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Written Opposition from Solano County Board of Education



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June 10, 2022

By E-mail: charterappeals@cde.ca.gov

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Re: Solano County Board of Education's Opposition to Caliber: High Schools' Appeal to the SBE Regarding the Denial of the Petition to Establish a New Charter School

Dear Director Farland, Advisory Commission on Charter Schools, and State Board of Education:

This letter is submitted on behalf of the Solano County Board of Education ("County Board") pursuant to Education Code section 47605, subdivision (k)(2)(C), and serves as the County Board's opposition to Caliber: High School's ("Petitioner") May 13, 2022 appeal ("Appeal") of the Vallejo City Unified School District ("District") Board of Education's ("Board") and the County Board's respective denials of the petition to establish Caliber: High School ("Petition").

INTRODUCTION

The question before the State Board of Education ("SBE") regarding the County Board's April 13, 2022 denial of the Petition is simple: *Did the County Board abuse its discretion when it denied the Petition?* The documentary record confirms the answer is "no." The County Board acted squarely within its discretion under the Charter Schools Act ("Act") (Ed. Code, § 47600 et seq.), and it adopted comprehensive written findings of facts supported by the evidence to deny the Petition following its de novo review. The County Board properly denied the Petition pursuant to Education Code section 47605, subdivision (c)(8), finding that the District—which is unequivocally under state receivership—is not positioned to absorb the fiscal impact of the proposed charter school. Petitioner bears the burden of proving the opposite, but fails to do so. Petitioner's Appeal is laced with opinions and conclusory statements unsupported by the law, and asks the SBE to engage in underground rulemaking and impose requirements and obligations on chartering authorities, and adopt an interpretation of the Act wholly inconsistent with the plain language and Legislative intent of the Act.

This matter is straightforward, and the documentary record is clear—the County Board properly denied the Petition pursuant to Education Code section 47605, subdivision (c)(8) and did not

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Stephanie Farland
Charter Schools Division
June 10, 2022
Page 2

abuse its discretion. Therefore, the SBE may summarily deny review of the Petition. Should the SBE choose to hear the appeal, it must affirm the County Board's determination and deny the Petition.

BACKGROUND

A. Summary of Timelines and Actions by the District

Caliber Public Schools ("Caliber") submitted the Petition to establish Caliber: High School to the District's Board on September 8, 2021. On November 3, 2021, the District Board held an initial public hearing and on November 30, 2021, the District published its staff report and recommended findings of fact regarding the Petition ("Report"). (DR 2-3, 815-825; 11/03/21 District Board Meeting Video ("DMV") at 00:00:01-01:52:17.) The District Board denied the Petition on December 15, 2021. (DR 826-828, 1621-1632, 1640-1641, 1643-1667; 12/15/21 DMV at 00:00:01-01:32:17.) As outlined in Resolution No. 2998, the District Board denied the petition pursuant to Education Code section 47605, subdivision (c)(8):

"The Board has determined that, given the District's status as being under state receivership, and the anticipated loss of student enrollment and funding to the District if the Petition is approved, the District is not positioned to absorb the fiscal impact of the proposed Charter School."

(DR 838-849, 1621-1632.)

B. Summary of Timelines and Actions by the County Board

On January 14, 2022, Caliber submitted an appeal to the Solano County Office of Education ("SCOE") following the District Board's denial of the Petition. (DR 7-2560.) The County Board held an initial public hearing on March 9, 2022, to consider the level of support for the Petition. (DR 1668-1673; 03/09/22 County Board Meeting Video ("CMV") at 00:00:01-04:07:05.) At the public hearing, Petitioner and the District were afforded ten minutes each to present before the County Board, and members of the community were afforded an opportunity to provide public comment on the Petition. (DR 2565-2583, 2584-2592, 2593-2602; 03/09/22 CMV at 00:19:52-00:30:02, 00:30:36-00:39:16, 00:40:06-02:46:00.) On March 29, 2022, SCOE published its staff report and comprehensive recommended findings of fact based on its de novo review of the Petition. (DR 2612-2629.)

On April 13, 2022, the County Board held a second public hearing on the Petition. (04/13/22 CMV at 00:00:01 – 05:14:59.) During the public hearing, SCOE, the District, and Petitioner were each afforded ten minutes to present before the County Board and members of the community were afforded an opportunity to provide public comment on the Petition. (DR 2606-2611, 2644-2694; 04/13/22 CMV at 00:19:04-00:29:04, 00:29:33-00:37:40, 00:38:07-00:47:10.) SCOE staff concluded that Petitioner's proposed program was consistent with sound educational practice, and the Petition generally met the requirements outlined in Education Code section

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 3

47605, subdivisions (c)(1)-(7). However, as part of its staff report, SCOE staff, in consultation with the Fiscal Crisis Management Assistance Team (“FCMAT”), made a written factual finding that the District is under state receivership and is not positioned to absorb the fiscal impact of the proposed charter school pursuant to Education Code section 47605, subdivision (c)(8). (DR 2628.) The Report considered and weighed the evidence Petitioner submitted to refute the presumption of denial under the Act, but ultimately determined that Petitioner failed to refute the presumption of denial. (DR 2633-2643.) Following the second public hearing, the County Board adopted the staff report and written factual findings of fact and denied the Petition pursuant to Education Code section 47605, subdivision (c)(8). (DR 2612-2632, 2695.)

C. Summary and Timelines of Petitioner’s Submission of the Appeal to the SBE

SCOE submitted the documentary record to Petitioner on April 28, 2022, within 10 days of the request, which included the agendas and links to all documents therein, audio recordings, and Zoom recordings of the March 9, 2022 and April 13, 2022 County Board meetings. (DR 1668-2703; 03/09/22 CMV; 04/13/22 CMV.) On May 13, 2022, Caliber submitted an appeal on the denial of the Petition to the SBE.

STANDARD OF REVIEW

The SBE must *either* hear the appeal *or* summarily deny review of the appeal based on the documentary record. (Ed. Code, § 47605, subd. (k)(2)(E), emphasis added.) If the SBE hears the appeal, the SBE may, but is not required to, reverse the denial *only* upon a determination that there was an abuse of discretion by *both* the school district and county board of education. (*Id.*, emphasis added; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [The word “may” is ordinarily construed as permissive]; *Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802 [The normal rule of statutory construction is that when the Legislature provides that a court or other decision-making body “may” do an act, the statute is permissive, and grants discretion to the decisionmaker].)

The “abuse of discretion” standard was added under AB 1505, because the SBE no longer authorizes charter petitions based upon its independent review, and instead, the SBE now only hears an appeal of a petition denial. (*Id.* § 47605, subd. (k)(2).) While the Act does not define abuse of discretion, it is a well-established standard of review and the appellate review context is instructive here. “The appropriate test for ‘abuse of discretion’ is whether the [lower body] exceeded the bounds of reason; when two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) “An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice. . . . We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise.” (*Safeco Ins. Co. of America v. Super. Ct.* (2009) 173 Cal.App.4th 814, 833, citing *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.) Under this standard, an appellate body must “resolve all evidentiary conflicts in favor

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 4

of the judgment and determine whether the court’s decision ‘falls within the permissible range of options set by the legal criteria.’” (*Hirshfield v. Schwartz*, (2001) 91 Cal.App.4th at 771; see *Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815; *Dept. of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.)

Therefore, the SBE may not reverse a denial determination of a school district and/or county board of education absent an “abuse of discretion,” which requires a showing that the governing board exceeded the bounds of reason.

ARGUMENT

A. The County Board Properly Denied the Petition Pursuant to Education Code section 47605, subdivision (c)(8).

As an initial matter, the documentary record shows the County Board made written factual findings setting forth facts to support denial of the Petition pursuant to Education Code section 47605, subdivision (c)(8), providing just cause for the SBE to summarily deny review of the appeal.¹ (Ed. Code, § 47605, subd. (k)(2)(E).) The District is under state receivership, and in such an instance, the Act requires the Petition be subject to a rebuttable presumption of denial. (Ed. Code, § 47605, subd. (c)(8).) Contrary to Petitioner’s assertion, the presumption of denial was not sufficiently rebutted, either by Petitioner or through SCOE’s independent analysis; therefore, the County Board properly denied the Petition under the Act. Thus, the SBE should summarily deny review of the Appeal, or, at a minimum, affirm the County Board’s denial.

1. The Act Governs the Petition Review Standards and Criteria.

The Act governs the creation of charter schools in the state of California, and Education Code section 47605, subdivision (c), describes express standards and criteria for reviewing a petition to establish a charter school. (Ed. Code, § 47605, subd. (c).) Pursuant to Education Code section 47605, subdivision (c), “[t]he governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the” findings enumerated in statute. (*Id.*) The enumerated findings supporting denial include one or more of the following:

¹ Education Code section 47605, subdivision (k)(2)(D) requires the Advisory Commission on Charter Schools (“ACCS”) to provide a recommendation to the SBE whether there is sufficient evidence to hear the appeal or summarily deny review of the Appeal based on the documentary record. ACCS member, Jared Austin, spoke at the March 9, 2022, meeting in support of the Petition, urging the board to “do what’s right for kids, don’t stick with the equitable mediocrity everyone wants you to keep.” (March 9, 2022 CMV at 55:02—57:02.). As such, the County Board has serious concerns regarding Mr. Austin’s potential conflict of interest in the Appeal, and the County Board requests Mr. Austin recuse himself from any discussion or recommendation regarding the Petition.

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 5

- (1) The charter school presents an unsound educational program;
- (2) The petitioners are demonstrably unlikely to successfully implement the program set forth in the petition;
- (3) The petition does not contain the number of signatures required by subdivision (a);
- (4) The petition does not include an affirmation of each of the required conditions described in subdivision (e);
- (5) The petition does not include a reasonably comprehensive description of each of the 15 elements;
- (6) The petition does not contain a declaration of whether or not the charter school shall be deemed the exclusive public employer of the employees of the charter school for purposes of the Educational Employment Relations Act;
- (7) The charter school is demonstrably unlikely to serve the interests of the entire community in which it is proposing to locate; and
- (8) The school district is positioned to absorb the fiscal impact of the proposed charter school.

(Ed. Code, § 47605, subds. (c)(1)-(8).)

A school district or county board of education may deny a charter petition if “it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the above findings. (*Id.*, § 47605, subd. (c).) The County Board made written factual findings to support a denial pursuant to Education Code section 47605, subdivision (c)(8). (DR 2612-2632. 2695.)

2. A Chartering Authority May Deny a Petition Due to the Fiscal Impact on the School District.

Assembly Bill (“AB”) 1505, signed into law on October 3, 2019, amended the Act to add, among other provisions, Education Code section 47605, subdivision (c)(8) (commonly referred to as “fiscal impact”) as an additional basis for which a governing board may deny a charter petition. (Assem. Bill No. 1505 (2019-2020 Reg. Sess.)) Education Code section 47605, subdivision (c)(8) provides that a school district and/or county board of education may deny a petition if it finds that the school district in which the charter school is proposing to locate “is not positioned to absorb the fiscal impact of the proposed charter school.” (Ed. Code, § 47605, subd. (c)(8).) Per the plain language of the statute, “a school district satisfies” the provision and is not positioned to absorb the fiscal impact if *any one* of following conditions is met:

- (1) The school district has qualified interim certification and certifies, in consultation with FCMAT and county superintendent of schools, that approval of the charter petition would result in the school district having a negative interim certification.

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Stephanie Farland
Charter Schools Division
June 10, 2022
Page 6

- (2) The school district has a negative interim certification; or
- (3) The school district is under state receivership.

(*Id.*)

If a charter school proposes to operate “in a school district satisfying one the above conditions, the Petition **“shall be subject to a rebuttable presumption of denial.”** (*Id.*, emphasis added.) The statute expressly includes the word “shall,” which means if any one of the three conditions is met, the Petition must be subject to a presumption of denial. When reviewing the meaning of statutory language, the word “shall” is ordinarily construed as mandatory. (*Common Cause v. Bd. of Directors v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442, Ed. Code, § 75.) As such, a charter petition is presumptively denied if it proposes to locate in a school district satisfying any of the above conditions, unless the presumption is properly rebutted. (Ed. Code, § 47605, subd. (c)(8).)

The Act does not define “rebuttable presumption of denial,” nor are there any clarifying regulations. When a statute does not define a term, rules of statutory construction permit a court to refer to other statutes or case law to determine what a court may consider instructive in assigning a definition. (*People v. Coker* (2004) 120 Cal.App.4th 581, 588-589 [To understand the intended meaning of a statutory phrase, a court may consider use of the same or similar language in other statutes, because similar words or phrases in statutes dealing with the same subject matter ordinarily will be given the same interpretation].) Instructive here, Evidence Code section 606 provides, in relevant part:

The effect of a presumption affecting the burden of proof is to **impose upon the party against whom it operates** the burden of proof as to **the nonexistence of the presumed fact.** (Evid. Code, § 606, emphasis added.)

The parties agree that the charter school is the party against whom the rebuttable presumption operates, and thus the charter school must provide sufficient evidence to rebut the fact that the school district is in state receivership and is not positioned to absorb the fiscal impact of the proposed charter school. (Appeal at pp. 11-12; see also, e.g., *People v. Dubon*, 90 Cal.App.4th 944, 953-54.) If the charter school fails to provide sufficient evidence to rebut the presumption of denial, the governing body may properly make writing factual findings supporting denial pursuant to Education Code section 47605, subdivision (c)(8), if it finds that the school district is not positioned to absorb the fiscal impact of the proposed charter school and deny the charter petition. (Ed. Code, § 47605, subd. (c)(8).)

While a county board conducts a de novo review, if the school district denied the petition pursuant to Education Code section 47605, subdivision (c)(8), the statute provides, in relevant part: “the county board of education **shall** also review the school district’s findings.” (Ed. Code, § 47605, subd. (k)(1)(A)(ii), emphasis added.) The County Board acted in accordance with each of these required provisions.

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 7

However, Petitioner asks the SBE to engage in improper underground rulemaking and circumvent section 47605, subdivision (c)(8) to include a 9-factor test to assess the fiscal impact of a proposed charter school—a test that Petitioner has presented for the first time in its written Appeal. (Appeal p. 12-13.) Petitioner further alleges, with no legal support, denials under section 47605, subdivision (c)(8) “uniquely warrant greater scrutiny because of what is at stake for students in California.” (Appeal at p. 2.) This is contrary to the Legislative history underpinning AB 1505, which demonstrates the Legislative intent to give charter authorizers greater local control in the petitioning approval process, and the amendments to the Act expressly contemplate an assessment of the fiscal impact of charters on local public schools. (Sen. Com. on Ed. on Assem. Bill 1505, (2019-2020 Reg. Sess.) as amended July 5, 2019, p.10 [“No question that when students leave traditional public schools to attend charter schools, the school district’s finances suffer”]; *Id.* at p. 5 [“This measure ensures that charter schools are authorized and overseen by school districts and county offices of education, who are the elected officials that best understand the educational needs of their local students, thus improving proper oversight. The bill gives school districts greater authority to choose which charter schools are approved in their community, and to consider the fiscal impact of the charter school on the current students in the district”].)

In sum, a finding of fiscal impact under section 47605, subdivision (c)(8), is a straightforward analysis. A school district is considered not positioned to absorb the fiscal impact of a proposed charter school if it satisfies any one of the three conditions, in which case, the charter petition is presumptively denied. The petition may *only* be approved if the petitioner offers sufficient evidence to rebut the presumption of denial. A determination of whether the presumption of denial is sufficiently refuted is left to the discretion of the local governing body.

3. The County Board Made Written Findings to Deny the Petition Based on the Fiscal Impact to the District.

Consistent with the Act, the County Board conducted a de novo review of the Petition and made independent findings. (DR 2612-2632, 2695.) Based upon this review, the Petition was subject to a rebuttable presumption of denial. (Ed. Code, § 47605, subd. (c)(8).) Petitioner presented evidence to rebut the presumption, which the County Board also considered, as is outlined in the Report, but determined that the presumption was not sufficiently rebutted. (*Id.*) Therefore, the County Board properly denied the Petition pursuant to Education Code section 47605, subdivision (c)(8).

a. The District is Under State Receivership.

It is undisputed that the District is under state receivership. The California Legislature established a process for financially distressed schools, under certain circumstances, to receive emergency apportionments from the State. (Ed. Code, §§ 41320, 41326.) This process is commonly referred to as “state receivership.”

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 8

The District had a negative general fund balance for the 2002–2003 fiscal year and projected potential deficits in its 2003–2004 budget. (DR 2626, 2666.) In 2004, the District entered into state receivership when it received an emergency apportionment pursuant to Education Code section 41326 for approximately \$60,000,000. (*Id.*) After entering state receivership in 2004, the District was assigned an administrator. (*Id.*) The District regained local control in 2013 and was appointed a trustee to continue to oversee the District’s operations. (*Id.*) The District is currently assigned a trustee and has an outstanding balance of approximately \$9.5M on the emergency loan. (*Id.*) Therefore, the District remains under state receivership.

This was confirmed by the District’s Board in its Resolution No. 2998; the District Superintendent, William Spalding at the March 9 and April 13 County Board public hearings; Mike Fine, Chief Executive Officer of the FCMAT in a February 28, 2022 letter to Solano County Superintendent of Schools, Lisette Henderson and again during the April 13 public hearing; and independently by SCOE and Superintendent Estrelle-Henderson in their respective capacities of providing certain financial oversight of school districts within Solano County. (*Id.*, DR 2361-2362, 2549-2551, 2553, 2666; 03/09/22 CMV at 00:00:01-04:07:05; 04/13/22 CMV at 00:00:01 – 05:14:59.)

Petitioner alleges the District is under state receivership only “as a technical matter” because it is expected to pay off the loan by 2024, which is a gross misapplication of the law. (Appeal at p. 3.) Petitioner further request the ACCS and SBE to engage in underground rulemaking and “to clarify the applicable standard bearing on charter petitions under the new standard,” alleging that this is “within the prerogative” of the ACCS and SBE, even though no regulations have been adopted interpreting this statute. (Appeal at p. 3.) Petitioner’s request is not only inappropriate, but it is unlawful. (Ed. Code, § 33031; Govt. Code, §§ 11340, et seq.; see also, *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333 [“A ‘regulation’ within the meaning of the APA . . . may not be adopted, amended, or repealed except in conformity with ‘basic minimum procedural requirements’” that include public notice, opportunity for comment, agency response to comment, and review by the state Office of Administrative Law].) The only proper avenue for the SBE to clarify any provision of the Act, including Education Code section 47605, subdivision (c)(8), is through the formal rulemaking and regulatory process—but it has not done so. (*Id.*) This pending appeal is not the proper forum to engage in any rulemaking.

The law is clear—a school district satisfying any of the three conditions satisfies a finding that it is not positioned to absorb the fiscal impact—and the SBE has no authority to promulgate underground rule-making that is directly contrary to the statutory language and Legislative intent underpinning AB 1505. (*Id.*; Ed. Code, § 47605, subd. (c)(8).) Here, the District is under state receivership. A school district is either factually under state receivership or it is not; this is not a subjective assessment. Moreover, in Petitioner’s own words, section 47605, subdivision (c)(8) “may only be invoked by school districts with legally recognized statuses suggesting they may be financially imperiled.” (Appeal at p. 10.) And, the District has the legally recognized status of being under state receivership. Thus, the County Board properly found that the District is not positioned to absorb the fiscal impact of Caliber: High School.

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 9

b. Petitioner did not Rebut the Presumption of Denial.

The County Board weighed the evidence Petitioner submitted to refute the presumption of denial, including its January 14, 2022, cover letter as part of its submission to SCOE, its presentation during the March 9 public hearing, the responses to the Report submitted on April 8, and its presentation during the April 13 public hearing. Specifically, the Report, which the County Board adopted, includes a section describing the evidence Petitioner submitted, and SCOE concluded:

While Petitioner presented evidence regarding the proposed impact of the Charter School, Petitioner does not contest that VCUSD has an outstanding emergency loan. Petitioner estimated that at least one-third of Caliber: Changemakers Academy’s graduating 8th grade student would otherwise attend VCUSD. Therefore, the proposed Charter School will have a negative fiscal impact on VCUSD, including but not limited to, a loss in revenue due to projected decrease in enrollment of at least one-third of students who would otherwise attend VCUSD if the Petition is approved. Accordingly, VCUSD is not positioned to absorb the fiscal impact of the proposed Charter School.

(DR 2628.)

Neither the April 8 responses nor the presentation on April 13 provided any substantively new evidence not previously provided to refute the presumption of denial. Therefore, the County Board adopted Resolution No. B21-22-36, which expressly adopted the Report and denied the Petition, indicating the County Board “finds VCUSD is under state receivership and is not positioned to absorb the fiscal impact of the proposed Charter School.” (DR 2695.)

Based on the documentary record, the County Board properly denied the Petition pursuant to Education Code section 47605, subdivision (c)(8), finding that the District—which is unequivocally under state receivership—is not positioned to absorb the fiscal impact of the proposed charter school and Petitioner failed to rebut the presumption of denial mandated under the Act. Accordingly, the SBE may summarily deny review of the Appeal.

B. Petitioner Failed to Demonstrate the County Board Abused Its Discretion.

The SBE may reverse a decision *only* if it finds an abuse of discretion—i.e., the decision exceeded the bounds of reason.² (*Tudor Ranches, Inc. v* (1998) 65 Cal.App.4th at 1431.) The

² Petitioner asserts the SBE should apply the abuse of discretion standard under Code of Civil Procedure section 1094.5, but Petitioner provides no legal authority to support the application of section 1094.5 here. (Appeal at p. 5.) If the Legislature intended to incorporate a stricter, and narrowly applicable (only relevant in the writ of mandate context) definition of the “abuse of discretion” standard, it would have done so, but it did not. In fact, the Legislature expressly enacted a stricter standard for revocations. (Ed. Code, § 47607, subd. (j)(2) [“The state board

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 10

documentary record, including the County Board’s written factual findings, confirm the County Board properly denied the Petition under the Act. Petitioner bears the burden of proving an abuse of discretion, and it has failed to do so. (See, e.g., *Grail Semiconductor, Inc.*, 225 Cal.App.4th at 801; see *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 146.)

Petitioner alleges the County Board abused its discretion, but each of Petitioner’s arguments are conclusory and inaccurate—thus, Petitioner has not established an abuse of discretion. (Appeal at pp. 20-28; Appeal, Table 2.) To the extent reasonable minds may differ regarding the rebuttable evidence, the SBE must resolve all evidentiary conflicts in favor of the County Board and determine whether the County Board’s decision “falls within the permissible range of options set by the legal criteria.” (See *Hirshfield*, 91 Cal.App.4th at 771; see *Dorman*, 35 Cal.App.4th at 1815; *Dept. of Parks*, 233 Cal.App.3d at 831.)

The County Board responds to Petitioner’s allegations as follows:

- *Response to allegation that the County Board purportedly ignored evidence of the actual projected average daily attendance (“ADA”) impact of the charter school and “local control funding formula (“LCFF”) and evidence that the fiscal impact projections were erroneous (Appeal at pp. 20-23.):*

Petitioner alleges the County Board’s fiscal impact analysis was erroneous and it should have considered alternative figures regarding the potential ADA loss to the District. (Appeal at pp. 20-23.) However, the County Board reasonably considered three separate figures in analyzing the potential ADA loss due to the proposed charter school (80 students, 100 students, and 150 students). (DR 2626-2628.) The Report includes three figures since any potential ADA loss is speculative given the charter school is not in operation. (*Id.*) Petitioner suggests the County Board should only have considered an ADA loss based on 50 students, but Petitioner did not provide any evidence to explain why the 50 figure is more appropriate. (Appeal at p. 20.) All told, the County Board conducted a comprehensive and thorough fiscal analysis, arguably exceeding the requirements of the Act, and Petitioner did not provide sufficient evidence to rebut the presumption of denial.

may reverse the revocation decision if the state board determines that the findings made by the chartering authority...are not supported by substantial evidence”].) Further, the SBE could have adopted regulations to define “abuse of discretion,” but it has not done so, and it cannot now engage in underground rulemaking to adopt a definition inconsistent with the plain language of the statute. (Ed. Code, § 33031; Govt. Code, §§ 11340, et seq.; see also, *Morning Star Co.*, 38 Cal.4th at 333.) Lastly, while not binding, the SBE’s withdrawn proposed regulations provide: “[a]buse of discretion’ occurs when a decision to deny a petition to establish or renew a charter exceeds the bounds of reason, based on the evidence presented and the law applied. Mere conclusory allegations are insufficient to support a decision.” (Proposed 5 C.C.R. § 11968, subd. (a).)

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 11

- *Response to allegation that the County Board purportedly ignored evidence from the State that the District's increased revenues would offset any fiscal impact of the charter school and evidence that the District's own revised financial projections indicated an even greater capacity to absorb any fiscal impact of the charter school (Appeal at pp. 23-24.):*

Petitioner alleges the County Board should have considered the Legislative Analyst Office's ("LAO") November 2021 "guidance regarding the expected funding level for the coming years," because "[t]hese revised projections indicated that the positive impact on the District's funding under the LAO's forecast is large than any potential negative impact on the District from the proposed Charter School." (Appeal at p. 23.) As Petitioner notes, the LOA's guidance is merely a *projection*, and it has not been approved by the State. The County Board properly did not rely on the LAO's guidance, and the evidence does not rebut the presumption of denial. In fact, arguably, it would have been an abuse of discretion for the County Board to consider the LAO's guidance as a basis to find that the presumption was rebutted.

Petitioner also alleges the County Board should have considered the second interim report, but the second interim report was never provided by the District or Petitioner as part of the administrative record, and Petitioner cannot now augment the record to include the second interim report. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 367 ["Extra-record evidence may be considered in quasi-judicial administrative mandamus proceedings only if the evidence was unavailable at the time of the hearing 'in the exercise of reasonable diligence' or if improperly excluded from the record . . . Appellants made no showing in the trial court that either exception applied, and make no such showing here. We therefore decline to consider the materials submitted by appellants which are outside the certified administrative record"].)

All told, Petitioner did not rebut the presumption of denial, and the County Board did not abuse its discretion.

- *Response to allegation that the County Board ignored the rebuttable evidence that the District will exit state receivership in two years (Appeal at pp. 24-25.):*

The law is clear—a school district under state receivership satisfies a finding that it is not positioned to absorb the fiscal impact of a proposed charter school. (Ed. Code, § 47605, subd. (c)(8).) A school district is either factually under state receivership or it is not; this is not a subjective assessment. Petitioner provided no evidence demonstrating the District is not under state receivership. While Petitioner alleges the District's anticipated loan repayment is relevant to this assessment, it is not. Here, the District is under state receivership, and the County Board properly *did not* rely on the District's anticipated, but unconfirmed, loan repayment in 2024 and Petitioner did not rebut the presumption of denial.

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Stephanie Farland
Charter Schools Division
June 10, 2022
Page 12

- *Response to allegation that the County Board improperly relied on a FCMAT opinion (Appeal at pp. 25-26.):*

The County Board's consideration of FCMAT's opinion regarding the District's status as being under state receivership and the impact of a proposed charter school on the District's fiscal health was one of many evidentiary components the County Board considered in making a fiscal impact finding under Education Code section 47605, subdivision (c)(8). (DR 2612-2632, 2695.) Further, the Act expressly contemplates FCMAT's involvement in fiscal impact assessments. To the extent Petitioner alleges a chartering authority's consultation with FCMAT is improper and constitutes an abuse of discretion, this is simply false and is a red herring. (Ed. Code, § 47605, subd. (c)(8).)

- *Response to allegation that the County Board failed to issue written findings for denial in compliance with Education Code section 47605, subdivision (c), (Appeal at pp. 26-28.):*

Petitioner alleges it sufficiently rebutted the presumption of denial through a single two-bar graph that shows Petitioner would only have an alleged \$5.7M impact on the District's \$27.8M fund balance in the 2024-2027 fiscal year. (Appeal at p. 26.) However, Petitioner provides no substantive explanation as to how it came to the figures in the graph, nor did it provide any financial documents or analysis to support the figures presented at the April 13, 2022 County Board meeting. Unlike the extensive fiscal impact analysis set forth in the Report, Petitioner provided conclusory evidence. (DR 2638-2643.) Petitioner alleges the County Board dismissed this evidence and it should have included factual findings in the report or resolution addressing this evidence, but the Act does not require the County Board to do so. Overall, Petitioner's allegation does not establish an abuse of discretion.

- *Response to allegation that the County Board failed to provide a transcript of the April 13, 2022 meeting (Appeal at p.28.):*

First, this allegation is a red herring, as it is irrelevant to the issue of whether or not the County Board abused its discretion when it denied the Petition. Regardless, on April 26, 2022, our office contacted the SBE's General Counsel's office to seek clarification regarding the permissible format for submitting the transcripts of the public hearing at which the County Board denied the Petition. Sandi Ridge from the California Department of Education responded stating, "The SBE will accept videoconferences of the public meeting as a "transcript", as long as the format presented permits specific citation and review of the record by the parties, including identification of the speaker, time stamp of the precise statements or discussion being referenced, and the date and time of the public hearing." (See enclosure.) Therefore, the County Board submitted video recordings. At the SBE's request, the County Board will prepare written transcripts of the April 13, 2022 public hearing.

Based on the foregoing, Petitioner failed to meet its burden of establishing an abuse of discretion. Therefore, the SBE must affirm the County Board's denial determination and deny the Petition.

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 13

C. The SBE Must Affirm the County Board’s Decision and Deny the Petition, Regardless of Whether it Affirms or Denies the District’s Decision.

Education Code section 47605, subdivision (k)(2)(E) provides, in relevant part, the SBE “*may* affirm the determination of the governing board of the school district *or* the county board of education, *or both* of those determinations.” (Ed. Code, § 47605, subd. (k)(2)(E).) Contrary to Petitioner’s assertion, the SBE need only affirm one of the lower governing boards’ decisions to deny the Petition. As set forth in detail in Sections A and B, the County Board properly denied the Petition pursuant to Education Code section 47605, subdivision (c)(8), a decision which is supported by the written factual findings set forth in the Report, which was adopted by the County Board on April 13, 2022. Thus, the County Board did not abuse its discretion; the County Board’s determination must be affirmed; and the Petition must be denied.

1. Maxims of Statutory Construction Confirm County Board’s Proposed Interpretation.

The plain language of the statute is clear on its face and does not require any further analysis. However, even if the plain language is ambiguous—which it is not—a statutory construction analysis further supports a reading of the statute which only requires the SBE to affirm *either* one *or* both the District and County Board’s denial determinations to deny the Petition. Petitioner’s alternative interpretation is contrary to the Legislative intent of AB 1505, leads to an absurd result, and should be dismissed entirely.

a. The Plain Language Requires the SBE to Affirm Only One Denial Determination.

Petitioner asserts that “[a]ny one abuse of discretion by either the District or County is sufficient to result in the approval of the Petition.” (Appeal at p. 7.) However, the plain language of the statute is clear—the SBE “*may* affirm the determination of the governing board of the school district *or* the county board of education, *or both* of those determinations.” (Ed. Code, § 47605, subd. (k)(2)(E); see, e.g., *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547 [When statutory language is clear and unambiguous, there is no need for interpretation, and the court must apply the statute as written].)

The Act affords the SBE three options: (1) affirm the school district’s determination, (2) affirm the county board of education’s determination, or (3) affirm both the school district and county board of education’s determination. (*Id.*; *In re W.B., Jr.* (2012) 55 Cal.4th 30, 52 [If the statutory language is unambiguous, the court presumes that Legislature meant what it said, and the plain meaning of the statute controls].) Petitioner seeks to rewrite the plain language of the Act and remove the first part of the provision entirely, which states the SBE “*may* affirm the determination of the governing board of the school district *or* the county board of education.” (*Id.*) This is improper. The SBE cannot engage in underground rulemaking to circumvent the express statutory language enacted under AB 1505. (Ed. Code, § 33031; Govt. Code, §§ 11340,

Stephanie Farland
Charter Schools Division
June 10, 2022
Page 14

et seq.; see also, *Morning Star Co.*, 38 Cal.4th at 333.) Therefore, the SBE need only approve either the District's or the County Board's denial determination to deny the Petition on appeal.

b. Petitioner's Interpretation Leads to an Absurd Result.

Even if the plain language of the statute is ambiguous, which it is not, Petitioner's interpretation lends to an absurd result, contrary to the Legislative intent of the Act. Where the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair, and in harmony with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305). Stated differently, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation, and the SBE should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose. (See *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305).

Petitioner's interpretation ignores the key purpose of a de novo review by a county board of education. If the SBE finds the County Board did not abuse its discretion and affirms the County Board's decision but reverses the District's denial for an abuse of discretion, the SBE could still approve a petition that does not meet the requirements of the Act. This result is inconsistent with the Act as a whole. (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483, 491 [Interpretation of the statutory language should be consistent and harmonized with the purpose of the statute and the statutory framework as a whole].)

The only legal authority Petitioner cites, albeit with no discussion at all, to support its claim that an abuse of discretion by either the District or the County Board is sufficient to approve the Petition is *Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582. (Appeal at pp. 7-8.) However, *Santa Cruz* does not stand for the proposition that "any one abuse of discretion by either the District or the County is sufficient to result in the approval of the Petition." In fact, *Santa Cruz* is irrelevant to the question before the SBE, and Petitioner fails to demonstrate, in any way, how the case is applicable here either procedurally, factually, or otherwise.

Therefore, the SBE should review the District's and the County Board's decisions independently, and as discussed in Sections A and B, affirm the County Board's denial determination, regardless of the SBE's determination as to the propriety of the District's denial of the Petition.

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Stephanie Farland
Charter Schools Division
June 10, 2022
Page 15

CONCLUSION

Based on the foregoing, the County Board properly denied the Petition under the Act—a decision which was supported by written factual findings specific to the Petition, and the County Board did not abuse its discretion. The County Board respectfully requests the SBE summarily deny review of the Appeal, or, in the alternative, to affirm the County Board’s denial and deny the Petition.

Sincerely,

LOZANO SMITH



Megan E. Macy
Courtney de Groof

Enclosure

cc: Solano County Board of Education

From: Sandi Ridge <SRidge@cde.ca.gov>
Sent: Tuesday, April 26, 2022 5:19 PM
To: Amber Listman
Subject: RE: [EXTERNAL] Question Re: Charter Appeal Documentary Record

CAUTION: External E-Mail:

Hi Amber:

The SBE will accept videoconferences of the public meeting as a “transcript”, as long as the format presented permits specific citation and review of the record by the parties, including identification of the speaker, time stamp of the precise statements or discussion being referenced, and the date and time of the public hearing.

Please do not hesitate to contact me directly if you have any further questions.

Best Regards,

*Sandi Ridge
Education Programs Consultant
Charter Schools Division
1430 N Street, Suite 5401
Sacramento, CA 95814*



From: CHARTERS <CHARTERS@cde.ca.gov>
Sent: Tuesday, April 26, 2022 4:45 PM
To: Sandi Ridge <SRidge@cde.ca.gov>
Subject: FW: [EXTERNAL] Question Re: Charter Appeal Documentary Record

Charter Schools Division
California Department of Education
1430 N Street, Suite 5401 | Sacramento, CA 95814
Phone: 916-322-6029 | Email: charters@cde.ca.gov
(wg)

From: Amber Listman <alistman@lozanosmith.com>
Sent: Tuesday, April 26, 2022 4:16 PM