



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

***Re: East Bay Innovation Academy  
Response to District's Preliminary Proposal  
Proposition 39 2020-2021***

Dear Ms. Murarka:

East Bay Innovation Academy ("EBIA" or "Charter School") is in receipt of the Oakland Unified School District's ("District") February 1, 2020 letter ("Preliminary Proposal") regarding EBIA's request for facilities under Proposition 39 ("Prop. 39") for the 2020-2021 school year.

The District's Preliminary Proposal is a conditional proposal for a total of twenty three (23) teaching stations and no specialized classroom or administrative/special education space of any kind, with thirteen (13) rooms allocated at the Marshall site and ten (10) allocated at Skyline High School, as well as exclusive use of the non-teaching station space on the Marshall site and 13.07% of the non-teaching station space at Skyline. The Preliminary Proposal is based on a projected in-District ADA of 549.57.

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

The Preliminary Proposal fails to meet the legal requirements of Prop. 39 for numerous reasons, including the failure to provide sufficient information regarding the allocation of teaching station, specialized classroom, and non-teaching space to EBIA, failure to calculate the pro rata share in compliance with law, and thus an overall failure by the District to meet its legal obligations and provide EBIA with a reasonably equivalent allocation of space as required by law.

EBIA requests that the District's final offer of space be modified in accordance with Prop. 39 and its Implementing Regulations. We remind you that under California law the District must give

the same degree of consideration to the needs of charter school students as it does to the students in District-run schools and some disruption and dislocation of the students and programs in a district may be necessary to fairly accommodate a charter school's request for facilities.

### **Location of Allocated Space**

EBIA anticipates accepting its allocation of the space at Marshall for its Lower School. However, the Charter School notes that the furnishings and equipment on the site are not reasonably equivalent. Specifically, the school requires lunch tables in the cafeteria, which every other District school has, a working refrigerator in the kitchen, and replacement classroom tables and chairs.

In addition, the Marshall campus requires some form of security system to protect the integrity of the campus, including a buzzer entry, door knobs that can lock from the inside, and security cameras, which the comparison schools have and which are necessary for EBIA to ensure that only authorized persons enter onto the site.

EBIA would like to work with the District to develop a schedule whereby these items will be installed prior to the start of the 2020-21 school year.

### **Condition Analysis**

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

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

The Preliminary Proposal states that the District has evaluated data on the condition of the facilities at the comparison schools based on “site size (acreage) as well as data on the condition of the facilities based on information available from the Facilities Condition Index and Educational

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

### **The District’s Resolution to Allocate Non-Contiguous Space is Based on Factual Inaccuracies and Does Not Meet the Legal Standard**

In its Request, EBIA indicated its preference to be located on a single site large enough to accommodate its entire program. 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).) The Court in *Ridgecrest* noted that “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.” (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal. App. 4th 986, 1000, emphasis added.) There is absolutely no evidence that the District has done so here. Rather, it appears that after looking at the extra space available at its District sites, the District decided to locate EBIA across two separate sites. The District also misrepresented the holding in *Los Angeles Intern. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348 as there, the Court found that the disruption would occur because the school year had already started at that point. Here, the school year is many months away, and the District is still able to make necessary programmatic adjustments to ensure, as *Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226 requires the “District to treat charter and noncharter students fairly, but not favor one group over the other.”

The District may also not move EBIA unless it is necessary. (Educ. Code Section 47614.) Furthermore, Prop. 39 requires a school district to share facilities fairly between district and charter school students, and must give the same degree of consideration to the needs of charter school students as it does to the students in district-run schools. (*Ridgecrest Charter School v. Sierra Sands Unified School District* (2005) 130 Cal.App.4th 986.) The Court in *Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226 also mandated that the “District” treat charter and noncharter students fairly, but not favor one group over the other.” Here, the District is clearly favoring its own programs.

Lastly, 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.”

The District's Board Resolution No. 1920-0075 does not show that the District has fairly balanced the needs of District and charter students, but instead has just looked to find where it believes there may be "available space." It does appear to have substantively considered charter school student needs the way it has considered the needs of its own students. The District's Findings do not indicate the District considered redrawing District attendance boundaries, or the negative impact on the safety of EBIA's students that would occur if they are required to travel between two separate school sites in one day. Instead, the District's Findings focus primarily on the impact to District students of allocating to EBIA a single District school site – with no substantive analysis of the safety issues facing EBIA's students.

The Preliminary Offer also states that "the District exercised its discretion in determining that none of the schools in the Charter School's preferred locations had capacity to accommodate the Charter School's entire projected ADA. The District's determination is subject to deference. (See, e.g., *Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226; *Sequoia Union High Sch. Dist. v. Aurora Charter High School* (2003) 112 Cal.App.4th 185, 194-5.) The District did not abuse its discretion by considering the cost to the District, or the impact upon District pupils, of granting the Charter School's location preference." This is not a correct reading of *Westchester's* holding; *Westchester* still requires the District to treat charter school and District students equally and fairly. As such, while it is allowed to consider the cost to and impact on the District of granting a charter school's location preference, it must also consider the cost of and impact on charter school students of locating the school such a long distance from its other campus – which the District has failed to do.

EBIA believes that there are sites in the District could accommodate EBIA's entire program, without requiring EBIA's program to be split across two separate campuses that are so far from each other. Thus, the District's failure to offer EBIA a contiguous site violates Prop. 39 and its Implementing Regulations.

### **The District's Teaching Station to ADA Analysis Lacks Clarity**

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 ("*CCSA v. LAUSD*"):

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

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

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

In the *CCSA v. LAUSD* case, the Court explained further that classrooms used for preschool or adult education, or by other charter schools are not counted as classrooms provided to the District's non-charter K-12 public school students. (*Id.*, p. 1240.) However, the Court held that "counting classrooms 'provided to' district students for the purposes of section 11969.3(b)(1) is not the same as counting only those rooms a district elects to staff with a teacher." (*Id.*, p. 1241.) The Court reasoned that "[c]ounting only those classrooms staffed by an assigned teacher would effectively impute to charter schools the same staffing decisions made by the District. But there is no reason to think a charter school would necessarily use classrooms in the same way that the District does." (*Id.*)

On a practical level, even if certain rooms are not used for classroom instruction, students nonetheless benefit from these additional rooms, either in the form of having additional space to use for break-out instruction or storage, or in having less crowded classrooms. Thus, the District is required by the Supreme Court's ruling to count all of the classrooms provided to students in the District for K-12 classroom instruction regardless of whether the classrooms are staffed by teachers

or not, and use the resulting number as the denominator in the ADA/classroom ratio for allocating classrooms to charter schools based on their projected ADA. (*Id.*)

While EBIA appreciates the additional information provided by the District, there remain inconsistencies the District’s analysis remains somewhat opaque, does not provide for the transparency required by *CCSA v. LAUSD*<sup>1</sup>, and does not identify all data points used by the District. Moreover, the data points in the offer are sometimes inconsistent with the exhibits the District has attached in support of its calculations.

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

Table 2a in the Preliminary Proposal identifies the “Classrooms Provided” for each comparison school, as well as the projected ADA for the site excluding SDC ADA, and states that “To determine the number of classrooms “provided to” District students at District schools, the District has taken the additional step of creating an updated inventory of actual classroom utilization at each comparison group school using data that was provided by a contracted third party vendor (MKThink) to OUSD.”

Yet the number of classrooms for each comparison school as listed in the Preliminary Proposal often is inconsistent with the number listed in Exhibit C, even if SDC rooms are removed.

These inconsistencies cannot be explained based on the information provided by the District, and as in every case of a difference the number of teaching stations appears to have been undercounted, this results in charter schools being allocated fewer teaching stations than they are entitled to.

<b>Comparison School</b>	<b>Projected ADA</b>	<b>Number of Teaching Stations in Preliminary Proposal</b>	<b>Corrected Number of Teaching Stations<sup>2</sup></b>	<b>Corrected Teaching Station to ADA Ratio</b>
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<sup>1</sup> “The regulations prescribe a specific, transparent method for deriving the ADA/classroom ratio to be applied in allocating classrooms to charter schools, thereby allowing charter schools and the public to readily verify whether a district has complied with the regulation.” (*CCSA v. LAUSD*, supra, 60 Cal. 4th at 1236.)

<sup>2</sup> Does not count specialized classrooms or special day classes.

Harte	539.37	27	27	19.98
Montera	569.29	27	28	20.33
<b>Average</b>				<b>20.15</b>

This corrected ratio would entitle EBIA to **sixteen (16) teaching stations** for grades 6-8, not fifteen. For grades 9-12:

Comparison School	Projected ADA	Number of Teaching Stations in Preliminary Proposal	Corrected Number of Teaching Stations	Corrected Teaching Station to ADA Ratio
Coliseum College Prep Academy	564.77	47	53 <sup>3</sup>	10.35

**Therefore, EBIA is entitled to an allocation of twenty teaching stations for 6-8, and twenty-three teaching station for 9-12.** As discussed above, EBIA would prefer to arrive at a different arrangement with the District.

**The Preliminary Proposal Does Not Allocate Sufficient Specialized Classroom and Non-Teaching Station Space to EBIA**

EBIA 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 Preliminary Offer must include “a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space.” (5 CCR § 11969.3(b)(2).) The amount of specialized classroom space allocated and/or the access to specialized classroom space provided shall be determined based on three factors:

1. the grade levels of the charter school’s in-district students;
2. the charter school’s total in-district classroom ADA; and
3. the per-student amount of specialized classroom space in the comparison group schools.<sup>4</sup>

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

<sup>3</sup> Does not include rooms allocated to EBIA.

<sup>4</sup> *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*”).

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

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

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

Here, the District has also entirely failed to allocate any special education space or office space to EBIA, thus interfering with the school's ability to provide needed and legally-mandated services to some of its most vulnerable students.

The District's allocation of specialized classroom space (or more specifically, lack thereof) does not comply with the Implementing Regulations in several respects.

First, the Preliminary Proposal is intended to provide a description of the facilities to be offered to EBIA, so that the school can respond with its March 1 letter expressing concerns. Stating that the District will identify specialized classroom space in the final offer or organize a shared schedule does not provide the charter school with an opportunity to substantively respond to the District's offer of (or failure to offer) specialized classroom space. In addition, allocating specialized classrooms as part of the teaching station analysis means that the District has significantly under-allocated teaching stations (here, four (4) of the rooms allocated at Marshall are specialized but the District has just included those classrooms in its teaching station allocation).

Second, the District's analysis combines different kinds of specialized classroom space into one lumped square footage that encompasses science, technology and art spaces. It is not reasonably equivalent to combine different types and sizes of specialized classroom space. If there are science labs, computer labs, music rooms, weight rooms, art rooms, and the like available at the comparison schools, then the District must allocate reasonably equivalent, fully furnished and equipped kinds of these spaces and/or shared access to these spaces for EBIA. Allocating general education classrooms to meet this obligation is not consistent with the requirements of Prop. 39; a standard classroom does not have, for example, the risers in a choral classroom, the gas and water stations in a science classroom, or the computers in a computer classroom, nor can all these different kinds of uses (and the attendant furnishings and equipment) happen in classrooms allocated for other uses. By not allocating classrooms for all these uses, the District is relegating EBIA students to second-class status, given that District students enjoy access to these separate, furnished and equipped spaces. "[A] school district does not have the discretion to employ practices that are contrary to the very intent of Proposition 39 that school district facilities be "shared fairly among all public school pupils, including those in charter schools." (*Bullis, supra*, 200 Cal.App.4th 296, 336.)

b. Allocation of Non-Teaching Station Space to EBIA

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

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

First, the District's calculation of the non-teaching station space at the comparison schools appears to exclude many special day classrooms (though the spreadsheet makes it appear as though they have been included in the teaching station analysis, as noted above, it does not appear they have been in numerous cases).

The District directs attention to Exhibit E, which includes a spreadsheet demonstrating how the District arrived at the "Interior NCS" calculation for each comparison school site. This spreadsheet shows that the District used data from the MKThink facilities master plan (from 2010)<sup>5</sup> identifying each comparison school site's interior square footage, and simply deducted the square footage of each room identified as a "classroom" that was more than 600 square feet from the total interior square footage. The resulting number is used as the "Interior NCS" for each comparison school site.

This approach is problematic for several reasons. First, this appears to exclude all regular classrooms that are used for special education. Yet when the District calculated its teaching station to ADA ratio calculation, it removed Special Day Class and Newcomer ADA from its calculation, and appears to have not counted Special Day Classes in its tabulation of total teaching stations on the comparison school site.

This is especially notable as the Preliminary Proposal makes no mention at all of special education, whether as an analysis of the special education space at the comparison schools, or to make an allocation of space to EBIA – and the District's special day class ADA has been taken out of its "ADA per Classroom calculation".

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

In addition, the District has failed to identify the specific non-teaching station space to be allocated to EBIA and its allocation of non-teaching station space based on the percentage of EBIA's enrollment on the sites, as determined by the District, not the actual square footage of space which EBIA should be allocated under the law. The District's process for allocating NCS also does not ensure reasonably equivalent NCS, and appears to try and hide this fact. Specifically, the District calculates the amount of NCS that the charter school is entitled to based on the NCS square feet/ADA of the

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<sup>5</sup> Note also this means that the data on Greenleaf's non-teaching station space is completely out of date, with the addition of the new building on the campus.

comparison schools (Table 8), broken out by interior and exterior NCS. The District then calculates the amount of square footage to be allocated to the charter school at the co-located sites in table 9, breaking out interior and exterior NCS. However, then Table 10 claims to provide an analysis of the charter school's allocation vs. entitlement, but instead lumps all NCS back together and divides it by the charter school's projected ADA, stating that "A charter school's allocation is considered to fall within reasonable equivalence standards if it is commensurate with the average of the sqft/ADA ratios at the comparison group schools." Yet lumping all the different kinds of NCS space into one large number does not provide an accurate or evaluable way of ensuring a charter school has access to reasonably equivalence NCS. A charter school that gets significant use of field space, but very minimal access to gym or other interior space, is not receiving reasonably equivalent access.

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

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

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

EBIA would be willing to consider an allocation of four additional classrooms to create specialized and non-teaching stations spaces on its campuses.

### **Pro Rata Charge Worksheet**

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

#### **1. Improper Costs Included in Pro Rata Share Calculation**

a. Please confirm whether any of the classified salaries or employee benefits include custodial costs.

b. **RRMA Transfer:** The District has included \$17,704,932 in facilities costs identified as "RRMA transfer from UR to resource 8150." Typically this transfer represents 3% of the District's annual total general fund budgeted expenditures. EBIA requests additional information to document that this is the correct transfer amount, as the District's current budget situation, in which the District has made and is making significant cuts, makes it seem less likely that its RRMA transfer amount would have increased between 2018-19 and 2019-20.

c. **Police Services:** The District may not include police costs in its pro rata share calculation because EBIA provides its own security and alarm services, and also has been told by the District's Police Services that Police Services does not provide services to charter schools in the District. Pro rata share amounts are intended to reflect a charter school's portion of the District's facilities costs that EBIA uses. Because EBIA does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate. Moreover, EBIA wonders how the District's police costs increased by almost \$800,000 in the last year.

d. **Insurance:** EBIA will provide and pay for the full spectrum of its insurance benefits, as required by its charter and the Facilities Use Agreement; the District has included the cost of its own property insurance on the facility. Including the District's insurance costs in the calculations not only double bills EBIA for a cost it is already paying for, it is requiring EBIA to pay for a cost that is actually the District's responsibility. Moreover, insurance is not contemplated under the Prop. 39 regulations as an acceptable "facilities cost," and Education Code Section 47614 specifically states that a charter school may not be charged for use of district facilities beyond the pro rata share.

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

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

EBIA will not agree to the District's current process for charging custodial costs.

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

g. **Emergency Debt Service Costs:** The District has included its emergency debt service costs in the pro rata share calculation. 5 CCR Section 11969.7 states that only unrestricted General Fund facilities costs that are not costs otherwise assumed by EBIA 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 EBIA 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 EBIA'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."

### **Draft Facilities Use Agreement.**

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

1. **Section 1:** This section states "District agrees to allow use of the Premises at the School(s) by Charter School for the sole purpose of operating Charter School's educational program in accordance with all applicable federal, state and local regulations relating to the Premises and to the operation of Charter School's educational program." This section will need to be revised to include EBIA's summer school, if any, and programs procured by EBIA through third party entities, e.g. after-school program providers.

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

3. **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 site. The District is required to provide EBIA 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.

4. **Section 11.2:** The District may not avoid its obligation to provide legally compliant facilities that can be used for a school program.

5. **Section 13:** 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 EBIA's program. The District must provide relevant scheduling information and reasonable notice to EBIA if it will be coming onto the facility to perform maintenance. In addition, EBIA wishes to perform its own custodial services at Marshall, and as a result, does not agree to allow the District to enter the Premises to perform custodial services.

6. **Section 15:** While EBIA is willing to pay any taxes or assessments on its personal property, or modifications or improvements it performs on the facility, it may not otherwise be obligated to pay any costs to occupy the facility beyond the pro rata share. (Education Code Section 47614(b)(1).)

7. **Section 16:** EBIA wishes to perform its own cleaning and custodial services at Marshall. Therefore, the Final Offer will need to be revised to provide for this revision.

8. **Section 18:** If the comparison schools have a security system, then in order to provide a reasonably equivalent facility, the District must also provide the Premises with a security system. EBIA does not agree to provide written verification of compliance with the fingerprinting and criminal background investigation requirements to District prior to EBIA taking possession of the Premises and prior to conducting its educational program on the Premises.

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

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

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

Sincerely,



**Michelle Cho**  
Executive Director

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