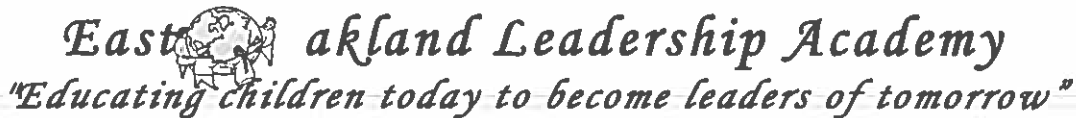

2614 Seminary Avenue, Oakland, CA 94605
Phone: (510) 562-5238/ Fax: (510) 562-5239
Dr. Laura Armstrong, Director

February 28, 2017

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

Re: East Oakland Leadership Academy
Response to District's Preliminary Proposal
Proposition 39 2017-2018

Dear Ms. Bradford:

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

The District's Preliminary Proposal is for six (6) teaching stations and one (1) standard classroom for use as specialized classroom space at the Frick Middle School campus at 2845 64th Avenue, Oakland CA, and is based on a projected in-District classroom ADA of 119.63. The Preliminary Proposal also appears to allocate 34.3% of the administrative space, MPR/Auditorium/Cafeteria/Gym, and Library space at Frick.

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

EOLA appreciates the efforts of District staff to identify an offer of space for EOLA, and EOLA anticipates accepting the offered space, with clarifications and modifications as outlined below. EOLA would like to express the following concerns regarding the Preliminary Proposal

and the draft Facilities Use Agreement and request that the District's final offer of space be modified in accordance with Prop. 39 and its Implementing Regulations.

1. Required Elements of the Preliminary Proposal:

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

2. Allocation Specialized Classroom Space and Non-Teaching Station Space

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

1. The grade levels of the charter school's in-district students;
2. The charter school's total in-district classroom ADA; and
3. The per-student amount of specialized classroom space in the comparison group schools.

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

As such, the District must allocate specialized classroom space, such as science laboratories, art rooms, computer rooms, music rooms, wood/metal shop rooms, etc. commensurate with the in-District classroom ADA of EOLA. 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 EOLA and the per-student amount of non-teaching station space in the comparison group schools. (5 CCR Section 11969.3(b)(3).) Non-teaching space is all of the remainder of space at the comparison school that is not identified as teaching station space or specialized space and includes, but is not limited to, administrative space, a kitchen/cafeteria, a multi-purpose room, a library, a staff lounge, a copy room, storage space, bathrooms, a parent meeting room, special education space, nurse's office, RSP space, and play area/athletic space, including gymnasiums, athletic fields, locker rooms, and pools or tennis

courts. (5 CCR Section 11969.3(b)(3).) An allocation of non-teaching station space can be accomplished through shared use or exclusive use. (5 CCR Section 11969.3(b)(3); *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal. App. 4th 296, and *California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal. App. 4th 530.)

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

> While a Proposition 39 analysis does not necessarily compel a school district to allocate and provide to a charter school each and every particular room or other facility available to the comparison group schools, it must at least account for the comparison schools' facilities in its proposal. A determination of reasonable equivalence can be made only if facilities made available to the students attending the comparison schools are listed and considered. And while mathematical exactitude is not required (cf. *Sequoia, supra, 112 Cal.App.4th at p. 196* [charter school need not provide enrollment projections with "arithmetical precision"]), a Proposition 39 facilities offer must present a good faith attempt to identify and quantify the facilities available to the schools in the comparison group--and in particular the three categories of facilities specified in *regulation 11969.3, subdivision (b)* (i.e., teaching stations, specialized classroom space, and non-teaching station space)--in order to determine the "reasonably equivalent" facilities that must be offered and provided to a charter school.
>
> (*Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal. App. 4th 296)

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

Instead, in a completely confusing and illegal process, the District has allocated specialized classroom space "as a fraction of general education classrooms depending on grade levels as follows: Elementary, 1/6; Middle, 1/8; High, 1/10." This formula is completely irrelevant, illegal and illogical, and guarantees EOLA will not receive sufficient specialized classroom space. Prop. 39 requires the District to document every kind of specialized classroom space at the comparison schools, identify the number of square feet of each kind of space is provided per ADA, and then apply that square footage to EOLA's ADA.

Moreover, the District is not permitted to use its bizarre formula to arrive at an allocation of specialized classroom space, and then allocate non-specialized classrooms to RFA. A review of the comparison school Facility Plans, School Accountability Report Cards, LCAP reports, and websites reveal that these schools have science labs, computer labs, music rooms, and art rooms. As a result, the District must allocate exclusive or shared use of reasonably equivalent, fully furnished and equipped kinds of these spaces space and/or access to EOLA. A standard classroom does not have, for example, the risers in a choral classroom, the gas and water stations in a science classroom, or the computers in a computer classroom, nor can all these different kinds of uses (and the attendant furnishings and equipment) happen in a single space. EOLA also notes that by allocating one classroom for all these uses, thus essentially forcing EOLA to create its own fully furnished and equipped specialized classroom space in a standard teaching station space, the District is relegating EOLA students to second-class status, given that District students enjoy access to these separate and furnished and equipped spaces. EOLA middle school students, for example, will not have access to the science lab space available at the comparison middle schools.

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

First, the square footage used excludes significant categories, and almost certainly amounts, of non-teaching station space. This includes special education space, kitchen/servery space,[1] teacher workrooms, nurse's space, storage and custodial space, bathroom space, locker rooms, and Title I, afterschool program, and other special use rooms.

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

[1] If kitchen space, with its attendant refrigerators and microwaves/warmers, is not provided, EOLA will need confirmation from the District as to where it can place and use its own refrigerator and microwave for its students, all of whom bring their own lunch and need a place to store their lunches prior to the noon meal time.

Third, this calculation does not include any of the outdoor space on the campus, even though Frick has a huge outdoor blacktop space. EOLA must be allocated reasonably equivalent access to this space.

Fourth, while the District claims that EOLA will have access to 2,439 of Administrative, Office and Conference space, a review of the Frick space actually allocated reveals the school has only been allocated 1,496 square feet of Administrative, Office and Conference space. The pro rata share will need to be adjusted to correctly reflect the actual shared square footage actually used by EOLA, both of office and other shared spaces.

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

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

Special Education Space

Special education space is necessary for compliance with state and federal special education laws, which require privacy for implementation of certain special education services. The District's Preliminary Proposal does not include an allocation of any private space to be used for special education services. EOLA is entitled to special education space under Proposition 39 based on factors including, but not limited to, EOLA's ADA, the comparison schools, and the needs of EOLA's special education students under each special educations student's individualized education plan or Section 504 plan. Also, EOLA is entitled to special education space under Proposition 39 regardless of whether or not it provides the District with documentation of or information regarding its special education needs. Further, EOLA also is not, at this early date, able to state with any certainty what all of its special education needs will be six months from now. EOLA will be enrolling an entirely new class of Kindergarten, and potentially new sixth grade students, and may enroll other new students as space becomes available in other grade levels; these new students may have special education needs that EOLA is not currently able to determine. In addition, one or more of its current students may become eligible for special education services during the school year. Currently the school serves 10%

special education students, and it requires sufficient reasonably equivalent space to serve them.

As such, EOLA requires at least one (1) more room for providing special education services.

Staff Lounge

All of the comparison schools have a staff lounge space; the District's Preliminary Offer does not note this, nor does it include an allocation of this space. EOLA does require an allocation of staff lounge/workroom space and anticipates that the final offer will be revised to provide an allocation this space.

3. Preliminary Proposal's Facility Fees and Allocation at the Frick site:

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

4. Pro Rata Charge Worksheet:

a. **Police Services**: The District may not include police costs in its pro rata share calculation because EOLA has been told by the District's Police Services, when EOLA has called for help, that Police Services does not provide services to charter schools in the District. Pro rata share amounts are intended to reflect a charter school's portion of the District's facilities costs that EOLA uses. Because EOLA does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

b. **Insurance**: EOLA will provide and pay for the full spectrum of its insurance benefits, as required by its charter and the Facilities Use Agreement; it appears the District has included the cost of its own property insurance on the facility. Including the District's insurance costs in the calculations not only double bills EOLA for a cost it is already paying for, it is requiring EOLA to pay for a cost that is actually the District's responsibility. Moreover, insurance is not contemplated under the Prop. 39

regulations as an acceptable "facilities cost," and Education Code Section 47614 specifically states that a charter school may not be charged for use of district facilities beyond the pro rata share.

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

d. The District has included $13,548,405 in facilities costs identified as "RRMA transfer from UR to resource 8150." However, Prop. 39 provides that the ongoing operations and routine maintenance of the facilities is the responsibility of EOLA. As such, and pursuant to 5 CCR Section 11969.7, the District may not include in its facilities costs "any costs that are paid by the charter school, including, but not limited to, costs associated with ongoing operations and maintenance and the costs of any tangible items adjusted in keeping with a customary depreciation schedule for each item." Therefore, please provide EOLA with the necessary documentation to show that the District has removed all facilities costs related to ongoing operations and maintenance from its RRMA transfer amounts that are EOLA's responsibility, including custodial services.

e. Third, the District has included its emergency debt service costs in the pro rata share calculation. 5 CCR Section 11969.7 states that only unrestricted General Fund **facilities costs** that are not costs otherwise assumed by EOLA 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 EOLA 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 EOLA'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."

5. **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 EOLA's summer school and programs procured by EOLA through third party entities, e.g. after-school program providers.

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

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

   e. **Section 3**: This section states that the pro rata share is due monthly or annually. However, the Preliminary Proposal indicates that the payment schedule will be on a quarterly basis, beginning October 1. EOLA prefers a quarterly payment schedule for the facilities use fees. This section also needs to reflect that if EOLA constructs or installs recreational improvements or other school facilities, EOLA and the District will agree to negotiate a reduction in the facilities use fees. EOLA's other concerns regarding the Pro Rata Share Charge outlined above are

incorporated herein. Again, any costs assumed by EOLA cannot be included in the pro rata share calculation, including custodial and maintenance costs.

f. **Section 10**: This section states that the District "shall not be liable for any personal injury suffered by Charter School or Charter School's visitors, invitees, and guests, or for any damage to or destruction or loss of any of Charter School or Charter School's visitors, invitees or guests' personal property located or stored in the parking lots, street parking or the School Site, except where such damage is caused by the District's negligence or misconduct." This section will need to be changed to reflect that the District may not avoid liability for injuries or damage caused by its failure to maintain the parking spaces on the site. The District is required to provide EOLA with a facility that complies with the California Building Code, and to maintain the facility in compliance with the California Building Code. (5 CCR Section 11969.9(k).) It may not provide the parking lot in an "as-is" condition. Moreover, EOLA is confused by the language that "Charter School may instruct its visitors, invitees and guests to park on available street parking" – EOLA will assume the District does not mean that it will not be sharing the parking on site with EOLA, as that would be illegal.

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

   Furthermore, it is not acceptable for the District to terminate the FUA if the cost to make repairs exceeds $150,000. The District is required to make the facility available to EOLA 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. Moreover, the District must absolutely provide alternative facilities to EOLA while any repairs are being performed. Lastly, the District cannot limit its obligations under this section to damage "due to no fault or negligence of Charter School." The District is obligated to maintain first party property insurance on the Premises, and any repair costs it incurs on other District sites are included in the pro rata share, thus it must perform these repairs for EOLA.

h. **Section 13.3 and 13.4**: The District must make reasonable efforts to keep their materials, tools, supplies and equipment on the Premises in such a way as to minimize disruption to EOLA's program. The District must provide relevant scheduling information to EOLA if it will be coming onto the facility to perform maintenance. In addition, EOLA wishes to perform its own custodial services in large part because it is not financially able to absorb the cost of District services. If the parties are able to reach some separate agreement, however, that EOLA will accept District custodial services at Frick, the cost to EOLA for these services will need to be adjusted to accurately reflect EOLA's fair share of these costs.

i. **Section 14**: While EOLA 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).)

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

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

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

m. **Section 22**: If EOLA chooses to seek its insurance through a joint powers authority such as CharterSAFE, JPAs do not receive an A.M. Best insurance rating. This section will need to be revised to provide that insurance through a JPA will satisfy the terms of the FUA. In addition, the JPA does not provide notice to additional insureds, so any notice requirements will have to be provided by EOLA.

n. **Section 28.1**: This section must be revised to provide that the District is responsible for maintaining the Premises in compliance with applicable law, except to the extent that compliance arises as a result of modifications or improvements performed by EOLA.

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

We look forward to working with the District to make the necessary changes to the District's Preliminary Proposal in order to ensure compliance with Proposition 39 and its Implementing Regulations in time for the issuance of the final notification of facilities on or before April 1, 2017. I can be reached at (510) 363-6761.

Sincerely,

Laura Armstrong, Director

Cc: Sarah Kollman, Esq., Young, Minney & Corr
EOLA Board Members