Education *for* Change
Public Schools

July 27, 2018

Leslie Jimenez
Office of Charter Schools
Oakland Unified School District
1000 Broadway, Suite 639
Oakland, CA 94607

Re: ***Cox Academy***
Response to District's Final Offer
Proposition 39 2018-2019

Dear Ms. Jimenez:

Cox Academy ("Cox" or "Charter School") is in receipt of the Oakland Unified School District's ("District") June 28, 2018 letter ("Final Offer") regarding Cox's request for facilities under Proposition 39 ("Prop. 39") for the 2018-2019 school year.

The District's Final Offer is for a total of twenty-four (24) teaching stations and specialized classrooms, as well as 101,927 sq. ft. (60.9%) of the non-teaching station space at the E. Morris Cox campus (25,183 sq. ft. of exclusive use of interior non-teaching station space and shared use of 76,744 sq. ft. of exterior non-teaching station space). The Final Offer is based on a projected in-District ADA of 535.76.

Section 11969.9(i) of the Proposition 39 Implementing Regulations (the "Implementing Regulations") requires Cox to notify the District in writing whether or not it intends to occupy the offered space. Accordingly, despite the deficiencies in the Final Offer (which are identified herein to the extent practicable, with all rights reserved) and as set forth in the response to the Preliminary Proposal, which is incorporated herein by reference, Cox accepts the District's Final Offer and also intends to occupy the entire Cox campus pursuant to Section 11969.3(d)(1), without acknowledging the legal sufficiency of the Final Offer under applicable local, state, or federal law and without waiving any of its legal rights under applicable local, state, or federal law, including Proposition 39 rights and remedies.

The Final Offer fails to meet the legal requirements of Prop. 39, in part, because the Final Offer fails to provide sufficient information regarding the allocation of teaching station, non-teaching space and specialized classroom space to Cox and fails to provide Cox with a reasonably equivalent allocation of space as required by law. Cox requests that the District's Final Offer be modified in accordance with Prop. 39 and its Implementing Regulations, including the requirement that Cox, as a conversion school established in accordance with Education Code Section 47605(a)(2), be allocated its entire converted school site in its first year of operation, and thereafter upon annual request, unless and until a mutual amendment of the charter occurs.

1. Overarching Concerns

Cox anticipates occupying the entire Cox campus for the 2018-19 school year, and as stated above, Cox is entitled to use of the entire converted school site for 2018-2019. There is no back-and-forth contemplated in the regulation. The District simply provides the space. While the District may charge Cox a pro rata share, Cox is entitled to occupy the entire school site identified in its charter. The District's only remedy is to collect an overallocation penalty if Cox's ADA fall below its projection. While Cox may *voluntarily* surrender a portion of its site in order to avoid an over-allocation penalty, the school is not *required* to do so, and has no reason to do so when the school is not over-allocated based on its attendance. The entire Cox campus is identified as the school site in the charter, and its in-District ADA has only increased each year. Therefore, the District must allocate the entire school site to Cox pursuant to Section 11969.3(d)(1).

The District claims that "the Proposition 39 regulations do not require a school district to continue providing the same capacity of facilities to a conversion charter school." The District bases this claim on the holding in *Anderson Union High School District v. Shasta Secondary School* (2016) 4 Cal.App.5th 262, 277 ("*Shasta*"), which involved interpretation of the terms "schoolsite" and "site" within the context of the geographical restrictions on charter schools (Ed. Code Sections 47605 and 47605.1). Specifically, the District claims that pursuant to *Shasta*, the term "site" in Section 11969.3(d)(1) only refers to the location of the conversion school rather its facilities, and as a result, the District is not required to provide Cox with the same facilities it had at the time it was established as a charter school (only the same location). However, the District completely ignores that Section 11969.3(d)(1) refers to a "school site" rather than a "site." *Shasta* found that within the context of Ed. Code Sections 47605 and 47605.1, "'[s]ite' speaks to location, while 'schoolsite' speaks to use. (*Shasta* at p. 278.) Therefore, if *Shasta* has any application on the interpretation of the term "school site" in Section 11969.3(d)(1), it supports Cox's position.

Even though Section 11969.3(d)(1) plainly allocates the entire site to Cox, the District has presented a comparison school group analysis and failed to allocate Cox exclusive use of the entire converted campus in violation of 5 CCR § 11969.3(d)(1). Even if Cox were willing to admit that a comparison school analysis is legally required or appropriate (which it is not), as explained in more detail below, the District's comparison school analysis is not legally compliant, and results in an under-allocation of space to Cox in violation of Prop. 39 and the Implementing Regulations.

2. 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 District did not perform this complete analysis in the Final Offer or the exhibits attached thereto. The District claims that it has evaluated data on the condition of the facilities at the comparison schools based on the information available from the District's Asset Management and Facilities Master Plan, and that the site offered to Cox is reasonably equivalent in every category. However, the District's Asset Management and Facilities Master Plan only addresses a small subset of the categories required to be analyzed by the District under 5 CCR Section 11969.3(c). In addition, these documents were prepared a number of years ago, and thus likely do not reflect an accurate assessment of the condition of the facilities.

The Final Offer does not assess the condition of the athletic fields, play areas, furnishings and equipment, technology infrastructure, mechanical, plumbing, electrical, and fire alarm systems, the suitability of lighting, or the size for intended use. Therefore, the District's Final Offer fails to perform the complete condition analysis required by the Implementing Regulations.

3. The Final Offer Does Not Allocate Sufficient Teaching Stations to Cox

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 Cox 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 school district must count the number of classrooms in the comparison group schools and cannot use districtwide norming ratios. (*Id.*, p. 1236.)

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

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

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

teachers or not, and use the resulting number as the denominator in the ADA/classroom ratio for allocating classrooms to charter schools based on their projected ADA. Despite the clear language of *CCSA v. LAUSD*, however, the District's Final Offer excludes "unassigned" or "out of service" classrooms. These classrooms are not accounted for anywhere else in the District's Final Offer; the District's Final Offer, therefore, is in violation of the ruling in *CCSA v. LAUSD.*

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

As mentioned above, even if Cox were willing to admit that a comparison school analysis is legally required or appropriate (which it is not), the District's comparison school analysis is not legally compliant and results in an under-allocation of space to Cox in violation of Prop. 39 and the Implementing Regulations.

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

The District also has previously claimed that its list of classrooms at the comparison school that are staffed with District teachers is "far superior" to the District's own Facilities Master Plan that specifically identifies the number of classrooms on a site. However, the number of classrooms that may be staffed with a teacher is not necessarily equivalent to the number of classrooms provided to District students for instruction. As noted above, in the *CCSA v. LAUSD* case, the Court held that "counting classrooms 'provided to' district students for the purposes of section 11969.3(b)(1) is not the same as counting only those rooms a district elects to staff with a teacher." (*Id.*, p. 1241.) Unless the District accounts for all of the specific uses of each classroom at the comparison schools, Cox has no way to verify that the information provided by the District is accurate.

Further, the Jacobs data reveals the District's claimed teaching station to ADA ratios do not account for all the teaching stations that are provided to students at the comparison schools. For example, the District claims a teaching station to ADA ratio of 22.38 for Acorn Woodland/Encompass, with an ADA of 606.51. This ratio requires 27 classrooms on the site. Yet

the Jacobs report reveals there are at least 29[1] classrooms on the site, for a corrected teaching station to ADA ratio of 20.9. Similarly, the District claims a teaching station to ADA ratio of 24.58 for Futures, with an ADA of 604.41. This ratio requires 25 classrooms on the site. Yet the Jacobs report reveals there are at least 35 classrooms on the site, for a teaching station to ADA ratio of 17.3. The other comparison schools have similarly lower teaching station to ADA ratios based on the Jacobs Report data.

As a result, the District has underallocated the number of teaching stations to Cox, and it must instead be based on the following teaching station to ADA ratio:

School	**Corrected Number of Teaching Stations**	**ADA**	**Corrected Teaching Station/ADA Ratio**
Acorn Woodland/Encompass	29	606.51	20.91
Brookfield ES	27	255.49	9.46
Burckhalter ES	14	220.09	15.72
East Oakland Pride	26	304.75	11.72
Esperanza ES/Korematsu	35	616.33	17.61
Futures ES/Community United	35	604.41	17.27
Howard ES	16	182.69	11.42
Madison Park Academy	18	274.12	15.23
Markham ES	25	322.06	12.88
New Highland/RISE	35	551.28	15.75
Reach Academy	?	351.47	0.00
Greenleaf	16	609.16	38.07
Parker ES	20	353.54	17.68
Average			**15.67**

This teaching station to ADA ratio would actually entitle Cox to thirty-four (34) teaching stations, far more than the twenty-four (24) regular and specialized classrooms offered by the District.

[1] This excludes classrooms designated as science labs.

4. The Final Offer Does Not Allocate Sufficient Specialized Classroom and Non-Teaching Station Space to Cox

Cox is entitled to reasonable allocations of specialized and non-teaching station space. Section 11969.3(b)(2) requires that, if a school district includes specialized classroom space, such as science laboratories, in its classroom inventory, the Proposition 39 offer of facilities provided to a charter school must include a share of the specialized classroom space. The Final Offer must include "a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space." (5 CCR § 11969.3(b)(2).) The amount of specialized classroom space allocated and/or the access to specialized classroom space provided shall be determined based on three factors:

(A) the grade levels of the charter school's in-district students;
(B) the charter school's total in-district classroom ADA; and
(C) the per-student amount of specialized classroom space in the comparison group schools.[2]

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 Cox. 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 Cox 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/non-teaching station space in the comparison group schools). (5 CCR § 11969.3(b)(2)-(3).) 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:

---

[2] 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).

> [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 failed to count wide swaths of specialized classroom and non-teaching station space at the comparison schools or has entirely failed to account for those spaces in its offer.

a. Allocation of Specialized Classroom Space to Cox

The Final Offer allocates 2,553 sq. ft. of "specialized" classroom space to Cox and claims this is 684 sq. ft. more than the total amount of specialized teaching space to which Cox is entitled. However, the Final Offer does not include an allocation of any special education space or include special education space in its calculation of the specialized or non-teaching station space that exists at the comparison schools.

As noted above, Prop. 39 makes clear that the allocation of specialized classroom space must be based on the amount of specialized classroom space at the comparison schools: "The amount of specialized classroom space allocated and/or the access to specialized classroom space provided shall be determined based on three factors: **(A)** the grade levels of the charter school's in-district students; **(B)** the charter school's total in-district classroom ADA; and **(C)** the per-student amount of specialized classroom space in the comparison group schools." (5 CCR Section 11969.3(b)(2); emphasis added.) This space must be allocated to Cox either as "a share of the specialized classroom space and/or a provision for access to reasonably equivalent specialized classroom space." (*Id.*) *Bullis* is also clear that a school district must count all of the specialized classrooms spaces on the comparison school campuses and ensure that a charter school receives a reasonably equivalent allocation of all of these spaces. Cox 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 and the reasonably equivalent furnishings and equipment therein at the school site.

b. Allocation of Non-Teaching Station Space to Cox

The Final Offer does not properly allocate non-teaching space to Cox. The Final Offer allocates lumped-together categories of non-teaching station space (admin/office/conference, MPR/auditorium/cafeteria/Gym, and library) as well as a catch-all "other interior" without any further specification. The offer provides for a total allocation of 25,183 square feet of interior non-teaching station space and 76,744 total outdoor space to Cox.

The District's allocation of non-teaching space to Cox in the Final Offer does not comply with Prop. 39 or its Implementing Regulations in several respects, including its failure to identify the specific non-teaching station space to be allocated to Cox and its allocation of non-teaching station space based on the percentage of Cox's enrollment on the site, as determined by the District. Moreover, the District's calculations of the space to be allocated to Cox are opaque, unverifiable, and based on mysterious formulas that have not been provided to Cox. This makes it almost impossible for the school to understand both how the District arrived at its allocation of space and make a determination whether that allocation is legally compliant.

First, there is a considerable amount of non-teaching station space at the comparison schools that is not referenced in the District's calculation or allocation to Cox. The Final Offer does not appear to include any of the following types of spaces in its calculation of non-teaching space at the comparison schools or its allocation to Cox even though such spaces are available at the comparison schools: kitchen/servery, nurse/health clinic space, special day class/resource and other special education spaces, and parent centers/community use rooms.

Similarly, the Final Offer 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. The District is required to provide Cox with a reasonably equivalent allocation of all these types of spaces based on the "per-student amount of non-teaching station space in the comparison group schools," and Cox requires an allocation of all these types of spaces in order to operate its educational program. 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 Cox 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 Cox a percentage of unspecified non-teaching station spaces that exists at the allocated site.

Second, the Final Offer contains no listing or description of the types of shared non-teaching spaces to which Cox will be provided access at the offered site beyond large categories of space. The District's failure to provide this basic information to Cox precludes Cox from assessing whether the Final Offer provides Cox with access to all of the different types of non-teaching station space to which Cox 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.)

Third, the District may not base its non-teaching station space allocation to Cox on the "minimum" amount of non-teaching space that exists at any one of the comparison group schools, which results in a significantly and artificially reduced allocation to Cox. The District claims a "charter school's allocation is considered to fall within reasonable equivalence standards if it falls within the minimum/maximum Sqft/ADA ratios at the comparison group 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.

Fourth, Tables 7a and 7b add even more opacity to the District's analysis. The District is using these tables, we assume, to calculate how much total non-teaching station space exists at the comparison schools (including indoor and outdoor space) per unit of ADA. Furthermore, the District has ensured that its calculation misstates the actual per ADA amount of non-teaching station space by deducting the total "classroom space"[3] from the "total site area".[4] By using this formula, the District has assumed that all classrooms larger than 600 square feet are accounted for in its teaching station to ADA ratio – but by its own admission, the District's teaching station to ADA ratio calculation only includes rooms staffed by a teacher – not empty rooms, not classrooms used for storage or counseling or special education or restorative justice or any other purposes. This space is also not necessarily captured by the specialized teaching station allocation, as this is also based only on the number of classrooms larger than 600 square feet on the site, but does not actually determine the use of each space, or whether the proportion actually captures usage at each comparison school site.

Most important, even based on the District's square footage figures for the comparison schools, which evidently exclude a considerable amount of non-teaching station space, Cox is still entitled to an allocation of at least 48,604.15 sq. ft. of interior non-teaching station space (i.e., -23,421.15 more sq. ft. than the District allocated to Cox) as set forth below:

---

[3] Defined as the square footage of all classrooms that are equal to or larger than 600 square feet "and any attached classroom storage space included in the Prop. 39 preliminary offers."

[4] The total square feet of outdoor and building square feet on the campus, including non-ground level building square footage.

Comparison School	ADA	Interior Space	Classroom Space	Non-Charter Use	Interior NTS Space	Resulting Interior NTS/ADA
Acorn Woodland/Encompass	606.51	74,585	30,112	100.00%	44,473	73.33
Brookfield ES	255.49	65,234	28,519	100.00%	36,715	143.70
Burckhalter ES	220.09	32,514	15,512	100.00%	17,002	77.25
East Oakland Pride	304.75	60,625	28,851	100.00%	31,774	104.26
Esperanza ES/Korematsu	616.33	53,202	29,651	100.00%	23,551	38.21
Futures ES/Community United	604.41	77,599	33,425	100.00%	44,174	73.09
Howard ES	182.69	36,329	20,227	85.89%	16,102	75.70
Madison Park Academy	274.12	85,599	14,458	100.00%	71,141	259.53
Markham ES	322.06	52,614	28,022	100.00%	24,592	76.36
New Highland/RISE	551.28	77,960	41,945	100.00%	36,015	65.33
Reach Academy	351.47	98,979	49,777	39.61%	49,202	55.45
Greenleaf	609.16	48,251	20,125	100.00%	28,126	46.17
Parker ES	353.54	51,014	18,852	100.00%	32,162	90.97
Average						**90.72**

Non-teaching station space	SF/ADA ratio	Applied to in-District ADA of 535.76
Interior NTS	90.72	48,604.15

Even an analysis of the total (not just interior) non-teaching station space at the comparison schools demonstrates how woefully the District has underallocated non-teaching station space.

Comparison School	ADA	NTS Provided to Students	NTS/ADA

Acorn Woodland/Encompass	606.51	357,391	589
Brookfield ES	255.49	385,956	1,511
Burckhalter ES	220.09	116,491	529
East Oakland Pride	304.75	354,347	1,163
Esperanza ES/Korematsu	616.33	328,412	533
Futures ES/Community United	604.41	244,937	405
Howard ES	182.69	210,376	1,152
Madison Park Academy	274.12	602,780	2,199
Markham ES	322.06	109,053	339
New Highland/RISE	551.28	130,094	236
Reach Academy	351.47	72,746	207
Greenleaf	609.16	117,632	193
Parker ES	353.54	126,162	357
Average			**724**

The District's Final Offer allocates 101,927 square feet of non-teaching station space, both interior and exterior. Applying the average per-square foot amount of non-teaching station space to the school's projected in-District ADA of 535.76 requires an allocation of 387,890.24 square feet of non-teaching station space.

For all these reasons, the District's allocation of specialized and non-teaching station space included in the Final Offer fails to comply with Prop. 39 and its Implementing Regulations. Cox 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 site.

5. Pro Rata Charge Worksheet

As a preliminary matter, Cox notes that the District has indicated that Cox'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 Cox an additional amount for custodial services above what is included in the pro-rata share, this is not permitted by the Implementing Regulations.

a. Utilities: The District indicates that utilities may be included in the pro rata share if applicable under the Use Agreement. These amounts should be separately metered and billed to Cox, as it is not appropriate nor provided for in the law to include these costs in the pro rata share calculation, especially since some schools in the District (for

example, comprehensive highs schools that have pools and large gymnasiums) have substantially higher utilities costs, thereby requiring Cox to shoulder higher burdens of utilities costs than the amounts Cox actually uses. If the District receives billing from the utilities companies for each of its individual school sites, Cox is willing to pay the actual utilities costs for the site based on the same calculation used to determine the pro rata share costs for the shared use space, with the exception that any costs assumed by Cox cannot be included in the pro rata share calculation.

b. Police Services: The District may not include police costs in its pro rata share calculation because Cox 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 Cox uses. Because Cox does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

c. Insurance: Cox 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 Cox for a cost it is already paying for, it is requiring Cox 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.

d. Custodial Services: The District indicates that custodial services may be included in the pro rata share if applicable under the Use Agreement. The Implementing Regulations provide that ongoing operations and maintenance of facilities, which includes custodial costs, are the responsibility of Cox (5 CCR Section 11969.4(b)) and that any costs assumed by Cox cannot be included in the pro rata share calculation. Cox wishes to continue to perform its own custodial services; therefore, the Final Offer will need to be revised to provide for this revision.

e. The District has included $13,048,405 in facilities costs identified as "RRMA transfer from UR to resource 8150." However, the Implementing Regulations provide that ongoing operations and maintenance of facilities, which includes custodial costs, are the responsibility of Cox (5 CCR Section 11969.4(b)) Therefore, please provide Cox with the necessary documentation to show that the District has removed all facilities costs related to ongoing operations and maintenance from its RRMA transfer account that are Cox's responsibility, including custodial services.

f. 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 Cox 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 Cox 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 Cox'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."

6. **Draft Facilities Use Agreement:** We are reviewing the draft Facilities Use Agreement and look forward to negotiating the terms of that or an in-lieu agreement over the next several weeks, as required by the Implementing Regulations. (5 CCR Section 11969.9(k).)

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

   b. **Section 1.4**: Prop. 39 only requires Cox 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).

   c. **Section 1.6:** Fees charged under the Civic Center Act are intended to reimburse school districts for the costs they incur to process permits and to clean up after community use of their facilities. The portion of the Civic Center Act fees related to custodial and maintenance costs must be paid to Cox if Cox is responsible for cleaning up its site after each community use.

d. Section 2: The Site must be furnished, equipped and available for occupancy by Cox for a period of at least ten (10) working days prior to the first day of instruction. However, we are willing to consider taking possession earlier if mutually agreed upon between the parties.

e. Section 3: This section also needs to reflect that if Cox constructs or installs recreational improvements or other school facilities, Cox and the District will agree to negotiate a reduction in the facilities use fees. Cox's other concerns regarding the Pro Rata Share Charge outlined above are incorporated herein. Again, any costs assumed by Cox cannot be included in the pro rata share calculation, including custodial and maintenance costs. Cox objects to the late charge listed in Section 3.5. The Implementing Regulations do not contemplate late fees to be charged to Cox.

f. Section 6: This number will need to be adjusted to reflect the number of Cox students on the site.

g. 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 Cox 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.

h. Section 10: For the same reason, the District may not require Cox to take the facility in "as is" condition. Furthermore, it is not acceptable for the District to terminate the FUA if the cost to make repairs exceeds $150,000. The District is required to make the facility available to Cox for its entire school year (5 CCR Section 11969.5) and to maintain the facility in compliance with the California Building Code. (5 CCR Section 11969.9(k).) As a result, if the facility is damaged, the District must repair it, or, if it is destroyed, the District must provide alternative facilities.

i. 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 Cox's program. The District must provide relevant

scheduling information and reasonable notice to Cox if it will be coming onto the facility to perform maintenance. In addition, Cox wishes to perform its own custodial services, and as a result, does not agree to allow the District to enter the Premises to perform custodial services.

j. **Section 14**: While Cox 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).)

k. **Section 15**: Cox wishes to perform its own cleaning and custodial services. Therefore, the FUA will need to provide for this revision.

l. **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. Cox does not agree to provide written verification of compliance with the fingerprinting and criminal background investigation requirements to District prior to Cox taking possession of the Premises and prior to conducting its educational program on the Premises.

m. **Section 18.1.7**: Cox does not agree that should it default under the FUA, it must pay the District its unpaid pro rata share. The District is obligated to attempt to first find an alternative occupant for the site.

n. **Section 18.2**: This section must provide for Cox to perform any District obligation if the District is in default, and to recover its reasonable costs in so doing from the District.

o. **Section 20**: If Cox chooses to seek its insurance through a joint powers authority such as CharterSAFE, JPAs do not receive an A.M. Best insurance rating. This section will need to be revised to provide that insurance through a JPA will satisfy the terms of the FUA.

p. **Section 28**: This section must be revised to provide that the District is responsible for maintaining the Premises in compliance with applicable law, except to the extent that compliance arises as a result of modifications or improvements performed by Cox.

We have attempted in this letter to enumerate all of our concerns with the District's Final Offer; however, we note that our failure to mention a concern in this letter should not be interpreted as acceptance of that term. We look forward to working with the District to make the necessary

changes to the District's Final Offer in order to ensure compliance with Proposition 39 and its Implementing Regulations.

Hae-Sin Thomas
Chief Executive Officer

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