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MEMORANDUM

TO Gary Borden, California Charter School Association

FROM Eugene H. Clark-Herrera

DATE September 30, 2008

RE Transfer of Proceeds of Los Angeles Unified School District General Obligation Bonds to Charter Schools to Finance Charter School Facilities in the District

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I. INTRODUCTION

You have asked us whether Los Angeles Unified School District ("LAUSD") may provide proceeds of its general obligation bonds to charter schools for the purpose of wholly or partially financing the construction, acquisition or leasing of charter school facilities. To guide discussions, this memorandum presents the salient arguments for and against this proposition. However, on balance, we believe that LAUSD is generally permitted to provide proceeds of its general obligation bonds to charter schools to finance the construction, acquisition or leasing of charter school facilities, provided that such facilities remain in use as public school facilities and LAUSD retains ultimate dominion and control over the financed facilities for their useful lives. We note, however, that any facilities made available by LAUSD to a charter school pursuant to a facilities request under Section 47614 of the Education Code must remain the property of LAUSD.

However, because the law is not well developed in this area, we cannot guarantee that a court presented with the same facts and questions would decide these matters as we believe they should be decided.

II. FACTUAL BACKGROUND:

In connection with the potential new voter authorization of general obligation bonds of LAUSD to be held at the November 4, 2008 statewide general election, various constituents in the charter school community have proposed at least four different methods by which LAUSD might utilize proceeds of the new bonds to provide financing to charter schools for the construction of charter school facilities in LAUSD. These proposals, as described below, have been referred to in communications with LAUSD as "smart financing" ideas.

A. Subordinate Loan/Grant

LAUSD provides capital to Owner[1] as a loan or as a recoverable grant. Owner promises to (i) construct school in accordance with applicable law, (ii) enter into a lease with Operator[2], and (iii) cause financed

[1] "Owner", for purposes hereof, is the entity that acquires and/or constructs the charter school and leases it to the Operator (defined below). Owner typically borrows capital from Lender and obtains equity from philanthropic sources to finance the facility. Though an Owner could be a nonprofit tax-exempt corporation or a for-profit school facilities development company,

project to be operated as a charter school at the specified location for life of loan/grant. Covenants that "run with the land" could be recorded against the financed property (as provisions of the lease or a via a tax/regulatory agreement between Operator, Owner, Lender[3] and LAUSD) to ensure use of the financed property as a charter school for the life of the loan/grant.

B. Purchase of Charter School Debt

If an Owner is constructing a facility using tax-exempt private activity bonds, typically the Owner engages an institutional trustee to act on behalf of the bondholders. This institutional trustee handles collection and asset management services, but will also play a role in workout or default situations if necessary. In this structure LAUSD could infuse capital into a given project by using bond proceeds to purchase Owner's tax-exempt private activity bonds (the "Subordinate Bonds") under its statutory power to invest bond proceeds in other governmental bonds. Thus, LAUSD would be the owner of the charter school's bonded debt. The Subordinate Bonds would be payable on a subordinate basis to the Owner's other tax-exempt private activity bonds which are sold to finance the majority of the facility (perhaps 80%). Again, a tax/regulatory agreement could be recorded against the financed property to ensure use of the facility as a charter school for the term of the lease (or for some other specified period).

C. Prepaid Lease

LAUSD enters into a lease with Owner pursuant to which Owner as Landlord agrees to construct charter school in accordance with applicable law. Lease requires District to prepay rent from general obligation bond proceeds. LAUSD then subleases to Operator; if Operator fails to operate a charter school, LAUSD has remedies in the lease which include replacing Operator. Note in this approach either (x) LAUSD leases and subleases the entire school, in which event LAUSD may be obligated to pay rent whether or not Operator is paying rent (in effect serving as a guarantor of Operator's rent payments), or (y) LAUSD leases only the portion of the facility its financing supports, and LAUSD is not obligated to pay rent for facility costs beyond the portion it has financed. The lease (or a tax/regulatory agreement) could be recorded against the financed property to ensure use of the facility as a charter school for the term of the lease (or for some other specified period).

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for all purposes of this memo. Owners will be assumed to be 501(c)(3) tax-exempt organizations (either independent third parties or wholly controlled entities of the charter school).

[2] "Operator", for purposes hereof, is the entity that holds a valid charter authorized by the LAUSD and that operates (or plans to operate) a charter school in LAUSD. In general Operators lease facilities from Owners to take advantage of lease/rental payment reimbursement rules under state law ("SB 740"). In general, and for all purposes of this memo, Operators are nonprofit corporations exempt under Section 501(c)(3) (though there are some for-profit charter school operators, this memo assumes such entities would be excluded from the proposed financing programs).

[3] "Lender", for purposes hereof, is a source of capital, such as a banking institution or an institutional investor that purchases tax-exempt private activity bonds (or "501(c)(3) bonds"). In some instances, charter schools have multiple lenders — e.g., a traditional bank may finance 60% to 80% of the project cost, and a "mission based lender" may provide an additional 10-30% of project costs as a subordinate loan. Alternatively, a charter school may finance 100% of the project with proceeds of an issue of 501(c)(3) bonds (issued through a conduit governmental joint powers authority).

D. Ground Lease to Charter School

LAUSD purchases land with bond proceeds and enters into long term ground lease with Owner for a nominal amount of rent. Owner agrees to (i) construct school in accordance with applicable law, (ii) enter into sublease with Operator, and (iii) cause financed property to be operated as a charter school at the specified location for life of the lease (or for some other specified period).

Each of these "smart financing" concepts represent a hypothetical approach to financing charter school facilities. Specifically, the ideas described in (A) and (B) above represent methods by which LAUSD could provide the proceeds of general obligation bonds to third party charter schools to construct charter school facilities. We have been asked to analyze whether such expenditures, or similar expenditures, of bond proceeds by LAUSD would be permitted by law.

III. QUESTION PRESENTED:

May LAUSD provide proceeds of its general obligation bonds to charter schools for the purpose of wholly or partially financing the construction, acquisition or leasing of charter school facilities?

IV. SUMMARY CONCLUSION:

So long as such facilities remain in use as public school facilities and LAUSD retains ultimate dominion sufficient to ensure use of the financed facilities for authorized purposes for their useful lives, LAUSD is generally permitted to provide proceeds of its general obligation bonds to charter schools to finance the construction, acquisition or leasing of charter school facilities. However, if such facilities are made available by LAUSD to a charter school pursuant to a facilities request under Section 47614 of the Education Code, such facilities are probably required to remain the property of LAUSD.

V. ANALYSIS:

Three basic sources of law guide the analysis of the question presented: constitutional law, statutory authority and local district (LAUSD) policy.[4] Part V(A) hereof analyzes relevant provisions of the California Constitution. Part V(B) analyzes three sources of controlling statutory authority (and jurisprudence derived therefrom): first, school district general obligation bonding authority; second, general rules of ballot measure interpretation; and third, charter school facilities law under the Charter Schools Act. Finally, Part V(C) analyzes local LAUSD policy, as in existence at the time of this writing.

A. California Constitution

1. Authority to Incur Bonded Indebtedness

The constitutional authority for school districts to incur bonded indebtedness exists in two parts: (1) by a 2/3 voter approval,[5] and (2) by a 55% voter approval[6] ("Proposition 39"). LAUSD has called a new bond

[4] Federal tax law also guides this analysis, to the extent the bonds are issued on a tax-exempt basis, however federal tax law is outside the scope of this memorandum.

[5] CAL. CONST., Art. XIII A, §1(b)(2).

election for November 4, 2008 under Proposition 39 (as it has for previous measures K, Y, and R). Proposition 39 permits school districts to incur bonded indebtedness for the "...construction, reconstruction, rehabilitation or replacement of school facilities...or the acquisition or lease of school facilities...".[7]

While Proposition 39 does not prohibit LAUSD from constructing or improving voter-authorized school facilities within LAUSD at locations other than LAUSD school sites,[8] bond proceeds probably cannot be used to finance facilities that are not under the dominion of LAUSD. We can point to no express Constitutional or statutory language for this proposition, however, we believe it is implicit in the Constitution (and the bond election law as described below), and reasonable that voters expected, that the proceeds of the LAUSD bonds would be used to fund only "...construction, reconstruction, rehabilitation or replacement...or the acquisition or lease" of school facilities that are "permanent" in the sense that they would always be used by LAUSD for voter-approved K-12 purposes. This principle of permanence suggests that bond funds should be used to finance school facilities for so long as the bond-funded facilities are reasonably expected to last.

Note that, under this principle, the end of the useful life of the bond-funded facilities, not the maturity date of the bonds, marks the date on which the district's obligations are lifted, because a school district can issue bonds of longer or shorter maturity as it desires, and can pay off bonds early without affecting the financed buildings at all. So, for example, if a school district funds construction of a school with bond proceeds and then sells the school, we believe the law would require the district to apply the sale proceeds to replacement facilities that will last at least as long as the school being replaced, and that were authorized under the terms of the original bond measure, whether or not the bonds that funded the school being replaced are still outstanding.

In order to ensure that bond funds are used in compliance with the voters' approval, if LAUSD spends bond proceeds to improve property or to construct a building that does not belong to the district, such projects must remain under the secure and ongoing dominion of LAUSD. District ownership (i.e., title to the land and/or buildings) is one indication of whether a building is under the dominion of LAUSD, but it is not the only indication, nor is ownership alone sufficient to ensure compliance with the law. The critical point is that LAUSD must have and keep the power to ensure the building is and will be used for an authorized purpose.[9] LAUSD can probably use bond proceeds to improve or construct a building on

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[6] CAL. CONST., Art. XIII A, §1(b)(3).

[7] *Id.*

[8] *See, e.g.*, 81 Cal. Ops. Att'y Gen. 80 (1998) (concluding that a school district may establish a school within the boundary of another district only if the school is to be located upon a site immediately adjacent to a school site within the establishing district); CALIF. EDUC. CODE §17570 (permitting school districts to acquire easements or rights-of-way for pedestrian walkways within one mile of any school within the district); *but cf.* CALIF. EDUC. CODE §17569 (limiting power of school district to construct pedestrian walkways "in immediate proximity" to schools or school sites owned by it); 17. Cal. Ops. Att'y Gen. 150 (1951) (concluding that a school board is not authorized to pay part of the cost of installing an underpass through a railroad right-of-way not directly abutting school property, but could pay an assessment for such an improvement if it were levied against school property).

[9] We acknowledge that there might be periods during which bond funds are not be used for the authorized purposes; however, these ought to be temporary and unavoidable, such as following acquisition of real property and before construction can proceed, or following closure of a school facility because of declining enrollment. During such periods, lease out to a private or another

real property owned by another entity, such as a charter school, but LAUSD or a charter school under its chartering authority must use the building for K-12 educational purposes, and it must take steps to obtain the charter school's reasonable assurance that the building (and therefore the bond proceeds) will not be diverted to another purpose during the reasonably expected useful life of the building.[10] Otherwise, LAUSD taxpayers would have been taxed to pay for unauthorized improvements. LAUSD's bond measure certainly does not contemplate that result, nor would the voters who may approve it.

2. Prohibition Against Gifts of Public Funds

While we can find no legal authority requiring that a school district own the school facilities financed with the proceeds of indebtedness incurred under Proposition 39, the transfer of such proceeds to a non-governmental third party for the purpose of constructing school facilities could be subject to challenge on the basis of what is commonly referred to as the "gift of public funds" doctrine. Although charter schools are public schools, many charter schools are run by private non-profit organizations and therefore if a district provides funding, it may be subject to challenge as a gift of public funds in violation of Article XVI, Section 6 of the California Constitution.[11] The determination of whether an appropriation of public funds is considered a gift rests primarily on "whether the funds are to be used for a 'public' or 'private' purpose. If they are used for a 'public purpose,' they are not a gift [of public money]."[12] The Attorney General of California has found that if public funds are used to make improvements on private land, the public entity must maintain "control over the use of and access to the facility."[13] This suggests that if a school district pays for capital improvements on land it does not own, such as land owned by the non-profit corporation operator of a charter school, the district must retain control over and access to those improvements even after the charter school no longer exists.

Generally, a public body, like a school district, "may delegate the performance of administrative functions to such [private] groups if it retains ultimate control over administration so that it may safeguard the public interest."[14] Since the courts have ruled that "operation and management of a place of public assembly is an administrative function which may be delegated," whether such funds are being applied to a prohibited use depends on whether a public entity retains judgment and discretion over the use of funds.[15] The Education Code provides that, "Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools."[16] Charter schools are public schools with operational independence, but whose "very destiny…lies solely in the hands of public

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public entity ought to be allowed. We can point to no clear rule for how long bond-financed facilities may be temporarily idled or used for non-bond purposes; but we note the opportunity for abuse if no rule whatsoever is observed.

[10] For example, a declaration of restrictive covenants, similar to those utilized in the context of tax-exempt bond financing for affordable housing projects, or some other form of use agreement, could be recorded in the property records at the time of the financing that limits the use of the subject property in accordance with LAUSD's requirements (e.g., to be used only as a public school facility for 55 years from the date of general obligation bond financing).

[11] CAL. CONST., Art. XVI, §6.

[12] *County of Alameda v. Janssen*, 16 Cal.2d 276, 281 (1940).

[13] Office of the Attorney General of the State of California, Opinion No. 61-180. 39 Ops. Cal. Atty. Gen. 39 (1962).

[14] *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607, 610 (1931); *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603, 617 (1965).

[15] *Egan v. City and County of San Francisco*, 165 Cal. 576, 584 (1913); *Irwin v. City of Manhattan Beach*, 65 Cal. 2d 13 (1966); *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603, 616 (1965).

[16] CAL. EDUC. CODE §47615.

agencies and officers."[17] However, in some cases, a non-profit charter management organization receives public funds to run one or more charter schools. In *County of Los Angeles v. Nesvig*, a county's 40-year contract allowing a private non-profit corporation to manage the operations of a music center whose facilities were partially funded with county funds was permissible and not considered a gift of public funds.[18] In view of the foregoing, chartering authority public agencies (such as LAUSD) are considered to retain ultimate control over the administration of charter schools. Any transfer of public funds (such as bond proceeds) to a charter school (or its non-profit management organization) should be considered permissible under the gift of public funds doctrine so long as such transfer were effectuated in a manner that allowed LAUSD to retain ultimate judgment and discretion over the use of those funds (or use of the facilities financed therewith). Such control can probably be accomplished a variety of ways through contractual arrangements without title to the subject facility being held by LAUSD.[19]

B. California Education Code

The three sources of controlling statutory authority (and jurisprudence derived therefrom) are: first, school district general obligation bonding authority under Education Code Sections 15100 and following; second, general legal rules of ballot measure interpretation; and third, charter school facilities law under the Charter Schools Act, specifically Education Code Section 47614.

1. Sections 15100 and following (Bond Election Law)

Pursuant to Education Code Sections 15100 and following (the "bond election law"), LAUSD is authorized to call an election submitting to voters the question of whether general obligation bonds of the district shall be issued to finance certain capital expenditures, including the "...building or purchasing of school buildings...".[20] The plain meaning of the statutory authority to "build...school buildings" does not restrict LAUSD to build school buildings which it must own. On the contrary, the language explicitly provides school districts with a choice, "building *or* purchasing". A school district could conceivably undertake the process of building school buildings on its own, or engage a third-party to build school buildings in which the district would provide education services to its students.[21] In order to ensure that such third-party arrangements would not subject the bond-financed facility to later conversion to a non-school building use, such an arrangement would need to ensure the use of the bond-financed facility as a school building for a minimum of the building's useful life, similar to the analysis above. In sum, the express authority to build school buildings with the proceeds of bonds issued under the bond election law, together with the absence of an explicit requirement that a school district must own school buildings

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[17] *Wilson v State Bd. of Education*, 75 Cal. App. 4th 1125, 1139 (1999).
[18] *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603 (1965).
[19] See footnote 10, above. The same approach to affecting ongoing LAUSD control over the bond-financed facility's use solely for authorized purposes would address this issue as well.
[20] CAL. EDUC. CODE §15100(b) (authorizing the calling of an election to authorize the issuance of general obligation bonds by a school district); CAL. EDUC. CODE §15266(a) (authorizing the issuance of general obligation bonds upon 55% voter approval for the purposes set forth under Section 1(b)(3) of Article XIII A of the California Constitution).
[21] Examples could include (1) a joint-use arrangement between a school district and a city, county or non-profit organization, (2) an arrangement with a private party school building development company, or (3) an arrangement with a non-profit charter school organization.

financed with such proceeds, provides authority under the bond election law for LAUSD to provide, subject to appropriate controls,[22] such bond proceeds to charter schools to build charter school buildings.

2. Ballot Measure Interpretation Generally

The bond measure to be considered by voters of LAUSD at the November 2008 general election (the "LAUSD bond measure") would, upon 55% voter approval, constitute LAUSD's "contract with the voters".[23] To the extent such bond measure language were narrower in its scope of authority for the expenditure of proceeds of general obligation bonds, such narrower authority would control, regardless of the breadth of authority conferred by the Constitution and the Education Code.[24] Language from the LAUSD bond measure authorizes, among numerous other purposes (covering literally all of its several thousand school sites as well as future school sites), expenditure of general obligation bond proceeds for the following purpose:

> "*Provide new seats through* the acquisition, purchase, lease, *construction, reconstruction, repair, rehabilitation*, furnishing, and equipping *of facilities for use as charter schools*, and furnish and equip charter-operated facilities, pursuant to a program to be adopted by the Board governing the qualifications and selection of charter schools with regard to their capacity to assist in the relief of overcrowding on the District's most impacted campuses and to meet the District's responsibilities under Education Code Section 47614."[25] [emphasis added]

The pertinent words of the first clause of this sentence, italicized above, provide authority to LAUSD to provide new seats (presumably for students) by construction of charter school facilities. A requirement that such facilities be constructed directly by, or owned by, LAUSD, is absent from the first clause of the sentence. Thus, the plain authority of this bond measure language regarding charter school facilities is nearly identical in scope to that of the Constitution and the Education Code, in that either the district or a third-party could conceivably carry out the purposes of "construction, reconstruction, [etc.]...of charter school facilities". The first clause is, however, qualified by the second portion of the sentence, thus a complete analysis must review the substance of such qualification.

The grammatical construction of this sentence yields at least two alternative readings of the qualification of the first clause thereof. The first clause may be fairly summarized, in pertinent part, as "LAUSD may spend bond proceeds to construct charter school facilities". Such expenditure is, however, qualified by the second portion of the sentence, which is broken into either one or two additional clauses. The second clause reads, in pertinent part, "...pursuant to a program...governing...selection of charter schools". The

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[22] See, again, footnote 10, above. The same approach to affecting ongoing LAUSD control over the bond-financed facility's use solely for authorized purposes would address this issue as well.

[23] See generally, *City of San Diego v. Millan*, 127 Cal. App. 521, 534 (1932), articulating the principle, "...which has long been recognized by our courts, that the proceedings leading up to the issuance of municipal bonds create a relation between the [issuer] city and its taxpayers which is in the nature of a contractual relation between parties whether they be public or private".

[24] *Tooker v. San Francisco Bay Area Rapid Transit Dist.*, 22 Cal. App. 3d 643, 650 (1972) (observing that the terms of the specific proposal submitted to voters have the attributes of the contract with voters and must be respected).

[25] Board of Education of the Los Angeles Unified School District, resolution adopted on July 31, 2008, (calling a general obligation bond election for November 5, 2008), Exhibit A: List of Improvements/Full Text of Ballot Measure, at p. 18.

third clause, if intended as an additional qualification of the first clause's basic authority, would qualify such authority insofar as the expenditure of proceeds for construction of charter school facilities were intended, in some manner, "to meet the District's responsibilities under Education Code Section 47614." This reading of the measure language would impose on LAUSD an obligation to ensure that such an expenditure of bond proceeds had the effect of either directly or indirectly discharging whatever obligations arise on the part of LAUSD pursuant to Section 47614. (These obligations are discussed below in subsection 3.)

This third clause, however, could alternatively be read to modify the second clause which establishes the mechanism by which LAUSD must select charter schools for receipt of the benefit of the authority provided in the first clause of the sentence. The second clause requires establishment of a program for selection of charter schools "...with regard to their capacity to assist in the relief of overcrowding...". Such program could be read to also require that charter schools be selected with regard to their capacity to "...meet the District's responsibilities under Education Code Section 47614". In other words, the program for selecting such charter schools must take into account LAUSD's obligation to provide facilities under Section 47614, and must ostensibly result in the discharge of such obligation.

In either case, however, the language stops short of mandating that such facilities exclusively be provided *pursuant to* Section 47614, or independently of 47614, that such facilities be *owned by* LAUSD. Whether qualifying the sentence's basic authority for the expenditure of bond proceeds, or modifying the charter school selection program requirements, the final clause of the sentence does not independently impose a restriction on grants to third party providers of charter school facilities.

3. Section 47614 (Charter School Facilities Law)

Education Code Section 47614 (the "charter facilities law") requires each school district to make available to charter schools operating in the district facilities that are reasonably equivalent to those in which the charter school students would be accommodated if they were attending other public schools of the district.[26] Two lines of reasoning could be applied to the question of whether the charter facilities law permits LAUSD to provide general obligation bond proceeds to a charter school for the construction of charter school facilities, each beginning from a separate premise: (1) that the charter facilities law exists as an optional framework for the provision of charter facilities, the obligations under which arise only upon the initiation of a charter school's facilities request thereunder; or (2) that the charter facilities law is a mandatory framework, imposing obligations on every district in which a charter school operates, regardless of whether a charter school submits a facilities request. Part V(B)(3)(a) below analyzes the question from the premise that the charter facilities law provides an optional framework; and Part V(B)(3)(b) below analyzes the question from the premise that the charter facilities law provides a mandatory framework.

a. Section 47614 as an Optional Framework

Charter schools are not compelled to request facilities from school districts under the charter facilities law, but instead may locate their operations wherever they deem appropriate within the boundaries of the

[26] CAL. EDUC. CODE §47614(b).

chartering district.[27] Nor are they, upon receiving an offer of facilities from a school district, compelled to accept such facilities under the charter facilities law.[28] Further, while districts are obligated to make facilities available in response to requests under the charter facilities law, under limited circumstances, districts have discretion to deny facilities request (for charter schools below the minimum attendance requirement).[29] The statutory scheme contemplates, and the implementing regulations provide specific procedures to accomplish, a request-offer-acceptance process by which a charter school seeks facilities, a district offers facilities, and the charter school accepts or rejects such facilities.[30] As a practical matter, many charter schools occupy facilities other than those provided pursuant to the charter facilities law, and many never request facilities thereunder. If such a request is made in compliance with the charter facilities law, districts are mandated to provide contiguous, reasonably equivalent facilities, to the maximum extent practicable and which the District must own, in response to such request.[31] However, if such request is not made, or the facilities offered pursuant to such a request are not satisfactory to the requesting charter school and it rejects such offer, then the charter school must find an alternative facility.

The implementing regulations (the "charter facilities regulations") promulgated pursuant to the charter facilities law[32] acknowledge that charter schools in this context may make alternative arrangements with districts for the provision of charter school facilities.[33] Section 11969.1(b) thereof provides:

> "If a charter school and a school district mutually agree to an alternative to specific compliance with any of the provisions of this article, nothing in this article shall prohibit implementation of that alternative, including, for example, funding in lieu of facilities in an amount commensurate with local rental or lease costs for facilities reasonably equivalent to facilities of the district."

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[27] CAL. EDUC. CODE §47605 (authorizing charter schools to be located within chartering districts, as specified in the charter petition, but not limiting their location to district-owned or any other type of facilities); CAL. EDUC. CODE §47614.5 (authorizing State funding support for charter schools' rent or lease expenses, but only for charter schools located in facilities other than those provided pursuant to Section 47614 (and subject to other requirements)).

[28] *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal. App. 4th 986, 996 (2005) relying on the charter facilities regulations, noted that "a charter school must accept or reject the school district's facilities offer in its entirety, and must do so within 30 days after the offer is made or by May 1, whichever is later".

[29] CAL. EDUC. CODE §47614(b)(4).

[30] CAL. EDUC. CODE §47614(b)(2), CAL. EDUC. CODE §47614(b)(4) and CAL. EDUC. CODE §47614(b)(6) each make important reference to the mechanics of the charter facilities law as an optional statutory scheme. Section 47614(b)(2) requires "...each charter school *desiring* facilities..." to provide certain information to the school district. Use of the term "desires" implies that some schools may *not* so desire, and therefore are not required to make requests under this section. Section 47614(b)(4) states, "Facilities requests based upon projections of fewer than 80 units of average daily classroom attendance for the year may be denied by the school district" (indicating that the operation of this statute includes a request on the part of the charter school and parameters for a school district's discretion to deny such request). Finally, Section 47614(b)(6) directs the Department to propose regulations implementing the charter facilities law, "including...defining the procedures and establishing the timelines for the request for...facilities" (implying such regulations will include mechanism for a request-offer-acceptance/rejection process). Also, see CAL. CODE REGS., Tit. 5, §11969.9 (providing for 30-day periods between each of charter school's request, district's offer/response, charter school's counter-offer/response, district's final offer, and charter school's acceptance/rejection).

[31] *Sequoia Union High School District v. Aurora Charter High School*, 112 Cal. App. 4th 185 (2003) holding that provision of facilities pursuant to the charter facilities law is mandated upon proper request; and *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal. App. 4th 986 (2005) holding that such facilities must, to the maximum extent practicable, be contiguous and reasonably equivalent to those provided to other in-district students.

[32] CAL. CODE REGS., Tit. 5, §11969.1(a) (stating that Section 11969 "governs the provision of facilities by school districts to charter schools under Education Code Section 47614").

[33] CAL. CODE REGS., Tit. 5, §11969.1(b).

Further, the Final Statement of Reasons prepared by the California Department of Education (the "Department") regarding the charter facilities regulations (the required explication of the regulations) describes the existence of and potential future necessity for such alternative arrangements.[34]

> "This section states that the group of sections that follow govern provision of facilities by school districts to charter schools under Education Code section 47614. This section serves as an introduction to the group of sections and also restricts the application of these proposed regulations to the provision of facilities *under Education Code section 47614*. Thus, charter schools and school districts may continue existing facilities arrangements or develop new *arrangements outside of Education Code section 47614*, which would not be subject to the regulations." [emphasis added]

The regulatory framework comports with the statutory framework, insofar as it implements a mechanism for the provision of school facilities to charter schools pursuant to an opt-in process, and leaves charter schools that do not opt in free to undertake whatever alternative arrangements they deem appropriate to house their educational programs.

On July 24, 2008, the California School Boards Association ("CSBA") (and other plaintiffs) filed a petition in Sacramento County Superior Court seeking to compel the Department to set aside and vacate the charter facilities regulations, including Section 11969.1, on the grounds that it is inconsistent with and exceeds the scope of its enabling statute (namely, Section 47614). In particular, the pleadings state:

> "Section 47614 only speaks to sharing facilities. Nowhere does it state that charter schools may receive funding from school districts. Instead, section 47614 imposes a *mandatory duty* on school districts to share their facilities fairly and with reasonable equality with eligible charter schools. No discretion is provided to a school district to arrange for any alternative to specific compliance, much less an alternative where the school district would provide funds to the charter school in lieu of providing facilities."[35] [emphasis added]

Under the premise, as articulated above in this subsection, that the charter facilities law creates an optional statutory framework, the "mandatory duty" described in the CSBA pleadings is only imposed on those districts in receipt of a request for facilities. As to others, no such duty would arise (unless and until an eligible facilities were timely submitted). This analysis gives rise to a perhaps hyper-technical, but analytically important distinction, which can be drawn between those districts, on the one hand, who receive a facilities request and must rely on the charter facilities regulations to offer money "in lieu of facilities" to the requesting charter school, and, on the other hand, those districts who never receive such a request, but instead enter into negotiations, either *sua sponte* or at the invitation of a charter school, to determine ultimately that the district will assist the charter school in housing its operations by providing some amount of money to the charter school to be used for payment of rent or purchase of facilities. The

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[34] California Regulatory Law Bulletin, 2007-3 CRLB 28, (California Department of Education, School Fiscal Services Division, Final Statement of Reasons regarding Article 3 of Subchapter 19 of Chapter 11 of Division 1 of Title 5 of the California Code of Regulations), pp. 2-3.

[35] *California School Boards Association, et. al, v. California State Board of Education, et. al*, Superior Court of the County of Sacramento, Case No. 34-2008-00016957-CU-WM-GDS, Petitioners' and Plaintiffs' Amended Memorandum of Points and Authorities in Support of Write of Mandate; Petition for Declaratory and Injunctive Relief, filed September 2, 2008, at p. 9.

former arrangement, according to the challenge, would be disallowed as contradictory to the charter facilities law's authority while the latter, because the parties never trigger the "mandatory duty", would be allowed. However the distinction between the former and the latter arrangements becomes a distinction without a difference, if, as a practical matter, the parties could end up in the latter arrangement by going though the motions of requesting, offering, and rejecting - leaving them back at the beginning of the process once again. Thus, either a mandatory duty exists, and can theoretically be discharged without the provision of facilities (due to offer rejection), or the duty is never triggered. In either case, districts and charter schools seem to have a mechanism for, without violating the law, arriving at alternative arrangements.

To date, the CSBA litigation is unresolved. If successful, the Department could be required to set aside the charter facilities regulations, and to undertake anew the process of promulgating regulations to implement the charter facilities law.[36] However, if the preceding analysis is correct that alternate arrangements may be made without initiating the facilities request process, the invalidation of the charter facilities regulations could not, on its own, have the effect of altering the optional framework of the statutory scheme of the charter facilities law, and thus could not give rise to any new requirement that either (a) charter schools *must request* facilities under the charter facilities law, (b) districts *must provide* facilities absent a proper request, or (c) charter schools *must accept* facilities offered thereunder. Finally, nothing in the charter facilities law expressly prohibits a district from entering into alterative facilities arrangements with a charter school.

The question presented here, whether LAUSD may provide bond proceeds to charter schools, then, turns on one fundamental consideration: has the charter school submitted a request under the charter facilities law? I.e., has the charter school exercised its option under the charter facilities law? If so, LAUSD's obligation to provide contiguous, reasonably equivalent facilities that it owns (but not funding in lieu) would have been triggered under the statute. Provision, in that context, of bond proceeds to finance charter school facilities as an alternative arrangement would seem appropriate only to the extent the charter facilities regulations survive legal challenge. Otherwise, before any alternative arrangements could be entered into, LAUSD would first be required to discharge its duty under the statute. However, if no such facilities request has been made, then, regardless of the status of the implementing regulations, LAUSD seems to be free to respond to, invite or initiate negotiations with a charter school for the purpose of determining whether and how to provide funding for charter school facilities.

b. Section 47614 as a Mandatory Framework

An alternative analysis of the charter facilities law postulates that the charter facilities law represents a mandatory framework, imposing obligations on every district in which a charter school operates, regardless of whether a charter school submits a facilities request. Similar to the arguments raised in the CSBA pleadings referenced above, this view holds that districts could not possibly be permitted to provide funding to charter schools for the construction, acquisition or leasing of charter school facilities

[36] CAL. EDUC. CODE §47614(b)(6) (directing the Department to propose regulations implementing the charter facilities law).

because of the express requirement in Section 47614(b) that facilities provided under the statute "shall remain property of the district".[37]

Several points may support this contention. First, Section 47614(a) states broadly that, "the intent of the people in amending Section 47614 is that public school facilities should be shared fairly among all public school pupils, including those in charter schools." "Public school facilities" as used in this section, could be interpreted to mean *existing* public school facilities, and that no other, non-district, facilities are intended to be shared.[38] Second, the charter facilities law's requirement of accommodating only a charter school's in-district students tends to support the premise, in that, were no charter schools to exist in the district, such students "in all probability, would be attending district-run schools".[39] Districts should thus maintain, or undertake to construct, facilities sufficient to accommodate their student populations, be they in attendance at traditional district schools or charter schools.

Further, to the extent a district's facilities cannot currently accommodate all its students (both charter and non-charter students), several alternatives exist that do not involve the provision of funding to charter schools, such as: "buying or leasing portable classrooms, redrawing school attendance boundaries, increasing class size…and changing to a year-round multi-track school calendar".[40] Indeed, the *Ridgecrest* court, in holding that districts must place slightly greater weight on the "contiguity" requirement under the charter facilities law in the balancing against the "shared fairly" and "reasonably equivalent" requirements, described at least five factors a district ought to consider in the determination as to what facilities to provide to a charter school: educational, logistical, financial, legal and practical.[41] Therefore, following this line of reasoning, it could be argued that any interpretation of the charter facilities law that permitted the construction, with district resources, of charter school facilities that do not remain the property of the district would represent a departure from the intent of the law, and would result in an excess of school facilities that could constitute waste.

However, ultimately, the charter facilities law is silent as to the whether it should be applied in this manner, as a mandatory framework that prohibits any deviation or alternative arrangement. The charter facilities law does not expressly permit alternative arrangements, nor, as noted above in subsection (a), does it expressly prohibit such alternatives. Courts have articulated rules for interpreting statutes that are unclear. *Landrum v. Superior Court* stated that "in the interpretation of a statute where the language is clear, its plain meaning should be followed."[42] *Jurcoane v. Superior Court* noted, "But if the meaning of the words is not clear, courts must take the second step and refer to the legislative history." The final

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[37] An extension of, or corollary to, this argument, could hold that any provision of facilities by a district to a charter school must comply with the "shall remain property of the district" language, viewing the concept of a "facilities request" in its broadest sense. In other words, even in the absence of a written request, any discussions between a district and a charter school are necessarily characterized as such if those discussions result in the provision of facilities by the district to the charter school. Upon such reasoning, no avoidance of the statutory ownership requirement would be possible. As discussed below, however, this line of reasoning seems inconsistent with the broader statutory scheme of the Charter Schools Act.

[38] Such an interpretation of Proposition 39 would, indeed, be at odds with the broader purpose of the constitutional amendment, which included the implementation of stricter accountability standards on general obligation bond expenditures and a lowering of the voter authorization threshold for approval. See, generally, CAL. CONST., Art. XIII A, §1(b)(3).

[39] *Ridgecrest Charter School v. Sierra Sands Unified School District*, 130 Cal. App. 4th 986, 999 (2005).

[40] *Id.* at 995.

[41] *Id.* at 1002.

[42] *Landrum v. Superior Court*, 177 Cal. Rptr. 325, 333 (1981).

step, as articulated in *Jurcoane*, is "one which we believe should only be taken when the first two steps have failed to reveal clear meaning - is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable."[43] The *Landrum* court recognizes, "a cardinal rule of statutory construction, that 'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect'".[44] *Jurcoane* concludes, "If statutory language is ambiguous, and only then, we must construe statutes to ensure reasonable, not absurd, results, consistent with overall legislative intent."[45]

Applying these rules to the charter facilities law, we first conclude that, given the silence of the statute as to whether alternative arrangements are permitted, the statute's plain meaning cannot be ascertained in this regard. Further, because Section 47614 was added to the Charter Schools Act by Proposition 39, a voter approved initiative measure, the only legislative history we may look to is the content of the proceedings leading up to the voter approval of the measure – e.g., the arguments submitted in favor and against the ballot measure.[46] The charter facilities law is not mentioned in any of those materials. Thus, the statutory interpretation analysis quickly proceeds to the third and final step, interpreting the statute's meaning in the broader context of the Charter Schools Act, or to "apply reason, practicality, and common sense", "make them workable and reasonable", "construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect", and "ensure reasonable, not absurd, results, consistent with overall legislative intent".[47]

The Charter Schools Act is premised on the principle of flexibility. It commences with broad statements of legislative intent, invoking the goals that charter schools should infuse vigorous competition, continuous improvement and innovation into the public school system.[48] Requirements for charter petitions under the Act include broad authority to establish charter schools in locations the charter schools deem appropriate and permit the implementation of diverse instructional programs.[49] Yet, charter schools must remain under the purview of the public school system and are intended to incubate improvements that can ultimately achieve systemic impact.[50] Finally, charter schools are entitled to receive school facilities from school districts that are reasonably equivalent, contiguous facilities, owned by the district, per the charter facilities law.[51]

In the broader context of the Act, the charter facilities law must be deemed an optional framework, designed to harmonize with the Act's principle of flexibility and to permit charter schools and districts to determine alternative arrangements outside of the charter facilities law's specific requirement that district own the facilities provided to charter schools. The opposite result could be deemed absurd or at least in violation of common sense, in that it would drastically limit flexibility, stymie innovation and generally contradict the basic goals of the Act. Oversight mechanisms are not abandoned when charter schools

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[43] *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 893 (2001).
[44] *Landrum v. Superior Court,* 177 Cal. Rptr. 325, 333 (1981).
[45] *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 893 (2001).
[46] No legislative history exists in the State Legislature because the law was not enacted by the Legislature.
[47] *Landrum v. Superior Court,* 177 Cal. Rptr. 325, 333 (1981); *Jurcoane v. Superior Court*, 93 Cal. App. 4th 886, 893 (2001).
[48] CAL. EDUC. CODE §47601(a)-(g).
[49] CAL. EDUC. CODE §47605.
[50] CAL. EDUC. CODE §47615(a)(2); CAL. EDUC. CODE §47601(g).
[51] CAL. EDUC. CODE §47614(b).

occupy their own facilities given the well established procedures for charter petition review, approval and renewal. Public resources remain in the ultimate control of the public agency chartering authorities, and mechanisms can be put in place to ensure appropriate disposition of facilities (and other assets of charter schools) in the event a charter school ceases to operate in the facility. In designing their own facilities, charter schools are often able to tailor the architectural elements to support the innovative education programs the Act is designed to incubate. And charter schools' ability to construct innovative school facilities more efficiently than school districts can inspire further innovation on the part of school districts to improve the delivery of their school construction programs. Taken together, these factors tend to support the notion that the charter facilities law is an optional framework, subject to the establishment of alternative arrangements between charter schools and districts, including the provision of money for the construction of charter school facilities.

C. Local District Policy

The legislative action taken by the Board of Education of LAUSD (the "Board") on July 31, 2008 included the adoption of a resolution calling an election for November 4, 2008 (the "LAUSD bond resolution").[52] The LAUSD bond resolution did not do any of the following: (1) make reference to specific allocations of bond proceeds among various projects described in the excel spreadsheet included in the Board agenda materials, or (2) make reference to any of the staff memoranda describing the necessity for the bond funds, or the needs assessment/analysis underlying the projects listed in the measure. While these staff memoranda described in (2) above may have mentioned staff recommendations regarding implementation of LAUSD's charter facilities financing program, given that such memoranda were not formally adopted by the Board (or even referenced in the LAUSD bond resolution), it is unclear whether they in fact constitute the policy of the Board, or instead were simply recommendations which are not controlling on district staff. Thus, even if district ownership of bond-financed charter facilities were indicated as a recommendation in one or more of those memoranda, it is not clear that district ownership constitutes the current policy of the Board.

If those memoranda did contain language that stated a district policy of maintaining ownership of bond-financed charter school facilities, and if those memoranda do (by virtue of thier inclusion in the LAUSD bond resolution agenda materials) constitute the formal policy of the Board, then it could be argued that district ownership is currently required as a matter of Board policy. In such event, the Board would need to rescind or amend that policy in order for staff to implement bond-financed charter school facilities programs where LAUSD did not own the facilities. No formal declaration need be made to "overturn" the previous policy; instead the Board could simply approve a new policy that constituted a departure from a previous policy by expressly or implicitly approving a charter school project. Any existing Board policy should not be viewed as a legal limitation to the "smart financing" approaches.

VI. CONCLUSION

We caution that the views expressed in this memorandum are based on an analysis of existing laws and court decisions and cover certain matters not directly addressed by such authorities and are based on the

[52] Board of Education of the Los Angeles Unified School District, resolution adopted on July 31, 2008 (calling a general obligation bond election for November 4, 2008).

facts and factual assumptions recited in this letter. The views expressed herein are explicitly qualified insofar as the matters discussed herein may be subject to the application of equitable principles and to the exercise of judicial discretion. It is possible that a court presented with the same questions could decide each matter differently from what we have described.

In particular, as we have stated, we are not aware of any decided cases on the specific factual matters discussed herein. Primarily because of this lack of legal authorities, Orrick generally cannot give an unqualified opinion on the permitted use of bond proceeds for any particular project, either favorable or unfavorable. Any taxpayer is entitled to sue the district to enjoin the expenditure of bond proceeds for a project the taxpayer reasonably believes is not authorized by the ballot measure.