



MEMORANDUM

TO: Members of the Public School Choice Resolution (“PSC Resolution”), Workforce Stability Task Force (“Task Force”) as established by the Los Angeles Unified School District (“LAUSD or the District”) School Board (“Board”)

FROM: Maria Heredia, General Counsel, California Charter Schools Association

DATE: October 19, 2009

RE: California Charter Schools Association (“Association”) Identification of Issues Relevant to Charter School Participation in the RFP Site Allocation Process under the PSC Resolution dated August 25, 2009 (“RFP Site Allocation Process”)

I. INTRODUCTION

Ms. Maria Casillas, co-chair of the Task Force, concluded the October 5, 2009 meeting amidst an agreement amongst those serving on the Task Force that the scope of work required focus on the issue of workforce stability. Specifically, the PSC Resolution states that the Task Force is:

[T]o work collaboratively with all stakeholders to develop guidelines and a process for the District to apply when evaluating operational plans from external operators for schools not already subject to binding legal and contractual collective bargaining obligations and to submit the recommendations of said task force to the Board for approval within 60 days.

The Association concurs that the work and discussion of the Task Force must be directed at developing guidelines and a process to suggest to the District and nothing extraneous to the same. Toward that end, the Association offers the following analysis to the Board and the Task Force in an effort to define the matter and the manner in which charter schools might effectively participate in the RFP Site Allocation Process while observing the Board’s objectives.

This memorandum is provided to the Task Force by the Association’s Office of General Counsel as an outline the Association’s analysis. It is not intended as nor should it be taken as legal counsel to the Task Force, the District, the Board or any other third party. Rather, it is the Association’s outline of the legal analysis applicable to charter schools as participants in the RFP Site Allocation Process provided to the Task Force to further develop the Association’s position.

II. THE PLAIN MEANING OF THE RESOLUTION: THE DISTRICT AS THE DEFAULT PROVIDER OF SERVICES

As a threshold issue, we understand that there are parties who are interpreting the language of the resolution to require all external partners in the RFP Site Allocation Process to outsource certain services to the District. However, by its own terms, the PSC Resolution provides no such requirement.

Two key provisions of the PSC Resolution set the stage for the analysis of how school support services should be staffed at the school sites assigned under the RFP Site Allocation Process.

First, the Resolution establishes that external partners that are allocated a site under the RFP Site Allocation Process (“External Partners”) will be required to enter into facilities use agreements (“FUA”) that “include a commitment to contract with the District as the default provider of outsourced school facility support services.”

Resolved further, that the Board directs the Superintendent to develop a plan to maintain continuity, quality, and consistency of support services to all District schools, including those operated by external partners, by requiring that all external partners submitting school plans under the process described in this Resolution enter into a facilities use agreement. The facilities use agreement must include a commitment to contract with the District as the default provider of outsourced school facility support services, such as cafeteria, custodial, maintenance, security, supplies, and transportation services. The use agreement would further specify that the District must meet agreed-upon performance standards for competitive contracted services. These standards must be met within an agreed-upon time frame. If the District fails to meet these standards within this timeframe, and a timely discussion (between the external partners, the District, and classified labor partners) does not resolve the identified issues, then external partners may then contract with non-District providers for specified support services;

Thus, there is nothing more required of an External Partner other than a commitment to make the District the default provider.

The term “default provider” is not defined in the PSC Resolution. However, the plain meaning of the term “default” is the automatic election absent a choice being made. Accordingly, in this case, the District will become the facility support services provider if and when the External Partner makes no other choice.

A second section of the PSC Resolution relevant to the analysis of the District as default provider of services, states that the resolution's terms must conform to applicable law:

Resolved further, that the Superintendent will work with the Office of General Counsel to ensure compliance with state and federal laws and regulations, comprehensive labor agreements, the Modified Consent Decree and other court orders, and that innovation, reorganization and restructuring of schools must be accomplished in accordance with these mandates.

Accordingly, by its own terms, the resolution plainly limits itself: its terms cannot violate applicable law.

A review of the law applicable to charter schools¹ run by independent, nonprofit corporations illustrates that, in the case of charter schools, while the law limits the District's ability to impose mandated contracts for facility support services, there are parameters within which the District can be placed in the position of default provider. The analysis on this is outlined in the following section.

III. THE DISTRICT AS DEFAULT PROVIDER OF FACILITIES SERVICES UNDER APPLICABLE CHARTER SCHOOL LAW

During the first Task Force meeting, the District outlined two alternative options for meeting the PSC Resolution's requirement regarding the District as the default provider of facility support services. Specifically, the District proposed:

- Requiring a Right of First Refusal – This would give LAUSD classified staff first priority in seeking jobs at charter schools that obtain placements under the RFP Site Allocation Process; or
- Requiring a Contract with LAUSD for facility support services – This would entail a commitment by the District to meet or exceed service opportunities otherwise garnered by the charter school including, scope of services, job completion time and cost per hour, among other things.

The following provides an overview of the Association's analysis of these proposals.

¹ The PSC Resolution provides that External Partners applying under the RFP Site Allocation Process must be separately incorporated non-profit corporations. Accordingly, this memorandum focuses on independent, separately incorporated charter schools.

A. The Right of First Refusal Option Violates Charter Autonomy as Provided by Law

The “right of first refusal” option would have to be further defined in order to work in respect to charter schools and only provided that the autonomies afforded charter schools under the Charter Schools Act are observed. As noted below, the law specifically allows a charter school to make its own decisions regarding employment decisions.

1. The Charter Schools Act Provides Charter Schools with Employment Autonomy

Charter schools retain the statutory right to determine their own employment relationships with their employees. In their charter petitions, schools are statutorily obligated to include declarations regarding whether they shall be deemed the exclusive public school employers of their employees. Cal. Educ. Code §§ 47605(b)(5)(K), (M), (O) and § 47611.5. Among other things, a charter school’s petition establishes the school’s exclusive jurisdiction over the “manner by which [charter school] staff will be covered by the State Teachers’ Retirement System, the Public Employees’ Retirement System, or the federal social security system.” Cal. Educ. Code § 47605(b)(5)(K) and § 47611.

In general, charter schools are free of the District’s collective bargaining agreement requirements. They are not in privity of contract with the unions unless the teachers and schools decide individually and independently to engage in collective bargaining arrangements. Even if they engage in collective bargaining, that bargaining process does not automatically result in adopting the District’s collective bargaining agreements.

2. The Charter Schools Act Precludes a District From Making Authorizing Decisions Based on Collective Bargaining Agreements.

The law provides that the approval or denial of a charter petition shall neither be controlled by collective bargaining agreements nor subject to review or regulation by PERB. Cal. Educ. Code § 47611.5(e). The PSC Resolution cannot introduce a requirement that is contrary to established law. Requiring a charter petitioner applicant under the RFP to waive its statutory rights and cede control of its workforce by providing the right of first refusal would be tantamount to denying a charter petition. Accordingly, this proposal would have to be tailored to meet charter school law.

3. If a Right of First Refusal Were Possible, Certain Parameters Would Have to Exist to Preserve Charter School Autonomy.

Observing the above-noted parameters, a categorical “Right of First Refusal,” requirement on External Partner charter schools might not work. However, District employees could certainly apply for charter school facilities services positions. In the course of this process, charter autonomies would have to be

met and would have to incorporate the following: (a) District applicants would not receive an automatic position; rather, they would be judged as against other applicants in the applicant pool; (b) District applicants would be required to apply to the charter school for work under the charter school's terms of employment, not their collective bargaining agreement with the District; (c) If hired by the charter school, employees would be subject to the terms of employment at the charter school, including, but not limited to pay rates, hours of employment, calendar/schedule, discipline and termination terms; and, (d) The terms of the collective bargaining agreement with the District would be inapplicable to charter school employment.

B. The District as the Default Contractor for Facility Support Services

The District's second option presents a viable option provided that it meets the terms of applicable law.

1. The District's Own Collective Bargaining Restrictions Cannot Be Imposed On Charter Schools.

Charter schools are generally exempt from the laws governing school districts. Cal. Educ. Code § 47610. Charter schools operating in school sites through the RFP Site Allocation Process will not be schools of the District. Rather, these schools will be independent of the District and not bound by any restrictions imposed on the District, including the collective bargaining agreements to which the District may be party.

2. Proposition 39 ("Prop. 39") Applies to the Site Allocation Process and Limits What the District May Require from Charter Schools.

In addition, under Prop. 39, the District has a pre-existing obligation to share public school facilities fairly and equitably with all public school pupils, including those in charter schools. Cal. Educ. Code § 47614(a). Each school district must make available to each charter school operating in the school district, facilities sufficient for the charter school to accommodate its in-district students in conditions reasonably equivalent to those in which students would be accommodated in other public schools in the District. Cal. Educ. Code § 47614(b). While "[t]he school district may charge the charter school a pro rata share... of those school district facilities costs which the school district pays for with unrestricted general fund revenues[,] [t]he charter school shall not be otherwise charged for the use of facilities." (Emphasis added). Cal. Educ. Code § 47614(b)(1).

By imposing the District's existing collective bargaining agreements on independent charter schools—including the established rates of pay, fees and charges -- the District would be conditioning Prop. 39 access on terms that exceed the limits of Prop. 39.

3. The District Cannot Require its Employees to Work at a Charter School.

“The governing board of a school district shall not require any employee of the school district to be employed in a charter school.” Cal. Educ. Code § 47605(e). Accordingly, the District does not have the authority to require its staff to work at charter school sites whether by contract as the default provider or otherwise.

C. The District Can Offer Services to Charter Schools Obtaining Placements Under the RFP Site Allocation Process.

Within the parameters noted in sections B(1)-(3) above, the Association sees the possibility of meeting the concern of the District as default provider of facilities services. Specifically, in the case of charter schools as External Partners, the ambition of having the district as default provider can be accomplished using the combination of a facilities use agreement (“FUA”) and a protocol for selecting contractors to fulfill charter school service requirements (“Service Protocol”).

In regards to the FUA, the Association is prepared to do its share of work. Attached hereto is a list of terms that the Association suggests for the FUA. In addition, the Association is willing to engage in the process of meeting with charter school stakeholders in an effort to streamline the process of developing an FUA that is acceptable to both the District and the charter school community. Further, the Association will draft a template FUA in relation to charter school participation in the RFP Site Allocation Process for the District’s consideration.

In relation to the Service Protocol, attached hereto is a summary description of the manner in which the District’s role as the default contractor for maintenance and operations services could be observed within the context of charter law. The Association looks forward to the opportunity to work through the Service Protocol terms with the District in an effort to ensure that the rights and responsibilities of its membership are addressed within this process.

IV. **THE GRANTING OF A CHARTER IS NOT EQUIVALENT TO SUBCONTRACTING UNDER THE COLLECTIVE BARGAINING AGREEMENTS AT ISSUE.**

As a final note, the Association wishes to address the argument raised by a few of the labor groups. Specifically, during the course of the Task Force meetings, some have argued that the District’s assignment of a site under the RFP Site Allocation Process is the equivalent of subcontracting for services. On that basis, some argue that the District may not award sites without requiring that External Partners take facilities services according to collective bargaining agreement terms.

Simply put, the granting of a charter petition and a site to a charter school are not acts of subcontracting. The Legislature empowered and entrusted Districts with the authority to grant charters to those seeking to open public charter schools. The act of granting a charter is not tantamount to subcontracting out of work. The District does not retain managerial control or responsibility over the charter school. Rather, charter law provides that, charter schools operated as or by a nonprofit corporation are operated independently from the district. Cal. Educ. Code § 47604.



MEMORANDUM

TO: Members of the Public School Choice Resolution ("PSC Resolution"), Workforce Stability Task Force ("Task Force") as established by the Los Angeles Unified School District ("LAUSD or the District") School Board ("Board")

FROM: Maria Heredia, General Counsel, California Charter Schools Association

DATE: October 19, 2009

RE: Service Protocol Proposal Submitted by the California Charter Schools Association ("Association") in relation to Charter School Participation in the RFP Site Allocation Process under the PSC Resolution dated August 25, 2009 ("RFP Site Allocation Process")

The following is a draft outline of a proposal for a service protocol establishing LAUSD as default provider of facilities maintenance services to charter schools provided school sites in the RFP Site Allocation Process ("Service Protocol"). This Service Protocol is submitted to further discussions as to how to effectuate the goals of the PSC Resolution in respect to the District as default provider of services.

February 2010

- District presents written site offers and Facilities Use Agreements ("FUA") to schools that will be awarded facilities under the RFP Site Allocation Process
- The FUAs will be executed by February 26, 2010.
- As an Exhibit to the FUAs, the District includes a menu of services that are available for purchase by schools ("District Service Menu"). This menu includes specifics regarding each form of service, scope of work, price point, agreed upon service level commitments, etc.
- As a separate Exhibit to the FUAs, the District includes a sample Agreement for Facilities Services ("Service Contract") that includes terms such as: one year term of the contract; assurances, representations and warranties regarding quality of service; conflict resolution methods; termination provisions allowing schools to terminate contracts with 30 days written notice with no financial penalty for early termination, etc.
- All of the above items are presented to schools no later than February 26, 2010.

March 2010

- Schools have the month of March to analyze District Service Menu and Service Contract and to pursue bids from other, outside contractors in relation to the facilities services they will seek from a third party.
- During this time, schools can meet with District representatives to obtain further detail regarding the scope of services and the proposals for service contracts.
- Schools prepare counter-offers to District noting: Services the schools will require; comparison bids that appear better than District's bid(s); terms of engagement being offered (scope of work, service levels, price point, termination provisions, etc.)
- Schools deliver their counter-offers to the District by March 26, 2010.

April 2010

- District has the opportunity to address counter-offer with a written response to the school.
- District has the opportunity to meet or surpass the offers made to schools by third party contractors.
- District delivers its best and final offer to schools by April 16, 2010.
- Schools have until April 30, 2010 to respond to the District's final offers.

May 2010

- Service Contracts are finalized and documented by May 14, 2010.



MEMORANDUM

TO: Members of the Public School Choice Resolution (“PSC Resolution”), Workforce Stability Task Force (“Task Force”) as established by the Los Angeles Unified School District (“LAUSD or the District”) School Board (“Board”)

FROM: Paul Escala, Senior Advisor for Charter School Facilities, California Charter Schools Association

DATE: October 19, 2009

RE: Suggested Terms for Facilities Use Agreement Submitted by the California Charter Schools Association (“Association”) in relation to Charter School Participation in the RFP Site Allocation Process under the PSC Resolution dated August 25, 2009 (“RFP Site Allocation Process”)

The Association submits the following list of terms that should be included within a Facility Use Agreement (“FUA”) used in relation to charter school participation in the RFP Site Allocation Process. The Association will draft a model FUA based on these terms for this purpose. In addition, the Association will engage with the LAUSD charter community to work through the FUA as the draft is developed.

LAUSD School Choice Facility Use Agreement Key Terms

- **Use Vehicle**
 - Signed FUA.
- **Term**
 - FUA is co-terminus with charter’s petition term.
- **Subject Premises**
 - Charter School shall have the right to conduct any and all inspections of site awarded under the RFP Site Allocation Process (“Subject Premises”) to ensure operational functionality prior to occupancy and District shall cure any and all defects found which may obstruct school operations prior to July 1, 2010.

- District will provide furnishings, equipment, and telecommunications (i.e. phones and computers) equivalent to those furnishings, equipment and telecommunications provided in the comparison group of schools in accordance with 5 C.C.R. Section 11969.2.
 - Comparison group shall be communicated to charter school by District at the time the FUA is presented to Charter School, but in no event later than February 26, 2010.
 - Charter School shall have the right to inspect the comparison group to ensure comparison is fair and reasonable.

- **Use of Subject Premises**
 - Compliance
 - Charter School shall use Subject Premises in accordance with all applicable federal, state, county and/or municipal laws, regulations, and ordinances.
 - Charter School and District shall abide by mutually agreed minimum standards for maintenance and repair of the facility, and Charter School shall be otherwise exempt from District policies.
 - Third-party use
 - Charter School shall have rights to manage the following third-party use of the Subject Premises for:
 - Civic center use (Charter School to manage)
 - Filming (Fee distribution and Subject Premises access to be negotiated)
 - Leasing/Licensing (Charter School to retain third-party agent to manage)
 - Exclusive Use and Enjoyment
 - Charter School shall have the exclusive use and enjoyment of the Subject Premises, subject to all applicable law.
 - District shall maintain the right to make routine, scheduled inspections to ensure facility compliance with applicable law and other emergency circumstances.

- **Fees**
 - Oversight: Charter School shall pay District a statutory oversight fee of up to 1% of Charter School revenue (pursuant to Education Code section 47613).
 - Pro-rated to the amount of direct oversight the District provides to the Charter School's allocated site.

- Define cost structure of District oversight (i.e. charter office) on a per student basis or per program basis, based upon an agreed upon formula tied to actual costs.
 - Pro rata contribution: Charter School and district may negotiate a pro rata share contribution by the Charter School for access to the facility (present contribution amount for charter school access to District facilities is 17 cents per square foot).
 - Deferred Maintenance: 0% through 2012/2013
 - Charter School pro-rata participation in District deferred maintenance program should be predicated on District's annual contribution levels.
 - Note: CA legislature has suspended school district deferred maintenance matching requirements from fiscal years 2008/2009 through 2012/2013 (pursuant to ABX4 2 – Evans).
 - Charter School will have the right to participate in the prioritization and scope definition of any deferred maintenance projects pertaining to the Subject Premises.
 - Any Charter School general fund contribution for deferred maintenance should be eliminated for projects funded by local or state bond funds.
 - Facility services:
 - Charter School shall have the right to negotiate a “fee-for-service” with the District for facilities services at the Charter School's discretion.
- **Maintenance and Operations**
 - Charter School, at its sole cost and expense, shall maintain and operate the Subject Premises in an appropriate, safe and sanitary condition.
 - If Charter School elects to “outsource” said services, the District may compete to provide said services via a Service Protocol, in the form attached to this memorandum.
- **Insurance**
 - Operator-held insurance
 - Commercial general liability: \$5M
 - Workers compensation: \$1M
 - Fidelity bond: \$50K
 - Mutual indemnification/hold harmless clause

- Charter School and District agree to name each other as named insured's on District-held and charter school held insurance policies for the Subject Premises.
- **Alterations, Additions and Improvements**
 - Charter School, at its sole cost and expense, shall have the right to make alterations, additions, and improvements to Subject Premises.
 - Charter School shall adhere to applicable building code and law in making such alterations, additions and improvements to Subject Premises.
 - Charter School shall be responsible for obtaining proper permits and approvals from the appropriate governing entity(ies), if required by building code and law. District agrees to cooperate in this process as necessary.
 - District review of alteration, addition and improvement plans will be subject to a monetary threshold to be negotiated, and:
 - District shall have 30 days after receipt of said plans to review the alteration, addition or improvement plans.
 - If District fails to respond to the Charter School within 30 days, said plans shall be deemed approved.
 - District may review and approve projects involving structural modifications if such projects are subject to the Field Act.
 - Charter School shall use licensed, bonded contractors, architects or engineers to conduct alterations, additions and improvements where necessary.
- **LAUSD School Bond Program**
 - Subject Premises shall receive equitable distribution of existing and future bond funds.
 - Charter School shall maintain the right to prioritize and define scope of bond-funded projects.