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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' OBJECTION TO JURISDICTION REGARDING 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: Memorandum of Points and Authorities in Opposition to Motion to Compel Compliance; Notice of Motion and Motion for Declaratory Relief; Memorandum of Points and Authorities in Support of Motion; Objection to Jurisdiction; Request for Judicial Notice; Declarations in Support of Opposition and Motion; and Proposed Order]

Each facilities offer that a school district makes annually to a charter school under Proposition 39 constitutes a legally distinct public agency action. In making such an offer, the district projects the enrollment at each of its schools for the coming year and measures the facilities allocated to each school for that year. The analysis is a fact-specific one that requires an exercise of discretionary judgment each year, based on information available to the district at that time.

BCS has challenged the District's 2012-2013 facilities offer—not through a mandamus procedure that typically is required to challenge public agency action, but through a "motion compel compliance" with the March 2012 judgment that arose out of the District's 2009-2010 facilities offer. That offer, however, involved a different group of students, different facilities, and different legal issues. Because BCS's motion seeks relief that exceeds this Court's jurisdiction, the Court should (1) decline jurisdiction altogether, or (2) treat BCS's motion as a new petition (but require it to file one so there is a pleading that frames the issues), and permit the District to respond and take discovery (if necessary), and apply the standard of review that applies to mandamus proceedings.

That BCS's motion is improper is evident in several ways. One is that there is a key legal issue in the present offer that was not presented in the earlier proceeding—which explains why the judgment is understandably silent on it. In 2012-2013, BCS will have a K-8 grade configuration that it did not have in 2009-2010 and that is not present at any other District school. The District made a written finding in January 2012 that BCS's K-8 configuration could not be accommodated on a single District school site. That was a distinct action involving a discretionary judgment that is outside the scope of the 2009-2010 offer. After all, BCS was not a K-8 school in 2009-2010, so the District never exercised its discretion to determine how to accommodate a K-8 school. Because the judgment is silent on this issue, there is nothing for the court to "compel" by way of BCS's motion.

Another new issue, also not raised by the judgment, is that it has come to light that BCS is engaging in unlawful admission practices that no public school district can condone. In May 2012, BCS's chartering authority—the County Superintendent of Schools—notified BCS that its admissions practices were illegal and directed it to change them or risk revocation of its charter. BCS agreed in June 2012 to change those practices. BCS has also engaged in other exclusionary practices that, if not illegal, are inconsistent with how a public school should operate. A charter

school that engages in practices antithetical to a public school's operation—an issue neither considered nor adjudicated in the earlier proceedings—is not entitled to the protection of Proposition 39. BCS thus has an affirmative defense to BCS's challenge to the 2012-2013 offer. Had BCS challenged that offer by a mandamus petition—the settled and appropriate procedure—the District could have asserted that defense and cross-complained on this basis. BCS may not shield scrutiny of those practices by circumventing that procedure in a motion to compel.

At the March 19, 2012 hearing, BCS offered no authority for its proposed blurring of the jurisdictional line between a past mandate action, that challenges a prior facilities offer, and a new mandate action, that challenges a new offer. Rejecting the "continuing jurisdiction" provision in BCS's proposed judgment, the Court opted for a narrower one, stating that, "[p]ursuant to Code of Civil Procedure section 1097, the Court has continuing jurisdiction to make any orders necessary and proper for the complete enforcement of the writ."[1] The Court thus retained jurisdiction over actions that are within the scope of the judgment and writ. But given the legally distinct nature of each Prop. 39 offer and the new issues posed by the 2012-2013 offer, the new offer is outside the scope of the 2009-2010 litigation, and consequently beyond the reach of BCS's motion.[2]

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[1] Section 1097, sometimes denominated a "contempt action for penalties" [*Professional Eng'rs in Cal. Govt v. State Personnel Bd.,* 114 Cal.App.3d 101, 112 (1980)], states that when a peremptory writ of mandate has been "issued and directed" to an inferior body or person, if the recipient, "without just excuse, refuse[s] or neglect[s] to obey the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ."

[2] The contempt procedure contemplated by section 1097 is an appropriate, but not the exclusive, procedure, for dealing with the refusal or neglect of an administrative body to comply with a writ. Where, for example, the court needs to consider the administrative record, it must proceed by way of a CCP section 1094.5 proceeding. *Professional Eng'rs*, 114 Cal.App.3d at 110-11. Even then, however, the issues are limited to those encompassed in the writ, not new issues that have never been adjudicated. *Cf. id.* at 108 ("'when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts.'" (citation omitted)). Indeed, none of BCS's cited authority in the "Legal Standard" section of its motion [Mot. at 6-7] purports to authorize a summary motion procedure to enforce a writ in a situation like ours, which involves a new agency action and which presents new facts and issues never before considered, much less adjudicated. *E.g.*, *Stoneham v. Rushen,* 156 Cal.App.3d 302, 310 (1984) (upholding order on remand "amplif[ying]" original order, under CCP § 1097, that bulletins concerning placement of prisoners be first adopted pursuant to the APA before they could be properly used as a classification mechanism); *Gonzales v. Int'l Assn of Machinists*, 213 Cal.App.2d 817, 820 (1963) (upholding supplemental award to plaintiff for damages *following jury trial* arising from defendant's failure to comply with final judgment). *Security Tr. &*

The confounding problems that arise from BCS's motion reinforce this conclusion. For example, BCS accompanied its motion with evidence not in the record of the 2009-2010 case. Much of that evidence, moreover, was never even presented to the District when the District formulated the 2012-2013 offer. BCS has thus turned what should be a proceeding designed to *review* the District's action (and the evidence the District considered) into a de novo proceeding based on evidence that the District never saw, much less considered. The District disputes that evidence, but BCS's motion provides no path for resolving that dispute.

Another problem is the standard of review—an issue on which BCS is noticeably silent. Is BCS's motion a summary judgment-type procedure under which the District wins unless BCS can show no triable issues of fact? If so, what facts does BCS claim are undisputed? Or is this a mini-trial in which the preponderance standard governs, in which case, again, what evidence must each side show? Perhaps BCS is silent on this problem because the standard of review that governs mandamus proceedings dooms its claims. It is settled that "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) (affirming school district's exercise of discretion) (orig. emph., internal citation and quote marks omitted). BCS recognizes that it cannot prevail under this standard and thus has attempted to avoid it in a "motion to compel" procedure that has no legal basis.

At the March 19 hearing, BCS offered only one rationale for circumventing the ordinary mandamus procedure—that it would delay adjudication of any challenge to the current year's offer.

Sav. Bank v. S. Pac. RR, 6 Cal.App.2d 585, 589 (1935) (upholding court's power to order specific performance of purchase agreement without requiring new action). *Molar v. Gates,* 98 Cal.App.3d 1, 25 (1979) did not even involve the scope of an enforcement issue, but merely specified that the trial court, on remand, could retain jurisdiction under section 1097. And although *Kent v. Super. Ct.*, 106 Cal.App.2d 593, 594-96 (1951) stated that a trial court may invoke statutes like section 1097 to enforce prior orders, it *prohibited* the trial court from invoking such statutes against a party not involved in the prior proceeding to do something the prior judgment never contemplated—direct that sums given to a husband's new wife be given to his prior wife.

But that argument does not justify denying the District due process; rather, it might justify accelerating the adjudication of a new action—something the District had already pledged to do.

In its submission for the March 19 hearing, the District acknowledged its obligation to conform future facilities offer to the Court of Appeal's opinion. The District reaffirms that commitment, and recognizes that it must conform such offers to the Judgment that this Court entered after that hearing. The District's new offer does both of these. But BCS's motion to compel cannot substitute for, much less defeat, the procedural guarantees that a mandamus proceeding requires. As the District put it four months ago, BCS's procedure is not "grounds to dispense with essential due process, procedure and adjudication." (Respondents' Brief re Form of Jmt. at 9)

The District thus objects to BCS attempt to litigate its challenge to the District's 2012-2013 offer by way of a summary procedure arising from a concluded mandamus action. Because its motion to compel seeks to avoid the standard of review, to deprive the District of an opportunity to meet BCS's new evidence, and to impair the District's ability to raise affirmative defenses and cross-claims, the Court should (1) decline jurisdiction altogether and deny BCS's motion summarily, or (2) treat BCS's motion as a new petition (but require it to file one so there is a pleading that frames the issues), and permit the District to file a responsive pleading and take discovery, and apply the standard of review that applies to mandamus proceedings.

DATED: July 24, 2012

Respectfully submitted,

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