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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 OPPOSITION TO BULLIS CHARTER SCHOOL'S MOTION TO COMPEL COMPLIANCE WITH JUDGMENT AND WRIT

Date: August 15, 2012
Time: 9:00 a.m.
Dept: 2

Judge: Hon. Patricia Lucas

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

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Bullis Charter School	"BCS"
Bullis Charter School v. Los Altos School District (2011) 200 Cal.App.4th 1022	"*Bullis*"
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.

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I. INTRODUCTION

Like most public entities, the District has a vexing resources issue: its limited facilities must accommodate 5,000 students at 10 schools on 9 campuses. In offering facilities for 2012-2013 to 466 BCS pupils, the District complied with the court of appeal's directions regarding its 2009-2010 offer and still met its obligation to share facilities fairly with its 4,500 other students. Its 2012-2013 offer provides BCS millions of dollars worth of facilities on 11 acres, expanding by 175% the facilities offered to BCS in 2011-2012. BCS has no interest in fair sharing, however. Instead, it asks the Court to close a thriving public school and take facilities away from less fortunate pupils, handing them over for the exclusive use of a wealthy school whose pupils already enjoy educational conditions that exceed their public school counterparts. BCS's reverse-Robin Hood demand has no support in law, the court of appeal's opinion, or this Court's judgment.

As the Sixth District recently held, court may not substitute its judgment for that of elected school officials on discretionary matters: "mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Generally, mandamus may only be employed to compel the performance of a duty that is *purely ministerial* in character. Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment." *Mooney v. Garcia*, __ Cal.App.4th __ (No. H032733, June 26, 2012) (upholding district's exercise of discretion) (orig. emph., citation and quote marks omitted). Yet, by way of a jurisdictionally improper motion, BCS seeks to stretch an opinion holding that the District violated ministerial duties in its 2009-2010 offer into a court-ordered BCS wish list for 2012-2013.

Because BCS distorts what is at stake, some context is due. The charter school movement arose to provide an alternative to failing public schools. (§ 47601) Yet in a District whose public schools were (and are) among the state's best, wealthy families spotted a path to a publicly funded private school. Those families formed BCS, invoked Proposition 39 to grab millions of dollars worth of public facilities, urged families who enrolled to "donate" $5,000 plus per child, and thus amassed resources that far exceed those available in public school. To bolster its bottom line, BCS cherry-picks, giving admissions preference to Los Altos Hills residents and requiring applicants to reveal disabilities or other information a public school may not consider. By such tactics, BCS

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enrolls the privileged, and leaves special needs students, English language learning ("ELL") and minority pupils for the District to educate. BCS recently agreed to change its admissions practices to avoid revocation of its charter. BCS's practices—none of which were before the courts the 2009-2010 case—are the antithesis of a *public* school and are a far cry from what Prop. 39 had in mind.

Prop. 39 requires school districts to "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 (italics added). The facilities the District offered suffice to accommodate BCS students in "conditions reasonably equivalent" to those in which they would be accommodated at a District public school. Those facilities suffice for BCS to accommodate students in conditions that include a student-teacher ratio below that of the District's, smaller classroom sizes, a broader curriculum, trips to London and China, and other perks that exceed what students receive at a District public school. The District's facilities accommodated BCS students in conditions that have enabled BCS to grow every year—so much that BCS has a robust waiting list of others who seek its enviable educational conditions.

Because BCS cannot legitimately challenge the 2012-2013 offer, it has moved to "compel compliance" with the judgment in the 2009-2010 case, glossing over the correct interpretation of Prop. 39 and ignoring the appropriate limits on judicial review. As explained in the District's accompanying objection, this Court lacks jurisdiction. If the Court nonetheless proceeds to the merits, the record show the District has offered BCS even more than the law requires.

The court of appeal took issue with the District's 2009 method for comparing facilities but did not direct a particular outcome. The District then revamped its methodology to address each concern stated in the opinion and this Court's judgment. The District also complied with its duty to all District students by weighing the impact of facilities alternatives on *all*. It offered BCS facilities that are 175% more than what BCS accepted in 2011-12. Yet, to create a false "same offer, more students" claim, BCS selects only part of the offered facilities, complains about matters that have nothing to do with Prop. 39, and uses other sleights of hand that aim to obscure what is a generous offer that complies fully with—indeed, exceeds—the District's duties. Because the District did not

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abuse its discretion, the Court, if it finds jurisdiction, should deny BCS's motion. It certainly should not grant BCS's wish for an extraordinary school closure. That request is improper in multiple ways, including it (1) contradicts BCS's March 19, 2012 admission that the appellate opinion did not require such relief, (2) violates the limits on judicial review of agency discretion, (3) seeks to force a one-sided settlement term the District rejected, and (4) violates public contracting law.

Although BCS has no right to relief, the Court should grant the District's cross-motion for declaratory relief. As explained there, the District erroneously slanted its offer in BCS's favor, and BCS's exclusionary practices disentitle it to public school facilities, or entitle it to less.

II. BACKGROUND

A. The District Allocates Limited Facilities To Produce Excellent Public Schools, Yet BCS Forms To Offer A Private School At Taxpayer Expense

The District operates seven elementary schools that will enroll over 3,500 students in 2012-2013 and that are configured for pupils in grades K-6, not in junior high school (i.e., they do not have lockers, science labs, a gym, or a track and field). (*Kenyon*, Ex. 2(G), p.3) It also operates two junior highs that are configured for those grades and that will enroll over 1000 students in 2012-2013. (*Kenyon*, Ex. 2(G), p. 4) The District configured its schools to maintain age groups (K-6 separate from junior high), class size (25 per class), school size (506 per school on average), and other conditions that enable pupils to thrive. (*Goines*, ¶6; *Kenyon*, Ex. 2(G), *pp.* 4-5) And thrive they have—its elementary schools placed first in the state in 2012 in Academic Performance Index scores and its junior highs also have excelled. (*Kenyon*, Ex. 2(G), p. 6 Ex. B)

Despite that excellent performance, in 2003, Los Altos Hills residents formed BCS, used Prop. 39 to obtain millions of dollars in public facilities, and amassed vast private funds. From its inception, BCS has acted like a private school, engaging in acts no public school may employ. BCS targets the affluent and those who would opt for private school and urges each BCS family to pay thousands of dollars per child. It applies admissions preferences and other exclusions to enroll the affluent while excluding those with special needs, ELLs, and minorities. Its enrollment of Hispanics or Latinos (2.5%), ELLs (less than 1%), and students with disabilities (6%) are far below District averages in each category. (*Compare Forest*, Ex A *with* L) By skimming to select the privileged,

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leaving the less fortunate and more expensive students for the District to educate, BCS amasses resources that permit it to spend more than 50 percent more per student than what the District's pupils receive. (*Forest*, Ex. M/235) This enables BCS to maintain small class sizes and a broader curriculum and to provide other perks not available in District public schools. (*Forest*, Exs. G/195, M/227) It also permits BCS to spend vast sums on its PR firm, law firms (it paid Mo-Fo over $850,000 in 2008 and 2009), and large "personal" loans to staff. (*Id.* Ex B/14, 16, 29-31, 42; *Lundberg* Ex. A at 8) District facilities sufficed for BCS to accommodate students in conditions so enviable it has grown steadily and has a waiting list. (*Hersey* ¶ 4; *Forest*, Ex. M/228)

The District had about 3900 students in 2003; including BCS, it had about 5,000 in 2012. (*Smith* ¶14) Thus, BCS appears to have drawn those who would have opted for private school, adding to the total the District must accommodate in its limited public facilities.

Although most of the above facts did not surface in the 2009-2010 case, BCS's chartering authority in May 2012 notified BCS its application process violated the law by requiring applicants to reveal disabilities, academic results, and other information that public schools may not consider in admissions. The County ordered BCS to correct the violations or risk revocation of its charter. BCS agreed in June 2012 to change its application process. (*Forest*, Ex. R/318)

B. <u>BCS Sues The District, Then Sues It Again, Then Sues It Yet Again</u>

<u>Prior Lawsuits</u>. In 2004, this Court (Hon. Kevin E. McKenney) denied a "Petition for Writs [sic] to Protect Bullis-Purissima Elementary School From Homelessness." In September 2004, BCS filed another writ petition; this Court (Hon. Leslie C. Nichols) granted summary judgment for the District in 2005. Next, BCS challenged the District's 2009-2010 offer. This Court again granted judgment for the District, but this time, the Court of Appeal reversed, identifying six principal areas in which the District had not properly measured facilities. *Bullis* at pp. 1043-1064. As discussed below, however, although BCS asked for broader pronouncements, the Court of Appeal *rejected* those arguments. *Id.* at p. 1052, 1063. Hence, on remand, BCS conceded that the opinion did not require the District to grant BCS its own site:

> COURT: [I]t's not the Petitioner's position that the opinion necessarily requires a separate site?
> MR. GONZALEZ: That is correct, Your Honor. (Ex. A, at 23:27-24:2)

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2010-11& 2011-2012 Offers. The District made legally distinct offers to BCS for 2010-11 and 2011-2012, and each year, BCS accepted and occupied the facilities. (*Kenyon* ¶1.)

C. Although The 2012-2013 Offer Greatly Expands BCS's Share, It Sues For More

By January 2012, BCS had expanded to a K-8 configuration that did not exist in 2009-2010 and that is not present at any other District school. Thus, in January 2012, the District made a written finding that it could not accommodate BCS on a single site. Then, the District made its final 2012-2013 Offer (*Kenyon*, Ex. 2(G)), a lengthy writing that spells out the exhaustive review it conducted and the many factors it weighed in exercising discretionary judgment on how to share fairly its limited facilities among all District students.

D. After Agreeing To Outlines Of A Deal Not Compelled By Prop. 39, BCS Reneges On Key Terms, Then Asks The Court To Order The Deal As BCS Would Write It

District Trustee Doug Smith's declaration details the District's effort over the last few months to negotiate long term litigation peace, and how BCS instead opted to sue yet again.

III. ARGUMENT

A. Standard Of Review

Although BCS omits to mention it, in Prop. 39 cases, "[c]ourts exercise limited review in ordinary mandamus proceedings. They may not reweigh the evidence or substitute their judgment for that of the agency. They uphold an agency action unless it is arbitrary, capricious, lacking in evidentiary support, or was made without due regard for the petitioner's rights." *Sequoia Union High Sch. Dist. v. Aurora Charter High School* (2003) 112 Cal.App.4th 185, 194-5. The courts do so even where they find a Prop. 39 violation. Thus, in *Ridgecrest v. Sierra Sands Unif. Sch. Dist.* (2005) 130 Cal.App.4th 986, 1003, while finding a district violated its duty, the court of appeal recognized that how a district complies is "largely a matter committed to its discretion."

There is good reason for these limits. Prop. 39 requires judgment about how to allocate limited public facilities. School district officials are accountable to the voters who pay for public school facilities, the officials have expertise in public education, and they have a duty to give equal regard to not only the well-heeled, but also those who lack lawyers and PR firms to promote their self-interest. While courts should intervene when agency action is arbitrary, reweighing decisions

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on which reasonable minds may differ or substituting judgment risks improvidently entangling the courts in educational affairs.

B. Court Of Appeal Opinion

The court of appeal's concern was with a perceived lack of transparency, as distinct from substituting its judgment: "[H]ere, mandamus is appropriate because the District did not satisfy its obligation of presenting a complete and fair facilities offer to Bullis *from which it could be determined* that 'reasonably equivalent' facilities were provided." (*Bullis* at 1064) (emph. added). The violations detailed were ministerial: (a) failure to take an objective look at all space available at the comparison schools [*id.* at 1062]; (b) failure to properly consider site size [*id*]; (c) overstating the teaching space by not accounting for BCS's shared use of that space. [*id*]; (d) failing to identify and consider such on-classroom space as a childcare facility [*id*].

The court was clear, however, that site size was but one of multiple factors (*id.* at 1051-2) and a site size disparity alone did not warrant relief: "We disagree with Bullis's contention that 'site size by itself shows that [it] has not received "reasonably equivalent' facilities. [Citation.]'" (*Id.* at 1052) The court also rejected BCS's demand for "mathematical exactitude." (*Id.* at 1063)

Also notable is what the opinion does *not* state. As BCS conceded at the March 19 hearing, the opinion does not state BCS is entitled to its own site—unsurprisingly, since Prop. 39 requires fair sharing and says nothing about exclusive use The opinion also does not address the accommodation of a K-8 school or a two-site offer. The opinion also does not discuss potential impacts of an alternative facilities grant to BCS on the District's other students, nor whether the BCS's vast resources or inequitable practices limit its right to grab more public facilities.

Accordingly, on remand, this Court rejected the part of BCS's proposed judgment that demanded its own site, recited the methodology errors the court of appeal had identified, and directed the District to provide reasonable equivalence but without directing a particular outcome.

C. The District Did Not Abuse Its Discretion In Its 2012-2013 Offer

Complying fully, the District analyzed each point the Judgment ("Jt") addressed: it (1) "consider[ed] total site size and account[ed] for (and allocate[d] reasonably equivalent building and outdoor space to Bullis for) all building and outdoor space on any and all comparison school sites

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(regardless of how it is utilized)" (Jt 2¶3; *Kenyon,* ¶2); (2) "instruct[ed] its architect to measure all outdoor space (not just "K play area," "non-K blacktop," and "turf area") at comparison schools (Jt 2¶5; *Kenyon,* ¶2); (3) "provide[d] an accurate measurement of the amount of building and outdoor space offered to Bullis, based on the correct configuration of that campus and a proration of shared use space, proportionate to time allocation and use restrictions the District imposes on that space." (Jt 2-3 ¶6; *Kenyon,* ¶2); (4) "offered Bullis facilities (such as a childcare facility and amphitheatre) reasonably equivalent to those at comparison schools." (Jt 3¶8; *Kenyon* ,¶2); and (5) after weighing all relevant facts, the District made the discretionary finding its 2012-2013 offer gave BCS facilities that are reasonably equivalent to those at the comparison schools. This analysis involved an exhaustive review of all teaching, specialized-teaching and non-teaching space at the schools, involving hundreds of new measurements (*Kenyon,* ¶13), going far beyond that which school districts ordinarily do (*Huntoon*). Because the details are spelled out in the Kenyon Declaration, this brief includes only a concise summary.

1. The District Considered Site Size, And Did Not Abuse Its Discretion

To ensure accuracy, the District measured each comparison site's acres from the County Assessor's Maps, calculated the area allocated to BCS at Egan and Blach, walked each site and visually determined the room and space configurations, created updated building drawings and current configurations, and measured all remaining non-teaching space at each site. (*Kenyon,* ¶3) It then considered all those measurements, but also considered other factors, including (a) its offer allocates BCS more *classroom* space per in-District student (pp. 12 below; *Kenyon,* ¶8), and (b) BCS's K-8 configuration is not present at any other District school (p. 3, above). The District increased BCS's acreage by 177% percent, allocating 11 plus acres, consisting of 1.22 more acres at Egan, plus 3.37 acres at Blach. As a result, "BCS students enjoy greater SF/ADA than District students for over 79% of the time between 8:30 a.m. - 3:00 p.m." (*Kenyon,* ¶2) (FO 21-22)

In claiming its site size allocation is inadequate, BCS misdirects in multiple ways.

a. Because No Other District School Has A K-8 Configuration, The District Did Not Abuse Its Discretion In Offering Facilities At 2 Sites

BCS discounts the 11-plus acre offer by criticizing the provision of 3.36 acres on a second

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site. But as noted in the District's jurisdictional objection, a second site was not at issue in 2009-2010, was not addressed by the courts, and is not cognizable on BCS's "motion." In any event, the District did not abuse its discretion. Prop. 39 states facilities must be "contiguous." But the regulations clarify that a district may place a charter school on more than one site if necessary:

> If the in-district average daily classroom attendance of the charter school cannot be accommodated on any single school district school site, contiguous facilities also includes facilities located at more than one site, provided that the school district shall minimize the number of sites assigned and shall consider student safety. . . .[T]he 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. If a school district's preliminary proposal or final notification. . . does not accommodate a charter school at a single school site, the district's governing board must first make a finding that the charter school could not be accommodated at a single site and adopt a written statement of reasons explaining the finding. Cal. Admin. Code tit. 5, § 11969.2(d)

Under § 11969.3(a)(1), "[t]he district is not obligated to pay for the modification of an existing school site to accommodate the charter school's grade level configuration."

In *Ridgecrest*, a district offered a charter school 9.5 classrooms at 5 sites separated by 65 miles. The court of appeal rejected the district's assertion that it had unlimited discretion to decide whether to place the charter school on one site, but also rejected the charter school's claim that it was entitled to a single site as long as one large enough to house its school existed. Noting "all the factors—educational, logistical, financial, legal and practical—that ordinarily go into deciding how to assign students among the various schools within a district," the court held "we believe the answer lies somewhere in between, albeit toward the contiguity end of the scale." "What all the other factors are, how much weight each ought to be given, and when consideration of them will make the single-site goal unfeasible, are all decisions that can only be made in light of the circumstances of the particular case." *Id.* at 1002. On those particular facts, the court held that "providing facilities at five different school sites does not strike a fair balance between the needs of the charter school, and those of the district-run schools," particularly given that district's perfunctory explanation of its reasons. *Id.* at 1006. The court emphasized, however, that how a district complied "was largely a matter committed to its discretion." *Id.* at 1003. *Ridgecrest* did not involve a charter school that had a different configuration from all other district schools.

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Pursuant to these principles, on January 30, 2012, the District's governing board passed a Resolution that made the required finding that BCS could not be accommodated on one site. (*Kenyon*, Ex. 2(G)) (FO, Ex. G) It considered student safety and minimized sites. As to safety, it cited: (a) reduction of Egan traffic; (b) placing BCS's middle schoolers on an exclusively middle school site; (c) utilizing Blach's greater space availability, (e) providing a closer location for BCS's 7th and 8th graders from Mountain View, Cupertino and Santa Clara. (FO, Ex. G, p. 9) As for minimizing sites, the District placed BCS on only two. (*Id.*)

The District's Board also explained why it was unable to place BCS on a single site. As noted, it was not required to modify an elementary school to add junior high facilities for BCS. The District also considered impact on other students if it were to close a school for BCS. This was permissible. In the Statement of Reasons ("SoR") supporting the Prop. 39 regulations (RJN, Ex. B), the California Charter Schools Ass. proposed requiring a district to place a charter school on a single site if one were available. In noting this language was rejected, the SoR stated: "To narrow the reasons that a charter school cannot be accommodated to physical size of facilities goes beyond statute and the *Ridgecrest* court decision, and may lead to unintended consequences, such as the relocation of a program that serves special students populations (e.g., continuation or special day classes)." [RJN Ex. B, p. 8 of 62] (*See Environmental Prot.& Info. Ctr v. Dep't of Forestry & Fire Prot.* (2008) 44 Cal.4th 459 (agency interpretation upheld if not clearly erroneous or unreasonable).)

In its January 30, 2012 Resolution, the District's board found that to treat all students equally (§ 200), District policy has been to limit school site population to 600 students. (*Kenyon* ¶25, Ex. 2(G)) Based on projected enrollment for 2012-2013, most of the District's elementary schools are near the 600 limit. (*Id.* ¶26) Closing a school and scattering displaced students to remaining schools would adversely affect pupils, neighborhoods, schools, traffic, and home values, and there may not be sufficient space at the remaining sites to absorb the displaced. (*Id.* ¶26-8; *Goines* ¶¶11-15)

Balancing it all, the District found BCS could not be accommodated on one site and should instead be offered elementary school and middle school facilities on two sites. This is how other District students are placed—elementary and middle school are separate. The offer furnishes BCS equivalent acreage and facilities, while minimizing impact on others. No abuse of discretion

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appears. (*Sequoia*, 112 Cal.App.4th at 194-5, ["[c]ourts exercise limited review. . . . [t]hey may not reweigh the evidence or substitute their judgment for that of the agency"].)

BCS's "same offer, more students" mantra rests on its erroneous claim that the District could not offer facilities on two sites, so the offer is just the "same" facilities at Egan. Wrong. The District was entitle to offer facilities on two sites, so the offer is very different from 2009-2010 and includes over 11 acres and many new facilities, including substantially more at Egan.

b. BCS's Other Size Arguments Also Misdirect

BCS also misstates the Egan part of the offer as a "K-6" site, and argues it is smaller than comparison elementary schools. (*Eyring*, ¶16) But the offer does not restrict how BCS allocates facilities. (*Kenyon*, ¶1) (FO 28) BCS may include more than grades 7-8 on Blach—the prevalent configuration in California is K-5 and middle school. Because BCS's K-6 enrollment is smaller than all but one comparison elementary school (FO at 20), the District did not abuse its discretion in offering a slightly smaller size site at Egan, along with the Blach facilities.

Hypocritically, BCS complains the District included unusable space in its offer. (*Eyring* ¶2-3) Much of this is a BCS board member's mischaracterization. (*Kenyon*, ¶24) More to the point, in the 2009-2010 case, BCS challenged the District's exclusion of an unusable "mound of dirt" in its comparison school analysis and secured a ruling that *all* space at comparison schools must be counted, "(regardless of how it is utilized)." (Jt ¶3) BCS now complains similar space is "unusable." If all space—usable or otherwise--counts at comparison schools, all counts at BCS.

Also disingenuous are BCS's references to the Egan "temporary camp site"—which imply the Egan facilities are of poor quality. Those facilities are worth millions, BCS admits their condition is good to the County, tells recruits the classrooms are "warm and welcoming," and the court of appeal had no issue with their condition. [*Forest*, Ex M/231; *Rivera*, ¶3(c)] Those facilities are modular, rather than permanent, buildings, because modulars cost less and offer more flexibility. (*Kenyon,* ¶8) Public schools thus commonly use modulars, and the District does so all over to house other students and administrators. (*Id.*) Similarly, the assertion that the District admitted that the Egan site's maximum capacity is 360 is based on a document referring to when the site held 7.5 less buildings and 1.22 acres less than what the District has offered for 2012-2103. The additions

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provide more than enough capacity—indeed, in the past, the District has housed over 550 of its own students in the space offered to BCS. (*Baier*, ¶2.)

BCS also incorrectly complains the District excluded outdoor space. It included all space within each comparison site in "Total Site Size," separately calculated "Other Outdoor Space" at each site. (*Kenyon*, ¶9-14.) It did not separately call out parking space in "Other Outdoor Space," but included such space in "Total Site Size." (*Id.*, ¶22.) Also, the District adjusted the acreage at Springer and Covington to reflect that on the County Assessor's Map, and adjusted the Covington acreage to exclude District Office space, which the Covington program does not use. (*Id.*,¶23) BCS's misapprehension accounts for the 10.54 acres it erroneously states was excluded. (*Id.*, ¶22.)

2. The District Did Not Abuse Its Discretion On All Other Criteria

Classroom Space. On the all-important factor of *classroom* space, the District offered BCS more SF per classroom than at comparison schools. (*Kenyon*, ¶8) The District also offered twice the allocation of 7th and 8th grade classrooms than the Prop. 39 regulations call for. (FO 13)

Non-Teaching Space. The court of appeal told the District "to take an objective look at all of such space available at the schools in the comparison group." (*Bullis* at 1062) The District did just that. Only certain space may be identified through use and function. Thus, the District asked its architect to develop/update its site plans for each comparison school, then identified the categories of non-teaching space that were capable of identification through common terms based on function (i.e., "storage," "custodial") and identified 16 categories. (*Kenyon,* ¶9-12, & attached charts; *Schadt & Korovesis*). Counting measurements for teaching, non-teaching and specialized teaching space, the District made 333 separate building calculations at the eight comparison schools. (*Kenyon*, ¶13)

Following the opinion's definition of non-teaching space as total site size less teaching and specialized teaching space, the District identified "Other Outdoor Space" for space that could not be counted in measuring teaching, specialized teaching, and non-teaching space with an identifiable function. (*Kenyon*, ¶14; *Schadt*, ¶¶ 5-7) As reflected in the "Space and Size Checklists," the District asked its architect to measure space as "other outdoor space," which included space not counted in the above three categories, but falling within the site acreage. (*Kenyon*, ¶14) As noted, the parking lots at each site were not included in "Other Outdoor Space," but were included in "Total Site Size."

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(*Kenyon* ¶22; *Schadt,*¶¶ 4-7) BCS misstates this as if such space had been excluded.

BCS's arguments also ignore that the court of appeal held the District must identify and quantify facilities at comparison schools—not that it must provide every conceivable type of space:

> While a Proposition 39 analysis does not necessarily compel a school district to allocate and provide to a charter school each and every particular room or other facility available to the comparison group schools, it must at least account for the comparison schools' facilities in its proposal.... (*Bullis* at 1062 (n. 2), 1063-4.)

Multi-Purpose Room. The court of appeal ruled the District could not count as space an MPR that BCS had provided for itself. To comply, the District stated it would install an MPR. (FO 30) The 4,971 SF that BCS complains about (Eyring Dec 4 ¶12) refers to ½ the SF of the City Gym referenced in the offer. However, based on a SF/ADA ratio, 4,971 SF exceeds BCS's entitlement. (Kenyon, ¶15; FO 29) The District also stated it would be willing to install an MPR of 3,840, which also exceeds what BCS would be entitled to under the comparison group SF/ADA.

Electrical and Data Rooms. The District listed the electrical and data rooms at each comparison school. (FO, Ex. H) Because some of this space is minimal (e.g. at Gardner, Electrical Room is 162 SF and Data Room is 106 SF), the District, consistent with the court of appeal's direction that not every facility must be provided, did not allocate specific space for an electrical or data room. But all of the space provided has electrical and data capabilities. (*Kenyon*, ¶16)

Childcare. Although the original SF/ADA calculation was incorrect for childcare, the District allocated BCS 1,440 SF of building space for childcare, commensurate with that offered in the comparison group schools. (*Kenyon*, ¶17; FO 29) It also offered BCS two extra 960 SF flex rooms, which may be used for childcare, and the Kindergarten play area and other blacktop and turf areas can be used for before and after school care. (*Id.*)

Special Day Class. BCS' complaint it was not allocated sufficient space for special day classes is incredulous because it has no such classes for special education students, and there is evidence that BCS discriminatorily excludes special ed students. (*See* Evidence and Cross Motion) The District did not abuse its discretion in not allocating a Special Day Class room to BCS based on the absence of any special education students that require a SDC room at BCS. (*Kenyon*, ¶18)

Kiln. Only one school has a Kiln Room—148 SF at Covington. (FO, Ex. G, p. 83) The District calculated this space from the architect's site plans and included it in "Space and Size

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Charts." The District did not abuse its discretion in treating BCS the same as 8 of 9 District schools.

Flex Rooms and Science Flex Rooms. BCS's SF/ADA allocation of Art and Music Flex Rooms (2.11 SF/ADA) exceeds 4 of 6 K-6 comparison schools. (*Kenyon*, chart, ¶21) Although the original SF/ADA calculation was incorrect for the flex rooms, BCS was allocated as much or greater science space and as much or greater square feet per ADA (SF/ADA) than five of six comparison schools. (*Id.*) Again, to offer BCS what most other schools get was not an abuse of discretion.

BCS's Complaints Outside the Scope of Proposition 39. Prop. 39 regulations allocate specialized teaching and non-teaching space commensurate with the per-student amounts of such space in the comparison schools. (See, e.g., Cal. Admin. Code tit. 5, §11969.3(b)(2) and (3).) But the regulations do not specify how a district would allocate a gymnasium to a 20-student charter school if the per-student ratio at the comparison group schools were 1 gymnasium to 200 students. The District's allocation of 7th and 8th grade facilities to BCS is based on a projection of 27 in-District students at those grade levels. (FO 12-13) BCS's 7th and 8th grade population is a mere 5.3% of the populations at the District's two junior high schools (FO 31). To allocate 5.3% of the non-teaching and specialized teaching space at Blach to BCS, in a manner fair to Blach students as well, the District reasonably exercised its discretion to reject impractical options, like providing access to a facility one school day a month, or carving out 1/20th of a facility (i.e., a tiny fraction of a music room.) Instead, the District provided BCS with two units of space to provide in the aggregate BCS's non-teaching and specialized teaching space. Hardly arbitrary.

BCS Principal Hersey makes other complaints, such as BCS's K-8 program is "integrated," and Blach facilities "inaccessible" and "disjointed." But nothing in Prop. 39 makes these gripes relevant. (See Cal. Admin. Code tit. 5, §11969.3(c)(1)(A) – (G) (criteria for "condition" do not include any of the areas in which BCS complains.). The District was required to offer facilities sufficient to yield conditions reasonably equivalent. It was not required to tailor facilities to unique BCS offerings or BCS wishes. Indeed, as the District's Assistant Superintendent explains, Hersey's complaints involve things that are normal in a *public* school or are untrue. (*Gallagher*)[1] For

[1] BCS misstates it only has access to the field and tennis courts in 14-minute increments. (Eyring 9 ¶ 30) The District offers those facilities for a 47-minute period 4 days a week, and a 37-minute increment each Wednesday. (FO 35)

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example, Hersey complains a Mandarin teacher must travel between sites even though that is what many District teachers must do. (*Id.at* ¶6) Hersey complains about changing space even though the District provided plenty of buildings, any one of which could be used as such space. (*Id.* at ¶13)

3. BCS's "Me-First" And Exactitude Demands Ignore The Rights of Others

BCS adds an improper "me-first" slant to Prop. 39. As shown, it gripes each time it was not offered a facility that exists at *one* or only a few schools—even if *most* other District schools lack that facility. But Prop. 39's "reasonable" equivalence standard examines *all* other schools; it is not a "Most Favored Charter School clause" that entitles BCS to every facility that appears at any other school. Similarly, BCS's fixation on "mathematical exactitude" and raw acreage is a ploy not aimed at reasonable equivalence but on a wish for an exclusive site. The court of appeal said the District must consider site size, but rejected exactitude. The District complied, measuring all space, increasing BCS's acres by 177%, adding much more classroom and building space. This is well more than "sufficient" for BCS to accommodate its pupils in "conditions reasonably equivalent."

BCS, by contrast, disregards that if the District places BCS's 466 students on its own site, that would cause huge impacts from closing a neighborhood school that are not measured in numerical facilities comparisons and also force the District to crowd its 4500-plus other students onto 8 sites. That would leave BCS pupils *ahead* of all others on Prop. 39 facilities numbers alone, and would treat the others even further behind when one factors in the non-numerical school closure impacts. Again, "reasonable equivalence" does not mean better than everyone else.

This highlights BCS's most fundamental misdirection. The Prop. 39 analysis aims to ensure "conditions reasonably equivalent." Yet, for tactical reasons, BCS seizes on perceived disparities that have little to no educational impact. Not only is this the sort of nitpicking that mandamus review abhors, but it ignores that on what counts for education, the offer compares favorably. BCS's demand for school closure, by contrast, risks substantial harm to a public school system that is performing well, communities and neighborhoods.

D. <u>BCS's Demand That The Court Order A School Closure Is Over The Top</u>

BCS's school handover request violates a slew of legal and equitable principles including:

- As BCS admitted, nothing in Prop. 39 or the court of appeal's opinion entitles it to its

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own site, much less the right to select its top 4 of the 9 District campuses.

- The request would violate Prop. 39 by not treating *all* students equally, since giving BCS exclusive use of a site for 466 in-District pupils would crowd well more than 466 per campus into other District schools and cause other school closure impacts. (*Kenyon*, ¶¶27-28; *Goines*, ¶¶ 11-15)

- Although mandamus will not lie "to compel an official to exercise discretion in a particular manner," [*Mooney,* p. 6], BCS seeks an extraordinarily directory order that will roil the community and adversely impact many.

- Although the parties negotiated knowing there could be no agreement until board-approved BCS's request seeks to foist on the District a term cherry-picked from a *rejected* settlement proposal, without holding BCS to the many other terms necessary to secure the District board's approval of any settlement. This violates settled law precluding enforcement of agreements that lack the approval of the public entity's governing board. (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 87-89; *Santa Monica Unif. Sch. Dist. v. Persh* (1970) 5 Cal.App.3rd 945, 952; *State of California v. Haslett* (1975) 45 Cal.App.3d 252, 257-58)

- The settlement discussions were not limited to what the law required but sought a voluntary agreement based on mutual interest. (*Smith Dec.*, *Moore*, Ex. ¶¶5-11)

By demanding that a neighborhood school be closed, pupils displaced, relationships and community destroyed, and the District's remaining public schools crowded, BCS manifests the "me-first" attitude on which it was founded. That attitude strains a community that places all oars in the water to support its public schools and has produced superb results. No legal or equitable principle supports BCS's demand to reorder the District to satisfy BCS's wishes, and plenty preclude it.

IV. CONCLUSION

The Hippocratic oath—"First, do no harm"—counsels against granting BCS's demand to reorder a district in which the public schools and BCS are both producing top notch results as-is. The millions of dollars in public facilities already offered suffice to permit BCS to accommodate students in conditions that have many banging on the door, and exceed what the District's public school students get. The District did not abuse its discretion in declining to take more away from its other schools. If the Court assumes jurisdiction, it should deny BCS's motion.

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Respectfully submitted,

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