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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TODAY'S FRESH START, INC., Plaintiff and Appellant, v. LOS ANGELES COUNTY OFFICE OF EDUCATION et al., Defendants and Appellants.	B212966, B214470 (Los Angeles County Super. Ct. No. BS112656)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Reversed.

Doll Amir & Eley, Michael M. Amir, Mary Tesh Glarum, and Hemmy So for Plaintiff and Appellant.

Los Angeles County Office of Education, Vibiana M. Andrade, Sung Yon Lee; Greines, Martin, Stein & Richland, Timothy T. Coates and Alison M. Turner for Defendants and Appellants.

The school board of Los Angeles County revoked the charter of a charter school. Before filing the administrative appeal to the state board of education, the charter school filed a petition for writ of administrative mandamus in the superior court, and filed an amended petition after the appeal to the state board of education ended in a tie vote. The trial court granted the writ, concluding that the charter school's due process rights were violated during the revocation proceeding. The judgment required the county school board to set aside its revocation decision and reinstate the charter. The county school board and the county office of education appeal from the judgment, and the charter school appeals from the trial court's denial of an award of attorney's fees. We conclude that no due process violation occurred, and we reverse the judgment.

BACKGROUND

Today's Fresh Start, Inc. (TFS) is a charter school serving Los Angeles County, and is organized as a not-for-profit corporation. The Los Angeles County Office of Education (LACOE) is a regional educational agency. The Los Angeles County Board of Education (County Board) is the governing board of LACOE. The County Board was the chartering authority for TFS and a signatory to the charter agreement. The County Board initially granted TFS's charter petition in 2003, and renewed the charter in 2005 for a five-year term.

TFS's charter renewal petition provided that LACOE would oversee TFS, investigating complaints and monitoring the school's operations pursuant to Education Code section 47604.3.[1] TFS agreed to "respond promptly to requests made by LACOE for operational and fiscal concerns." The charter renewal petition also provided: "The charter granted pursuant to this Petition may be revoked by LACOE if the county finds that [TFS] did any of the following: ● Committed a material violation of any of the conditions, standards, or procedures set forth in this Petition. ● Failed to pursue any of the student outcomes identified in this Petition. ● Failed to meet generally-accepted

[1] Unless otherwise indicated, all subsequent statutory references are to the Education Code.

accounting principles, or engaged in fiscal mismanagement. ● Knowingly and willfully violated any provision of law.[2] [¶] Prior to revocation, the county will notify [TFS] of any violation (as set forth above) in writing, noting the specific reasons for which the charter may be revoked, and give the school a reasonable opportunity to cure the violation."

I. Charter revocation and appeal

In June 2007, LACOE advised TFS that it planned to investigate concerns raised about TFS, including, but not limited to, four areas: The legal rights of students, parents, and employees; student attendance procedures; professional development; and applicable California Department of Education (CDE) procedures for testing. TFS responded that the planned investigation violated section 47604.4[3] and was contrary to the charter. Darline Robles, the county superintendent of schools[4] and the head of LACOE, wrote to TFS on June 18, 2007, requesting documents regarding the governance of TFS (information about TFS board members, minutes of board meetings, and other information).

On July 19, 2007, LACOE sent to TFS a "Report of Findings and Recommendations," which called for improvement in each of the four identified areas. A "Corrective Action Plan" dated July 31, 2007 listed required actions with due dates for completion. On August 24, 2007, Superintendent Robles wrote to TFS, enclosing a staff memorandum analyzing the governance materials sent to LACOE, and stating, "[s]taff express serious concerns regarding the governance of [TFS] and I share their concerns." An attachment requested additional materials to allow LACOE to complete the review of

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[2] The Education Code permits charter revocation for a violation of law whether or not the violation was knowing or willful. (§ 47607, subd. (c)(4).)

[3] Section 47604.4, subdivision (a) provides: "[A] county superintendent of schools may, based upon written complaints by parents or other information that justifies the investigation, monitor the operations of a charter school located within that county and conduct an investigation into the operations of that charter school. . . ."

[4] As the county superintendent of schools and the head of LACOE, Robles was by statute the ex officio secretary and executive officer of the County Board. (§ 1010.)

the governance and determine that TFS's "board is fulfilling its governance responsibilities, holding sufficient meetings to conduct charter school business as needed, complying with the Brown Act [Gov. Code, § 54950 et seq.], and demonstrating conclusively that Board members are protecting public funds and not using their positions improperly to the end of personal enrichment," so that Superintendent Robles could decide whether to recommend that the County Board take action to revoke TFS's charter.

On October 9, 2007, the County Board held a "Board Meeting/Study Session" at which TFS was one of several topics. The minutes of the meeting reflect that Dr. Lupe Delgado of LACOE's Charter School Office led a discussion of a LACOE staff analysis of TFS's governance structure and processes and TFS's response to the corrective action plan. The County Board members were provided "[c]omprehensive materials," and TFS had also received the three binders of material provided to County Board members. A public hearing on TFS was added to the calendar for the November 6, 2007 County Board meeting.

At a County Board meeting on October 16, 2007, six individuals addressed the County Board on behalf of TFS. Superintendent Robles recommended that the County Board give notice of its intent to revoke TFS's charter, adding that if the issues could not be resolved and the County Board did decide to revoke, the school would stay open during the appeal process to the State Board of Education (State Board),[5] and LACOE would recommend that TFS stay open until the end of the school year. The County Board voted[6] to approve Superintendent Robles's recommendation to begin the revocation process. TFS had the option to provide a written response, and at the November 6, 2007 public hearing, TFS could make an oral presentation to supplement any documentary response. The final decision of the County Board would be made at the December 4, 2007 meeting (this date was later moved to December 11, 2007). An

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[5] The State Board is the governing and policy making body for the CDE. (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 729.)

[6] Five members voted to approve the recommendation, and two abstained.

October 17, 2007 letter from the County Board informed TFS of the County Board decision, and advised TFS that it could submit written materials to support its oral presentation on November 6, 2007.

November 6, 2007 public hearing and subsequent County Board meetings

At the November 6, 2007 public hearing, six of seven County Board members were present, with member Sophia Waugh absent. Six TFS students addressed the County Board in support of TFS. Counsel for TFS provided the County Board with handouts, and five individuals, including TFS's Executive Director Dr. Jeanette Parker, Board Chair Dr. Clark Parker, General Counsel Mary Tesh Glarum, and Assemblyman Mervyn Dymally spoke on behalf of TFS.

At the County Board's November 20, 2007 meeting, TFS's counsel expressed concerns that LACOE's revocation procedures violated due process. LACOE's staff was both advocating that TFS's charter be revoked and also advising the County Board regarding the revocation, in addition to LACOE's having a preexisting relationship with the County Board. Stating, "I believe that the procedure that has been employed is unfair," counsel objected that TFS had not had an opportunity to respond to the LACOE presentation scheduled that day. TFS's Board Chair, Dr. Clark Parker, urged the County Board to "send it out, to hold the hearing with an administrative law judge that will do fact-finding," because due process required an "impartial adjudicator" to make findings of fact and make a recommendation to the County Board, and "[s]taff cannot do that." In response to a County Board member's question, Dr. Clark Parker explained that he was relying on general administrative law[7] rather than the charter school statute in the Education Code. Dr. Clark Parker objected to the introduction of any evidence after the

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[7] The statute cited was Government Code section 27721, which provides: "When a state law or local ordinance provides that a hearing be held or that findings of fact or conclusions of law be made by any county board, agency, commission, or committee, the county hearing officer may be authorized by ordinance or resolution to conduct the hearing; to issue subpoenas; to receive evidence; to administer oaths; to rule on questions of law and the admissibility of evidence; and to prepare a record of the proceedings." On this appeal, TFS does not argue that this statute applies to charter revocation proceedings.

public hearing. TFS's executive director made a brief appeal to the County Board to see things from TFS's perspective. Dr. Delgado from LACOE's Charter School Office gave a chronology of the events surrounding the charter revocation process, and asked for any specific items the County Board would like to see in the final report on TFS.

In response to a board member's request for an analysis of the "legal situation," Shari Kim Gale, general counsel for the County Board and LACOE, explained that the County Board was the authorizer of TFS's charter. Superintendent Robles and LACOE were not the authorizers but the advisers to the County Board, and the County Board's job was to decide whether to revoke the charter. If the County Board decided to revoke, the Education Code provided that TFS could then appeal to the State Board. "And that is the due process stage. It is at that stage where there should be no one-sided communications, each side should have independent counsel. And most important, the adjudicator is the State Board of Ed[ucation], and it is neutral. In this matter, in this process, you are not neutral. You are the authorizer. [¶] Essentially this is the same process we use to evaluate new petitions that come to this board. We use literally the same spectrum of expert—technical expert staff, there is a public hearing, there is a report of staff, and then there is a recommendation upon which our board votes. [¶] So with all due respect, we do disagree and still maintain that our process is entirely legal."

At the County Board meeting on December 4, 2007, Dr. Jeanette Parker spoke on behalf of TFS. Dr. Delgado presented LACOE's final report, which concluded that TFS had not corrected its noncompliance with testing procedures, had not explained how it would rectify irregularities in its governance, and had failed to meet 47 of the 53 items on the corrective action plan. "After review and analysis of TFS's rebuttal materials and presentations, LACOE stands by its original recommendation that substantial evidence exists of violations of the charter, failure to meet or pursue pupil outcomes as set out in the charter, i.e. testing irregularities, and violations of the law. TFS . . . has had a reasonable opportunity to correct, and has not done so." TFS had submitted a response to the report that afternoon, which TFS had prepared within 24 hours of receiving the final report.

December 11, 2007 vote to revoke

At the December 11, 2007 County Board meeting, with all seven County Board members present, six speakers addressed the County Board on TFS's behalf. Dr. Jeanette Parker defended TFS's testing procedures. TFS's fiscal coordinator assured the County Board that TFS had promptly complied with reporting responsibilities. TFS's general counsel emphasized TFS's performance and the schools' importance in their communities, asking the County Board to consider the children as well as the roughly 700 pages of documents sent by TFS. Assemblyman Mervyn Dymally asked the County Board to give TFS at least another year.

Dr. Clark Parker asked that County Board member Waugh abstain from voting because she was absent from the November 6, 2007 hearing (citing Gov. Code, § 11517[8]), complained that LACOE had not met with TFS to resolve the disputes between the parties, and argued that the revocation process was flawed. A TFS board member and parent testified that TFS had achieved test scores above that of the Inglewood public schools.

Before the County Board voted on the revocation, Superintendent Robles explained that LACOE had suggested meetings with TFS, but TFS had resisted LACOE's investigation. Dr. Clark Parker rejoined that TFS had not been contacted "to be included in the process," and had refused to schedule interviews unless LACOE would consult TFS regarding how to conduct the investigation. Superintendent Robles responded that the authority to investigate was independent of any procedure for dispute resolution. After further discussion of differences regarding procedure and a lawsuit filed by TFS,[9] the County Board voted four to three to approve the recommendation to revoke

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[8] The Administrative Procedures Act, in Government Code section 11517, subdivision (b)(2) provides: "No member of the agency who did not hear the evidence shall vote on the decision." Government Code section 11500 defines "'agency'" as "the *state* boards, commissions, and officers to which this chapter is made applicable by law." (Italics added.)

[9] TFS had filed a lawsuit on July 13, 2007 in Los Angeles Superior Court for breach of contract and declaratory relief, to clarify LACOE's authority to investigate the

TFS's charter, with direction to Superintendent Robles to urge the State Board in the appellate process to permit currently enrolled TFS students to finish out the year. The County Board adopted factual findings regarding improprieties in student testing, material violations of the charter, the Brown Act, and the Corporations Code, and TFS's failure to correct numerous provisions of the corrective action plan, in violation of section 47607, subdivisions (c)(1), (c)(2), and (c)(4).

Appeal to State Board

On January 9, 2008, TFS filed an appeal to the State Board of "the decision (by a vote of 4 to 3) of its chartering authority, [LACOE] and the [County Board] to revoke [TFS]'s charter . . . ." The appeal argued that the revocation was improper because it was "in direct retaliation for [TFS]'s decision to seek court assistance after LACOE repeatedly overstepped its statutory role as a chartering authority." The process employed violated due process ("[m]ost significantly," Waugh failed to abstain from voting on the revocation although she was no present at the public hearing, and the County Board was not impartial), and the revocation was not based on substantial evidence.

A report from the Charter Schools Division of the CDE recommended that the State Board reverse the revocation decision. The report noted that the State Board had "not adopted any regulations regarding revocation appeals and, therefore, the [State Board] is primarily guided by the language of the statute," which required that revocation decisions be supported by "'substantial evidence.'"[10] The analysis and recommendations from the Charter Schools Division, based on five binders of materials from TFS and

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alleged charter violations. The case was pending when TFS filed its amended writ petition on July 21, 2008.

[10] The report cited section 47607, subdivision (f)(4), which applies to revocation appeals when the chartering authority is a local school district. The provision applicable on TFS's appeal, subdivision (g)(2), applies when the chartering authority is a county board of education. Both subdivisions, however, state: "The state board may reverse the revocation decision if the state board determines that the findings made by the chartering authority under subdivision (e) are not supported by substantial evidence."

seven binders from LACOE,[11] concluded that the County Board's revocation of TFS's charter "was not supported by specific factual findings of violations of law and the charter, and that the findings were not supported by substantial evidence. Further, the [County Board] did not provide full due process to [TFS] prior to revoking the charter."[12] Only one basis for revocation, a violation of the Brown Act, was supported by substantial evidence, but the County Board had failed to comply with the statutory requirement (§ 47607, subd. (d)) that it provide notice and an opportunity to remedy the violation. The Charter Schools Division staff recommended that the revocation be reversed.

The CDE report was presented to the State Board without a recommendation from the Advisory Commission on Charter Schools (ACCS).[13] ACCS had considered the revocation appeal at its meeting on May 19, 2008, at which it heard argument from both TFS and LACOE regarding the alleged violations and whether the County Board had provided TFS with proper notice and opportunity to remedy. After lengthy discussion, ACCS had voted four to two to recommend reversal of the revocation; this was insufficient for a recommendation to the State Board, because five votes were the minimum required for the commission to adopt a recommendation.

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[11] After its initial review, the CDE found the record of revocation "unclear and/or incomplete" and wrote LACOE on March 19, 2008 asking for specific information identifying the five most significant violations, and evidence of the violations and of notice to TFS and opportunity to cure. LACOE submitted a response on April 16, 2008 (which does not appear in the administrative record at trial and on appeal), and TFS replied to the response on April 18, 2008.

[12] The CDE's conclusion that full due process had not been provided was based on a finding that the County Board had not given TFS notice of the violations and a reasonable opportunity to cure, as required by section 47607, subdivision (d). The CDE declined to address TFS's other allegations of due process violations, except to note that there was insufficient evidence from which to conclude that board member Waugh's absence from the public hearing on November 6, 2007 violated due process.

[13] The ACCS is an advisory body whose role "include[s] advice on 'all aspects of the State Board's duties under the Charter Schools Act of 1992.'" (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1330.)

At a hearing on July 10, 2008, eight members of the State Board heard argument on TFS's appeal of the charter revocation. The CDE described its review of the revocation materials provided to it by TFS and the County Board, as set out in its report, and answered questions from the State Board members. There were speakers in support of TFS and in support of the County Board and LACOE. Board members discussed the closeness of the vote to revoke by the County Board and the Charter Schools Division, the adequacy of notice to TFS, whether both sides could work out an alternative together, the possibility of postponing a vote and encouraging CDE to work with both sides, whether substantial evidence existed for revocation, and whether the State Board had the authority to act other than voting yes or no on the revocation. On a motion to accept the CDE's recommendation that the revocation of TFS's charter be reversed, four State Board members voted to accept, and four members voted to reject the recommendation. The State Board president stated, "Motion fails to carry a majority, and so the revocation is upheld."

II. Petition for writ of administrative mandamus

On December 27, 2007—16 days after the County Board voted on December 11, 2007 to revoke TFS's charter—TFS filed a petition for writ of administrative mandamus in Superior Court pursuant to Code of Civil Procedure section 1094.5,[14] naming LACOE and CDE as respondents. The petition argued that the revocation was invalid because County Board member Waugh, who voted in favor of revocation, had not been present at the November 6, 2007 public hearing, and TFS did not receive a fair hearing because (among other contentions) the County Board did not appoint an independent, impartial decision maker. The petition also argued that requiring TFS to exhaust its administrative

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[14] Code of Civil Procedure section 1094.5, subdivision (a) provides: "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . ." Subdivision (b) provides: "The inquiry in such a case shall extend to the question[] . . . whether there was a fair trial."

remedies (an appeal to the State Board) would be inequitable, because CDE would not consider TFS's due process objections, and any hearing before the State Board would not take place until May or June 2008. TFS requested a stay of the revocation decision and an order compelling CDE to continue to fund TFS.

On January 4, 2008, TFS filed an ex parte application for a stay of the revocation order to allow TFS to continue to operate pending the outcome of the writ proceeding. At the hearing, the court noted that without a completed appeal to the State Board, the revocation decision was not final, leaving the court without jurisdiction over TFS's request for invalidation of the revocation decision. On January 16, 2008, the trial court granted the stay only to the extent the revocation decision terminated funding for TFS before the end of the 2008 school year. The parties subsequently stipulated that funding would continue pending the resolution of the writ proceeding.[15]

At a status conference on July 15, 2008, after the State Board tie vote on July 10, 2008 failed to adopt a motion to reverse the charter revocation, the parties stipulated that TFS had exhausted its administrative remedies. On July 21, 2008, TFS filed an amended petition, adding the County Board and the State Board as respondents. The amended petition argued that with the State Board's four-to-four vote, TFS had exhausted its administrative remedies. In addition to a stay of the revocation decision, a writ requiring the County Board to reverse the revocation decision, and a writ compelling invalidation of Waugh's vote, the amended petition sought a peremptory writ of mandamus requiring the State Board "to cast a valid vote and reverse the [County Board] revocation decision."

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[15] Section 47607, subdivision (i), provides: "During the pendency of an appeal filed under this section, a charter school, whose revocation proceedings are based on paragraph (1) or (2) of subdivision (c), shall continue to qualify as a charter school for funding and for all other purposes of this part, and may continue to hold all existing grants, resources, and facilities, in order to ensure that the education of pupils enrolled in the school is not disrupted." TFS's revocation proceedings were based on subdivision (c), paragraphs (1), (2), and (4).

On August 21, 2008, TFS filed a motion for judgment under Code of Civil Procedure section 1094,[16] seeking reversal of the charter revocation and reinstatement of the charter on three grounds: the County Board violated section 47607, subdivision (d), by failing to provide TFS with notice and an opportunity to cure; the County Board deprived TFS of due process at the November 6, 2007 public hearing before revocation, because the County Board was not an impartial decision maker; and LACOE failed to introduce any evidence at the November 6, 2007 public hearing to support revocation.

Before the trial court, TFS did not raise the issue whether the revocation decision was supported by substantial evidence. Correspondingly, that issue is not before us on appeal.

The trial court held a hearing on September 15, 2008 and granted the motion for judgment on September 19, 2008.[17] Stating that it was undisputed that TFS had both a liberty and property interest in its charter, the court concluded that the revocation procedure violated due process. First, section 47607, subdivision (e) and due process required that all the evidence supporting revocation be introduced at the public hearing. "The final decision must be from the evidence introduced during the public hearing. . . . The evidence must be introduced at the hearing; only then can [the County Board] make a final decision about it."

Second, although section 47607, subdivision (e) required only a public hearing held by the County Board in the normal course of business and did not require an

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[16] Code of Civil Procedure section 1094 provides: "If a petition for writ of mandate . . . presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the preemptory writ."

[17] The court adopted its tentative ruling, which concluded that the County Board substantially complied with the notice requirement in section 47607, subdivision (d). The court also stated that TFS "is entitled to judgment and a writ setting aside the decision and remanding to [the County Board] for further proceedings. . . . Where there have been defects in the manner in which an agency conducts the hearing, the proper remedy is to remand for a new hearing." Further, the court ruled that motions to compel the depositions of County Board member Waugh and two LACOE employees were moot.

adversarial proceeding before a neutral hearing officer or other third party, the trial court nevertheless concluded that due process required a separate evidentiary hearing. The County Board was not an impartial decision maker, and "[t]o the extent *arguendo* that [section 47607, subdivision (e)] contemplates merely a hearing before the [County Board], it does not meet the minimum requirements of due process." Due process required "[a]n evidentiary hearing before a[n] unbiased hearing officer." The court suggested that the hearing officer could be a LACOE employee uninvolved in the revocation process, or a third party, "either of which would satisfy due process. The hearing officer's findings then must either be accepted or rejected by the [County Board] in a public hearing." Further, the court also concluded that due process was not satisfied by the statute's provision for an appeal to the State Board, because the State Board's review was limited to determining whether the County Board's findings were supported by substantial evidence.

The court entered judgment for TFS on October 21, 2008, remanding to the County Board to set aside its revocation decision and to reinstate TFS's charter. The judgment also provided that LACOE and the County Board "shall pay petitioner the reasonable attorney's fees [TFS] has incurred in this proceeding in the amount of $0 pursuant to California Code of Civil Procedure [section] 1021.5 and California Government Code section 800." LACOE and the County Board appeal from the judgment, and TFS appeals from the trial court's order denying attorney fees.

DISCUSSION

"Code of Civil Procedure section 1094.5 governs judicial review by administrative mandate of any final decision or order rendered by an administrative agency. (Code Civ. Proc., § 1094.5.) If the decision of an administrative agency substantially affects a fundamental vested right, such as the right to disability benefits, then the trial court must not only examine the administrative record for errors of law, but must also exercise its independent judgment on the evidence. [Citations.] In the appellate court, the appropriate standard of review is the substantial evidence test. [Citations.] Therefore, where the trial court is required to exercise its independent judgment in an administrative

mandamus proceeding, the appellate court reviews the record to determine whether the trial court's judgment is supported by substantial evidence. [Citations.] [¶] Questions of law, on the other hand, are subject to a de novo standard of review. [Citations.] The proper interpretation of a statute, and its application to undisputed facts, presents a question of law that the appellate court reviews independently. [Citations.]" (*Dobos v. Voluntary Plan Administrators, Inc.* (2008) 166 Cal.App.4th 678, 683.)

The legal questions before us in this appeal—whether TFS exhausted its administrative remedies, and whether the charter revocation procedure before the County Board violated TFS's due process rights—are subject to de novo review. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169.)

Statutory background

The Charter Schools Act of 1992, section 47600 et seq., provides for the establishment and operation of charter schools, allowing "teachers, parents, pupils, and community members to establish . . . schools that operate independently from the existing school district structure." (§ 47601.) Amendments to the statute in 2002 added a provision allowing a county board of education to approve a charter for a countywide charter school, which must operate at "one or more sites within the geographic boundaries of the county." (§ 47605.6, subd. (a)(1).) Section 47607, subdivision (a)(1), provides that a charter granted by a county board of education may be granted one or more subsequent renewals of a period of five years each, with criteria for renewal specified in subdivision (b). Subdivision (c) provides: "A charter may be revoked by the authority that granted the charter under this chapter if the authority finds, through a showing of substantial evidence, that the charter school did any of the following: [¶] (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter. [¶] (2) Failed to meet or pursue any of the pupil outcomes identified in the charter. [¶] (3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement. [¶] (4) Violated any provision of law."

Further amendments to the Charter Schools Act in 2006, effective January 1, 2007, added protections for charter schools during the revocation process. Section 47607, subdivision (d) requires that the authority that granted the charter, prior to revocation, give the charter school notice of any violation and a reasonable opportunity to remedy. Section 47607, subdivision (e), directly at issue on this appeal, provides: "Prior to revoking a charter for failure to remedy a violation pursuant to subdivision (d), and after expiration of the school's reasonable opportunity to remedy without successfully remedying the violation, the chartering authority shall provide a written notice of intent to revoke and notice of facts in support of revocation to the charter school. No later than 30 days after providing the notice of intent to revoke a charter, the chartering authority shall hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter. No later than 30 days after the public hearing, the chartering authority shall issue a final decision to revoke or decline to revoke the charter . . . . The chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that support its findings." Subdivision (g)(1) provides for an appeal to the State Board if the County Board revokes the charter: "If a county office of education is the chartering authority and the county board revokes a charter pursuant to this section, the charter school may appeal the revocation to the state board within 30 days following the decision of the chartering authority." Subdivision (g)(2) provides: "The state board may reverse the revocation decision if the state board determines that the findings made by the chartering authority under subdivision (e) are not supported by substantial evidence."[18]

I. TFS exhausted its administrative remedies.

Code of Civil Procedure section 1094.5, subdivision (a), provides that in a writ proceeding the trial court may review "any final administrative order or decision." "[T]he failure to exhaust administrative remedies prevents [a party] from seeking relief

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[18] The statute provides for different appeal procedures when the chartering authority is a local school district. (See §47607, subd. (f).)

through administrative mandamus (Code Civ. Proc., § 1094.5), which provides judicial review of *final* administrative proceedings." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619.) TFS was therefore required to exhaust all its administrative remedies—including the appeal to the State Board—and was required to obtain a final order or decision, before seeking relief in superior court. LACOE and the County Board argue that the tie vote by the State Board did not constitute a final administrative order. Without a final order, LACOE and the County Board argue that TFS failed to exhaust its administrative remedies, and the trial court therefore did not have jurisdiction.

"In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "The rule is a jurisdictional prerequisite in the sense that it 'is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.' [Citations.]" (*Citizens for Open Government v. City of Lodi*, *supra*, 144 Cal.App.4th at p. 874.) "The doctrine prevents courts from interfering with the subject matter of another tribunal." (*Ibid.*) "Consideration of whether exhaustion of administrative remedies has occurred depends on the procedures applicable to the public agency in question." (*Id.* at p. 876.)

TFS did everything it could to seek relief from the administrative body by filing and pursuing its appeal of the charter revocation to the State Board, pursuant to section 47607, subdivision (g). The State Board, with eight members present, tied four to four on the recommendation by CDE to reverse the revocation of TFS's charter. LACOE and the County Board point out that the State Board is composed of 10 members (§ 33000) and cites section 33010, which provides: "The concurrence of six members of the board shall be necessary to the validity of any of its acts." LACOE and the County Board argue that the tie vote resulted in no action at all, so that there was no final administrative decision on the charter revocation. TFS argues that the tie vote left the revocation in place, and thus constituted a final decision.

Whether the State Board's tie vote constitutes a final decision leaving in place the charter revocation is not a simple question. The State Board certainly believed it had taken an action, stating that the tie vote on the motion to reverse the revocation of TFS's charter meant that "the revocation is upheld."[19] Nevertheless, "[t]ie votes mean different things in different contexts." (*Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 521 (*Vedanta*).) In the context of a judicial appeal from the decision of a lower court, a tie vote leaves the lower court decision intact. (*Ibid.*) In the context of an administrative appeal, however, a tie may not have the same effect. "'[A]s a general rule an even division among members of an administrative agency results in no action.' [Citation.]" (*Clark v. City of Hermosa Beach, supra,* 48 Cal.App.4th at p. 1176.)

In support of their argument that TFS did not exhaust its administrative remedies because the State Board's tie vote was not a final administrative decision, LACOE and the County Board cite *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, *Clark v. City of Hermosa Beach, supra,* 48 Cal.App.4th 1152, *Lopez v. Imperial County Sheriff's Office* (2008) 165 Cal.App.4th 1, and *Vedanta, supra,* 84 Cal.App.4th 517. They point out that these cases concluded that a tie vote on an appeal to an administrative agency that constitutes no action does not affirm or uphold the decision being appealed. In each of the above cases, however, the statutes governing the administrative appeals in issue required specific factual findings. In *Woodland Hills,* at p. 837, neither agency reviewing the appeal from the initial approval of the subdivision made express findings of fact, which violated the requirement of the applicable section of the Business and Professions Code that the agencies not approve a tentative subdivision map without first making an express finding that the proposed subdivision was consistent with the general plan. "A tie vote under the circumstances here, where such a finding of consistency was a legal prerequisite of approval, did not constitute approval action." (*Id.*

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[19] The motion voted on was "to reverse the revocation and [¶] . . . [¶] [s]upport CDE's recommendation." After the tie vote, the State Board president stated: "Motion fails to carry a majority, and so the revocation is upheld."

at p. 838.) In *Clark v. City of Hermosa Beach*, *supra*, 48 Cal.App.4th at p. 1175, the city council hearing the appeal of the approval of a conditional use permit by the city planning commission was required by the municipal code to "hear[] the matter de novo, take[] additional evidence at a public hearing, and decide[] whether *it* should grant or deny the permit." The municipal code also required that the action of the city council deciding the appeal "'shall be by *three (3) affirmative* votes.'" The council vote (after the disqualification of one member) was a two-to-two tie. (*Id.* at pp. 1175–1176.) The code also provided "'[t]ie votes shall be lost motions and may be reconsidered.'" Under these statutes, the tie vote was insufficient to affirm the approval of the conditional use permit. (*Id.* at p. 1176, fn. 24.) In *Lopez v. Imperial County Sheriff's Office*, *supra*, 165 Cal.App.4th at p. 5, the board reviewing the appellants' appeal of their termination by the sheriff's office was required, by county ordinance, to "file . . . its findings as to each cause and factual allegation" with its decision affirming, revoking or modifying the decision, and was required to review independently the facts and law. The board's tie vote resulted in no action until the board conducted another vote. (*Ibid.*) In *Vedanta*, *supra*, 84 Cal.App.4th at pp. 527–529, the appeal was governed by the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). Under the facts of that appeal, CEQA required the decisionmaking body on appeal of the certification of an environmental impact report to make findings and to provide an affirmative explanation, or at least to adopt the findings made by the planning commission. A tie vote did not constitute affirmative action or adopt the findings of the planning commission, and the statute required "not only de novo *review* by a board of supervisors, but de novo fact finding as well." (*Id.* at pp. 527–529.)

Significantly, in none of these cases did the court of appeal conclude that the appellant had failed to exhaust administrative remedies. Instead, each case concluded that the decision on the appeal did not comply with the applicable law, because the tie vote by the agency reviewing the appeal meant that the agency failed to make the findings required by the statutes in issue.

Here, the statute governing an appeal to the State Board provides that the State Board may reverse a decision by a county board of education to revoke a charter "if the state board determines that the *findings made by the chartering authority* . . . are not supported by substantial evidence." (§ 47607, subd. (g)(2), italics added.)[20] This does not require the State Board to make independent factual findings. The State Board is merely directed to review the chartering authority's (in this case, the County Board's) "written factual findings supported by substantial evidence" (§ 47607, subd. (e)) and determine whether the *County Board's* findings are in fact "supported by substantial evidence." That language does not contemplate independent factual findings by the State Board. The State Board is required only to determine whether the County Board correctly performed its function.[21]

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[20] Similar language appears elsewhere in the statute. Where a local school district is the chartering authority and revokes the charter, the charter school may appeal the revocation to the county board of education. (§ 47607, subd. (f)(1).) The county board may reverse the local school district's revocation "if the county board determines that the findings made by the chartering authority . . . are not supported by substantial evidence. The school district may appeal the reversal to the state board." (§ 47607, subd. (f)(2).) If the county board does not issue a decision on an appeal within 90 days, or if the county board upholds the revocation, "the charter school may appeal the revocation to the state board." (§ 47607, subd. (f)(3).) The State Board may uphold a revocation decision on a charter authorized by a school district if it "determines that the findings made by the chartering authority . . . are supported by substantial evidence," and may reverse the revocation if the findings of the chartering authority "are not supported by substantial evidence." (§ 47607, subd. (f)(4).)

Section 47607, subdivision (c) provides "[a] charter may be revoked by the authority that granted the charter," but the statute is silent as to procedures for any appeal of the revocation of a charter granted by the State Board, which is authorized by section 47605.8 to approve a charter for a state charter school. Section 47604.5 provides that the State Board may revoke a charter "whether or not it is the authority that granted the charter," if the State Board finds gross financial mismanagement, illegal use of charter school funds, or substantial departure from successful educational practices.

[21] LACOE and the County Board point out that CDE's counsel described the State Board's scope of review as "an open question" regarding "a relatively new statute," and, as TFS's counsel stated in a declaration and the CDE acknowledged, the CDE and State Board have not issued any regulations or policies regarding revocation appeals. The lack

Section 47607 requires no independent fact finding by the State Board on appeal. We therefore conclude that the State Board four-to-four vote—on a motion to accept the CDE's recommendation that the revocation of TFS's charter be reversed—amounted to a final decision by the board failing to adopt the motion, denying the appeal, and upholding the revocation.[22] TFS thus exhausted its administrative remedies.

Our conclusion that TFS exhausted its administrative remedies makes it unnecessary to address TFS's argument that the parties' stipulation at a July 15, 2008 status conference that administrative remedies had been exhausted, waived any argument by LACOE and the County Board that TFS had not obtained a final decision from the State Board (and therefore that it had not exhausted its administrative remedies). We note, however, that "[T]he requirement of exhaustion is a jurisdictional prerequisite, not a matter of judicial discretion. . . . [¶] [and] cannot be overcome by stipulation between the parties or by admission." (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 341 & fn. 3.)

II. The revocation procedure did not violate due process.

The trial court ruled that due process required two procedures not employed when the County Board revoked TFS's charter: first, all the evidence in support of revocation had to be introduced at the public hearing before the County Board, and second, "an evidentiary hearing before an unbiased hearing officer" was required before the County Board could vote on whether to revoke TFS's charter. The court also concluded that these violations of due process were not cured by the statute's provision of an appeal of the revocation to the State Board.

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of case law or regulation regarding the application of section 47607 does not, however, obscure that the plain language of subdivision (g)(2) requires only that the State Board review the County Board's revocation findings for substantial evidence.

[22] Section 33010 provides that the concurrence of a majority (6 of ten) is required for the validity of the State Board's acts. Even viewing the four-to-four vote on the motion to accept the CDE's recommendation as an invalid act, the result of the failure to adopt the motion is that the revocation was left in place.

Section 47607 does not require either a formal presentation of all the evidence at the public hearing on revocation, or a separate evidentiary hearing before a neutral decision maker. The statute requires the County Board, as the "chartering authority," to "hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter." The statute also requires the County Board to issue its decision within 30 days, and "[t]he chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that support its findings." (§ 47607, subd. (e).) As to the appeal to the State Board, the statute provides only that the State Board "may reverse the [County Board's] revocation decision if the state board determines that the findings made by the chartering authority under subdivision (e) are not supported by substantial evidence." (§ 47607, subd. (g)(2).) There are no regulations providing more detail on the procedures to be employed in a charter revocation or a revocation appeal. We have found no appellate cases addressing the constitutionality of the charter school revocation procedures in section 46707, subdivision (e), or the appeal process in section 47607, subdivision (g), which was enacted in 2006. Whether the statute complies with due process is a question of first impression.

"Because the [County Board and LACOE's] contention[s] regarding procedural matters present[] a pure question of law involving the application of the due process clause, we review the trial court's decision de novo." (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 285.)

TFS's motion for judgment argued that the revocation procedure violated its due process right to a fair hearing, invoking both the federal and California due process clauses (U.S. Const. 14 Amend., Cal. Const., art. I, § 7, subd. (a).) "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 332 [96 S.Ct. 893, 47 L.Ed.2d 18].) "'(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.]" (*Id.* at p. 334.) To

determine whether administrative procedures are constitutionally sufficient in specific circumstances "generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Id.* at p. 335.)

"'Under the California Constitution, the extent to which due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [Citations.]' [Citations.]" (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390–391.) In this case, the federal and state due process clauses have a similar scope, and like the parties, we rely on decisions construing both the federal and the state provisions. (See *Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 285, fn. 16.)[23]

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[23] The California factors require the government to treat the individual with dignity and respect; otherwise they are substantially identical to the federal test. (*Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1329–1330.) TFS does not emphasize this factor, and we would reach the same result under either federal or California due process law.

A. TFS has a property interest in its charter.

Property interests that are entitled to due process protection "extend well beyond actual ownership of real estate, chattels, or money." "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." (*Board of Regents v. Roth* (1972) 408 U.S. 564, 572, 576 [92 S.Ct. 2701, 33 L.Ed.2d 548].) Such property interests include an interest in the continued receipt of welfare benefits and interests in continued employment (where a clearly implied promise of continued employment exists). (*Id*. at p. 576.) "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." (*Id.* at p. 577.) Such property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Ibid.*; see *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 109 ["'such an interest is created if the procedural requirements are intended to be a significant substantive restriction on . . . decision making.'"].)

In *California Assn. of Private Special Education Schools v. Department of Education* (2006) 141 Cal.App.4th 360, the plaintiffs were an individual school that had been certified by the CDE to provide educational services to disabled children, and a nonprofit corporation representing schools that had been certified by the CDE. Some of the schools had their certifications suspended or revoked without prior notice or hearing. (*Id.* at p. 365.) The relevant statutes provided only for a petition for review after the school received a suspension or revocation notice, without a hearing prior to revocation. (*Id*. at pp. 366–367.) In reviewing the plaintiffs' facial due process challenge to the statute and an accompanying regulation, the appellate court concluded: "the private

interest at issue, the financial stability of a nonpublic, nonsectarian school providing educational services to disabled children, is a serious matter." (*Id.* at pp. 371, 374.)

Charter schools are part of the public school system, and are entitled to "full and fair funding" appropriated from public education funds. (§§ 47615, subds. (a)(1), (a)(3), 47612, subd. (a).) TFS's property interest in its charter was created and defined by the Education Code sections outlining the establishment and operation of charter schools, including the revocation procedures in section 47607. TFS, a not-for-profit corporation, obtained its charter when the County Board granted its charter petition in 2003, and the County Board renewed the charter for a five-year term in 2005. When revocation proceedings began in 2007 and throughout the revocation process, TFS had a legitimate claim of entitlement to the continuation of its charter. TFS therefore had a protectable property interest in its charter and in the financial stability of its business, and was entitled to due process protections in the administrative revocation process.[24]

B. The revocation proceedings do not present an unacceptable risk of erroneous deprivation.

"Having decided that the due process clause applied . . . we must now determine what process was due. 'Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.' [Citations.] 'However, there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required.' [Citation.] '"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific

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[24] The trial court also concluded that TFS had a liberty interest in its charter. The Fourteenth Amendment's guarantee of liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . ." (*Board of Regents v. Roth, supra*, 408 U.S. at p. 572; see *Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695, 709–710 [liberty interest of nonprofit corporation operating child care programs was implicated by three-year debarment from further contracts with department].)

factual contexts.' [Citations.]" (*Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 286.) "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 348.)

The statute governing the revocation hearing provides: "Prior to revoking a charter for failure to remedy a violation pursuant to subdivision (d) [the notice provision], and after expiration of the school's reasonable opportunity to remedy without successfully remedying the violation, the chartering authority shall provide a written notice of intent to revoke and notice of facts in support of revocation to the charter school. No later than 30 days after providing the notice of intent to revoke a charter, the chartering authority shall hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter. No later than 30 days after the public hearing, the chartering authority shall issue a final decision to revoke or decline to revoke the charter, unless the chartering authority and the charter school agree to extend the issuance of the decision by an additional 30 days. The chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that support its findings." (§ 47607, subd. (e).)

1. Due process does not require the formal introduction of evidence at the public hearing.

At the November 6, 2007 public hearing on the revocation of TFS's charter, the County Board did not formally introduce the evidence relied upon in support of revocation. The trial court concluded that although the statute did not require that the evidence in support of revocation be introduced at the hearing: "the statute implicitly contemplates the presentation of evidence. . . . The final decision must be from the evidence introduced during the public hearing. It would make little statutory (or due process) sense for the agency to have but not disclose evidence supporting revocation at the public hearing, receive evidence from the charter school, and then issue a final

decision disclosing for the first time its evidence supporting revocation. The evidence must be introduced at the hearing; only then can the [County Board] make a final decision about it."

We agree that it would violate due process for an administrative agency to conduct a hearing while failing to disclose evidence to the party before it, and then to make a decision in which it reveals the undisclosed evidence for the first time. "The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. [Citations.] Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. [Citation.]" (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158 (*English*).) When "information [is] received without the knowledge of the parties and at a time and place other than that appointed for the hearing," and "the board secretly obtains information and bases its determination thereon," the parties affected are denied a fair hearing. (*Id.* at p. 159.) "Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test, and explain it." (*La Prade v. Department of Water & Power* (1945) 27 Cal.2d 47, 51–52 (*La Prade*).) The trial court cited *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265. In that case, an employee was demoted, and after a two-day hearing a civil service commission concluded that the demotion was improper and forwarded a recommendation to the city manager. The city manager rejected the recommendation based in part on a discussion with the city personnel director and a report prepared by the personnel department. (*Id.* at pp. 270–271.) This violated the employee's due process right to a hearing. "'[T]he right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information

received without the knowledge of the parties.'" (*Id.* at pp. 274–275, 276, quoting *English*, at p. 159.) *English*, *LaPrade*, and *Vollstedt* each involved an appeal from an initial decision to discharge an employee, and each appeal was decided in part based upon undisclosed information. (*English*, *supra*, 35 Cal.2d at p. 157; *La Prade*, 27 Cal.2d at pp. 49–50; *Vollstedt*, *supra*, 220 Cal.App.3d at pp. 274–275.)

This basic principle of due process was not violated in this case. TFS did not contend in the trial court and does not argue on this appeal that TFS was not apprised of all the evidence against it, or that either the County Board or the State Board relied on evidence not disclosed to TFS during the revocation process. Unless evidence received by the administrative board making the decision was not disclosed, due process is not violated. (*Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557, 570 [*English* does not apply where there was no concealment].) The lack of a formal introduction of evidence did not render the revocation process unfair.

We conclude that the lack of a formal introduction of the evidence at the revocation proceeding does not create an unacceptable risk of an erroneous deprivation of a protected interest. (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 336.) "'Procedural informality is the hallmark of administrative proceedings as opposed to judicial proceedings.' [Citation.] . . . . '[I]t is settled that strict rules of evidence do not apply to administrative proceedings[.]'" (*Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 291.) The probable value of the "additional . . . procedural safeguard[]" (*Eldridge*, at p. 335) represented by a formal presentation of evidence is not significant, and the "fiscal and administrative burdens" (*ibid.*) placed on the government is similarly minimal. We note in addition that the requirement of formal presentation would necessarily apply to both parties; each would be burdened and benefited in equal measure.

We also reject TFS's contention that the lack of a formal presentation of evidence at the hearing violates the statute. As we stated above and as the trial court acknowledged, the plain language of section 47607, subdivision (e) does not require a formal presentation of evidence at the revocation hearing.

TFS also argues that the lack of a formal presentation of evidence at the County Board hearing led to CDE's recommendation that the State Board reverse the revocation. That contention is not supported by the portions of the CDE report cited by TFS, which merely state that the record of the revocation was unclear and incomplete and not supported by specific factual findings, and the findings were not supported by substantial evidence.[25]

We conclude that due process does not require the formal presentation of evidence at the public hearing.

2. Due process does not require an additional evidentiary hearing.

In determining that an additional evidentiary hearing was necessary, the court quoted Gale's statement that the County Board "was not the neutral decision-maker," and rejected the County Board's argument based on the factors in *Mathews v. Eldridge*, *supra*, 424 U.S. 319, because "this test has no application to . . . biased decision-makers," and "[d]ue process always requires a level playing field of a fair hearing before a neutral or unbiased decision-maker where an adjudicative decision is made." The trial court concluded that section 47607, which was "silent on the issue of an evidentiary hearing," did not meet the minimum requirements of due process: "An evidentiary hearing before a[n] unbiased hearing officer is required. The hearing officer may be an employee of LACOE who was uninvolved in the investigation and prosecution of the revocation, or may be a third party, either of which would satisfy due process. The hearing officer's findings then must either be accepted or rejected by the [County Board] in a public hearing."

Although TFS argues that the trial court did not conclude that due process mandated an additional hearing before revocation, that is exactly what the trial court required: an additional, preliminary evidentiary hearing before a designated "unbiased"

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[25] The trial court denied TFS's request for judicial notice of the May 19, 2008 analysis and the July 2008 agenda of the State Board. Both items, however, appear in the administrative record admitted into evidence in the trial court, and which has been lodged with this court.

hearing officer, with findings that would then be presented in a public hearing before the County Board for acceptance or rejection. This evidentiary hearing is not required by section 47607, and we conclude that it is not required by due process, as we will explain.

a. TFS did not show bias by the County Board.

TFS argues that "it cannot be disputed that [the County Board] was biased," citing the remarks of the general counsel for the County Board and LACOE. Those remarks bear repeating in their entirety. Ms. Gale, the general counsel to the County Board and LACOE, stated: "[i]n this matter the superintendent and staff [LACOE] are not the authorizer, and in our capacity we all advise the board in making this very important decision. It is not LACOE[']s] staff versus TFS's staff. The legal burden is on you, the board of LACOE, to determine whether there is substantial evidence to revoke your charter school. [¶] The [Education Code] provides for an appeal to the State Board of Education, and that is the due process stage. It is at that stage where there should be no one-sided communications, each side should have independent counsel. And most important, the adjudicator is the State Board of Ed[ucation], and it is neutral. In this matter, in this process, you are not neutral. You are the authorizer. [¶] Essentially this is the same process we use to evaluate new petitions that come to this board. We use literally the same spectrum of expert—technical expert staff, there is a public hearing, there is a report of staff, and then there is a recommendation upon which our board votes. [¶] So with all due respect, we do disagree and still maintain that our process is entirely legal."

Paraphrased and summarized, Gale's remarks explained that the County Board, the authorizer of the charter, was charged by section 47607 with the revocation decision. LACOE would advise the County Board on the revocation, just as it made recommendations to the County Board on new charter petitions. The statute also provided for an appeal to the State Board, which required independent counsel for both sides and disclosure of all communications. The County Board, as the entity initially granting the charter, was "not neutral."

The trial court cited Gale's statements as evidence of bias by the County Board and did not apply the *Mathews v. Eldridge*, *supra*, 424 U.S. 319 test, which "has no application to the issue of biased decision-makers." The court therefore required an additional evidentiary hearing without balancing the benefits and burdens of such a procedure.

Gale's statements were not an admission (or a description) of actual bias, which must be shown except in situations where the allegation regards a financial or personal interest of the adjudicator, in which case even a probability of bias will suffice to make the administrative procedure unfair. "A 'fair trial in a fair tribunal is a basic requirement of due process.' [Citation.] This applies to administrative agencies which adjudicate as well as to courts. [Citation.]" (*Withrow v. Larkin* (1975) 421 U.S. 35, 46–47 [95 S.Ct. 1456, 43 L.Ed.2d 712].) To attempt to "'prevent even the probability of unfairness.' . . . various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally intolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." (*Id.* at p. 47, citations & fns. omitted.)

In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, the California Supreme Court concluded that due process required the disqualification of a temporary hearing officer "when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." (*Id.* at p. 1024.) The Court noted that "adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality," citing *Withrow v. Larkin*, *supra*, 41 U.S. at p. 47, but "adjudicators challenged for financial interest have not." (*Id.* at p. 1025.) In the face of the pecuniary interest involved, actual bias need not be shown; the objective appearance of bias sufficed. "The appearance of bias that has constitutional significance is not a party's *subjective, unilateral* perception; it is the *objective* appearance that arises from financial circumstances that would offer a possible temptation to the average person as

adjudicator." (*Id.* at p. 1034.) Independent review by the board of the hearing officer's decision and the administrative record did not cure the possibility of bias. The trial court procedure may not "'be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance*.' [Citation.]" (*Ibid.*) The Court declined to consider the *Mathews v. Eldridge*, *supra*, 424 U.S. 319 balancing test, which applied only when procedural safeguards were insufficient, not "when the due process claim involves an allegation of biased decisionmakers." (*Id.* at p. 1035.) "The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the goodwill of frequent litigants who pay the adjudicator's fee." (*Id.* at p. 1037.)

"The standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding. [Citation.]" (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219–220.) "[A] party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with concrete facts: '"Bias and prejudice are never implied and must be established by clear averments." [Citation.]'" (*Id.* at p. 220.) While the "'probability or likelihood of actual bias'" was the standard to be employed when personal or financial interest was involved, where the plaintiff failed to establish a pecuniary or personal interest on the part of the officer plaintiff sought to disqualify, a showing of actual bias was required. (*Id.* at pp. 228–229.) In the administrative setting, therefore, in the absence evidence of financial or personal interest, "in order to prevail on a claim of bias violating fair hearing requirements, [plaintiffs] must establish '"an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims,"'" with specific facts. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) Such facts were shown when a member of the planning commission reviewing an appeal of a decision on a development project wrote a newsletter article attacking the project during the pendency of the appeal. The

article "g[ave] rise to an unacceptable probability of actual bias," and the plaintiff was entitled to a new hearing before an impartial panel. (*Id.* at pp. 483, 486.)

There was no evidence of a financial or personal interest on the part of the County Board, nor did TFS show "concrete facts" giving rise to an unacceptable probability of actual bias. The trial court identified only Gale's statement that the County Board was "not neutral" in declining to consider the balancing test in *Mathews v. Eldridge*, *supra*, 424 U.S. 319, which the court determined did not apply "to the issue of biased decisionmakers." This was too far a stretch.

Although when financial or personal bias is alleged, a litigant need only make a showing of a "probability of actual bias" to succeed on a due process claim, "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." (*Withrow v. Larkin*, *supra*, 421 U.S. at p. 47.) The Supreme Court found it "not surprising, therefore, to find that 'the case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . .' [Citation.]" (*Id.* at p. 52.) The Court rejected "the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." (*Ibid.*) When "there was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate," and "[t]he processes utilized by the Board . . . do not in themselves contain an unacceptable risk of bias," no constitutional violation occurred. (*Id.* at pp. 54–55.)

TFS argues that it "presented ample evidence that [the County Board] was biased." In addition to Gale's statement relied upon by the trial court, TFS points to Gale's presence ("to provide information and respond to questions") with other LACOE staff members at the October 9, 2007 presentation to the County Board, at which Superintendant Robles indicated that she believed the only option was "to go forward with her recommendation to revoke" at the October 16, 2007 County Board meeting. At the December 28, 2007 meeting of the County Board, Gale explained that based on the evidence received, LACOE was required to complete the investigation into TFS, and at the same meeting explained the grounds on which LACOE was seeking revocation. TFS complains that at the same time, Gale advised the County Board on procedural rules and explained the legal situation and the Education Code at the request of board members.

TFS also contends that Superintendent Robles "wore numerous hats throughout the revocation process," participating in the investigation of TFS, recommending that the Board give TFS notice of intent to revoke, and recommending that the County Board revoke TFS's charter. In essence, TFS complains that because Gale was general counsel to LACOE and to the County Board, and Superintendent Robles was county superintendent of schools, the head of LACOE, and the County Board's chief executive officer and secretary, there existed "overlapping functions" of "advocates and advisors to the [County] Board" and the County Board was inclined to "give extreme deference to staff[] recommendations regarding revocation," constituting a "clear bias in favor of LACOE staff." Neither Gale nor Superintendent Robles was a member of the County Board entitled to vote on the revocation.[26] To claim that their participation created an appearance of bias throughout the revocation proceedings, TFS relies on cases involving counsel performing dual roles before administrative review boards.

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[26] TFS's only assignment of "personal[] bias[]" as to a County Board member voting on the revocation relates to a County Board member who voted for revocation and then defended the revocation decision before the State Board at the hearing on TFS's appeal. Defending a vote after the fact, in an appearance before the board charged with deciding the appeal, is not indicative of personal bias in the casting of the vote.

In *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, a detention officer was discharged by the city police department, and filed an appeal with the city personnel board. (*Id.* at p. 812.) The city attorney, who had acted as a legal adviser to the board, could not simultaneously advise the board and represent the city on the appeal without creating "the probability of actual bias . . . [and] the appearance of unfairness is sufficient to invalidate the hearing." (*Id.* at pp. 815–816.)

In *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, the court found a due process violation when a city attorney took "an active and significant part in the renewal application process" for a cabaret's permit, and then "also appeared and participated in the administrative review of the denial of that application by advising and assisting" a city employee acting as a hearing officer. (*Id.* at p. 90.) "There was a clear *appearance* of unfairness and bias," because the city attorney's participation "was the equivalent of trial counsel acting as an appellate court's adviser during the appellate court's review of the propriety of a lower court's judgment in favor of that counsel's client." (*Id.* at p. 94.)

In *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, after a county deputy sheriff was disciplined, he challenged the discipline before a quasi-independent administrative tribunal established to resolve disputes between the county and county employees. During a contested hearing, the sheriff's department was represented by county counsel, and county counsel also advised the appeals board. (*Id.* at p. 1578.) Because the employment appeals board was cast as a "'supposedly neutral decision maker' . . . the attorney's dual role as both advocate for a party and adviser to the tribunal . . . does violence to [the] constitutional ideal" of due process." (*Id.* at p. 1586.)

Morongo Band of Mission Indians v. State Water Resources Control Bd. (2009) 45 Cal.4th 731, concerned an administrative hearing governed by the APA before the state water resources board to revoke a water license. The holders of the license petitioned the board to disqualify the entire group of counsel prosecuting the license revocation because at least one member of the group concurrently was acting in an advisory capacity to the board in a separate matter. (*Id.* at pp. 734, 735, fn. 1.) The California Supreme Court

concluded that in the absence of any evidence of actual prejudice, the potential for unfairness when an attorney acted as a prosecutor before the board and also acted as an adviser to the board "in an unrelated matter is too slight and speculative to achieve constitutional significance," in part because there was no evidence that the attorney acted in both capacities "in this or any other single adjudicative proceeding." (*Id.* at pp. 737, 740.) The court also disapproved of *Quintero v. City of Santa Ana*, *supra*, 114 Cal.App.4th at p. 817, to the extent that it "contains language suggesting the existence of a per se rule barring agency attorneys from simultaneously exercising advisory and prosecutorial functions, even in unrelated proceedings." (*Morongo Band of Mission Indians*, at p. 740, fn. 2.)

These cases do not support a conclusion that an unacceptable appearance of bias, let alone actual bias, existed in the revocation proceeding before the County Board. The cases finding due process violations did not involve the initial adverse decisions, but addressed appeals of those adverse decisions before purportedly neutral review boards, in which the same counsel simultaneously advised the board and represented one of the parties. (See *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1142 [no bias or probability of bias "since none of the people involved in the process had any overlapping memberships in both the adjudicatory body and the reviewing appeal board].") The equivalent in this case would be for Gale to represent the County Board before the State Board, *and to simultaneously advise the State Board*, on TFS's appeal from the County Board's revocation decision. Gale's remarks specifically advised the County Board that such overlapping of functions was prohibited on the appeal to the State Board ("[i]t is at that stage [that] there should be no one-sided communications, each side should have independent counsel"). There is no evidence of such improper interference in the State Board's review of TFS's appeal.

What took place at the revocation hearing was the unexceptional circumstance of general counsel and other LACOE staff advising the County Board regarding the initial decision whether to reverse TFS's charter. It cannot be said to violate due process for the County Board, the governing board of LACOE, to rely on LACOE staff to investigate

and make recommendations regarding revocation of TFS's charter. At the State Board appeal, the CDE performed similar functions for the State Board (which is the CDE's governing and policy-making body) by reviewing the entire record, corresponding with TFS and LACOE, and preparing an analysis which recommended reversal of the revocation, without (understandably) any objection from TFS.

The County Board was involved with TFS's charter from the start, granting it in 2003 and renewing it in 2005, and then in 2007 deciding to revoke the charter. This is entirely consistent with section 47607, subdivision (c), which contemplates that "the authority that granted the charter" may also revoke the charter. The statement that the County Board was "not neutral," seized upon by TFS and relied upon by the trial court, is both accurate and constitutionally acceptable. The County Board was "not neutral" because it had initially authorized TFS's charter, and later renewed it. To say that the County Board was "biased" against TFS because it was the authorizing authority is nonsensical. (It would make just as little sense to conclude that the County Board was biased in *favor* of TFS, because it had decided to grant TFS's charter in the first case and subsequently renewed it.)

The participation of Superintendant Robles also did not create an unacceptable appearance of bias. Again, she was simply doing her job, and the County Board was entitled to consider the recommendations of Superintendent Robles and LACOE staff. In *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, the California Supreme Court rejected the contention that school board members were prejudiced against a teacher who requested a public hearing after the board notified her that it intended to terminate her employment, pursuant to an accusation filed by the school superintendent. "The members of the board admit they were inclined to presume that the recommendations of their superintendent were correct, subject to reevaluation on the basis of what would appear at the hearing, but this does not show they were prejudiced against [the teacher] or that they could not give her a fair hearing." (*Id.* at p. 98.)

We conclude that the record does not show circumstances to "overcome a presumption of honesty and integrity in those serving as adjudicators." (*Withrow v.*

Larkin, *supra*, 421 U.S. at p. 47.) The County Board was not a biased decision maker, and we therefore balance the interests involved under *Mathews v. Eldridge*, *supra*, 424 U.S. at p. 335. The trial court's imposition of an evidentiary hearing as an additional procedural safeguard actually provides little additional protection to a charter school's interest in its charter. Under the trial court's formulation, even after the initial evidentiary hearing, the final decision whether to revoke the charter would remain with the County Board, which the trial court charged with accepting or rejecting the recommendation of the hearing officer. This still leaves the ultimate decision whether to revoke the charter in the hands of the chartering authority, which is the very fact of which TFS complains. Many of the arguments TFS makes on this appeal regarding biased decisionmaking could be used to challenge the County Board's vote on the hearing officer's recommendation. Most importantly, there can be no question that the government's interests would be greatly burdened by an additional hearing, which would entail an entirely new layer of fact finding and adjudication, with the attendant cost and further delay in revocation proceedings. Due process does not require an evidentiary hearing preliminary to the revocation procedures in section 47607, subdivisions (c), (d), and (e). We decline to add another level of adjudication to the statute.

b. The appeal to the State Board provides an additional safeguard.

Section 47607, subdivision (g)(1) provides: "If a county office of education is the chartering authority and the county board revokes a charter pursuant to this section, the charter school may appeal the revocation to the state board within 30 days following the decision of the chartering authority." Section 47607, subdivision (g)(2) provides: "The state board may reverse the revocation decision if the state board determines that the findings made by the chartering authority under subdivision (e) are not supported by substantial evidence." After concluding that the revocation proceeding before the County Board violated TFS's due process rights and that an evidentiary hearing was required, the trial court stated: "The [State Board] could not act as the neutral fact-finder on appeal from [the County Board's] decision; its review is not *de novo*, but rather is limited to

determining whether [the county Board's] findings are supported by substantial evidence. In such a circumstance, [the County Board] cannot look to the [State Board] as the impartial decision-maker for revocation."

In *Haas v. County of San Bernardino*, *supra*, 27 Cal.4th 1017, the California Supreme Court rejected the proposition that the possibility of financial bias on the part of a hearing officer "is cured when the Board independently reviews the administrative record and decides whether to accept or reject the officer's recommendation. . . . [N]o court has relied on this argument to uphold a decision reached by an adjudicator found to have suffered from a constitutionally significant risk of bias. Indeed, several courts have expressly rejected the argument." (*Id*. at p. 1034.) As we state above, however, there was no evidence of actual bias or unacceptable risk of bias in the County Board's revocation of TFS's charter. While we agree that an appeal to the State Board would not cure a due process violation at the County Board level, the revocation proceedings did not violate TFS's due process rights.

The Education Code does not charge the State Board with making independent factual findings on appeal from a revocation decision. Instead, section 47607, subdivision (g)(2) charges the State Board with determining whether "the findings made by the chartering authority under subdivision (e) are . . . supported by substantial evidence." That is the same standard section 47607, subdivision (e) requires the County Board to apply in deciding whether to revoke a charter it has authorized: "The chartering authority shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that support its findings." The plain language of the statute contemplates that the County Board and the State Board are to apply the same standard.

On TFS's appeal to the State Board, the CDE in this case conducted an independent review of the entire record, requested and received additional material from LACOE, assessed whether substantial evidence supported each ground for revocation, with no indication of deference to the County Board, and recommended that the State

Board reverse the County Board's revocation decision.[27] TFS does not argue that the State Board was not impartial. Further, TFS does not point to anything in the administrative record to show that the State Board applied the highly deferential standard employed in appellate *judicial* review for substantial evidence. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128–1129 [under substantial evidence standard of appellate judicial review, reviewing court must view evidence in light most favorable to prevailing party, drawing all reasonable inferences and resolving all conflicts in its favor].)

The statute's provision for an appeal to the State Board under section 47607, subdivisions (g)(1) and (g)(2), provides an additional safeguard against the erroneous deprivation of TFS's property interest in its charter. The existing administrative procedures, as provided for in the statute, do not violate due process.

c. There was substantial compliance with the notice requirement.

As an alternate ground for affirmance of the judgment,[28] TFS argues that the County Board failed to comply with section 47607, subdivision (d), which provides: "Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to remedy the violation . . . ." The trial court concluded that the County Board "substantially complied with section 47607[, subdivision] (d) by delegating the issue of notice to LACOE. This makes particular sense because LACOE's employees are [the

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[27] Further, ACCS and the State Board held hearings at which both sides appeared, although no requirement of further hearings on appeal appears in section 47607, subdivision (g)(1).

[28] TFS did not cross-appeal on this ground, but Code of Civil Procedure section 906 provides: "The respondent . . . may, without appealing from such judgment, request the reviewing court to and it may review any of the [judgment or order appealed from] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal . . . ." "The purpose . . . is to allow a respondent to assert a legal theory which may result in affirmance of the judgment." (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.)

County Board's] staff[.] Dr. Robles, who sent the July 19, 2007 letter, is both the Superintendent of Schools and the chief executive officer of [the County Board], and the parties in the charter expressed confusion about a division of authority between LACOE and [the County Board]. . . . This substantial compliance also comports with the requirements of due process. [Citation.]" The trial court also concluded that TFS "shows no prejudice or confusion from the notice."

TFS argues that to comply with the statue the notice must have come from the County Board, not from LACOE, pointing out that section 47607, subdivision (d) requires notice from "the authority that granted the charter" (here, the County Board). (The statute, however, also refers to "a county office of education" as a "chartering authority" in subdivision (g)(1), and as the trial court noted, TFS in its charter petition referred to LACOE as the entity that could revoke the charter.)

On appeal, TFS does not challenge the trial court's finding that TFS did not show any prejudice or confusion. "Only if the manner in which an agency failed to follow the law is shown to be prejudicial, or is presumptively prejudicial, as when the department or the board fails to comply with mandatory procedures, must the decision be set aside . . . ." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) The Supreme Court presumed prejudice because, in "failing to proceed in the manner prescribed by" CEQA, the forestry board frustrated the purpose of the statute, making "any meaningful assessment of the potentially significant environment impacts of timber harvesting and the development of site-specific mitigation measures impossible. "In these circumstances, prejudice is presumed." (*Id.* at p. 1237.) The receipt of notice from LACOE instead of the County Board substantially complied with the mandatory notice and did not frustrate the purpose of the statute, so we do not presume that TFS was prejudiced. Further, TFS does not show how the receipt of notice from LACOE rather than the County Board was prejudicial.

The form in which TFS received notice is therefore not an alternate ground for affirmance of the judgment reversing the revocation of TFS's charter.[29]

III. TFS is not eligible for attorney fees.

TFS filed an appeal from the trial court's judgment awarding TFS zero in attorney fees pursuant to Code of Civil Procedure section 1021.5, and Government Code section 800. Code of Civil Procedure section 1021.5 provides that under certain circumstances "a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest . . . ." Government Code section 800, subdivision (a) provides that a complainant may collect attorney's fees from a public entity "if he or she prevails" in a civil action to review the determination of an administrative proceeding under a provision of state law, "if it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity . . . ."

Because we reverse the judgment, TFS is neither a successful party under Code of Civil Procedure section 1021.5, nor a prevailing party under Government Code section 800, subdivision (a). TFS is not eligible for attorney's fees under either statute.

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[29] As a second alternate ground for affirmance, TFS argues that the County Board failed to make adequate factual findings under section 47607, subdivision (e) because it "'rubber-stamped'" LACOE's findings, and incorporated LACOE reports that were not sufficiently specific. TFS does not provide record citations to those reports, and they are not included in the administrative record before the trial court and before us on this appeal. Further, TFS did not raise this issue in its motion for judgment in the trial court. We therefore decline to consider this issue.

DISPOSITION

The judgment is reversed. Appellants Los Angeles County Office of Education and Los Angeles County Board of Education are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.