

New West Charter Middle School v.  
LAUSD  
BS 115979

Tentative decision on petition for writ of  
mandate: granted

Petitioner New West Charter Middle School ("New West") seeks a writ of traditional mandamus to compel Respondent Los Angeles Unified School District ("LAUSD" or the "District") to comply with its non-discretionary duties under Education Code section 47614 to provide reasonably equivalent school facilities. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

**A. Statement of the Case**

New West commenced this proceeding on July 21, 2008, seeking to compel LAUSD to fulfill a mandatory obligation to provide its facilities to New West under Education Code §47614 and Proposition 39, enacted in November 2000.

**B. Applicable Law**

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A traditional writ of mandate under section 1085 is the method of compelling the performance of a legal, ministerial duty. Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-584. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn., 58 Cal.App.4th at 584 (internal citations omitted). No administrative record is required for traditional mandamus. The court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

**C. Statement of Facts**

New West is a California public charter school approved by the State Board of Education ("SBE"), and operated as a California non-profit corporation in accordance with Education Code section 47604. New West is a highly successful public charter middle school located in West Los Angeles. Its current enrollment exceeds 300, all residing within the bounds of LAUSD, and could be legally increased to 600 students under its charter if it had space in which to educate them. New West had 689 applicants for less than 80 spaces available for fall 2008.

Charter schools generally, and New West specifically, have been highly successful. The Academic Performance Index ("API"), which is used by the State of California to evaluate a school's overall academic performance, reveals that charter schools operating in LAUSD are outperforming traditional public schools at the middle and high school levels. At the middle school level, LAUSD schools had an API of 634, far below the charter schools' median API of 729. New West's most recent API score of 835 is almost 200 points higher than LAUSD's median scores. Last year, New West was ranked in the top ten-percent of similar middle schools in the entire state, and was among the highest-performing middle schools in the LAUSD.

Given this success, many parents have endeavored to place their children at New West and the other severely seat-limited charter schools. New West currently has a waiting list of about 400 students for next school year, out of about 689 applicants for Fall 2008. Students are not selected as the "cream of the crop," but rather are selected by a public random drawing (i.e., lottery) from among those seeking to attend.

On October 1, 2007, New West submitted a request to LAUSD pursuant to Ed. Code section 47614 for facilities to house approximately 300 middle school students for the 2008/2009 school year.

On April 1, 2008 LAUSD sent a letter to New West offering facilities at the District's Fairfax High School ("Fairfax") to co-locate the Charter School, which LAUSD stated was to meet its obligations under Proposition 39. On April 30, 2008, New West accepted the offer effective immediately, reserving its right to challenge its sufficiency. Later that same day, LAUSD faxed a letter to New West purporting to "withdraw" its Proposition 39 facilities offer made more than four weeks earlier.

Since April 30, 2008, New West has attempted to persuade the LAUSD to comply with its offer and the law, in an effort to avoid this litigation. LAUSD has continued to refuse to comply with Proposition 39.

#### **D. Analysis**

##### **1. The Duty to Accommodate a Charter School**

In November 2000, California voters passed Proposition 39, which amended Ed. Code section 47614. Also known as the "Smaller Classes, Safer Schools and Financial Accountability Act," Proposition 39 requires school districts to provide public charter schools and the students who opt to attend those public charter schools with "reasonably equivalent" facilities to those they would have if they attended district-run schools." Prior to the passage of Proposition 39, a charter school's right to use school district facilities was "very limited initially; a charter school was entitled to use district facilities only if that would not interfere with the district's use of them. This restriction was effectively eliminated by Proposition 39." Ridgecrest Charter School v. Sierra Sands Unified School District, (2005) 130 Cal.App. 4th 986, 998-999. Now, a charter school's right to equitably share school district facilities is unequivocal and mandatory, even if it might cause some "disruption and dislocation" of district students. Id. at 1000.

The relevant portions of Proposition 39, as codified in the Education Code are as follows: "[t]he intent of the people in amending Section 47614 is that public school facilities should be shared fairly among all public school pupils, including those in charter schools." Ed. Code §47614(a). "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 students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district. Facilities provided shall be contiguous, furnished, and equipped, and shall remain the property of the school district. The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily." Ed. Code §47614(b) (emphasis added).

"Proposition 39's stated intent is 'that public school facilities should be shared fairly among all public school pupils, including those in charter schools.'" Sequoia Union High School

District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 191. The statutory language imposes a mandatory duty on districts to make available "...facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending public schools of the district." Ed. Code § 47614(b). Thus, district-operated facilities "shall" be shared among all public school students, including those who attend charter schools. Ridgecrest Charter School, *supra*, 130 Cal.App. 4th at 1002; Sequoia Union High School District, *supra*, 112 Cal.App.4th at 196.

The SBE has adopted regulations implementing Proposition 39, operative as of August 29, 2002. See 5 CCR §11969 *et seq.*<sup>1</sup> These regulations specify procedures and time lines for Proposition 39 facilities requests from charter schools. The regulations require charter schools to submit a facilities request to the school district "by October 1 of the preceding fiscal year." 5 CCR §11969.9(b). The regulations detail the information that must be provided to the district. "The school district shall review the projections and provide the charter school a reasonable opportunity to respond to any concerns raised by the school district regarding the projections." 5 CCR §11969.9(d). "The school district shall prepare a preliminary proposal regarding the space to be allocated to the charter school and the associated pro rata share amount and provide the charter school a reasonable opportunity to review and comment on the proposal." 5 CCR §11969.9(d). "The school district must provide a final notification of the space offered to the charter school by April 1 preceding the fiscal year for which facilities are requested. The school district notification must specifically identify: (1) the teaching station and non-teaching station space offered for the exclusive use of the charter school and the teaching station and non-teaching station space to be shared with district-operated programs; (2) for shared space, the arrangements for sharing; (3) the in-district classroom ADA assumptions for the charter school upon which the allocation is based and, if the assumptions are different than those submitted by the charter school, a written explanation of the reasons for the differences; (4) the pro rata share amount; and (5) the payment schedule for the pro rata share amount, which shall take into account the timing of revenues from the state and from local property taxes." 5 CCR §11969.9(e). The charter school must notify the school district in writing whether or not it intends to occupy the offered space. The notification must occur by May 1 or 30 days after the school district notification, whichever is later. 5 CCR §11969.90.

## **2. New West Timely Sought Space and Accepted LAUSD's Offer**

On October 1, 2007, New West timely submitted to LAUSD its complete request for facilities to house approximately 300 middle school students for the 2008-2009 school year, as described in its charter, pursuant to section 47614 and 5 CCR 11969(b). LAUSD conducted site reviews at each of its campuses to determine space availability for all of its Proposition 39 offers, district-wide. After that extensive review, on April 1, 2008, LAUSD sent a letter to New West offering the exclusive use of twelve "teaching stations" and one "non-teaching station" at Fairfax in an effort to meet the facility-sharing requirements of Proposition 39. See 5 CCR

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<sup>1</sup>The regulations have been amended, but the amendments do not take effect until next year.

§11969.9(e). On April 24, 2008, LAUSD sent a letter to New West outlining the fees LAUSD expected to charge for the facilities and provided a sample facilities use agreement the District expected New West to execute for use of the facilities. This letter also noted that New West "must accept or reject the Proposition 39 offer made by LAUSD by May 1, 2008. If LAUSD does not receive an acceptance or rejection from you by May 1, 2008 the offer will be considered rejected."

New West accepted LAUSD's offer on April 30, 2008, by fax and by hand-delivering a notice of intent to occupy the facilities offered by LAUSD for the 2008-09 school year, all in accordance with the applicable regulations. See 5 CCR §11969.9(i). Later that day, but after New West delivered its notice of intent to occupy to LAUSD, the New West received a one paragraph letter from LAUSD Senior Deputy Superintendent Ray Cortines purporting to "withdraw[] the offer made to New West Charter of thirteen classrooms at Fairfax High School."<sup>2</sup>

Plainly, as a matter of contract law, the parties had a binding contract. LAUSD made an offer and New West timely accepted it. The fact that New West reserved its right to challenge any aspect of the offer that was unlawful does not affect this acceptance. The purported "withdrawal" letter was therefore legally meaningless as a matter of contract law.

The withdrawal was also meaningless under Proposition 39. Neither that law, nor any other provision of the Charter Schools Act, provides LAUSD with any authority to "withdraw" its mandatory obligation to share facilities with New West. The "withdrawal" only means that LAUSD failed to perform its mandatory duty under Proposition 39.<sup>3</sup>

### **3. The Opposition Contains a Parade of Unproven Horribles**

In opposition, LAUSD does not offer any legal authority for its action. Instead, LAUSD presents 72 pages of declarations from its superintendent, chief of facilities, charter planning manager, associate general counsel, new construction manager, the principal of Fairfax, and outside counsel. The court has read all of these declarations, which consist of a litany about the "web" of statutory and other legal duties governing LAUSD, its size (700,000 students, 45,000 teachers, and 900 schools), the District's historical and perhaps existing overcrowding,<sup>4</sup> its evaluation of charter school space requests, its own schools' operating capacities, its effort to make charter offers based on geographical component, the problems at Fairfax, the need for small learning communities ("SLC") at Fairfax to maintain its accreditation for state college entrance requirements, the difficulties with portable classrooms, the problems with busing students, the problems with multi-track schedules, its efforts to meet classroom size reduction

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<sup>2</sup>It appears that it succumbed to pressure from the teachers' union, which does not care for charter schools, which had staged a protest about the offer.

<sup>3</sup>LAUSD argues that New West has an adequate remedy at law of damages for its breach of contract claim. No such claim has been pled. The breach of contract is relevant only as evidence that LAUSD has violated its legal duty.

<sup>4</sup>New West presents evidence that LAUSD is facing declining enrollment and an excess of space, causing it to close schools.

goals, its consent decree in another case concerning maximum enrollments, construction bonds and other funding, implementation of full-day kindergarten programs, and the teacher's union opposition to "teacher traveling."

The sheer scope and number of matters discussed in these declarations demonstrates the weakness of LAUSD's position. Very little of the evidence even concerns New West. The portion that does is clearly inadequate. Thus, the Declaration of Ana Teresa Fernandez ("Fernandez") refers to a "provisional offer" to New West. There was nothing provisional about the offer made to New West pursuant to Prop. 39. That some teachers did not like it is irrelevant.<sup>5</sup>

The Declaration of Edward Zubiate purports to link accommodation of New West at Fairfax with loss of SLC's on campus without an explanation as to why. He also argues that it will be disruptive to the school's Master Calendar, which may be true, but not controlling since New West's right to equitably share facilities is mandatory, even if it might cause some "disruption and dislocation" of district students. Ridgecrest Charter School v. Sierra Sands Unified School District, *supra*, 130 Cal.App. 4th at 1000. After a lengthy investigation, LAUSD believed when it made the offer that Fairfax was available for New West's accommodation. There simply is insufficient evidence that it was wrong.

\* / Even if *arguendo* Fairfax was not available, LAUSD has a duty to accommodate New West somewhere. The District presents only speculation and conclusions that it cannot do so without any evidence. The best it can offer is the Declaration of David Brewer, the District's Superintendent, which states that accommodation of charter schools "generate[s] ripple effects adversely affecting LAUSD students all across the District." ¶11. Of course, charter students are LAUSD students too. They, too, are entitled to the District's facilities. LAUSD's conclusion that location of charter students in an existing school would favor "charter school students over non-charter school students" is likewise unproven. ¶23.

In short, LAUSD has violated its statutory obligation to accommodate New West students. It has also breached a contract to do so.<sup>6</sup>

#### **4. Equitable Defenses**

LAUSD argues that New West is guilty of laches, observing that it waited close to three months after LAUSD's purported withdrawal of the offer to seek relief. Classes have begun at

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<sup>5</sup>When Fernandez says that the offer was "on hold" as of April 22, 2008, and New West was informed of this fact, this is inconsistent with Fernandez's own email to New West of April 28, which stated that the hold only related to classroom configuration.

<sup>6</sup>LAUSD suggests that New West lacks standing to make this claim. It argues that the SBE chartered New West, and it has not approved any change in location for it. LAUSD cites no authority that New West's obligations to the SBE bear on LAUSD's statutory obligations to accommodate New West's students. See Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 191 (school district's obligation to accommodate is to each charter school operating in the the district). LAUSD's similar argument that SBE is an indispensable party because it, not LAUSD, chartered New West fails for the same reason.

Fairfax, and it would be inconvenient and burdensome for LAUSD to fulfill the Proposition 39 facilities request.

New West's only response is to suggest that it was negotiating with LAUSD, hoping it would realize its mistake and honor its obligations. Given LAUSD's patently unreasonable and unlawful conduct, New West cannot be blamed for hoping to avoid litigation. LAUSD shirked its statutory obligation and cannot rely on an equitable defense of delay.<sup>7</sup>

In any event, LAUSD had since October 1, 2007 to figure out how to accommodate New West's Proposition 39 request, and has had since May 1, 2008 to assess how it would meet this obligation if compelled by litigation. If the District has failed to prepare a contingency plan, that failure is its own.

In a related argument, LAUSD points out that New West has renewed its lease and does not have need for LAUSD space. LAUSD does not acknowledge, however, that the lease renewal only occurred because it refused to provide accommodation. LAUSD cannot bootstrap New West's effort to mitigate the damage caused by LAUSD's actions into a reason to deny relief.

**E. Conclusion**

The Petition for Writ of Mandate is granted. LAUSD is ordered to fulfill its Proposition 39 duty, and its offer to New West, for the facilities offered at Fairfax High or other acceptable location for the school year 2008-09.<sup>8</sup>

New West's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for October 3, 2008.

*Relief needed now*

- ① Pro Rata Share .17¢
- ② Damages 1095
- ③ Atty's Fees 1021.5
- ④ - CONTINUING JURISDICTION

<sup>7</sup>It bears noting that all of New West's students reside within LAUSD, and are entitled to LAUSD's facilities as much as any student attending a LAUSD school.

<sup>8</sup>LAUSD points out numerous duplicates supporting New West's facilities request. LAUSD is correct that it is obligated to provide facilities only for the number of students reasonably projected in New West's application. If New West does not need the requested facilities, no writ should issue compelling LAUSD to provide them. The court will discuss this issue with counsel at hearing.