March 1, 2017

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

Re: Envision Academy
Response to District's Preliminary Proposal
Proposition 39 2018-2019

Dear Ms. Jimenez:

Envision Academy ("EA") is in receipt of the Oakland Unified School District's ("District") February 1, 2018 letter ("Preliminary Proposal") regarding the EA's request for facilities under Proposition 39 for the 2018-2019 school year.

The District's Preliminary Proposal is for sixteen (16) total teaching stations and specialized classroom spaces, spread across two District sites, Westlake Middle School (3) and McClymonds High School (13). The Preliminary Proposal is based on a projected in-District classroom ADA of 350.29. The Preliminary Proposal also appears to allocate 41.22% of the administrative/office/conference space, MPR/Auditorium/Cafeteria/Gym, and Library space at McClymonds, and 15.27% of the same space at Westlake.

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

EA appreciates the efforts of District staff to identify an offer of space for EA. EA would like to express the following concerns regarding the Preliminary Proposal and the draft Facilities Use Agreement. The Preliminary Proposal would not allow EA to operate effectively and we cannot accept it as offered.

1. Allocation of Non-Contiguous Space

The express provisions of Proposition 39 require that the District allocate facilities to the Charter School that are "contiguous, furnished, and equipped." (Education Code Section 47614(b).) This requirement exists irrespective of the grade level configuration of a charter school. (5 CCR Section 11969.3(a).)

Section 11969.2(d) goes on to state that "[i]f the in-district average daily classroom attendance of the charter school cannot be accommodated on any single school district school site, contiguous facilities also includes facilities located at more than one site, provided that the school district shall minimize the number of sites assigned and shall consider student safety." In addition, "the district's governing board must first make a finding that the charter school could not be accommodated at a single site and adopt a written statement of reasons explaining the finding." (5 CCR Section 11969.2(d).) "If none of the district-operated schools has grade levels similar to the charter school, then a contiguous facility within the meaning of subdivision (d) of section 11969.2 shall be an existing facility that is most consistent with the needs of students in the grade levels served at the charter school." (5 CCR Section 11969.3(a) (emphasis added).) This analysis is purely numerical; the Court in *Ridgecrest* noted that "*all else being equal, a charter school should be housed at a single site if one exists with the capacity to handle all the school's students.*" (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal. App. 4th 986, 1000 (emphasis added).)

In both its Notice of Proposed Rulemaking File, and its Final Statement of Reasons, the State Board of Education specifically reiterates that 5 CCR 11969.3(d) was amended to make it clear that "when no school of the district serves grade levels similar to the charter school's, a contiguous facility is an existing facility that is most consistent with the charter school's grade levels" in order to bring the Regulations in line with the *Ridgecrest* decision. (Final Statement of Reasons, Page 20.) The Initial Statement of Reasons further clarified that in looking at the issue of a school district making facilities available to a charter school at multiple locations as discussed in the *Ridgecrest* decision, it was clear an addition to the regulations was necessary to formalize two requirements: 1) a school district is not permitted to treat a charter school's in-district students with less consideration than students in the district-run schools, and 2) in allocating and providing access to facilities to a charter school, a school district must begin from the premise that the facilities are to be on a single school site." (Initial Statement of Reasons, Page 3.)

The Court of Appeal has also ruled that Proposition 39 requires that a school district "*begin* with the assumption that all charter school students will be assigned to a single site, and attempt from there to adjust the other factors to accommodate this goal." (*California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal. App. 4th 530, 548-549.) *Ridgecrest* also specifically acknowledged that "we have little doubt that accommodating [Ridgecrest Charter School's] facilities request will cause some, if not considerable, disruption and dislocation among the District's students, staff, and programs. But section 47614 requires that the facilities 'should be shared fairly among all public school pupils, including those in charter schools.'" (*Ridgecrest*, 130 Cal. App. 4th at 1006.)[1] In other words, the District may not reject a potential

[1] The *Ridgecrest* court also stated that "In discussing the timeframe within which a new charter school must submit a facilities request (Regs., § 11969.9, subd. (a)), the Department explained: 'This section is intended to ensure that a charter school is or has a reasonable chance of becoming a viable concern before requiring the school district to plan modifications to its programs to accommodate the charter school. *For example, accommodating a charter school might involve moving district-operated programs or changing attendance areas.*' (Italics added.) Plainly then, the

contiguous site just because it would potentially disrupt and dislocate District students.

In addition, while the District does not have to expend general fund monies to rent, buy, or lease facilities to meet this obligation, the law implicitly recognizes that a district must use all resources including any restricted monies (parcel taxes, bond monies, etc.) to meet this obligation.[2]

The District's Findings of Fact supporting its non-contiguous allocation of space to the Charter School claims that *Westchester Secondary Charter School v. Los Angeles Unified School District* (2015) 237 Cal.App.4th 1226 fully supports its failure to make any accommodations to locate charter schools on contiguous facilities. The District has fundamentally misread and misapplied *Westchester*, which was not about a non-contiguous allocation of space, but rather about making reasonable efforts to place a charter near where it wishes to be located. Even in its analysis about the reasonable efforts a district must make, the court acknowledged the importance of "balancing impacts," and of treating both District and charter school students fairly. Here, and in prior years, the District has never actually balanced the needs of both groups of students, but rather has only looked for where empty rooms exist at District sites, and shoe-horned charter schools into those sites, with allocations of space across up to seven different sites. While always closing District sites or moving District students around would not meet the intent of Prop. 39 to treat all students fairly, the District does not act in compliance with the law if it never does these things to make space. As *Ridgecrest* said, some displacement is required in order to minimize the harm to both District and charter school students. Here, the District favors only its own students and places charter school students in harm's way by forcing them to locate on multiple sites separated, despite availability of rooms to locate the program on a contiguous site.

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

EA is also 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

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regulations contemplate that some disruption and dislocation of the students and programs in a district may be necessary to fairly accommodate a charter school's request for facilities." (*Ridgecrest*, 130 Cal. App. 4th at 1000 (emphasis added).)

[2] Therefore, as an example if the District has any restricted monies it could put additional portables on one of its school sites to meet this obligation.

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 EA. 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 EA 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 EA 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 EA's ADA. A review of the maps and websites for Fremont High School suggests that there is well over 15,000 square feet of specialized classroom space at Fremont High School and at least 10,000 square feet at LIFE Academy. Even assuming this likely-undercounted amount of specialized classroom space, EA would be entitled to at least three classrooms of additional space to create specialized classroom space.

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 EA. 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 and art rooms, architecture rooms, media, graphic design and photography space, etc.. 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 EA. 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. EA also notes that by allocating **one classroom for all these uses**, thus essentially forcing EA to create its own fully furnished and equipped specialized classroom space in a single standard teaching station space, the District is relegating EA students to second-class status, given that District students enjoy access to these separate and furnished and equipped spaces. EA high school students, for example, will not have access to the science lab space available at the comparison high 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 space, teacher workrooms, nurse's space, storage and custodial space, bathroom space, locker rooms, and Title I, afterschool program, and other special use rooms.

Second, even using the broad categories of space in the District's Master Facilities Plan document, the District has seriously underallocated even those categories of non-teaching station space.

Third, 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.

Fourth, this calculation does not include any of the outdoor space on the campus, even though all three sites have outdoor blacktop space, football field and soccer field space. EA must be allocated reasonably equivalent access to this space.

Lastly, the District's Preliminary Proposal for the Westlake and McClymonds sites is not consistent with Prop. 39 because it indicates that EA's allocation of access to specialized and non-teaching station space will be based on the percentage of square footage that EA occupies on the school sites 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).

EA 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 sites through agreements with the Site Principals. EA anticipates that, should the negotiations with the District Principals not provide EA 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. EA is entitled to special education space under Proposition 39 based on factors including, but not limited to, EA's ADA, the comparison schools, and the needs of EA's special education students under each special educations student's individualized education plan or Section 504 plan. Also, EA 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, EA 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. EA will be enrolling an entirely new class of 9th graders, and may enroll other new students as space becomes available in other grade levels; these new students may have special education needs that EA 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, EA requires at least one (1) more room for providing special education services.

3. **Preliminary Proposal's Facility Fees and Allocation at the Westlake, Alliance and Bunche 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 EA has been told by the District's Police Services, when EA 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 EA uses. Because EA does not use the

District's police service, the inclusion of these costs in the pro rata share calculation is not appropriate.

b. **Insurance**: EA 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 EA for a cost it is already paying for, it is requiring EA 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 EA 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 EA (5 CCR Section 11969.4(b)) and that any costs assumed by EA cannot be included in the pro rata share calculation. EA 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 EA will accept District custodial services at the three sites, the cost to EA for these services will need to be adjusted to accurately reflect EA's fair share of these costs.

d. The District has included $13,048,405 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 EA. 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 EA 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 EA'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 EA 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 EA 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 EA'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."

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 [redacted].

Sincerely,

Sele Nadel-Hayes
Director, Operations & Finance