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**CLIENT NEWS BRIEF**

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**NEW PROPOSITION 39 REGULATIONS  
SCHEDULED TO BECOME EFFECTIVE**

On February 28, 2008, the Office of Administrative Law (“OAL”) approved amendments to regulations that govern how school districts allocate facilities to charter schools as required by Proposition 39 (“Prop 39”). The amendments, which will go into effect thirty days from OAL’s approval (March 29, 2008), will make significant changes to the Prop 39 landscape. Although facilities requests currently pending will not be affected by the amendments, the regulations are set to be enforceable for the facilities requests received by school districts in the fall of 2008 for the 2009-2010 school year. The California School Boards Association has opposed the amendments and may initiate litigation to preclude their implementation.

Prop 39, passed by California voters in 1998, requires school districts to provide facilities to charter schools that timely request them. Regulations implementing Prop 39 are found at California Code of Regulations, title 5, section 11969.1 et seq. Amendments to the regulations were first approved by the State Board of Education (“SBE”) and submitted to OAL last May, but were subsequently withdrawn in August 2007. (See Client News Briefs No. 16, 2007 and No. 32, 2007.) SBE re-submitted the amendments to OAL with some changes at the end of 2007, and the regulations have finally been approved.

A brief summary of the amendments that will be of most interest to school districts follows. Because the amendments are extensive, we do not review all of them here, but invite you to contact one of our six offices statewide if you have questions about how these amendments may affect your school district.

***Charter School Facilities Must Be “Contiguous”***

Prop 39 provides that facilities offered to charter schools “shall be contiguous, furnished, and equipped”. In 2005, the California Court of Appeal considered a school district’s offer of facilities to a charter school at numerous different sites spread over a considerable distance, and concluded that the offer failed to meet the district’s obligations to provide contiguous facilities as set forth in Prop 39. (Ridgecrest Charter School v. Sierra Sands Unified School District (2005) 130 Cal.App.4th 986 (“Ridgecrest”).) The amended Prop

39 regulations implement the decision in Ridgecrest, stating that when a school district is evaluating a charter school's request for facilities, "the charter school's in-district students must be given the same consideration as students in the district-run schools, subject to the requirement that the facilities provided to the charter school must be contiguous." (See amended Cal. Code Regs., tit. 5, § 11969.2(d).) The newly adopted regulations go on to require that if a school district cannot accommodate a charter school at a single school site, its governing board must make a written finding to that effect and adopt a written statement of reasons in support of that finding.

### *School Districts Must Provide Reasonably Equivalent Furnishings and Equipment for Charter Schools*

Prop 39 provides that charter school facilities provided by school districts shall be "furnished, and equipped". The amended regulations state that a facility will be "furnished and equipped" if it includes "reasonably equivalent" furnishings and equipment that such as are found in the comparison group schools (as before, the Prop 39 regulations require that districts perform a comparison between certain district schools - known as the "comparison group schools" - and the charter school to ensure that the offer of facilities are reasonably equivalent to facilities of district-operated programs). (See amended Cal. Code Regs., tit. 5, § 11969.2(e).) The regulations go on to state that "equipment" is property that "does not lose its identity when removed from its location and is not changed materially or consumed immediately (e.g., within one year) by use." Examples given by the regulations include "furniture, vehicles, machinery, motion picture film, videotape" and "certain intangible assets, such as major software programs". The regulations do allow a school district to exclude furnishings and equipment paid for with non-district resources when determining reasonable equivalence. We anticipate that the scope of furnishings and equipment a school district is obligated to provide under Prop 39 will be a primary source of tension between districts and charter schools once these amended regulations are in force.

### *"Conversion" Charter Schools May Retain Their Sites Indefinitely*

Some charter schools are created when a district school's parents or faculty submit a petition to convert a district-operated school into a charter school; these are called "conversion" charter schools. Another type of "conversion" charter schools are those created as a remedy for poor performance under the state's Public School Accountability Act. Prop 39 provides that a school district may not move a charter school "unnecessarily", but under the revised regulations, a "conversion" charter school will be entitled to remain in the school site in which it was operating when it became a charter school so long as the charter school requests the site from the school district on an annual basis.

Under the amended regulations, a school district must obtain a waiver to move a "conversion" charter school away from its existing location. (See proposed amendment to Cal. Code Regs., tit. 5, § 11969.3.) The regulation also provides that a "conversion" charter school may, by revision to its charter, change its location and request different

facilities from the school district in which it is located. School districts must also seek “waivers” from SBE to change a charter school’s attendance area.

*Information on a School District’s Facilities Charges Must Now Be Reported to the Department of Education*

Under Prop 39, a school district can charge a charter school using school district facilities a pro rata share of its facilities costs. When the new regulations go into effect, each charter school will have to report, by June 1 of each school year, the per-square-foot charge it is paying in the current fiscal year to the Department of Education (“CDE”). School districts will have an opportunity to provide explanatory information regarding the per-square-foot charge. The CDE will post the per-square-foot amounts and any explanatory information on its website. (See amended Cal. Code Regs., tit. 5, § 11969.7.)

*Tighter Timelines For Responding To Facilities Requests Are Imposed*

Until now, the Prop 39 regulations provided that a charter school must submit its facilities request by October 1 of the school year. A school district must provide a preliminary offer of facilities, and must make a final offer by April 1. The amended regulations shorten this time period and impose deadlines for each action to be taken during for consideration of a facilities request. In addition, the amendments impose consequences for missed deadlines. The new deadlines are as follows:

**November 1** – Deadline for charter schools to submit facilities requests for the next school year.

**December 1** – Deadline for school districts to review a charter school’s enrollment projections, express any objections in writing and state the enrollment projections that the district considers reasonable. If a district misses this deadline, the charter school’s projections stand and the district must base its facilities offer on those projections.

**January 2** – Charter school’s deadline for responding to any objections submitted by the district in response to the charter school’s enrollment projections. If a charter school misses this deadline, the district’s counter-projections stand and the district must base its facilities offer on its counter-projections.

**February 1** – School district’s deadline to submit a preliminary proposal regarding the space to be allocated to the charter school. The preliminary proposal must include information related to in-district Average Daily Attendance (“ADA”) projection on which the proposal is based, the specific location or locations of the space, the condition of the facilities, and a description of the comparison schools used in developing the preliminary proposal, a draft facilities use agreement, the projected pro rata share amount and a description of the methodology used to determine that amount. The district must also spell out the differences between what the charter school requested and what the district is offering by way of facilities.

**March 1** – Charter school’s deadline to respond in writing to the district’s preliminary proposal. The charter school may express concerns, address any differences between its facilities request and the district’s preliminary proposal and/or make counter proposals.

**April 1** – School district’s last day to submit in writing a final notification of the space offered to the charter school. The offer must also address the charter school’s concerns and counter proposals, if any, and provide specific information about the capacities of the facilities offered.

**By May 1 or within 30 days of the district’s final notification** - Charter school must notify the district in writing if it intends to occupy the space offered. If a charter school misses this deadline, it will not be entitled to use facilities of the school district in the following fiscal year.

School districts may find it helpful to consult legal counsel when complying with charter school facilities requests. If you have any questions regarding these regulations or charter school facilities requests in general, please contact any one of our offices.

*As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.*

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