



Education *for* Change

Public Schools

February 27, 2019

Sonali Murarka
Office of Charter Schools
Oakland Unified School District
1000 Broadway, Suite 639
Oakland, CA 94607

Re: Cox Academy
Response to District's Preliminary Proposal
Proposition 39 2019-2020

Dear Ms. Murarka:

Cox Academy ("Cox" or "Charter School") is in receipt of the Oakland Unified School District's ("District") February 1, 2019 letter ("Preliminary Proposal") regarding Cox's request for facilities under Proposition 39 ("Prop. 39") for the 2019-2020 school year.

The District's Preliminary Proposal is for a total of twenty-six (26) teaching stations and three (3) specialized classrooms at E. Morris Cox, as well as 60.4% shared use of the non-teaching station space at E. Morris Cox. The Preliminary Proposal is based on a projected in-District ADA of 546.74.

Section 11969.9(g) of the Proposition 39 Implementing Regulations (the "Implementing Regulations") requires Cox to respond to the District's Preliminary Proposal, to express any concerns, address differences between the preliminary proposal and Cox's facilities request as submitted pursuant to subdivision (b), and/or make counter proposals.

The Preliminary Proposal fails to meet the legal requirements of Prop. 39 for numerous reasons, including the failure to provide sufficient information regarding the allocation of teaching station, specialized classroom, and non-teaching space to Cox, the artificial and illegal use of "weighting" factors in the calculation of the teaching station and specialized classroom, and non-teaching space to be allocated to Cox, which results in an allocation of less space than Cox is entitled to, double-counting allocated space as both teaching station space and specialized classroom space and then claiming that a charter school has been over-allocated space, failure to calculate the pro rata share in compliance with law, and thus an overall failure by the District to meet its legal obligations and provide Cox with a reasonably equivalent allocation of space as required by law.

Cox requests that the District's final offer of space be modified in accordance with Prop. 39 and its Implementing Regulations. We remind you that under California law the District must give the same degree of consideration to the needs of charter school students as it does to the students in District-run schools and some disruption and dislocation of the students and programs in a district may be necessary to fairly accommodate a charter school's request for facilities.

Cox is Entitled to Its Entire Site as a Conversion School

Cox does not agree with the District's claim that the Charter School "...allocation of facilities is subject to the reasonable equivalence capacity requirements set forth in Proposition 39, including potential liability for an overallocation fee in the event of overprojection of ADA." In fact, the only requirements in Prop. 39 for conversion schools is to submit an annual request and report over-allocated space (which Cox has never had). Only if a conversion charter school is over-allocated space based on its projected ADA may the District take space back, and the charter school can get the space back upon further application that its in-District ADA has gone back up.

Neither the regulations nor the Final Statement of Reasons contemplate the District performing a capacity analysis each year. Instead, the regulations are clear that Cox need only submit a Prop. 39 request in order to qualify to occupy its entire site.

Nonetheless, without waiving its rights, Cox has responded to the District's Preliminary Proposal fully, including a review of the comparison school analysis and allocation of space.

Identification of Comparison Schools

The Implementing Regulations provide an analysis by which a school district must determine whether a facility is reasonably equivalent to those in which the students would be accommodated if they were attending public schools of the school district. First, pursuant to 5 CCR Section 11969.3(a), the District must identify a comparison group of district-operated schools with similar grade levels to the Charter School.

5 CCR Section 11969.3(a) defines the process for identifying comparison schools as follows:

The comparison group shall be the school district-operated schools with similar grade levels that serve students living in the high school attendance area...in which the largest number of students of the charter school reside. The number of charter school students residing in a high school attendance area shall be determined using in-district classroom ADA projected for the fiscal year for which facilities are requested.

The comparison school analysis fails to include all of the comparison school space. For example, here, the District has failed to include Greenleaf School's middle school program as part of the comparison school analysis, even though it is part of the same program as the school's elementary grades, is on the same campus, and the ADA of the middle school program was included in Tables 7a, and 9, as well as the related Exhibits. In addition, the Jacobs report data excludes the classrooms used by the middle school grades, claiming that the campus only has 16 classrooms, and no science lab or technology space. This is not the case, however, as a new two-story wing was constructed on the Greenleaf campus in 2016 (to add administrative space, library space, and six new classrooms) and in fact the campus has substantial additional space, including a large multi-purpose room and gymnasium, and science lab space.

Condition Analysis

A district must also determine whether a facility is reasonably equivalent by determining whether the condition of facilities provided to a charter school is reasonably equivalent to the condition of comparison group schools. Pursuant to 5 CCR Section 11969.3(c), the District must assess "such factors as age (from latest modernization), quality of materials, and state of maintenance." The District must also assess the following factors:

1. School site size
2. The condition of interior and exterior surfaces
3. The condition of mechanical, plumbing, electrical, and fire alarm systems, including conformity to applicable codes
4. The availability and condition of technology infrastructure
5. The condition of the facility as a safe learning environment including, but not limited to, the suitability of lighting, noise mitigation, and size for intended use
6. The condition of the facility's furnishings and equipment
7. The condition of athletic fields and/or play area space

The Preliminary Proposal states that the District has evaluated data on the condition of the facilities at the comparison schools based on "site size (acreage) as well as data on the

condition of the facilities based on information available from the Facilities Condition Index and Educational Adequacy Score, as part of the Jacobs Study” and references Exhibit C to the Preliminary Proposal. A review of this spreadsheet makes clear that the District has taken this information directly from the “Oakland USD Facility Adequacy Assessment” (“FAA”) prepared through the Jacobs report, but not the Facilities Condition Assessment Report (“FCAR”) which accompanied it. Rather, the information from the FCAR is reflected in the Facility Condition Index (“FCI”) listed on page 7 of the Preliminary Proposal.

From the information available to us, the District’s claim that the condition of Toler Heights and Howard are reasonably equivalent to the condition of the comparison schools is not accurate.

Specifically, the District identifies individual, and then the “range” of FCI and Educational Adequacy Scores (“EAS”) at the comparison schools, and then lists Toler Heights and Howard’s scores. The District does not identify an average for all of these scores at the comparison schools (even though it used average scores elsewhere in the Preliminary Proposal), which would be a much more accurate tool for determining reasonable equivalence. It then states that “the site offered to the Charter School is within the range of the comparison school group on the condition index, and the educational adequacy score.”

However, an actual assessment of whether the condition of the allocated site is reasonably equivalent to the comparison schools would require an assessment of whether the condition of the site is actually even close to the comparison schools. The actual average FCI score for the comparison schools, for example, is 35%, and the average EAS is 51.5. Compared to E. Morris Cox’ scores of 20% and 56.2, the averages of the site allocated to the Charter School is lower when it comes to FCI scores and slightly higher when it comes to EAS scores.

Therefore, the District’s Preliminary Proposal does not perform a mathematically logical analysis of the facility condition information required by the Implementing Regulations, but the Charter School accepts that the condition of its allocated site is reasonably equivalent.

The District’s Teaching Station to ADA Analysis Is Illegal

All California public school students are entitled to learn in a classroom that is safe, that is not crowded with too many students, and that is conducive to a supportive learning environment. In accordance with the implementing regulations, the District must provide a facility to the Charter School with the same ratio of teaching stations to average daily

attendance (“ADA”) as those provided to students in the comparison group of schools, as well as a proportionate share of specialized classroom space and non-teaching space, and are to be allocated at each grade level consistent with the ratios provided by the District to its students. (5 CCR Section 11969.3(b)(1).) There is no such thing as a fractional classroom for a single grade level of students and the allocation cannot be based upon the District’s “loading standard,” nor can it be based on an arbitrary and fabricated formula.

In determining the number of teaching stations to allocate to a charter school, a school district must follow a three-step process, as explained by the California Supreme Court in *California Charter Schools Association v. Los Angeles Unified School District* (2015) 60 Cal. 4th 1221 (“*CCSA v. LAUSD*”):

“First, the district must identify comparison group schools as section 11969.3(a) prescribes. Second, the district must count the number of classrooms in the comparison group schools using the section 1859.31 inventory and then adjust those classrooms ‘provided to’ students in the comparison group schools. Third, the district must use the resulting number as the denominator in the ADA/classroom ratio for allocating classrooms to charter schools based on their projected ADA.” (*Id.*, p. 1241.)

In calculating the number of classrooms that the District will make available to the Charter School, the District must count the number of classrooms in the comparison group schools and cannot use districtwide norming ratios. (*Id.*, p. 1236.)

Under 5 CCR Section 11969.3(b)(1), “[t]he number of teaching stations (classrooms) shall be determined using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31, adjusted to exclude classrooms identified as interim housing.” Classroom shall be provided “in the same ratio of teaching stations (classrooms) to ADA as those provided to students in the school district attending comparison group schools.” (*Id.*)

In the *CCSA v. LAUSD* case, the Court explained further that classrooms used for preschool or adult education, or by other charter schools are not counted as classrooms provided to the District’s non-charter K-12 public school students. (*Id.*, p. 1240.) However, the Court held that “counting classrooms ‘provided to’ district students for the purposes of section 11969.3(b)(1) is not the same as counting only those rooms a district elects to staff with a teacher.” (*Id.*, p. 1241.) The Court reasoned that “[c]ounting only those classrooms staffed by an assigned teacher would effectively impute to charter schools the same staffing

decisions made by the District. But there is no reason to think a charter school would necessarily use classrooms in the same way that the District does.” (*Id.*)

On a practical level, even if certain rooms are not used for classroom instruction, students nonetheless benefit from these additional rooms, either in the form of having additional space to use for break-out instruction or storage, or in having less crowded classrooms. Thus, the District is required by the Supreme Court’s ruling to count all of the classrooms provided to students in the District for K-12 classroom instruction regardless of whether the classrooms are staffed by teachers or not, and use the resulting number as the denominator in the ADA/classroom ratio for allocating classrooms to charter schools based on their projected ADA. (*Id.*)

In prior years, the District used enrollment instead of ADA to calculate its ratios, and simply averaged the enrollment of all core classes at each comparison school (excluding all non-core classes). This year, the District’s analysis is opaque, does not provide for the transparency required by *CCSA v. LAUSD*¹, and does not identify all data points used by the District. Moreover, the data points the Charter School is able to extrapolate often are inconsistent with the exhibits the District has attached in support of its calculations. In addition, despite somewhat complying with the required Prop. 39 formula, the District has, in the second part of its required analysis, unfortunately engaged in a similarly illegal and manipulative tactic to reduce the number of classrooms it proposes to allocate to charter schools, by applying a weighting factor to its calculations that has no support in law or regulation.

The District’s Calculation of the Number of Teaching Stations at the Comparison Schools is Inconsistent with its Supporting Documentation

Table 7a in the Preliminary Proposal identifies the “ADA per Classroom” at the comparison schools, as well as the “Projected ADA” for each site and the “Proportion of Total Comparison Group ADA,” which is the percentage of the total comparison school ADA that each comparison school’s ADA represents. The Preliminary Proposal states that “To determine the number of classrooms ‘provided to’ District students at individual District schools, the District has taken the additional step of creating an updated inventory of actual classroom allocation utilization at each comparison group school using educational adequacy

¹ “The regulations prescribe a specific, transparent method for deriving the ADA/classroom ratio to be applied in allocating classrooms to charter schools, thereby allowing charter schools and the public to readily verify whether a district has complied with the regulation.” (*CCSA v. LAUSD*, supra, 60 Cal. 4th at 1236.)

assessment data that was provided by a contracted third party vendor (Jacobs) to OUSD during the 2017-18 school year. That inventory is provided as Exhibit C.” Exhibit C provides a list of each classroom and other space on each District site, categorizing each room/space according to categories:

1. Classroom (used just for general education classrooms)
2. Laboratory (spaces identified as science labs, music and art space, computer labs, vocational education rooms)
3. Instructional Support (spaces identified as for special education)
4. Student Dining (cafeteria and eating spaces)
5. Media Center (library space)
6. Physical Education
7. Assembly (multi-purpose rooms, auditoriums, theaters)

Nothing in the Preliminary Proposal or the District’s Exhibit C actually states the number of teaching stations that it used for each comparison school, but the Charter School believes it has been able to determine that number algebraically, by dividing the number in the Projected ADA column by the ADA per Classroom number for each school.

Comparison School	“ADA Per Classroom”	Projected ADA	Number of Teaching Stations Used in District “ADA Per Classroom” Calculation
Brookfield Village Elementary	14.33	171.95	12
Community United Elementary School	19.22	326.25	17
Howard Elementary	11.24	146.06	13
Reach Academy	18.89	358.95	19
Burckhalter Elementary	14.97	209.54	14
East Oakland PRIDE Elementary	17.88	268.21	15
Greenleaf Elementary ²	37.92	606.68	16
Futures Elementary	18.17	291.26	16

² See footnote 6 below regarding Greenleaf; this ADA Per Classroom ratio is incorrect.

New Highland Academy	16.27	325.48	20
Markham Elementary	15.84	300.87	19
Parker Elementary	15.58	249.29	16
Madison Park Academy TK-5	13.96	251.32	18
Fred T. Korematsu Discovery Academy	11.32	214.11	19
Esperanza Elementary	19.94	320.72	16
EnCompass Academy	21.81	315.81	14.5
RISE Community School	11.88	202.03	17
ACORN Woodland Elementary	18.00	279.24	15.5
District's "Weighted Average" ADA per Classroom	19.42		
Actual Average ADA Per Classroom	17.48		

A review of Exhibit C, however, suggests that the District has not counted certain teaching stations that are identified as general education classrooms in its calculation – as even when classrooms that are identified as being allocated to a charter school, or as being used for a purpose other than classrooms (for example, as a parent/community room or administrative room) are deducted, the number of teaching stations identified as being provided to students at the comparison school sites do not match up with the number of teaching stations apparently used by the District in its “ADA per Classroom” calculation. This is a violation of *CCSA v. LAUSD* and 5 CCR section 11969.3(b), which require the District to count all teaching stations provided to students.

The Charter School also reviewed the websites for each comparison school to evaluate the District’s claimed number of teaching stations, and actual usage of particular rooms on campus as something other than general education.

Thus, not only has the District potentially miscalculated the number of teaching stations on the comparison school campuses, but has not been transparent about its calculations, making it impossible for the Charter School to verify the District’s calculations. And there is also an even more fundamental problem with the District’s “ADA Per Classroom” calculation, one that appears to be a blatant effort by the District to manipulate

its calculations so as to illegally reduce the number of teaching stations it allocates to charter schools.

Most charter schools have multiple comparison schools, and thus in order to determine the teaching station to ADA ratio that will be applied to a charter school's projected in-District ADA to determine the number of teaching stations which a charter school must be allocated, the ratios for all of the comparison schools must be averaged by adding them all together, and then dividing by the number of comparison schools. This is commonly known as the "mean"³ and is the most frequently used formula to calculate the average of a set of numbers as it identifies the most central value of a discrete set of numbers (again, the sum of the values divided by the number of values). This ensures that the allocation of teaching stations to a charter school most closely reflects the actual teaching station to ADA ratio across all comparison schools – which is the intent of Prop. 39.

However, rather than simply calculating the average teaching station to ADA ratio at the comparison schools (as required by Prop. 39 and the formula set forth in *CCSA v. LAUSD*), the District, for mathematically fallacious reasons, first calculated the ratios of each comparison school, but then calculated a "weighted average" by applying a "weighting factor" to the ratios of the comparison schools which gave heavier weight to those District comparison schools with higher projected ADA in averaging the teaching station to ADA ratios of the comparison schools. In other words, the teaching station to ADA ratios of schools with higher ADA were given greater weight than schools with lower ADA.

There is no support for using a weighted average in this situation, as weighted averages are typically used when it is necessary to give certain values in a data set more weight to reflect the fact that those values are inherently more meaningful than other values in the set. For example, in calculating classroom grades, the grade on a final exam will typically be given more weight than a weekly exam to reflect the fact that what the student's final classroom grade is intended to reflect (i.e., the student's overall command of a subject matter) is best captured by the more comprehensive and integrated final exam, and not by weekly exams that are typically designed for an entirely different purpose (i.e., to ensure the

³ Other calculations to determine the average, the median (the middle number in a list of sorted numbers) and the mode (the most frequently occurring value in a set of values) are not mathematically appropriate here, as they would result in skewed allocations. Prop. 39 requires that facilities must be provided in the same ratio of teaching station space to ADA as available in a group of school district-operated comparison schools, and using medians or modes would likely result in a charter school receiving an allocation of teaching stations that does not reflect space available at the comparison schools, as one school with far more or far fewer teaching stations would have a disproportionate impact on the calculation.

student stays engaged in the subject matter and to flag any comprehension difficulties when they still may be timely remedied).

It is a violation of Prop. 39 to give certain larger and likely more crowded District schools more weight in the teaching station to ADA ratio calculation. Instead, each comparison school should be given the same weight, because Prop. 39 clearly does not contain any language even suggesting that some comparison schools are more important than others.

Instead, Prop. 39 simply states that the comparison group consists of schools with similar grade levels that serve students living in the high school attendance area in which the largest number of charter school students reside – in other words, the comparison group was developed to reflect the kinds and amounts of facilities charter school students would otherwise enjoy had they chosen to attend a traditional district school. (See, e.g. the Final Statement of Reasons accompanying the first set of Prop. 39 Implementing Regulations, which describes the comparison school analysis as trying to find a “middle ground” between a comparison group that consists of all district-operated schools and one that consists of one to three schools, as using all district-operated schools as the comparison group would “result in a standard that might be significantly different than the neighborhood schools the charter school students would otherwise attend. (This is because in large school districts the conditions in schools may vary widely from neighborhood to neighborhood)” whereas “[u]sing one to three schools would result in a group that is too small and would result in problems agreeing on the group selected.”) The State Board of Education (“SBE”) could have allowed school districts to employ a weighted average in calculating comparison group teaching stations, but did not. The District must comply with the SBE’s decision in this regard.

One can only assume the District used this weighted average because schools with higher ADA are more likely to have more crowded classrooms and less empty space, whereas schools with lower ADA are more likely to be under-enrolled, and thus have lower class sizes and more empty rooms. We note neither the Preliminary Proposal nor any of the exhibits offer any explanation for how or why the District elected to engage in this sort of mathematical gymnastics. However, a review of Table 7a shows that in fact the comparison schools with higher ADA do have higher teaching station to ADA ratios. As such, the District’s use of a weighted average for the teaching station to ADA ratio results in an allocation of fewer classrooms to the Charter School, as proven below.

Please note that the data in the “Number of Rooms Identified As General Education Classrooms In Exhibit C” column below does deduct rooms allocated to charter schools, but

not rooms identified in Exhibit C as being used for some other non-classroom purpose (e.g. Administration, Community Room, etc.) because those rooms were excluded from the District's calculation of non-teaching station space and thus need to be added back into the reasonable equivalence calculation. As described more fully in the non-teaching station space calculation, the non-teaching station space calculation used the MKThink data, and deducted the square footage of any room categorized as a "classroom" in MKThink. As MKThink did not make any differentiation for classrooms used for non-general education purposes, all classrooms were deducted from the non-teaching station space calculation. This illegally removes numerous rooms from the District's reasonable equivalence analysis, and as such the Charter School has added it back in here.

Comparison School	Number of Teaching Stations Used in District "ADA Per Classroom" Calculation	Projected ADA	Corrected Number of Teaching Stations⁴	Corrected Teaching Station to ADA Ratio
Brookfield Village Elementary	12	171.95	13	13.23
Community United Elementary School	17	326.25	17 ⁵	19.19
Howard Elementary	13	146.06	11	13.28
Reach Academy	19	358.95	19	18.89
Burckhalter Elementary	14	209.54	14	14.97
East Oakland PRIDE Elementary	15	268.21	15	17.88

⁴ This number has been determined by identifying the number of rooms listed as General Education Classrooms in Exhibit C, as well as cross-referencing this information with the number of classrooms (including room numbers) identified in the MKThink site plans and school websites.

⁵ Community United and Futures are on the same campus, and are combined in the Jacobs data. According to Exhibit C, the campus has a total of 34 classrooms, but the District has only counted 33 (17 for Community United and 16 for Futures) in their calculation. Cross-referencing the websites of each school, and the Jacobs data, there are actually 34 classrooms on the Community United/Futures campus that are either being used for general education or are empty.

Greenleaf Elementary	16	606.68	27 ⁶	22.47
Futures Elementary	16	291.26	17	17.13
New Highland Academy	20	325.48	20	16.27
Markham Elementary	19	300.87	20	15.04
Parker Elementary	16	249.29	16	15.58
Madison Park Academy TK-5	18	251.32	18	13.96
Fred T. Korematsu Discovery Academy	19	214.11	19	11.27
Esperanza Elementary	16	320.72	16	20.05
EnCompass Academy ⁷	14.5	315.81	14.5	21.78
RISE Community School	17	202.03	17	11.88
ACORN Woodland Elementary	15.5	279.24	15.5	18.02
CORRECT AVERAGE Teaching Station to ADA Ratio				16.52

Therefore, Cox is entitled to an allocation of 33.1, or thirty-three (33) teaching stations. As the Preliminary Proposal only allocates twenty-nine (29) classrooms, the District's offer is missing at least four teaching stations.

The Preliminary Proposal Does Not Allocate Sufficient Specialized Classroom and Non-Teaching Station Space to Cox and Fails to Allocate Special Education Space

Cox is 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

⁶ This appears to be a mistake in the District's calculation; while the Jacobs report identifies 16 classrooms on the Greenleaf/Whittier campus, there are more. First, the MKThink report for the site identifies 28 classrooms on the site. In addition, the school's website states that there are 27 teachers at the school. This is further supported by the fact that the school serves grades TK/ K-8; as noted in the comparison school section, the Jacobs report has clearly erroneously identified the facilities available at Greenleaf, as a new wing was added to the campus in 2016 with 6 new classrooms, a library and an administrative space.

⁷Encompass and ACORN are on the same campus, with a total of 30 classrooms.

facilities provided to a charter school must include a share of the specialized classroom space. The Preliminary 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:

1. the grade levels of the charter school's in-district students;
2. the charter school's total in-district classroom ADA; and
3. the per-student amount of specialized classroom space in the comparison group schools.⁸

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 Cox. 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 Cox 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 space in the comparison group schools"). (5 CCR § 11969.3(b)(2)(C).) 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 (especially here, where the District averaged the specialized classroom and non-teaching station space over all the comparison schools). Instead:

⁸ *Id.*; see also *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 296 ("Bullis") 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.)

Here, the District has failed to count specialized classroom and non-teaching station space at the comparison schools, or has failed to account for those spaces in its offer. The District has also entirely failed to allocate any special education space to Cox, thus interfering with the school's ability to provide needed and legally-mandated services to some of its most vulnerable students.

a. Allocation of Specialized Classroom Space to Cox.

The Preliminary Proposal does not allocate any specialized classroom space to Cox, instead stating that The District's calculation of the Charter School's entitlement to specialized classroom space shows that the Charter School is being allocated approximately 541 sqft of specialized teaching space beyond the amount to which it is entitled. Therefore, the District has met its obligations with regards to the allocation of specialized classroom space."

First, the District has counted the same classrooms as both teaching stations and specialized classrooms, thereby illegally reducing the amount of space it allocates to Cox. More specifically, on page 2 of the Preliminary Proposal, the District states that it is allocating twenty-nine (29) classrooms to Cox, three of which are specialized classrooms. Next, on Page 9 of the Preliminary Proposal, the District calculates that it owes Cox twenty-nine (29) regular teaching stations. Then, on page 10, the District claims that its allocation of those same twenty-nine (29) classrooms to Cox includes 1,702 square feet of art space, 851

square feet of science lab space, and 0 square feet of technology space and subsequently concludes that since the District owes Cox 2,012 total square feet of specialized classroom space, it has met its obligation to allocate specialized classroom space to Cox. In other words, the District is using the same square footage to meet two entirely different obligations.

This is illegal. As outlined above, there are three separate kinds of space that must be analyzed and allocated by a district to a charter school, each with its own separate analysis: teaching station space, specialized classroom space, and non-teaching station space. (5 CCR section 11969.3(b); *Bullis Charter School v. Los Altos School Dist.*, *supra*, 200 Cal. App. 4th at 1063-1064 [“and in particular the three categories of facilities specified in regulation 11969.3, subdivision (b) (i.e., teaching stations, specialized classroom space, and nonteaching station space) [must be used to] determine the “reasonably equivalent” facilities that must be offered and provided to a charter school.) The District cannot have it both ways – here, either Rooms D-1-15, D-1-16, and D-2-3 are allocated to Cox as regular teaching stations and are counted against the District’s obligation to provide Cox with twenty-nine (29) teaching stations, or it is counted against the over 2,012 (at a minimum) square feet of specialized classroom space the District is required to provide to Cox.

Because the District’s offer double counts this room, in this context the District’s offer is either deficient in the number of teaching stations it has offered Cox, or the amount of specialized classroom square footage.

Next, the District’s offer combines different kinds of specialized classroom space into one lumped square footage that encompasses science, technology and art spaces. It is not reasonably equivalent to combine different types and sizes of specialized classroom space. 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 and/or shared access to these spaces for Cox.

Allocating general education classrooms to meet this obligation is not consistent with the requirements of Prop. 39; 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 classrooms allocated for other uses. By allocating three classrooms for all these uses, the District is relegating Cox students to second-class status, given that District students enjoy access to these separate, furnished and equipped spaces. “[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, supra*, 200 Cal.App.4th 296, 336.)

Furthermore, as noted in the prior section, the District has again illegally applied a weighting factor to its calculations of specialized classrooms space, thereby giving more weight to the comparison schools with higher ADA, which are more crowded and thus less likely to have specialized classroom space. Using a weighted average also contradicts the express language of the Prop. 39 regulations, which require the District to calculate “the per-student amount of specialized classroom space in the comparison group schools.” (5 CCR § 11969.3(b)(2).) By applying a weighting factor, the District’s formula does not calculate a per-student amount of specialized classroom space, and instead gives more weight to the space made available to students at larger comparison schools, and less for those at smaller comparison schools. Thus, the District may not apply a weighting factor to its allocation of specialized classroom space.

Corrected Exhibit E Data Regarding Specialized Classroom Space (SCS) Entitlement⁹

Comparison School	Arts	Science	Tech	Total
Brookfield Village Elementary	0	0	3.36	3.36
Community United Elementary School	0	0	0	0
Howard Elementary	0	4.84	4.84	9.69
Reach Academy	0	2.33	2.59	4.92
Burckhalter Elementary	1.34	0	3.89	5.23
East Oakland PRIDE Elementary	2.57	3.33	0	5.9
Greenleaf Elementary	0	0	0	0
Futures Elementary	0	0	0	0
New Highland Academy	1.76	1.49	0	3.25
Markham Elementary	3.14	2.83	2.75	8.72
Parker Elementary	0	0	3.21	3.21
Madison Park Academy TK-5	1.79	0	0	1.79
Fred T. Korematsu Discovery Academy	2.34	0	1.36	3.7

⁹ While Cox does not agree that the District may combine kinds of SCS in its allocation, in order to update the District’s calculations to remove the weighting factor, for each of reference Cox has used the District’s categories in these tables.

Esperanza Elementary	2.34	0	1.36	3.7
EnCompass Academy	1.14	2.9	0	4.04
RISE Community School	1.76	1.49	0	3.25
ACORN Woodland Elementary	1.14	2.9	0	4.04
District's "Weighted Average"	1.08	1.21	1.16	3.45
Corrected (Non-Weighted) Average	1.14	1.30	1.37	3.81

Corrected Allocation of SCS

	Arts	Science	Tech	Total
Grades TK -5 (546.74 ADA)	623.28	710.76	749.03	2,083.07
Total	623.28	710.76	749.03	2,083.07

Thus, the simple removal of the District's illegal "weighting" factor results in an increased allocation to Cox of 2,083.07 square feet of specialized classroom space, more than the amount the District alleged it owes Cox.

Cox 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 at the school site.

b. Allocation of Non-Teaching Station Space to Cox

The Preliminary Proposal provides for the allocation of 60.4% of the non-teaching station space at the E. Morris Cox site, claiming a total allocation of 25,849 square feet of interior space, and 103,838 square feet of outdoor space.

As noted above, Prop. 39 requires that "the school district shall allocate and/or provide access to non-teaching station space commensurate with the in-district classroom ADA of the charter school and the per-student amount of non-teaching station space in the comparison group schools." (5 CCR § 11969.3(b)(3).)

The District's allocation of non-teaching station space to Cox in the Preliminary Proposal does not comply with Prop. 39 or its Implementing Regulations in several respects.

First, the District's calculation of the non-teaching station space at the comparison schools excludes all special education classrooms, as well as a number of other non-teaching station spaces that are housed in classrooms and were specifically removed from the teaching station to ADA ratio calculation. These spaces are not accounted for anywhere else in the Preliminary Proposal.

The District directs attention to Exhibit B, which includes a spreadsheet demonstrating how the District arrived at the "Interior NCS" calculation for each comparison school site. This spreadsheet shows that the District used data from the MKThink facilities master plan (from 2010)¹⁰ identifying each comparison school site's interior square footage, and simply deducted the square footage of each room identified as a "classroom" from the total interior square footage. The resulting number is used as the "Interior NCS" for each comparison school site.

This approach is problematic for several reasons. First, this appears to exclude all regular classrooms that are used for special education. As an example, the Jacobs report attached as Exhibit C ("Rooms Inventory" tab) to the Preliminary Proposal identifies all special education classrooms on District sites, including rooms used for "SpEd Special Day Class," "SpEd Resource Room," "SpEd Life Skills Lab," and "Resource Room." Many of these special education classes are located in regular classrooms (though some are located in smaller conference or other spaces).

Yet when the District calculated its teaching station to ADA ratio calculation, it removed Special Day Class and Newcomer ADA from its calculation, and appears to have not counted special education classrooms in its tabulation of total teaching stations on the comparison school site. Exhibit E, tab "JRoomSCS" makes clear that these rooms were also not counted as specialized classroom space.

As an example, according to Exhibit C, Burckhalter has one Special Day Class classroom and fourteen (14) Kindergarten, Primary (1-2) or PreK/TK classrooms, for a total of fifteen (15) classrooms. The MKThinkRooms tab of Exhibit B, used to calculate non-teaching station space, also lists fifteen "classrooms" – whose square footage was taken out of the "Site Interior NCS" calculation.

Yet the District's "ADA per Classroom" analysis in Table 7a assumed fourteen classrooms for Burckhalter, not fifteen.

¹⁰ Note also this means that the data on Greenleaf's non-teaching station space is completely out of date, with the addition of the new building on the campus.

Therefore, it appears the Special Day Class classroom at Burckhalter is entirely absent from the District's calculation of space provided to Burckhalter students.

Similarly, according to Exhibit C, Fred T. Korematsu Discovery Academy and Esperanza Academy (which are located on the same campus) have a total of thirty-five (35) Kindergarten, Primary (1-2) and Intermediate classrooms and one Special Day Class classroom, for a total of 36 classrooms. The MKThink report lists forty (40) classrooms on the site (four of which appear to have been categorized as art, computer lab, music and MPR space in the Jacobs report), whose square footage was taken out of the "Site Interior NCS" calculation.

Yet the District's "ADA per Classroom" analysis assumed thirty-five classrooms for Stonehurst (the name of the campus in MKThink), not thirty-six.

Thus, it appears that special education classrooms provided to District students were removed or ignored in the calculation of space at the comparison schools. This is especially notable as the Preliminary Proposal makes no mention at all of special education, whether as an analysis of the special education space at the comparison schools, or to make an allocation of space to Cox – and the District's special day class ADA has been taken out of its "ADA per Classroom calculation".

Prop. 39 clearly requires that a charter school receive an allocation of reasonably equivalent facilities and that district facilities be shared fairly between district and charter school students. Yet despite the fact that each District comparison school has more than one special education space, and several special education teachers/service providers, Cox has not received any allocation of special education space. This is a clear violation of Prop. 39.

In addition, the District has failed to identify the specific non-teaching station space to be allocated to Cox and its allocation of non-teaching station space based on the percentage of Cox's enrollment on the site, as determined by the District, not the actual square footage of space which Cox should be allocated under the law. The District claims that "a charter school's allocation is considered to fall within reasonable equivalence standards if it falls within the range of the sqft/ADA ratios at the comparison schools." However, the District has not and cannot provide any legal authority to support this claim, and such a position directly conflicts with the basic premise of Prop. 39 – that public school facilities must be shared fairly between all public school students, including those in charter schools. Prop. 39 also requires a reasonably equivalent allocation of each different kind of non-teaching station space, based on the square feet per ADA of these spaces at the comparison schools – nowhere

does Prop. 39 or applicable case law state that falling within a “range” is acceptable. This would allow the District to allocate non-teaching station square footage at the far low end of a range that includes much higher numbers (as here, the range is from 214 square feet to 1,078 square feet per ADA) and claim compliance with Prop. 39.

Similarly, the Preliminary Proposal does not address the various types of outdoor areas that exist at the comparison schools such as gardens, basketball courts, play fields, and play structure space but rather lumps all the different types of exterior spaces together when calculating exterior non-teaching station space. Each of these types of spaces has a specific use and furnishings and equipment and/or design that are appropriate for such use, and the District's allocation method does not ensure Cox will receive a reasonably equivalent allocation of each type of non-teaching station space that exists at the comparison schools. As stated in *Bullis*, “a school district, in determining the amount of nonteaching station space it must allocate to the charter school, must take an objective look at all of such space available at the schools in the comparison group.” (*Bullis, supra*, at p. 1047, emphasis added.) The District is not permitted to average all of the unique types of non-teaching station spaces that exist at the comparison schools and then allocate Cox a percentage of unspecified non-teaching station spaces that exists at the allocated site, which is not a comparison school.

In addition, the Preliminary Proposal contains no listing or description of the types of shared non-teaching spaces to which Cox will be provided access at the offered site beyond large categories of space, or any proposed schedule for Cox's use. The District's failure to provide this basic information to Cox precludes Cox from engaging in timely and efficient negotiations with site principals regarding shared use schedules and prevents Cox from assessing whether the Preliminary Proposal provides Cox with access to all of the different types of non-teaching station space to which Cox is entitled. 5 CCR section 11969.9(h) requires that the school district, in its final facilities proposal, specifically identify the nonteaching station space offered to the charter school. (*Bullis, supra*, at p. 1046.) As such, Cox expects that the District's final offer will specifically identify all the non-teaching station space to be allocated to Cox.

For all these reasons, the District's allocation of specialized and non-teaching station space included in the Preliminary Proposal fails to comply with Prop. 39 and its Implementing Regulations. Cox is entitled to reasonably equivalent allocations of specialized and non-teaching spaces, and of furnishings and equipment that accompany those spaces in the comparison schools, and it anticipates receiving its full complement of the specialized and non-teaching space at the offered school site.

Pro Rata Charge Worksheet

As a preliminary matter, Cox notes that the District has indicated that Cox'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 Cox an additional amount for custodial services above what is included in the pro-rata share, this is not permitted by the Implementing Regulations.

1. Improper Costs Included in Pro Rata Share Calculation

a. **Facility Acquisition and Construction Costs:** The District's 2019/20 Fiscal Year Facility Use Rate Per Sq Ft Calculation, attached to the Preliminary Proposal, improperly includes \$6,760,492 in Facility Acquisition and Construction Costs (an increase from the \$70,324 the District listed for this line item in the prior year pro rata share calculation). It is the Charter School's understanding that these are costs associated with facility improvements performed by the District using money from the Proposition 39 Clean Energy Jobs Act.

As the District is aware, only "facilities costs that the school district pays with unrestricted general fund revenues includes those costs associated with plant maintenance and operations, facilities acquisition and construction" may be included in the pro rata share calculation. According to the California School Accounting Manual, "restricted programs or activities are those funded from revenue sources subject to constraints imposed by external resource providers or by law through constitutional provisions or enabling legislation." Prop. 39 Clean Energy Job Act funds are therefore restricted funds and may not be included in the pro rata share calculation.

b. **RRMA Transfer:** The District has included \$17,254,784 in facilities costs identified as "RRMA transfer from UR to resource 8150." Typically this transfer represents 3% of the District's annual total general fund budgeted expenditures. Last year the District claimed a transfer of \$13,048,405; in other words, the District's calculation suggests that this year it has increased its transfer amount by more than \$4 million. Cox requests additional information to document that this is the correct transfer amount, as the District's current budget situation, in which the District has made and is making significant cuts, makes it seem less likely that its RRMA transfer amount would have increased between 2017-18 and 2018-19.

c. **Police Services:** The District may not include police costs in its pro rata share calculation because Cox 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 Cox uses. Because Cox does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

d. Insurance: Cox 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 Cox for a cost it is already paying for, it is requiring Cox 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.

e. Custodial Services: The District, as it has done in prior years, is requiring Cox to use District custodial services, and is attempting to charge Cox for these services separately from the pro rata share, by adding a "Custodial Use Fee" on top of the pro rata share. The District's Preliminary Proposal indicates that it may charge the charter school for its custodial costs under the current case, *California Charter School Association v. Oakland Unified School District*.

First, this case is not binding precedent on Cox. Second, the ruling in the motion for summary adjudication referenced by the District was only related to whether the District could require charter schools to use District custodial services. However, whether or not the charter school accepts the District's custodial services, the District cannot charge those costs separately from the pro rata share. Instead, if the Charter School accepts the District's services, the District's district-wide custodial costs must be included in the calculation of the pro rata share and charged to the Charter School on a per-square-foot basis. Education Code § 47614(b)(1) is very clear that other than the pro rata share, "the charter school shall not be otherwise charged for use of the facilities."

f. Utilities: The District may not charge a separate "Utility Fee" for the same reason it cannot charge a separate custodial fee.

g. Emergency Debt Service Costs: 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 Cox 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

Cox 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 Cox'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."

h. **Exhibit G:** Exhibit G to the Preliminary Proposal contains a statement that "The District is entitled under Cal. Admin. Code tit. 5, § 11969.7(c) to charge the charter school on a square footage basis for use of common areas such as the parking lot, exterior corridors, field space, playground, and blacktop, but is not doing so at this time. The District reserves the right to amend its calculation of the pro-rata share to include all "space allocated by the school district to the charter school," and will provide the charter school notice and an opportunity to respond before implementing any changes. The full allocation of both interior and exterior space is outlined in the preliminary offer letter."

The District cannot include the square footage of outdoor space (fields, asphalt, etc.) in its calculation of the amount owed unless it also included the square footage of the District's total outdoor spaces when calculating the per-square foot charge. The intent of the pro rata share, as evidenced by the bond language of the Proposition 39 initiative, as well as the Statements of Reasons accompanying the first and second iterations of the Proposition 39 Implementing Regulations, was to determine the amount of money the District spent to operate and maintain its facilities on a per square foot basis. This calculation was performed by dividing the district's total facilities costs (minus costs paid for by the charter school) by the "total space" of the District. A charter school would then be required to pay its fair share of the District's facilities costs, based on the number of square feet it was allocated. In other words, the pro rata share charged to a charter school was expected to make the charter school's use of a school district's facilities as revenue-neutral as possible by reimbursing the school district for all costs it incurred in maintaining facilities use by the charter school. As further explanation, "pro rata" is defined by the American Heritage College Dictionary as "in proportion; according to a factor that can be calculated exactly." Proportion is then

defined as “a relationship between quantities such that if one varies than another varies in a manner dependent on the first.”

If the District does not include the square footage of its outdoor space, field space, or blacktop space at any of its facilities in the calculation, even if it is including the costs it incurs to operate, maintain and repair the outdoor spaces, its pro rata share will not accurately reflect its per square foot costs incurred to operate and maintain its entire complement of facilities.

This is remedied, of course, by not including the outdoor space used by the Charter School in the cost charged to the Charter School. In order for the costs calculated by the District and paid for by the Charter School to actually be proportional, and thus reflect a pro rata share of the costs, the costs and square footage included in the calculation must reflect the costs and square footage being charged to the Charter School. If the District does not include its outdoor square footage in its pro rata share calculation, but then charges the Charter School for outdoor square footage, the District is causing one quantity to vary without adjusting the other quantity, and is overcharging the Charter School for its use of the facility, in violation of 5 CCR Section 11969.7.

The District must therefore either only charge the Charter School for the square footage of the buildings it uses, or if it wishes to charge the Charter School for exterior space, it must recalculate its pro rata share as set forth above.

Draft Facilities Use Agreement.

We are reviewing the draft Facilities Use Agreement; attached please find a non-exhaustive list of proposed changes.

1. **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 Cox’s summer school, if any, and programs procured by Cox through third party entities, e.g. after-school program providers.

2. **Section 1.4:** Prop. 39 only requires Cox 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).

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3. **Section 3.1:** The Charter School does not agree to the District's calculated pro rata share for the reasons set forth above.

4. **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 Cox 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.

5. **Section 10:** The District should also make temporary facilities available to the Charter School for any of its program that is displaced while the District makes repairs. The Charter School would also prefer to see a higher dollar value than \$250,000 before the District can terminate the Agreement, such as \$400,000

6. **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 Cox's program. The District must provide relevant scheduling information and reasonable notice to Cox if it will be coming onto the facility to perform maintenance. In addition, Cox wishes to perform its own custodial services at the E. Morris Cox site, and as a result, does not agree to allow the District to enter the Premises to perform custodial services.

7. **Section 14:** While Cox 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).)

8. **Section 15:** Cox wishes to perform its own cleaning and custodial services at the E. Morris Cox site. Therefore, the Final Offer will need to be revised to provide for this revision.

9. **Section 16.3:** This section requires the Charter School to be responsible for the maintenance of the Premises, which is inconsistent with all other language in the Agreement.

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10. **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. Cox does not agree to provide written verification of compliance with the fingerprinting and criminal background investigation requirements to District prior to Cox taking possession of the Premises and prior to conducting its educational program on the Premises.

11. **Section 21.5:** Most insurance companies are now refusing to provide notice of cancellation to additional insureds. The Charter School would propose that this section be revised to require the Charter School to provide this notice to the District.

We have attempted in this letter to enumerate all of our concerns with the District's Preliminary Proposal; however, we note that our failure to mention a concern in this letter should not be interpreted as acceptance of that term.

Cox looks forward to the opportunity to discuss and negotiate these matters with the District moving forward.



Hae-Sin Thomas
Chief Executive Officer

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