American Indian
Model Schools
A School at Work!

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May 1, 2019

Via E-mail: sonali.murarka@ousd.org

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

Re: ***American Indian Public High School***
Response to District's Final Offer
Proposition 39 2019-2020

Dear Ms. Murarka:

American Indian Public High School ("AIPHS" or "Charter School") is in receipt of the Oakland Unified School District's ("District") April 1, 2019 letter ("Final Offer") regarding AIPHS's request for facilities under Proposition 39 ("Prop. 39") for the 2019-2020 school year.

The District's Final Offer is for a total of sixteen (16) teaching stations, including two (2) specialized classrooms, at Lakeview School, as well as shared use of some of the non-teaching station space at Lakeview. The Preliminary Proposal is based on a projected in-District ADA of 370.92.

Section 11969.9(i) of the Prop. 39 Implementing Regulations (the "Implementing Regulations") requires the Charter School to notify the District whether or not the Charter School 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 Offer ("Response"), which is incorporated here by reference, the Charter School accepts and intends to occupy the offered space, without acknowledging its sufficiency 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.

<u>The District's Teaching Station to ADA Analysis</u>

While AIPHS accepts the offer of teaching stations made by the District, and while AIPHS does appreciate the improvements in the District's calculation, AIPHS will still take this opportunity to note ongoing concerns with the teaching station to ADA ratio calculated by the District.

<u>The District's Use of a Weighting Factor Is Inconsistent with the Language and Intent of Prop. 39</u>.

The District continues to use a weighting factor in calculating its teaching station to ADA ratio for the comparison schools, arguing that the weighting factor "more accurately reflect the ADA-to-classroom ratio of the average student attending the comparison schools…which factors in the relative proportion that each comparison school's ADA contributes to the total comparison group ADA."

AIPHS does not agree that using a weighted average more accurately captures the individual experience of students at the comparison schools, given that in fact it gives more weight to the larger number of students who occupy schools that have higher enrollment and are more crowded. In fact, AIPHS students would be more likely to enroll in the schools with smaller enrollments as these schools likely have more available space.

However, whether or not the District believes use of a weighted average more accurately reflects a student's experience at the comparison schools, very simply, the clear language of the Prop. 39 regulations and the applicable case law do not contemplate or provide for use of a weighted average. 5 CCR Section 11969.3(b)(1) states that "School district ADA shall be determined using projections for the fiscal year and grade levels for which facilities are requested" – and does not state that any adjustments to this ADA can be made. It also requires use of the inventory established pursuant to 2 CCR 1859.30 to determine the number of teaching stations – again, without any weighting adjustment.

The District further claims that AIPHS "indicated that schools with a higher ADA would always have a lower ADA-to-classroom ratio." This is not what the Response said. In fact, as is exemplified by the District's Final Offers, the Response stated that the District's larger schools would have a higher teaching station to ADA ratio, as they are more crowded, and that higher teaching station to ADA ratio. Thus, by weighting these schools more than smaller schools, this results in fewer teaching stations for the charter school – which is likely why the District chose to add this extra step to the Prop. 39 analysis.

Lastly, AIPHS notes that in every Final Offer, using the weighting factor results in a reduction of the amount of space owed to a charter school.

<u>Prop. 39 Does Not Allow the District to Pull Out Special Day Classes from the Teaching Station to ADA Ratio Calculation, and Then Not Include Them Anywhere Else</u>.

The District has entirely removed all of its Special Day Class ADA and facilities from its Prop. 39 analysis and allocation of space to AIPHS, thus denying AIPHS a reasonably equivalent allocation of special education space, in violation of Prop. 39.

The District's Final Offer states that the District removed both its special day classes and its special day class ADA from the comparison school information in calculating the teaching station to ADA ratio "as these students require a lower ADA-to-classroom ratio than the general student population….Currently, because the Charter School does not serve students who require

an SDC setting, the non-SDC ADA-to-classroom ratio is used to determine classroom entitlement for the Charter School. However, if the Charter School served SDC students, space would be allocated for these students based on comparison schools' SDC ADA-to-classroom ratio."

In other words, the District took out a number of teaching stations and ADA from its teaching station to ADA ratio related to its SDC students and facilities, and these spaces were also entirely excluded from every aspect of the District's Prop. 39 analysis.

This is not allowed by Prop. 39 – instead, the District must count and allocate for all of its facilities in the Prop. 39 process, and allocate reasonably equivalent amounts of each kind of space that exists at the comparison schools to the charter school.

More specifically, all public schools, including charter schools, have a legal obligation to provide a "free and appropriate public education" to enrolled students with special needs. (20 U.S.C. § 1401, subd. (9); 20 U.S.C. § 1412(a)(1)(A); Cal. Educ. Code § 56040.) The penalties for a failure to do so can be substantial. As is evidenced from the District's own exhibits, each District comparison school site has numerous unique, separate special education spaces which it uses to provide services to District students with special needs.

Bullis Charter School v. Los Altos School District (2011) 200 Cal. App. 4th 1022 is extremely clear about the District's obligation to include all these spaces in its analysis:

> "[T]he District contends that in the case of nonclassroom facilities, it need only consider those that are common to each of the schools in the comparison group...There is no support in the regulations for this viewpoint....For instance, using the above example, if all five schools had tennis courts, but one school chose to use the area for badminton only, in the District's view, the space would not be considered in the Proposition 39 analysis...This common usage approach could lead to—as has occurred here—the exclusion of a substantial amount of nonteaching station space from the analysis, to the potential detriment of the charter school. We believe that 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. A school district may achieve the mandate under Proposition 39 and the regulations of "giv[ing] the same degree of consideration to the needs of charter school students as it does to the students in district-run schools" (*cite*) only if it considers the entire nonclassroom space in the facilities offer. (*Bullis*, *supra*, at 1047.)

Consistent with the *Bullis* language cited above, the District must include all of the special education spaces at the comparison schools in its analysis, and then allocate a reasonably equivalent amount of those spaces to AIPHS. (Education Code Section 47614, 5 CCR Section 11969.3(b)(3).) Despite this mandate, the District's calculation excludes all Special Day Class

from its analysis. Had they been included, AIPHS would be entitled to either additional teaching stations or additional special education space.

The District appears to justify this exclusion by stating that AIPHS does not serve SDC students, and if it did it would be allocated space for these students. Yet the number of students receiving special education services is irrelevant to the Prop. 39 analysis, and there is a good reason for this. Often, a school will not know until the first day whether a student has special education needs. In addition, many students are found eligible for special education during the school year. Thus, if a school district only had to allocate special education space to a charter school based on documented need, it would be a constantly moving target and students might be denied their rights. Even *California Charter School Association v. Los Angeles Unified School District*, a case about allocation of teaching stations, acknowledges that Prop. 39 does not allow a district to dictate or control a charter school's specific use of spaces once those spaces are allocated in compliance with the law:

> "The Legislature authorized the creation of charter schools in order to promote choice, innovation, and competition on the premise that charter schools, while [*1241] remaining accountable for student outcomes, would be largely free to adopt different educational approaches and make different decisions than those made by the school districts in which they operate. Counting 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." (*California Charter Schools Assn. v. Los Angeles Unified School Dist*., 60 Cal. 4th 1221, 1240-1241.)

As such, the District may not completely exclude Special Day Class spaces from its reasonable equivalence analysis as well as its allocation of space to AIPHS because it believes AIPHS does not serve Special Day Class students. Instead, the District must either include this space in the teaching station to ADA ratio calculation (including SDC ADA as well), or include it in the specialized or non-teaching station space allocations.

The Final Offer Does Not Allocate Sufficient Specialized Classroom and Non-Teaching Station Space to AIPHS and Does not Allocate any Special Education Classrooms

As stated in detail in the Response, AIPHS 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 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:

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.[1]

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 AIPHS. 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 AIPHS 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).)

a. Allocation of Specialized Classroom Space to AIPHS.

The Final Offer again does not allocate sufficient specialized classroom space to AIPHS, instead claiming that AIPHS is "underallocated" specialized classroom space by 3,313 square feet. While AIPHS accepts the District's offer of space, it will note its ongoing concerns with the allocation as the Final Offer did not substantively address the concerns outlined in the Response. It will also note that while it did receive its additional allocation of one classroom, as requested, this does not mean that the District has "met its obligations to provide reasonably equivalent specialized teaching space to the Charter School."

First, the District states that its process for allocation is correct because specialized classrooms can be included as a "subset" of teaching station space, and then states that "[i]f the specialized classroom allocation should, in fact, not be considered a subset of the classroom allocation, then all specialized classrooms should be removed prior to calculating the ADA to-classroom ratio, an argument the Charter School has not made."

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[1] *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*").

This statement is very strange, given that in the Preliminary Proposals, the District literally removed all specialized classrooms from its ADA to classroom ratio calculation. Exhibit C to the Preliminary Proposal categorized all science lab space, art/music/band rooms, computer labs and other specialized technology rooms as specialized classroom space, and did not include them in the teaching station to ADA ratio. As proof, please see the Response, which identifies the number of teaching stations used by the District in the teaching station to ADA ratio calculation. These numbers are different from the number of teaching stations identified for each comparison school in the Final Offer.

Moreover, AIPHS did specifically state in its Response that specialized classrooms should be categorized, counted and allocated separately from regular teaching stations, as these rooms have specialized furnishings and equipment (for example lab stations in a science classroom) that do not exist in general education teaching stations, and which are necessary for certain kinds of instruction. For example, science classrooms typically have lab stations and gas and water hookups; not only do general education classrooms not have these furnishings and equipment, but it would be difficult if not impossible to teach lab science without this specialized space. Therefore, inclusion of these spaces in the teaching station to ADA ratio is not only not contemplated by Prop. 39, but an allocation of extra general education classrooms instead of actual specialized classroom space would not be reasonably equivalent.

The District's very limited reference to 5 CCR Section 11969.3(b)(2) (which ignores the second portion of the section) does not suggest, as the District claims, that specialized classrooms should be included in the teaching station to ADA ratio analysis without also ensuring that a charter school has access to reasonably equivalent specialized classroom space. If that were the case, the regulation would not provide for a different formula for calculating reasonably equivalent specialized classroom space (based on square feet per ADA at the comparison schools) and for calculating the appropriate number of teaching stations. The regulation states that "If the school district includes specialized classroom space, such as science laboratories, in its classroom inventory, the space allocation provided pursuant to paragraph (1) of subdivision (b) shall include a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space." The "classroom inventory" referenced (the SAB 50-02) is the inventory prepared pursuant to 2 CCR Section 1859.31, which includes all facilities and classrooms of all kinds in the school district's inventory of facilities.

5 CCR Section 11969.3(b)(2) then goes on to state that "[t]he 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.

Thus, the regulation is simply saying that if the District's facilities, as identified in the SAB 50-02, include specialized classroom spaces such as science labs, the District must then perform the per-square-foot analysis of all of these kinds of spaces, and ensure that the square footage allocated to the charter school is reasonably equivalent.

It appears the District is now claiming that it did count these rooms in the teaching station to ADA ratio calculation in the Final Offer, and thus as long as the number of allocated teaching stations includes a square footage of specialized classroom space, it is reasonably equivalent.

However, the actual data included in the Final Offer and as exhibits to the Final Offer show that the District did not actually do this. The District appears to suggest that its Exhibit C counted all rooms that were either general education classrooms or specialized classrooms (see the column "Consider as Classroom" of the Rooms Inventory tab in Exhibit C).

Yet, for each comparison school, if one counts the number of rooms marked YES under the column "Consider as Classroom" of the Rooms Inventory tab in Exhibit C, which was supposedly used by the District to prepare Table 7, those numbers differ from the "Classrooms Provided to Students" in Table 7. As a result, the District did not actually count the number of total classrooms, including specialized classrooms, when determining the teaching station to ADA ratio:

	"Classrooms Provided to Students" from Final Offer	Actual Number of Rooms Under "Consider as Classrooms"[2]	Claimed Projected ADA	Corrected Teaching Station to ADA Ratio
Oakland High School	62	71	1448.30	20.39

Thus, the District must include all classrooms, specialized or otherwise, in the teaching station to ADA ratio calculation and then use the corrected teaching station to ADA ratio to allocate classrooms, and it must separately calculate the number of square feet of specialized classroom space at the comparison schools, determine the number of square feet per ADA provided to students at the comparison schools, and allocate space based on this number.

Lastly, the District has also used a weighting factor for the allocation of specialized classroom space. For the reasons outlined in the teaching station to ADA ratio section, this is not consistent with the actual language nor intent of Prop. 39, and in every case results in a reduction of space allocated to a charter school.

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[2] Does **not** include rooms identified as "SpEd Special Day Classroom," as well as "SpEd Life Skills Lab" and "SpEd Resource Room."

b. Allocation of Non-Teaching Station Space to AIPHS

As the District has not substantively responded to AIPHS' concerns in the Response related to the allocation of non-teaching station space, AIPHS will only incorporate the Response by reference.

Pro Rata Charge Worksheet

For all the reasons enumerated in the Response, AIPHS does not believe the District may separately charge it for custodial services or utilities for the site, and even if for purposes of argument it does agree to separate charges, it is not appropriate for these costs to based on a proportion of ADA at the site. Instead, it should be based on the actual square footage occupied by AIPHS on the site, as this more accurately reflects the amount of utilities and other costs consumed by each program. AIPHS wishes to perform its own custodial services at the site; as it is not co-located with a District school, and has minimal sharing issues with the District administrative programs on site, AIPHS does not believe this will violate the District's policies or practices.

In addition, AIPHS and the Lakeview administrator still need to negotiate a shared use schedule for the site. The pro rata share calculation will need to be revised to reflect AIPHS' actual usage on the site.

Prop. 39 requires the pro rata share to be based on "actual facilities costs in the year preceding the fiscal year in which facilities are provided" (5 CCR Section 11969.7(d)); as the current pro rata share is based on 18-19 "working budget," please confirm it will be updated once the 18-19 budget is final.

Lastly, while the majority of the Facilities Use Agreement is acceptable to AIPHS, there are a few small items that needs to be addressed:

1. **Section 1.7**: This section is a new addition to the FUA and has never existed in a District FUA before, and AIPHS does not agree to this language (nor does it agree to the language placing a grade range restriction on AIPHS outside the grade ranges served by the school). Once the space has been allocated, AIPHS can use it for whichever students, and in whatever grade configuration it deems necessary for its program. Prop. 39 does not allow the District to take space away from the Charter School once that space has been offered by the District and accepted. This section is also not consistent with the definition of overallocation in the Prop. 39 regulations, which is based on the school's total in-District ADA at P-2, not the in-District ADA accommodated on the site.

2. **Section 3**: The FUA proposes monthly payments, yet the Final Offer proposes quarterly payments. Please clarify which is correct.

3. **Section 8**: The District carves out a limitation on AIPHS using the Site related to joint use agreements that were "entered into between the District and a third party prior to January 1 of the school year to the Term." The District has provided no other information as to whether such a Joint Use Agreement exists at the Site. Without knowing this information, and how this will affect AIPHS' access to the Site, AIPHS cannot agree to this provision.

4. **Section 10**: Given how this section has been changed, the District needs to provide some assurance or warranty in the FUA that the Site can be used as a public school facility.

5. **Section 18**: This section should also apply to the District.

6. **Section 22**: this section currently states that AIPHS can only install "an onsite sign" on the campus. As in the past and currently, AIPHS has been able to install more than one sign on the campus, given the size of the campus, and as later in the section there is a reference to "signs" (plural), AIPHS assumes that it was not the District's intent to limit its signage ability to a single sign on campus.

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. We look forward to working with the District to finalize the details of our co-location at Lakeview, as well as the FUA. Please do not hesitate to contact me should you have any questions.

Respectfully,

Superintendent Maya Woods-Cadiz
American Indian Model School

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