October 21, 2015

Board of Education
Oceanside Unified School District
2111 Mission Ave.
Oceanside, CA 92058

Re: Jefferson Middle School

Dear Board Members:

I write to address the Board’s decision on September 22, 2015 to approve the petition of Orange County School of the Arts (OCSA) to establish California School of the Arts San Diego County (CSASDC) on the current site of Jefferson Middle School.

The Board’s decision unlawfully (1) approved a charter school petition with academic and audition prerequisites for admission, (2) failed to guarantee future preference to students in Jefferson’s former attendance area, (3) risked creating an unjustified disparate impact on Latino students, and (4) ignored the California Environmental Quality Act (CEQA). I ask the Board to reconsider its decision in order to provide for meaningful community participation in decisions about the Jefferson campus, uphold equal educational opportunity, comply with CEQA, and avoid potentially time-consuming and expensive litigation.

1. A charter school may not require academic and audition prerequisites for admission.

A charter school is a public school that may not impose academic or audition prerequisites for admission. The Board may not allow a charter school to operate as a de facto private school at state expense.

According to staff materials presented to the Board, OCSA requires prospective students to have “no ‘F’ grades” and “a minimum academic G.P.A. of 2.0.” Students must also “audition competitively” for one of several conservatories. The CSASDC petition is “based on the OCSA model,” with two exceptions:

- Future students who attend a proposed “district K-6 arts school” on the Jefferson site “for at least three years will be admitted to the 7-12 charter school in its Integrated Arts conservatory without audition, and may audition for the other conservatories.”
• The same is true for current sixth and seventh grade students at Jefferson, but current eighth graders must audition.

However, all CSASDC students must still have a 2.0 GPA with no F grades.

The academic and audition prerequisites for admission are illegal. “A charter school shall admit all pupils who wish to attend the school.” 1 Educ. Code § 47605(d)(2)(A); see also California Sch. Boards Assn. v. State Bd. of Educ., 191 Cal. App. 4th 530, 573 (2010) (“Generally, charter schools must admit all students who wish to attend to the extent the schools have the capacity to do so.”).

Charter schools are intended to “[i]ncrease learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.” Educ. Code § 47601(b). Academic and audition prerequisites for admission defy this legislative mandate.

In upholding the Charter Schools Act against a challenge that it created “a dual system of public schools,” in violation of the California Constitution, the Court of Appeal held that “the Act places charter schools within the common system of public schools” because charter schools are “open to all students,” among other requirements. Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1137 (1999). To suggest otherwise would bring charter schools into conflict with the state constitution.

Accordingly, the Board unlawfully approved the CSASDC petition because it did not comply with “each of the conditions described in subdivision (d),” which include admission of students without regard to academic or audition requirements. Education Code § 47605(b)(4).

2. **If Jefferson will convert to a charter school, the Board must guarantee preference in attending CSASDC to all future students residing within Jefferson’s former attendance area.**

The Board unlawfully failed to ensure that CSASDC will continue to provide preference in admission to students residing within the current Jefferson attendance area.

I understand CSASDC will guarantee preference only to current sixth and seventh graders at Jefferson and will not extend that preference to future students residing within Jefferson’s former attendance area.

The failure to continue that preference into the future is illegal. An “existing public school converting partially or entirely to a charter school under this part shall adopt and maintain a policy giving admission preference to pupils who reside within the former attendance area of

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1 “If the number of pupils who wish to attend the charter school exceeds the school’s capacity, attendance, except for existing pupils of the charter school, shall be determined by a public random drawing,” with preference for current pupils and pupils who reside in the district. Educ. Code § 47605(d)(2)(B).
that public school.” Educ. Code § 47605(d)(1). The statute is not satisfied merely by giving preference to some current Jefferson students. It requires CSASDC to “adopt and maintain” the preference for all students in the former attendance area. By definition, to “maintain” the preference requires CSASDC to continue it into the future, not limit it to current Jefferson students. Accordingly, the Board unlawfully approved the charter petition. Educ. Code § 47605(b)(4).

3. The Board’s decision creates a serious risk of unlawful disparate impact on Latino students, as well as violating laws against involuntary donations or fundraising.

The decision to close Jefferson and replace it with CSASDC raises the substantial risk of unjustified disparate impact on students of color, whose families often have far less income and net worth than white families. The extensive and demanding audition requirements for CSASDC require previous access to expensive training, materials, or equipment not often available to families of limited means, http://csarts.net/admissions/ (visited Oct. 21, 2015), likely resulting in adverse impact on people of color. Indeed, the cost of such training, materials, or equipment may amount to de facto tuition that a charter school may not charge.

The donations and fundraising on which CSASDC will rely also present significant problems. Few families of limited means are able to muster the money or time to contribute to fundraising campaigns, which may thus have a disparate impact on people of color. Though OCSA donation and fundraising is ostensibly voluntary, as required by Education Code § 49011, I understand OCSA families may be required to execute “Parent Funding Agreements” specifying how much money will be donated or raised. Even if families are not technically obligated to specify an amount, the pressure exerted by such arrangements may well make them involuntary in practice. Such pressure might violate both the Education Code and Free Schools Clause of the California Constitution, as well as create an unlawful disparate impact.

“No person in the State of California shall, on the basis of race, national origin, ethnic group identification … color … or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is … funded directly by the state, or receives any financial assistance from the state,” including public education. Govt. Code § 11135.

The regulations implementing § 11135 make it unlawful for state funding recipients “to utilize criteria” that “have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification.” 22 C.C.R. § 98101(i). Neither the statute nor the regulations require intent to discriminate. A violation of either exposes the district to loss of

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state funds, Govt. Code §§ 11136, 11137, or legal action “independent of any other rights and remedies,” Govt. Code § 11139.

The CSASDC admission or fundraising criteria likely violate disparate impact law by effectively discriminating against Latinos, regardless of intent. As of 2014-15, the most recent year for which statistics are available, Jefferson’s enrollment was 80.9 percent Latino. Oceanside Unified School District students were 54.5 percent Latino, as were 47.9 percent of San Diego County students. However, only 22.5 percent of OCSA students were Latino. In the likely event those percentages remain steady and CSASDC’s enrollment resembles that of OCSA, it will have approximately one-third to one-half the Latino enrollment of Jefferson, the District, or San Diego County.

It is difficult to imagine a proper justification for those substantial disparities, which likely result from the expensive training, materials, or equipment necessary to audition for admission, as well as the donation or fundraising criteria. Cf. City & County of San Francisco v. Fair Employment & Hous. Com., 191 Cal. App. 3d 976, 987 (1987) (finding disparate impact based on “variance in the passage rate of two and one-half times” between white and black firefighters) (citing cases).

4. The closure of a school and transfer of its students is a “project” under the California Environmental Quality Act, for which the Board must either make a proper finding of exemption or conduct further study.

The District violated CEQA by failing to consider whether the decision to close Jefferson Middle School, transfer students to other schools, and transform the Jefferson site is exempt from environmental review.

The closure of a school and transfer of students to other schools is a “project” under CEQA. San Lorenzo Valley Cnty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist., 139 Cal. App. 4th 1356, 1380 (2006). Therefore, the District was obligated to “conduct a preliminary review” to determine whether the project qualifies for a CEQA exemption. Davidon Homes v. City of San Jose, 54 Cal. App. 4th 106, 112 (1997).

“A school closure and accompanying transfer of students” is exempt from CEQA only if the receptor schools will experience “(1) the addition of 10 or fewer classrooms; or (2) an increase in original student capacity of 25 percent or less.” San Lorenzo Valley, 139 Cal. App. 4th at 1388. Original student capacity means “the receptor school’s preexisting physical ability to house students.” Id.

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3 If a project is not exempt, an agency must “conduct an initial study” to determine whether a “negative declaration” or full “environmental impact report” is necessary. San Lorenzo Valley, 139 Cal. App. 4th at 1373. If the project does not qualify for a negative declaration, the agency must prepare an environmental impact report. Id.
The District failed the threshold requirement to determine whether the transfer and closure were exempt from CEQA review. But even if the District had found the transfer and closure were exempt, such a decision would not have been supported by sufficient evidence.

According to District staff, the closure of Jefferson will require “a restructuring of the district’s services for grade 6-8 students.” Current Jefferson students below 8th grade “who desired a traditional middle school could attend Lincoln or Chavez middle schools.” Mission and Laurel Elementary Schools “would be expanded to K-8 schools,” and current fifth graders at those schools “would stay at their current school for 6th grade or apply for School of Choice to Lincoln or Chavez.” “Foussat and San Luis Rey students would attend either Chavez or Lincoln” instead of Jefferson.

Under this plan, Lincoln, Chavez, Mission, and Laurel will all undergo substantial expansion. However, the staff materials do not specify how many new classrooms will be needed or how many new students will go to each receptor school, nor do they state the enrollment capacity of those schools.

In addition, the Jefferson campus, which currently has 656 students, will house CSASDC and the K-6 arts school. CSASDC “is projected to open with 780 students,” expanding to 1200, and the projected capacity for the “K-6 arts school is 600 students.” The Jefferson campus is thus eventually expected to accommodate about 1800 students, but the staff materials do not specify the campus’s original or current capacity.

As a result, it would have been unlawful for the District to find the project exempt from CEQA, even if it had done so. “Without knowing the enrollment capacity of each receptor school, it was impossible for the District to properly determine that transfers would not cause the enrollment at any of the receptor schools to exceed 125 percent of the receptor school's enrollment capacity, or require fewer than 10 portable or permanent classrooms to be added to the receptor school.” Save Our Sch. v. Barstow Unified Sch. Dist. Bd. of Educ., 240 Cal. App. 4th 128, 142 (2015) (emphasis in original) (holding that exemption finding was unsupported).

The fact that current Jefferson students “would be able to choose which receptor school to attend … compounds the insufficiency of the evidence” for an exemption, especially where the District “did not indicate that it would limit enrollment at any of the receptor schools in order to ensure that the enrollment at any receptor school would not exceed 125 percent of its enrollment capacity before the transfers, or require the addition of 10 or more new classrooms to the receptor school.” Id. at 143.

In any event, the staff materials suggest the project will have significant environmental impacts requiring further review. The staff recommendations refer to building a “new access” to the Jefferson campus in order to “relieve traffic congestion.” A presentation to the Board states, “OUSD staff are still exploring options for managing the impacts of Jefferson’s closure” and acknowledges the District “will need to add significant facilities and staff at Lincoln and Chavez” as well as Laurel and Mission, resulting in construction and increased traffic at those
schools—not to mention increased traffic from the substantial increase in students at the Jefferson site—which likely merits CEQA review.

CONCLUSION

A charter school remains a public school subject to fundamental principles of open admission and equal educational opportunity. CSASDC’s petition violates those principles and must be rejected. The ACLU asks the Board to reconsider its decision on CSASDC as soon as possible and provide for meaningful community participation in the decision about how best to use the Jefferson campus to serve the children of Oceanside and promote equal educational opportunity for all students.

I hope this matter can be resolved without litigation. Please feel free to call me if you have any questions.

Sincerely,

David Loy
Legal Director