

CIVIL NO. B215777

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE**

NEW WEST CHARTER MIDDLE SCHOOL,

Plaintiff-Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.*

Defendants-Respondents.

Appeal from the Los Angeles County Superior Court
Case No. BS115979
Honorable James C. Chalfant, Judge

**APPLICATION OF CALIFORNIA CHARTER SCHOOLS
ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF PLAINTIFF-APPELLANT NEW WEST CHARTER
MIDDLE SCHOOL AND [PROPOSED] ORDER; [PROPOSED]
AMICUS CURIAE BRIEF IN SUPPORT THEREOF**

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APPLICATION OF CALIFORNIA CHARTER SCHOOLS
ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Charter Schools Association (“CCSA”) respectfully requests leave to file the attached *amicus curiae* brief in support of the arguments of Plaintiff-Appellant New West Charter Middle School (“New West”).

CCSA is a nonprofit membership and professional organization that represents over 800 public charter schools that educate more than 341,000 public school students across California. CCSA’s member schools are public schools, many of them operated as or by nonprofit entities, dedicated to innovation and educating public school students more effectively than district-run schools have done. CCSA advances the charter school movement by providing state and local advocacy, leadership on school quality, and operational and support services to its member schools.

Charter school success in the Los Angeles Unified School District (“LAUSD”) is vitally important to CCSA, as charter schools within LAUSD educate approximately 68,000 public school students at 163 public charter schools.¹ Indeed, 10% of all public school students in LAUSD’s boundaries attend charter schools, making charter schools an integral part of the public education system in the LAUSD area.

¹ Of the 163 charter schools operating in LAUSD, 144 (88%) are members of CCSA.

With strong Academic Performance Index scores, these CCSA-member public schools generally outperform LAUSD-run schools, and they do so while having tremendous diversity. The vast majority of students enrolled at public charter schools within LAUSD's boundaries are students of color. Indeed, Latino and African-American charter school students make up about 83% of the total charter school population in LAUSD's boundaries. As such, public charter schools in LAUSD are diverse places of learning that have been very successful in educating public school students within LAUSD's boundaries and across California.

Despite the strong performance of charter schools within LAUSD, many of CCSA's member schools in LAUSD are suffering and have no voice. They are suffering because LAUSD has continuously violated Proposition 39 since its inception, failing to provide charter schools with the campus space the law requires LAUSD to provide. LAUSD, like many other school districts across California, flatly refuses to comply with the nearly ten-year old, voter-enacted law that decrees that "public school facilities should be shared fairly among all public school pupils, including those in charter schools." (Ed. Code, § 47614, subd. (a).)

Moreover, few charter schools have any chance to seek judicial review of LAUSD's illegal actions. LAUSD has schemed to prevent courts from reviewing its violations of Proposition 39 by forcing charter schools, as a condition of obtaining charter approval, to acquiesce to an LAUSD-

written alternative dispute resolution (“ADR”) process that is so slow and costly that it has proven impossible to get to court until the school year has passed, at which time LAUSD asserts that its legal violation is moot.

CCSA itself has joined some of its member schools and parents of charter school students in attempting litigation against LAUSD, only for LAUSD to compel a process of slow mediation followed by slow arbitration, to delay the dispute to the point where LAUSD could argue that the school year has already begun and so the dispute is moot. LAUSD forces those one-sided, take-it-or-leave-it ADR provisions on charter schools, and then uses them as a shield to let LAUSD violate Proposition 39 with impunity, thereby preventing many charter schools from competing with LAUSD-run schools by offering parents educational choices.

New West is a special case, which makes this litigation especially important to charter school students across the LAUSD area and across California. Following LAUSD’s refusal even to grant New West a charter, New West was granted its charter directly from the State Board of Education. Unlike LAUSD, the State Board of Education did not impose on New West the onerous ADR provisions that LAUSD forces on charter schools as a condition of getting a charter, so New West was able to seek swift judicial recourse for LAUSD’s violations of Proposition 39. This litigation affords the first chance ever for a public charter school within LAUSD’s boundaries to get a court to review LAUSD’s illegal conduct

and, not surprisingly, the court readily confirmed what CCSA has long known – that LAUSD’s Proposition 39 practices violate Proposition 39.

This case is very important and is being closely watched across the state. This Court’s eventual ruling in this litigation may finally mean that LAUSD and other recalcitrant school districts in California must finally comply with Proposition 39, rather than letting fears of innovation and competition push them to violate the law. In support of its member schools, CCSA has a vital interest in the legal issues presented here.

CCSA believes that this is the first time a charter school has sought and been awarded damages for a school district’s failure to comply with a writ of mandate compelling compliance with Proposition 39. That is a big victory, but it alone is not enough. If LAUSD is allowed to violate Proposition 39 (as the Superior Court held it did) and also to violate the explicit writ of mandate the court issued against LAUSD (as the Superior Court held it did), and in response merely get a “slap on the wrist” like the trial court gave here, then New West’s hard-won victory will be illusory because neither LAUSD nor other recalcitrant school districts will feel compelled to follow the law requiring them to share space equitably with charter schools. After all, if LAUSD’s near-decade of violating Proposition 39 ultimately results in just one case being able to be adjudicated and a small damages award, then LAUSD and other recalcitrant school districts will likely make the same political calculus in the future that they have

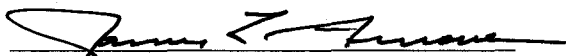
made in the past – that refusing to comply with Proposition 39 and the innovation and competition it was designed to foster poses less of a burden to political stakeholders than honestly following the law. As this case presents critical issues of first impression, CCSA’s proposed *amicus curiae* brief addresses these issues and their potential statewide ramifications.

In sum, CCSA’s interest and perspective regarding the impact this case will have on charter schools throughout California and the public school students they serve is essential for the Court to consider, and will assist the Court in reaching an appropriate decision. Accordingly, CCSA’s perspective is needed on this crucial matter, and CCSA respectfully requests leave to file the accompanying *amicus curiae* brief.

California Rule of Court 8.200(c)(3): No party or counsel for a party in this appeal authored the proposed *amicus curiae* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed *amicus curiae* brief. No one other than CCSA, its members and/or counsel made a monetary contribution intended to fund the preparation or submission of the proposed *amicus curiae* brief.

Dated: April 14, 2010

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By: 
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[PROPOSED] ORDER

For good cause shown, the Court hereby grants the Application of California Charter Schools Association for Leave to File the attached *Amicus Curiae* brief in support of Plaintiff-Appellant New West Charter Middle School. Any answer to the *Amicus Curiae* brief must be filed on or before _____, 2010.

IT IS SO ORDERED.

DATED: _____

Presiding Justice

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-
APPELLANT NEW WEST CHARTER MIDDLE SCHOOL

I. INTRODUCTION

The California Charter Schools Association, as *amicus curiae*, supports New West’s accurate measure for calculating damages when a school district violates its obligations under Proposition 39.¹

This voter-enacted initiative gives public school students attending charter schools an entitlement to space on a traditional school campus. When a school district fails to provide facilities to a charter school and thereby breaches its statutory duty (as happened here), the relief available is for that charter to seek a writ of mandate to compel compliance.

New West sought and won a writ of mandate against LAUSD. That was an extraordinary feat made possible, in part, by New West’s unique position of not having been burdened with the slow-moving alternative dispute resolution (“ADR”) process that LAUSD forces charter schools to accept when LAUSD grants their charters (LAUSD denied New West a charter, New West appealed and ultimately won a charter granted directly by the State Board of Education, and so New West has a reasonable charter, unlike those that LAUSD grants).

¹ There is no question here that LAUSD violated Proposition 39. The trial court issued a clear writ of mandate compelling compliance, and LAUSD dismissed its appeal of that writ. CCSA believes that LAUSD dismissed its appeal to avoid letting an appellate court confirm that it violates Proposition 39, since LAUSD continues to do so and seems intent on doing so indefinitely.

The problem here is that LAUSD's commitment to breaking the law is so great that, having stated before trial that it would not comply with Proposition 39 even if it lost the case, LAUSD took steps to make sure no space would be readily available for New West when New West won in court. As the trial court held, LAUSD "deliberately refused" to comply with its writ of mandate. That is extraordinary defiance of judicial and legislative authority, and it should not be tolerated by this or any court.

This appeal is about damages under Code of Civil Procedure Section 1095 that arise from LAUSD's "deliberate refusal" to comply with the writ. To make the damages reflect the campus to which New West's public school students were legally entitled but that LAUSD deliberately refused to provide, this Court must set the damages level so that it reflects the value of the traditional school campus space to which the charter school students were entitled. Those damages are most accurately calculated by utilizing the "just and equitable method of determining the value of nonprofit, special use property." (Evid. Code, § 824.) LAUSD has embarked on a well-publicized, multi-billion dollar bond-funded school construction program, so the value of such a campus can be ascertained using LAUSD's very own, real-world, present-day construction costs.

Proposition 39 cannot become a hollow promise. If LAUSD were to succeed in this appeal, it would be a punishing blow to the charter school movement in California – a movement that the Legislature initiated nearly

two decades ago and that the voters clearly supported when they approved Proposition 39 on November 7, 2000. If school districts face only minimal repercussions for violating their duty to share facilities among all public school students, even in the face of a clear writ of mandate compelling them to do so, then Proposition 39 risks becoming a dead letter. Rather than working cooperatively with charter schools to allocate space equitably among all public school students, school districts in California facing internal political pressures to disfavor charter schools will continue to violate Proposition 39, prolonging many school districts' already hostile attitude towards charter schools. This must be prevented.

Moreover, attorneys' fees must be awarded. Not only did New West's successful litigation confer a significant benefit on tens of thousands of public school students attending charter schools within LAUSD, but any financial stake New West might have in the litigation only resulted because LAUSD's failure to comply with Proposition 39 forced New West to operate its school at a non-school campus location and incur costs to make that location minimally suitable for educational instruction. Because the statutory criteria for an award for attorneys' fees under Code of Civil Procedure ("CCP") Section 1021.5 are met, the trial court must award fees.

CCSA respectfully requests that this Court reverse the trial court's erroneous damages determination and its order denying attorneys' fees, and remand for a meaningful determination of damages based upon the true

valuation of the public school campus that New West was entitled to receive, and reasonable attorneys' fees.

II. PROPOSITION 39'S MANDATE THAT PUBLIC SCHOOL FACILITIES MUST BE "SHARED FAIRLY AMONG ALL PUBLIC SCHOOL PUPILS" PROVIDES CHARTER SCHOOLS WITH AN ENTITLEMENT TO TRADITIONAL SCHOOL CAMPUS FACILITIES

By adopting the Charter School Act in 1992, the Legislature signaled its intent to "provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure." (Ed. Code, § 47601.) In the last two decades, charter schools have become an increasingly popular and successful option for parents of public school children. Charter schools are tuition-free public schools² with unparalleled innovation and flexibility, and are given the autonomy to tailor their educational and operational approaches to meet and respond to the needs of their students and community. In exchange for this flexibility, charter schools are held accountable for producing results.

Prior to the passage of Proposition 39, the Charter Schools Act only permitted charter schools to use, at no cost, school district facilities which the district was not using for instructional or administrative purposes or

² Charter schools are unequivocally "part of California's single, statewide public school system" and thus "are public schools because [they] are part of the public school system." (*Wilson v. State Bd. of Ed.* (1999) 75 Cal.App.4th 1125, 1137, 1139 [emphasis in original]; see also Ed. Code, § 47615, subd. (a)(1).)

which were historically used as rental properties. (Stats. 1998, ch. 34, § 15.) Charter schools had limited access to adequate facilities, and were “entitled to use district facilities only if that would not interfere with the district’s use of them.” (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 999 (hereafter *Ridgecrest*)).

Proposition 39 eliminated that discrimination, but the stigma of charter schools being second-class schools entitled only to leftover space still lingers in the minds of school district administrators.

With Proposition 39’s passage, California’s voters declared that “public school facilities should be shared fairly among all public school pupils, including those in charter schools.” (Ed. Code, § 47614, subd. (a).) Unlike the former Section 47614, Proposition 39 imposes a mandatory duty on each school district to “make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school’s in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district.” (Ed. Code, § 47614, subd. (b) [emphasis added].)³

³ The facilities provided to a charter school must be contiguous (located together, not spread across campus or multiple sites), and similarly furnished and equipped. (Ed. Code, § 47614, subd. (b); Cal. Code Regs., tit. 5, § 11969.2, subd. (d).) School districts also must make a reasonable effort to locate charter schools near the area in which they wish to locate. (Ed. Code, § 47614, subd. (b).)

In doing so, the school district must, to the maximum extent practicable, give the needs of the charter school the same consideration as those of the district-run schools. (*Ridgecrest, supra*, 130 Cal.App.4th at p. 1001.) “[S]ome disruption and dislocation of the students and programs in a district may be necessary to fairly accommodate a charter school’s request for facilities.” (*Id.* at p. 1000.)

In sum, Proposition 39 tells school districts that they cannot hoard classroom space and shut out charter school students. The law is clear. Students attending charter schools are public school students, and the public school classrooms taxpayers paid for must follow those students.

Many charter schools rely entirely upon Proposition 39 for their school facilities. Unlike district-run schools, charter schools cannot directly raise money through property tax assessments, developer fees, parcel taxes, or bond initiatives. When school districts fail to comply with their obligation to provide facilities to charter schools, these schools must spend precious public resources to seek out private facilities (often storefronts or church basements) to open and/or expand their schools. While some charter schools are lucky to find empty classrooms at parochial schools, others are forced to invest funds in improving private facilities, unnecessarily diverting and depleting funding meant for the instruction of students within the classroom. This trend cannot continue. The bias that school districts hold against charter schools must end.

III. LAUSD ROUTINELY VIOLATES PROPOSITION 39

Ever since Proposition 39's requirement to share facilities with charter schools went into effect in 2003, LAUSD has been in violation of its obligations. LAUSD's continuing violations of Proposition 39 are not limited to rescinding facilities offers, which it did when it unlawfully rescinded its space offer to New West, but instead run the gamut from not making any facilities offers at all to charter schools entitled to them, to making woefully inadequate offers which clearly do not provide charter schools with "reasonably equivalent" facilities.⁴ To that end, New West is just one of very many charter schools within LAUSD to be aggrieved by LAUSD's failure to comply with its duty to share facilities "fairly among all public school pupils." (Ed. Code, § 47614, subd. (a).)

In addition to New West, CCSA is aware of at least ten other charter schools in LAUSD whose operators sought judicial assistance over LAUSD's failure to provide facilities.

For example, in June 2004, the Renaissance Academy Charter School challenged LAUSD's failure to provide a facility for the 2004-05 school year, but in March 2005 a trial court found that it had no jurisdiction due to the illusory administrative remedies of the LAUSD-mandated ADR provision in Renaissance Academy's charter. Sadly, Renaissance Academy

⁴ LAUSD's former Superintendent admitted that LAUSD will not comply with Proposition 39 because of an alleged burden it places upon non-charter school students in the district. (See Clerk's Transcript ("CT") 00684-94.)

could not thereafter sustain the onerous costs of renting commercial space and obtaining approvals from the City of Los Angeles for the continued use of this space for school purposes. This meant that Renaissance Academy was unable to reopen in time for the school year beginning in Fall 2006, and it had no choice but to surrender its charter due to lack of an affordable, usable facility. Had LAUSD complied with Proposition 39 or not imposed its onerous ADR provision, Renaissance Academy could have continued to educate children.

For another example, in 2007, Ivy Academia commenced the LAUSD-mandated ADR process for LAUSD's failure to provide facilities for the 2007-08 school year. Now, three years later, that ADR process has just reached the arbitration step, which even in itself may just mean that the charter school is getting closer to the point where it can become able to seek judicial review of LAUSD's refusal to provide the classroom space to which its students were entitled three years ago. Not surprisingly, in each subsequent year LAUSD has continued to deny Ivy Academia the requisite classrooms to which it is entitled.

For another example, in 2007 CCSA, along with charter school operators Green Dot Public Schools ("Green Dot") and Partnerships to Uplift Communities ("PUC") and the parents of children attending eight separate charter schools run by those operators, was forced to sue LAUSD when LAUSD illegally denied facilities to Green Dot and PUC schools.

While CCSA and the schools and parents of those eight schools sought immediate judicial relief, arguing that the LAUSD-imposed ADR provisions should not apply to time-urgent Proposition 39 claims seeking school space for a school year that starts in just months, the trial court in those cases granted LAUSD's motion to compel ADR, which prevented any chance of prompt judicial review. Those cases settled in 2008, with LAUSD agreeing to comply with Proposition 39 from that point forward. (See CT 001512-27.)

Despite LAUSD's settlement agreement promise that it would comply with Proposition 39 and make legally compliant facilities offers to charter schools, it has failed to do so. As detailed in a March 19, 2010, letter from CCSA to LAUSD regarding LAUSD's failure to comply with the settlement agreement that resolved the Green Dot and PUC lawsuits, CCSA has been forced to continue to fight for LAUSD to start complying with Proposition 39's clear and unequivocal mandate that "[e]ach school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district." (Ed. Code, § 47614, subd. (b) [emphasis added].) (See Motion Requesting Judicial Notice filed concurrently herewith at Exhibit A, pp. 1-11.)

In addition to those examples of charter school operators having to fight LAUSD inch-by-inch to push LAUSD to start complying with Proposition 39, LAUSD's conduct just two weeks ago further highlights its commitment to ignoring the law. Specifically, despite the April 1, 2010, deadline to make final space offers for the 2010 – 2011 school year (see Cal. Code Regs., tit. 5, § 11969.9, subd. (h)), out of 81 applications, LAUSD issued timely final offers to only 45 schools – even though the law requires offers to be made to all qualified applicants. Just as bad, it appears based on initial analysis that none of those 45 “offers” comply with Proposition 39. As for the rest of the charter school applicants, they got refusals to provide any space or decrees that they were ineligible for space, in violation of Proposition 39.

Clearly, the slap on the wrist that the trial court gave LAUSD in this case has not motivated LAUSD to change its ways. Rather, if anything it has emboldened LAUSD's persistent noncompliance with the law.

IV. THE COURT SHOULD SET AN ACCURATE, REPLICABLE MEASURE FOR CALCULATING DAMAGES WHEN SCHOOL DISTRICTS VIOLATE PROPOSITION 39

This case presents a critical issue of first impression. CCSA believes that this case is the first time that a charter school has sought and been awarded damages for a school district's failure to comply with Proposition 39 – in the face of a writ of mandate compelling compliance. As such, it is essential that this Court delineate the proper method of

calculating damages when a school district violates Proposition 39 by failing to provide a charter school with space. This measure of damages would apply when a school district fails to make any facilities offer at all to a charter school entitled to facilities, when a school district makes a facilities offer that violates the statute and its implementing regulations, or when a school district rescinds an offer it had already made to a charter school. This Court's establishment of the correct standard of damages for Proposition 39 violations will not only ensure that charter school students actually obtain what is rightfully theirs, but will set precedent for school districts throughout California and will influence the behavior of those districts that have so far calculated that it is better to violate the law than to do what California's voters demanded when they enacted Proposition 39.

The correct measure of damages is the method explained by New West below and on appeal. Proposition 39 provides charter schools with an entitlement to space on a traditional public school campus. (See Ed. Code, § 47614, subd. (b).) When a school district fails to provide facilities to a charter school and thereby breaches its statutory duty, a charter school must seek a writ of mandate to compel compliance. But what happens when, as happened here, a hostile school district "deliberately refuses" to comply with that writ of mandate compelling the charter school's use of public school facilities? Without meaningful damages, the charter school is left where it began prior to obtaining the writ – the district's schools have the

school facilities and the charter schools do not.⁵ Therefore, damages must be awarded that reflect the actual value of the traditional school campus space to which the charter school's students are entitled. These damages are most accurately calculated by utilizing the "just and equitable method of determining the value of nonprofit, special use property."⁶ (Evid. Code, § 824.) This method is replicable across a wide array of factual situations, and New West's briefs provide sound and persuasive methodology in showing what the value of a traditional school campus would be.

Moreover, the method of calculating damages proposed by New West correctly recognizes that a charter school's rental of substitute private facilities when a school district violates Proposition 39 is irrelevant to the determination of the "fair market value" of the school's Proposition 39 entitlement. Should a charter school be lucky enough to find commercial or industrial space in which to operate when a district violates Proposition

⁵ Actually, the charter school would be worse off, because it went through the expense of litigation to successfully enforce its rights, yet has no Proposition 39 facility.

⁶ Contrary to LAUSD's contention, this valuation method is not just available in eminent domain proceedings. Article 2 of Chapter 1 of Division 7 of the Evidence Code, of which Section 824 is a part, "provides special rules of evidence applicable to any action in which the value of property is to be ascertained." (Evid. Code, § 810 [emphasis added].) The Legislature amended Section 810 in 1980, eliminating the former language which read: "This article provides special rules of evidence applicable only to eminent domain and inverse condemnation proceedings." (Stats 1980, ch. 381, § 1.) As the Law Revision Commission noted in recommending this statutory change, "[p]roperty valuation issues should be governed by a uniform set of rules" and these rules should "be extended to all cases." (Recommendation Relating to Application of Evidence Code Valuation Rules in Noncondemnation Cases, 15 Cal. Law Revision Com. Rep. 301 (Mar. 1979) p. 309.)

39, the charter school should not be penalized for being forced to rent that often inferior space. Conducting school operations in space designed for commercial or industrial uses is not the same as having a traditional school campus with a library, playground, auditorium, and so forth, and it is not an adequate alternative to Proposition 39. Rent that a charter school pays to operate its school at a facility other than a traditional school campus should not limit the damages to which the charter school is entitled after a district breaks the law.

V. BOTH LAUSD’S AND THE TRIAL COURT’S METHODS OF CALCULATING DAMAGES ARE ERRONEOUS

A. Calculating Proposition 39 Damages as a Charter School’s “Out of Pocket” Costs is Inappropriate

LAUSD’s measurement of damages in this case is predicated on an “out of pocket” damages theory, in that New West should only be entitled to the rent it incurred in renting its Pico facility, minus what LAUSD contends New West would have had to pay if it co-located on an LAUSD campus. LAUSD’s theory misinterprets Proposition 39. LAUSD is arguing for a rule that when LAUSD violates Proposition 39 – which it does consistently – all it need do is pay the charter school it harmed the difference between the rent the charter school had to pay for some inferior, non-school space less what LAUSD would have forced the charter school to pay had LAUSD complied with Proposition 39. That is absurd. That would perpetuate the second-class status that LAUSD presumes charter

school students have, as that would fail to recognize that the public school students attending charter schools are every bit as entitled to their fair share of public school facilities as the students attending LAUSD-run schools. When LAUSD violates Proposition 39 and forces a cash-strapped charter school to scramble for whatever space it can find, LAUSD cannot then pretend that the space the charter school had to accept was all that its students were ever entitled to have. Such bias is unacceptable.

Proposition 39 and its implementing regulations provide a detailed process obligating school districts, on a yearly basis, to offer facilities to charter schools that request them. Charter schools that submit valid facilities requests are, therefore, entitled to their students' fair share of school facilities that the public's tax dollars bought. The entire point of Proposition 39 was to make this clear – ending LAUSD's and other school district's disparate treatment of charter school students as second-class students. As such, "out of pocket" damages for Proposition 39 violations would be wholly inappropriate and would perpetuate LAUSD's and other districts' long-proven conduct of violating the law.

In addition, LAUSD's argument would have a further absurd result in the situation where LAUSD illegally denies facilities to a charter school that then was unable to find any substitute space. In that common scenario, the charter school simply could not open or could not serve all of the students seeking to attend, and so under LAUSD's theory the school it

wronged would presumably get nothing since the charter school would have incurred no out-of-pocket costs. While such a result would further the wishes of LAUSD's political stakeholders who want to limit educational choices for public school students, it would run afoul of the Legislature's clear intent that charter schools should be viable educational alternatives to traditional district-run schools. (See Ed. Code, § 47601.) Moreover, such a result would render Proposition 39 meaningless, as school districts would reap no meaningful repercussion in violating the law.

LAUSD's inappropriate "out of pocket" damages theory must not be applied to Proposition 39 cases.

B. The Measure of Damages Should Not Be Offset by Maintenance and Operations Charges

When a school district does comply with Proposition 39 and provides space to a charter school on a traditional school campus, Proposition 39's implementing regulations apportion all maintenance and operations ("M&O") responsibilities for that space to the charter school. The regulations state that "[t]he ongoing operations and maintenance of facilities and furnishings and equipment is the responsibility of the charter school." (Cal. Code Regs., tit. 5, § 11969.4 [emphasis added]; see also *id.* § 11969.7, subd. (a)(3) [stating that "facilities costs do not include any costs that are paid by the charter school, including, but not limited to, costs associated with ongoing operations and maintenance. . ."].) Despite the

regulations' clear direction, LAUSD asserts that it would have charged New West \$276,266.52 for its co-location "to cover the proportional costs of [M&O]," and that New West's damages must be offset by this amount. (Respondents' Brief ("RB"), p. 15-16.) LAUSD is wrong.

Charter schools are not required to obtain their M&O services from the school district. Not only do the regulations clearly dictate otherwise, but charter schools are not subject to school district collective bargaining agreements with custodial crews. (Ed. Code, § 47610 [exempting charter schools from laws governing school districts]; see also *id.*, § 47611.5, subd. (e) ["The approval or a denial of a charter petition by a granting agency . . . shall not be controlled by collective bargaining agreements. . . ."]) This independence allows charter schools to tailor their operational approaches to meet and respond to the needs of their students and communities. Requiring charter schools to pay for M&O services provided by a school district conflicts with the intent of the Charter Schools Act that charter schools must be permitted to "operate independently from the existing school district structure." (*Id.*, § 47601.)

Moreover, LAUSD cynically seeks to invoke against New West the settlement agreement entered into between CCSA and LAUSD. Given that New West was not a party to that agreement, LAUSD's effort is disingenuous. As referenced above, in April 2008, LAUSD and CCSA executed a settlement agreement to resolve the Green Dot and PUC

litigations. Among many other provisions, that settlement agreement obligated LAUSD and CCSA to negotiate in good faith for a form facilities use agreement that complies with Proposition 39 and the implementing regulations to be offered for use by any CCSA member school. As demonstrated in CCSA's March 19, 2010, letter to LAUSD, CCSA strongly asserts that LAUSD is violating the settlement agreement and Proposition 39 by trying to force charter schools to accept LAUSD's M&O services at the charter schools' expense. (See Motion Requesting Judicial Notice, Exhibit A, p. 12.) In addition, and contrary to LAUSD's contention (see, e.g., CT 001889), New West never agreed to pay for those M&O services. New West is not a party to the settlement agreement and, therefore, cannot be bound by its terms. It is also hypocritical of LAUSD to try to hide behind that settlement agreement when LAUSD knows that CCSA strongly asserts – and LAUSD has not yet replied to deny it – that LAUSD has been violating all of its obligations under the settlement agreement since its execution in April 2008. (See generally, Motion Requesting Judicial Notice, Exhibit A.) That cynical misuse of a settlement agreement LAUSD is violating is unbecoming for a public agency that is charged with following the law and educating children.

As New West never agreed that it would pay for LAUSD to perform M&O services on campus space that New West occupied, and because such a requirement would conflict with the clear direction of Proposition 39's

implementing regulations, LAUSD's contention that these M&O costs must be deducted from the damages awarded to New West is wrong.

C. **Affirming the Trial Court's Ruling on Damages Would Have a Grave Effect on the Future of Proposition 39**

The trial court incorrectly ruled that "contract-based" damages are appropriate for a violation of Proposition 39 and, even in doing so, misapplied contract-based damages law. If that error were to be affirmed, Proposition 39 would become a toothless tiger.

The goal of contract damages is to put the aggrieved party in the same position it would have been in had the other party fully performed a contract, *i.e.*, by giving the aggrieved party the "benefit of the bargain." (See, e.g., *Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 649.) Instead, the trial court punished New West for seeking and paying for alternative space – inferior for New West's educational purposes than a normal school campus would be – to operate its school. The trial court's ruling did not put New West in the same position it would have been in had LAUSD followed the law because, had LAUSD followed the law, New West's students would have had a relatively spacious public school campus with the typical attributes they offer, rather than the cramped converted commercial space New West's students got.

School districts in California are required to give public school students attending charter schools the same consideration they give to

students attending district-run schools. (*Ridgecrest, supra*, 130 Cal.App.4th at p. 1001.) To that end, Proposition 39 provides charter schools with an entitlement to classroom space on campuses traditionally run by school districts. (See *Sequoia Union High School Dist. v. Aurora Charter High School* (2003) 112 Cal.App.4th 185, 194 [noting that Proposition 39 “expressly and unmistakably” requires a school district to provide facilities to a charter school operating within that district].) Thus, Proposition 39 provides charter schools with a statutorily-based right to such facilities. The correct measure of damages is a valuation of that right under Evidence Code Section 824.

School districts throughout California routinely violate Proposition 39, with LAUSD being especially notorious. If the trial court’s damages award is affirmed, school districts would have no reason to change their ways. That would perpetuate the widespread violation of Proposition 39 in school districts with political dynamics opposed to educational innovation and parental choice, thereby intensifying the challenges those innovative schools already face. Such an imbalanced result is not what the voters intended when they changed the law to require public school facilities to be shared equally among all public school students.

VI. REASONABLE ATTORNEYS' FEES ARE JUSTIFIED HERE

A. New West's Lawsuit Conferred a Significant Benefit on a Large Class of Persons

Contrary to LAUSD's contentions, this is not the appropriate case to invoke deferential review of a trial court's order denying attorneys' fees under CCP Section 1021.5. Instead, this Court must use its own judgment in determining whether New West conferred a significant benefit on the general public or a large class of persons. To that end, there should be no doubt in this case that New West's victory did so.

The determination of whether a large class of persons benefits by a particular decision is a "value judgment" that appellate courts are "well situated to make." (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9.) In the context of public school education, courts have recognized that lawsuits impacting a school's students and their parents benefit a large class of persons. (*Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 551-52.) Further, the significant benefit need not be tangible or concrete; it may be recognized from the effectuation of a fundamental policy or when a lawsuit sets precedent for future agency decisions. (See, e.g., *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1097; *County of Colusa v. California Wildlife Conserv. Bd.* (2006) 145 Cal.App.4th 637, 655-56.)

New West did not make a Proposition 39 facilities request for the private benefit of New West's operator. Charter schools do not educate public school students for the benefit of their operators. They are not private schools, nor are they "for profit" entities that merely care about their financial bottom line. Rather, most charter schools are operated as or by "nonprofit public benefit corporations" and exist to educate their students. (See *Knapp v. Palisades Charter High School* (2007) 146 Cal.App.4th 708, 715, fn. 5 ["Public benefit corporations are formed for a public or charitable purpose. They are not operated for the mutual benefit of their members but for some broader good."] [emphasis added].) New West itself operates as a nonprofit public benefit corporation. Typical of many charter schools, New West's corporate board, which also serves as the school's governance council, consists of parents, teachers, community members, the principal and employees of the school.

New West, as well as other charter schools, requested facilities from LAUSD under Proposition 39 so that its students would have the opportunity to benefit from an educational experience at a traditional school campus that contains amenities beyond just classrooms, including athletic fields, auditoriums, science labs, and cafeterias. Accordingly, by successfully demonstrating that LAUSD failed to comply with its obligation to share campus space fairly among all public school students,

New West clearly vindicated the rights of its 284 students, not the entity itself, and thus conferred a significant benefit on a large group of persons.

Moreover, that this decision conferred a significant benefit on a large group of persons is further bolstered by the unfortunate reality that other charter schools operating within LAUSD, which are burdened by one-sided ADR provisions forced on them by LAUSD, have not been able to get expeditious judicial review when LAUSD violates Proposition 39. As a condition of obtaining charter approval, LAUSD requires charter schools to agree to onerous and lengthy ADR provisions before going to court to address any disputes with the district.⁷ (See LAUSD District Required Language for Charter Petitions, Element 14 – Dispute Resolution, attached to Motion Requesting Judicial Notice, Exhibit B.) In practice, these provisions have precluded charter schools from obtaining any meaningful relief as a result of LAUSD's Proposition 39 violations, and thus have prevented them from opening, expanding, and/or providing the best possible education they can to their students. As a rare charter school in LAUSD with the ability to seek timely judicial review of LAUSD's Proposition 39 violations, New West's victory affected the rights of tens of thousands of charter school students within LAUSD who are suffering as a

⁷ By obtaining its charter from the State Board of Education, New West is not subject to these ADR provisions, and thus was able to seek judicial recourse for LAUSD's violations of Proposition 39.

direct result of LAUSD's failure to provide facilities to the charter schools which they attend.

The trial court stated that LAUSD has no choice but to comply with Proposition 39 and that it cannot shirk its statutory duties. (See CT 001253; 001579.) Thus, and as LAUSD even admitted at the trial court, (see, e.g., CT 000688; 000694; 000838-39), the decision in this case will positively impact thousands of charter school students within LAUSD.⁸ There can be no doubt that the result of this lawsuit conferred a significant benefit on a large class of persons.

⁸ LAUSD argued at trial that "the public policy of California ... does not condone the differential treatment of public school students in the provision of basic educational necessities." (CT 000864.) In justifying its refusal to comply with Proposition 39 for New West and 25 other charter schools, District staff said that compliance with the trial court's writ would cause a "*domino effect*" requiring accommodation of charter schools. (CT 000838-839.) LAUSD claimed that "[a]pplying this same outcome across the District, the effect would be profound. Many of the goals the District has set forth would be disrupted and existing programs would have to be dismantled to accommodate the charter schools." (*Id.*) LAUSD summarized its opposition to Proposition 39 by stating that "[t]he writ New West seeks is a threat to public education." (CT 000844.) LAUSD testified that the writ "would engender chaos" within the District, and cause "calamitous harms." (CT 000855) The LAUSD Superintendent said it best: a writ issued in this case would "ripple far beyond the walls of the facility where the charter is placed." (CT 000694.) Clearly LAUSD believed (before it lost the case) that New West was litigating important rights affecting the public generally.

**B. The Financial Burden of Private Enforcement Warrants
an Award of Fees in this Case**

There can be no dispute that New West satisfies the financial burden prong of the private attorney general statute as well. As stated above, charter schools are public schools operated as or by nonprofit public benefit corporations. Charter schools are not in the field of education to make money. Rather, charter schools are dedicated to educating public school students using methods not typically used in district-run public school settings. Charter schools do not rush out to file Proposition 39 lawsuits in order to seek damages to line their pockets. Charter schools like New West only file litigation when it is the last resort. Any damages awarded to a charter school for a Proposition 39 would go towards providing a quality education to the school's students, and to recoup costs that the school is forced to incur when a school district violates its statutory entitlement to co-locate on a traditional school campus.

Even if this Court were to agree with the trial court that New West has a financial stake in this litigation, the Court must recognize that LAUSD, not New West, created this financial stake. If LAUSD had complied with its statutory duty to provide New West with reasonably equivalent facilities, New West would not have had to seek an alternative location to operate its school and thus would not have had to file this case.

Moreover, the financial burden prong cannot be analyzed in isolation. Instead, it must be considered in relation to the public benefits conferred as a result of the successful litigation:

If public benefits are very significant, it is more important to encourage litigation, and thus it may be appropriate to award fees under section 1021.5 'even in situations where the litigant's own expected benefits exceed its actual cost by a substantial margin.' In contrast, if public benefits are modest, 'the courts should award fees only where the litigant's own expected benefits do not exceed its costs by very much. . . .'

(*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1415 [citation omitted].) As explained in detail above, New West's success in this case served to benefit not only the public school students that it educates and the community that it serves, but tens of thousands of charter school students within LAUSD. Because such significant benefits extended to a wide class of persons, an award of attorneys' fees is appropriate in this instance.⁹

⁹ In addition, denying a charter school's ability to recover attorneys' fees for LAUSD's blatant disregard of the law will set bad precedent. LAUSD and other school districts will not be compelled to comply with Proposition 39 and will continue to violate it without any significant repercussion. This will simply maintain a status quo which has significant biases against students attending charter schools, and could hinder any ability to make real improvements in California's educational system.

C. When the Statutory Criteria of Section 1021.5 Are Met, a Trial Court's Discretion to Deny Fees is Very Limited

New West satisfies the three-pronged test of the private attorney general statute. When the criteria of Section 1021.5 have been met, the trial court must award attorneys' fees to the prevailing party. (See, e.g., *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297, fn. 3.) Thus, this Court should reverse the trial court's order denying attorneys' fees.

VII. CONCLUSION

The right to a public education is a fundamental right fully guaranteed and protected by the California Constitution. (*Butt v. State of California* (1992) 4 Cal.4th 668, 685 ["It therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts."].) This right risks being trampled upon when school districts refuse to comply with Proposition 39.

For the reasons set forth above, in order to maintain the viability of Proposition 39 and ensure that all public school children in California are afforded equal educational opportunities, CCSA respectfully requests that this Court grant New West's request that the trial court's erroneous damages award and order denying attorneys' fees be reversed, and the case be remanded for the trial court to properly determine the amount of

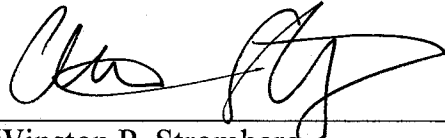
CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the word count for the brief above, excluding the caption and tables of contents and authorities is 6,387 words. I relied upon the word count feature provided by Microsoft Word.

DATED: April 14, 2010

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560.

On **April 14, 2010**, I served the following document described as:

APPLICATION OF CALIFORNIA CHARTER SCHOOLS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT NEW WEST CHARTER MIDDLE SCHOOL AND [PROPOSED] ORDER; [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT THEREOF

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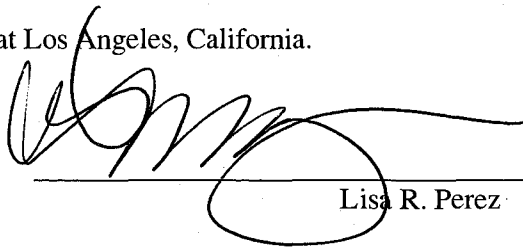
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