



Education for Change Public Schools

April 27, 2018

By Hand Delivery and Email: leslie.jimenez@ousd.org

Leslie Jimenez
Office of Charter Schools
Oakland Unified School District
1000 Broadway, Suite 639
Oakland, CA 94607

***Re: Achieve Academy
Response to District's Final Offer
Proposition 39 2018-2019***

Dear Ms. Jimenez:

Achieve Academy (“Achieve” or “Charter School”) is in receipt of the Oakland Unified School District’s (“District”) April 1, 2018 letter (“Final Offer”) regarding Achieve’s request for facilities under Proposition 39 (“Prop. 39”) for the 2018-2019 school year.

The District’s Final Offer is for exclusive use of thirty-one (31) teaching stations and specialized classrooms at Hawthorne Elementary, as well as 100% shared use of the non-teaching station space at Hawthorne. The Final Offer is based on a projected in-District ADA of 629.11.

Section 11969.9(i) of the Prop. 39 Implementing Regulations (the “Implementing Regulations”) requires Achieve to notify the District whether or not Achieve intends to occupy the offered space. Accordingly, despite the deficiencies in the Final Offer (which are identified herein to the extent practicable, with all rights reserved) and as set forth in the response to the Preliminary Proposal, which is incorporated here by reference, Achieve accepts and intends to occupy the offered space, without acknowledging the legal sufficiency of the Final Offer under applicable local, state, or federal law and without waiving any of its legal rights under applicable local, state, or federal law, including Proposition 39 rights and remedies.

Achieve’s primary concern with the Final Offer, as also detailed in its response to the Preliminary Proposal, is that it does not include four portables currently on the Hawthorne site, three of which have been used for many years by EBAC and which EBAC wishes to continue to use (with Achieve’s full support). In addition, the fourth portable – identified by the District as Portable “U” and Achieve as Room 44 – is used and needed by Achieve for its program, and Achieve is entitled to an allocation of this portable pursuant to Prop. 39.¹ As this portable is located on the campus and has always been used by Achieve, and Achieve is not aware of any specific plans the District has for this portable, Achieve is not clear as to why the District would

¹ Pursuant to the analysis included in the response to the Preliminary Proposal, Achieve is entitled to at least one more teaching station above the twenty-seven allocated by the District.

not wish to receive pro rata share payments for this classroom. As such, Achieve does not agree that the District is entitled to withhold this portable from its allocation of space.

1. The Final Offer Does Not Allocate Sufficient Specialized Classroom and Non-Teaching Station Space to Achieve

Achieve is also entitled to reasonable allocations of specialized and non-teaching station space. Section 11969.3(b)(2) requires that, if a school district includes specialized classroom space, such as science laboratories, in its classroom inventory, the Proposition 39 offer of facilities provided to a charter school must include a share of the specialized classroom space. The Final Offer must include “a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space.” (5 CCR § 11969.3(b)(2).) The amount of specialized classroom space allocated and/or the access to specialized classroom space provided shall be determined based on three factors:

- (A) the grade levels of the charter school’s in-district students;
- (B) the charter school’s total in-district classroom ADA; and
- (C) the per-student amount of specialized classroom space in the comparison group schools.²

As such, the District must allocate specialized classroom space, such as science laboratories, art rooms, computer labs, music rooms, weight rooms, etc., commensurate with the in-District classroom ADA of Achieve. The allocated site must include all of the specialized classroom space included across all of the different grade levels.

In addition, the District must provide non-teaching station space commensurate with the in-District classroom ADA of Achieve and the per-student amount of non-teaching station space in the comparison group schools. (5 CCR § 11969.3(b)(3).) Non-teaching space is all of the space at the comparison school that is not identified as teaching station space or specialized space and includes, but is not limited to, administrative space, a kitchen/cafeteria, a multi-purpose room, a library, a staff lounge, a copy room, storage space, bathrooms, a parent meeting room, special education space, nurse’s office, RSP space, and play area/athletic space, including gymnasiums, athletic fields, locker rooms, and pools or tennis courts. (*Ibid.*)

The allocation of specialized teaching space and non-teaching space is based on an analysis of the square footage of each category of space available to students at the comparison schools (i.e., “the per-student amount of specialized classroom/non-teaching space in the comparison group schools”). (5 CCR § 11969.3(b)(2)-(3).) Moreover, just because one kind of specialized classroom or non-teaching station space is not available at all the comparison schools, the District may not fail to provide an allocation of that kind of space. Instead:

² *Id.*; see also *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 296 and *California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal.App.4th 530 (CSBA).

[W]hile a Proposition 39 analysis does not necessarily compel a school district to allocate and provide to a charter school each and every particular room or other facility available to the comparison group schools, it must at least account for the comparison schools' facilities in its proposal. A determination of reasonable equivalence can be made only if facilities made available to the students attending the comparison schools are listed and considered. And while mathematical exactitude is not required (cf. *Sequoia, supra, 112 Cal.App.4th at p. 196* [charter school need not provide enrollment projections with "arithmetical precision"]), a Proposition 39 facilities offer must present a good faith attempt to identify and quantify the facilities available to the schools in the comparison group--and in particular the three categories of facilities specified in *regulation 11969.3, subdivision (b)* (i.e., teaching stations, specialized classroom space, and non-teaching station space)--in order to determine the "reasonably equivalent" facilities that must be offered and provided to a charter school. (*Bullis, supra, 200 Cal.App.4th 296, 336.*)

a. Allocation of Specialized Classroom Space to Achieve

The Final Offer has allocated four general education classroom spaces to Achieve.

As noted above, Prop. 39 makes clear that the allocation of specialized classroom space must be based on the amount of specialized classroom space at the comparison schools: "The amount of specialized classroom space allocated and/or the access to specialized classroom space provided shall be determined based on three factors: (A) the grade levels of the charter school's in-district students; (B) the charter school's total in-district classroom ADA; and (C) the per-student amount of specialized classroom space in the comparison group schools." (5 CCR Section 11969.3(b)(2); emphasis added.) This space must be allocated to the Charter School either as "a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space." (*Id.*) *Bullis Charter School v. Los Altos School Dist.* ((2011) 200 Cal.App.4th 296, 336) is also clear that a school district must count all of the specialized classrooms spaces on the comparison school campuses, and ensure that a charter school receives a reasonably equivalent allocation of all of these spaces.

While based on the information provided by the District, Achieve is entitled to approximately 1,775 square feet of specialized classroom space, nothing in the law authorizes the District to average all the various types and amounts of specialized classroom spaces across all the comparison schools as it has done in the Final Offer. Achieve is entitled to a reasonably equivalent allocation of or access to all of these types of specialized classroom spaces since they exist at the comparison schools, and the District may not combine different types and sizes of specialized classroom space into one lump square footage, and then allocate non-specialized classrooms to Achieve. If there are science labs, computer labs, music rooms, weight rooms, art rooms, and the like available at the comparison schools, then the District must allocate reasonably equivalent, fully furnished and equipped kinds of these spaces space and/or shared access to Achieve. A standard classroom does not have, for example, the risers in a choral

classroom, the gas and water stations in a science classroom, or the computers in a computer classroom, nor can all these different kinds of uses (and the attendant furnishings and equipment) happen in just one classroom.

Furthermore, allocation of regular classrooms is not an acceptable manner to allocate specialized classrooms; often these spaces have unique furnishings, equipment or other design elements that cannot be replicated in a standard classroom. Achieve notes that by refusing to allocate Achieve individual kinds of specialized classroom space, the District is relegating Achieve students to second-class status, given that District students enjoy access to these separate, furnished and equipped spaces. The District cannot force Achieve to create its own fully furnished and equipped specialized classroom space in a standard teaching station space. “[A] school district does not have the discretion to employ practices that are contrary to the very intent of Proposition 39 that school district facilities be “shared fairly among all public school pupils, including those in charter schools.” (*Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 296, 336.)

Achieve is entitled to reasonably equivalent allocations of specialized spaces, and of furnishings and equipment that accompany those spaces in the comparison schools, and it anticipates receiving its full complement of the specialized space and the reasonably equivalent furnishings and equipment therein at the school sites.

b. Allocation of Non-Teaching Station Space to Achieve

As set forth in its response to the Preliminary Proposal, Achieve does not believe that the District’s allocation of non-teaching station space complies with Prop. 39.

2. Pro Rata Charge Worksheet

As a preliminary matter, Achieve notes that the District has indicated that Achieve’s “share of the custodial costs may be subject to reconciliation in the event that the District is required to increase staffing as a result of the Charter School’s use and occupation of the District’s site.” To the extent that the District is indicating its intent to charge Achieve an additional amount for custodial services above what is included in the pro-rata share, this is not permitted by the Implementing Regulations.

- a. Utilities:** The District indicates that utilities may be included in the pro rata share if applicable under the Use Agreement. These amounts should be separately metered and billed to Achieve, as it is not appropriate nor provided for in the law to include these costs in the pro rata share calculation, especially since some schools in the District (for example, comprehensive high schools that have pools and large gymnasiums) have substantially higher utilities costs, thereby requiring Achieve to shoulder higher burdens of utilities costs than the amounts Achieve actually uses. If the District receives billing from the utilities companies for each of its individual school sites, Achieve is willing to pay the actual utilities costs for the site based on

the same calculation used to determine the pro rata share costs for the shared use space, with the exception that any costs assumed by Achieve cannot be included in the pro rata share calculation.

- b. Police Services:** The District may not include police costs in its pro rata share calculation because Achieve provides its own security and alarm services, and also has been told by the District's Police Services that Police Services does not provide services to charter schools in the District. Pro rata share amounts are intended to reflect a charter school's portion of the District's facilities costs that Achieve uses. Because Achieve does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.
- c. Insurance:** Achieve will provide and pay for the full spectrum of its insurance benefits, as required by its charter and the Facilities Use Agreement; the District has included the cost of its own property insurance on the facility. Including the District's insurance costs in the calculations not only double bills Achieve for a cost it is already paying for, it is requiring Achieve to pay for a cost that is actually the District's responsibility. Moreover, insurance is not contemplated under the Prop. 39 regulations as an acceptable "facilities cost," and Education Code Section 47614 specifically states that a charter school may not be charged for use of district facilities beyond the pro rata share.
- d. Custodial Services:** The District indicates that custodial services may be included in the pro rata share if applicable under the Use Agreement. The Implementing Regulations provide that ongoing operations and maintenance of facilities, which includes custodial costs, are the responsibility of Achieve (5 CCR Section 11969.4(b)) and that any costs assumed by Achieve cannot be included in the pro rata share calculation. Achieve wishes to perform its own custodial services in large part because it is not financially able to absorb the cost of District services; therefore, the FUA will need to provide for this revision.
- e.** The District has included \$13,048,405 in facilities costs identified as "RRMA transfer from UR to resource 8150." However, the Implementing Regulations provide that ongoing operations and maintenance of facilities, which includes custodial costs, are the responsibility of Achieve (5 CCR Section 11969.4(b)) Therefore, please provide Achieve with the necessary documentation to show that the District has removed all facilities costs related to ongoing operations and maintenance from its RRMA transfer account that are Achieve's responsibility, including custodial services.
- f.** The District has included its emergency debt service costs in the pro rata share calculation. 5 CCR Section 11969.7 states that only unrestricted General Fund **facilities costs** that are not costs otherwise assumed by Achieve are included in the methodology. Under the Implementing Regulations, items that are not specifically included in the pro rata share calculations because they are either obligations of

Achieve or facilities-related general fund expenses may not be included in the calculation of facilities costs. "Debt servicing" is typically not a cost charged to the unrestricted general fund (e.g., bond repayment obligations are excluded). Further, even if repayment of the District's emergency loan constitutes debt service that is charged to the unrestricted general fund, the pro rata share is intended to reimburse the District for a charter school's proportion of the District's facilities costs in exchange for Achieve's use of District facilities. The Emergency Apportionment state loans are clearly not facility-related debt service costs, and thus may not be included in the calculation. Again, only those facilities costs charged to the unrestricted general fund can be included in the pro rata share calculation. (5 CCR Section 11969.7.) If it is the District's position that the repayments of the emergency state loan are debt service for "facilities costs" then we request that the District provide some documentation demonstrating that the emergency loan monies were spent on "facilities costs."


3. **Draft Facilities Use Agreement:** We are reviewing the draft Facilities Use Agreement and look forward to negotiating the terms of that or an in-lieu agreement over the next several weeks, as required by the Implementing Regulations. (5 CCR Section 11969.9(k).)
 - a. **Section 1:** This section states "District agrees to allow use of the Premises at the School(s) by Charter School for the sole purpose of operating Charter School's educational program in accordance with all applicable federal, state and local regulations relating to the Premises and to the operation of Charter School's educational program." This section will need to be revised to include Achieve's summer school, if any, and programs procured by Achieve through third party entities, e.g. after-school program providers.
 - b. **Section 1.4:** Prop. 39 only requires Achieve to comply with the District's policies and procedures related to operations and maintenance, and not where actual school district practice substantially differs from official policies. (5 CCR Section 11969.4(b).)
 - c. **Section 1.6:** Fees charged under the Civic Center Act are intended to reimburse school districts for the costs they incur to process permits and to clean up after community use of their facilities. The portion of the Civic Center Act fees related to custodial and maintenance costs must be paid to Achieve if Achieve is responsible for cleaning up its site after each community use.
 - d. **Section 2:** The Site must be furnished, equipped and available for occupancy by Achieve for a period of at least ten (10) working days prior to the first day of instruction. However, we are willing to consider taking possession earlier if mutually agreed upon between the parties.

- e. **Section 3:** This section also needs to reflect that if Achieve constructs or installs recreational improvements or other school facilities, Achieve and the District will agree to negotiate a reduction in the facilities use fees. Achieve's other concerns regarding the Pro Rata Share Charge outlined above are incorporated herein. Again, any costs assumed by Achieve cannot be included in the pro rata share calculation, including custodial and maintenance costs. Achieve objects to the late charge listed in Section 3.5. The Implementing Regulations do not contemplate late fees to be charged to Achieve.
- f. **Section 6:** This number will need to be adjusted to reflect the number of Achieve students on the sites.
- g. **Section 9:** This section states that the District "shall not be liable for any personal injury suffered by Charter School or Charter School's visitors, invitees, and guests, or for any damage to or destruction or loss of any of Charter School or Charter School's visitors, invitees or guests' personal property located or stored in the parking lots, street parking or the School Site, except where such damage is caused by the District's negligence or misconduct." This section will need to be changed to reflect that the District may not avoid liability for injuries or damage caused by its failure to maintain the parking spaces on the site. The District is required to provide Achieve with a facility that complies with the California Building Code, and to maintain the facility in compliance with the California Building Code. (5 CCR Section 11969.9(k).) It may not provide the parking lot in an "as-is" condition.
- h. **Section 10:** For the same reason, the District may not require Achieve to take the facility in "as is" condition. Furthermore, it is not acceptable for the District to terminate the FUA if the cost to make repairs exceeds \$150,000. The District is required to make the facility available to Achieve for its entire school year (5 CCR Section 11969.5) and to maintain the facility in compliance with the California Building Code. (5 CCR Section 11969.9(k).) As a result, if the facility is damaged, the District must repair it, or, if it is destroyed, the District must provide alternative facilities.
- i. **Section 12.3 and 12.4:** The District must make reasonable efforts to keep their materials, tools, supplies and equipment on the Premises in such a way as to minimize disruption to Achieve's program. The District must provide relevant scheduling information and reasonable notice to Achieve if it will be coming onto the facility to perform maintenance. In addition, Achieve wishes to perform its own custodial services, and as a result, does not agree to allow the District to enter the Premises to perform custodial services.
- j. **Section 14:** While Achieve is willing to pay any taxes or assessments on its personal property, or modifications or improvements it performs on the facility,

it may not otherwise be obligated to pay any costs to occupy the facility beyond the pro rata share. (Education Code Section 47614(b)(1).)

- k. **Section 15:** Achieve wishes to perform its own cleaning and custodial services. Therefore, the Final Offer will need to be revised to provide for this revision.
- l. **Section 17:** If the comparison schools have a security system, then in order to provide a reasonably equivalent facility, the District must also provide the Premises with a security system. Achieve does not agree to provide written verification of compliance with the fingerprinting and criminal background investigation requirements to District prior to Achieve taking possession of the Premises and prior to conducting its educational program on the Premises.
- m. **Section 18.1.7:** Achieve does not agree that should it default under the FUA, it must pay the District its unpaid pro rata share. The District is obligated to attempt to first find an alternative occupant for the site.
- n. **Section 18.2:** This section must provide for Achieve to perform any District obligation if the District is in default, and to recover its reasonable costs in so doing from the District.
- o. **Section 20:** If Achieve chooses to seek its insurance through a joint powers authority such as CharterSAFE, JPAs do not receive an A.M. Best insurance rating. This section will need to be revised to provide that insurance through a JPA will satisfy the terms of the FUA.
- p. **Section 28:** This section must be revised to provide that the District is responsible for maintaining the Premises in compliance with applicable law, except to the extent that compliance arises as a result of modifications or improvements performed by Achieve.

We have attempted in this letter to enumerate all of our concerns with the District's Final Offer; however, we note that our failure to mention a concern in this letter should not be interpreted as acceptance of that term. Achieve looks forward to the opportunity to discuss and negotiate the Facilities Use Agreement with the District, along with Achieve's other above-referenced concerns, moving forward.



Fabiola Harvey

Cc: Sarah Kollman, Young, Minney & Corr, LLP
Achieve's Board Members