

00001

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SANTA CLARA
3 BEFORE THE HONORABLE JAMES P. KLEINBERG, JUDGE
4 DEPARTMENT NO. 1

5
6

BULLIS CHARTER SCHOOL,)

7

)
PLAINTIFF,)

8

9

VS.) CASE NO. 1-09-CV
) 144569

10

)
LOS ALTOS SCHOOL DISTRICT,)

11

ET AL.,) WRIT OF MANDATE

12

)
DEFENDANT.)

13

14

15

---o0o---

16

17

REPORTER'S TRANSCRIPT OF PROCEEDINGS

18

HELD ON OCTOBER 26, 2009

19

20

A P P E A R A N C E S:

21

FOR PLAINTIFF: ARTURO J. GONZALEZ,
ATTORNEY AT LAW

22

SUZANNA P. BRICKMAN,
ATTORNEY AT LAW

23

24

FOR DEFENSE: JOHN R. YEH,

25

ATTORNEY AT LAW

26

DONALD VELEZ,
ATTORNEY AT LAW

27

REPORTED BY: ANNETTE KAISER, C.S.R.

28

CERTIFICATE NO. 6990

00002

1

San Jose, California October 26, 2009

2

PROCEEDINGS:

3

THE COURT: Morning. On the Bullis

4

Charter School case, Counsel, can I have your

5 appearances?

6 MR. GONZALEZ: Arturo Gonzalez for
7 Morrison Foerster on behalf of the petitioner.

8 MS. BRICKMAN: Suzanna Pacht Brickman on
9 behalf of Bullis Charter School.

10 MR. YEH: John Yeh from Miller Brown
11 Dannis on behalf of the Los Altos School District and
12 superintendent.

13 MR. VELEZ: Don Velez, Miller Brown Dannis
14 on behalf of the Los Altos School District and the
15 superintendent as well.

16 THE COURT: I had an opportunity to read
17 over a good amount of these papers. I won't suggest
18 I have read every page of all the exhibits, all the
19 other materials that are here.

20 Just so everybody can lower their blood
21 pressure, I'm not making any decision today. I'm
22 going to have to take this under submission and think
23 about the issues that have been presented. I have
24 some questions for Counsel that I wanted you to
25 consider.

26 In fact, I think what I may do is hear
27 from you for a little bit, and we have to wrap this
28 up by around 10:00, but hear from both sides in a

00003

1 preliminary way. Then I will have some questions --
2 I may interrupt you with some questions, and then
3 we're going to take a brief break is my present plan
4 anyway, and during the break, I'm going to ask these
5 questions and ask you to consider them. Then I'll
6 come back out and hear from you in response to these
7 questions.

8 The questions are these. I don't want to
9 get you too distracted from your present course, but
10 question one is: What are the consequences if I
11 grant the writ?

12 Next question is: What are the
13 consequences if I don't grant the writ? I want to
14 know the practical consequences both ways here.

15 The other thought I had, and I'll talk
16 about this a little bit at the end perhaps and that
17 is whether there have been any efforts to mediate
18 this dispute by an independent, knowledgeable and
19 competent mediator.

20 The reason I mention that is we have many
21 cases in this court where the parties to the dispute

22 have an ongoing relationship. Down the street in
23 family court, there are a lot of situations like
24 that, and for better or for worse, the parties to
25 this case, as best I can determine, are going to be
26 living with each other for a long time.

27 As a consequence, it seems to me to make
28 sense to consider how the case might be resolved

00004

1 peaceably. And that may not be possible, but I would
2 strongly urge everyone to consider the possibility at
3 least of having someone independent and knowledgeable
4 try to mediate this dispute.

5 Maybe there are no grounds to do that,
6 maybe you have explored everything, but I'm also
7 frankly concerned that some of the antagonism here
8 which I sense coming through the papers may filter
9 down to the children. Maybe that's over blown, maybe
10 I shouldn't worry about that, but I have some concern
11 about that because at the end of the day, that's what
12 this is all about, isn't it? It's about educating
13 children. Young children. I don't think anybody
14 should lose sight of that.

15 So let me ask you a couple preliminary
16 questions. These are technical questions. I think
17 both sides filed evidentiary objections. What is the
18 authority by which the Court has to make a ruling on
19 evidentiary objections in the context of this type of
20 proceeding? This is not summary judgment. What is
21 the basis, if you know, off the top of your head? If
22 not, let me know at some point, please, what is the
23 authority for that. The Court is having to make
24 rulings on evidentiary objections.

25 Second sort of technical point is a
26 detailed set of findings have been presented to the
27 Court. I think BCS submitted a detailed set of
28 findings, maybe two sets one of which was over

00005

1 thirty-eight pages in length. Is that required? I
2 don't think it is, but I'd like to know if there is
3 some rationale behind that.

4 Let me make these other preliminary
5 comments now I think may be helpful to you. In
6 reading the papers here, I had the impression of two
7 ships that passed in the night. That is to say, the
8 primary thrust of the papers that are read, and I
9 could have misread them from BCS's standpoint, was

10 the primary issue being the equivalency in space and
11 usage of space and the expansion into the seventh
12 grade.

13 The school district seemed to focus
14 preliminarily and for the most part on the seventh
15 grade grade issue, seventh grade issue for 2009,
16 which I take it is now moot. So we're looking at the
17 possibility of seventh grade in 2010.

18 I have a fact question. Are the middle
19 schools in the school district seventh and eighth
20 grades or six, seven and eighth grades? Some school
21 districts are six through eight, some are seven and
22 eight.

23 MR. YEH: The middle school in the school
24 district are seven and eight.

25 THE COURT: Thank you. I had some other
26 questions. I think I have some other questions.
27 They may be answered in the presentations, and I'll
28 interrupt you if I think they are appropriate at the

00006

1 time. I'll start with petitioner.

2 MR. GONZALEZ: With the Court's
3 permission, I'm going to approach a board I put up
4 here that will help us both, I'm hoping, with our
5 presentation.

6 Your Honor, you are correct, that from the
7 petitioner's standpoint we raised two issues. One is
8 the seventh grade, the other issue is a more general
9 one which I will call space.

10 The space, you're right, from our
11 standpoint is the most important. That is why I'm
12 going to address that first. I'll get to the seventh
13 grade issue, Your Honor.

14 There are three main issues in this case
15 pertaining to space, overstating and understating,
16 that the law says, and I quoted the relevant language
17 on the board. It's a relatively simple,
18 straightforward statement. Non-teaching station
19 space that should be provided to a charter school is
20 all -- and that's the key word, A L L -- is all of
21 the space not identified as teaching station space or
22 specialized classroom space.

23 In other words, what a district is
24 supposed to do is to count the space at the schools
25 they are using as comparison schools, figure out how
26 much space is there and then give the charter schools

27 something that is reasonably equivalent.

28 THE COURT: Doesn't have to be exact.

00007

1 MR. GONZALEZ: Does not have to be exact.

2 We have never made that argument.

3 THE COURT: What is the definition of
4 reasonably equivalent?

5 MR. GONZALEZ: Reasonably equivalent is a
6 phrase that has not been identified. That is a
7 phrase that you and I and the parties together are
8 going to have to deal with.

9 We submit to you, Your Honor, is that the
10 Court should interpret reasonably equivalent as using
11 the same standard English meaning of those words. I
12 could say more or less the same thing. I want to
13 demonstrate to the Court where we have problems here.
14 I want to start with the undercount.

15 In order for the district to provide us
16 with a site that is reasonably equivalent to the
17 other schools, they have to fairly count the space at
18 the other schools.

19 I want to give you a few examples of how
20 they have not done that. The district in this case
21 has purposely undercounted the space at the other
22 schools in order to end up at a result where we are
23 in a smaller campus. Here are some equal examples,
24 all of which is in the record.

25 THE COURT: Let me -- I don't mean to
26 interrupt.

27 MR. GONZALEZ: Please do, Your Honor.

28 THE COURT: I did read the papers. I did

00008

1 see the points made on both sides with respect to how
2 the space was calculated. Black top versus concrete,
3 other space figured in in some instances and not
4 others. I understand your point on that score.

5 In fact, it occurred to me at some point,
6 I'm not saying I'm going to do this, it occurred to
7 me maybe I should go take a view of this actual
8 property. I'm not saying I'm going to do that. But
9 go ahead.

10 MR. GONZALEZ: That's an interesting
11 point. I thought the same thing. The reason why we
12 submitted so many photographs is because I agree with
13 you, it's very important to visualize what is there.
14 We tried to give you as much as a visual as we could

15 without complete burying the Court in paper. We
16 would not be opposed to a site visit.

17 Very quick examples. Santa Rita has what
18 is referred to as a park, beautiful area of grass
19 surrounded by trees. And this is Eyring declaration
20 Exhibit 10 at 1. That space was not counted. The
21 reason it was not counted is because the architect
22 was told what to count.

23 Instead of the district telling the
24 architect why don't you count all the space out
25 there, tell me what is there. How big it is, they
26 circled very limited areas, said count that. That's
27 all they counted. This big patch of grass as an
28 example was not counted.

00009

1 Same thing with Loyola. You see this
2 beautiful entry into the school? It's all cement.
3 Why have this distinction? They haven't explained
4 it. They counted the black top, but any cement that
5 is white as opposed to gray they simply didn't count.
6 These grassy areas, picnic tables in between the
7 buildings, they didn't count that.

8 Here is Covington. We thought this was
9 helpful as an overhead. Covington shows all these
10 areas between schools, these are black top areas and
11 were not counted. These grassy areas were not
12 counted. This circle, not counted. Playground
13 spaces were not counted. That is important because
14 I'll get to our playground, they are counted. Our
15 playground, not anybody else's.

16 Here is one of the other schools, Gardner.
17 You can see from this photo this huge patch of grass
18 in between the buildings wasn't counted. You see
19 this area here with a purple door that is an
20 amphitheater. That was not counted.

21 All the white cement around the
22 amphitheater is for parents to sit, put chairs out
23 there, watch your kids do a show. You have all these
24 picnic or lunch areas.

25 Almond. All the areas between the
26 buildings that you see here and that is a concrete
27 that is black top wasn't counted. This area here,
28 not counted, it's a garden the students use.

00010

1 THE COURT: Go back to Santa Rita for a
2 moment. I should advise you and other Counsel I'm a

3 parent. My kids are old people now, they are in
4 their thirties, but at one time, they were little
5 people. They went to public school in Palo Alto.
6 Palo Alto, like a lot of other school districts that
7 I have seen in California, not that I have studied
8 them in any sense, oftentimes, the schools back up to
9 a park. In other words, they are co-extensive.

10 Palo Alto, one of the elementary schools,
11 backs up to a park. The park is quite large. So it
12 kind of looks like Santa Rita, for example. That's
13 not unusual where there is sort of shared space.
14 There is other places in the Palo Alto School
15 District, same sort of thing where schools back up to
16 a park. In fact, it's very difficult to have any
17 sort of demarcation between the school and the park.
18 I'm just wondering how that factors into this
19 calculation if you will.

20 MR. GONZALEZ: Thank you, Your Honor. Let
21 me try to clarify. From our standpoint, all this
22 space should be counted because it is available for
23 the children to use. If there was a fence around
24 this space or something such that the children were
25 not allowed to use it, then obviously, I would
26 understand why it would not be counted. The district
27 has never suggested this is not space that's
28 available for the children to use.

00011

1 The architect simply didn't measure it
2 because it was not circled and because it was not a
3 playing field. Baseball diamonds would be measured.
4 This is not is your turf because the children
5 couldn't use it. I thank you for asking that
6 question for clarification.

7 What happened, Your Honor -- and we have
8 some history here. When the charter school first
9 opened, it was much smaller than it is now. So the
10 district came up with a formula for how to determine
11 how much space to provide the charter school. This
12 is their way of answering your question. When you
13 say what does reasonably equivalent mean, they came
14 up with an analysis we don't disagree with.

15 What they did, Your Honor, is they took
16 three schools to use as comparison schools, and this
17 is according to their own written policy. They have
18 a policy that says you use three schools. When
19 you're doing this analysis, you use the schools

20 closest to the charter school or the schools or the
21 charter school students would otherwise attend if
22 they weren't a charter school.

23 Then last year, they changed. This is
24 what we think is, and I'll say this gently, an
25 intentional manipulation of the system. They changed
26 the rules last year because, Your Honor, if they had
27 continued to use the same little test they themselves
28 developed, it would have shown the site we have been

00012

1 given is too small. So last year, they changed the
2 rules in a number of ways.

3 First, Your Honor, last year instead of
4 three comparison schools, they began to use five with
5 no explanation, a violation of their own written
6 policy. When we asked why did you go from three to
7 five, all they could tell us was advice of Counsel.
8 No other reason.

9 They made a couple other moves last year,
10 Your Honor, that are very significant. First, when
11 measuring the other campuses, they used to use actual
12 square footage, which makes complete sense. They
13 would go out, look at what the library is at one of
14 the comparison schools and measure it. They would
15 come up with an average size for libraries.

16 Last year, Your Honor, they changed that.
17 They threw it the actual measurements and instead
18 they started using something called standard room
19 size which is not defined anywhere in the
20 regulations, in their policies. It's something they
21 just made up.

22 So instead of looking at the actual size
23 of the buildings in the other schools, they used the
24 standard size. Here is the result of that. I'll
25 give you one example. We discussed this in our
26 details in our papers.

27 One example. The libraries at Almond and
28 Covington are thirty-six hundred square feet. So if

00013

1 one were to use square sizes, you would measure those
2 thirty-six hundred square feet and that would help
3 you determine how big of a library you have to give
4 the charter school.

5 When they switched the standard room size,
6 Your Honor, they measured them at nineteen hundred
7 twenty. Both of them. They just assumed for some

8 illogical reason the libraries were only nineteen
9 hundred twenty square feet in order to undercount the
10 size of the buildings at the comparison schools.

11 That's another way of accomplishing what they have
12 already started to accomplish by not counting stuff.

13 We have two concerns here, Your Honor.

14 One is they don't count a lot of stuff, and two, what
15 they do count they don't fairly count. They come out
16 with these standard room sizes that are completely
17 undefined.

18 They they did something else. In response
19 to your question how do we determine what reasonably
20 equivalent means, what they used to do, Your Honor,
21 what they did for the first four years we had that
22 issue is they calculated acres needed. Acres needed.
23 They calculated acres needed by looking at the size
24 of the schools they were comparing the charter school
25 to. Makes total sense.

26 Last year, Your Honor, they stopped doing
27 that with no explanation they no longer calculated
28 acres needed. We know why. If you had taken the

00014

1 three comparison schools they used historically or
2 just the three comparison schools closest to where
3 our children would attend, and if you would in fact
4 do an acres needed analysis, same analysis they have
5 done historically, you would conclude the charter
6 school needed nine point four acres of space. That,
7 Your Honor, is even without a seventh grade which I
8 will get to later. Nine point four acres using three
9 schools and acres needed.

10 If they had simply continued to do the
11 same thing they had done year after year, we would
12 have needed a site that was nine point four acres.
13 They realize that, and so they changed the rules.
14 They started using five schools instead of three.
15 They stopped using actual square footage and made up
16 something called standard room size to shrink the
17 size of the comparison schools. They stopped
18 calculating the acres needed.

19 THE COURT: Let me get practical with you
20 for a moment. Where would the school district get
21 the acreage that you maintain they need for this
22 school?

23 MR. GONZALEZ: Let me respond two ways.
24 First of all, that is not our issue today. Second,

25 let's take it head on, Your Honor. They -- the
26 reason all this started is because they closed down
27 an elementary school in this community because they
28 had too many elementary schools. Their projections

00015

1 were we don't need this school, so they closed it.

2 We then immediately went to them and said
3 all right, we will have a charter school. They said
4 no. We went to the county. They said yes. That's
5 how all this started. We initially asked them, Your
6 Honor, to give us the school they had closed. They
7 didn't need it by their own admission. It's a
8 beautiful campus. It's right here, Gardner. They
9 closed it down because they said they didn't need it.

10 Then what do they do, Your Honor, as soon
11 as we get approval from the county to have a charter
12 school and we go back to them because the county made
13 us go back to them a second time, the county did the
14 right thing, we will let you have a chance, but go
15 back one more time to the district so they can go to
16 chartering agency. The district again said no.

17 Once we asked for this facility which was
18 closed, guess what they do? They start to analyze
19 reopening the school, and they reopen it two years
20 later after they themselves say we have too many
21 schools, not enough kids.

22 Today, Your Honor, today the number of
23 students attending this school from the district, if
24 you assume the same boundary they had which they
25 closed, it's a hundred fifty-four. We have more
26 than three hundred fifty kids. We have twice as many
27 kids and they put us on this temporary site full of
28 portables.

00016

1 The answer, Your Honor, is if you were
2 acting as a mediator and sitting down with both
3 parties trying to be fair, the question you would ask
4 is, ask them, wait a minute, why don't you just give
5 them this site? And the hundred fifty kids that are
6 there? Easy.

7 Number one. We will absorb lots of them.
8 We can take some of those kids.

9 Number two. The other schools have space.

10 Number three. Let's not forget where they
11 have us. They claim the site where they have us is
12 fine for three hundred fifty kids. If it's fine for

13 three fifty, boy, a hundred fifty would be overjoyed
14 with that much space.

15 If you really want to get to the practical
16 answer, Your Honor, that is it. The charter school
17 should be here. The hundred fifty kids, we'd absorb
18 lots of them. The others could be sent to the other
19 schools and then they have the campsite where they
20 have us.

21 It's not an issue of them not having the
22 space, Your Honor. That's not an issue. You know
23 what it is? It's really a political issue. You're
24 right. What we should be thinking about, you hit the
25 nail on the head. What we all should be thinking
26 about is what is in the best interest of these kids.

27 That's not, we submit, what the district
28 is thinking about. The district is thinking we don't

00017

1 want to encourage charter schools because when we
2 have charter schools we lose control and we lose
3 funding and they don't want that. That's why they
4 are fighting us every step of the way.

5 When we wanted to expand to seventh grade,
6 the district actually showed up at the county and the
7 superintendent spoke out against it. Why? Because
8 they are threatened by this school.

9 THE COURT: Well, again, I'm not nearly as
10 knowledgeable about this as all of you are. You have
11 lived with this issue for some time, but I can take
12 judicial notice of the current economy which is
13 terrible.

14 I can also take notice, I believe, from my
15 own experience, and I don't think anybody could
16 contest this, that one of the most difficult things
17 for school districts, public school districts is to
18 figure out what the needs are for the district at any
19 point in time, what the attendance levels will be,
20 how many kids there will be, how many school sites
21 are needed, how big the school site should be. This
22 is a tough problem, a very tough problem.

23 How are they going to come up with the
24 money to fund all these different sites? Those are
25 very practical concerns.

26 So I hear what you're saying, but I think
27 there are some practical concerns that are legitimate
28 on the other side here. I guess from your

00018

1 perspective, you can say it's politics. I think it's
2 also -- as I'm hearing this and reading these papers,
3 I think there is a very practical side to this, too.

4 MR. GONZALEZ: Let me follow up on that.
5 At no point has the district suggested that we cannot
6 have the Gardner school site because of some
7 financial reason. That's never been an issue, never,
8 Your Honor.

9 So what the law says is that they must
10 provide us with space that is reasonably equivalent.
11 Period. What you cannot do, Your Honor, and this is
12 critical, what you cannot do -- even if we assume
13 hypothetically there was a financial issue here, you
14 cannot short change two charter school kids because
15 you cannot afford to serve them. That we cannot do.
16 The legislature is clear on that point. They are to
17 be treated fairly.

18 If there is any type of financial
19 suffering, if you will, issue, it should be spread
20 evenly across the board. I think everybody would
21 agree with that. There is no evidence before the
22 Court whatsoever that there is a financial reason why
23 they have to keep us on this campsite. Never been
24 their argument.

25 Two more points very quickly in terms of
26 the space and in terms of what they have done
27 recently in order to undercount the space, the other
28 schools, so they can keep us on this small site.

00019

1 They actually measured the space of these other
2 schools right from the beginning when we first asked
3 for a charter school.

4 What happened last year and this year is
5 those numbers were all reduced. The amount of black
6 top, amount of turf at the other schools, they
7 reduced the numbers as though the schools shrank with
8 no explanation.

9 Two quick examples. At Almond, the turf
10 was reported for the first four years to be one
11 hundred fifty-nine thousand square feet. Last year,
12 the turf suddenly shrank from a hundred fifty-nine
13 thousand to a hundred thirty-two. We have asked them
14 why they have given no explanation.

15 Santa Rita, we figured this one out
16 partially. This year, the black top at Santa Rita
17 shrank by ten thousand square feet. When we took the

18 deposition of the architect, Your Honor, he produced
19 some e-mails that showed he was told what to measure.
20 Items were circled. He gave the district his
21 measurements and then he was told to change the
22 measurement for the black top.

23 This is in our reply papers. He changed
24 the measurements by reducing the black top by ten
25 thousand square feet. We asked a very simple
26 question. Why did you do that? What was it? Did he
27 make an error? No. Why did he reduce it by ten
28 thousand square feet? He doesn't recall. It's an

00020

1 unanswered question and explains, Your Honor, why all
2 these numbers they are reporting to the Court are
3 suspicious because they are intentionally
4 undercounting and changing the rules.

5 Let me change to what they did count.

6 THE COURT: I don't want to cut you off,
7 but we have limited time. I want to hear from you on
8 the seventh grade issue.

9 MR. GONZALEZ: This will take one minute.
10 Then I will move to the seventh grade.

11 THE COURT: I think I have seen this
12 chart.

13 MR. GONZALEZ: You have, Your Honor. I
14 want to call your attention -- it's critical. All I
15 will say about what they did count is by their own
16 admission, what they did count, they counted
17 incorrectly. They substantially undercounted in
18 their offer of facilities to the charter school.
19 They say we're giving you fifty-three thousand square
20 feet of black top. The architect admits it's forty
21 thousand.

22 They say we're giving you eighty-seven
23 thousand. The architect says it's eighty thousand,
24 and by the way, a big chunk we only get two days a
25 week. You can't count a hundred percent we can only
26 use two days a week. If you factor in that issue, it
27 is down to sixty-four thousand.

28 I'll move on to the seventh grade. They

00021

1 don't count it all. They change the rules. What
2 they do count they count incorrectly by admission of
3 their own architect.

4 Seventh grade briefly. You were right,
5 Your Honor, that to a certain extent one could argue

6 the issue is moot because it is too late to get a
7 seventh grade. It's not moot. Legally, the issue
8 could arise again. In other words, they can continue
9 to just deprive us of seventh grade facilities.

10 All say about that is the law is clear on
11 what you must do. We did everything the law requires
12 in order to request seventh grade facilities. They
13 didn't give us those facilities because they say we
14 saw something in a newspaper article. It wasn't even
15 a quote. It was something in a newspaper article
16 they say they saw.

17 After that was written, we, Morrison and
18 Foerster, wrote two letters explaining wait, we want
19 a seventh grade facility. They still didn't provide
20 that.

21 THE COURT: Here is the question that will
22 show my ignorance about this, I apologize. The
23 seventh grade, why would this school have a seventh
24 grade? In other words, it's K through 6 as an
25 elementary school, am I right?

26 MR. GONZALEZ: The charter school has the
27 discretion to go to K to 8. There are many charter
28 schools in California that are K to 8 including the

00022

1 school my son attends, Kipp in San Leandro. There is
2 nothing inherently wrong with a charter school asking
3 for a seventh grade.

4 THE COURT: Where would the kids go after
5 seventh grade?

6 MR. GONZALEZ: Eighth grade.

7 THE COURT: Some middle school for one
8 year?

9 MR. GONZALEZ: No, Your Honor. The plan
10 has always been for the charter school to add a
11 seventh grade first and then the next year add an
12 eighth grade. So we'd have a K to 8 facility.

13 THE COURT: None of the other schools in
14 this district have K to 8; is that right?

15 MR. GONZALEZ: I don't believe so, Your
16 Honor, I don't believe so. I don't think that's
17 relevant, respectfully. I don't think that precludes
18 a charter school from K to 8. They have never argued
19 that.

20 We asked for a seventh grade facility.
21 They are obligated under the law to provide us with
22 that. There is nothing in the law that says oh, no,

23 you can't have one because our other schools are only
24 K to 6. Nothing in the law to suggest that. That's
25 not been their argument.

26 They didn't provide us with seventh grade
27 facility for one simple reason. They don't want the
28 school to grow because they know already the site

00023

1 they have given us is too small. They'd like to keep
2 us there. They are hoping their parents surrender,
3 get frustrated and give up, maybe not even proceed.

4 They are obligated to give us a seventh
5 grade facility. They can't say we saw something in a
6 newspaper. What next, they heard a whisper in the
7 hallway? If somebody makes a written request for
8 facilities, you must respond.

9 When they failed to provide us with
10 seventh grade, we wrote to them twice and said we
11 want seventh grade facilities. They still didn't
12 give them to us. That's wrong. They can't do that.

13 Couple more quick points and I'll sit
14 down. There are a number of other sub issues, if you
15 will, in this case that are actually quite important.
16 You asked about mediation, Your Honor. We certainly
17 don't have any problem talking to someone, but we
18 think we need guidance from the Court. Without
19 guidance, I don't think mediation is going to get us
20 anywhere.

21 Couple examples. They have a huge piece
22 of turf they claim is available for us to use and
23 they count one hundred percent of it. They count one
24 hundred percent two ways. They count one hundred
25 percent of this turf in terms of how much turf they
26 have given us for the Proposition 39 analysis and
27 also charge us for all that space. We can only use
28 it two days a week.

00024

1 There is a fence around the turf with a
2 locked gate on the other three days. Our kids can
3 only use it two days per week. They should only
4 count forty percent of that turf. They should only
5 charge us, Your Honor, a forty percent fee for that
6 turf.

7 That is a sort of issue we need resolution
8 on before we think these issues can be resolved
9 because that's what we're up against. That's what
10 we're up against. They give us the turf, count a

11 hundred percent, say you can only use it two days out
12 of the week.

13 Another issue briefly, then I will sit
14 down and address any questions the Court may have.
15 I've explained in the papers, Your Honor, all these
16 other schools have amphitheatres. All have
17 facilities for before and after school child care.
18 They have parent PTA rooms.

19 When we asked why we don't have those
20 facilities, this was the response. It's one line.
21 I'll read to you. This is from the final offer of
22 facilities. They say:

23 Mr. Gonzalez's letter points to facilities
24 that BCS believes it's entitled to but
25 that fall outside those contemplated by
26 the regulation, including a parent teacher
27 room, before and after care facilities,
28 covered walkways, concrete or black top

00025

1 lunch areas and amphitheatres.

2 This is why we need help from you. They are
3 saying all those areas fall outside the regulation I
4 showed you which says you're supposed to count all the
5 space. We're arguing with a brick wall here. We point
6 out to them there is this regulation that requires you
7 to count everything. We point out all the other schools
8 have all these things we don't have. All they say is
9 well, those fall outside of the areas contemplated by
10 the regulation.

11 Last point. Because we don't have a
12 multipurpose room -- because we didn't have one, the
13 parents got together, raised money and built their own
14 facility. They now count that as space they have
15 provided us. They cannot do that. The regulations are
16 clear that when you provide space to a charter school,
17 you, the district, still object to it. Obviously, they
18 cannot object to something we built and they admit and
19 agree we object.

20 Not only do they count it, Your Honor, they
21 charge us for it. They charge us a facility fee for
22 that multipurpose room even though we have agreed to
23 contractually be responsible for it. We think that's
24 wrong. Those are the types of issues we need the Court
25 to resolve so we can make some progress. Unless the
26 Court has questions --

27 THE COURT: Not at this time. Thanks,

28 Mr. Gonzalez.
00026

1 Mr. Yeh.

2 MR. YEH: Mr. Gonzalez made a statement
3 that stood out to me that's very interesting that I
4 vehemently disagree with and that is the term
5 reasonably equivalent is not identified or defined in
6 the regulations. We have almost twenty pages of
7 regulations that were adopted by the State Board that
8 define what are reasonable equivalents. I'd like to
9 emphasize to the Court Prop. 39, Education Code
10 47614.

11 Under Prop. 39, the term isn't absolutely
12 equivalent. The term isn't categorically, it's
13 reasonably equivalent. Their overarching theme the
14 district has argued in its papers and will argue
15 today is that the district has discretion in terms of
16 determining what is reasonably equivalent. I would
17 submit to you, Your Honor, that if you interpret
18 Prop. 39 in a way Counsel urges, there could never be
19 any way for a school district to insulate itself from
20 liability.

21 I'm going to walk through some of the
22 specifics on that.

23 First of all, in terms of the teaching
24 space issue, it is important to remember that the way
25 that the charter school pleads its petition paragraph
26 67 is that the respondents have a mandatory,
27 non-discretionary ministerial duties to interpret
28 Prop. 39. That can be hugely significant in the

00027
1 context of this case.

2 We cite authority on page 15 of our first
3 written opposition that sets forth and defines what a
4 ministerial duty is. There is only one outcome
5 possible and provided under the law. As you can see
6 in this situation, the Prop. 39 regulations don't
7 provide for just one outcome under the law. Let me
8 show you how.

9 In terms of non-teaching space, and there
10 is a quote up there on the first exhibit that quotes
11 from the -- partially from the regulation, and the
12 second part is left off. I'm going to include the
13 second part for the record.

14 Essentially, as Your Honor acknowledged,
15 the charter school is demanding basically down to the

16 square foot that each unit of ADA, which is fancy
17 school talk for a student -- basically based on
18 attendance, each student or ADA receives their pro
19 rata square footage of non-teaching space. That
20 interpretation is undermined by Prop. 39 regulations.

21 The Prop. 39 regulations, this is all they
22 say in terms of quantity of teaching space.

23 The school district shall allocate
24 non-teaching space on a per student amount
25 of non -- per student amount of
26 non-teaching space. Per statute amount.

27 That gives a guideline that does not indicate
28 to the parties they have to hire an aerial airplane and

00028

1 take photos of the shot, run it through some program and
2 figure out the last square foot how much turf and black
3 top area to give them.

4 I think Your Honor has already acknowledged
5 the practical and practicality of that. If a school
6 district finds it is forty square feet short of black
7 top, what does it do? They don't come like puzzles and
8 insert and take out pieces interchangeably. They are
9 parameters and these areas are fixed in nature.

10 This is the second part of the argument in
11 terms of non-teaching space. These regulations we
12 have -- in some instances, they haven't done us any
13 favors because the language is not clear, but what it
14 does, it gives examples, specific examples of
15 non-teaching space, including, but not limited to,
16 administrative space, kitchen, multipurpose room and
17 play area space.

18 So it's a canon of statutory instruction you
19 take -- interpret that to mean to extend that to the
20 type of facilities that are like kind and like manner.
21 That would include some of the other teaching,
22 non-teaching space the district has offered the charter
23 school, black top play area space and kindergarten
24 space.

25 I don't think it's a reasonable reading of
26 these regulations to say the district has to go to every
27 single comparison group school, measure an area walkway,
28 patch of dirt, patch of grass, patio area and include

00029

1 that in the calculation. I think that goes well beyond
2 what Prop. 39 establishes as a ministerial duty to
3 provide non-teaching space.

4 Second point. I'd like to briefly address
5 the point on comparison group schools and the board
6 policy that the charter school sites in support of its
7 argument was a board policy that was based on the
8 previous versions of Prop. 39 regulations. There is
9 also a provision in those policies the parties shall
10 follow the Prop. 39 regulations in determining all
11 matters related to Prop. 39.

12 If you look closely at 5 CCR 11969.3, that
13 provision tells you how you to determine the comparison
14 group schools. They are not, I would submit to you,
15 models of clarity in terms of legislative drafting. I
16 think we have enough of a direction here that BCS is
17 contending the district should use only three comparison
18 group schools.

19 However, the section that subsection 3 that
20 requires that starts out with the phrase:

21 For school districts whose students do not
22 attend high school based on attendance
23 areas.

24 As Your Honor as acknowledged, the Los Altos
25 school districts runs K through 8 and doesn't include
26 high school. However, the evidence shows that its
27 students do attend high school based on high school
28 attendance area. Therefore, the test under subsection 2

00030

1 would apply.

2 Subsection 2 does not apply a cap in terms of
3 the number of comparison group schools. If you look at
4 the districts -- this has been spelled out for the
5 charter school, it's not a new argument. If you look at
6 the district's offer of facilities for the previous
7 school year 2008-2009 which is attached to the -- as
8 Exhibit 5 to the David Spectre declaration, the district
9 explains that the district, even though it doesn't have
10 or operate high schools, is divided into high school
11 attendance areas. Therefore, you would use -- the
12 process to use would be sub 2 which does not place a cap
13 on the number of comparison group schools.

14 THE COURT: I hear what you're saying. Let
15 me ask you this. Mr. Gonzalez made an issue in his
16 papers as well about the change in the calculations, the
17 change in how the calculations were done. Can you tell
18 me why the change in the methodology of doing the
19 calculations, why was that change made? What was the
20 reasoning behind that?

21 MR. YEH: I don't think there was -- I
22 think in general, the methodology was the same in
23 terms of taking a group of comparison group schools
24 and measuring certain non-teaching spaces that were
25 common to those schools. That approach has been in
26 effect since 2003.

27 What you did, I would submit, you did have
28 a number of changes that took place starting either

00031
1 in '08 '09 or '09 '10. We did have the Prop. 39
2 regulations revised.

3 In terms of the -- more pertinently, in
4 terms of some of the measurements that were made,
5 this is in the second declaration of Randy Kenyon we
6 submitted up through '07 '08 school year, Mr. Kenyon
7 relied upon the measurements of the district's
8 construction manager who is no longer with the
9 district.

10 That person -- so that person is no longer
11 available. Starting in '08 '09, he went to what I
12 would consider the best source, the architect who
13 actually did design work in all these sites and asked
14 the architect to come up with a measurements on these
15 three key areas.

16 As you can tell from the papers, in
17 theory, Bullis Charter School has the district
18 through Mr. Kenyon sitting behind the scenes
19 manipulating numbers to short change space. None of
20 that is borne out by the evidence. You see a
21 declaration from the architect on which the district
22 relied. He's professional architect. We produced
23 him to deposition for to the charter school. He is
24 very transparent in producing everything we had to
25 Your Honor.

26 Fact is Mr. Kenyon relied upon his
27 professional judgment. He didn't go out there with a
28 tape measure and intentionally exclude certain areas.

00032
1 I would submit as well Prop. 39 under the Ridgecrest
2 versus Sierra Sands case gives the district some
3 degree of discretion in coming up with these
4 measurements.

5 THE COURT: I'm sorry to distract you.
6 You mentioned the Ridgecrest case. There is that
7 case. What other case or cases -- I'll ask this of
8 the other side as well -- do you think are

9 particularly helpful to the Court in deciding this
10 issue? Is there another case besides Ridgecrest?

11 MR. YEH: I litigate Prop. 39 quite a bit,
12 and because this is a relatively new area of the law
13 that took effect basically with the 2001 school year,
14 there are only a small number of published appellate
15 cases not directly on point. We don't have a
16 situation interpreting the space issue or the seventh
17 grade issue. I can count the cases in one hand.
18 They deal with different issues.

19 I would like to point you to page 15 of
20 our brief, citation cases. We cite American
21 Federation of Teachers versus Pasadena Unified that
22 talk about ministerial duty as well as the
23 regulations.

24 I think there is more than adequate
25 guidance for the Court to determine the issue of
26 whether the district, one, had a ministerial duty as
27 urged by Bullis Charter School, or two, whether the
28 areas they are complaining about fall within the

00033

1 district's discretion. I would urge the closest case
2 we have on that is Ridgecrest versus Sierra Sands.
3 It's the district's discretion.

4 Two. The second point is that you have a
5 lot of smoke and mirrors and a lot of fancy evidence
6 here, but what BCS is should go over is the words on
7 the page. If you look at the -- couple of instances
8 here. We are all doing battle over just a handful of
9 words which Your Honor can appreciate because you
10 probably do that daily, but the per student amount of
11 non-teaching space, that's all we have to object to.

12 I would submit if we take by analogy the
13 method for determining the number of classrooms to
14 allocate to the charter school where the regulations
15 intend to provide a quantitative specific formula for
16 determining that they do so.

17 If you look at the capacity under 11969.3
18 A-1, the methodology is use teaching stations, not
19 square footage per ADA. They tell you where to go to
20 determine the number of teaching stations. That's
21 SAB 50 filed with the State Allocation Board. That
22 is closer to creating the ministerial duty than the
23 phrase per student amount of non-teaching space.

24 I would submit to you if you try to create
25 a ministerial duty, every last square inch, nook,

26 cranny and water fountain would have to be torn out
27 and moved to the charter school campus. We'd be here
28 seeing you every day if that's how Prop. 39 were to

00034

1 be interpreted.

2 On the issue of site acreage, the ironic
3 thing about it, given the amount of effort and
4 resources, the charter school -- the word acreage
5 doesn't appear in the regulations. The only
6 authority that's been cited by either side on the
7 issue of the site acreage is in 5 CCR 11969.3 C.

8 Then again, we're down to three words.
9 There is a list of things the district shall consider
10 when determining the condition of comparison group
11 site. The first one under capital letter A is school
12 site size.

13 Importantly, that is under the heading of
14 condition, not capacity, but condition. They are
15 arguing ministerial duty on the part of a school
16 district to provide a pro rata share of acreage per
17 student and while ignoring the fact that if you look
18 at the regulations, they don't come close to
19 requiring that. I think as Your Honor indicates, the
20 acreage of a school site is the hardest thing to
21 change.

22 If you find out that you're half a acre
23 short, what do you do? You can't declare eminent
24 domain on the street. I don't think the State Board
25 intended for school districts to be boxed in in this
26 manner. The overarching legal requirement is
27 reasonably equivalent, not exactly or categorically
28 equivalent.

00035

1 I would like to talk about some of the
2 photographic evidence that's been put before you. I
3 will cut to the chase. One thing, if you look at
4 that graph up there, there is one thing Bullis
5 Charter School hasn't brought to your attention I
6 think that's crucial. If I were submitting that, I
7 would go to Kinko's and in addition, slap on the
8 right end, I would add these figures as well.

9 These are the figures that the charter
10 school's personnel came up with when they looked at
11 the aerial photo of the shots and created the auto
12 CAD files. This is attached to as Exhibit 6.1 to the
13 declaration of Edward Smith. The charter school's

14 figures for the black top, fifty-three thousand two
15 hundred forty-one square feet.

16 I should not -- for the Court, there is an
17 area, a sand box area that is adjacent to both the
18 black top and turf, and the boundary in one instance
19 one drawn one way and in another instance drawn
20 another. That may provide for some of the variation,
21 but I would submit to you it's not really a hugely
22 significant factor.

23 The turf comes out to forty-six thousand
24 five hundred seventy-nine and the soccer field comes
25 out to thirty-six thousand two hundred four. The
26 kindergarten area turf is measured at seven thousand
27 seven hundred eighty-seven square feet.

28 BCS hasn't brought this to your attention.

00036

1 If you put those numbers up there, in three of the
2 four cases, those numbers are larger than the
3 district's measurements, both the original and
4 corrected once as well.

5 The point here is that by BCS's own
6 measurements, if they are arguing the measurements
7 are undershot at the comparison group schools, their
8 measurements overshoot at Bullis Charter School.
9 That's their own space, turf. Factor that in as
10 well. We have not only some variation, but we come
11 closer to meeting the reasonable equivalent in terms
12 of the square footage of the space they are asking
13 for.

14 THE COURT: I don't want to rush you. I
15 would like you to wrap up as quickly as you can and
16 talk, if you want to, with respect to this seventh
17 grade issue as we have discussed this morning.

18 MR. YEH: The seventh grade. This is a
19 matter of credibility. Mr. Gonzalez keeps saying we
20 relied upon the whisper in a hallway or relied upon
21 an article in the newspaper. What he doesn't mention
22 and what is in the record are the Bullis Charter
23 School's own board minutes, official record of their
24 action taken on December 1, 2008.

25 Then I think this is really a matter of an
26 attempt to manipulate through clever word play. The
27 language of the resolution reads:

28 As you can tell from the papers, we're

00037

1 sitting here in December of '08 and there

2 is a motion to delay seventh grade to no
3 later than 2010 2011.

4 If you look at that from a common sense point
5 of view, if you are sitting there in December of '08,
6 there is only one point to delay to, that's 2010.

7 The next school year next -- beginning of the
8 school year is 2009. That's not a delay. I think what
9 they are asking you to do is defy common sense. All the
10 circumstances indicate that this was nothing more than a
11 charade to try to claim extra space from the district.

12 To me, the most damning think about that is
13 that the significance of the date December 1 that has --
14 that date has -- is significant under Prop. 39
15 regulations as well. That's a date by which a district
16 has to give the charter school written objections of the
17 charter school's projections. That document is in the
18 record.

19 I would submit this doesn't give the right to
20 a charter school to add projections to grade levels
21 after the December 1 deadline and deprive the district
22 of the ability to make its own determination and
23 assessment of whether the charter school intends to
24 offer seventh grade. If you look at all the evidence we
25 point you to, there is no objective indications they
26 intended to open seventh grade, and we have the parent
27 petition and newspaper article showing why. There was
28 significant parent opposition to it.

00038

1 I think what the charter school is trying to
2 do is have it both ways. Speak outside of their mouths
3 telling us they are doing it. That is the bottom line.
4 Simple as that.

5 I'll close on one issue. Interesting choice
6 of words by Mr. Gonzalez is this is a political issue.

7 If you dig into the annals of constitutional
8 law, you will find I agree this is driven by politics.
9 If you look at the laws and regulations, you will see
10 there is nothing actionable against the district and
11 that the charter school's interpretation of Prop. 39 is
12 completely out of line with not only the case law, but
13 the ministerial duty and obligations created by the
14 regulations.

15 I'm short on time. I have many other things
16 to address which I'd like to do so, Your Honor.

17 THE COURT: I want you to understand that
18 lawyers love to talk and I love to hear lawyers talk,

19 but you have, both sides, have submitted very, very
20 detailed papers on this matter.

21 There used to be a now retired Judge of
22 this Court who would begin the law and motion
23 hearings by looking at the sea of lawyers and say to
24 them, are you proud of your papers? The lawyers
25 would sit there and stand there and think how do I
26 answer that question.

27 I'm sure you're proud of your papers. I'm
28 sure the other side is proud of their papers. Having

00039

1 looked through them, I can see why. I think they are
2 very well done on both sides. Don't be dismayed by
3 not being able to talk for hours and hours on this
4 case. The talking is in the papers. I understand
5 that for sure.

6 MR. YEH: I wanted to point out for the
7 record, if there is a point we're not able to speak
8 on, we're not waiving or conceding it.

9 THE COURT: I understand. Let me say
10 also, I'm not inviting this and it's unlikely, but it
11 is possible that after thinking about this more and
12 looking at the papers again, I may want you to come
13 back to address particular issues. I'm not saying
14 I'm going to do that, but it is possible.

15 MR. YEH: I'll submit, but one point I
16 can't leave unaddressed, the Gardner site, the one
17 closed and reopened. Obviously, these times of tight
18 financial resources, the district has to -- and I
19 know you understand this -- the district has to be
20 really vigilant in maintaining its facilities.
21 Obviously, real estate is expensive. The law gives
22 the district the discretion here to do what it did
23 with respect to the Gardner site.

24 THE COURT: Mr. Gonzalez.

25 MR. GONZALEZ: Very briefly, Your Honor.
26 Couple things. First of all, there are a lot of
27 straw men here. I want to make it clear this is not
28 a case, as Counsel said, we're not arguing that you

00040

1 need to measure everything down to the last square
2 foot. That has never been our point.

3 Our point is there are tens of thousands
4 of square feet of space not being measured at all. I
5 also want to point one other thing out to you. You
6 asked me, does the law define reasonably equivalent.

7 The answer is, as I told you earlier, there isn't any
8 one sentence I can point you to.

9 However, this section that we have here on
10 the board, the entire section gives guidance as to
11 how we can determine whether the facilities provided
12 are reasonably equivalent.

13 So when you're asking yourself if I'm
14 trying to be fair to the charter school and give them
15 reasonably equivalent facilities, what should I do,
16 what you should do is what you're required to do by
17 this regulation is to count all the space, which they
18 have not done. They mention a couple examples, we're
19 off by forty square foot. We're going to be tearing
20 out drinking fountains. That's not this case,
21 nowhere near this case.

22 They didn't answer your question about the
23 change. You asked a simple question. Why did you
24 change. They never explained why they stopped
25 calculating square feet needed, why they went from
26 three to five schools or suddenly dumped the actual
27 measurement and went to the standard room size. They
28 never explained that.

00041

1 They made a reference, Your Honor, to the
2 black top that was measured by Mr. Smith. Two
3 points.

4 Number one. Mr. Smith makes it clear he
5 has included the black top in his measurements that
6 is underneath the multipurpose room that's more than
7 four thousand square feet.

8 Number two. If you look at his
9 measurements, Exhibit 6, he included the kiddie play
10 area.

11 With respect to that black top issue
12 again, they overlook the point we have made which is
13 they have undercounted the black top to begin with.
14 They don't address that. They don't address why the
15 black top measurement dropped by ten thousand square
16 feet at Santa Rita or all the measurements at the
17 schools suddenly dropped dramatically last year.

18 The only thing they say to Your Honor that
19 comes anywhere near an explanation as to why these
20 numbers changed suddenly last year, they say well, we
21 used to use the measurements of a construction
22 manager, but then we went to the architect, told him
23 to go out and measure.

24 What they failed to point out is, when
25 they told the architect to go measure, they were very
26 narrow in terms of what they told him to measure. We
27 submit this is part of our supplemental reply. We
28 were able to find two of the documents.

00042

1 What they did is simply circled in red
2 certain portions of the campus they wanted the
3 architect to measure and that's all the architect
4 measured. That's why the numbers dropped. Not
5 because the architect corrected a prior error, but
6 because the architect was asked to measure only
7 certain limited parts of the campuses so the campuses
8 would appear smaller.

9 They haven't explained why they did that
10 or why that complies with the law. Why is it that
11 you only ask the architect to measure very discrete
12 parts of these schools. Why didn't you ask him to
13 measure all the space as required by the regulations?

14 Your Honor, even if you assume their
15 numbers using their calculation, we're entitled to a
16 site that is nine point four acres. That is not even
17 counting a seventh grade. It is undisputed the site
18 they have given us counting only forty percent of the
19 turf we can only use two days a week is only five
20 point six acres. It is far too small.

21 THE COURT: Where is the other acreage
22 going to come from?

23 MR. GONZALEZ: Your Honor, I come back to
24 this point. That issue is not before this Court,
25 number one, but number two, if you want my answer,
26 I've given you the answer, the school they reopened.
27 The school they reopened is more than big enough for
28 the charter school. Those students can be absorbed

00043

1 by the other schools and the campsite. We've got
2 more students than they do. Yet, they keep us on the
3 campsite. They insist to you here that's an adequate
4 facility.

5 Your Honor --

6 THE COURT: I'm sorry to interrupt you,
7 Mr. Gonzalez. Going back in time -- this may not be
8 an appropriate question, but going back in time when
9 the school was closed, the Gardner school was closed,
10 correct? The students from the Gardner school or the
11 parents of those children had the option of these

12 children all going to spread them around these other
13 schools?

14 MR. GONZALEZ: I assume that's correct.
15 Respectfully, Your Honor, I don't think that's
16 relevant. I don't think we can say well, I don't
17 know what the charter school kids are going to be
18 playing on if you chose a charter school. They can
19 go to these other schools which are all nice.

20 I understand why you're asking the
21 question, you're trying to be practical, and I'm
22 trying to be legal and practical, Your Honor.
23 Charter school has a right to exist. They have been
24 chartered by the County Board of Education. The
25 California legislature has recognized charter schools
26 are good because it makes the districts compete with
27 the charter schools.

28 That's what we want. We want competition.

00044

1 We want people to think of new ideas and new ways to
2 educate children.

3 One issue we don't disagree with, it's a
4 great school, Your Honor. It's an outstanding
5 school. You said yourself we should be thinking
6 about the education of these kids. They are
7 receiving an outstanding education at this charter
8 school. The only problem we're having is we don't
9 have enough space. We don't have enough space for
10 them to play. Don't have facilities the other
11 schools have we should also have.

12 THE COURT: On the seventh grade issue,
13 what do you want the Court to do with respect to that
14 issue? Because 2009 is obviously moot.

15 MR. GONZALEZ: What I want the Court to do
16 is declare the district should have given us seventh
17 grade facilities so that when the time comes, and the
18 time is right around the corner, Your Honor, when we
19 have to ask for facilities for next year, and when we
20 again ask for seventh grade facilities, this Court
21 should make it clear you have to give them those
22 facilities. The legislature has provided a remedy to
23 them.

24 This whole business about this is some
25 charade for us to get more space for K to 6. We
26 didn't mean seventh grade. Look at the declarations
27 we have filed, Your Honor. They did an enormous
28 amount of work in order to lay the foundation for

00045

1 seventh grade program including working with people
2 from Stanford. It is incredibly impressive advising
3 intermediate schools throughout the state.

4 They were ready for a seventh grade
5 program. We need you to tell them they should have
6 give us us those facilities. Otherwise, we will be
7 here next year.

8 THE COURT: Where are the facilities going
9 to be? You have five point oh six acres you told me
10 should be, you think, nine point four. Where is the
11 seventh grade going to sit?

12 MR. GONZALEZ: Your Honor, I'm going to
13 give you the same response. I'm being candid with
14 you. That is not our issue for the day.

15 Having said that, I can tell you the
16 seventh grade students and even the eighth grade
17 students would all fit on the Gardner site. They
18 previously closed the site and it would be big enough
19 for all the students we currently have and to absorb
20 seven and eight.

21 There is a easy solution if they are
22 candid, honest and trying to provide us with
23 reasonably equivalent facilities. I have one other
24 sentence I want to read you, and then I'd like to
25 answer any questions you may have. There was a
26 statement made a school site size doesn't matter. I
27 don't know how they can possibly say that, that it
28 doesn't matter. Ridgecrest says it does.

00046

1 Ridgecrest says at page 1000:
2 School site size is also one of the
3 factors considered in determining whether
4 a cite is reasonably equivalent.
5 You asked me what it means, Your Honor.
6 There is partial answer. One of the factors we have we
7 take into consideration is the size of the site, and the
8 size of the site they have given us is half the size of
9 these other schools. That is one factor the Court
10 should take into consideration. It's relevant. I would
11 rather answer your questions than talk.

12 THE COURT: Here is where we are. At the
13 beginning of the session this morning, I mentioned
14 these two questions, and I'm happy to take a break
15 and let you ponder them and think about them for a
16 minute. In fact, I think we should do that.

17 That would be, what are the consequences
18 if I grant the writ and what are the consequences if
19 I don't grant the writ? Why don't you ponder that
20 say for five or seven minutes. We will resume around
21 10:15 and we will wrap it up at that point for today.
22 (WHEREUPON, the morning recess was taken.)
23 THE COURT: I'll start with petitioner.

24 Mr. Gonzalez.

25 MR. GONZALEZ: I'd like to address the two
26 questions you posed before the break. What are the
27 consequences of the Court granting the writ? If the
28 Court grants the writ as requested, then going

00047

1 forward, I would hope the relationships between the
2 parties would improve because you would resolve many
3 of the issues that have been at issue for quite some
4 time.

5 Can they actually count the multipurpose
6 room we built in the space they give us? Can they
7 charge us for that multipurpose room even though
8 contractually we have agreed we're responsible for
9 it? Can they count one hundred percent of the turf
10 that is shared or, as we argue, should they only
11 count the percentage we're allowed to use, forty
12 percent, two school districts.

13 Many of those issues should be resolved to
14 clear the path, if you will, so we can move forward.
15 In moving forward, we're not asking you today, Your
16 Honor. This is why I tried to keep this train on
17 track. We're not asking you today to award us any
18 specific site. We're not doing that.

19 What we're asking for is a ruling from the
20 Court that the site they have isn't good enough. The
21 site they have right now, this temporary portable
22 building campsite doesn't comply with the law. That
23 is not reasonably equivalent to what the children in
24 the rest of the district get. Then we can go back to
25 the drawing board.

26 I'd be more than happy to go back with a
27 mediator and sit down and try to do something fair.
28 I want to read one line to you from Ridgecrest which

00048

1 addresses your question, what are the parties to do.
2 The parties obviously are to go back and reevaluate
3 what reasonable equivalency means because we have a
4 huge difference of opinion as to what it means.

5 In Ridgecrest, they said this, helping
6 answer your question. This is page 1001.
7 We interpret reasonably equivalent and
8 shared fairly to mean that, to the maximum
9 extent practicable, the needs of the
10 charter school must be given the same
11 consideration as those of the district run
12 schools.

13 The same consideration, Your Honor. They are
14 not to look at us as a thorn in the side. They should
15 look at us as another school they need to accommodate
16 with the facilities they have. The question becomes how
17 can we best do that in a manner that is reasonably
18 equivalent.

19 And one other sentence I would like to read,
20 Your Honor, because it is important and responsive to
21 your question. The Court in Ridgecrest at page 1006
22 also said this:

23 We have little doubt that accommodating
24 the charter school's facilities request
25 will cause some, if not considerable,
26 disruption at this location among the
27 district's students, staff and programs.

28 In other words, this addresses some of the
00049

1 comments the Court made. It is not adequate to say
2 well, we don't really have a facility open, available to
3 give to them. We have to move some kids around, so
4 we're going to keep them on the campsite.

5 You cannot do that. You have to provide
6 these kids with facilities that are reasonably
7 equivalent. If that means having to move other kids, so
8 be it. Then if you have to, we have to. That's fair.
9 But what they cannot do, Your Honor, is keep us on this
10 site.

11 The second part of your question, what
12 happens if I deny relief. If you deny relief, Your
13 Honor, then we stay on this temporary campsite with
14 nothing but portables, even though it is clear, I
15 believe, respectfully, to anyone who is fair, it's clear
16 from the photos this site is not reasonably equivalent
17 to the other schools where they say they can keep us.
18 What happens if we say give us a seventh grade, we will
19 add another portable?

20 They will keep charging us for the building
21 we built even though we're responsible for maintaining

22 it. They will continue to count that building as space
23 they have given us even though it's not space they gave
24 us. They will continue to require us to share a soccer
25 field with a junior high school. We only get it two
26 days a week. Yet, they count it as a hundred percent
27 ours.

28 These are things that cannot continue. They
00050

1 will continue, I assume, to use these numbers that you
2 know are not accurate. Not accurate because they
3 undercounted substantially not forty square feet, let's
4 try four hundred thousand square feet.

5 And because they have grossly overcounted the
6 square footage they have given to us, and instead of
7 using actual measurements, Your Honor, without your
8 intervention, they will continue to use this fantasy
9 called standard room size they simply made up. Standard
10 room size for a library thing, say, is nineteen hundred
11 twenty square feet. You know why they use that number?
12 That's the size of the library they gave us. They'd
13 like you to say standard room is nineteen twenty for a
14 library. That's what you got, what are you complaining
15 about.

16 Our concern, Your Honor, is that the library
17 at the other schools are substantially larger. We
18 shouldn't be playing around with standard room size.
19 Let's get actual measurements.

20 You asked about efforts to mediate. In our
21 view, the only way this case can be mediated is if you
22 make some decisions respectfully. Otherwise, Your
23 Honor, we're going to go before a mediator and continue
24 to argue about what we have been arguing for years. I'm
25 going to say Mr. Mediator, Madam Mediator, they
26 shouldn't be charging us for this room because we built
27 it. They are going to say it's still there.

28 THE COURT: I take your point.

00051

1 MR. GONZALEZ: Thank you, Your Honor.

2 THE COURT: Thanks, Mr. Gonzalez.

3 Mr. Yeh.

4 MR. YEH: Proposition 39 is a year to year
5 process. Each year, there is a request procedure and
6 response, and you have all that in front of you.

7 If Your Honor grants this writ, what we
8 have is basically adjudication as the legality brief
9 the district did in terms of issuing its final offer

10 in April, and for '09 '10 school year we will
11 probably get that in the middle of the school year.

12 I would submit that would be an idle act
13 because this is a process that rolls over from year
14 to year, and in a matter of five days, the charter
15 school will be making its request for facilities for
16 '10 '11 school year that has its own life and own
17 legal questions as well.

18 I would note, Your Honor, that the final
19 offer was issued by the district on April 1, 2009 and
20 the lawsuit was filed sometime approximately June 10.
21 Charter school was in a position to avoid this
22 situation and had that in its control. I do note the
23 points Mr. Gonzalez points to in terms of
24 adjudicating whether to charge for the multi --
25 whether to count the turf.

26 That to me doesn't reach the heart of the
27 issue they are complaining about, space. Those
28 aren't the issues that directly feed into that.

00052

1 So I would note, Your Honor, that we have
2 asked you to take judicial notice of the previous
3 instances, two lawsuits, three judges' orders ruling
4 in the district's favor.

5 I have been involved in this matter since
6 2003. There was a prior attempt to mediate the case
7 by my co-counsel, Mr. Velez, a few years ago that
8 didn't resolve it as well, but to me, this lawsuit is
9 not well taken for the reasons I have spent the last
10 hour and a half talking about, and in addition,
11 because of the timing.

12 There is one comment Mr. Gonzalez made
13 that needs to be addressed here in his argument
14 because it's more argument than fact based on the
15 evidence. This idea that the district can easily fit
16 the charter school within the Gardner site and this
17 representation the site is a hundred fifty.

18 THE COURT: Too fast.

19 MR. YEH: The representation the
20 enrollment of the Gardner Bullis site is one fifty
21 and easily fits the charter school into the Gardner
22 Bullis site and solves the whole problem, it's not
23 quite as easy as that because the population of the
24 Gardner Bullis site is a growing project for two
25 hundred forty-six, and there is not space for two
26 schools in that site.

27 Plus, it's an elementary site. If they
28 are indeed interested or serious about seeking the
00053

1 seventh grade, then that site is not a fit for
2 another reason.

3 There is evidence, and responding to
4 Mr. Gonzalez's requests, evidence in the deposition
5 testimony of Mr. Kenyon the standardized size for
6 classroom is nine hundred sixty square feet. We have
7 given you the acres. There is an exhibit to
8 Mr. Kenyon's declaration, Exhibit 2, that list of
9 square footages of the comparison group site
10 classrooms, all of them average out to be being
11 reasonably close to that.

12 In conclusion, Your Honor asked at one
13 point whether we were proud of our papers. We're
14 proud of the papers. I'm proud of my school
15 district. Every one of the schools in the district
16 is a California distinguished school. They are the
17 best at what they do. I acknowledge Bullis runs an
18 outstanding program, and I'm proud of my client, too.
19 Everyone is at the top of their game.

20 I'll submit, Your Honor.

21 THE COURT: Thank you, Mr. Yeh, appreciate
22 it.

23 I'm going to take the matter under
24 submission and get you a decision as quickly as I
25 can. How long that will take I cannot tell you. I
26 really don't know.

27 The audience may not be aware of this, we
28 have a lot of people here today, but by California
00054

1 law, I have up to ninety days to decide a case after
2 it's been submitted.

3 I certainly am not intending to take that
4 much time because I know this is a matter of urgency
5 for everybody concerned. I would like to have from
6 both sides -- you can send this to me on a disk or by
7 e-mail -- the proposed findings from both sides. You
8 can edit them down, take out all rhetoric, no
9 footnotes, no adjectives or adverbs, boil it down.
10 Send that to me so I will have that.

11 If you can do that in the next day or so,
12 that would be helpful, and that would be helpful to
13 me in terms of working with those materials. They
14 should be set in Microsoft Word.

15 Without anything further, I'm going to go
16 off the record for a moment.
17 (WHEREUPON, there was a brief pause in the
18 proceedings.)
19 THE COURT: We will adjourn and I'll get you
20 a decision as soon as I can. Thank you so much.

21
22
23
24
25
26
27
28
00055

1
STATE OF CALIFORNIA)
2) SS.
COUNTY OF SANTA CLARA)

3
4
5
6

7 I, ANNETTE KAISER, do hereby certify that
8 foregoing is a full, true and correct transcript of
9 the proceedings had in the within-entitled action on
10 October 26, 2009.

11 That, I reported the same in stenotype
12 being the qualified and acting Official Court Reporter
13 of the Superior Court of the State of California, in and
14 for the County of Santa Clara, appointed to said court,
15 and thereafter had the same transcribed into typewriting
16 as herein appears.

17 I further certify that I have complied with
18 CCP Section 237(a)(2), in that all personal juror
19 identifying information has been redacted, if
20 applicable.

21
22
23

ANNETTE KAISER, C.S.R.
CERTIFICATE NO. 6990

24
25
26
27
28