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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' RESPONSE TO EX PARTE APPLICATION

Date: June 6, 2012
Time: 8:30 a.m.
Dept: 2

Judge: Hon. Patricia Lucas

I. RESPONSE

Respondents (collectively "The District") do not oppose petitioner Bullis Charter School's ("BCS") request for an expedited hearing and briefing schedule, and the parties have agreed on such a schedule, subject to the Court's availability. But the District objects to any procedure that permits BCS to challenge the District's offer of facilities for the 2012-2013 school year via a postjudgment motion in the litigation regarding the District's 2009-2010 facilities offer, as opposed to a challenge by way of a new writ petition.

After the Court entered its judgment in the 2009-2010 litigation, the District made BCS a final and voluminous offer of facilities for the 2012-2013 year and BCS gave notice it intends to occupy those facilities. As the Court will see when it reviews the 2012-2013 offer, the offer required the exercise of discretionary judgment involving a different student population than the 2009-2010 population, different facilities, and different legal issues. It is jurisdictionally improper to review that offer by way of a post-judgment motion in the prior litigation.

BCS also requested that it be allowed to take two depositions and present two witnesses at the hearing. The District agreed so long as it also may take two depositions and present two witnesses. BCS first objected on the ground that the District is seeking irrelevant information. After the District explained the relevance (and further explains the relevance below), BCS withdrew its request for depositions. But the District does not withdraw its request for 2 depositions and submits that an ex parte application is not the place to rule on relevance objections. *See* Code Civ. Proc. § 1005 et seq. (preference for noticed motion). The Court should permit the requested discovery and can take up any relevance objections at the appropriate time. *Id.*; *cf.* § 2017.010 (liberal right to discovery of any matter reasonably calculated to lead to discovery of admissible evidence).

Since the end of the 2009-2010 year, the District's student population has grown. Also since 2009-2010, BCS has added a junior high program, converting BCS into a K-8 configuration that is not present in any other school within the District and that does not fit the separate K-6, and junior high configurations that have been in place for years in the District. BCS has demanded more space for its school, a demand that is hard to meet at the Egan campus alone without encroaching on the

top performing junior high school that shares that campus. While the District's facilities needs have increased, it continues to have only 9 campuses that must house its 10 schools.

The charter school law does not require the District to reconfigure existing facilities for BCS [Cal. Code Regs, tit. 5, § 11969(a)(1)], and also provides that if BCS's in-District students cannot be accommodated on a single site, the District can provide facilities at more than one site provided it minimizes the number of sites and adopts a written statement of reasons explaining its finding [*id.* § 11969.2(d)]. And, as BCS's counsel admitted to this Court on March 19, 2012, the court of appeal's opinion in the 2009-2010 case does not require the District to furnish BCS its own campus:

> THE COURT: [I]t's not the Petitioner's position that the opinion necessarily requires a separate site?
>
> MR. GONZALEZ: That is correct, Your Honor. (3/19/RT 23: 27-24:2)

The law commits the selection of reasonably equivalent facilities to the discretion of the school district, who can apply its expertise in public education to act in the best interests of all the in-District students that it must educate equally. The District here exercised its discretion to offer BCS facilities for 2012-2013 that increases its space allocation considerably from 2009-2010—to 11.3 acres. The offer shares the District's largest site—the 20-acre Egan campus—between BCS and the Egan Junior High. But because BCS's demand for more space for its K-8 students risks encroaching on the top-performing Egan Junior High, the offer also provides BCS facilities on the Blach campus. The District made the requisite written finding explaining why it furnished its facilities on two sites. This offer is consistent with the configuration of other District schools—in which K-6 and junior high schools are on separate campuses. The offer complies fully with—indeed exceeds what is owed under—Prop. 39 and this Court's judgment and writ relating to the 2009-2010 offer. The offer also is a reasonable exercise of discretion because it grants BCS reasonably equivalent facilities in a way that also avoids destroying the small classroom size, manageable school size, neighborhood assignments and other key features of the 7 neighborhood K-6 schools, and 2 junior high school configuration that has been in place and highly performing for years in the District.

By contrast, BCS's demand that the District hand over one of the District's other schools would require the transfer of all the students in that school to other schools, destroying established

communities and crowding the remaining schools. That would treat the displaced and crowded students *unequally* even though BCS is entitled only to "reasonable equivalence."

This chart illustrates the differences between the 2012-2013 and the 2009-2010 offers:

	2009-10 Offer	2012-13 Offer
Total acreage provided to BCS	6.23	11.04
Total square footage of classroom space provided to BCS	14,400	19,200
Total Specialized Teaching and Non-Teaching building square footage provided to BCS	15,370	27,568
Total number of buildings provided to BCS	29	34.5
BCS grade configuration	K-6	K-8
Campuses to be shared with BCS	1 (Egan Jr. High)	2 (Egan Jr. High and Blach Jr. High)

Moreover, apart from the offer it made for 2012-2013 pursuant to Prop. 39, the District also, outside the Prop. 39 process, has voluntarily offered to contract with BCS to either (a) house its entire school on the Egan campus in exchange for reasonable commitments necessary to make that arrangement work, and/or (b) provide BCS its own campus for at least 10 years beginning in 2014-2015 in exchange for reasonable commitments necessary to make the long term deal work. BCS, however, declined the first option. And after publicly announcing its tentative agreement to the second option, BCS reneged. It rejected the District's draft incorporating the tentative agreement, and instead insisted upon unreasonable requirements and rejected essential District terms.

BCS is now demanding that the Court rush to a judgment that second guesses the District's exercise of discretion in its 2012-2013 facilities offer. As the Court will recall, BCS made a similar ex parte demand that the Court enter a judgment on remand from the court of appeal. After the Court instead correctly afforded the District due process in the form of briefing and a hearing, the District pointed out excesses in the judgment that BCS has asked the Court to enter ex parte. This produced BCS's concession quoted above that it was not entitled to its own campus and resulted in other key changes to the judgment. This history highlights the reason to pause, permit the District to obtain discovery, and then consider argument and evidence, without a rush to judgment.

Moreover, BCS cannot obtain relief without resolution of another substantial question that the court of appeal carved out of its decision regarding the 2009-2010 offer and reserved for future

litigation. BCS is the wealthiest of the District's communities and is the only one that operates on a self-selecting, exclusionary basis. Unlike BCS, the District must educate all in-District students, including the special needs students, English language learning, and minority populations that BCS has excluded though admission preferences. By reserving admission for the most advantaged, and by shunning the comparatively disadvantaged, BCS raises massive private funds, which it combines with the public facilities it receives from the District to provide BCS students more in combined private/public resources than that which other District students get. BCS also avoids, by virtue of its exclusionary ways, the burdens of educating those with greater or special needs.

This semi-private school arrangement misuses the charter school law. The text of Prop. 39 shows it was not intended to generate exclusionary semi-private schools but was instead intended simply to ensure that the conditions under which charter school students are educated are reasonably equivalent to the conditions those students would receive had they enrolled in another public school in the district: "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.*" (Ital. added) Nothing in Prop. 39 directs that the "conditions" that must be compared require a court to ignore *all* conditions the charter school students enjoy compared to those of their in-District counterparts. To consider only the district-owned facilities furnished to the charter school, while ignoring all other resources available to the charter school students, would confer a windfall on the charter school, perverting the intent to ensure parity in educational *conditions* among the schools. The court of appeal noted this potential for windfall but held it was not "called upon to address the issue in this case." *See Bullis Charter School v. Los Altos School Dist.*, 200 Cal.App.4th 1022, 1059, n. 28 (2011).

This Court *is* called upon, however, to address the issue in this 2012-2013 litigation. Any construction of the reasonable equivalence standard that allows for a windfall to the charter school cannot be squared with the rule that every law must be interpreted consistent with the body of law in which it forms a part. The body of law here includes the constitutional mandate of uniformity within the public school system [Cal. Const., Art. IX, § 5], and its judicial construction to require an

educational system "open on equal terms to all." *Butt v. California*, 4 Cal.4th 668, 680-81 (1992). Indeed, the charter law was upheld only because it was deemed to meet the constitutional requirement of uniformity within the public school system. *See Bullis*, supra, 200 Cal.App.4th at 1039-40. In light of that constitutional mandate, the reasonable equivalence standard cannot be construed to shelter exclusionary practices or private fund raising that enables a semi-private school to achieve *inequality* in public education.

Since the enactment of Prop. 39, no reported decision has addressed whether a charter school that operates as a de facto semi-private school is entitled to an allocation of public school facilities under Prop. 39, or if so, whether the reasonable equivalence standard permits consideration of exclusionary practices or the private funds and resources available to the charter school students. This is an important question of first impression, and the District must be allowed to conduct reasonable discovery to develop the factual record relevant to the issue.

The District assumed in its 2012-2013 offer that BCS, despite its semi-private nature, was entitled to reasonably equivalent facilities, and the District thus has offered BCS such facilities. But should the Court find the District abused its discretion in that decision, before BCS may get relief, two additional questions must be decided: (1) whether BCS's exclusionary practices preclude it from seeking public facilities and (2) since Prop. 39 gives a charter school only the right to "reasonably equivalent," not superior, facilities [*Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 130 Cal.App.4th 986, 1001 n. 16 (2005)] whether a district's Prop. 39 offer complies with that law so long as the offered facilities, when combined with the charter school's private resources, provide the charter students with equal or greater per student resources than in-District counterparts.

These substantial new issues highlight the necessity of proceeding by a new mandate action, and the need for moderate discovery, briefing, and presentation of evidence. To accommodate BCS's desire for a speedy determination, the District has agreed to its proposed schedule.

II. CONCLUSION

The rights at stake do not belong exclusively to BCS but also involve other District students who are impacted by any facilities allocation. The District exercised its discretion to offer a

different mix of facilities for 2012-2013 based on a different student population. In making that decision, the District balanced the interests of all the students that it must educate equally. Any challenge to the 2012-2013 offer should proceed by way of a new mandate proceeding that includes consideration of evidence and argument relevant to the District's exercise of discretion, as well as all the legal issues that arise from a semi-private school's request for a "reasonably equivalent" share of public, taxpayer-funded facilities. Such due process may be inconvenient from BCS's perspective, but is essential when such substantial public rights are in dispute.

Dated: June 8, 2012

Respectfully submitted,

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