ENVISION ACADEMY of ARTS & TECHNOLOGY

March 1, 2019

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

Re: ***Envision Academy of Arts and Technology***
Response to District's Preliminary Proposal
Proposition 39 2019-2020

Dear Ms. Murarka:

Envision Academy of Arts and Technology ("Envision" or "Charter School") is in receipt of the Oakland Unified School District's ("District") February 1, 2019 letter ("Preliminary Proposal") regarding Envision'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 six (6) teaching stations and two (2) specialized classrooms at Lowell, as well as 47.6% shared use of the non-teaching station space at Lowell. The Preliminary Proposal is based on a projected in-District ADA of 187.64.

Section 11969.9(g) of the Proposition 39 Implementing Regulations (the "Implementing Regulations") requires Envision to respond to the District's Preliminary Proposal, to express any concerns, address differences between the preliminary proposal and Envision'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, including the failure to provide sufficient information regarding the allocation of specialized classrooms and non-teaching space to Envision, the artificial and illegal use of "weighting" factors in the calculation of the specialized classroom, and non-teaching space to be allocated to Envision, which results in an allocation of less space than Envision is entitled to, double-counting allocated space as both teaching station space and specialized classroom space and then claiming that a charter school has been over-allocated space, 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 Envision with a reasonably equivalent allocation of space as required by law. Nonetheless, as Envision notes and the District's offer confirms, Envision is willing to accept an allocation of eight (8) classrooms at Lowell.

Alternative Proposal

As the District confirmed in the Preliminary Proposal, Envision indicated its willingness to limit it allocation to eight (8) classrooms on the Lowell site, assuming the District's Preliminary Proposal and Final Offer were for this amount of rooms on the Lowell site. In subsequent conversations, the Charter School and District discussed the possibility of fewer classrooms, but Envision now believes that it will need all eight (8) classrooms. In addition, Envision only anticipates that it will need 30% of the non-teaching station spaces on the Lowell campus, based on the proportion of Envision students to other students and uses on the campus. Envision has asked the District for more clarity regarding the non-teaching station spaces available on the Lowell campus, and looks forward to receiving this information.

Given this agreement between the District and Envision, the Preliminary Proposal does not contain an analysis regarding the number of teaching stations and the amount of specialized classroom space for Envision, which Envision does not dispute.

As such, Envision's response will be limited to those relevant aspects of the District's proposal that are outside this agreement. However, if the District's Final Offer is for fewer than eight (8) classrooms, for facilities on a different District site, or for a lower shared use percentage at Lowell, the Charter School reserves its right to object to the revised allocation, and does not waive its right to express concerns at that later date with the Preliminary Proposal and Final Offer in this context, given that it has not done so in this letter due to an agreement between the parties, and the Preliminary Proposal does not contain the analysis for Envision to respond to.

Non-Teaching Station Space Allocation

Envision is entitled to reasonable allocations of non-teaching station space. The District must provide non-teaching station space commensurate with the in-District classroom ADA of Envision 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 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 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 non-teaching station space over all the comparison schools). Instead:

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

The Preliminary Proposal provides for the allocation of 47.6% of the shared space on the Lowell campus.

The District's allocation of non-teaching station space to Envision 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) 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 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.

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 Envision – 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, Envision has not received any allocation of special education space. This is a clear violation of Prop. 39.

In addition, the District has failed to identify the specific non-teaching station space to be allocated to Envision and its allocation of non-teaching station space based on the percentage of Envision's enrollment on the sites, as determined by the District, not the actual square footage of space which Envision 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 Envision will receive a reasonably equivalent allocation of

each type of non-teaching station space that exists at the comparison schools. As stated in *Bullis*, "a school district, in determining the amount of nonteaching station space it must allocate to the charter school, must take an objective look at all of such space available at the schools in the comparison group." (*Bullis*, *supra*, at p. 1047, emphasis added.) The District is not permitted to average all of the unique types of non-teaching station spaces that exist at the comparison schools and then allocate Envision 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 Envision will be provided access at the offered sites beyond large categories of space, or any proposed schedule for Envision's use. The District's failure to provide this basic information to Envision precludes Envision from engaging in timely and efficient negotiations with site principals regarding shared use schedules and prevents Envision from assessing whether the Preliminary Proposal provides Envision with access to all of the different types of non-teaching station space to which Envision 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, Envision expects that the District's final offer will specifically identify all the non-teaching station space to be allocated to Envision.

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. Envision 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, Envision notes that the District has indicated that Envision'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 Envision 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. Envision 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 Envision 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 Envision uses. Because Envision does not use the District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

d. Insurance: Envision 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 Envision for a cost it is already paying for, it is requiring Envision 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 Envision to use District custodial services, and is attempting to charge Envision 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 Envision. 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 Envision 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 Envision 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 Envision'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 Envision's summer school, if any, and programs procured by Envision through third party entities, e.g. after-school program providers.

2. **Section 1.4**: Prop. 39 only requires Envision 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 Envision 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 Envision's program. The District must provide relevant scheduling information and reasonable notice to Envision if it will be coming onto the facility to perform maintenance.

7. **Section 14**: While Envision 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 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.

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

10. **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. Envision looks forward to the opportunity to discuss and negotiate these matters with the District moving forward.

Sincerely,

Sele Nadel-Hayes
Chief Operating Officer

Cc: Sarah Kollman, Young, Minney & Corr, LLP
Envision Board Members