SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CALIFORNIA SCHOOL BOARDS ASSOCIATION, et al., Petitioners and Plaintiffs, v. CALIFORNIA STATE BOARD OF EDUCATION, Respondent and Defendant; ASPIRE PUBLIC SCHOOLS, INC., Real Party in Interest.	No. RG07-353566 STATEMENT OF DECISION

The petition of California School Boards Association (CSBA), Education Legal Alliance, California Teachers Association (CTA), Association Of California School Administrators, and Stockton Unified School District for writ of mandate[1]

[1] Petitioners' pleading, filed October 26, 2007, is captioned "Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief," and includes three causes of action seeking writs of mandate, a fourth cause of action for injunctive relief, and a fifth cause of action for declaratory relief.

came on regularly for hearing on December 16, 2011, in Department 30 of the above-entitled court, the Honorable Jo-Lynne Q. Lee presiding. CTA appeared by Priscilla Winslow. All other petitioners appeared by Deborah Caplan and Richard Miadach. Respondent California State Board of Eduction (SBE) appeared by Jennifer Bunshoft. Real party in interest Aspire Public Education (Aspire) appeared by Paul C. Minney.

On March 15, 2012, the court issued a proposed statement of decision granting the petition as to the first and third causes of action, and invited further briefing from the parties. On May 14, 2012, the court issued a proposed judgment. On June 8, 2012, the court heard further argument regarding the content of the statement of decision, judgment, and writ to be issued in this case. CTA appeared by Laura Juran. All other petitioners appeared by Ms. Caplan. SBE appeared by Gregory D. Brown. Aspire appeared by Mr. Minney.

Now, having considered all the papers filed on behalf of the parties, as well as the arguments presented at the hearings, and good cause appearing, the court HEREBY GRANTS the petition as to the first and third causes of action.[2] The court will issue a writ of mandate directing SBE to set aside its approval(s) of a

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[2] Petitioners have abandoned their second cause of action. (Petitioners' memorandum of points and authorities in support of petition for writ of mandate, filed October 28, 2011, at p. 8, fn. 4.) The court dismisses petitioners' causes of action for injunctive and declaratory relief as duplicative of the mandamus relief granted pursuant to this statement of decision and accompanying judgment.

statewide charter for Aspire, and to adopt regulations in compliance with the Education Code. The reasons follow.

SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

This matter comes before this court for determination on the merits following remand by the Court of Appeal in *Cal. School Boards Assn. v. State Board of Education* (2010) 186 Cal.App.4th 1298 (*CSBA*).[3] The First District opinion sets forth a detailed description of the factual and procedural background of this case up to the time this case was remanded to this court, and discusses in full the history and statutory scheme of the Charter Schools Act of 1992 and subsequent amendments (CSA, Education Code section 47600 et seq.)[4] and the regulations implementing section 47605.8 (Cal. Code Regs., tit. 5, §§ 11967.6, 11967.7, 11967.8).[5] A comprehensive history of the CSA, its purposes, and design is also found in *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125. Rather than reiterate the factual and procedural background of this case from the

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[3] In that July 26, 2010 decision, the Court of Appeal reversed the trial court's ruling sustaining respondents' demurrers to all of petitioners' claims, and remanded to this court for further proceedings. On August 24, 2010, the Court of Appeal denied rehearing. The Supreme Court denied review in November, 2010.

[4] Unless otherwise noted, all statutory references are to the Education Code.

[5] Unless otherwise noted, all references to regulations are to title 5 of the California Code of Regulations.

outset, or repeat the appellate courts' discussion of the purposes and history of the CSA, this court begins where the *CSBA* opinion leaves off.

In *CSBA* the Court of Appeal held that the CSA requires SBE to "find, before approving a statewide charter, that the applicant's instructional services will provide a statewide benefit, and that the benefit is one that cannot be provided under local charters." (*CSBA* at p. 1318.) Determining that SBE had not engaged in this "two-step analysis," it reversed the trial court's dismissal of the petition (on demurrer) and remanded the matter to the trial court for determination on the merits.

After remand, on December 21, 2010, Aspire submitted a request to SBE for approval of "material revisions" to its state charter petition in light of the *CSBA* opinion.[6] (AR 677-687.) SBE hearing agendas referencing "material revisions" were posted in January and February, 2011, but no action was taken on this agenda item at those meetings.[7] (AR 343, 650) On April 29, 2011, the material revisions

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[6] Petitioners assert that this request was not made public and the revisions being requested were not provided in response to several requests by petitioners. (AR 320, 366; Caplan Decl. ¶¶ 3-6.)

[7] The item was withdrawn at the January 2011 meeting. (AR 343.) In February 2011, an item was placed on SBE's meeting agenda titled "Statewide Benefit Charter Schools: Development of Regulations to Revise the Requirements for Statewide Benefit Charters and Consideration of Material Revisions to the Aspire Public School Statewide Benefit Charter." At its February 9, 2011 meeting, SBE directed the CDE to propose revisions to the requirements for statewide benefit charters as set forth in 5 California Code of Regulations section 11967.6 and to bring those revisions to SBE for approval. (AR 650.)

were placed on the agenda for consideration at the May 11, 2011 SBE meeting. (AR 668.)

Both proponents and opponents of Aspire's request for "material revisions," including representatives from the parties in this litigation, submitted evidence to SBE for consideration before and during the May 11, 2011 SBE hearing. (AR 1203-1286.) After the public comment period closed, SBE voted to approve two sets of "two-part findings" and to otherwise rectify the record to support its approval of Aspire's statewide charter. (AR 1246-1293.)

First, SBE determined "that [Aspire's] benefit in terms of funding and its ability to get statewide bonds constitutes a state-wide benefit in accordance with Education Code (ED) Section 47605.8 and Title 5, California Code of Regulations Section 11967.6 (b)." (AR 1246-1248.) SBE found that "this statewide benefit related to the ability to get funding through statewide bonds through good financing, that it cannot be provided by a series of local charters." (AR 1248-1250.)

Second, SBE determined that "Aspire's benefit in terms of being able to expand its teacher residency program constitutes a state-wide benefit in accordance with Education Code (ED) Section 47605.8 and Title 5, California Code of Regulations Section 11967.6 (b)." (AR 1264.) SBE found that Aspire's benefit related to the teacher residency program "could not be provided through a series of local charters."[8] (AR 1264-1267.) These actions were "affirmed" by the SBE "as a whole package as the board's response to Aspire's request for consideration of Material Revisions." (AR 1291-93.)[9]

Following the May, 2011 SBE actions, SBE filed an amended answer to the instant petition asserting as an affirmative defense that petitioners' claims are moot. (Amended Answer, affirmative defense ¶ 2.) Petitioners did not amend their original petition.

During the course of this litigation, Aspire has opened several state charter schools, bringing the total number of state charter schools it operates at this time to six. (AR 811.) In addition, there exist 24 locally chartered Aspire schools.[10]

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[8] Additionally, SBE made a finding that "Aspire has fully or substantially complied with all pre-opening conditions for operation for approval that were established by the state board and/or CDE for its statewide charter, and to waive any deadline that may or may not have been met in a timely fashion by Aspire." In connection with their second cause of action, now abandoned, petitioners sought an order that SBE enforce compliance with the pre-opening conditions set forth in the state charter.

[9] SBE approved each of these motions by a vote of 6-2, with one abstention. (AR 1248-1250, 1266-1268, 1291-93.)

[10] Aspire began operating locally approved charter schools in 1998. In 2005, when it petitioned the SBE for state charter approval, Aspire was operating 11 locally chartered schools. By January 2007, when it was being considered for state-wide charter, Aspire was operating 17 locally chartered schools. (AR03.)

Aspire's statewide benefit charter was scheduled to expire on or about June, 2012. (AR 815.)[11]

DISCUSSION

I. Petitioners' Claim that SBE's Approval of Aspire's State Charter Violated Section 47605.8

The court concludes that SBE violated section 47605.8 when it approved Aspire's petition for a state charter in 2007, and approved "material revisions" to the petition in 2011, because there was not substantial evidence in the record showing that Aspire met the statutory requirements for a state charter. Before reviewing the evidence, the court must address CSBA and Aspire's argument that this claim is moot, and the legal standard that Aspire's state charter application was required to meet.

A. Petitioners' First Cause of Action Is Not Moot

CSBA and Aspire argue that, in light of SBE's actions following the Court of Appeal decision in this case, as well as petitioners' decision not to amend their pleading, this matter is rendered moot. The court disagrees.

Petitioners' main contention is that SBE's findings are not supported by evidence. In their first cause of action, they broadly allege that SBE's approval of

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[11] The parties have informed the court that SBE renewed Aspire's statewide charter in January 2012. The validity of this renewal is not presently before the court in this proceeding.

Aspire's statewide charter violates section 47605.8, subdivision (b) because "the substantial evidence does not support the SBE's determination that the proposed state charter school will provide instructional services of statewide benefit that cannot be provided by a charter school operating in only one school district, or only in one county." Additionally, petitioners generally allege that SBE's findings are not supported by the record. As was the case when it was on appeal, "[a]t the heart of petitioners' claim [in the first cause of action] is the interpretation of this statutory provision." (*CSBA* at p. 1315.)

It is true that the record before the Court of Appeal is not the same record currently before this court. But petitioners' claim remains the same, to wit, that substantial evidence does not support that the statewide benefits proposed by Aspire cannot be achieved by locally chartered schools. In other words, while it is not disputed that SBE has now made the requisite two-part finding required by *CSBA*, petitioners continue to dispute that those findings are in compliance with the statute or supported by the record. Thus the allegations of the first cause of action have not been mooted by SBE's approval in 2011 of Aspire's state-wide charter based upon the material revisions of the petition.

Additionally, the appellate court specifically remanded for the trial court determination of Petitioners' Third Cause of Action which alleges that the SBE is using policies and procedures that have not been adopted in compliance with Government Code section 11500 et seq., the Administrative Procedures Act

(APA). (*CSBA* at p. 1335.) There is nothing in the record reflecting this claim for relief is moot.

B. The Requirements of the Charter Schools Act and Regulations Adopted Pursuant to the Act

CSBA provides guidance regarding key aspects of the CSA and section 47605.8 in particular. In determining the legal standard SBE was required to apply, the court will also address issues that the litigants have raised relating to the interpretation of the term "statewide benefit," whether cost reduction in and of itself can constitute a statewide benefit, and whether a statewide benefit can only arise from a charter school's educational program.

In determining the relevant legal standards, including construing regulations or determining whether they conform with the statute, the court applies its independent judgment, giving deference to the determinations of the agency appropriate to the circumstances of the agency's action. (*CSBA* at pp. 1314-1315; *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.)

1. The Statute and Regulations

Section 47605.8, subdivision (b) states:

> The [SBE] may not approve a petition for the operation of a state charter school under this section unless [it] finds that the proposed state charter school will provide instructional services of statewide benefit that cannot be provided by a charter school operating in only one school district, or only in one county.

As set forth in *CSBA,* SBE may only award a state charter if "approval of a statewide charter petition would require a finding that the school's 'instructional services of a statewide benefit' cannot be provided if the proposed schools … were operated under charters from those districts." (*CSBA* at p. 1317.)

SBE's regulations governing charter schools include section 11967.6, subdivision (b), which states:

> "Instructional services of a statewide benefit", as referenced in Education Code section 47605.8(b), shall include, but not be limited to, the following factors:
>
> (1) Unique factors and circumstances related to the statewide benefit charter school's educational program that can only be accomplished as a statewide benefit charter and not as a single district- or single county-authorized charter, including specific benefits to each of the following:
>
> (A) The pupils who would attend the statewide benefit charter school,
>
> (B) The communities (including the school districts and the counties) in which the individual schools would be located (e.g., in terms of pupil demographics and performance),
>
> (C) The state, to the extent applicable, and
>
> (D) The statewide benefit charter school itself (e.g., in fund raising, community partnerships, or relationships with institutions of higher education).
>
> (2) Neither an administrative benefit to a charter operator, nor a desire by a charter operator to provide services in more than one district and county, shall be considered sufficient in and of itself to constitute a statewide benefit.

Petitioners have not specifically asked the court to overturn SBE's regulations or suggested they are facially invalid. The court does not interpret the above-quoted regulation as conflicting with the CSA, as is further discussed below.

2. "Statewide Benefit" and "Educational Program"

Quoting a letter from legislative leaders, petitioners have suggested that a statewide charter pursuant to section 47605.8 is only available "to charter schools, such as those operated by the California Conservation Corps and federal job corps training agencies that, in fact served pupils throughout the state." (Petitioners' memorandum of points and authorities, filed October 28, 2011, at pp. 4-5.) However, section 47605.1, subdivision (g) already allows statewide charter schools that operate in partnership with the California Conservation Corps, the federal job corps, and similar programs. Petitioners have not suggested what types of charter schools would be authorized pursuant to section 47605.8, if it indeed excludes applicants such as Aspire, that seek a statewide charter to expand programs previously offered under one or more local charters. The court finds no merit in the argument that a statewide charter school fails to meet the statutory requirements if it does not sufficiently resemble the schools that partner with the California Conversation Corps, and other such programs.

Perhaps more significantly, petitioners further contend that any statewide benefit under the statute must be found in Aspire's "educational program." Specifically, they point out Aspire's educational program is one that Aspire has been successfully providing in its locally chartered schools, before and after statewide charter approval, and therefore it is not a statewide benefit that cannot be achieved through local charters.

It cannot be seriously disputed that the educational program proposed by Aspire in its statewide charter petition (and material revisions)—designed to prepare traditionally underserved students for college or other higher education—

is substantially the same program as that provided in its locally chartered schools.[12] Indeed, the record reflects that in awarding the statewide charter to Aspire, the SBE intends the success Aspire has achieved at the local level be replicated in other traditionally under-served communities throughout the state.

SBE and Aspire, for their part, point the court to the regulations enacted to implement section 47605.8, subdivision (b),[13] which contain a broad definition of "statewide benefit" as used in the statute. They contend the legislature has specifically left it to the SBE to enact the regulations which define and set the criteria for determining whether a "statewide benefit" exists. The regulations do not define "instructional services of a statewide benefit" as "educational program";

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[12] A comparison of Aspire's state charter with several Aspire local charters demonstrates that the curriculum and instructional methodologies are the same in both. (See, e.g., AR 50-74, 943-59, 986-1006.) All schools focus on small, multi-age classes, with longer school days and school years as a means to maximize in-depth learning. (AR 52-54, 945-47, 988-91.) All provide the same variety of teaching methods and the integration of arts and technology into its teaching methods. (AR 54, 945-47, 989-91.) The goal of closing the achievement gap by targeting instruction to assist under-prepared students become college-ready is shared by Aspire's locally approved and state-wide approved schools (AR 38, 44-45, 1181) and the "target student" profiles are virtually the same (AR 51,943-44, 986-87).

[13] Section 47605.8, subdivision (a) of the Education Code provides in pertinent part: "The State Board of Education shall adopt regulations, pursuant to the Administrative Procedures Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) for the implementation of this section. Any regulations adopted pursuant to this section shall ensure that a charter school approved pursuant to this section meets all requirements otherwise imposed on charter schools pursuant to this part, except that a charter school approved pursuant to this section shall not be subject to the geographic and site limitations otherwise imposed on charter schools."

rather, contrary to petitioners' view, instructional services need only be *related* to an educational program and includes such "benefits" as "fund raising, community partnerships, or relationships with institutions of higher education" and other unspecified benefits to pupils, the community, the state, and the school itself. (See Cal. Code Regs., tit. 5, § 11967.6(b).) SBE and Aspire also point to the regulation requiring a statewide charter applicant to demonstrate past success with its educational program, i.e., that it was successful with the same or similar educational program in their locally chartered schools. (See Cal. Code Regs., tit. 5, § 11967.6(a)(7).)

The court is not persuaded that Aspire must clear the additional hurdle of showing that its statewide benefit is found wholly within its educational program—as long as it satisfies the statute and relevant valid regulations. The court agrees with SBE and Aspire that the statute allows SBE to employ a broad, non-exclusive set of criteria in assessing statewide benefit. The fact that a proposed state charter educational program does not differ from that offered in an applicant's locally chartered schools is not a *disqualifying* factor.

On the other hand, the appellate court has directed that section 47605.8 is not available to simply facilitate the expansion or replication of an existing locally approved educational program. (*CSBA* at p. 1322.) In returning this petition for action on the merits, the Court of Appeal specifically noted: "… we pause to observe that the record contains no analysis of whether the elements of Aspire's statewide benefit constituted 'unique factors and circumstances,' or were merely restatements of the elements of its existing programs, being operated under local charters. It is for the trial court to make further determinations of this issue." (*CSBA* at p. 1321.)

3. Reduced Administrative Overhead

The parties' arguments also raise the question of whether Aspire can show a statewide benefit that cannot be achieved through a series of locally chartered schools by virtue of savings resulting from reduced administrative overhead with a statewide charter. The court determines as a matter of law that marginal cost reductions (achieved through economies of scale or reduced administrative costs) do not, in and of themselves, satisfy section 47605.8, subdivision (b). Charter schools must be chartered locally *unless* "the applicant's instructional services will provide a statewide benefit, and … the benefit is one that cannot be provided under local charters." (*CSBA* at p. 1318.) The statute cannot reasonably be interpreted as authorizing a state charter for all institutions that can reduce their per capita costs simply by reducing the number of chartering entities to which they must account or on which they must rely. If the statute were interpreted in that fashion, it is difficult to conceive of a state charter application that would fail to clear that hurdle.[14]

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[14] The California Charter Schools Association stated, in its May 5, 2011 letter in support of Aspire's request for material revisions:

> While we agree that administrative benefit alone is not sufficient to justify a statewide benefit charter, a school that is not bound by the inefficiencies and expenses of multiple (and perhaps conflicting)

California Code of Regulations, title 5, section 11967.6(b)(2) specifically states: "Neither an administrative benefit to a charter operator, nor a desire by a charter operator to provide services in more than one district and county, shall be considered sufficient in and of itself to constitute a statewide benefit."

C. Substantial Evidence

In reviewing the sufficiency of the evidence, the court must resolve all conflicts in favor of the respondents and presume in favor of the judgment all reasonable inferences. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.) Absent proof to the contrary, it is presumed that the agency's findings "are correct and supported by substantial evidence" and that the "agency performed its duties as required by law." (*Holmes v. Hallinan* (1998) 68 Cal.App.4th 1523, 1534.) Petitioners bear the burden of demonstrating that substantial evidence does not exist to support the agency's findings. (*Ibid.*) The "ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record." (*Kuhn, supra,* 22 Cal.App.4th at pp.1632-1633; *Ryan v. California Interscholastic Federation-San Diego Section* (2002) 94 Cal.App.4th 1048, 1077, fn. 21.)

> local authorizer policy and practices, frees up resources to focus more directly and strategically on its instructional program.

(AR 828.)

1. Statewide Benefit 2

The first statewide benefit finding adopted by the SBE was "Statewide Benefit 2" proposed by Aspire in its Material Revisions, to wit:

> **Statewide Benefit 2:** Accelerate academic growth among students traditionally under-prepared for high school success, and underrepresented among high school graduates, college-goers, and college graduates.
>
> > **Why can't this be accomplished through a series of locally approved charters?**
> >
> > With locally approved charters, Aspire's ability to offer the full and complete academic program to our students as outlined in the attached charter (and therefore our state-wide benefit) is **substantially limited** due **to inadequate facilities and a failure of school districts universally to comply with Proposition 39.** With a statewide benefit charter, Aspire is able to access affordable forms of financing—and through it, develop and access adequate facilities for our students. An adequate fully furnished and equipped facility enables Aspire to offer its full academic program....

(AR 679, 818-820 [bold text in original].)

In support of the claim that local school districts are either unable or unwilling to provide adequate facilities to enable Aspire to offer its full educational program, Aspire submitted to SBE letters from various local school districts—including the local school districts where the state chartered schools have been established—reflecting local charter denials and non-compliance with Proposition 39. (AR 412-461.) It also submitted documents to reflect the substantial requirements placed on local charters for data, forms and other requirements by local school districts. (AR 485-647.) Aspire's charter petition included Aspire financial statements as part of the package that went to SBE for consideration. (AR 353-364.) At the May 11, 2011 SBE meeting to review the material revisions, Aspire presented witnesses and a slide presentation for its assertion that the perception among investors that a statewide charter presented reduced risks to them was a factor in Aspire's ability to obtain a bond at a favorable interest rate. Aspire's CEO, James Wilcox, for instance, testified:

> Access to affordable facilities.... Because of the Statewide Benefit [charter], we were able to access facilities at affordable rates. We had made it possible for us to build appropriate secondary school facilities when Prop 39 and other efforts have failed.
>
> The numbers are there. 6.2 percent interest versus a 7.3 percent interest that we were able to get in 2001. We were actually able, because of the Statewide Benefit [charter], to convince investors in the rating agencies who are telling us whether we're going to be junk bond, or high-interest rate, or low interest rate, that we face less risk because of the Statewide Benefit [charter].
>
> The reason they looked at that, is they were very rationally looking at the situation. So you mean to tell me – I'm a banker – that the district that will lose students that they would like to keep, is the one that gets to decide whether you keep your charter or not? That sounds pretty risky to me...The State Board on the other hand, as your authorizer, is responsible for the whole state. Their responsibility is to make sure everyone has a great school, and [no] particular allegiance.

(AR 1190-1191,1225-1226.)

Aspire presented a slide show that reflected $1.7 million in savings over ten years as result of the lower interest rate compared to the next best alternative without a statewide charter. (AR 1165.) Erick Premack, Founder and Executive Director of the Charter School Development Center (CSDC) testified that in his experience from many calls he has received from bond rating agencies, bond counsel, and others, the possibility of non-renewal by a granting agency is a risk factor considered by these entities and that Aspire's (presumably positive) relationship with SBE is a "huge risk reduction and benefit to a bond proposal." (AR 1202-1203.) Representatives from the California Department of Education confirmed that it is difficult for most charter operators to issue bonds but Aspire was able to do so because of its large size and high student enrollment. (AR 1245-1246.)

Aspire also submitted a Fitch Bond Rating report, which gave Aspire's $93 million bond a "BBB" rating and mentioned Aspire's statewide charter:

> Aspire operates 29 schools under 11 different charter authorizers, primarily with local school districts within its three operating regions. To date, Aspire has never had a charter petition denied and has successfully renewed all of its outstanding charters following expiration of the standard five-year terms.
>
> In January 2007, the state board of education awarded Aspire a statewide benefit charter (SBC) making Aspire one of only two charter management organizations to receive an SBC. Under the SBC, Aspire may open up to 20 additional schools serving grades K-12 anywhere in the state. Over time, the organization intends to transition certain schools currently under charter with local school districts to the SBC, as well as open new sites where opportunities arise. However, in either case, Aspire will continue to collaborate closely with local school districts.

(AR 466.)

While petitioners complain that these assertions were not fully examined by SBE but rather simply taken at face value, SBE member Yvonne Chan affirmed from her own experience operating a locally approved charter school that if a locally approved charter school wants to get "facility money" by issuing a bond, it cannot do so "unless you go through the district," and "most districts will not want to take on that liability or have the collateral to put up." (AR 1221-1222.)

Petitioners' representatives argued (1) the record did not actually support the conclusions Aspire reached; (2) Aspire was able to obtain a bond in 2001 and obtain other funding in 2003; and (3) the difference in interest rates was due to the market and not the state charter. (AR 1241.)

On the subject of bonding, SBE member Yvonne Chan remarked:

> I am locally approved by Los Angeles Unified. It's very hard to get facility money. And we know that the district is also very difficult to provide us with space, especially those of us in the inner city [multi-trust] schools. So Prop 39, we already can see that—let's don't push; let's work together. That's how we do it. So we really want to go and get bonds, but you cannot do it unless you go through the district. Now, how many district …want to take that liability?

(AR 1221.)

After SBE member Chan inquired as to the process by which a local charter school may issue a bond (or, raise funds through issuance of a bond), there was the following exchange among Ms. Moore with the School Facilities division of the Dept. of Education, Chan, and SBE member Richard Zeiger:

> Moore: "...It's very difficult for most charters to access the capital markets through bond measures. Aspire is one that has been able to because they receive … a credit enhancement and were able to be credit worthy to issue their own bonds backed by their student enrollments."
>
> Chan: "Basically none of us can just go out on our own and sell them."
>
> Zeiger: "Well, in theory you could. It's extremely difficult for small organizations to issue a bond. Aspire is a much bigger organization, and therefore has the capacity to reach into financial

> markets, develop a prospectus, and convince investors to invest in them."

(AR 1245-1246.)

On this record, SBE member Trish Williams moved to find that Aspire offered a statewide benefit that could not be achieved through local charters, as follows:

> The first statewide benefit that I think meets these [statutory] criteria should be in that attachment listed as Statewide Benefit No. 2. It is the benefit of funding that Aspire can achieve by operating as a Statewide Benefit Charter. Aspire's statewide benefit charter has enabled it to obtain a more favorable bond rating, because the status reduces uncertainty about Aspire's business plans. This more favorable rating enabled Aspire to pass a larger bond at a lower interest rate. The funding from the bonds has been used to improve school facilities, and to expand the number of students the school can serve. The money it has saved on interest can be used directly to support Aspire's educational program, allowing the schools to provide a full and complete program for more students whoare traditionally unprepared for high school, and to get more underserved students ready for admission to college. I believe this is a unique factor that meets that statewide benefit criteria...In particular, the regulations specifically mentioned benefits in fundraising as one of the factors that can support a statewide benefit finding. And this certainly meets that standard.
>
> Aspire has also demonstrated that this funding benefit cannot be achieved through locally-approved charters as the ability to sell bonds at this favorable rate is premised upon Aspire having a statewide charter that indicates its security in its business plan.

(AR 1239.)

The motion passed. SBE found "Aspire's benefit in terms of funding and its ability to get statewide bonds constitutes a statewide benefit." (AR 1246-1248.) SBE further found "...this statewide benefit related to the ability to get funding through statewide bonds through good financing, that it cannot be provided by a series of local charters." (AR 1248-1250.)

The court concludes the record lacks substantial evidence that Aspire's program offered a statewide benefit that could not be achieved through local charters. While there was evidence that, in 2010, Aspire obtained favorable financing and having state charter status may have been an important factor in its funding proposal, the record does not reflect that, absent state-charter status, Aspire could not have achieved the funding necessary to provide its full educational program. For example, the Fitch report, quoted above, suggests Aspire's favorable rating was based upon its relatively positive financial statements, the number of students served by Aspire, its historical and projected ability to open new schools and maintain existing charters, and its good relationship with local school districts.

Regardless of the foregoing, Aspire did not offer evidence that it had tried and failed, or was otherwise unable, to obtain adequate financing for its proposed state-chartered schools. As discussed above, that a statewide charter may have reduced Aspire's administrative costs does not, in and of itself, establish a statewide benefit under the statute or regulations that cannot be achieved through local charters or otherwise constitute a "unique factor" under the statute.

2. Statewide Benefit 3

SBE's second finding was that a state charter would allow Aspire to more efficiently manage and administer its programs, resulting in cost savings that could be used to enlarge and enhance the number of teachers in its teaching credentialing program.

> **Statewide Benefit 3:** Create alternative credentialing pathways and professional development activities that focus on the skills and knowledge necessary to work effectively with diverse students.
>
> > **Why can't this be accomplished through a series of locally approved charters?**
> >
> > The statewide benefit of an alternative credentialing program as described in the charter will not materialize as proposed if this work is pursued using a series of locally approved charters. Today Aspire is limited to 20 Residents in the Aspire Teacher Residency due to constrained financial resources.... If Aspire is forced to grow through a series of locally approved charters as opposed to a statewide charter it will force Aspire to invest scarce resources into managing multiple authorizer relationships to achieve the statewide benefit and effectively prevent the development of alternative credentialing pathways and professional development activities. The cost of duplicative oversight, redundant reporting, and monitoring unique local demands for operating multiple district-approved charters requires substantial investment of financial resources....

(AR 356-357, 681, 820-821 [bold text in original].) The costs savings equate to "25 full time positions (approximately .50 FTE for each school) and an annual cost of approximately $2M across 50 schools." (AR 358.) SBE member Williams moved as follows:

> Aspire has demonstrated that due to the cost savings from being a statewide charter as opposed to individual local charters, it will be able to significantly increase the size of this teacher residency

> program, which trains teachers to work in underserved areas.... Aspire has also shown that it cannot achieve this same benefit through local charters, as the cost savings that allows them the expansion of this program is coming directly from the state charter.

(AR 1250-1251.) The motion passed. (AR 1266-1267.)

As discussed above, as a matter of law, this does not satisfy the statute. At the hearing considering Aspire's material revisions, Aspire demonstrated the significant savings it obtained by no longer having to comply with multiple school districts' requests or regulations. The Court of Appeal, however, explicitly rejected this as grounds for approval of a statewide charter:

> Respondents assert as "obvious" the proposition that section 47605.8 was adopted to "provide[ ] a mechanism for charter school operators to avoid the patchwork quilt of local school district approval...."
>
> ...[A]s we have already noted, the 2002 amendments were specifically designed to encourage locally chartered schools and to impose geographic restrictions on charter school operations.... Having chosen to impose such restrictions, it would make no sense for the Legislature to simultaneously create "a mechanism for charter school operators to *avoid* ... local school district approval." We read section 47605.8 as an exception to the CSA's chartering scheme, not as an equally available option for establishing a charter school.

(*CSBA* at pp. 1320-1321 [italics in original].)

II. SBE Violated the Administrative Procedures Act

SBE failed to adopt regulations in compliance with the Administrative Procedures Act ("APA"), Government Code section 11500 et seq., as required by section 47605.8.

"Where, as here, the petition seeks a writ of mandate under Code of Civil Procedure section 1085, our review is limited to a determination of whether the agency's decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*CSBA* at pp. 1313-1314.)

Petitioners allege in their third cause of action that SBE is using policies and procedures in connection with its consideration of statewide charter petitions that have not been adopted in accordance with Government Code section 11500 et seq., the Administrative Procedures Act (APA). (Petition, ¶ 65.)[15]

Section 47605.8 requires SBE to adopt regulations "for the implementation of this section" pursuant to Government Code section 11500 et seq. This language references the adjudicatory provisions of the APA which require formal hearings akin to a court trial. In proceedings adopted under the APA, evidence is subject to examination and objection, and witnesses testify under oath. It is undisputed that when SBE considered and approved Aspire's state-wide petition (both in 2007 and 2011), the public hearings it held did not comply with Government Code section 11500 et seq. Indeed, petitioners claim, and it is not disputed, that SBE regulations simply do not set forth any procedures for how hearings to approve state charter petitions (or material revisions) shall be conducted. Rules regarding notice,

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[15] Petitioners' focus in the demurrer and appellate proceedings was on SBE's alleged reliance on the ACCS in considering adoption of Aspire's state charter. Respondent has advised the Court and Petitioners that it does not plan to continue to use the ACCS in making state charter determinations in the future. Therefore, this argument is no longer being advanced by Petitioners.

discovery, cross examination, or other procedures seen in adjudicatory proceedings have never been used or even discussed in connection with charter school petitions. Rather, it has been the long-standing practice, and until now not challenged, for SBE to simply hold public hearings before approving a state-wide charter. (Decl. of Michael Kirst, ¶ 9; Decl. of Patricia De Cos, ¶ 13.)

Respondent argues that Government Code section 11340, and not section 11500, applies to the process it implements to approve statewide charters. SBE and Aspire concede that section 47605.8, subdivision (a) appears to direct the SBE to "adopt regulations pursuant to the Administrative Procedures Act (Chapter 5, commencing with section 11500, of Part I of Division 3 to Title 2 of the Government Code) for implementation of this section." They argue, however, that section 47605.8, subdivision (a) is internally inconsistent and suggest the Legislature simply made a drafting error when it referenced the APA's adjudicatory hearing provisions (Gov. Code, § 11500 et seq.) in this statute. They suggest that the Legislature actually meant to refer to Government Code section 11340.

SBE raises various other arguments to explain why the APA formalities do not apply to its actions with regard to statewide charter approvals. SBE argues that the petitioners' contention that the approval process must meet the formalities called for in semi-judicial proceeding—with discovery, cross-examination and other formalities—is outside the scope of the pleadings, beyond the statute of limitations, and precluded by laches.

Notwithstanding SBE's historical practice, this court finds that the statute is unambiguous and specific. SBE and Aspire readily admit that SBE has failed to adopt procedures for considering statewide charter petitions that are in accordance with the APA. The claim is not outside the scope of the pleadings nor does SBE cite authority to establish its limitations and laches claims. For the above reasons, the court must find in favor of petitioners as to the third cause of action.

Petitioners state they are *not* requesting that the court set aside the 2007 and 2011 SBE actions purely on this procedural ground, although they believe such grounds provide a legal basis for setting aside those actions. Rather, they urge that the court include in any writ a directive to SBE to adopt procedural rules in accordance with Government Code section 11500 *et seq.* In order for SBE's review of future statewide charter petitions or renewal requests to conform with the Education Code, the court concludes it is appropriate to direct SBE to adopt regulations as required by section 47605.8, subdivision (a).

III. EVIDENCE AND JUDICIAL NOTICE

SBE's request for judicial notice of legislative history facts and documents is GRANTED.

Aspire's request for judicial notice of the Hersher declaration and exhibits attached thereto is GRANTED. The court OVERRULES petitioners' objections to the following exhibits to the Hersher Declaration: Cal Network letter to Senator Vasconcellos, letter from Nevada County Superintendent to Assemblywoman Strom-Martin, and CASB's letter to Senator Vasconcellos. However, by taking judicial notice of these documents, the court does not take judicial notice of the truth of the matters stated therein.

Aspire's objection to the Caplan declaration is SUSTAINED as to the original declaration on the ground it lacks foundation. As to the supplemental declaration (curing the lack of foundation), the objections to paragraphs 2-18 are moot in light of the withdrawal of the second cause of action. Aspire's objection to paragraph 19 is sustained on the ground of relevancy.

Petitioners' objection to the declaration of James Wilcox is OVERRULED.

CONCLUSION

The court will issue a judgment and writ of mandate directing SBE to set aside its 2007 and 2011 approvals of a statewide charter for Aspire and to adopt regulations in compliance with section 47605.8, subdivision (a) within 350 days from the date that a copy of the writ has been served on SBE; and to submit a return to the writ on or before June 24, 2013.[16]

[16] The court has set a one-year deadline for the return on the writ of mandate in order to reduce any hardship to presently enrolled students and facilitate the transition of schools currently operating under Aspire's statewide charter, not to enable Aspire to open additional schools under that charter.

Petitioners shall serve a copy of the writ of mandate on SBE within ten days of its issuance, and file a proof of service.

Pending discharge of the writ, the court will maintain continuing jurisdiction over this matter, including to amend the judgment and writ of mandate in order to facilitate or ensure the good faith performance of SBE's legal obligations.

IT IS SO ORDERED.

Date 6/22/12

JO-LYNNE Q. LEE
Judge of the Superior Court

Superior Court of California, County of Alameda
Department 30, Administration Building

Case Number: RG07353566

STATEMENT OF DECISION

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document, below or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 201 13th Street, Oakland, California.

Executed on June 26, 2012

Executive Officer/Clerk of the Superior Court

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