

FACILITIES AGREEMENT BY AND BETWEEN  
BERKELEY UNIFIED SCHOOL DISTRICT AND REALM CHARTER SCHOOL  
IN LIEU OF PROPOSITION 39

THIS FACILITIES AGREEMENT (“Agreement”) is made this 13th day of April 2017, by and between the Berkeley Unified School District, public school district organized and existing under the laws of the State of California (“District”) and REALM Charter School, a California public school (“Charter School”), operating two separate schools, a middle school and a high school, within the geographic boundaries of the District. The District and the Charter School are collectively referred to as “the parties.”

**RECITALS**

WHEREAS, the Charter School is a California school under a charter granted by the District and operating pursuant to its Charter and any Memorandum of Understanding (“MOU”), and

WHEREAS, pursuant to Title 5 of the California Code of Regulations, section 11969.1(b), the District and Charter School have mutually agreed to an alternative arrangement to the allocation of facilities under Proposition 39; and

WHEREAS, the District desires to grant the use of certain to the Charter School upon the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter set forth, the parties agree as follows:

**Section 1. Charter School Allocation and Use of Facilities**

Academic Year 2017-2018:

- a. The Charter School will house its high school program (Grades 9, 10, 11 and 12) at a privately-owned facility, located at 2023 Eighth Street, Berkeley, CA (“the REALM School Site”). The Charter School shall be solely responsible, legally and financially, for negotiating and securing a lease for said private facility.
- b. Unless otherwise specifically agreed to by the District in writing, the District shall have no interest in or obligations with respect to any lease of the REALM School Site. The Charter School shall defend and hold District harmless from any and all claims or actions related to or in connection with the Charter School lease of the REALM School Site and/or use thereof.
- c. The Charter School’s middle school program (Grades 6, 7, and 8) will be housed at the District’s West Campus, located at 1222 University Avenue,

Berkeley, California (“West Campus,” “West Campus Site,” or “Facility”). The Charter School shall have use and occupation of the following eight (8) classrooms in Building A: A201, A202, A203, A204, A205, A206, A211, A212. The Charter School will also have a right to use and occupation of 1 Laboratory space, and 1 Office Space. The Charter School shall not have the right to use or occupation of any other classrooms or facilities at the West Campus Site other than those listed above.

- d. The District shall grant Charter School use of the District’s gymnasium at West Campus; provided, however, that use of the gymnasium would be offered on an “as is” condition. The parties will establish a sharing schedule and agreement with respect to the use of the gymnasium. The District shall have no obligation to repair and/or equip the gymnasium for the Charter School’s use. The District shall not have any other obligation to provide non-teaching or specialized teaching space to the Charter School.

## **Section 2. Furnishings and Equipment**

REALM shall retain furnishings and equipment necessary for Charter School (specifically, student desks, chairs, and blackboards) and front office furnishings and equipment at the West Campus Site provided by the District in 2016-2017. The obligations set forth in this paragraph shall be the District’s only obligations with respect to furnishings and equipment during the term of this agreement.

## **Section 3. Waiver of Rights under Proposition 39**

The Charter School hereby waives its rights under Proposition 39 during the term of this Agreement, and : (1) for five [5] years for the Charter School’s middle school program and (2) for five [5] for the Charter School’s high school program upon termination of this Agreement. It is understood between the parties that the District shall have no obligation to provide any facilities, furnishings or equipment to the Charter School, either under Proposition 39, or in lieu of Proposition 39, and that the District does not intend to provide facilities, furnishings or equipment to the Charter School under Proposition 39, or in lieu of Proposition 39, during the term of this Agreement, and for the five school years following the termination of this agreement on May 31, 2018. It is further understood and acknowledged by the parties that, except as expressly set forth otherwise, Charter School’s use of District facilities herein is not being granted pursuant to its Proposition 39 facility request. Rather, the parties agree that this Agreement is made in lieu of any Charter School’s Proposition 39 facility request.

## **Section 4. Term**

The term this Agreement shall be commence on August 1, 2017 and end on May 31, 2018, unless the Charter School ceases operations, either voluntarily or involuntarily. The District makes no guarantee or representation that the facilities allocated in this

Agreement will be available for any additional term beyond the current term and/or that the facilities may not be required to be shared with other programs or District charter schools in future years. The District retains all rights including the right to move the Charter School in the future in conformity with law, and the right to access West Campus during 2017-2018 to make improvements, and to in fact make any such improvements desired by the District, as called for under Section 15 of this Agreement.

## **Section 5. Termination**

This Agreement will automatically terminate, upon written notice by the District, upon the effective date of any termination, non-renewal, or revocation of Charter School's charter, or the cessation of Charter School's operation for any reason or upon the commission of a default or breach of its obligations by Charter School, on the terms set forth in this Section 5. The occurrence of any one or more of the following events shall constitute a default and material breach of this Agreement, resulting in its termination upon written notice of the District:

- a) Failure by Charter School to make timely monthly payments to the District due under this Agreement, where such failure shall continue for a period of 30 days after receipt of written notice thereof by District to Charter School.
- b) Failure by Charter School to observe or perform any of the covenants, conditions, or provisions of this Agreement to be observed or performed by Charter School, including shared use terms, if applicable, where such failure shall continue for a period of 30 days after receipt of written notice thereof by District to Charter School.
- c) Failure to establish and maintain an academic calendar for the 2017-2018 school year that falls entirely between August 1, 2017 through May 31, 2018. Charter School shall not have any rights to use or possession of the facilities described herein before August 1, 2017, and shall vacate the site no later than May 31, 2018.
- d) By executing this Agreement, the Charter School agrees that its officers, directors, employees, agents or representatives shall not at any time seek an extension of the terms of this Agreement, and shall not otherwise seek the right to use and/or possession of any facilities on the West Campus site upon expiration of this Agreement on May 31, 2018. Violation of this term shall constitute an event of default under this Agreement.
- e) The Charter School agrees to send a public announcement to the Charter School parents and other community members within one week of execution of this Agreement that the Charter School has agreed not to seek an extension of this Agreement pursuant to subsection (d) above. Violation of this term shall constitute an event of default under this Agreement.

- f) By executing this Agreement, the Charter School expressly agrees that it will meet all five (5) conditions of the Board's renewal of the REALM charters, as well as the conditions set forth in the Notice of Violation, including providing a written response no later than July 1, 2017. Violation of this term shall constitute an event of default under this Agreement.
  
- g) By executing this Agreement, the Charter School expressly agrees that it will pay the balance of the 2016-2017 facilities costs, for the period between January 1, 2017 to June 30, 2017 (approximately \$145,000), within 30 days of the billing date of September 15, 2017. Violation of this term shall constitute an event of default under this Agreement.

**Section 6: Costs.** The space allocated to Charter School at West Campus for its exclusive use for the 2017-2018 school year is estimated to be as follows:

- Main Building: 8 Classrooms, 1 Laboratory space, and Office Space, approximately 22,109 SF.

The charge for the Charter School's use of the facilities shall be \$3.00 per square foot based on a total square footage of 22,109 for a total of \$66,327, plus maintenance cost at a percentage of square foot of the District (22,109/1,500,000) or 1.47% of actual cost estimated at \$115,000 and a 1.2 FTE (10 months) custodian estimated at \$70,000, for a total estimated cost of \$251,327.

Payments shall be made monthly and deducted from in-lieu of property taxes beginning August 1, 2017 and ending May 1, 2018 in the amount of \$25,000 monthly with the balance owed based on actual cost being deducted on May 1, 2018.

**Section 7. Utilities.** This Section 7 applies only to the Charter School's middle school facilities at the West Campus Site. To the extent possible, the charter school shall be solely responsible for the costs of all utilities used or consumed by the charter school, including the cost of internet access services. If utilities cannot be separately metered, the charter school shall be responsible for the cost of utilities on a pro-rata basis according to the proportion of square footage occupied at the West Campus Site relative to that of the District. Charter School will bear sole responsibility for all utilities at the REALM School Site located at 2023 Eighth Street, Berkeley, CA.

**Section 8. Maintenance of Facilities.** This Section 8 applies only to the Charter School's middle school facilities at the West Campus Site., and not the Charter School's private facilities at 2023 Eighth Street, Berkeley, CA. District shall provide the ongoing operations and maintenance of the facilities, furnishings and equipment, based on the same terms established in the Fiscal MOU negotiated with REALM Charter Schools for school year 2015-16. District will invoice REALM for costs of such maintenance based on the same terms established in the Fiscal MOU negotiated with REALM Charter Schools for 2015-16. District shall be responsible for repair of vandalism not caused by the Charter School or its students, employees, agents,

representatives or invitees, and consistent with District policy for District schools. Charter School shall be responsible for repairs or corrections required as the result of damage caused by Charter School, its students, employees, agents, representatives or invitees.

District shall assume the cost and responsibility for projects eligible to be included in the District deferred maintenance plan established pursuant to Education Code section 17582 and the replacement of furnishings and equipment supplied by the District in accordance with District schedules and customary practices. The District shall be responsible for the major maintenance of the Facilities. For purposes of this section, “major maintenance” includes the major repair or replacement of plumbing, heating, ventilation, air conditioning, communication wiring, electrical, roofing, and floor systems, exterior and interior painting, and any other items considered deferred maintenance under Education Code section 17582. District shall have access to the Facilities to perform maintenance and inspections and will coordinate such work with the Charter School administration.

Contact Information:

Emergency:

District: School Police:

Charter Site Administrator: Victor Diaz (510)-672-4653

Charter Lead Operations: Emily Nathan (510)-520-2212

Major Maintenance Request:

District: Stephen Collins (510)-644-6250(51)

Minor Maintenance Request for Service:

District: Greg Williams (510)-644-6858

The District shall have no obligation to maintain or repair, in any capacity, the REALM School Site located at 2023 Eighth Street, Berkeley, CA. Charter School will bear sole responsibility for all maintenance at the REALM School Site located at 2023 Eighth Street, Berkeley, CA.

**Section 9. Installation of Improvements.** This Section 9 applies only to the Charter School’s middle school facilities at the West Campus Site. No structures, improvements, fixtures (as defined in Civil Code 660), alterations (including painting of any interior or exterior surfaces), or facilities, shall be constructed, erected, altered, added, or made on or within the Facilities without the prior written consent of District and subject to terms agreeable to District, and, if required, the Division of State Architect. In the event Charter School makes any modification to the Facilities in violation of this provision it shall be required to restore the Facilities to its original condition at Charter School’s sole expense and shall pay a fee in the amount of one thousand dollars (\$1,000) per day for each day that the Facilities is out of conformity with its original condition. “Original condition” as used in this provision shall refer to the condition in which the Facilities existed upon the walk through as referenced in Section 10.

**Section 10. Condition of Property.** This Section 10 applies only to the Charter School's middle school facilities at the West Campus Site. The District agrees to provide a facility suitable for use as an instructional school site. The Charter School shall have an opportunity to conduct a "walk-through" of the Facilities with District Personnel to inspect and notate the condition of the facilities at the time of turnover. The Charter School, at its sole cost and expense, shall comply with all applicable laws, regulations, rules and orders with respect to its use and occupancy of the West Campus Site. District is responsible for appropriate modifications to existing facilities that may be necessary to comply with new or existing laws or regulations consistent with the support provided to other District school sites, except that the Charter School shall be responsible for modifications caused or triggered in part or in whole by its use and/or occupation of the sites or facilities.

Should any discharge, leakage, spillage, emission, or pollution of any type occur upon or from the Facilities in whole or in part as a result of the Charter School's use and occupancy thereof, the Charter School, at its expense, shall be obligated to clean all the property affected, to the satisfaction of the District and any governmental agencies having jurisdiction over the West Campus Site. Where the resulting discharge, leakage, spillage, emission, or pollution results from a facilities system failure, the District will assume responsibility for required clean up of the affected property.

**Section 11. Title to Property.** This Section 11 applies only to the Charter School's middle school facilities at the West Campus Site. The parties acknowledge that title to the Facilities is held by the District and shall remain in the District at all times. In the event Charter School fails to limit its use of the Facilities to the space allocated to Charter School pursuant to this Agreement it shall be in breach of the Agreement as set forth in Section 5(e).

**Section 12. Fingerprinting.** Charter School shall be responsible for ensuring compliance with all applicable fingerprinting and criminal background investigation requirements described in Education Code section 45125.1. The District shall be responsible for complying with all criminal background check laws for all employees or vendors that it directs to the Facilities for any work to be performed at its direction.

**Section 13. Insurance.** The Charter School shall, at its sole cost and expense, commencing as of the date of this Agreement, and during the entire Term hereof, procure, pay for and keep in full force and effect the following insurance:

- (a) **General Liability Insurance.** The Charter School shall maintain throughout the Term of this contract, at its own expense, general liability insurance with limits of liability of \$2,000,000 per occurrence for bodily injury, personal injury and property damage. If any form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this location or the general aggregate limit shall be twice the required occurrence limit. This insurance shall include products and completed

operations of the same limits as the policy limits. This insurance shall be endorsed to include the following: (i) the District, its officers, officials, employees, agents and volunteers as additional insureds; (ii) a waiver of any right to contributions from any other coverage purchased by, or on behalf of, the District; and (iii) a written notice to be mailed to the District 30 days prior to the effective date of a cancellation or non-renewal of such insurance.

- (b) **Automobile Liability.** The Charter School shall maintain throughout the Term of this Agreement at its own expense, automobile liability insurance with limits of liability of \$2,000,000 per occurrence, for owned, non-owned or hired vehicles. If any form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this location or the general aggregate limit shall be twice the required occurrence limit. Such insurance shall apply to any automobile, Symbol 1 of the ISO Form. Such insurance shall be endorsed to include the following: (i) the District, its officers, officials, employees, agents and volunteers as additional insureds; (ii) a waiver of any right to contributions from any other coverage purchased by, or on behalf of, the District; and (iii) a written notice to be mailed to the District 30 days prior to the effective date of a cancellation or non-renewal of such insurance.
- (c) **Property Insurance.** The District will continue to maintain its current levels of first party insurance on the structures on the West Campus Site. The Charter School shall secure and maintain property insurance that addresses business interruption and casualty needs, including flood and fire, and other hazards with replacement costs coverage for all assets listed in the Charter School's property inventory and consumables. The Charter School shall secure property coverage with a minimum policy limit of 80% of the fair market value of the Charter School's contents.
- (d) **Workers' Compensation insurance** as required by the State of California and Employer's Liability insurance (for lessees with employees). This insurance shall be endorsed to include the following: (i) a waiver of any right to contributions from any other coverage purchased by, or on behalf of, the District; and (ii) a written notice to be mailed to the District 30 days prior to the effective date of a cancellation or non-renewal of such insurance.
- (e) The Charter School shall carry any other insurance as required by law or its charter.

Any and all deductibles or self-insured retentions applicable to the above required insurance shall be specifically approved by the District prior to its application, except the

Property Insurance required above may include a deductible of not more than \$10,000 without prior approval.

The insurances required above shall be provided by a company or insurance joint powers authority with the consent of the District prior to commencement of such insurance.

The Charter School shall provide proof of such insurance prior to taking possession of the Facilities, including copies of the endorsements specifically required above. The Charter School shall provide proof of renewal of any insurance required above, including any endorsements required, at least 15 days prior to the expiration of such insurance.

**Section 14. Indemnification.** The Charter School shall, to the fullest extent permitted by law, indemnify, defend, and hold harmless the District, its officers, directors, and employees, attorneys, agents, representatives, volunteers, successors and assigns (collectively hereinafter District and District Personnel) from and against any and all actions, suits, claims, demands, losses, costs, penalties, obligations, errors, omissions, or liabilities, including legal costs, attorney's fees, and expert witness fees, whether or not suit is actually filed, and/or any judgment rendered against District and/or District Personnel, that may be asserted or claimed by any person, firm or entity arising out of the Charter School's use of the Facilities and/or the REALM School Site or from the conduct of its business or from any activity, work, or other things done, permitted or suffered by Charter School in or about the Facilities and/or the REALM School Site and/or use of the Facilities to the Charter School. This indemnity and hold harmless provision shall exclude actions brought by third persons against the District arising out of the willful negligence or intentional acts, errors or omissions of the District and/or District Personnel.

**Section 15. Access.** Charter School shall permit District, its agents, representatives or employees, to enter upon the Facilities for the purpose of inspecting same or to make repairs, alterations, or additions to any portion of the Facilities required by this Agreement. District shall attempt to give reasonable notice where practicable but shall not be obligated to do so in the event of emergency or imminent threat to health or safety of occupants.

**Section 16. Destruction of Facilities.** If the Facilities are damaged by any casualty, then the District shall have the option to either promptly restore the facilities or to terminate this Agreement with written notice. If the District chooses to restore the facilities, the cost of restoring the facilities under this section shall be borne by the Charter School if the cause of the casualty is the negligence or intentional act of the Charter School, its employees, agents, students or invitees, in part or in whole. The cost of restoring the Facilities under this section shall be borne by the District if the cause of the casualty is the negligence or intentional act of the District, its employees, agents, or invitees. The parties shall tender the cost of restoring the facilities to their respective insurance carriers if the casualty is caused by a third party or by act of God. The Parties, and/or their insurance carrier, reserve the right to pursue recovery or reimbursement in



subrogation for any restoration to the facilities against any responsible party, including but not limited to each other. If restoration is to occur, it shall be performed in such a way that will cause the least disruption to the Charter School's academic program.

**Section 17. Notice.** Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served and received if given in writing and personally delivered or either deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service or facsimile transmission, addressed as follows:

If to the District:        Attn:

If to the School:        [Charter School]

Attn: Principal

Any notice personally given or sent by facsimile transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective three (3) days after deposit in the United States mail.

**Section 18. Subcontract and Assignment.** Neither party shall assign its rights, duties or privileges under this Agreement, nor shall a party attempt to confer any of its rights, duties or privileges under this Agreement (including that of sublease) on any third party, without the written consent of the other party. Charter School shall not sublease, pledge, encumber, mortgage or otherwise transfer or assign to any party whatsoever any interest in the Facilities.

**Section 19. Independent Status.** This Agreement is by and between two independent entities and is not intended to and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association.

**Section 20. Entire Agreement of Parties.** This Agreement, and all its incorporated documents, constitute the entire agreement between the parties and supersede all prior discussions, negotiations and agreements, whether oral or written. This Agreement may be amended or modified only by a written instrument executed by the parties expressly indicating an intent to modify or amend this Agreement.

**Section 21. California Law.** This Agreement shall be governed by and the rights, duties and obligations of the parties shall be determined and enforced in accordance with the laws of the State of California. The parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in Alameda County, California.

**Section 22. Waiver.** The waiver by any party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.

**Section 23. Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors, and assigns.

**Section 24. Counterparts.** This Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.

**Section 25. Captions.** The captions contained in this Agreement are for convenience only and shall not in any way affect the meaning or interpretation hereof nor serve as evidence of the interpretation hereof, or of the intention of the parties hereto.

**Section 26. Severability.** Should any provision of this Agreement be legally determined to be invalid, illegal or unenforceable in any respect, such provision shall be severed and the remaining provisions shall continue as valid, legal and enforceable.

**Section 27. Attorney's Fees.** The parties hereby agree that in any action or proceeding to enforce any of the terms or conditions contained herein, the prevailing party shall be entitled to an award of reasonable attorneys' fees and costs.

**Section 28. Incorporation of Recitals and Exhibits.** The Recitals and each exhibit attached hereto are incorporated herein by reference.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

**BERKELEY UNIFIED SCHOOL DISTRICT**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**REALM CHARTER SCHOOL**

By: \_\_\_\_\_

Title: \_\_\_\_\_

