ASPIRE PUBLIC SCHOOLS
College for Certain

February 28, 2017

Silke Bradford
Oakland Unified School District
Office of Charter Schools
1000 Broadway, Suite 639
Oakland, CA 94607

Dear Ms. Bradford,

Per Section 11969.9(g) of the Proposition 39 Implementing Regulations, Aspire is including the attached written Preliminary Response to express our concerns with the Preliminary Proposition 39 Offer for Aspire ERES Academy and to preserve our rights in moving forward with the Prop 39 facility allocation process.

We appreciate the progress that we've made on discussing an alternative site and will continue to work in partnership with the district to find the best solution, given the high need to find Aspire ERES Academy a different site for next year.

Sincerely,

Casey Hoffman
Director of Growth & Strategy
Aspire Public Schools

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Silke Bradford
Oakland Unified School District
Office of Charter Schools
1000 Broadway, Suite 639
Oakland, CA 94607

Re: Aspire ERES Academy
Response to District's Preliminary Proposal
Proposition 39 2017-2018

Dear Ms. Bradford:

Aspire ERES Academy ("Aspire EA") is in receipt of the Oakland Unified School District's ("District") February 1, 2017 letter ("Preliminary Proposal") regarding the Aspire EA's request for facilities under Proposition 39 for the 2017-2018 school year.

The District's Preliminary Proposal is for nine (9) teaching stations and two (2) standard classroom for use as specialized classroom space, spread across two District sites, East Oakland PRIDE Elementary School and Markham Elementary School. The Preliminary Proposal is based on a projected in-District classroom ADA of 192.65. The Preliminary Proposal also appears to allocate 24.4% of the administrative/office/conference space, MPR/Auditorium/Cafeteria/Gym, and Library space at East Oakland PRIDE and 21.5% of the same space at Markham.

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

Aspire EA appreciates the efforts of District staff to identify an offer of space for Aspire EA. Aspire EA would like to express the following concerns regarding the Preliminary Proposal and the draft Facilities Use Agreement and request that the District's final offer of space be modified in accordance with Prop. 39 and its Implementing Regulations.

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1. **Required Elements of the Preliminary Proposal**:

Aspire EA notes that the District's Preliminary Proposal does not comply with the specific requirements of Proposition 39 in several respects. There is minimal analysis of the capacity and condition of the comparison schools and an incorrect allocation of the teaching station to ADA ratio at the comparison school, as well as what appears to be a completely illegal manner of calculating the specialized classroom and non-teaching station space at the comparison schools, as well as the actual space allocated to Aspire EA.

2. **Allocation of Non-Contiguous Space**

The express provisions of Proposition 39 require that the District allocate facilities to the Charter School that are "contiguous**,** furnished, and equipped." (Education Code Section 47614(b).) This requirement exists irrespective of the grade level configuration of a charter school. (5 CCR Section 11969.3(a).)

Section 11969.2(d) goes on to state that "[i]f the in-district average daily classroom attendance of the charter school cannot be accommodated on any single school district school site, contiguous facilities also includes facilities located at more than one site, provided that the school district shall minimize the number of sites assigned and shall consider student safety." In addition, "the district's governing board must first make a finding that the charter school could not be accommodated at a single site and adopt a written statement of reasons explaining the finding." (5 CCR Section 11969.2(d).) "If none of the district-operated schools has grade levels similar to the charter school, then a contiguous facility within the meaning of subdivision (d) of section 11969.2 shall be an existing facility that is <u>most consistent with the needs of students in the grade levels served at the charter school</u>." (5 CCR Section 11969.3(a) (emphasis added).) This analysis is purely numerical; the Court in *Ridgecrest* noted that "<u>*all else being equal, a charter school should be housed at a single site if one exists with the capacity to handle all the school's students*</u>." (*Ridgecrest Charter School v. Sierra Sands Unified School Dist*. (2005) 130 Cal. App. 4th 986, 1000 (emphasis added).)

In both its Notice of Proposed Rulemaking File, and its Final Statement of Reasons, the State Board of Education specifically reiterates that 5 CCR 11969.3(d) was amended to make it clear that "when no school of the district serves grade levels similar to the charter school's, a contiguous facility is an existing facility that is most consistent with the charter school's grade levels" in order to bring the Regulations in line with the *Ridgecrest* decision. (Final Statement of Reasons, Page 20.) The Initial Statement of Reasons further clarified that in looking at the issue of a school district making facilities available to a charter school at multiple locations as discussed in the *Ridgecrest* decision, it was clear an addition to the regulations was necessary to formalize two requirements: 1) a school district is not permitted to treat a charter school's in-district students with less consideration than students in the district-run schools, and 2) in allocating and providing access to facilities to a charter school, a school district must begin from the premise that the facilities are to be on a single school site." (Initial Statement of Reasons, Page 3.)

The Court of Appeal has also ruled that Proposition 39 requires that a school district "*begin* with the

assumption that all charter school students will be assigned to a single site, and attempt from there to adjust the other factors to accommodate this goal." (*California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal. App. 4th 530, 548-549.) *Ridgecrest* also specifically acknowledged that "we have little doubt that accommodating [Ridgecrest Charter School's] facilities request will cause some, if not considerable, disruption and dislocation among the District's students, staff, and programs. But section 47614 requires that the facilities 'should be shared fairly among all public school pupils, including those in charter schools.'" (*Ridgecrest*, 130 Cal. App. 4th at 1006.)[1] In other words, the District may not reject a potential contiguous site just because it would potentially disrupt and dislocate District students.

In addition, while the District does not have to expend general fund monies to rent, buy, or lease facilities to meet this obligation, the law implicitly recognizes that a district must use all resources including any restricted monies (parcel taxes, bond monies, etc.) to meet this obligation.[2]

The District's Findings of Fact supporting its non-contiguous allocation of space to the Charter School claims that *Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226 fully supports its failure to make any accommodations to locate charter schools on contiguous facilities. The District has fundamentally misread and misapplied *Westchester*, which was not about a non-contiguous allocation of space, but rather about making reasonable efforts to place a charter near where it wishes to be located. Even in its analysis about the reasonable efforts a district must make, the court acknowledged the importance of "balancing impacts," and of treating both District and charter school students fairly. Here, and in prior years, the District has never actually balanced the needs of both groups of students, but rather has only looked for where empty rooms exist at District sites, and shoe-horned charter schools into those sites, with allocations of space across up to seven different sites. While always closing District sites or moving District students around would not meet the intent of Prop. 39 to treat all students fairly, the District does not act in compliance with the law if it never does these things to make space. As *Ridgecrest* said, some displacement is required in order to minimize the harm to both District and charter school students. Here, the District favors only its own students and places charter school students in harm's way by forcing them to locate on multiple sites separated, in this case, by more than 12 miles.

The District's Findings of Fact supporting its non-contiguous allocation of space to the Charter School also states as follows:

[1] The *Ridgecrest* court also stated that "In discussing the timeframe within which a new charter school must submit a facilities request (Regs., § 11969.9, subd. (a)), the Department explained: 'This section is intended to ensure that a charter school is or has a reasonable chance of becoming a viable concern before requiring the school district to plan modifications to its programs to accommodate the charter school. *For example*, *accommodating a charter school might involve moving district-operated programs or changing attendance areas*.' (Italics added.) Plainly then, the regulations contemplate that 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." (*Ridgecrest*, 130 Cal. App. 4th at 1000 (emphasis added).)

[2] Therefore, as an example if the District has any restricted monies it could put additional portables on one of its school sites to meet this obligation.

> The District offered two sites that are a mere 1.0 mile away from one another. This placement was designed to address safety concerns regarding students, families, or teachers having to travel to multiple sites during the school day. Here, the two sites are in very close proximity to each other and therefore, minimize issues regarding commutes and travel between school sites. Retaining students, families, and staff within the community to which they are accustomed and already a part of is a safety consideration that is taken into account. The District's offer of two sites that are less than three miles away from the charter school's preferred location. Accordingly, students will continue to be a part of the community with which they are familiar.
>
> The District was mindful of keeping campus occupancy and traffic at a level that would not subject students or personnel to increased physical safety risks. The safety concern of managing student safety would be disproportionately exacerbated if total in-District classroom ADA was located at any one site.

This finding is inadequate and insufficient. It does not address the fact that its two sites are located in completely different neighborhoods from its current community, which will require families to drive students between campuses, adding traffic and driving danger for these families, as they must travel far from their community. In addition, any claim that the District was attempting to keep campus occupancy and traffic lower is fallacious; the District is instead choosing to prioritize the safety of District students over those of charter school students. Many District campuses are underutilized; were the District to actually consolidate its programs to ensure the best use of all of its sites, it would not need to allocate charter schools space at multiple sites. The District's findings contain also no analysis of the safety issues facing the Charter School's students if they are placed on District campuses with different grade levels and a hostile school community/located far from where they wish to be located/other reason the site is unacceptable.

3. Location of Allocated Space

Unfortunately, the allocation of space at East Oakland Pride and Markham are not near where Aspire EA wishes to locate; it is not anywhere near Aspire EA's current campus or where its school community lives, where Aspire EA's charter commits it will locate, and where Aspire EA has done all of its community building and recruiting. Instead, it is a twenty plus minute drive in rush hour traffic from the area where it indicated in its Prop. 39 request it wished to be located.

Pursuant to Education Code § 47614(b), the District is required to make "reasonable efforts" to provide the Charter School "with facilities near to where the charter school wishes to locate." Under the District's own policies, the District is to offer a charter school space at one of its top three comparison schools, if space is available, and to consider other schools only if space is unavailable at those schools.

In addition, the District confirmed in *Los Angeles International Charter High School v. Los Angeles Unified School District*, Case No. BS127458 (L.A. Sup. Ct.) ("*LAICHS*"), that the District's Innovation and Charter School Division "attempt[s] to identify matches of facilities requested by the charter school applicants with available

District facilities, according to the following prioritization: a match with the top three comparison group schools; if a match has not been made, then with District Schools in the same Local District; and if a match has still not been made, with schools in the adjacent Local District in ever-expanding circles of geographic relevance." (Los Angeles Unified School District's Responses and Objections to Petitioner's Special Interrogatories, Set One served September 1, 2010, Response to Special Interrogatory No. 1, at 3. *See also* Declaration of Sean Jernigan filed by District in *LAICHS* on August 30, 2010, ¶ 24 (same).

In its Proposition 39 request, Aspire EA requested to locate as close to 1936 Courtland Ave. Oakland, CA as possible, to continue to serve the surrounding community and make transportation as easy as possible for families.

As noted above, Aspire ERES notes that the District has never actually attempted to treat charter school and District students fairly, by looking for ways to consolidate District programs to make space for charter school programs. Again, while always closing District sites or moving District students around would not meet the intent of Prop. 39 to treat all students fairly, the District does not act in compliance with the law if it never does these things to make space. As *Ridgecrest* said, <u>some</u> displacement is required in order to minimize the harm to both District and charter school students. Here, the District favors only its own students and places charter school students in harm's way by forcing them to locate on multiple sites separated, in this case, by more than 12 miles.

As required by the law and District policy, the District must make a reasonable effort to locate Aspire EA in where it wishes to be located. If there is sufficient room in any school in that area, per District policy, Aspire EA must be allocated space there. Aspire EA believes that there are schools in the area have sufficient room for its program, and believes that the District's offer of space at East Oakland Pride and Markham are therefore inconsistent with the requirements of Proposition 39.

4. Allocation of Teaching Stations

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 responding to a charter school's request for classroom space, 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):

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> "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. (*CCSA v. LAUSD*, *supra*, 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 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**. Despite the clear language of *CCSA v. LAUSD*, however, the District's Preliminary excludes "unassigned" or "out of service" classrooms. These classrooms are not accounted for anywhere else in the District's Preliminary Offer; the District's Preliminary Offer, therefore, is in violation of the ruling in *CCSA v. LAUSD.*

The District has identified Bridges Academy, Global Family School, Horace Mann Elementary, International Community School, Think College Now, Melrose Leadership Academy, Manzanita SEED Elementary, and Manzanita Community School as the K-5 comparison schools, with a teaching station to ADA ratio of 22.88, and Melrose Leadership Academy, United for Success, Urban Promise Academy and Life Academy as the middle school comparison schools, and has identified a teaching station to ADA ratio of 22.72.

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Very simply, Prop. 39 requires the District to count the number of regular teaching stations at the comparison schools, and divide the ADA at the comparison school by the number of regular teaching stations. The spreadsheet forming Exhibit B to the Preliminary Offer, which the District cites as the source of its calculation, is a list of each of the classes at each comparison school and, we assume, the number of students enrolled in each class. The District then averages the number of students enrolled in every class at these two schools to arrive at its "teaching station to ADA ratio" calculation.

Not only does the District's calculation fail to count the number of regular teaching stations at the comparison schools, or divide the ADA of the school by that number (the required formula), but it also uses enrollment, rather than ADA, to determine its class size average – and enrollment, because it is a larger number than actual ADA, will result in an artificially higher "ratio." This manner of calculation is illegal and in direct contravention to the formula set forth in the regulations and applicable case law.

The District also has previously claimed that its list of classrooms at the comparison school that are staffed with District teachers is "far superior" to the District's own Facilities Master Plan that specifically identifies the number of classrooms on a site. However, the number of classrooms that may be staffed with a teacher is not necessarily equivalent to the number of classrooms provided to District students for instruction. As noted above, in the *CCSA v. LAUSD* case, 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.) Unless the District accounts for all of the specific uses of each classroom at the comparison schools, Aspire EA has no way to verify that the information provided by the District is accurate.

A review of the publicly available information for the District comparison school's teaching stations, enrollment, and attendance rates, specifically CDE data regarding enrollment in 2015-16, the 2015-16 OUSD "Fast Facts" regarding the average District attendance rate, and the 2012 OUSD Facilities Master Plan suggests that Aspire EA is entitled to an allocation of at least **ten (10) teaching stations.**

School Name	ADA at school site	District Claimed TS/ADA Ratio	Corrected Teaching Stations[3]	Teaching Station to ADA Ratio

[3] These numbers are developed from reviewing the OUSD Master Plan site profile for the comparison schools to determine the number of classrooms, as well as a review of the District's Exhibit B and the comparison school websites to determine the actual number of classrooms used by the District for regular teaching stations, as well as the number of rooms used for specialized

Bridges Academy	415.79	22.47	21	19.80
Global Family School	434.45	23.88	20	21.72
Horace Mann	340.71	21.80	16	21.29
Manzanita Community School/Manzanita SEED	802.69	22.9	37	21.69
International Community School/Think College Now	548.17	23.09	26	21.08
AVERAGE				**21.18**
Melrose Leadership Academy	498.19	22.93	21	23.72
Urban Promise Academy	343.40	22.58	16	21.46
United for Success Academy/LIFE Academy	791.06	24.33	38	20.8
AVERAGE				**21.99**

Therefore, Aspire EA is entitled to 5.87 (rounded up to 6) teaching stations for K-5, and 3.10 teaching stations (rounded up to 4) for 6-8, for a total of ten (10) teaching stations.

5. Allocation of Specialized Classroom Space and Non-Teaching Station Space

Aspire EA is also entitled to reasonable allocations of specialized and non-teaching station space pursuant to 5 CCR Section 11969.3. 5 CCR 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 shall include a share of the specialized classroom space. The Preliminary Proposal must include "a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space," and "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.

5 CCR Section 11969.3(b)(2) and Section 11969.9(f). *(See also Bullis Charter School v. Los Altos School Dist.*, 200 Cal. App. 4th 296 (Cal. App. 6th Dist. 2011) and *California School Bds. Assn. v. State Bd. of Education*, 191 Cal. App. 4th 530 (Cal. App. 3d Dist. 2010).)

As such, the District must allocate specialized classroom space, such as science laboratories, art rooms, computer rooms, music rooms, wood/metal shop rooms, etc. commensurate with the in-District classroom ADA

classroom and non-teaching space (such as a parent center, band/music, special education, science labs, computer lab space, home economics, or an art room).

of Aspire EA. 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 Aspire EA and the per-student amount of non-teaching station space in the comparison group schools. (5 CCR Section 11969.3(b)(3).) Non-teaching space is all of the remainder of 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. (5 CCR Section 11969.3(b)(3).) An allocation of non-teaching station space can be accomplished through shared use or exclusive use. (5 CCR Section 11969.3(b)(3); *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.)

Bullis provided even more detailed analysis of how a school district must perform the analysis of the specialized classroom space and non-teaching station space at the comparison schools, noting that a school district has an "obligation to account for all space" when performing its calculations and allocating space:

> While 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 Charter School v. Los Altos School Dist.* (2011) 200 Cal. App. 4th 296)

In sum, according to the Implementing Regulations, the allocation of specialized classroom space and non-teaching station space is based on an analysis of the square footage of these types of space available to students at the comparison schools (specifically, "the per-student amount of specialized classroom space in the comparison group schools." (5 CCR Section 11969.3(b)(2) and (3).) The District has not performed this analysis in its preliminary offer, either for specialized classroom space or non-teaching station space.

Instead, in a completely confusing and illegal process, the District has allocated specialized classroom space "as a fraction of general education classrooms depending on grade levels as follows: Elementary, 1/6;

Middle, 1/8; High, 1/10." This formula is completely irrelevant, illegal and illogical, and guarantees Aspire EA will not receive sufficient specialized classroom space. Prop. 39 requires the District to document every kind of specialized classroom space at the comparison schools, identify the number of square feet of each kind of space is provided per ADA, and then apply that square footage to Aspire EA's ADA. A review of the maps and websites for the comparison schools suggests that there are thousands of square feet of specialized classroom space that has not been counted at the comparison schools. Even assuming this likely-undercounted amount of specialized classroom space, Aspire EA would be entitled to at least three (3) classrooms of additional space to create specialized classroom space.

Moreover, the District is not permitted to use its bizarre formula to arrive at an allocation of specialized classroom space, and then allocate non-specialized classrooms to Aspire EA. A review of the comparison school Facility Plans, School Accountability Report Cards, LCAP reports, and websites reveal that these schools have science labs, computer labs, music and art rooms, architecture rooms, media, graphic design and photography space, etc.. As a result, the District must allocate exclusive or shared use of reasonably equivalent, fully furnished and equipped kinds of these spaces space and/or access to Aspire EA. 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 a single space. Aspire EA also notes that by allocating **two classrooms for all these uses**, thus essentially forcing Aspire EA to create its own fully furnished and equipped specialized classroom space in just two standard teaching station spaces, the District is relegating Aspire EA students to second-class status, given that District students enjoy access to these separate and furnished and equipped spaces. Aspire EA students, for example, will not have access to the science lab space available at the comparison middle schools.

Furthermore, the District's calculation of non-teaching station space makes no sense, nor is it consistent with the Implementing Regulations. What the District has done is looked at the Facility Plans for the comparison schools, and added together the square footage in those documents identified as "Admin/Office/Conference," "MPR/Auditorium/Cafeteria/Gym," and "Library" for each school. It has then applied an arbitrary "Site Utilization" percentage to this square footage, and divided it by the school's ADA, to arrive at a random Sq Ft/ADA number. There are so many problems with this formula.

First, the square footage used excludes significant categories, and almost certainly amounts, of non-teaching station space. This includes special education space, kitchen space, teacher workrooms, nurse's space, storage and custodial space, bathroom space, locker rooms, and Title I, afterschool program, and other special use rooms. On this basis alone, the District's Preliminary Offer violates Prop. 39.

Second, the use of the Site Utilization percentage assumes that even if the District program is not using the site to capacity, that its students are not provided full access to these non-teaching station spaces. It seems extraordinarily unlikely that if a site is only at 75% capacity, then only 75% of the gym or cafeteria will be used, or that the existing program will not use these spaces all of the time. Moreover, Prop. 39 requires the District to count all space that is "provided to" District students – and all of these specialized spaces are provided to

District students for their use for the entire school day, any time they want, whether or not their facility is at full capacity.

Third, this calculation does not include any of the outdoor space on the campus, even though all three sites have outdoor blacktop space, football field and soccer field space. Aspire EA must be allocated reasonably equivalent access to this space.

Lastly, the District's Preliminary Proposal for the East Oakland PRIDE and Markham sites is not consistent with Prop. 39 because it indicates that Aspire EA's allocation of access to specialized and non-teaching station space will be based on the percentage of square footage that Aspire EA occupies on the school sites that it has been allocated; for a charter school allocated space on a large District campus, for example, this will artificially reduce the amount of space to which the charter school is actually entitled (beyond the fact, as described above, that this is not the formula for allocation in the Implementing Regulations).

Aspire EA is entitled to reasonably equivalent allocations of these spaces, and of furnishings and equipment, and that it anticipates receiving its full complement of the specialized and non-teaching space at the school sites through agreements with the Site Principals. Aspire EA anticipates that, should the negotiations with the District Principals not provide Aspire EA with the full complement of spaces including in the Preliminary Proposal, that the District will work with both parties to ensure a satisfactory schedule is reached.

Special Education Space

Special education space is necessary for compliance with state and federal special education laws, which require privacy for implementation of certain special education services. The District's Preliminary Proposal does not include an allocation of any private space to be used for special education services. Aspire EA is entitled to special education space under Proposition 39 based on factors including, but not limited to, Aspire EA's ADA, the comparison schools, and the needs of Aspire EA's special education students under each special educations student's individualized education plan or Section 504 plan. Also, Aspire EA is entitled to special education space under Proposition 39 regardless of whether or not it provides the District with documentation of or information regarding its special education needs. Further, Aspire EA also is not, at this early date, able to state with any certainty what all of its special education needs will be six months from now. Aspire EA will be enrolling an entirely new class of Kindergarten and 6th graders, and may enroll other new students as space becomes available in other grade levels; these new students may have special education needs that Aspire EA is not currently able to determine. In addition, one or more of its current students may become eligible for special education services during the school year. Currently the school serves 11.1% special education students, and it requires sufficient reasonably equivalent space to serve them.

As such, Aspire EA requires at least one additional standard classroom for providing special education services.

6. Preliminary Proposal's Facility Fees and Allocation at the East Oakland PRIDE and Markham sites:

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The District is mandating that the Charter School use its custodial services, which is in direct contravention of the Implementing Regulations. The Implementing Regulations provide that ongoing operations and maintenance of facilities ("M&O"), which includes custodial costs, are the responsibility of the Charter School (5 CCR Section 11969.4(b)) and that any costs assumed by the Charter School cannot be included in the pro rata share calculation. The Preliminary Offer and the draft facilities use agreement seek to mandate that the District perform custodial services without the authorization or consent of the Charter School, for which the Charter School must then pay the District's high costs. The Charter School 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 Final Offer will need to be revised to provide for this revision.

7. Pro Rata Charge Worksheet:

a. Police Services: The District may not include police costs in its pro rata share calculation because Aspire EA has been told by the District's Police Services, when Aspire EA has called for help, 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 Aspire EA uses. Because Aspire EA does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

b. Insurance: Aspire EA will provide and pay for the full spectrum of its insurance benefits, as required by its charter and the Facilities Use Agreement; it appears 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 Aspire EA for a cost it is already paying for, it is requiring Aspire EA 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.

c. **Custodial Services:** The District is indicating that Aspire EA must use its custodial services, which is in direct contravention of the Implementing Regulations. The Implementing Regulations provide that ongoing operations and maintenance of facilities, which includes custodial costs, are the responsibility of Aspire EA (5 CCR Section 11969.4(b)) and that any costs assumed by Aspire EA cannot be included in the pro rata share calculation. Aspire EA 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 Final Offer will need to be revised to provide for this revision. If the parties are able to reach some separate agreement, however, that Aspire EA will accept District custodial services at the two sites, the cost to Aspire EA for these services will need to be adjusted to accurately reflect Aspire EA's fair share of these costs.

d. The District has included $13,548,405 in facilities costs identified as "RRMA transfer from UR to resource 8150." However, Prop. 39 provides that the ongoing operations and routine maintenance

of the facilities is the responsibility of Aspire EA. As such, and pursuant to 5 CCR Section 11969.7, the District may not include in its facilities costs "any costs that are paid by the charter school, including, but not limited to, costs associated with ongoing operations and maintenance and the costs of any tangible items adjusted in keeping with a customary depreciation schedule for each item." Therefore, please provide Aspire EA with the necessary documentation to show that the District has removed all facilities costs related to ongoing operations and maintenance from its RRMA transfer amounts that are Aspire EA's responsibility, including custodial services.

e. Third, 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 Aspire EA 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 Aspire EA 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 Aspire EA'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."

8. 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 Aspire EA's summer school and programs procured by Aspire EA through third party entities, e.g. after-school program providers.

b. Section 1.4: The FUA currently requires Aspire EA to comply with the District's "policies and procedures regarding the use and occupation of District facilities." Prop. 39 only requires Aspire EA 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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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. As Aspire EA will be responsible for cleaning up its site after each community use, the portion of the Civic Center Act fees related to custodial and maintenance costs must be paid to Aspire EA.

d. **Section 2:** The Sites must be furnished, equipped and available for occupancy by Aspire EA 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 states that the pro rata share is due monthly or annually. However, the Preliminary Proposal indicates that the payment schedule will be on a quarterly basis, beginning October 1. Aspire EA prefers a quarterly payment schedule for the facilities use fees. This section also needs to reflect that if Aspire EA constructs or installs recreational improvements or other school facilities, Aspire EA and the District will agree to negotiate a reduction in the facilities use fees. Aspire EA's other concerns regarding the Pro Rata Share Charge outlined above are incorporated herein. Again, any costs assumed by Aspire EA cannot be included in the pro rata share calculation, including custodial and maintenance costs.

f. **Section 10**: 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 sites. The District is required to provide Aspire EA 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. Moreover, Aspire EA is confused by the language that "Charter School may instruct its visitors, invitees and guests to park on available street parking" – Aspire EA will assume the District does not mean that it will not be sharing the parking on site with Aspire EA, as that would be illegal.

g. **Section 10**: For the same reason, the District may not require Aspire EA to take the facility in "as is" condition, nor may it require Aspire EA to accept the Premises in their existing condition as a pre-condition to accepting the Premises. It may also not limit its maintenance obligations "only to the extent the compliance would be required of the District without regard to Charter School's use of the Premises." Any legal compliance issues would only be required because Aspire EA is occupying the sites; to limit the District's obligations this was not only violates 5 CCR Section 11969.9(k)(4), but it appears to be an attempt to minimize the District's maintenance obligations.

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 facilities available to Aspire EA for its entire school year (5 CCR Section 11969.5) and to maintain the facilities in compliance with the California Building Code. (5 CCR Section 11969.9(k).) As a result, if the facilities are damaged, the District must repair them, or, if they are destroyed, the District must provide alternative facilities. Moreover, the District must absolutely provide alternative facilities to Aspire EA while any repairs are being performed. Lastly, the District cannot limit its obligations under this section to damage "due to no fault or negligence of Charter School." The District is obligated to maintain first party property insurance on the Premises, and any repair costs it incurs on other District sites are included in the pro rata share, thus it must perform these repairs for Aspire EA.

h. **Section 13.3 and 13.4**: 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 Aspire EA's program. The District must provide relevant scheduling information to Aspire EA if it will be coming onto the facility to perform maintenance. In addition, Aspire EA wishes to perform its own custodial services in large part because it is not financially able to absorb the cost of District services. If the parties are able to reach some separate agreement, however, that Aspire EA will accept District custodial services at its sites, the cost to Aspire EA for these services will need to be adjusted to accurately reflect Aspire EA's fair share of these costs.

i. **Section 14**: While Aspire EA 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 facilities beyond the pro rata share. (Education Code Section 47614(b)(1).)

j. **Section 15**: Aspire EA wishes to perform its own custodial services. Therefore, the Final Offer and FUA will need to be revised to provide for this revision.

k. **Section 18.1.6:** Aspire EA does not agree that it is a default under the FUA if it provides a "warranty, representation or statement to District in connection with the Agreement, or any other agreement to which the Charter School and District are parties, which is false or misleading in any material respect when made or furnished…"

l. **Section 18.1.7**: Aspire EA 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.

m. **Section 22**: If Aspire EA 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. In addition, the

JPA does not provide notice to additional insureds, so any notice requirements will have to be provided by Aspire EA.

n. **Section 28.1**: 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 Aspire EA.

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.

We look forward to working with the District to make the necessary changes to the District's Preliminary Proposal in order to ensure compliance with Proposition 39 and its Implementing Regulations in time for the issuance of the final notification of facilities on or before April 1, 2017. I can be reached at 510-434-5000.

Sincerely,

Casey Hoffman
Director of Growth & Strategy
Aspire Public Schools

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