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7 DISTRICT; and TIM JUSTUS

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SANTA CLARA**

11 BULLIS CHARTER SCHOOL,

12 Petitioner,

13 v.

14 LOS ALTOS SCHOOL DISTRICT;
15 BOARD OF TRUSTEES OF THE LOS
ALTOS SCHOOL DISTRICT; and TIM
16 JUSTUS, in his capacity as District
Superintendent,

17 Respondents.
18

CASE NO. 109 CV 144569

[PROPOSED] FINDINGS OF FACT

Petition Filed: June 10, 2009

Hearing Date: October 26, 2009

Time: 9:00 a.m.

Dept.: 1

Judge: Hon. James P. Kleinberg

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20 Respondents LOS ALTOS SCHOOL DISTRICT; BOARD OF TRUSTEES OF THE
21 LOS ALTOS SCHOOL DISTRICT; and TIM JUSTUS submit the following proposed Findings
22 of Fact.

23 This matter came on for hearing on October 26, 2009, the Honorable James P. Kleinberg
24 presiding. Arturo J. Gonzalez and Suzanna Pacht Brickman of Morrison & Foerster appeared on
25 behalf of Petitioner Bullis Charter School; John R. Yeh and Donald A. Velez of Miller Brown &
26 Dannis appeared on behalf of Respondents.

27 Having read and considered the evidence, accompanying declarations and memorandum
28 of points and authorities, other pleadings and papers on file herein, and after all parties had an

1 opportunity to be heard, and good cause appearing, the Court hereby issues the following finding
2 of fact:

3 I. REASONABLE EQUIVALENCE

4 (Legal Authority -- 5 C.C.R. 11969.3(a)(1): “Facilities made available by a
5 school district to a charter school shall be provided in the same ratio of teaching
6 stations (classrooms) to ADA as those provided to students in the school district
7 attending comparison group schools.”)

8 Finding No. 1: *The District’s 2009-2010 Final Offer of Facilities to BCS offered the*
9 *following facilities:*

10 a. Teaching Space - Exclusive Use

- 11 • 2 Kindergarten classrooms with interior bathrooms (2,880 sq. ft. total);
- 12 • 14 1st through 6th grade classrooms (960 sq. ft. each)
- 13 • (TOTAL: 16 classrooms --Net increase of 2 classrooms from the 2008-2009
14 school year)

15 b. Specialized Instructional Space - Exclusive Use

- 16 • Two Flex Rooms (1920 sq. ft.)
 - 17 • 1 Computer Laboratory (960 sq. ft.)
 - 18 • Small Group Space (480 sq. ft.)
 - 19 • Resource specialist space (480 sq. ft.)
 - 20 • Library (1,440 sq. ft.)
 - 21 • TOTAL: 5.0 units of specialized space
 - 22 • Multiuse Room (4,330 sq. ft.) (Built at BCS expense per BCS request on
23 District grounds)
- (Kenyon Decl., para. 3, Exh. 1, Exh. 1(A)(A) and 1(C).)

24 Finding No. 2: *BCS had a smaller projected in-District Average Daily Attendance*
25 *(ADA) for 2009-2010 than all but one of the comparison group schools.*

Almond (524 ADA)	Covington (459 ADA)	Loyola (538 ADA)	Santa Rita (506 ADA)	Gardner (239 ADA)	BCS (345 ADA)
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(Kenyon Decl., para. 3, Exh. 1, Exh. 1(A)(A) and 1(C).)

26 *BCS’s facilities request also projected the enrollment of approximately 30 non-District students.*
27 *(See, Amended Petition for Writ of Mandate, Exh. 1 thereto, (Doc. 0027)) The school district’s*
28 *obligations only extend to accommodating in-District students.*

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Finding No. 3: *The District’s classroom allocation to BCS was at a smaller (more favorable) student-to-classroom ratio than the ration the District provided to its own schools.*

<i>Grade levels</i>	<i>BCS</i>	<i>District</i>
<i>K</i>	<i>26</i>	<i>29</i>
<i>1-3</i>	<i>18</i>	<i>19</i>
<i>4-6</i>	<i>28</i>	<i>29</i>

(Declaration of Randy Kenyon, Para.. 14, Exh. 1, p. 4; Deposition of Wanny Hersey, 46:22-49:4)

Finding No. 4: *The District offered BCS non-teaching space in an amount reasonably equivalent to that offered at the comparison group schools and has reasonably responded to BCS’s requests for additional forms of non-teaching space.*

(Legal Authority -- 5 C.C.R. 11969.3(a)(3): “The school district shall allocate and/or provide access to non-teaching station space commensurate with the in-district classroom ADA of the charter school and the per-student amount of non-teaching station space in the comparison group schools. Non-teaching station space is all of the space that is not identified as teaching station space or specialized classroom space and includes, but is not limited to, administrative space, kitchen, multi-purpose room, and play area space.”)

The District offered the following categories of non-teaching space available at the comparison group schools:

<u><i>Non-Teaching Space</i></u> <i>Admin/Workroom</i> <i>Teacher Lounge</i> <i>Storage/Custodial</i> <i>Student Restrooms</i> <i>Servery</i>	<u><i>Specialized Classroom Space</i></u> <i>Computer Lab</i> <i>Library</i> <i>Resource Specialist</i> <i>Flex Room</i> <i>Multi</i> <i>Small Group</i>	<u><i>Outdoor Space</i></u> <i>Kindergarten Playground</i> <i>Blacktop</i> <i>Turf</i>
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(Kenyon Decl., ¶ 5, Exhs. 2 - 6).

Finding No.5: Even using BCS’s calculations, the square footage calculation for the BCS’s facilities are reasonably equivalent to those of the comparison group schools:

*Square Footage per ADA per Site
 (According to BCS Calculations)
 Shows Total square footage/square feet per ADA at each site*

	<i>Almond (524 ADA)</i>	<i>Covington (459 ADA)</i>	<i>Loyola (538 ADA)</i>	<i>Santa Rita (506 ADA)</i>	<i>Gardner (239 ADA)</i>	<i>Comp. Sch. Av.</i>	<i>BCS (345 ADA)</i>
<i>Kindergarten (Total sf/sf Per ADA)</i>	<i>12,223/23.3</i>	<i>16,057/34.9</i>	<i>9,490/17.6</i>	<i>6,211/12.27</i>	<i>12,310/51.5</i>	<i>27.9 sf/ADA</i>	<i>7,787/ 22.6 sf/ADA</i>
<i>Blacktop (Total sf/sf Per ADA)</i>	<i>78,179/149.2</i>	<i>57,578/125.4</i>	<i>58,579/108.9</i>	<i>55,992/110.7</i>	<i>51,257/214.4</i>	<i>141.62 sf/ADA</i>	<i>53,241/ 154.3 sf/ADA</i>
<i>Turf (Total sf/sf Per ADA)</i>	<i>144,586/275.9</i>	<i>128,933/280.9</i>	<i>101,924/189.4</i>	<i>210,668/416.3</i>	<i>50,485/211</i>	<i>274.7 sf/ADA</i>	<i>83,161/ 241 sf/ADA</i>

*Square Footage per ADA per Site
 (According to BCS Calculations)
 Shows square feet per ADA only at each site*

	<i>Almond (524 ADA)</i>	<i>Covington (459 ADA)</i>	<i>Loyola (538 ADA)</i>	<i>Santa Rita (506 ADA)</i>	<i>Gardner (239 ADA)</i>	<i>Comp. Sch. Av.</i>	<i>BCS (345 ADA)</i>
<i>Kindergarten (sf Per ADA)</i>	<i>23.3</i>	<i>34.9</i>	<i>17.6</i>	<i>12.27</i>	<i>51.5</i>	<i>27.9 sf/ADA</i>	<i>22.6 sf/ADA</i>
<i>Blacktop (sf Per ADA)</i>	<i>149.2</i>	<i>125.4</i>	<i>108.9</i>	<i>110.7</i>	<i>214.4</i>	<i>141.62 sf/ADA</i>	<i>154.3 sf/ADA</i>
<i>Turf (sf Per ADA)</i>	<i>275.9</i>	<i>280.9</i>	<i>189.4</i>	<i>416.3</i>	<i>211</i>	<i>274.7 sf/ADA</i>	<i>241 sf/ADA</i>

*Using BCS’s calculations, the square footage allocation per ADA to BCS for the blacktop, turf area and kindergarten area falls within the range of reasonably equivalent square footage per ADA at the comparison group schools. For each category of space, there is at least one comparison group school that has a lower square footage per ADA than BCS. **In short based on BCS’s calculations, there are students at the comparison group schools that have lower square footage per ADA ratios than BCS students enjoy for turf area, blacktop and kindergarten space.** (Declaration of Ken Smith in Support of Petition for Writ of Mandate, Exh. 1-6; Kenyon Decl., para. 3, Exh. A, 1(A)(A) and 1(C).)*

Nonetheless, the District acted reasonably and within its discretion in requesting that Larry Schadt, a member of the architect firm that performed design work on most of the comparison group schools, provide square footage measurements for the blacktop, turf area

1 and kindergarten area for the comparison group school and BCS facility, using reference
2 material such as aerial and ground photographs of the sites, site plans and survey reports. The
3 District acted reasonably and within its discretion in selecting these three areas for measurement
4 determining which areas were to be measured, based on the personal knowledge of District sites
5 of Randy Kenyon, and offering BCS an amount of blacktop, turfed area and kindergarten area
6 that met reasonable equivalence standards. (*Declaration of Randy Kenyon, Supplemental*
7 *Declaration of Randy Kenyon, Declaration of Lawrence Schadt*)

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9 Finding No. 4:

10 Legal Authority - Education Code section 47614(b): “Each school district shall
11 make available, to each charter school operating in the school district, facilities
12 sufficient for the charter school to accommodate all of the charter school's in-
13 district students in conditions reasonably equivalent to those in which the students
14 would be accommodated if they were attending other public schools of the
15 district.”

16 Legal Authority - Education Code section 47605(f): “The governing board of a
17 school district shall not require any pupil enrolled in the school district to attend a
18 charter school.”

19 *BCS is not seeking in this proceeding an adjudication that it be placed in the Gardner Bullis site,*
20 *and Proposition 39 does not allow the Court to compel such a result. (Hearing Transcript,*
21 *October 26, 2009, 47:17-18 (“We’re not asking you today to award us any specific site. We’re*
22 *not doing that.”).) The Gardner site re-opened in 2008-2009 as a District school, and enrolls at*
23 *least 239 students in the 2009-2010 school year. (Kenyon Decl., para. 3, Exh. A, 1(A)(A) and*
24 *1(C); LaPoll Decl., para. 9) The Gardner site is a K-6 site. (Kenyon Decl., para. 3, Exh. A,*
25 *1(A)(A) and 1(C).) The Gardner site does not have the capacity to hold the BCS population of*
26 *approximately 372 and the Gardner Bullis population of 239. (See, e.g., Declaration of Andrea*
27 *Eyring, Exh. 12; See, Amended Petition for Writ of Mandate, Exh. 1 thereto, (Doc. 0027).) The*
28 *Gardner population cannot and should not be used as a means of boosting BCS’s student*
enrollment. (Education Code section 47605(f).)

Finding No. 5: *The District correctly determined that the comparison group*
schools should consist of Almond, Covington, Santa Rita, Loyola and Gardner, as the District’s

1 *students attended high school by attendance area.* (Spector Decl., Exh. 5 [Facilities Offer for
2 2008-2009 school year])

3 (Legal Authority - 5 C.C.R 11969.3(a)(2): “(2) The comparison group shall be
4 the school district-operated schools with similar grade levels that serve students
5 living in the high school attendance area, as defined in Education Code section
6 17070.15(b), in which the largest number of students of the charter school reside.”)

6 *Finding No. 6:* *The District offered sufficient acreage to BCS. BCS had a*
7 *projected ADA smaller than all but one comparison group school for the 2009-2010 school year.*

<i>Almond</i> (524 ADA)	<i>Covington</i> (459 ADA)	<i>Loyola</i> (538 ADA)	<i>Santa Rita</i> (506 ADA)	<i>Gardner</i> (239 ADA)	<i>BCS</i> (345 ADA)
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9 (Kenyon Decl., para. 3, Exh. 1, Exh. 1(A)(A) and 1(C).)
10 *The Proposition 39 regulations do not require that a prescribed ratio of acres to ADA be offered*
11 *to a charter school. Rather, the regulations only identify “school site size” as one of the factors*
12 *to be considered whether the “condition” of the site meets reasonably equivalent standards, not*
13 *as a means of measuring “capacity.” BCS did not contest the “condition” of its allocated*
14 *facilities other than “school site size.” The District has calculated the acreage of the BCS site at*
15 *Egan Jr. High School to be approximately 7 acres (including the parking lot), which is*
16 *proportionate with BCS’s ADA commensurate with those of the comparison group schools.*

17 Legal Authority – 5 C.C.R. section 11969.3(c): All of the factors listed below
18 shall be used by the school district and charter school to determine whether the
19 condition of facilities provided to a charter school is reasonably equivalent to the
20 condition of comparison group schools. Condition is determined by assessing such
21 factors as age (from latest modernization), quality of materials, and state of
22 maintenance. (A) *School site size.* (B) The condition of interior and exterior
23 surfaces. (C) The condition of mechanical, plumbing, electrical, and fire alarm
24 systems, including conformity to applicable codes. (D) The availability and
25 condition of technology infrastructure. (E) The condition of the facility as a safe
26 learning environment including, but not limited to, the suitability of lighting, noise
27 mitigation, and size for intended use. (F) The condition of the facility's furnishings
28 and equipment. (G) The condition of athletic fields and/or play area space.
(Emphasis provided)

25 **II. REQUEST FOR FACILITIES FOR THE SEVENTH GRADE**

26 *Finding No. 7:* *BCS’s claim that the District should have awarded it facilities for*
27 *the seventh grade is moot.*

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2. *BCS Board President Kenneth Moore told Los Altos Town Crier reporter Traci Newell that his best estimate was that BCS would open seventh grade in 2010. (Newell Depo., Exhs. A, 7:10-21, 20:15-22:6)*
3. *Moore never told Newell that BCS would be offering the seventh grade in 2009. (Newell Depo, 12:10-19; 48:2-49:5)*
4. *Newell confirmed in an e-mail message to Los Altos School District school board member David Luskin that Moore told her that the BCS would postpone adding the 7th grade until 2010. (Newell Depo., Exh. A and B; 5:16-6:12)*
5. *Seventy-Seven BCS parents had signed an online charter petition between November 28, 2008 and December 2, 2008, opposing the addition of 7th grade. The petition was taken off line soon after Newell attempted to contact parents to ask about it. (Newell Depo., 15:4-17:17) See, also, Moore depo., 51:10-25, Exh. 7)*
6. *Newell’s article regarding the action taken by the BCS board to delay 7th grade, and regarding the online petition, was published in the December 10, 2008 edition of the Los Altos Town Crier (Newell Depo., Exh. A (pp. 2-3 thereto); 16:6-16; See also, Deposition of Anne Marie Gallagher, 53:25-55:14, Exh. 10)*
7. *BCS Principal Wanny Hersey also told District Superintendent Tim Justus during a meeting on February 2, 2008 that the charter school did not intend to offer seventh grade in 2009-2010. (Deposition of Tim Justus (“Justus Depo.”), 7:2-21; Hersey Depo., 64:16-18)*
8. *Shelly Lapkoff, a District demographer, also testified that she was advised by the BCS principal that the school would not open a seventh grade in 2009-2010. (Lapkoff Depo, 22:6 - 26:1; 109:18-21, Exh. 52, p. 26)*

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9. *BCS Board Member Anne Marie Gallagher stated at a meeting of the Los Altos Hills Education Committee that BCS would not offer 7th grade in 2009. (Declaration of Susan Stark)*
10. *BCS's Board took no official action to implement 7th grade after the December 1, 2009 Board meeting. (Yeh Decl., Exh. B; Moore Depo., 93:14-94:23, Exh. 12; 102: 18-104:22, Exh. 14; 99:15-23; 101:23-102:2)*
11. *After the December 10, 2008 article was published in the Los Altos Town Crier, BCS's leaders did nothing to rebut the article. BCS also did not respond to a December 17, 2008 editorial in the Town Crier questioning why BCS delayed the seventh grade, and BCS's board members' refusal to comment on the issue. (Moore depo: 49:6-50:4; Supplemental Declaration of Tim Justus, Exh. 1)*
12. *BCS took no steps to enroll 7th grade students during the 2008-2009 school year (Hersey Depo., 30:17-31:7)*
13. *BCS did not include 7th grade in its open enrolment period from November 3, 2008 and ended on January 30, 2009. (Moore Depo., 19: 21-20:10).*
14. *BCS also held its enrollment lottery in February, 2009, without the seventh grade (Moore Depo., 29:22-30:8).*

Finding No.8: *The District was justified in charging pro rata share for multi-use room, since that structure rested on District property and the District was likely to be responsible for major maintenance costs for the grounds upon which the multi-use room rested.*

Legal Authority - 5 C.C.R. 11969.2(h): "Facilities Costs. As used in Education Code section 47614(b)(1), "facilities costs" are those activities concerned with keeping the physical plant open, comfortable, and safe for use and keeping the grounds, buildings, and equipment in working condition and a satisfactory state of repair. These include the activities of maintaining safety in buildings, on the grounds, and in the vicinity of schools. This includes plant maintenance and

1 operations, facilities acquisition and construction, and facilities rents and leases.”
2 (Emphasis Provided)

3 Finding No. 9: *The District is potentially responsible for the cost of major*
4 *maintenance, including utility infrastructure, for the multi-use room on the BCS campus.*
5 (Kenyon Supplemental Declaration, para. 4)

6 Legal Authority - 5 C.C.R. 11969.7(a)(1): “... Projects eligible to be included in
7 the school district deferred maintenance plan established pursuant to Education
8 Code section 17582 and the replacement of furnishings and equipment supplied by
9 the school district in accordance with school district schedules and practices, shall
10 remain the responsibility of the school district.”

11 Finding No. 10: *The District was justified in including the shared field in the*
12 *calculation of the pro rata share. BCS had exclusive use of the field two days a week on a shared*
13 *basis with Egan Jr. High School. (Spector Decl., para. 36)*

14 Legal Authority: 5 C.C.R. 11969.7(c): “... The portion of the shared space to be
15 included in the ‘space allocated by the school district to the charter school’ shall be
16 calculated based on the amount of space allocated for the exclusive use of the
17 charter school compared to the amount of space allocated to the exclusive use of
18 the school-district-operated program.”

19 Finding No. 11: *The District was justified in conditioning occupation of the*
20 *facilities on the execution of a facilities agreement*

21 Legal Authority - 5 C.C.R. section 11969(f): “At a minimum, the preliminary
22 proposal shall include: (3) “all conditions pertaining to the space, including a
23 draft of any proposed agreement pertaining to the charter school’s use of the
24 space.”

25 Finding No. 12: *The District did not violate Proposition 39 with respect to*
26 *the sharing arrangements for the field at Egan. The District and BCS spent most of the*
27 *2008-2009 school year in good faith discussions attempting to agree upon terms for*
28 *sharing the field space, among other issues. (Spector Testimony, 16:3-19:1; Spector*
Declaration in Support of BCS reply, Exh. 9; Declaration of Randy Kenyon in Support of
Opposition to Petition for Writ of Mandate, paras. 19-22.) *The District’s April 1, 2009*
Final Offer of Facilities to BCS acknowledges that the parties had been attempting to

1 reach an agreement on the sharing of the fields, and also acknowledges that Randy
2 Kenyon offered to insert placeholder language in the Facilities Use Agreement. (Spector
3 Decl., Ex. 6, p. 8)

4 Legal Authority – 5 C.C.R. section 11969.9(h): “... The notification shall
5 specifically identify: “...non-teaching station space to which the charter is to be
6 provided access on a shared basis with district-operated program; (2) for shared
7 space, the arrangement for sharing.” (See also, 5 C.C.R. 11969.9(f); 5 C.C.R.
8 11969.9(h).)

9 Legal Authority – 5 C.C.R. section 11969: “If necessary to implement this
10 paragraph, the district shall negotiate in good faith with the charter school to
11 establish time allocations and schedules so that educational programs of the charter
12 school and school district are least disrupted.”

13 Finding No. 13: The District did not violate Proposition 39 with respect to provision
14 of an amphitheatre, PTA space and before and after school care. BCS undertook to build its own
15 multi-use room with District consent and declined to build an amphitheatre. (Spector Depo,
16 23:7-18; 23:19-25:21) BCS was obligated to indemnify and hold harmless the District against
17 liability arising out of the multi-use room. (Declaration of David Carter in Support of BCS’s
18 Reply Brief, Exh. 1, Sections 12 and 15, pp. 5-6; Exh. 2, Sections 12 and 16, pp. 6-8) The
19 District does not provide dedicated PTA space to its comparison group schools (Kenyon Depo.,
20 110: 8-111:2). BCS could use any of its classroom allocation for before and after school care.
21 The District did not consider before and after school care facilities to be part of the charter
22 school’s instructional program, and only an ancillary facility at District schools. (Kenyon
23 Deposition, 113: 18-24)

24 IT IS SO ORDERED.

25 Dated: _____

26 _____
27 Honorable James P. Kleinberg
28 Judge of the Superior Court
County of Santa Clara