LASD
Los Altos School District

August 12, 2013

To BCS Leadership And Its Chartering Authority

With this letter, the District is furnishing BCS the keys to all facilities that the District has offered BCS for the 2013-14 school year. BCS is not authorized to use the offered facilities unless it first executes and returns the enclosed copy of the Facilities Use Agreement ("FUA"), which the District has executed. There will be no more negotiations relating to the FUA prior to BCS's execution of it (although, as the District has stated, it will entertain good faith negotiations after execution). If BCS uses the facilities without first executing the FUA, its use of the facilities shall be deemed, at the District's sole election, either an agreement to the FUA's terms, or a breach of the terms on which facilities use was expressly offered and preconditioned, with all remedies flowing therefrom available to the District.

All of the terms in the enclosed FUA either appear expressly in the District's April 1, 2013 final offer of facilities ("FO") to BCS or were added at BCS's request as an accommodation.. The enclosed FUA and FO incorporate a number of terms that are essential to ensuring compliance with applicable laws, and it is therefore a mandatory precondition of any BCS use of the offered facilities that BCS signify its adherence to the FO terms by executing the FUA prior to use, and by adhering to its terms thereafter. The District expressly preserves all rights and remedies available to it against any entity or individual in the event these facilities are used without advance District authorization (i.e. by use prior to execution of the FUA) or in the event of any use that violates the terms of the FUA or FO.

BCS's actions in recent weeks have suggested that it intends to refuse to sign the FUA or to use the facilities in violation of the FO terms. Because of the severity of the consequences that might follow from any such BCS action, the District recaps some key facts below that should be considered before the BCS Leadership takes any such step, and of which its chartering authority should be aware to fulfill its oversight and monitoring responsibilities over BCS.

THE APRIL 1 FINAL OFFER AND ITS INCORPORATION, WITHOUT EMBELLISHMENT, INTO THE DISTRICT-EXECUTED FACILITIES USE AGREEMENT

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The April 1 Final Offer from LASD to BCS included a couple of key provisions, namely:

- Capacity limits of 469 students at the facilities offered to BCS on the Egan campus, and 146 students for the BCS at Blach facilities. These limits were set based on the BCS projected in-district enrollment (not the District's counter-projections, even though the District is legally permitted to use its counter-projections)

- Students in grades K-3 are not permitted access to Blach. The District has not undergone the expense of duplicating facilities required for students in those grade levels. All BCS students K-3 can be accommodated at the Egan Site

- The FO expressly conditions access to the facilities on BCS executing a facilities use agreement. A draft FUA was attached to the April 1st Final Offer.

As BCS has grown from a school of under 200 to one of 600 plus, the impact of that growth has been felt by other pupils on the sites it shares with other District schools and the neighborhoods and communities in which the shared campuses are located. The limits above are critical to managing that impact, as well as complying with applicable laws, such as the California Environmental Quality Act ("CEQA").

The District adopted these conditions following plenary debate at multiple public meetings in which BCS had ample opportunity to be heard, and was heard. For example, at the March 25, 2013 meeting of the District's Board of Trustees, Joe Hurd, Janet Medlin, and Andrea Eyring addressed the District Board. As reflected in the videotape of that evening, Mr. Hurd specifically states BCS was not asking to place all of its K-8 at Egan or at Blach ((video at 1:16:10) (1:16:42) "without asking to place all K-8 students either at Egan or Blach")). Mr. Hurd also admitted that BCS had intentionally "played close to the vest" with its data, which further complicated the District's ability to assess appropriate site capacity limits. At 1:22 of the video, Janet Medlin talked extensively about BCS's desire to have more kids at Blach, and she explicitly stated BCS was willing to have a cap of 469 at Egan.

Despite being aware of the FO restrictions in the spring, the staff and leadership of BCS chose to create a new program which, by design, violates the terms of the FO. BCS also has apparently informed its families that all BCS pupils will meet at Egan next week in clear violation of the terms if of FO, and in potential violation of CEQA limitations which are legal requirements that both the District and BCS must follow.

This year, the District has spent almost $1 million to prepare the facilities offered to BCS in the FO. Over the summer, District staff worked extensively with BCS to provide extra fixtures and equipment that exceed the requirements calculated in the FO.

BCS SUES TO CHALLENGE THE SITE CAPACITY LIMITS, AND THE SANTA CLARA SUPERIOR COURT RULES AGAINST BCS.

After giving notice that it intended to occupy the facilities as stated in the FO, BCS filed a

new lawsuit challenging the FO under Prop. 39, including an explicit challenge to the conditions of use referenced above. BCS's lawsuit also asserted the District had not complied with CEQA. On June 24, 2013, the Santa Clara Superior Court entered an order deciding all Prop. 39 issues against BCS and in favor of the District, thereby upholding the terms of use of the 2013-14 FO.

In mid July 2013, the District furnished a draft FUA to BCS. After BCS objected to certain FUA terms that it claimed went beyond the FO, the District made clear it would remove any terms that did not appear expressly in the FO but that execution of an FUA that contained all FO terms remained an essential precondition to use of the facilities. BCS asked the District to renegotiate the site capacity and grade level FO terms. The District was and is under no obligation to do so, and as noted, has prevailed in court on a BCS lawsuit challenging those terms. Nevertheless, in an attempt to spark new cooperation between these parties, the District pledged to engage in good faith negotiations over modification of the terms and the broader facilities dispute *after* BCS executed an FUA confirming its agreement to abide by all FO terms unless or until both sides agree to any FUA or FO modifications.

In response, BCS continued to refuse to sign the FUA that was no more than a mirror image of the FO terms, and instead prepared an FUA that unilaterally modified FO terms and BCS executed that unilaterally modified draft. Thus, as of this delivery of the 2013-14 facilities keys to BCS BCS still has not complied with its legal obligations and with the FO's express preconditions to use of the facilities. To appreciate BCS's legal obligations and the potential consequences of its violation of them, a review of several important legal principles is helpful.

BCS'S LEGAL OBLIGATIONS

Under Prop. 39, BCS has the choice whether to accept the District's FO or to find facilities elsewhere. But BCS cannot unilaterally modify the FO's terms. Rather, under elementary contract law, BCS's unilateral modification of the District's FO constitutes a counteroffer to the District *that extinguishes the District's original FO*. Thus, not only is the District not obliged to accept the BCS counteroffer, but the District is also not required to renew its FO (which BCS extinguished via its counteroffer). Thus, the BCS Leadership's unilateral modification of the FO was a serious and improvident legal error that extinguished BCS's right to any District facilities, unless the District agrees anew to furnish facilities to BCS.

To avoid punishing BCS's schoolchildren for the BCS Leadership's reckless legal error, the District, by its retransmission of the FUA herein with the facilities keys, is once again renewing its offer of facilities to BCS on the FO terms. Should BCS decline to execute the FUA yet again, BCS would once again be exposing BCS pupils and families to all consequences that flow from rejection of the FO. The District emphasizes that it is not obliged to give BCS further chances to correct BCS's errors and the District is preserving all rights and remedies to the full extent of the law in the event BCS yet again fails to execute the FUA or violates any FO terms.

The District also believes BCS's recent behavior is legally reckless and may warrant action by BCS's oversight authority. It appears from recent communications from Grace Mah and Dr. De La Torre that BCS's chartering authority is not in possession of the full facts, including, most notably—(1) BCS has refused to agree to abide by express terms of the FO itself, which the Court already has upheld. Surely, the chartering authority can appreciate that BCS's unilateral disregard of express terms of a FO is unacceptable, (2) the unilaterally modified FUA that BCS executed constitutes, under ordinary contract law principles, a rejection of the FO and a BCS counteroffer—again, it was reckless for BCS to extinguish its rights to receive District facilities on the eve of the school year, (3) the rent and other terms in the earlier draft of the FUA to which BCS objected on the ground that those terms were not in the FO are no longer even at issue, because the District has agreed to defer all such terms to post-FUA-execution negotiations; the critical, immediate and non-negotiable point is that BCS must expressly agree in writing to abide by all FO terms until any mutually agreeable further agreement or modifications are reached. The District-executed FUA that accompanies this writing so provides, and BCS needs to execute it *before* it commences use of any of the offered facilities.[1]

In short, BCS's legal duty to execute the accompanying District-executed FUA and to abide by all FO terms is clear, and the potential consequences of its failure to do either are substantial. The BCS Leadership should therefore carefully consider its next steps, and its chartering authority should closely monitor and scrutinize BCS's actions.

The BCS Leadership's actions thus far are indefensible. BCS has already taken steps that, under the law, extinguish the District's FO, but the District has overlooked that multiple times and given BCS multiple chances to correct its mistakes and accept the facilities under the FO terms. That is asking a lot of the District—BCS has brought relentless litigation against the District since BCS was formed, so BCS should not be expecting the District to overlook BCS's legal mistakes and refrain from taking steps that the District, under the law, would be entitled to take. It also bears emphasis that the District is under no legal obligation to renegotiate the FO terms, and BCS's recent conduct strains the District's willingness to engage in such negotiations. The District remains committed to good faith negotiations to move this facilities dispute forward, but it is essential that BCS cease all further disregard of its legal obligations.

The clearest and safest path forward is for BCS to sign and return the enclosed FUA. The District looks forward to receipt of an executed copy of the enclosed.

Respectfully,

Doug Smith

President, Board of Trustees

Los Altos School District