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Item 2 Written Public Comment Received via Email for Caliber: High School

From: [Terence Johnson](#)
To: [CHARTERS](#)
Subject: [EXTERNAL] August 11, 2022 ACCS Meeting - Comment on Agenda Item #2 Body:
Date: Monday, August 8, 2022 3:10:11 PM
Attachments: [Johnson comment item 2.pdf](#)

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Greetings: 

My name is Terence Johnson, and I am the Chief Executive Officer of Caliber Public Schools and the lead petitioner of Caliber: High School. Please see the attached written comment on Item #2 of the ACCS' August 11, 2022 agenda for inclusion in the ACCS' agenda packet and for consideration by the Commissioners of the ACCS.

Thank you,

Terence Johnson

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AUGUST 8, 2022

VIA: EMAIL
charters@cde.ca.gov

Advisory Commission on Charter Schools
California Department of Education
1430 N Street, Suite 5401
Sacramento, CA 95814

Re: *Item #2 - Caliber: High School's Response and Comment to the Recommendation of the California Department of Education Regarding the Appeal to the Denial of its Charter Petition to the State Board of Education*

Dear Members of the Advisory Commission on Charter Schools:

With all due respect to the California Department of Education ("CDE"), its recommendation to the Advisory Committee on Charter Schools ("ACCS") that the State Board of Education ("SBE") should not hear Caliber: High School's ("Caliber" or the "Charter School") appeal of the denial of its charter petition is flatly **wrong** in its application of the relevant law here.

The CDE's recommendation is based on an erroneous conclusion that a school district's receivership status **alone** is **always** sufficient to deny a new charter petition, and that the mere fact of receivership makes the denial **unappealable** to the SBE, no matter the existence of facts demonstrating that the school district **can absorb** the fiscal impact of the proposed charter school. The CDE's recommendation ignores the protections afforded to charter schools under AB 1505 (2019), codified in Education Code Section¹ 47605(c)(8), that a charter petitioner is entitled to rebut the presumption of denial with evidence that **despite the on-paper status of receivership, the school district can absorb the fiscal impact of the new charter school.**

The CDE recommendation misapplies the law when it treats the District's receivership status as the fact to be *to be rebutted* under the rebuttable presumption standard. That is not the

¹ All statutory citations herein are to the Education Code, unless otherwise noted.



correct application of the law. Receivership is not the fact to be rebutted; it is merely the condition that triggers the rebuttable presumption standard. What is subject to rebuttal is whether the fact of receivership means that the District can or cannot absorb the fiscal impact of the proposed charter school. This is an issue that is explicitly subject to rebuttal under the law based on the facts (e.g., what is the projected impact and can that impact be absorbed?).

The Legislature's intent² to craft the law in this way, and not the way the CDE suggests, is indicated by it having rebuffed AB 1172 and approved AB 1505 instead. In doing so, the Legislature rejected the standard the CDE now imposes in its recommendation, that the fact of receivership alone conclusively "establishes" that a charter petition may be denied due to fiscal impact. Instead, under AB 1505, the Legislature provided charter petitioners the legal protection that **if** a school district is in receivership, there is a "presumption" that the school district is not positioned to absorb the fiscal impact of the charter school, **but** that the charter petitioner may rebut that presumption by showing that the school district **can** absorb the fiscal impact of the new charter school. **The CDE's recommendation fails to account for this right, and fails to account for the fact that Caliber submitted evidence fully rebutting the presumption by demonstrating the Vallejo City Unified School District's (the "District") financial capacity to absorb the fiscal impact of the Charter School.**

AB 1172 Status: Failed to pass out of committee	AB 1505 Status: Enacted into law
<p><i>The charter school would have a negative fiscal impact on the school district. For the purpose of this paragraph, the finding that a charter school would have a negative fiscal impact on a school district may only be established, and is deemed to be established, if any of the following conditions are met:</i></p> <p><i>(A) The school district has received a qualified or negative financial certification pursuant to Section 42131.</i></p> <p><i>(B) The school district demonstrates fiscal distress through the application of the standards and criteria adopted pursuant to Section 33127 for the development of annual budgets and the management of subsequent expenditures from annual budgets.</i></p> <p><i>(C) The school district applies for an emergency apportionment or loan, or has received an emergency apportionment or loan and is operating under the oversight of a state administrator or trustee pursuant to Article 2 (commencing with Section 41320) or Article 2.5 (commencing with Section 41325) of Chapter 3 of Part 24.</i></p>	<p><i>The school district is not positioned to absorb the fiscal impact of the proposed charter school. A school district satisfies this paragraph if it has a qualified interim certification pursuant to Section 42131 and the county superintendent of schools, in consultation with the County Office Fiscal Crisis and Management Assistance Team, certifies that approving the charter school would result in the school district having a negative interim certification pursuant to Section 42131, has a negative interim certification pursuant to Section 42131, or is under state receivership. Charter schools proposed in a school district satisfying one of these conditions shall be subject to a <u>rebuttable presumption</u> of denial.</i></p>

² It is worth noting here that the opinion of State Senator O'Donnell submitted by the District that receivership alone is somehow dispositive to the outcome is legally irrelevant under California Supreme Court law, and it is also contrary to the plain language of the statute that was actually adopted. (See *Williams v. Garcetti* (1993) 5 Cal.4th 561, 569 ["In construing a statute 'we do not consider the motives or understandings of an individual legislator even if he or she authored the statute.'"])

Furthermore, the CDE's position, if adopted, would lead to outcomes that the rebuttable presumption standard was specifically designed to avoid. The Charter Schools Act ("CSA") reflects the Legislature's intent "that the establishment of charter schools be encouraged" and provides for the approval of new charter schools unless "specific facts" in a "particular petition" demonstrate that a charter petition should not be approved. (Section 47605(c).) The CDE's approach, in contrast, would mean that no matter the merits of a charter school program and community need, a school district in receivership could **always** and **automatically** deny a charter petition even when the school district is capable of absorbing the fiscal impact of the new charter school. For example, even if a school district owed only \$1.00 to the State and had one loan payment left at the time of the charter decision meeting (and is thus still technically considered in receivership), and even if that school district had a \$100 million in fiscal reserves and the charter school's impact was only 1% of that amount, the CDE's approach would permit the denial of the school's petition. That approach is clearly not consistent with the intent of the CSA or AB 1505.

At this stage, Caliber's appeal is no differently situated than the other appeals CDE has recommended to date to be heard by the SBE. Caliber's appeal submission was complete and timely and, at minimum, there is a live, factual issue for the SBE to decide as to whether the District can absorb the fiscal impact of the Charter School or not, and whether Caliber has overcome the rebuttable presumption for denial on that issue. We respectfully ask that the ACCS recommend to the SBE that Caliber's appeal be heard by the SBE.

What is a Rebuttable Presumption?

Although Caliber's written appeal details what a rebuttable presumption is (*see* p. 12), given that the CDE's recommendation did not address the rebuttable presumption standard correctly, we have provided background information on this issue below.

As the California Supreme Court has explained, "a rebuttable presumption is designed to place the responsibility for establishing the nonexistence of certain facts on the party most able to do so." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 694.) Rebuttable presumptions are "designed to avoid unnecessary proof of facts likely to be true if not disputed." (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1375.)

In all cases, rebuttable presumptions involve some kind of *triggering fact* which must be independently established (referred to below as fact #1). If the triggering fact is established, the law creates a presumption that some *other* fact is true, unless proven otherwise. (referred to below as fact #1) (*See People v. McCall* (2004) 32 Cal.4th 175, 182 ["presumptions 'are conclusions that the law requires to be drawn (in the absence of a sufficient contrary showing) **when some other fact is proved** or otherwise established in the action."]; (Emphasis added); *see also Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1247-1225 ["many of the complaints and disciplinary actions occurred within 120 days of each other, thereby triggering the rebuttable presumption of discrimination established in Health & Saf. Code, § 1278.5."]; *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 334 ["The trial court found that on August 29, 2016, Omar perpetrated domestic violence against S.Y. The court stated that this finding triggered a rebuttable presumption that an award of sole or joint custody to Omar would be detrimental to A.'s best interest."])

Once a rebuttable presumption is triggered, the party opposing the presumption must “rebut” the presumption by proving that the presumed fact is false. Below, we have provided examples of rebuttable presumptions under the law, their triggers, and how they work, followed by the rebuttable presumption under Section 47605(c)(8) at issue in this appeal:

Statute	Initial Factual Trigger (Fact #1)	Other Fact Presumed to be True (Fact #2)	Sample Rebuttal Evidence to Disprove the Presumed Fact
“A person not heard from in five years is presumed to be dead.” (Evidence Code Section 667)	Person not heard from in five years.	The person is dead.	Evidence introduced by a family member that a relative is still alive, like proof of a phone call, may overcome the presumption that the person is dead.
“The things which a person possesses are presumed to be owned by him.” (Evidence Code Section 637.)	Person possesses a thing.	The person owns the thing.	The presumption that a person in possession of a phone is its owner might be rebutted through evidence that the phone bill is paid by a third-party.
“A writing is presumed to have been truly dated.” (Evidence Code Section 640.)	Writing is dated.	Date is true.	An envelope containing a postmark dated months after the letter was dated might rebut the presumption that the date on the letter is accurate.
“A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.” (Evidence Code Section 641.)	Letter is correctly addressed and mailed.	The letter was received.	Proof that a local mail processing center burned in a fire might rebut the presumption that the letter was received.
“[T]he school district shall <u>not deny</u> a petition for the establishment of a charter school <u>unless</u> ... [t]he school district is not positioned to absorb the fiscal impact of the proposed charter school.... Charter schools proposed in a school district [in receivership] shall be subject to a <u>rebuttable presumption of denial</u> .” (Education Code Section 47605(c)(8).)	District is in receivership.	The school district is not positioned to absorb the fiscal impact of the proposed charter school (and the charter may be denied.)	Evidence introduced by a charter petitioner that the impact of the proposed charter school only represents a small portion of the school district’s unrestricted year-end fund balance rebuts the presumption that the school district is unable to absorb the fiscal impact of the proposed charter school.

As each of these examples illustrate, “when some other fact is proved or otherwise established in the action,” this triggers a presumption that “the law requires to be drawn” “**in the absence of a sufficient contrary showing**,” and “place[s] the responsibility for establishing the nonexistence” of the presumption “on the party most able to do so.” Relevant here, under Section 47605(c)(8), the rebuttable presumption provides that a charter petitioner intending to locate in a school district under receivership may overcome the presumption that the school district is unable to absorb the fiscal impact of the charter school through evidence that the school district **is** actually able to absorb the fiscal impact.

These examples also demonstrate that if the triggering fact (fact #1) is false or not established, i.e., a person was heard from three years ago, or a letter was incorrectly addressed, or the school district is not in receivership, no other facts will be presumed and no there will be no presumption to rebut (fact #2), i.e., the person will not be presumed dead, the letter will not be presumed to have been received, and the school district will not be presumed to be unable to absorb the fiscal impact of the charter school. In other words, whether the trigger is true or not (fact #1) is a separate issue and fact from whether the presumption created by the prerequisite fact is true or not (fact #2).

The CDE's Error, Explained

The CDE's error is that it mistook the fact triggering the rebuttable presumption (fact #1) as the fact to be rebutted (also fact #1). This error is apparent by comparing the legal standard for denial under Education Code Section 47605(c)(8) with the CDE's own conclusion. Again, that standard provides, in relevant part, that:

The 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... [t]he school district **is not positioned to absorb the fiscal impact** of the proposed charter school. **A school district satisfies this paragraph if it ... is under state receivership.** Charter schools proposed in a school district **satisfying one of these conditions shall be subject to a rebuttable presumption of denial.**

(Emphasis added.) There are three rules that can be drawn from the law:

1. A charter petition **may** be denied where a school district **cannot absorb** the fiscal impact of a charter school. Conversely, a charter petition **may not** be denied under Section 47605(c)(8) where a school district **can absorb** the fiscal impact of a new charter school.
2. A charter school proposing to open in a school district that is in receivership satisfies the triggering "condition" (fact #1) that makes the charter petition "**subject to a rebuttable presumption of denial**" on the basis that the school district cannot "absorb the fiscal impact" of the new school.
3. However, if the charter school **rebutts the presumption for denial** by demonstrating that despite the receivership status, the school district **can absorb** (fact #2) the fiscal impact of the proposed charter school, the charter petition cannot be denied under Section 47605(c)(8).

Here, the District is in receivership, and therefore "satisfies one of these conditions" (fact #1) to trigger the rebuttable presumption of denial. Thus, the burden shifts to Caliber to rebut the presumption for denial and demonstrate that the District **can absorb** (fact #2) the fiscal impact of a new charter school. The CDE's recommendation demonstrates that it did not apply this standard, and instead conflated facts #1 and 2 together as only fact #1:

The CDE concludes that VCUSD is under state receivership and satisfies the requirements of EC Section 47605(c)(8), and that **[Caliber] has not submitted evidence to rebut that VCUSD is under state receivership.** Therefore, the CDE recommends that the ACCS

submit a recommendation to the SBE to summarily deny review of the appeal (Recommendation, p. 6.).

This conclusion demonstrates that CDE mistook the fact of receivership – the “condition” triggering the rebuttable presumption standard – as the fact to be rebutted. That is, the CDE mistakenly construed the law as providing that if a school district produces evidence that it is in receivership, then receivership is presumed unless receivership is rebutted. But, “receivership” is not the “presumption” at issue and is not the subject to be rebutted. Receivership is the *trigger*, fact #1. The factual finding that “the school district is not positioned to absorb the fiscal impact of the proposed charter school” is the “presumption” that the law presumes due to receivership. That presumption of the school district’s inability to absorb the fiscal impact of a charter school is rebuttable by Caliber. Caliber did fully rebut that presumption, as the record demonstrates. (Caliber’s Appeal at pp. 18-32.) The CDE’s recommendation completely, and inexplicably, ignores the rebuttal evidence in the record.

Again, it is clear from Section 47605(c)(8) that receivership is not the fact to be rebutted under the rebuttable presumption standard – receivership is the condition that triggers the rebuttable presumption standard. Notably, the fact of receivership is not open to debate or interpretation – receivership is a status applied by State based on whether a school district has an outstanding loan to the State. (<https://www.cde.ca.gov/fg/fi/ir/loanlist.asp>.) Either a school district is in receivership, or it is not. On the other hand, whether a school district can or cannot absorb the fiscal impact of a charter school is a factual issue that is subject to rebuttal based on the facts, i.e., what is the projected impact and can that impact be absorbed?

If receivership alone were a sufficient reason to deny a charter petition, and the school district’s actual ability to fiscally absorb the charter school were irrelevant (as the CDE’s recommendation proposes), there would be no reason for the Legislature to write a “rebuttable presumption” into the law. The Legislature would have provided that if a school district were in receivership, it would be “deemed established” that the school district is unable to absorb the fiscal impact of the charter school, and therefore the charter can be denied for that reason alone. But, as addressed above, the Legislature adopted the “rebuttable presumption” language in AB 1505 rather than the “deemed to be established” language rejected in AB 1172.

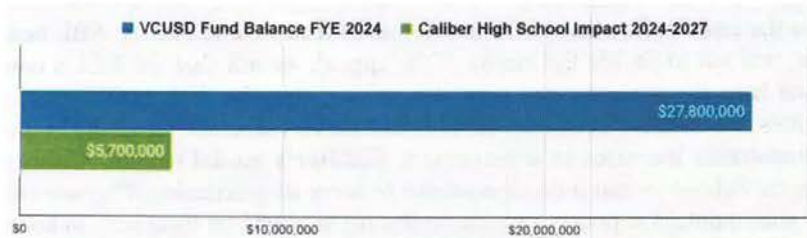
The District is Clearly Able to Absorb the Fiscal Impact of the Charter School

As addressed in detail in Caliber’s appeal and the record, Caliber established that the District is positioned to absorb the fiscal impact of the charter school through the time period that the District will remain in receivership, i.e., 93 units of ADA through 2023-24.

	VCUSD Second Interim Forecast		
	2021-22	2022-23	2023-24
Beginning Unrestricted Fund Balance	27,526,938	48,035,620	42,046,632
Total Revenues	127,283,691	102,621,811	97,874,404
Total Expenditures	106,775,009	108,212,550	111,161,647
Net Increase (Decrease)	20,508,682	-5,590,739	-13,287,243
Ending Unrestricted Fund Balance	48,035,620	42,444,881	28,759,389
Charter Impact		-398,249	-943,649
Adjusted Ending Fund Balance	48,035,620	42,046,632	27,815,740

(Caliber’s Appeal at pp. 21-25.) The District’s own financial reports accounted for the fiscal impact of the Charter School and indicate that the District could readily absorb the fiscal impact of the Charter School during the remaining period of receivership. (Appeal at p. 8, 18-21, DR 1639, DR 1649-1650, SR 24.)

Even accounting for the fiscal impact of the Charter School beyond receivership, less than \$6 million through the end of the five-year term of the Charter School, the Charter School’s fiscal impact combined for all five years constitutes only approximately 20% of the District’s unrestricted ending fund balance in 2023-24. (*Id.* at 24.)



At full capacity in its fourth year of operation, the Charter School’s existence will impact 186 units of ADA, which is barely 2% of the District’s 2021-22 P-2 ADA of 8,475.23. (*Id.* at 21.)

The Ramifications of the CDE’s Recommendation Are Troubling

The CDE’s position, if adopted, would lead to outcomes harmful to students and families, and which the rebuttable presumption standard was designed to avoid. If adopted, the position would mean that a school district repaying a loan to the State could always refuse to authorize new charter schools with impunity, no matter how insignificant or manageable the loan payments are, no matter that the loan balance will be soon repaid (or could be paid off immediately from cash on hand), and no matter that the district can easily absorb the fiscal impact of the charter school. The CDE’s position means that irrespective of the merits of a proposed charter school program and community demand and need, and despite reality that the district can absorb the fiscal impact, that the technical status of “receivership” alone allows that school district, solely out of financial interest, to preclude students from enrolling in school programs expected to serve them better.

Specifically, for example, on the CDE’s recommendation, Inglewood Unified School District can refuse to authorize a new charter school until it pays off its loan 12 years from now in November 2034, simply because it has an outstanding loan, and regardless of the fact that it was projected to have a \$40 million positive fund balance as of its second-interim report in 2021-22. As is commonly known, the mere fact of having a loan does not indicate insolvency nor a dire financial condition; having a mortgage, a car loan or lease, a credit card balance, a bond, or other debt does not mean that a person or entity is “unable to absorb” the impact of some kind of reduction in income. A 10% loss of income would have a different impact from an 80% loss of income. Debt payments that constitute 10% of the unrestricted ending fund balance would have a different implication on the ability to absorb a loss compared with debt payments that constitute 80%. The facts of each case must be evaluated to reach a conclusion regarding whether a person or entity can absorb a financial loss or not.

As the CDE's recommendation would have it, regardless of the facts, and a school district's actual ability to absorb the fiscal impact of a new charter school, a denial by a school district in receivership will always be unappealable and will never reach the State Board of Education, because the fact of receivership will never be rebuttable. This is not the law. The law provides that there is a **rebuttable presumption** for denial when a school district is in the condition of receivership, *not an unappealable, conclusive right to deny, facts and reality and truth do not matter, because a school district is in receivership.*

The Denial is About Preventing Students From Choosing Better Schools

While the issue before the ACCS is whether to recommend that the SBE hear the Caliber's appeal or not, and not to decide the merits of the appeal, we ask that the ACCS consider the high stakes at issue here for students, and why it is critical that the SBE hear appeals like this one. Caliber operates two successful charter schools that serve vulnerable students in grades TK-8 and produce demonstrable increases in achievement. **Caliber's model works.** Caliber petitioned to open the Charter School so that it could continue to serve its graduating 8th grade students through high school, and maintain supports and continuity for students on their path to college and career – the core education objective of the State. **There is no finding at issue in this appeal that Caliber's program is unlikely to succeed or unsound or not in the interests of the community.**

Ultimately, the sole issue in this appeal is about money and blocking students from exercising choice: whether the District can rest on its receivership status alone to avoid authorizing new schools that would serve provide a choice to the District's students and thereby preclude the District from claiming apportionment for those students. Caliber agrees that the law now allows school districts in receivership to deny petitions for new charter schools when they **cannot** absorb the fiscal impact of a new charter school. But, the law was never intended to give carte blanche authority to school districts to deny new charter schools when they **can** absorb the fiscal impact. The evidence shows that District can readily absorb the fiscal impact of the Charter School, and in the interest of students, the law requires that the Charter School be approved.

* * *

We appreciate the time and attention of the ACCS in reviewing this very important matter, and reiterate our request that the ACCS recommend that Caliber's appeal be heard by the SBE. Please feel free to contact me (terence@caliberschools.org) if you have any questions.

Sincerely,



Terence Johnson
Lead Petitioner