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July 14, 2010

The Honorable Theodore R. Mitchell
President, State Board of Education
1430 N Street, Room 5111
Sacramento, CA 95814

Re: Agenda Items 32 and 33, July 14-15, 2010 Board Meeting

Dear President Mitchell:

I write to urge you and your Board to reject the proposed regulation defining "adverse financial impact" (Agenda Items 32 and 33).

Section 11342.2 of the California Government Code clearly provides that "... no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

The 'adverse financial impact' regulations proposed for your consideration, however, are clearly contrary to the language of the statute (SB X5 4). The language you are considering clearly thwarts rather than implements the requirements of the legislation.

This is not a case of statutory ambiguity or differing interpretations. The statutory language is crystal clear; and the regulatory language is equally clear in its contrary impact.

The statutory language says plainly that a local school district may consider "adverse financial impact" when considering the application of a student under the open enrollment provisions of the bill (Education Code section 48356(a)). The statute also says quite plainly that "No exercise of discretion by a district of enrollment in its administration of this article shall be overturned absent a

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finding as designated by a court of competent jurisdiction that the district governing board acted in an arbitrary and capricious manner" (EC sec. 48361).

In short, local districts are clearly authorized by state law to consider adverse financial impact, and it is the local governing board's decision that will determine what constitutes an adverse financial impact, unless the court determines that the board has acted in an arbitrary and capricious fashion.

Notwithstanding the clear language of the statute, the regulatory language before you proposes to impose a wholly different definitional standard of "adverse financial impact" (i.e., whatever we give you, it's enough). It also imposes a new burden of proof, "clear and convincing evidence", on local districts; which is wholly inconsistent with the statutory protection provided for any decision not deemed 'arbitrary and capricious.'

Even if the language of the regulation was not so clearly inconsistent and in conflict with the statute, the regulation would also fail to meet the requirement that it be "reasonably necessary to effectuate the purpose of the statute."

The statute already provides that, "A school district of enrollment may adopt specific written standards for acceptance and rejection of applications. ... The standards may include consideration of ...adverse financial impact" (EC sec. 48356(a)).

Because the statute already provides the district of enrollment with the authority to "adopt specific written standards for acceptance and rejection of applications ... (including) ... adverse financial impact," then state regulation is clearly not "necessary to effectuate the purpose of the statute."

I urge rejection of the proposed regulatory language because it is unlawful on its face. The issue before your Board is not one of policy or preference; it's a matter of law, and the Board's willingness to respect the rule of law.

The adoption of such language will surely generate litigation, and your Board cannot possibly prevail in this instance given that the regulatory language is so clearly inconsistent with and contrary to the statutory language.

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Apart from the cost, the attendant delay can only inhibit, rather than enhance, your worthy efforts to implement these programs.

And finally, adoption of the proposed regulatory language can only add to the public's growing cynicism about the conduct of government. The statutory language at issue here was negotiated in an open, public and vigorous debate. Indeed, the bill's passage out of the Senate Education Committee was specifically predicated on the inclusion of the statutory language at issue. To use the regulatory process to do an end run around the legislative process can only breed distrust among the stakeholders.

During my ten years in the Legislature I have never before felt compelled to weigh in on a regulatory matter before your Board. In this instance, however, the proposal before you is so egregious that I simply felt that I must weigh in.

I urge that agenda items 32 and 33 either be withdrawn, or rejected by a "no" vote.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Joseph Simitian". The signature is fluid and cursive, with a long horizontal stroke at the end.

S. Joseph Simitian
State Senator, Eleventh District

SJS:ctj

Enclosures (5)

cc: Senate President pro Tem Darrell Steinberg
Ms. Susan Lapsley, Director, Office of Administrative Law
Members, State Board of Education