 551, 554.) Therefore, it is clear that the private interests in this case are significant.

Second, the risk of erroneous deprivation is substantial. Indeed, this risk is confirmed by the fact that ***even CDE***, an administrative agency well-versed with the requirements of the Education Code, ***found LACOE's revocation unclear and incomplete***, stating that it found it impossible to determine which of the fifty-three alleged violations of the charter LACOE found material. (*See* Opn. 9, n. 11.) As a result, in order to proceed with the appeal before the State Board, CDE required LACOE to narrow its claims to the five most material allegations. (*See id.*)

Thus, the risk of erroneous deprivation is clear. If an agency as experienced as CDE required clarification of LACOE's claims in order to properly address its points, there can be no doubt that that Today's Fresh Start (and even LACBOE) would similarly benefit from a clarification of LACOE's claims. And had LACOE been required to present evidence at the revocation hearing, there is no doubt that the concern for clarity would be addressed. Instead of simply resting on its numerous binders containing "unclear and/or incomplete" information, LACOE would have been required to actually process and distill its allegations in order to adequately present its claims before LACBOE. To be sure, had LACOE been required to clarify its

allegations prior to the deprivation of Today's Fresh Start's charter, not only would Today's Fresh Start have been given the opportunity to directly address LACOE's material and primary allegations ***before*** its charter was revoked, it would also permit LACBOE to actually have rendered an informed administrative decision, as opposed to simply deferring to LACOE's findings because LACOE's documents were too difficult or onerous to decipher. Thus, the risk of erroneous deprivation clearly exists here, and weighs in favor of requiring presentation of evidence at the statutorily mandated hearing.

Third, the burden on LACOE is minimal at best. Indeed, CDE subsequently required LACOE to clarify and streamline its allegations, and thus, there is little reason why LACOE could not have done so ***before*** Today's Fresh Start's charter was revoked. Considering that LACOE also has a significant interest in ensuring that revocations are handled in an appropriate manner and needless litigation is avoided, this factor also falls in favor of requiring a presentation of evidence.

Therefore, in light of the foregoing factors, due process requires that at a minimum, LACOE introduce the evidence supporting revocation at the statutorily mandated hearing under Education Code § 47607. Because presenting evidence at the required public hearing under the Education Code

would permit charter schools (and decision-making entities) to have a clear understanding of the charges levied against the charter school before revocation becomes final (and thus provide the opportunity to adequately address the issues), because it would discourage attempts to obfuscate the material issues and reduce the risk of erroneous deprivation, and because it would impose a minimal burden upon the government, due process requires that LACOE present evidence supporting revocation at the required public hearing under Education Code § 47607. A charter school must be sufficiently apprised of the charges against it, not simply inundated with evidence.

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V.
CONCLUSION

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

Dated: December 28, 2011

DOLL AMIR & ELEY LLP

By: _____

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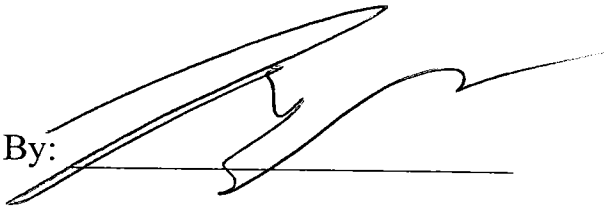
By: 

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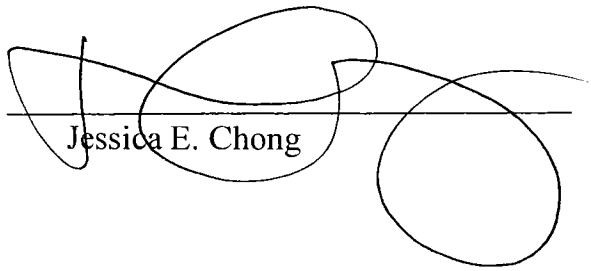

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