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 TRUSTEES OF THE LOS ALTOS SCHOOL  
 DISTRICT; and TIM JUSTUS

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SANTA CLARA

BULLIS CHARTER SCHOOL,

Petitioner,

v.

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

Respondents.

Case No. 109CV144569

**RESPONDENTS' MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT OF CROSS-MOTION FOR  
 DECLARATORY RELIEF**

Date: August 15, 2012  
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Judge: Hon. Patricia Lucas

[Filed with: Notice of Motion and Motion for  
 Declaratory Relief; Memorandum of Points and  
 Authorities in Opposition to Motion to Compel  
 Compliance; Objection to Jurisdiction; Request  
 for Judicial Notice; Declarations in Support of  
 Opposition and Motion; and Proposed Order]

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Academic Performance Index	“API”
Bullis Charter School	“BCS”
<i>Bullis Charter School v. Los Altos School District</i> (2011) 200 Cal.App.4th 1022	“ <i>Bullis</i> ”
Los Altos School District	“District”
Request for Judicial Notice	“RJN”

Declarations will be referred to by the declarant’s last name. For the Court’s convenience, citations to the declatation of Adam M. Forest include references to added consecutive pagination, as follows: “*Forest*, Ex. [exhibit letter]/[page number].”

Statutory references are to the California Education Code, unless otherwise indicated.

## I. INTRODUCTION

Had BCS followed the correct procedure of filing a new mandate action to challenge the District's legally distinct 2012-2013 facilities offer, the District would have been entitled to cross-complain for declaratory relief and raise affirmative defenses. However, in an attempt to shield inquiry into inequitable practices that were not raised in the 2009-2010 case and to circumvent the controlling standard of mandamus review, BCS instead has proceeded by a jurisdictionally improper motion. But BCS cannot invoke an improper procedure to limit the issues to its self-serving framing only. Rather, if BCS's motion is heard, due process entitles the District to raise its affirmative defenses and declaratory relief questions also. Accordingly, if the Court assumes jurisdiction, it should decide not only BCS's motion but also the issues raised in this cross-motion.

Those issues arise from the fact that the District's duty to furnish facilities under Prop. 39 assumes BCS is a public school. However, BCS walks, talks and quacks like a private school. It has not honored the two most basic criteria for a public school: (1) it is not open on an equal basis, and (2) it expects a large tuition. BCS also has engaged in discriminatory practices that public schools may not commit. As a result, BCS is not representative of the District population and instead is a more affluent subset that amasses greater private funds than is available at District public schools.

For years, including in its 2012-2013 offer, the District has offered BCS facilities without considering these facts. When BCS was a school of only 200, complying with its facilities demands had less impact on public education. But as BCS has continued to enroll families who would have opted for another private school and as it has continued to discriminate in admissions, the District has found itself taking millions of dollars worth of public facilities away from schools who accept all equally and without charge, and providing those public facilities to an exclusionary school. And, BCS now demands closure of a neighborhood public school, evicting those pupils from their neighborhood, established relationships and community and scattering them around town to enhance the BCS experience. This raises several questions relevant to clarify the District's facilities duties and also raises affirmative defenses to BCS's request for relief.

First, the Prop. 39 facilities comparison the District has applied includes private support at the District's comparison schools, but excludes the massive private funds donated to BCS. Prop. 39

does not permit this, however, because the requirement of reasonable equivalence must be measured through an apples-to-apples comparison. Therefore, the facilities comparison must either exclude private resources from both sides of the comparison, or include them on both sides. Accordingly, this Court should declare that the District may (a) include only the “baseline” facilities at the its comparison group schools that were publicly funded, or (b) determine whether the combined private-public resources at BCS are reasonably equivalent to what in-District public school students get. Either way, the District’s facilities obligations to BCS going forward should be reduced substantially under a correct, and not a slanted, comparison.

Second, because Prop. 39 calls for fair sharing of *public* school facilities, a charter school must operate like a public school to receive facilities. Accordingly, BCS is either not entitled to public school facilities at all or is entitled to less facilities.

## II. STATEMENT OF FACTS

### A. The BCS Model: A Publicly Subsidized Private School

Since its formation by Los Altos Hills residents, BCS has operated like a private school.

#### 1. BCS’s Discriminatory Cherry-Picking Of The Most Privileged

Admission to any public school must occur on an equal opportunity basis.

To boost private fundraising, and avoid the cost of educating on an equal opportunity basis, however, BCS uses discriminatory practices to cherry-pick the wealthiest families, while excluding those with special needs, ELLs, and minorities. BCS’s original charter school petition contained a preference for children who resided in Los Altos Hills—one of the state’s wealthiest areas—but the District and the County Board of Education did not approve it out of concern for its legality. (*Forest*, Ex D/103) BCS requested a similar preference during its charter renewal process in 2006 and 2007. (*Id.*) SCCOE staff remained “concerned that the proposed revision would lead to a result inconsistent with [BCS’s non-discrimination] affirmation, in that Hispanic and African American students who live in the district outside of the proposed preference area could lose their ability to attend [BCS].” (*Id.*) BCS nevertheless amended its charter to add this preference and has refused to remove it, despite the County’s continuing concern that the preference may “hinder [BCS] from achieving the required racial and ethnic balance ‘reflective of the general population residing within

the territorial jurisdiction' of [the] District.” (*Id.* Ex F/187-88 (quoting § 47605(b)(G))) BCS also grants a preference to siblings—thereby perpetuating past discrimination. (*Id.* Ex G/198)

Some charter schools use a simple application process whereby applicants need furnish little more than the child’s age, grade of enrollment, declaration of residency and sufficient information to contact the family if the child is eligible for enrollment (through lottery or wait list). (*See, e.g. id.* Ex I/211) By contrast, BCS for years illegally has demanded that applicants provide (1) information on the child’s health or disability, prior academic performance, test scores and cognitive abilities, and special education records, and (2) a driver’s license. (*See id.*, Ex. R/317-8; *Uhler; Rosenfeld*) This may deter potential applicants who do not want to disclose such information and also permits the consideration of improper factors in admissions. BCS’s selection process is opaque, with lack of clarity as to its records to verify equal access, even for basic inquiries such as the number of applicants in its lottery. (*Smith ¶41; Black Ex A at 2*)

And even when BCS admits a child with special needs, BCS has made clear the child is not welcome at BCS and would be better served elsewhere. Two families have submitted declarations describing the cold shoulder BCS gave them after they enrolled a child with special needs at BCS. (*Uhler & Rosenfeld*) Because other families likely are reluctant to discuss such experiences due to concerns for their children’s privacy, it is unknown how many others BCS has shunned.

The numbers show BCS does not provide equal access. It serves no socioeconomically disadvantaged students. (*Forest*, Ex L/220) Out of the elementary students who took the Department of Education’s API test in the 2011-12 school year, only seven were Hispanic or Latino (2.5%), five ELLs (less than 1%), and eighteen were students with disabilities (6%)—numbers far below LASD’s average in each category.<sup>1</sup> (*Compare Forest Ex A with L*). Eighty-eight percent of BCS students had parents with graduate school education levels. (*Forest*, Ex L/222)

Although these facts were not illuminated during the 2009-2010 offer case, BCS’s chartering authority finally took notice in recent months. BCS had added a proviso on its application forms that

<sup>1</sup> For the same API test period, LASD elementary schools had 243 Hispanic or Latino children (7%), 381 ELLs (11%), and 408 students with disabilities (12%). (*Forest*, Ex A/2)



1 stated its request for private health and education information was “optional,” but still continued to  
2 illegally demand such information. (*Forest*, Ex R/320-23) In a May 30, 2012 letter from Dr.  
3 Charles Weis, the County’s Superintendent of Schools, Dr. Weis advised BCS that its application  
4 process still “infringe[s] on the rights of children and parents under state and federal laws protecting  
5 the privacy of confidential health information and the privacy of educational records. Furthermore,  
6 the forms suggest that factors such as a child’s disability or prior academic performance may play a  
7 role in whether they are offered admission at Bullis. . . . As a public school, admission to Bullis may  
8 not be conditioned upon a parents’ willingness to waive his or her child’s right to privacy with  
9 respect to medical or educational records.” (*Id.*) Dr. Weis noted the Education Code requires a  
10 chartering authority to notify a charter school of violations of law and to give it an opportunity to  
11 cure prior to revoking its charter, and that BCS directed to correct the violations. (*Id.*)

12 After receiving this notice, BCS agreed to correct its illegal admissions practices to comply  
13 with the County’s direction. (*Id.* at R/318-19) But the fact that it illegally had demanded applicants  
14 to furnish such information, and even after it changed the process, only added an “optional”  
15 disclaimer until the County finally ordered it to change that as well means that the 2012-2013 BCS  
16 population was selected via an illegally discriminatory process and that process yielded a population  
17 that is not representative of the District’s and is particularly low in special needs enrollment.

## 18 2. BCS’s \$5,000 Tuition

19 Public schools must provide a free education, regardless of the means of the pupil.

20 Through a variety of subtle or not-so-subtle messages, however, BCS makes another  
21 “wrinkle” clear to parents: that each enrolled family is expected to donate \$5,000 or more per child.  
22 (*Rivera* ¶ 3(h); *Forest*, Exs G/200, H/205, & O/247-51 (reporting on, among other things, BCS’s  
23 “aggressive” donation requests) After protests regarding this “tuition” were raised to the County  
24 [*Uhler* Ex 2], BCS incorporated standard disclaimers that it is a public school and no one is required  
25 to donate into recruiting pitches. But those pitches *still* continue to send the message that  
26 “donations” are essential. (*Rivera* ¶ 3(h) (transcript of recruiting meeting where BCS principal  
27 Hersey describes the “funding gap” as “the other wrinkle,” stating that “our parents are aware of this  
28 and really, quite frankly, help us with their efforts.”))

While BCS's lack of transparency makes it hard to discern, without discovery, all the ways it achieves its fundraising, the numbers do not square with a public school that is open on an equal opportunity basis at no charge and regardless of means. More than eighty-five percent of BCS's families donate [*Forest*, Ex P/254], and with only 466 in-District pupils, BCS raises about the same amount in private funds as the entire private fundraising for all 4,500 District pupils. (*Forest*, Ex B/15 (showing BCS received \$2,3 million in private funding for 2009); *Bardman* ¶ 4 (LAEF raised \$2.5 million for the 2011-12 school year) If BCS were truly drawn randomly and equally from the District and without a tuition expectation, such a fundraising disparity would be improbable.

### 3. BCS Conditions Not Available In Public School

The District's limited public funds must pay for not only the cost of teachers, textbooks, administrators and other costs, but also for the facilities that house all in-District students—including BCS pupils. By contrast, because BCS receives taxpayer-paid facilities and maintenance, BCS's entire wealth is available to ensure its students are accommodated in conditions that compare to private school and are beyond what District students receive. BCS spent \$13,245 per student in 2011 compared to \$8,769 per student at District-run schools.<sup>2</sup> (*Forest*, Ex M/234) As a result, BCS has a lower student-teacher ratio than most public schools, including a 9:1 ratio in Kindergarten, is able to afford associate teachers in every classroom, and "boasts a rich offering of co-curricular programs and extended day extra-curricular activities" such as Lego robotics, animation, guitar, and sculpture. (*Id.* Exs G/195, M/227). BCS students enjoy other enviable perks that are not available to their District public school counterparts, such as trips to Washington D.C. and Costa Rica, SMART boards, iPads, laptops and other goodies. (*Id.* Exs M/227; Exs H/208; & N/244)

BCS's healthy private coffers also permit it to spend vast sums on its own public relations firm, law firms (BCS paid Morrison and Foerster over \$850,000 in 2008 and 2009), and large "personal" loans to staff, like the \$250,000 and \$62,000 loans principal Wanny Hersey received. (*Id.* Ex B/14, 16, 29-31, 42; Lundberg Ex A (independent auditor's report) at 8)

<sup>2</sup> Although BCS has attempted to justify its demand that parents "donate" \$5,000 plus to attend BCS on the ground that District students have access to parcel tax and other monies not available to BCS, these figures show that the total funds available to BCS students exceed BCS's claimed "funding gap" and provide its students far more in per capita spending than at the District's public schools.

1           **4.       BCS's Lack Of Accountability And Transparency To The Public**

2           Public schools must operate as open books, abide by restrictions applicable to public officials  
3 and take especial care in safeguarding public monies. BCS's record is spotty on all three.

4           For example, in 2007, FCMAT found that BCS had misappropriated funds allocated to it for  
5 special education. (*Forest*, Ex Q/266-72) After these FCMAT findings and after County staff  
6 expressed concerns about Bullis discrimination, BCS responded to the County through counsel  
7 stating its charter "must" be approved notwithstanding the violations. (*Uhler*, Ex 2 at 21) After  
8 BCS made that litigation threat, the County did not take action. Later, in June 2012, the County  
9 wrote BCS and explained BCS's "misappropriation" was considered resolved because BCS had paid  
10 back the funds. (*Forest*, Ex R/317) Yet, in an email to BCS parents, BCS's Board President Moore  
11 described the outcome of the FCMAT investigation as a vindication of BCS (*Uhler*, Ex 2 at 96-97).

12           In another example, after BCS made clear his special needs child was not welcome at BCS, a  
13 concerned parent, Mike Uhler made a Public Records Act request to BCS and other agencies to  
14 obtain more information about the FCMAT investigation. The other agencies promptly produced  
15 over 100 pages of records. BCS responded through counsel, initially stated it had no records, and  
16 then stonewalled. (*Uhler* ¶22) Similarly, when another community member made a Public Records  
17 Act request for information to determine the legality of BCS personal loan to its Principal Hersey,  
18 BCS stonewalled. (*Lundberg* ¶11) Following at least one Board meeting, BCS has not reported out  
19 to the waiting public, in violation of open meeting laws. (*Clay* ¶¶ 2-6)

20           Potential election law violations [*Smith* ¶4], and other items also are suggested. Regardless  
21 of how BCS explains each episode or whether it may have skirted the legal side of the line in some  
22 instances, the pattern is that of a party that views itself as a free agent, accountable to itself only,  
23 rather than a public entity—transparent and accountable to the public that pays for its facilities.

24           **5.       BCS's Grow And Grab Facilities Strategy**

25           Due to these practices, BCS has created an entity in which a selectively chosen few receive  
26 resources that exceed what District public school pupils get. The opportunity to receive such a  
27 private school-like experience for a "tuition" of only \$5,000 per child is attractive. Thus, with the  
28 District's facilities allocations, BCS has grown steadily and has a waiting list. (*Hersey* ¶4) The BCS

1 model has increased the number of students that the District's limited facilities must accommodate—  
2 it must educate every child in Los Altos that seeks a public education and must also accommodate  
3 those who seek a private education and enroll at BCS. The total in-District population enrolled in  
4 District schools or in BCS has grown from 3900 in 2003 to about 5,000 today. (Smith ¶14)

5 Although BCS controls how many students to admit, it has elected to leverage its model to  
6 grow and has demanded more and more facilities from the District based upon that growth. But  
7 because BCS has not done this on an equal opportunity basis, serious questions arise about whether  
8 it should be entitled to grab *public* school facilities away from the District's public school pupils.

9 **B. The County's Laissez-Faire Approach But Recent Concerns**

10 Although PTAs in Los Altos have become deeply concerned (*Black* ¶¶3-4), BCS's chartering  
11 authority has not acted—until recently. Following a compelling submission from Mr. Uhler about  
12 BCS's exclusion of special needs children, Dr. Weiss directed BCS to change its application process  
13 and took note of BCS's "misappropriation" of special needs funds. (*Forest*, Ex R/317) Although  
14 the County afforded BCS the opportunity to change its ways, rather than revoking its charter, the  
15 County also was clear that it expressed no opinion on facilities questions. (*Black* ¶5) Thus, the  
16 County did not decide whether in light of BCS's years of skimming the privileged in Los Altos, the  
17 District should take more facilities from its public schools for BCS. And, BCS's promise to change  
18 its ways in the future is no answer to the facilities question because the populations at BCS and in  
19 the District in 2012-2013 and private fundraising disparities are the product of the past skimming,

20 While a majority of the County Board declined to revoke BCS's charter, at least one Board  
21 member has expressed doubts. County Board Member Anna Song noted in a September 23, 2011  
22 email to fellow Board members that she stated was also a message to BCS's board: "The numbers  
23 are so poor they could justify an immediate revocation hearing to cancel BCS's charter and  
24 permanently shut down the school this term, in my opinion. BCS serves zero socioeconomically  
25 disadvantaged students. After eight years, you have zero. Zero. Los Altos School District reports  
26 97 out of 3351 students are socioeconomically disadvantaged – a group of approximately three  
27 percent. LASD reports 380 of 3351 are English Language Learners. And, 406 of 3351 are Students  
28 with Disabilities. Also, 243 of 3351 are Latino. BCS reports 281 students in its recent API report.

1 The comparable BCS ratios are: 0/281 are socioeconomically disadvantaged; 5/281 are English  
2 Language Learners; 18/281 are Students with Disabilities; 7/281 are Latino.” (*Forest*, Ex E/167)

3 “Additionally, BCS’ Parent Education Level is even more elite than LASD as a whole  
4 because BCS now serves zero families with a PEL below that of ‘some college.’ BCS does not  
5 reflect the population of its school district.” (*Id.*)

6 “By any measure, these numbers demonstrate BCS’ failure to meet state law as well as a  
7 disinterest in the legislative intent of Education Code 47601(b) that a charter shall ‘increase learning  
8 opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who  
9 are identified as academically low-achieving.” (*Id.*)

10 Ms. Song also stated “I do not believe” BCS’s claim it sought “the broadest spectrum of  
11 students and families,” noting: “BCS reports zero outreach in Spanish.” (*Id.* at E/168) She added:

12 Sadly, after being a strong advocate of BCS from its first days, I now conclude that  
13 BCS is in material breach of its charter agreement with the Santa Clara County Board  
14 of Education. Moreso, I conclude the BCS community does not take the contract  
15 with SCCBOE seriously. I note a sense of entitlement from BCS’ population in  
16 general, especially from your letter. And, after reading your letter, I seriously  
17 question if Bullis’ future would be better served as a private school. There is nothing  
18 dishonorable about private education.

19 BCS’ 2010-2011 Annual Charter School Report states “BCS does not request parents  
20 to donate to the school.” However, in the same section, BCS states “BPESF’s  
21 suggested donation for the fall annual campaign is \$4500 per student.” The editorial  
22 construction in this section is misleading and borders on duplicitous as it refers to  
23 ‘our families,’ while simultaneously suggesting that parents are not requested to  
24 donate. It appears that all parents ARE requested to contribute a suggested donation  
25 of \$4500 a year. Donations may not go to “the school,” but parents certainly feel that  
26 a price of admission to BCS is the requirement to raise money. That to me, is not a  
27 public school. (*Id.*)

28 Ms. Song also rejected BCS’s complaints about funding, noting “seriously, BCS has more  
access to private funding than probably any other public school in the state of California. Almost  
every other public school - charter or neighborhood - has less funding than BCS.” (*Id.* at E/170)

How did BCS respond to this message? Its Board President issued a press release declaring  
BCS would sue again to achieve “equity” for its 466 students. By “equity,” BCS means it wants the  
Court to close one of 4 neighborhood schools on BCS’s wish list, destroy the relationships and  
communities that revolve around that school, scatter its pupils, and thereby increase the crowding of  
the District’s 3500 plus elementary school students at the remaining 6 elementary schools.

### III. ARGUMENT

#### A. Declaratory Relief

An action for declaratory relief is appropriate where there exists an “actual controversy relating to the legal rights and duties of the respective parties.” Code Civ. Proc. § 1060; *Coronado Cays Homeowners Assn. v. City of Coronado* (2011) 193 Cal.App.4th 602, 608 (purpose of declaratory relief is “to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation.”) (quotation omitted).

##### 1. To Avoid The Very Inequity That Proposition 39 Forbids, The Statute Must Be Construed To Account For BCS’s Inequitable Practices

Since California’s inception, our law has imposed three fundamental prerequisites for public education: public schools must be (1) open on equal terms to all, (2) “free” of charge, and (3) furnish reasonable uniformity from one school to the next. (Cal. Const. of 1849, art. IX, § 3; Cal. Const., art. IX, § 5; *see Butt v. State of California* (1992) 4 Cal.4th 668, 680 [“In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. . . .”]).

Consistent with the mandate of uniformity, Prop. 39 provides: “Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school’s in-district’s students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools in the district.” § 47614, subd. (b). The voters’ intent to further uniformity across public schools is also reflected in the recital--“that public school facilities should be shared fairly among all public school pupils, including those in charter schools. (*Id.*, subd. (a)). Thus, Prop. 39 survived constitutional challenge because the law was interpreted to meet the mandate of uniformity in education. *See Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1138.

Because Prop. 39 and the regulations assume the charter school is a public school—open on equal terms to all and free of charge—neither address how the facilities comparison works for a

1 school, like BCS, that cherry-picks from the District in a way that enables it to amass greater private  
2 funding than is available at the public schools. The Prop. 39 regulations, for example, direct school  
3 districts to compare the physical facilities at the District's other schools and at the charter school to  
4 determine reasonable equivalency. (Cal. Admin. Code, tit. 5, section 11969.3.) Thus, while it is  
5 clear that a school district must apply the Section 11969.3 criteria, it would be inconsistent with  
6 Prop. 39 and the broader law to interpret those criteria as the *only* ones that may be applied—such  
7 that a district must turn a blind eye to a disparity in resources created by a charter school's selectivity  
8 in admissions. After all, the whole point of the facilities comparison is to create a level playing  
9 field. While the regulations take into account certain physical considerations, they do not contain  
10 words like “only” that would establish physical criteria as the only considerations.

11 Nor could they. In interpreting a voter-approved law, the “letter will, if possible, be so read  
12 as to conform to the spirit of the act,” and the measure construed to avoid anomalous or absurd  
13 consequences. (*Horwich v. Superior Court*, 21 Cal.4th 272, 276.) To prohibit a district from  
14 considering charter school selectivity and resource disparities would violate the spirit of Prop. 39  
15 and produce anomalous consequence. That rule would advance inequity and lack of uniformity  
16 across the district's schools—even though Prop. 39 expressly aims at the opposite. As noted, Prop.  
17 39 is intended to place charter school students in “conditions reasonably equivalent to those in which  
18 the students would be accommodated if they were attending public schools of the school district”—  
19 not better. § 11969.

20 Consider, for example, the evidence that BCS has excluded special needs students to avoid  
21 the cost of educating them. (*See Uhler & Rosenfeld*) In doing so, BCS has imposed greater costs  
22 and greater demands on the facilities at the District's other schools. It would be absurd to hold that,  
23 notwithstanding such practices BCS is nonetheless entitled to the same facilities as would follow  
24 under a pure physical facilities comparison. That result would leave BCS better off for shunning the  
25 disabled, and the comparison group schools more burdened—causing a lack of uniformity and  
26 rewarding inequitable behavior. The result would be particularly bizarre here because without  
27 discriminatory skimming, with less per capita private resources, and with a per pupil spend that is 60  
28 percent below BCS's, the District has educated 4,500 pupils to produce excellent results and API

1 scores on par with BCS's. Since the idea behind charter schools was to educate better with publicly  
2 furnished resources, it would be a waste of taxpayer funds to ignore discriminatory practices in a  
3 public school district that operates more cheaply to achieve the same results.

4 Permitting a district to consider charter school selectivity and resource disparity also avoids  
5 providing an incentive for others to mimic's BCS's exclusionary model. The evidence suggests this  
6 is already a problem as-is. According to a June 2012 report from the United States Governmental  
7 Accountability Office, charter schools nationwide enroll less children with special needs than  
8 traditional public schools (8% compared with 11% at public schools on average). (*Forest*, Ex J/214)  
9 As The Wall Street Journal reported, the trend may evidence charter schools' refusal "to enroll  
10 special-ed students, or push them out once enrolled, to save money or boost schoolwide test scores."  
11 (*Id.* Ex K/217) California does not need to further incentivize such behavior by applying a too-rigid  
12 construction of Proposition 39.

13 There is no reason to mandate such a rigid construction because it is easily "possible" to read  
14 the "letter" to conform to Prop. 39's spirit. (*Horwich*, 21 Cal.4th at p. 276.) One need only interpret  
15 the comparison described in the regulations as a non-exclusive list of criteria that informs the  
16 analysis but does not prevent consideration of other relevant criteria—like charter school selectivity.  
17 One must so construe the regulations because the regulations are supposed to implement the statute,  
18 and therefore cannot be read to produce a result that contradicts the statute's textually stated goals.

19 Moreover, the absence of language in the regulations addressing charter school selectivity  
20 and disparity in resources is not surprising. Because public schools are not allowed to cherry-pick  
21 and are supposed to admit all free of charge, it is likely the implementing agency simply did not  
22 contemplate a charter school, like BCS, that skims to build wealth. The governing statutes also  
23 direct charter schools to provide "learning experiences for pupils who are identified as academically  
24 low achieving," § 47601(b)) and that they not charge tuition (§ 47605(d)(1)). Moreover, a charter  
25 school that is revoked for violation of law or fiscal mismanagement loses its right to continued use  
26 of a District facility. (§ 47607(i).) The voters who enact an initiative statute "may be deemed to be  
27 aware of existing law." (*Horwich*, *supra*, 21 Cal.4th at p. 283 [quotation omitted].) A court must  
28 "discern the sense of the statute, and therefore its words, in the legal and broader culture." (*Hodges*



1 v. *Super. Ct.* (1999) 21 Cal.4th 109, 114 [italics omitted].) Thus, to construe the Prop. 39 regulations  
2 in harmony with the body of law of which they form a part, the regulations require a physical  
3 facilities comparison but do not foreclose consideration of charter school selectivity or wealth in  
4 determining what constitutes “fair sharing.” After all, any common sense interpretation of “fair  
5 sharing” would include wealth on the scale of BCS’s. (*Forest*, Ex. O [Bloomberg article “Taxpayers  
6 Get Billed for Kids of Millionaires at Charter School,” (discussing incongruity of BCS’s demands)])

7 No court has held that charter school selectivity or resulting wealth must be ignored under  
8 Prop. 39. The issue came up in part, but only obliquely so, in the court of appeal’s opinion in the  
9 2009-2010 offer case. The issue there was whether the District was entitled to count a Bullis-  
10 purchased multi-purpose room in its facilities comparison. The court of appeal held the MPR could  
11 not be counted but observed “since a Proposition 39 facilities offer considers only district-owned  
12 facilities that a school district may be required to provide to a charter school, there may theoretically  
13 be an instance—for example, where substantial facilities are built and paid for by the charter school  
14 itself—where the charter school has facilities superior to those of its district-run counterparts.  
15 Neither the statute nor the implementing regulations address the possibility of such a windfall to a  
16 charter school, nor are we called upon to address the issue in this case. (*Bullis* n. 28)

17 This Court, however, *is* called upon to address and preclude such a windfall in this new  
18 challenge to the 2012-2013 offer. The District has pointed to discriminatory practices and clear  
19 statistical disparities between the charter school and District populations and parallel disparities in  
20 the resources available to the charter school. To prevent BCS from obtaining a windfall from  
21 inequitable practices, the Court should declare BCS’s selectivity and the resources disparities that  
22 have followed either disqualify it from receiving public facilities at all or entitle it to less.<sup>3</sup>

23 Because the District did not rely in its 2012-2013 offer on BCS’s selectivity or resources,  
24 those factors apply here in two ways. First, if the Court somehow finds the District abused its

25  
26 <sup>3</sup> Because BCS has elected to proceed by a summary motion, rather than filing a new action in  
27 which discovery could be conducted into these practices, the Court should apply a standard similar  
28 to that for parties that seek dispositive relief on the pleadings: it should accept as true the District’s  
allegations that BCS has discriminated in admissions, established an expectation for charter school  
enrollees of substantial donations, and amassed vastly greater resources per pupil as a result.

1 discretion in its 2012-2013 offer analysis, BCS's inequitable conduct nonetheless disqualifies it from  
2 obtaining relief under the affirmative defense of unclean hands. (*See* pp. 14-15). Second, to clarify  
3 the District's obligations, the Court should grant declaratory relief that the District may consider  
4 BCS's inequitable practices in either of two ways in any future offers. If the District finds that BCS  
5 has unlawfully discriminated in past admissions, the District may decline to allocate any facilities.  
6 Intentional discrimination is antithetical to the *public* school premise of a facilities offer.  
7 Alternatively, if the District finds BCS has not intentionally discriminated, but has used practices  
8 that disparately impact, the District may reduce its facilities allocation as a result.

9           **2. At A Minimum, To Ensure An Even-Handed Facilities Comparison, The District**  
10           **Is Entitled To Either Consider BCS's Private Funding Or Back Out Any Private**  
11           **Contributions To The District's Schools**

12           In measuring facilities at the comparison schools, the District incorporates private funding at  
13 those schools. To produce a truly equivalent comparison, therefore, it must be entitled to either  
14 consider BCS's private resources or exclude the private resources on the District side.

15           The Los Altos Education Foundation raises funds to support the District's schools, albeit at a  
16 per capita level that pales compared to BCS's prodigious fundraising. Those funds are applied  
17 primarily to reduce class size by paying for more teachers. The funds thus result in more classrooms  
18 at the comparison schools. Under the Prop. 39 analysis that the District has been applying, this has  
19 resulted in more classrooms being offered to BCS to maintain reasonable equivalence. Similarly,  
20 certain District facilities were funded from private donations. They too have been counted in the  
21 District's Prop. 39 analysis and have resulted in increased facilities for BCS. (*See Smith & Kenyon*)

22           Although the District facilities allocations embed the private contributions it has received, it  
23 has not counted the private contributions BCS has received. This cannot be right because both the  
24 textual command of reasonable equivalence and the analysis spelled out in the regulations require an  
25 apples-to-apples comparison. Thus, the District's existing analysis has been unlawfully slanted in  
26 BCS's favor. The slant has been pronounced because the District provides BCS facilities and pays  
27 to maintain them. Thus, the BCS private funds that are not counted in the District's analysis go  
28 directly to program benefits for BCS pupils—enabling BCS to provide the conditions that have  
spawned its long waiting list. In other words, although Prop. 39 requires only facilities “sufficient”

for a charter school to accommodate its students in “conditions reasonably equivalent,” the District’s pro-BCS analysis has provided facilities that go beyond sufficiency and that instead have permitted BCS to produce conditions that exceed those present at District schools.

Thus, the Court should hold that the District’s Prop. 39 analysis has been too generous to BCS. That holding would apply in two ways. First, if the Court finds any abuse of discretion in the District’s 2012-2013 offer, the unwarranted generosity built into that offer offsets any such abuse and precludes relief. Second, going forward, the District must be entitled to either count BCS’s private resources or to exclude private contributions to the District when formulating facilities offers.

**B. Affirmative Defense: Unclean Hands Bar BCS From Relief**

“‘The [unclean hands] rule is settled in California that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy.’” (*Moriarty v. Carlson* (1960) 184 Cal.App.2d 51, 55, citing *Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.) “He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.” (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978) This defense is also available in a legal action. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 728.) “This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. The doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal to be ‘the abetter of iniquity.’” *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945)

Further, “the unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of

the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it. (Citations.) Thus, any evidence of a plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation." (*Kendall-Jackson*, 76 Cal.App.4th at 985.)

The premise of Proposition 39 is that charter schools are public schools. But BCS has not honored the two most fundamental precepts of a public school. It has not enrolled pupils on an equal basis. And it has not done so free of charge. Because BCS has proceeded by "motion" in an attempt to hide its practices from discovery, it is unclear how egregious its violations have been. But, no matter how BCS spins its practices, the numbers tell an unmistakable story: *zero* socioeconomically disadvantaged students, *88 percent* children of parents with graduate schooling, *stark* disparities in special needs, ELLs and minority students, and *85%* "donating" enough to raise more for 466 BCS pupils than is raised for the entire 4,500 public school population in the very same District. That is not a school equally drawn from a cross-section of the District with no expectation of payment. Because its practices have enabled BCS to amass vast resources not available to the District's public school pupils, this Court should refuse to be an "abettor of inequity" and should close its doors to BCS's demand for even *more* than the District's already-generous offer of millions of dollars in taxpayer-paid facilities.

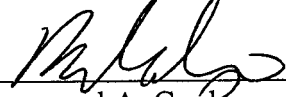
#### IV. CONCLUSION

For the foregoing reasons, the Court should grant this cross-motion and provide the declaratory relief set forth in the District's proposed order.

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Respectfully submitted,

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