EAST BAY INNOVATION ACADEMY

February 28, 2019

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 2019-2020

Dear Ms. Murarka:

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

The District's Preliminary Proposal is for a total of nine (9) teaching stations and four (4) specialized classrooms at the former Thurgood Marshall Elementary School site, four (4) teaching stations and one (1) specialized classrooms at Markham Elementary School, and ten (10) total classrooms with no specialized classrooms at Skyline High School, as well as 100.0% shared use of the non-teaching station space at Thurgood Marshall, 23.6% shared use at Markham, and 11.2% shared use at Skyline. The Preliminary Proposal is based on a projected in-District ADA of 520.46.

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, the artificial and illegal use of "weighting" factors in the calculation of the teaching station, specialized classroom, and non-teaching space to be allocated to EBIA, which results in an allocation of less space than EBIA is entitled to, 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 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.

Alternative Proposal

As previously shared, EBIA finds the preliminary offer of three separate facilities untenable from operational perspective. Understanding that a single site that accommodates our community is not available, EBIA respectfully requests that the final offer includes at most two locations -- Thurgood Marshall and one other site at Skyline or another nearby facility, that can meet the needs of the program according to the projected ADA and prop 39 regulations as discussed herein.

Condition Analysis

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

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

The Preliminary Proposal states that the District has evaluated data on the condition of the facilities at the comparison schools based on "site size (acreage) as well as data on the condition of the facilities based on information available from the Facilities Condition Index and Educational Adequacy Score, as part of the Jacobs Study" and references Exhibit C to the Preliminary Proposal. A review of this spreadsheet makes clear that the District has taken this information directly from the

"Oakland USD Facility Adequacy Assessment" ("FAA") prepared through the Jacobs report, but not the Facilities Condition Assessment Report ("FCAR") which accompanied it. Rather, the information from the FCAR is reflected in the Facility Condition Index ("FCI") listed on page 7 of the Preliminary Proposal.

From the information available to us, the District's claim that the condition of Marshall and Markham are reasonably equivalent to the condition of the comparison schools is not accurate.

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

However, an actual assessment of whether the condition of the allocated sites is reasonably equivalent to the comparison schools would require an assessment of whether the condition of the two sites is actually even close to the comparison schools. The actual average FCI score for the comparison schools, for example, is 56.67% and the average EAS is 55.0. Compared to Thurgood Marshall's scores of 48% and 48.0 and Markham's scores of 43% and 49.4, the averages of the sites allocated to the Charter School are lower when it comes to both FCI and EAS scores.

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

The District's Teaching Station to ADA Analysis Is Illegal.

All California public school students are entitled to learn in a classroom that is safe, that is not crowded with too many students, and that is conducive to a supportive learning environment. In accordance with the implementing regulations, the District must provide a facility to the Charter School with the same ratio of teaching stations to average daily attendance ("ADA") as those provided to students in the comparison group of schools, as well as a proportionate share of specialized classroom space and non-teaching space, and are to be allocated at each grade level consistent with the ratios provided by the District to its students. (5 CCR Section 11969.3(b)(1).) There is no such thing as a fractional classroom for a single grade level of students and the allocation cannot be based upon the District's "loading standard," nor can it be based on an arbitrary and fabricated formula.

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

> "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.

In comparison to prior years, when the District used enrollment instead of ADA to calculate its ratios, and simply averaged the enrollment of all core classes at each comparison school (excluding all non-core classes), this year the District has mostly complied with the required Prop. 39 process for the first part of its analysis regarding the teaching station to ADA ratio at the comparison schools, though the manner in which it arrived at the number of teaching stations for each comparison school is opaque and inconsistent with the documentation it has attached in support of its calculations. In addition, despite somewhat complying with the required Prop. 39 formula, the District has then unfortunately engaged in a similarly illegal and manipulative tactic to reduce the number of classrooms it proposes to allocate to charter schools. In addition, the District has

<u>The District's Calculation of the Number of Teaching Stations at the Comparison Schools is Inconsistent with its Supporting Documentation.</u>

Table 7a in the Preliminary Proposal identifies the "ADA per Classroom" at the comparison schools, as well as the "Projected ADA" for each site and the "Proportion of Total Comparison Group ADA," which is the percentage of the total comparison school ADA that each comparison school's ADA represents. The Preliminary Proposal states that "To determine the number of classrooms 'provided to' District students at individual District schools, the District has taken the additional step of creating an updated inventory of actual classroom allocation utilization at each comparison group school using educational adequacy assessment data that was provided by a contracted third party vendor (Jacobs) to OUSD during the 2017-18 school year. That inventory is provided as Exhibit C." Exhibit C provides a list of each classroom and other space on each District site, categorizing each room/space according to categories:

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

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

Comparison School	"ADA Per Classroom"	Projected ADA	Number of Teaching Stations Used in District "ADA Per Classroom" Calculation
Bret Harte Middle School	19.58	411.08	21
Montera Middle School	16.29	619.13	38
District's "Weighted Average" ADA per Classroom	**17.60**		
Actual Average ADA Per Classroom	**17.94**		

Comparison School	"ADA Per Classroom"	Projected ADA	Number of Teaching Stations Used in District "ADA Per Classroom" Calculation
Skyline High School	20.96	1425.24	68
District's "Weighted Average" ADA per Classroom	**20.96**		
Actual Average ADA Per Classroom	**20.96**		

A review of Exhibit C reveals no logical connection between the number of classrooms used by the District to calculate the ADA per classroom ratio and the data the District claims to have used, or any of the other exhibits – even when classrooms that are identified as being allocated to a charter school, or as being used for a purpose other than classrooms (for example, as a parent/community room or administrative room) are factored in, and even in the context of a review of the websites for each comparison school to evaluate usage of particular rooms on campus as something other than general education.

There is an even more fundamental problem with the District's "ADA Per Classroom" calculation, one that appears to be a blatant effort by the District to manipulate its calculations so as to illegally reduce the number of teaching stations it allocates to charter schools.

Most charter schools have multiple comparison schools, and thus in order to determine the teaching station to ADA ratio that will be applied to a charter school's projected in-District ADA to determine the number of teaching stations which a charter school must be allocated, the ratios for all of the comparison schools must be averaged by adding them all together, and then dividing by the number of comparison schools. This is commonly known as the "mean"[1] and is the most frequently used formula to calculate the average of a set of numbers as it identifies the most central value of a discrete set of numbers (again, the sum of the values divided by the number of values). This ensures that the allocation of teaching stations to a charter school most closely reflects the actual teaching station to ADA ratio at the comparison schools – which is the intent of Prop. 39.

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

There is no support for using a weighted average in this situation, as weighted averages are typically used when it is necessary to give certain values in a data set more weight. For example, in calculating classroom grades, the grade on a final exam will necessarily have more weight than a weekly exam, in calculating the financial performance of different investments, where more weight would be given to the performance of larger dollar value investments, or even in calculating slugging percentage in baseball, where, for example, multi-base hits are given more weight than singles.

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

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

comparison schools are more important than others. Instead, Prop. 39 simply states that the comparison group consists of schools with similar grade levels that serve students living in the high school attendance area in which the largest number of charter school students reside – in other words, the comparison group was developed to reflect the kinds and amounts of facilities charter school students would otherwise enjoy had they chosen to attend a traditional district school. (*See, e.g.* the Final Statement of Reasons accompanying the first set of Prop. 39 Implementing Regulations, which describes the comparison school analysis as trying to find a "middle ground" between a comparison group that consists of all district-operated schools and one that consists of one to three schools, as "using all district-operated schools as the comparison group would "result in a standard that might be significantly different than the neighborhood schools the charter school students would otherwise attend. (This is because in large school districts the conditions in schools may vary widely from neighborhood to neighborhood)" whereas "[u]sing one to three schools would result in a group that is too small and would result in problems agreeing on the group selected.")

One can only assume the District used this weighted average because schools with higher ADA are more likely to have more crowded classrooms and less empty space, whereas schools with lower ADA are more likely to be under-enrolled, and thus have lower class sizes and more empty rooms. We note neither the Preliminary Proposal nor any of the exhibits offer any explanation for how or why the District elected to engage in this sort of mathematical gymnastics.

Comparison School	**Number of Teaching Stations Used in District "ADA Per Classroom" Calculation**	**Projected ADA**	**Corrected Number of Teaching Stations[2]**	**Corrected Teaching Station to ADA Ratio**
Bret Harte Middle School	21	411.08	23	17.87
Montera Middle School	38	619.13	38	16.29

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

CORRECT AVERAGE Teaching Station to ADA Ratio				**17.08**

Comparison School	Number of Teaching Stations Used in District "ADA Per Classroom" Calculation	Projected ADA	Corrected Number of Teaching Stations	Corrected Teaching Station to ADA Ratio
Skyline High School	68	1,425.24	68	20.96
CORRECT AVERAGE Teaching Station to ADA Ratio				**21.66**

Therefore, EBIA is entitled to an allocation of 18.3, or nineteen (19) teaching stations for 6-8, and 9.6 or ten (10) teaching stations for 9-12, for a total of twenty-nine (29) teaching stations. As the Preliminary Proposal only allocates twenty-eight (28) classrooms, the District's offer is missing one teaching station.

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.[3]

As such, the District must allocate specialized classroom space, such as science laboratories, art rooms, computer labs, music rooms, weight rooms, etc., commensurate with the in-District classroom ADA of 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-

[3] *Id.*; see also *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 (CSBA).

teaching station space)--in order to determine the "reasonably equivalent" facilities that must be offered and provided to a charter school. (*Bullis*, supra, 200 Cal.App.4th 296, 336.)

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

a. Allocation of Specialized Classroom Space to EBIA.

The Preliminary Proposal allocates 896 square feet of Arts space, 3,589 square feet of Science space, and no technology space, stating that "The District's calculation of the Charter School's entitlement to specialized classroom space shows that the Charter School is entitled to approximately an additional 4,899 sqft of specialized classroom space. In order to meet this entitlement, the District will either identify additional specialized classroom space to include in the Final Offer of facilities or consider reasonable requests from the Charter School to reconfigure offered classrooms for use as specialized classroom space."

The District's allocation of specialized classroom space 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 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. The District's other solution is for EBIA to voluntarily give up teaching stations (which it will need to operate its general education program) to turn them into specialized classroom space. Notably, the Preliminary Proposal also appears to contemplate that the charter school would be responsible for the cost to reconfigure classrooms into specialized space, thus asking EBIA to pay to remedy the District's failure to comply with the law. This is clearly not legally compliant.

Second, the District has counted the same classrooms as both teaching stations and specialized classrooms, thereby illegally reducing the amount of space it must allocate to EBIA. More specifically on page 2 of the Preliminary Proposal, the District states that it is allocating twenty-eight (29) classrooms to EBIA, five of which are specialized classrooms. Next, on Page 9 of the Preliminary Proposal, the District calculates that it owes EBIA twenty-eight (28) regular teaching stations. Then, on page 10, the District claims that its allocation of those same twenty-eight regular classrooms to

EBIA includes 896 square feet of art space and 3,539 square feet of science lab space, and then concludes that it owes EBIA 9,334 square feet of specialized classroom space, but because it has already offered EBIA 4,435 square feet of specialized classroom space, it thus only owes EBIA 9,334 square feet of specialized classroom space. In other words, the District is using the same square footage to meet two entirely different obligations (allocations of teaching stations and specialized classroom space).

This is illegal. As outlined above, there are three separate kinds of space that must be analyzed and allocated by a district to a charter school, each with its own separate analysis: teaching station space, specialized classroom space, and non-teaching station space. (5 CCR section 11969.3(b); *Bullis Charter School v. Los Altos School Dist., supra*, 200 Cal. App. 4th at 1063-1064 ["and in particular the three categories of facilities specified in regulation 11969.3, subdivision (b) (i.e., teaching stations, specialized classroom space, and nonteaching station space) [must be used to] determine the "reasonably equivalent" facilities that must be offered and provided to a charter school.) The District cannot have it both ways – here, either Rooms A-1-38, A-1-46, A-1-47, A-1-49 (on the Marshall campus), and R-1-5 (on the Markham campus) are allocated to EBIA as regular teaching stations and are counted against the District's obligation to provide EBIA with twenty-eight teaching stations, or it is counted against the over 9,335 (at a minimum) square feet of specialized classroom space the District is required to provide to EBIA.

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

Third, the District's offer combines different kinds of specialized classroom space into one lumped square footage that encompasses science, technology and art spaces. It is not reasonably equivalent to combine different types and sizes of specialized classroom space. If there are science labs, computer labs, music rooms, weight rooms, art rooms, and the like available at the comparison schools, then the District must allocate reasonably equivalent, fully furnished and equipped kinds of these spaces and/or shared access to these spaces for 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 allocating one classroom 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 Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 296, 336.)

EBIA is entitled to reasonably equivalent allocations of specialized spaces, and of furnishings and equipment that accompany those spaces in the comparison schools, and it anticipates receiving its full complement of the specialized space at the school sites.

b. Allocation of Non-Teaching Station Space to EBIA

The Preliminary Proposal provides for the allocation of 23.6% of the non-teaching station space at Markham, 11.2% of the non-teaching station space at Skyline, and all of the non-teaching station space at Marshall, claiming a total allocation of 34,143 square feet of interior space, and 591,001 square feet of outdoor space.

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

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

The District directs attention to Exhibit B, which includes a spreadsheet demonstrating how the District arrived at the "Interior NCS" calculation for each comparison school site. This spreadsheet shows that the District used data from the MKThink facilities master plan (from 2010)[4] identifying each comparison school site's interior square footage, and simply deducted the square footage of each room identified as a "classroom" from the total interior square footage. The resulting number is used as the "Interior NCS" for each comparison school site.

This approach is problematic for several reasons. First, this appears to exclude all regular classrooms that are used for special education. As an example, the Jacobs report attached as Exhibit

[4] 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.

C ("Rooms Inventory" tab) to the Preliminary Proposal identifies all special education classrooms on District sites, including rooms used for "SpEd Special Day Class," "SpEd Resource Room," "SpEd Life Skills Lab," and "Resource Room." Many of these special education classes are located in regular classrooms (though some are located in smaller conference or other spaces).

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

As an example, according to Exhibit C, Harte has eight (8) Special Day Class classrooms, one Life Skills Lab, and twenty-three (23) Classroom, MS/JHS (6-8) classrooms, for a total of thirty-two (32) classrooms. The MKThinkRooms tab of Exhibit B, used to calculate non-teaching station space, lists thirty-nine "classrooms" – whose square footage was taken out of the "Site Interior NCS" calculation.

Yet the District's "ADA per Classroom" analysis in Table 7a assumed twenty-one classrooms for Harte, not thirty-two.

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

Thus, it appears that special education classrooms provided to District students were removed or ignored in the calculation of space at the comparison schools. This is especially notable as the Preliminary Proposal makes no mention at all of special education, whether as an analysis of the special education space at the comparison schools, or to make an allocation of space to 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.

Based on a review of the Jacobs data, EBIA is actually entitled to the following special education square footage:

	SPED SqFt[5]	Projected ADA[6]	Square Feet/ADA
Harte	10,021	636.75	15.74
Montera	2,867	666.09	4.30
Average			**10.02**

	SPED SqFt[7]	Projected ADA	Square Feet/ADA
Skyline	7,956	1,472.45	5.40

Applied to EBIA's projected ADA, EBIA is entitled to 3,131.45 (312.52*10.02) square feet of special education space for its middle school grades, and 1,122.88 square feet of special education space for its high school students, for a total of 4,254.33 square feet of special education space. Given that the District has excluded all of its special education classrooms from its non-teaching station analysis, and thus has allocated no special education classrooms to EBIA, the District's Preliminary Proposal violates 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

[5] This column adds up the square footage of all rooms identified as SpEd Resource Room (OUSD), SpEd Special Day Classroom (OUSD), SPED Life Skills Lab, and Resource Room in Exhibit C, Tab "Rooms Inventory." This does not count the likely numerous special education office spaces and conference rooms that exist at the comparison schools, as those are not specifically identified in any of the District's exhibits.

[6] The Charter School recognizes that the District took out each comparison school's ungraded ADA when calculating the teaching station to ADA ratio, and likely did not count any Special Day Class rooms in its ADA to Classroom calculation, and here the Charter School is including all projected ADA for each comparison school site in calculating the square feet of special education space per ADA

[7] This column adds up the square footage of all rooms identified as SpEd Resource Room (OUSD), SpEd Special Day Classroom (OUSD), SPED Life Skills Lab, and Resource Room in Exhibit C, Tab "Rooms Inventory." This does not count the likely numerous special education office spaces and conference rooms that exist at the comparison schools, as those are not specifically identified in any of the District's exhibits.

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 claims that "a charter school's allocation is considered to fall within reasonable equivalence standards if it falls within the range of the sqft/ADA ratios at the comparison schools." However, the District has not and cannot provide any legal authority to support this claim, and such a position directly conflicts with the basic premise of Prop. 39 – that public school facilities must be shared fairly between all public school students, including those in charter schools. Prop. 39 also requires a reasonably equivalent allocation of each different kind of non-teaching station space, based on the square feet per ADA of these spaces at the comparison schools – nowhere does Prop. 39 or applicable case law state that falling within a "range" is acceptable. This would allow the District to allocate non-teaching station square footage at the far low end of a range that includes much higher numbers (as here, the range is from 214 square feet to 1,116 square feet per ADA) and claim compliance with Prop. 39.

Similarly, the Preliminary Proposal does not address the various types of outdoor areas that exist at the comparison schools such as gardens, basketball courts, play fields, and play structure space but rather lumps all the different types of exterior spaces together when calculating exterior non-teaching station space. Each of these types of spaces has a specific use and furnishings and equipment and/or design that are appropriate for such use, and the District's allocation method does not ensure 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, supra*, "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 precludes EBIA from engaging in timely and efficient negotiations with site principals regarding shared use schedules and 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.

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

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

b. **RRMA Transfer**: The District has included $17,254,784 in facilities costs identified as "RRMA transfer from UR to resource 8150." Typically this transfer represents 3% of the District's annual total general fund budgeted expenditures. Last year the District claimed a transfer of $13,048,405; in other words, the District's calculation suggests that this year it has increased its transfer amount by more than $4 million. 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 2017-18 and 2018-19.

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.

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."

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."

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

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

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

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

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

Draft Facilities Use Agreement.

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

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

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

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

4. **Section 9**: This section states that the District "shall not be liable for any personal injury suffered by Charter School or Charter School's visitors, invitees, and guests, or for any damage to or destruction or loss of any of Charter School or Charter School's visitors, invitees or guests' personal property located or stored in the parking lots, street parking or the School Site, except where such damage is caused by the District's negligence or misconduct." This section will need to be changed to reflect that the District may not avoid liability for injuries or damage caused by its failure to maintain the parking spaces on the site. The District is required to provide 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.

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

6. **Section 12.3 and 12.4**: The District must make reasonable efforts to keep their materials, tools, supplies and equipment on the Premises in such a way as to minimize disruption to 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.

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7. **Section 14**: 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).)

8. **Section 15**: 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.

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

10. **Section 17**: If the comparison schools have a security system, then in order to provide a reasonably equivalent facility, the District must also provide the Premises with a security system. 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.

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

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

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

Michelle Cho

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