No. A139652

IN THE

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION TWO

AMERICAN INDIAN MODEL SCHOOLS,

Respondent/Plaintiff,

v.

OAKLAND UNIFIED SCHOOL DISTRICT, ET AL.,

Appellant/Defendant.

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
THE HONORABLE EVELIO GRILLO, PRESIDING
LOWER COURT CASE NO.: RG13680906

BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF DEFENDANTS AND APPELLANTS

Laura Schulkind (SBN 129799)
Megan M. Lewis (SBN 246052)
LIEBERT CASSIDY WHITMORE
153 Townsend Street, Suite 520
San Francisco, California 94107
Telephone: 415.512.3000 / Facsimile: 415.856.0306

Keith Bray (SBN 128002)
General Counsel/ELA Director
Joshua R. Daniels (SBN 259676)
Staff Attorney
CALIFORNIA SCHOOL BOARDS ASSOCIATION/EDUCATION LEGAL ALLIANCE
3251 Beacon Boulevard
Sacramento, California 95691
Tel: 916.669.3248 / Fax: 916.374.3407

Attorneys for Amicus Curiae
CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE

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I. INTRODUCTION

Amicus Curiae California School Boards Association's Education Legal Alliance ("ELA") submits this brief in support of the Oakland Unified School District's ("District") appeal of a preliminary injunction erroneously granted by the trial court. The injunction should be overruled on multiple grounds.

First, as the trial court's own order demonstrates, it issued a preliminary injunction despite having no jurisdiction over the underlying action. Specifically, the court states that its preliminary injunction is intended to maintain the status quo, "while AIMS [American Indian Model Schools] pursues its administrative appeals." (Alameda County Superior Court Order Granting in Part Motion for Preliminary Injunction ("Order"), 6:19-20 (Appellant's Appendix ("AA"), Vol. 7, p. AA01691).) In other words, the Order concedes that AIMS filed its writ of mandamus while still pursuing its administrative remedies. As such, the doctrine of exhaustion of administrative remedies precluded the trial court from taking jurisdiction of the writ. Without jurisdiction of the writ, it had no legal ability to entertain the request for preliminary injunction, nor could it properly conclude that AIMS was likely to succeed on its underlying action.

This usurpation of the administrative process is particularly troubling where, as here, the tribunals vested with authority to hear charter revocations and revocation appeals are boards of education. These

governmental entities are charged by statute to oversee the state's public school system. They are granted broad discretion to carry out this duty and are recognized in law as having the unique expertise to do so. Here, the trial court disregarded the expertise and fact-finding undertaken by the district and county governing boards and preempted the essential role of the State Board of Education ("SBE")—the expert tribunal designated to hear this appeal—by opining on the merits of AIMS' appeal before the SBE had an opportunity to rule. The trial court also failed to give proper weight to the District's decision to revoke by failing to apply the abuse of discretion standard applicable in writ proceedings. This indifference to the expertise and administrative role of boards of education undermines the integrity of the administrative review process and implicates the separation of powers.

Second, the trial court's misapplication of the law is evident in its analysis. The Order reveals a fundamental misunderstanding of the Charter Schools Act ("Act") and confusion over the proper interplay between Education Code sections 47607(c)(1) and (c)(2). Indeed, the parties' substantive dispute over the proper interpretation of the Act demonstrates why the trial court should not have taken premature jurisdiction of the writ and granted a preliminary injunction; it was struggling with parsing the statutes precisely because it acted before (and thus without the guidance of) the SBE's more thorough and expert review of the evidence and the findings of the District board.

Finally, as a matter of policy, ELA submits that this Court must be concerned with the burden that will be placed on the judiciary if this preliminary injunction is upheld. As described below, the Education Code establishes administrative review procedures to adjudicate numerous disputes that arise in the educational setting. If AIMS is permitted to obtain judicial preliminary relief while pursuing its administrative appeal, this option will become available in the thousands of administrative disputes that are handled by district and county boards and the SBE. No principled distinction would preclude parties frustrated with the administrative process from seeking injunctive relief before exhausting their administrative remedies. For this reason also, the preliminary injunction should be overruled.

II. LEGAL BACKDROP

To understand the error of the trial court's Order, it is useful to first consider the authority vested in local governing boards, county boards, and the SBE by California's legislature and constitution. These laws confer broad discretionary authority on local and county boards, as well as the SBE, and reflect the deference owed these entities in the exercise of their duties.

A. The Constitutional and Legislative Scheme Vesting Public School Oversight in Local Governing Boards, County Offices, and the State Board of Education.

Article IX of the California Constitution directs the Legislature to establish a system of public schools and confers on it the power to, among other things, "authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." (Cal. Const., art. IX, § 14.) Fulfilling its mandate, the Legislature imbued district boards, county boards, and the SBE with broad authority to govern the administration of the state's public education system.

For example, the Legislature vested in local school boards primary responsibility for managing their districts and contemplated that they would possess the educational expertise to do so. Thus, among the duties and privileges of local governance, the Legislature provides that,

> The governing board of any school district may: (a) Conduct studies through research and investigation as are determined by it to be required in connection with the present and future management, conditions, needs, and financial support of the schools; or join with other school district governing boards in the conduct of such studies. (Ed. Code § 35172.)

Further, and most importantly, in creating and setting the authority of local school boards, the Legislature recognized the need for local discretionary authority in the implementation of public education:

> (a) The Legislature finds and declares that school districts, county boards of education, and county superintendents of schools have diverse needs unique to their individual

communities and programs. Moreover, in addressing their needs, common as well as unique, school districts, county boards of education, and county superintendents of schools should have the flexibility to create their own unique solutions.

(b) In enacting Section 35160, it is the intent of the Legislature to give school districts, county boards of education, and county superintendents of schools broad authority to carry on activities and programs, including the expenditure of funds for programs and activities which, in the determination of the governing board of the school district, the county board of education, or the county superintendent of schools are necessary or desirable in meeting their needs and are not inconsistent with the purposes for which the funds were appropriated. It is the intent of the Legislature that Section 35160 be liberally construed to effect this objective.

(Ed. Code § 35160.1.)

At the state level, the SBE is charged with the responsibility to develop and utilize educational expertise to administer the state's public school system and is given the authority to:

- Determine all questions of policy within its powers (Ed. Code § 33030);
- Adopt rules and regulations for its own government and the government of the state's elementary, secondary, technical, and vocational schools (Ed. Code § 33031); and
- Study the educational conditions and needs of the state and make plans for the improvement of the administration and

efficiency of the public schools of the state. (Ed. Code §§ 33502, *et seq*.)

As discussed below, the exhaustion of administrative remedies doctrine is designed to preserve the separation of powers and ensure that the tribunal with the requisite expertise adjudicates disputes. (See *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal. 4th 377, 391; *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 86.) The statutory treatment of boards of education as educational experts with broad discretionary powers is thus relevant to the application of the exhaustion doctrine. Indeed, it provides the essential context for reviewing the trial court's intrusion upon the charter revocation review process.

B. The Education Code's Administrative Review Processes.

The Education Code provides for the administrative review and resolution of a wide range of disputes and complaints that arise in the educational context. For example, the Education Code prescribes an administrative review process for dispute resolution in each of the following areas:

- certificated layoffs (Ed. Code § 44949);
- student expulsions (*Id*. at §§ 48919-48921);
- inter-district transfers (*Id*. at §§ 46601-46603);
- discrimination complaints (*Id*. at §§ 260-262.4);

- classified employee discipline (*Id*. at § 45113 (c));
- certificated employee discipline (*Id*. at §§ 44944-44947); and
- special education compliance complaints (*Id*. at §§ 56500.2)

For each of these areas of potential dispute, the Legislature has provided a process of administrative review and remedies involving internal district procedures, county boards of education, the State Department and Board of Education, and/or the Office of Administrative Hearings. The relevant procedures prescribe the manner and timing of notice, standard of review, manner of taking and weighing evidence, scope of appeal, and administrative remedies. Collectively, this evidences a pervasive legislative intent to have disputes relating to educational matters first considered and acted on by local education agencies—the bodies with the knowledge and expertise to adjudicate these disputes; and then, if challenged, to have local decisions vetted administratively by appellate tribunals with the special expertise to do so.

ELA provides this information as part of the necessary legal backdrop to this case because the trial court's ruling implicates the integrity of all administrative review processes established by the Education Code. If AIMS is permitted to enjoin administrative review here, ELA sees no principled basis on which to deny such attempts in layoffs, student expulsions, charter renewals, and the myriad other educational disputes currently resolved through statutorily prescribed administrative procedures.

Inevitably, this would "open the floodgates" to the already over-burdened civil court system. Few issues create a greater sense of urgency than public education or stir such heated debate. Parents, pupils, educators, and administrators are all passionate stakeholders in the State's public school system, and emotions often run high over issues such as layoffs, student expulsions, and serving students with special needs. If the aggrieved in such disputes were able to circumvent the required administrative processes whenever they believed it was too slow to address their needs, the courts would quickly become overwhelmed by writ petitions and requests for preliminary injunctions.

C. The Charter Schools Act Administrative Review Process.

The Charter Schools Act establishes a comprehensive scheme for the authorization, oversight, renewal, and revocation of charter schools. (Ed. Code § 47600, *et seq.*) Among other things, this scheme identifies the grounds for revocation of a charter and vests authority in the chartering authority to weigh the evidence and determine whether revocation of the charter is appropriate. (Ed. Code §§ 47604.5, 47607(c)(1).)

Among other things, the Act and the corresponding regulations specify in detail the steps that a chartering authority must take before deciding whether to revoke a school's charter. (Ed. Code §§ 47607(d), (e); 5 CCR 11968.5, *et seq.*) These steps generally include:

- Providing written notice to the charter school of any violation of the applicable section of the Education Code;
- Giving the charter school a reasonable opportunity to remedy the violation(s); and
- Holding a public hearing on whether evidence exists to revoke the charter.

(Ed. Code §§ 47607(d), (e); 5 CCR 11968.5.2).

The Act also requires that a charter school wishing to challenge the revocation of its charter follow a specific process. First, the charter school must appeal the revocation to the county board of education ("CBOE") within 30 days of receiving a final decision from the local board. (Ed. Code § 47607(f)(1); 5 CCR 11968.5.4(a).) If the CBOE upholds the revocation and the charter school still wishes to challenge its revocation, it must then appeal to the SBE. (Ed. Code § 47607(f)(3); 5 CCR 11968.5.4(b).) The SBE is charged with reviewing whether the findings made by the local board are supported by substantial evidence. (Ed. Code § 47607(f)(4); 5 CCR 11968.5.5.) If the findings are supported by substantial evidence, the SBE may uphold the revocation. (Ed. Code § 47607(f)(4).)

III. LEGAL ARGUMENT

A. Because the Failure to Exhaust Administrative Remedies Dooms AIMS' Underlying Writ, the Trial Court Erred in Finding AIMS Likely to Succeed on the Merits.

1. AIMS cannot succeed on its underlying writ because the trial court lacks jurisdiction to hear it, and, as such, the trial court erred in granting the preliminary injunction.

The correct question before the trial court in considering AIMS' request for a preliminary injunction was whether AIMS had demonstrated a likelihood of success on its underlying claim before that court—i.e., the writ of mandamus. Thus, although the issue on appeal pertains to issuance of a preliminary injunction, analysis must begin with the writ itself; if the underlying action cannot succeed, then AIMS cannot meet the "likelihood to succeed" criterion necessary to prevail. With the question properly framed, the answer is clear: AIMS' failure to exhaust administrative remedies precludes success on its underlying writ, and, on this basis alone, the preliminary injunction should have been denied.

Under the doctrine of exhaustion of administrative remedies, "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 292.) To satisfy the exhaustion requirement, a party must take advantage of every stage of the administrative grievance process provided. (See *Sea & Sage Audubon Society, Inc. v. Planning Comm'n* (1983) 34 Cal. 3d 412, 418; *Campbell v. Regents of Univ. of Calif.* (2005) 35 Cal. 4th 311, 328; *Citizens*

for Open Government v. City of Lodi (2006) 144 Cal. App. 4th 865, 875 (no exhaustion where plaintiff failed to appeal Planning Commission's decision to City Council, as required by CEQA).)

The exhaustion doctrine constitutes a fundamental rule of procedure, not a matter of judicial discretion. (*Abelleira, supra,* 17 Cal.2d at 293.) Consequently, "[w]hen no exception applies, the exhaustion of an administrative remedy is a jurisdictional prerequisite to resort to the courts." (*County of Contra Costa v. State of California* (1986) 177 Cal. App. 3d 62, 73; see also *United States v. Superior Court* (1941)19 Cal. 2d 189). A court violating this rule acts in excess of its *jurisdiction,* so that any injunction will be set aside. (*Board of Police Commrs. v. Sup.Ct.* (1985) 168 Cal. App. 3d 420, 431-432; *Morton v. Superior Court* (1970) 9 Cal. App. 3d 977, 981.)

As described above, and demonstrated in the record, the Charter Schools Act provides a detailed administrative appeal process for reviewing a chartering authority's decision to revoke a charter. (Ed. Code § 47607(f); see also 5 CCR 11968.5.4; 5 CCR 11968.5.5.) This process requires charter schools to appeal a revocation to both the CBOE and the SBE before pursuing a judicial remedy. (*Id.*)

Contrary to this scheme, AIMS—in the midst of pursuing its administrative remedy—sought a writ of mandamus to "set aside the District Board's revocation of three charter schools …, and a writ of

prohibition to prevent [the District] from taking any action pursuant to the revocations. [AIMS] further seeks preliminary and *permanent* injunctive relief." (Writ Petition, 1:1-10 (emphasis added).) AIMS filed the instant writ while its first-level appeal was pending before the Alameda County Board of Education ("ACBOE") and continued to pursue writ relief while adjudicating (and losing) its appeal before the ACBOE and after filing its administrative appeal with the SBE. (Opening Brief, pp. 9-10.) In other words, AIMS sought judicial intervention in the form of a writ petition while simultaneously pursuing its administrative appeal to achieve the same result. By permitting AIMS to concurrently pursue administrative and judicial relief, the trial court caused a fundamental disruption to the administrative process prescribed by law.

As such, the writ itself must fail; and because the writ must fail, the trial court erred in concluding that AIMS was likely to succeed on the merits of its claim. (See *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal. App. 4th 65, 78 (physician challenging peer review action who failed to exhaust administrative and judicial remedies could not establish probability of prevailing).) Therefore, the trial court's order must be reversed.

2. The trial court erroneously asserts that issuing a preliminary injunction does not intrude on the administrative review process.

The trial court appears to assert that it has not intruded upon the administrative review process by issuing the instant preliminary injunction. However, the trial court's own explanation reveals that this is erroneous. First, the court sates that it "can craft a preliminary injunction that will permit [the District] to more carefully monitor and regulate the financial management of the AIMS schools *while AIMS pursues its administrative appeals*." (Order, 6:17-20 (Vol. 7, p. AA01691) (emphasis added).) Nothing in the detailed step-by-step revocation appeal process contemplates a court's stepping in—either to stay the proceedings or to direct how a school district board will regulate the financial management of a charter school while an appeal is pending. Indeed, the court's approach thwarts the intention behind the exhaustion doctrine, which is to protect the separation of powers by vesting the tribunal with the appropriate expertise with decision-making autonomy. (See *Farmers Ins. Exch., supra,* 2 Cal. 4th at 391; *Rojo, supra,* 52 Cal. 3d at 86.)

Here, the tribunals with the appropriate expertise were the District's board in the first instance, followed by the ACBOE and the SBE. As summarized above, these entities are charged with the oversight of California's public education system; they are granted broad discretion to carry out these duties; and they are considered to have the expertise to do so. Moreover, the legislative decision not to create such a role must be respected. (*Grant v. Superior Court* (1978) 80 Cal. App. 3d 606, 609 ("The

Legislature must be deemed to have been aware of the doctrine of exhaustion of administrative remedies, and made no express exemption from that requirement in the statute.").)

Second, it is revealing that the court characterizes its injunction as simply imposing a stay while AIMS "pursues its administrate (sic) and judicial remedies." (Order, 9:4-6 (Vol. 7, p. AA01694).) The court similarly stated that it "does not intend to interfere with any appeal to the State Board of Education . . ." (Order, 9:6-7 (Vol. 7, p. AA01694).) However, if the court does not intend to preempt the appeal before the SBE, then it cannot intend to issue the permanent relief sought by AIMS. In other words, *the court concedes that the writ is merely a foil for the preliminary injunction.* This concession, by itself, demonstrates that the trial court does not have jurisdiction over the writ, and, without that jurisdiction, it was precluded from entertaining the preliminary injunction.

Finally, the court's ruling does—in fact—interfere with the appeal to the SBE. The Order concludes that "AIMS has demonstrated a likelihood that it will prevail on the merits *at trial*." (Order, 7:2 (Vol. 7, p. AA01692) (emphasis added.).) This indicates that the court does intend to adjudicate the writ—contrary to its claim that it does not intend to interfere with the administrative appeal. Thus, the court failed to recognize that adjudicating AIMS' request for permanent relief would eviscerate the administrative appeal.

The Legislature instilled the CBOE and the SBE with the authority to review and decide appeals of charter revocations because those bodies have the necessary expertise to evaluate the evidence and consider the analysis and review conducted by the local board as the chartering authority. Under the scheme contemplated by the Education Code, it is for the SBE to decide whether the District relied upon substantial evidence in revoking AIMS' charter. (Ed. Code § 47607(f)(4).) Notably, the review prescribed by the Legislature at both the CBOE level and the SBE level is *de novo,* which further indicates the legislative intent that these administrative bodies exercise careful, expert review on revocation appeals. (Ed. Code §§ 47607(f)(2), (f)(4).) The trial court was not in a position—as a matter of jurisdiction, separation of powers, procedure, and policy—to preempt the SBE by predicting how the SBE would carry out its role and review the evidence.

3. AIMS erroneously asserts that it has exhausted its administrative remedies.

AIMS argues that it should be deemed to have exhausted its administrative remedies because the statutory deadline for the SBE to act on the appeal passed on November 20, 2013. (AIMS' Brief, p. 44.) This claim is without merit for two reasons.

First, the matter before the Court of Appeal is the trial court's order dated July 19, 2013. What may or may not have occurred after that date is

irrelevant. At the time the trial court analyzed AIMS' likelihood of success on the writ, its appeal was pending before the SBE. Indeed, AIMS admits in its brief that it had not exhausted its administrative remedies until November 20, 2013—more than four months after the trial court evaluated AIMS' likelihood of success on the writ petition.

Second, to find exhaustion of administrative remedies here would reward AIMS for its abuse of the administrative process. The SBE did not voluntarily opt not to act on AIMS' appeal. Rather, it was divested of its authority by the trial court's erroneous intrusion on the process. (See the District's Motion for Judicial Notice, Exh. C.) When the trial court determined that AIMS had demonstrated a likelihood of success on the merits of its writ petition and granted AIMS a preliminary injunction to maintain the status quo, the SBE determined that it had been divested of its jurisdiction. (*Id*.) That is the sole reason why it did not act. (*Id*.) AIMS should not be permitted to use the effects of an erroneous preliminary injunction to secure jurisdiction over its writ. Moreover, should this Court overrule the grant of the preliminary injunction, the impediment to the SBE's jurisdiction will be lifted. Thus, administrative review should not be viewed as exhausted, but rather unilaterally placed on hold by the erroneous issuance of the preliminary injunction.

4. Upholding the preliminary injunction would invite disregard for the administrative process,

undermine judicial efficiency, and open the judicial floodgates to those impatient with administrative review.

The court's entertainment of an unmeritorious writ to bootstrap a preliminary injunction must be rejected. Not only does this maneuver ignore the "likelihood of success" standard discussed above, it ignores the prohibition against seeking a preliminary injunction while administrative remedies are still pending. Where a statute provides for administrative remedies, AIMS must exhaust those remedies prior to seeking injunctive relief. (*Board of Police Commissioners v. Superior Court, supra,* 168 Cal. App. 3d at 433.) As the court in *Board of Police Commissioners* explained, once an administrative agency commences adjudicatory proceedings, the exhaustion doctrine cannot be circumvented by bringing an action for injunctive relief. (*Id*. at 499.) The court reasoned that "[t]his rationale is necessary for the exhaustion doctrine to be meaningful. Without such a rule, persons subject to administrative procedures with claims of unconstitutionality urged on requests for injunctive relief would clog the courts, and administrative agencies would be by passed and become impotent." (*Id*.) Indeed, one of the primary purposes of the doctrine of exhaustion of administrative remedies is to encourage the adjudication of as many cases as possible in the administrative realm to help lighten the load on the overburdened judiciary. (*Duffy v. State Bd. of Equalization* (1984)

152 Cal.App.3d 1156; *Morton, supra,* 9 Cal. App. 3d at 982; *Doe v. Albany Unified Sch. Dist.* (2010) 190 Cal. App. 4th 668, 685-86.)

These principles of exhaustion would be thwarted by upholding the preliminary injunction here. It would signal that impatient litigants faced with charter revocations need not take their disputes to their county boards or to the SBE as prescribed by law. Moreover, the effect would extend beyond charter revocation disputes. The Education Code has established a similar review process for the granting and renewal of charters, both of which also give rise to disputes in which litigants feel a sense of urgency. Thus, the potential burden to the courts of authorizing this preliminary injunction is significant, as there are currently close to 1,000 charter schools operating in California.[1]

Further, such a ruling would implicate the integrity of other administrative remedies codified in the Education Code. As noted above, the Education Code provides for administrative resolution of numerous educational disputes. ELA sees no principled distinction between permitting a writ/injunction while an administrative revocation appeal is pending and permitting such judicial intervention while (for example) an administrative expulsion appeal is pending. In short, once the floodgates are open, there is nothing to prevent would-be litigants from circumventing

[1] (See http://www.cde.ca.gov/sp/cs/re/cefcharterschools.asp.)

the administrative processes contained in the Education Code with respect to other types of administrative decisions. As such, granting AIMS' writ petition threatens the integrity of these processes as well.

B. Even If It Were Proper for the Trial Court to Entertain AIMS' Motion for Preliminary Injunction, It Erred in Concluding AIMS Is Likely to Succeed in Challenging the Revocation of Its Charter.

ELA has demonstrated above that AIMS' writ cannot succeed on jurisdictional grounds, and that, on that basis alone, the preliminary injunction must be overturned. Nevertheless, ELA respectfully requests that the Court additionally reach the trial court's erroneous interpretation of the Charter Schools Act. The trial court's interpretation of the relevant language erroneously divests local boards of their statutory authority to manage the charter schools in their districts and revoke their charters upon substantial evidence of any of the bases authorized by statute. Because this interpretation impacts the hundreds of local school boards that oversee charter schools, the Court should reach this issue in order to provide statewide clarity on this important matter.

1. The trial court misapplied the standard of review applicable to writs of administrative mandate.

The trial court correctly recognized that, on a writ, review is for abuse of discretion: "[T]he court will consider whether petitioner is likely

to prevail on its claim taking into consideration that judicial review is limited to errors of law and a review of whether the administrative findings are support by substantial evidence. The agency has already completed its process, made its factual findings, and made its decision, so the court will not 'evaluate the credibility of witnesses and make[] factual findings on disputed evidence.'" (Order, 2:14-18 (Vol. 7, p. AA01687); see also *International Brotherhood of Electrical Workers v. Aubry* (1996) 42 Cal. App. 4th 861, 868; *301 Ocean Ave. Corp. v. Santa Monica Rent Control Bd.* (1991) 228 Cal. App. 3d Cal. Code Civ. Proc. § 1094.5(c) ("abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record").)

Further, when considering all relevant evidence within the administrative record, a trial court must remember that it is for the administrative agency to weigh the preponderance of conflicting evidence, as the court may reverse an administrative decision only if, based on the evidence before the administrative entity, a reasonable person could not have reached the conclusion reached by that agency. (*Eden Hospital Dist. v. Belshe* (1998) 65 Cal. App. 4th 908, 915.) This deferential standard requires the reviewing court to presume the correctness of the administrative ruling, as all reasonable doubts must be resolved in favor of the administrative ruling. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205, 1244; *Pescosolido v. Smith* (1983) 142 Cal. App. 3d

964, 970.)

Here, the trial court failed to give the required deference to the District's decision to revoke AIMS' charter. To apply the standard summarized above (and acknowledged by the trial court), the court should have asked:

- ***Could any reasonable fact-finder have reached the same conclusion as the District that substantial evidence supported revocation of the charter?***

Instead, the trial court formulated its standard of review this way:

- ***Whether "there is a reasonable probability that there is no substantial evidence that the [District] considered 'increases' in pupil academic achievement for 'all groups of pupils.'"*** (Order, 9:2-3 (Vol. 7, p. AA01692).)

Aside from being convoluted, the trial court's framing of the issue strains to avoid the deference to the District that is due. Specifically, by considering in a vacuum one of the factors upon which a board may revoke a charter under section 47607(c) (i.e., pupil outcomes), the court's analysis ignores the necessary weighing of multiple factors contemplated by section 47607(c)(1). In so doing, the court shifted the standard from whether a reasonable fact-finder could weigh the evidence related to multiple factors and reach the conclusion to revoke, to whether this criterion alone could support revocation. As discussed below, this not only intrudes on the

deliberative weighing of evidence delegated to boards of education, it misinterprets the review process set forth in the Education Code.

2. The trial court misconstrued Education Code section 47607(c)(2) as a separate inquiry that must be supported by substantial evidence.

Education Code section 47607(c) sets forth the standard of review that chartering authorities must apply in considering the revocation of a charter. Analysis of this standard must begin with section 47607(c)(1)—which was neither amended nor repealed when the Legislature added section 47607(c)(2). Section (c)(1) states:

> 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:***
>
> (A) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.
> (B) Failed to meet or pursue any of the pupil outcomes identified in the charter.
> (C) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.
> (D) Violated any provision of law.

(Ed. Code § 47607(c)(1) (emphasis added).) In other words: a charter may be revoked if a chartering authority finds substantial evidence of ***any one*** of the violations enumerated.

Effective January 1, 2013, the Legislature added section

47607(c)(2), which states:

> The authority that granted the charter shall consider increases in pupil academic achievement for all groups of pupils served by the charter school as the most important factor in determining whether to revoke a charter.

AIMS asserts that the plain meaning of the phrase "most important" supports its claim that "increases in pupil achievement for all groups of pupils served by the charter school" trumps the factors listed in section (c)(1). This argument fails because such an interpretation requires that section (c)(2) be read in a vacuum, and the canons of statutory construction require that statutes be read and considered as a whole, not piecemeal. (*Jurcoane v. Superior Court* (2001) 93 Cal. App. 4th 886, 893 ("[Courts] must read statutes as a whole, giving effect to all their provisions, neither reading one section to contradict others or its overall purpose, nor reading the whole scheme to nullify one section.").)

Thus, before discussing what this new section adds to the revocation scheme, it is essential to note what it has not taken away. Namely, nothing in the statutory language indicates an intent to repeal section (c)(1). Absent any such clear intent, section (c)(1) remains in full force and effect. Thus, section (c)(2) cannot be interpreted in a manner that vitiates a chartering authority's discretion to revoke a charter on ***any*** of the bases enumerated in section (c)(1) that is supported by substantial evidence. "[A]ll presumptions are against a repeal by implication. Implied repeals may be

found only where there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are so inconsistent that the two cannot have concurrent operation." (*Med. Bd. of California v. Superior Court* (2001) 88 Cal. App. 4th 1001, 1004-05 (internal citations and quotations omitted).)

The trial court's interpretation of 47607(c)(2) effectuates an improper repeal of section (c)(1) by concluding that substantial evidence of:

- a material violation of the charter ((c)(1)(A);
- failure to meet pupil outcomes identified in the charter (c)(1)(B);
- failure to adhere to accepted accounting principles or other, fiscal mismanagement (c)(1)(C); and/or
- violations of law (c)(1)(D)

cannot support a revocation, if there is not substantial evidence that the District treated pupil achievement of all groups as the most important factor. This interpretation nullifies the language in (c)(1) that substantial evidence of any one of the criteria for revocation is sufficient to revoke.

Such an implied repeal is unwarranted because section (c)(2) can logically be harmonized with (c)(1) in a manner that does not divest chartering authorities of their essential, discretionary authority, as provided for in section (c)(1). Under this analysis, section (c)(2) is properly read to guide chartering authorities in the application of section (c)(1)(B), which considers whether the charter school has "[f]ailed to meet or pursue any of

the pupil outcomes identified in the charter." As the basic canons of statutory construction recognize, a word or phrase bears the same meaning throughout a text, and statutes addressing the same subject should be interpreted together, as though one law. (*Emmert Indus. Corp. v. Artisan Associates, Inc.* (2007), 497 F.3d 982, 987; *Spriesterbach v. Holland* (2013) 215 Cal. App. 4th 255, 270.) Applying these principles of interpretation, it is clear that the consideration of "pupil outcomes" referenced in (c)(1)(B) refers to the same data boards are required to give primary importance to under (c)(2). Thus, (c)(2) simply provides a procedural guide as to how the criteria in (c)(1) are to be reviewed.

That (c)(1)(B) and (c)(2) are talking about the same issue is made evident by looking at the Act as a whole. First, the phrase "pupil outcomes" appears earlier in the Charter Schools Act, where it delineates that a charter petition must include a description of, "the measurable **pupil outcomes** identified for use by the charter school." (Ed. Code. § 47605(b)(5)(B) (emphasis added).) Thus, the "pupil outcomes identified in the charter" referred to in section (c)(1) are logically the "pupil outcomes" that are required to be stated in the charter pursuant to section 47607(b)(5)(B).

Second, section 47605(b)(5)(B) goes on to define the "pupil outcomes" to be described in the charter as including, "… **increases in pupil academic achievement** both school wide and **for all groups** of

pupils served by the charter school . . . ." (Emphasis added.) Thus, section 47607(c)(1)(B), read in conjunction with 47605(b)(5)(B), is properly understood to mean that:

- One of the bases upon which a charter may be revoked is where there is substantial evidence that the school has failed to meet or pursue the pupil outcomes in the charter; and
- Pursuant to section 47605(b)(5)(B), consideration of "pupil outcomes" includes whether there are increases in pupil academic achievement for all groups served by the charter school.

Now, turning to section 47607(c)(2). This section uses the same words and phrases as section 47605(b)(5)(B), and, as such, must be given the same meaning and read to support a coherent statutory scheme. Taking this approach, section 47607(c)(2) is logically read to guide in the application of section 47607(c)(1)(B)—and not as an additional criterion. In other words, the "increases in student achievement" for "all groups" that must be treated as "the most important factor" in (c)(2) are the same pupil outcomes that may (upon substantial evidence) justify revocation under (c)(1).

Thus, section (c)(2) does not establish a different inquiry with its own standards or required showing of evidence. Rather it indicates that, in applying (c)(1), student achievement of all groups is the most important

factor. As section (c)(1) makes clear, it is the role of local boards to determine whether the other enumerated factors, including fiscal mismanagement and violations of law, outweigh student achievement, as the local board did in this case. Section (c)(2) does not override the clear language of (c)(1) that a chartering authority may revoke based upon substantial evidence as to *any one* of the enumerated factors.

The trial court turned the inquiry on its head by essentially requiring that a chartering authority have substantial evidence that it considered student achievement of all groups as a threshold to revoking a charter. That is not what the statute requires. Rather, a chartering authority must have substantial evidence in support of the bases on which it decides to revoke. Where lack of student achievement is not the basis for revocation, there is no substantial evidence requirement as to that criterion.

Finally, ELA notes that, even if the juxtaposition of (c)(1) and (c)(2) creates ambiguity, the relevant extrinsic evidence supports ELA's interpretation. If statutory language is open to multiple interpretations, the Court must look to the legislative history and context to ascertain which interpretation is correct. (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272.) As the court explained in *Fontana*:

> If . . . the statutory terms are ambiguous, then [the court] may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such circumstances, [the court] select[s] the construction that comports most closely with the apparent intent of

> the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid[s] an interpretation that would lead to absurd consequences.

(*Id*. (internal citations and quotations omitted)).)

Here, the legislative intent behind the adoption of 47607(c)(2) supports ELA's interpretation. This section was added to meet the higher charter school accountability standards required by the federal government. (See discussion of accountability standards in the legislative history at Vol. 2, p. AA00342-344.) Specifically, states receiving federal charter school funds are required to codify procedures under which pupil achievement for all groups is the most important factor in all phases of the charter review process: granting, renewing, and revoking. In other words, the concern behind this requirement is in preventing the continuation of charter schools where one or more student groups are not succeeding. Indeed, charter groups *opposed* adoption of this provision, arguing that among other things, it "places unrealistic expectation on every charter school in the state." (Vol. 2, p. AA00344.) It would be fundamentally contradictory to the intent of this provision to permit it to be used as a shield against revocation by charter schools that may have high test scores, but where there is substantial evidence of gross malfeasance, as is the case here.

3. Applying the correct standard of review and correct interpretation of Section 47607(c)(2), a

reasonable fact-finder could and likely would determine that there is substantial evidence to support the District's revocation of AIMS' charter.

The proper inquiry on a writ of mandamus is whether a reasonable fact-finder could have reached the same conclusion as the administrative body. (*Sierra Club v. California Coastal Com.* (1993) 12 Cal. App. 4th 602, 610). Because there is substantial evidence to support the bases on which the District revoked AIMS' charter, the preliminary injunction must be overruled. The evidence in the record is reviewed at length by the District and will not be belabored here. However, ELA briefly notes the following particularly salient points:

- FCMAT (the Fiscal Crisis Management and Assistance Team) is a legislatively created, quasi-governmental entity that holds significant expertise and responsibilities regarding school finance and auditing practices. It was created by statute to help local educational agencies meet and sustain their financial obligations. (Ed. Code § 42127.8; Vol. 4, p. AA00888.) In short, FCMAT's findings and recommendations carry tremendous weight.
- The FCMAT audit requested by the ACBOE regarding AIMS found significant conflict of interest violations, fiscal mismanagement, and improper use of public funds by AIMS. The Audit's recommendation stated:

> The county superintendent should [n]otify the governing board of AIMS charter schools, the Oakland Unified School District governing board, the state controller, the superintendent of public instruction, and the local district attorney that there is sufficient evidence that fraud or misappropriation of assets and other illegal activities of charter funds may have occurred. (Vol. 4, p. AA00924.)

In light of the above, a reasonable fact-finder could reach the same conclusion as the District on the same evidence—to revoke the charter. Indeed, it is hard to imagine how a reasonable person could conclude otherwise. As such, AIMS cannot be found likely to prevail on the underlying writ, and the preliminary injunction should have been denied.[2]

C. The Court Erred in Finding That the Balance of Harms Weighed in Favor of AIMS.

In order to prevail on a preliminary injunction, the moving party must show that, on balance, the moving party would suffer greater harm if the court declined to issue the injunction than the responding party would suffer if the court did issue the injunction. (*Hunt v. Superior Court* (1999) 21 Cal. 4th 984, 999.)

[2] The District in its Reply Brief also demonstrates that there is substantial evidence in the record that it did—in fact—consider pupil achievement of all groups as the most important factor. As explained above, ELA does not think it is the District's burden to produce substantial evidence to show the weight it gave to the revocation criteria or that it did treat pupil achievement of all groups as the most important factor. Rather it needed to demonstrate that it treated this criterion as the most important factor, and the District is able to demonstrate it has substantial evidence to support the bases on which it revoked the charter. However, under either approach, the District clearly met the evidentiary standard.

The fundamental flaw in the court's balancing of harms is that the purported "harm" to AIMS is one that is the direct result of applying the statute. The Education Code specifically allows for charter schools that are in the process of appealing revocations, based on either a material violation of the charter or a failure to meet or pursue pupil outcomes identified in the charter, to continue to receive funding and remain open and operational during the appeals process. (Ed. Code § 47607(i).) The implication is that the Legislature intended to preclude charters that were revoked on the grounds of failure to adhere to generally accepted accounting principles, fiscal mismanagement, and/or any violation of law from continuing to receive funding and operate while the appeal of the revocation is pending.

ELA contends that, where the Legislature has established a comprehensive administrative review process, it cannot be circumvented by a claim that the process itself constitutes a cognizable harm. Every time a charter is revoked for malfeasance, students will be disrupted. The Legislature nonetheless provides for immediate closure of charter schools when malfeasance is at stake. If AIMS believes this scheme imposes an undue burden, its remedy is in the Legislature. (*Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal. App. 4th 1185, 1193-94 ("The separation of powers doctrine prevents [courts] from rewriting statutes that do not conflict with the Constitution, other than to correct an obvious and minor drafting error where necessary to effectuate the intent

of the Legislature.").)

IV. CONCLUSION

For the foregoing reasons, the Order should be reversed.

Dated: February 18, 2014

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

By: _____

Laura Schulkind
Megan M. Lewis
Attorneys for Amicus Curiae
CALFORNIA SCHOOL
BOARDS ASSOCIATION'S
EDUCATION LEGAL
ALLIANCE

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Brief of *Amicus Curiae* is produced using 13-point Roman type including footnotes and contains approximately 8,366 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 18, 2013

LIEBERT CASSIDY WHITMORE

By: _____
Megan M. Lewis

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the County of , State of California. I am over the age of 18 and not a party to the within action; my business address is 153 Townsend Street, Suite 520, San Francisco, California 94107.

On February 18, 2014, I served the foregoing document(s) described as **BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF DEFENDANTS AND APPELLANTS** in the manner checked below on all interested parties in this action addressed as follows:

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Executed on **February 18, 2014**, at San Francisco, California.

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

Becky L. Kirby, CCLS

SERVICE LIST

Court of Appeal of the State of California **(PERSONAL DELIVERY)**
First Appellate District, Division 2
350 McAllister Street
San Francisco, CA 94102

The Honorable Evelio Grillo
Alameda County Superior Court, Dept. 31
1225 Fallon Street, 2nd Floor
Oakland, CA 94612
(510) 268 – 5105

Alex James Kachmar, Jr.
Weintraub, Genshlea, Chediak, Tobin & Tobin
400 Capitol Mall, 11th Floor
Sacramento, CA 95814
(916) 558 – 6122

Gregory V. Moser
Evelyn F. Heidelberg
Alyssa Aiko Yamakawa
Procopio, Cory, Hargreaves and Savitch LLP
525 B Street, Suite 2200
San Diego, CA 92101
(619) 515 – 3208

Burke, Williams & Sorensen, LLP
John R. Yeh
2440 West El Camino Real, Suite 620
Mountain View, CA 94040
(650) 327 – 2672

Burke, Williams & Sorensen, LLP
Amy E. Hoyt
2280 Market Street, Suite 300
Riverside, CA 92501

Office of the General Counsel
Oakland Unified School District
Jacqueline P. Minor
1000 Broadway, Suite 398
Oakland, CA 94607