



East Bay Innovation Academy

Special Board Meeting - Prop 51 CSFP MOU and Funding Agreement

Date and Time

Saturday September 8, 2018 at 7:30 AM PDT

Location

Join from PC, Mac, Linux, iOS or Android: <https://zoom.us/j/9086460388> or US: +1 646 588 8656 or +1 669 900 6833 Meeting ID: 908 646 0388

Agenda

	Purpose	Presenter	Time
I. Opening Items			7:30 AM
Opening Items			
A. Record Attendance and Guests		Rochelle Benning	1 m
B. Call the Meeting to Order		Rochelle Benning	1 m
II. Governance			7:32 AM
Finance			
A. Approve CSFP Memorandum of Understanding and Funding Agreement	Vote	Rochelle Benning	5 m
Per Prop 51 - Agreement approvals are required from EBIA board prior to providing agreements to OUSD board for their approval. Then fully executed contracts will be returned to CSFP.			
III. Closing Items			7:37 AM
A. Adjourn Meeting	Vote	Rochelle Benning	1 m

Coversheet

Approve CSFP Memorandum of Understanding and Funding Agreement

Section:	II. Governance
Item:	A. Approve CSFP Memorandum of Understanding and Funding Agreement
Purpose:	Vote
Submitted by:	
Related Material:	September 2018 - CSFP FA - EBIA.PDF September 2018 - CSFP MOU - EBIA.PDF

CHARTER SCHOOL FACILITIES PROGRAM FUNDING AGREEMENT

Between the State of California,

and

**East Bay Innovation Academy
(CDS Code # 01-61259-0129932)
a California Charter School**

ARTICLE I – PURPOSE

- A. This Funding Agreement (“Agreement”) is made and entered into as of _____, (“Effective Date”) by and between the State Allocation Board and the California School Finance Authority (individually or collectively referred to as the “State”) and the charter school identified above, as assigned by the California Department of Education, a California Charter School operating as a non-profit public benefit corporation in accordance with Education Code Section 47604 (“Charter School”). The provisions of this Agreement shall be effective from and after the Effective Date until the termination of the Agreement as provided herein.
- B. The Charter School has applied to the State for financing of its charter school facilities project (“Facilities”) under the Charter School Facilities Program (“CSFP”) established pursuant to Article 12 of Chapter 12.5 of Part 10 of the California Education Code and the regulations for its implementation provided in Title 4, Cal. Code Regs., Section 10151, et seq., and Title 2 Cal. Code Regs., Section 1859.160, et seq.
- C. The Charter School’s Facilities may involve the purchase of real property or the purchase of real property and construction of all improvements, repairs, replacements, substitutions, and modifications located or to be constructed on the property, or the construction of all improvements, repairs, replacements, substitutions, and modifications located or to be constructed on real property that the Charter School has acquired previously.
- D. This Agreement is being entered into in accordance with the requirements of the CSFP. To the extent the Agreement is inconsistent with or in conflict to the provisions of the CSFP and the implementing regulations, the CSFP and implementing regulations shall prevail.
- E. The terms of this Agreement may not be waived, altered, modified, supplemented or amended in any manner except in writing, upon the agreement of the parties,

or except as otherwise permitted by law. This Agreement may be amended, or a new agreement executed, as necessary, upon the application of the Charter School and the approval by the State of a final apportionment.

ARTICLE II – FINANCING OF THE CHARTER SCHOOL’S PROJECT

2.1 Fifty Percent Local Matching Share Obligation

A. Payments

1. The Charter School’s Application for Preliminary, Advance, and/or Final apportionment for the Facilities has been approved by the State. The State will provide as a grant funding for fifty percent (50%) of the approved costs for the Facilities, and the Charter School is responsible for a Local Matching Share of fifty percent (50%) of the approved costs for the Facilities. The Final Apportionment Amount will be reduced by any amounts received by the Charter School through any Advance Apportionment(s). The amounts of the Preliminary, Advance and/or Final Apportionment are set forth in Exhibit “A” of this Funding Agreement.
2. The Charter School’s Final Apportionment (“Apportionment”) is contingent upon the Charter School paying its 50% Local Matching Share obligation by making payments to the State pursuant to this Agreement. The 50% grant funding does not need to be repaid.
3. The Charter School will make its payments on the Local Matching Share to the State through the use of the Intercept Mechanism as described in Section 17199.4 of the Education Code. The Charter School shall comply with all provisions in this section prior to any funds being released.
4. The Charter School will repay the Local Matching Share to the State by making monthly payment installments, in arrears, as provided for in the schedule of payments (“Payment Schedule”), developed in compliance with section 2.1(D). The amount shall include interest on the unpaid principal balance at the interest rate prescribed in Section 17078.57(a)(1)(D) and (E) of the Education Code.
5. Payments will be applied first to accrued but unpaid interest, then to the unpaid principal balance.
6. Payments may be prepaid in whole or in part at any time before the end of the payment term without penalty.
7. Payments shall be made directly to the State Allocation Board for deposit into the respective 2002, 2004, 2006, or 2016 Charter School Facilities Account, or as otherwise directed by the State in writing.

B. Late Payments

The failure to make a payment on time will cause the State to incur costs not contemplated by the parties when entering into this Agreement, the exact nature and amount of which would be extremely difficult and impracticable to ascertain.

Accordingly, on the fifteenth day after a payment is due, the Charter School may be assessed, by way of damages, a late charge in an amount equal to five percent (5%) of the past due amount. The parties agree that this late charge represents a fair and reasonable estimate of the costs incurred by the State as the result of a late payment, and the Charter School agrees to immediately pay the late charge. The State's acceptance of late charges will not constitute a waiver of default with respect to the overdue payment, and will not prevent the State from exercising any other rights available under this Agreement. The Charter School will pay a late charge only once on any late payment. The late charges will be deposited into the 2002, 2004, 2006, or 2016 Charter School Facilities Account.

C. Payment Period

The payment period shall commence upon the later to occur: (1) the Effective Date; or (2) after one full year of the Facilities being open and the Charter School commences its educational program ("Commencement Date"). The period shall end 30 years following the Effective or Commencement Date, or when paid in full.

D. Payment Schedule

1. Within thirty (30) days of the start of the Charter School's operations, the parties will execute a letter confirming the Commencement Date, the Expiration Date, the payment terms, and other such terms, including a Payment Schedule which shall be attached to this Agreement and incorporated herein as Exhibit "B".
2. The State shall establish the Payment Schedule in accordance with Education Code section 17078.57 and California Code of Regulations, title 4, Section 10160. The Payment Schedule may be amended, at the State's sole discretion, where the Charter School has demonstrated financial hardship to the State's satisfaction and the State has determined that the Charter School continues to be financially sound. The Payment Schedule shall end 30 years following the Effective or Commencement Date, or when paid in full.

E. Payments To Be Unconditional

Except as expressly provided for in this Agreement, any present or future law to the contrary notwithstanding, this Agreement shall not terminate, nor shall the Charter School be entitled to any abatement, suspension, deferment, reduction, setoff, counterclaim, or defense with respect to the payments, nor shall the obligations of the Charter School be affected (except as expressly permitted) by reason of:

1. any failure of the Facilities or any part thereof to be delivered or installed, any defects, malfunctions, breakdowns or infirmities in the Facilities, any accident or unforeseen circumstances, or any damage to or destruction of the Facilities, or any part thereof;
2. any taking of the Facilities, or any part thereof, or interest therein by condemnation or otherwise;

3. any prohibition, limitation, restriction or prevention of the Charter School's use, occupancy or enjoyment of the Facilities, or any part thereof, or any interference with such use, occupancy or enjoyment by any person for any reason;
4. any title defect, lien or any other matter affecting title to the Facilities;
5. any eviction by paramount title or otherwise;
6. any default by the Charter School;
7. any action for bankruptcy, insolvency, reorganization, liquidation, dissolution or other proceeding relating to or affecting this Agreement or the Charter School;
8. the impossibility or illegality of performance by the Charter School;
9. any action of any governmental authority or any other person;
10. the Charter School's acquisition of ownership of all or part of the Facilities;
11. breach of any warranty or representation with respect to the Facilities;
12. any defect in the condition, quality, or fitness for use of the Facilities;
13. Any other cause or circumstance similar or dissimilar to the foregoing, and whether or not the Charter School has notice or knowledge of any of the foregoing; or
14. Notwithstanding the above, nothing in this section shall affect a Charter School's rights and obligations pursuant to Education Code Section 17078.62 if the Charter School ceases to use the facility after a revocation and/or non-renewal.

F. Acceptance and Application of Payment; Not Accord and Satisfaction

1. No receipt by the State of a lesser payment than the payment required under this Agreement shall be considered to be other than on account of the earliest amount due, and no endorsement or statement on any check or letter accompanying a payment or check shall be considered an accord and satisfaction. The State may accept checks or payments without prejudice to its right to recover all amounts due and pursue all other remedies provided for in this Agreement.
2. Acceptance of monies from the Charter School after the Charter School has received notice of termination shall in no way reinstate, continue, or extend the term or affect the termination notice. The State may receive and collect any payment due, and payment shall not waive or affect any prior notice, action, or judgment.

2.2 Conditions for Release of Funding

The following conditions must be satisfied, and such others as may be reasonably required by the State, before the State will release any funding:

- A. The Charter School shall have satisfied all of the requirements for such funding under the CSFP and Memorandum of Understanding, including that it shall have a current, valid charter.
- B. The Charter School shall have entered into this Agreement and the State shall have received an original of this Agreement properly executed on behalf of the Charter School, with each of the Exhibits hereto properly completed.
- C. If title to the property is already held by the Charter School, the Charter School, at its sole cost and expense, shall cause to prepare a conveyance instrument, acceptable to the school district in which the Facilities are located ("School District"), which is listed in the attached Staff Summary, Exhibit "D", and the State, which shall convey title to the real property from the Charter School to the School District as trustee on behalf of the public school system. The Charter School must notify the State and the School District when CSFP funds are received by the Charter School. Within 30 days of receipt of CSFP funds, the Charter School must provide evidence to the State that title to the real property has been transferred to the School District. If Charter School fails to meet this requirement, Charter School will be in default of this Agreement.
- D. If title to the real property is not held by the Charter School, the Charter School, at its sole cost and expense, shall cause to prepare a conveyance instrument, acceptable to the State, which shall convey title to the real property in trust on behalf of the state public school system. The School District will accept conveyance of the good, absolute and marketable title to the Facilities in fee simple, free and clear of any mortgage, deeds of trust, liens (monetary or otherwise), claims, charges or other encumbrances or matters of any nature what so ever other than those included in any other provisions of this Agreement.
- E. If the Charter School is required to have a Guarantor for its project, it shall have entered into a guaranty with an acceptable Guarantor and the State shall have received an executed original of the agreement.
- F. The State shall have received a certificate of the secretary of the Charter School as to (i) the resolution of the board of directors of the Charter School, or authorizing the execution, delivery and performance of this Agreement, (ii) the bylaws of the Charter School, (iii) signatures of the officers or agents of the Charter School authorized to execute and deliver this Agreement on behalf of the Charter School and, if applicable, attaching thereto a copy of the Charter School's certificate or articles of incorporation or partnership or limited liability company formation document certified by the Office of the Secretary of State for the State of California.
- G. Certificate of good standing issued to the Charter School by the California Secretary of State not more than 30 days prior to the Effective Date of this Agreement, if applicable.
- H. The School District shall deliver to the State a standard preliminary title report issued by a title company with respect to the Facilities, and legible copies of all documents referred to in the title report. (Exhibit "C"). The Charter School and School District shall comply with the title requirements of section 3.4 of this

Agreement, and shall provide to the State, upon request, all documents and materials relating to the Facilities and the title to the Facilities.

- I. The Charter School represents that it has a minimum debt service coverage ratio determined by the State to be sufficient, but in no event to be less than 1.0x.
- J. The Charter School represents that it is financially sound, and will demonstrate to the satisfaction of the State, its continued financial soundness. If the Charter School's chartering authority revokes or declines to renew the Charter School's charter, this Agreement will be in default and the provisions of Education Code section 17078.62 shall be invoked. Nothing in this section shall affect a Charter School's rights and obligations pursuant to Education Code Section 17078.62 if the Charter School ceases to use the facility after a revocation and/or non-renewal.
- K. The Charter School shall establish and maintain a separate and distinct account for deposits of all CSFP loan proceeds.
- L. The Charter School and the School District, in whose geographical jurisdiction the Charter School is located, will enter into an agreement governing the use of the facilities ("Use Agreement"). The phrase "substantial completion of construction" shall mean that standard of construction generally recognized by California construction law. The State shall have the right to review and approve the Use Agreement if there will be any modifications to the standard provisions. The State reserves the right to communicate directly with either the Charter School or the School District regarding amendments to the Use Agreement. The Charter School shall be in full compliance with the terms of the Use Agreement.

2.3 Payment During Dispute Period

Notwithstanding any dispute between the Charter School, its chartering authority, the State, or any vendor under any purchase agreement or any other person, the Charter School shall make all payments when due and shall not withhold any payments pending final resolution of a dispute, nor shall the Charter School assert any right of set-off or counterclaim against its obligation to make payments, and the Charter School waives any and all rights now or hereafter available by statute or otherwise to modify or to avoid strict compliance with its obligations under this Agreement.

2.4 Force Majeure

The time for the Charter School or the State to perform any obligation or assert any right under this Agreement or the CSFP shall be extended on a day for day basis for any Force Majeure event, which shall include but not be limited to: (1) Acts of God or of the public enemy; and (2) Acts of the federal or State government in either its sovereign or contractual capacity.

2.5 No Debt or Liability/Obligation of the State

- A. This Agreement shall not be deemed to constitute a debt or liability or obligation of the State or any political subdivision thereof, or a pledge of the faith and credit or taxing power of the State or any political subdivision thereof, but shall be a special obligation payable solely by the Charter School.

- B. The obligation to make payments does not constitute an indebtedness of the Charter School or its chartering authority within the meaning of any constitutional or statutory debt limitation or restriction and in all cases shall be made solely from legally available funds.
- C. The parties intend that the obligations of the Charter School shall be covenants, agreements and obligations that are separate and independent from any obligations of the State, and shall continue unaffected unless modified or terminated in accordance with an express provision of this Agreement.

ARTICLE III – CHARTER SCHOOL’S FACILITY

3.1 Utilization of Apportionment for Facility

The Charter School agrees to utilize its apportionment for purposes consistent with the CSFP, and for the acquisition of real property and the installation, construction, retrofitting and improvement of said real property in order to allow a charter school educational program to be conducted. To the extent that the apportionment is insufficient in any way, the Charter School must pay additional amounts as necessary to complete the acquisition, installation, construction, retrofitting and improvement of the Facilities and to ensure that all elements of the Facilities, including the property and improvements, are operational. The State shall have no obligation to provide additional funding beyond the apportionment provided for in this Agreement.

3.2 Use of Facilities for Charter School

- A. The Charter School may use and occupy the Facilities during the term of the Agreement solely for the operation of a charter school, as authorized under the California Education Code and subject to the terms of the Use Agreement. The foregoing statement shall not constitute a representation or guaranty that the operation of a charter school may be conducted in the Facilities or is lawful or permissible under any certificates of occupancy issued for the Facilities, or is otherwise permitted by law. Use of the Facilities shall in all respects comply with all applicable legal requirements.
- B. The general terms of the Charter School’s use of the Facilities shall be governed by the Use Agreement between the Charter School and the School District.
- C. Prior to commencing operations in the school, the Charter School shall provide the State and the School District with a copy of a valid certificate of occupancy issued by the appropriate governmental agency for the Facilities, if applicable, or the equivalent issued by the California Division of the State Architect.
- D. In the event the Charter School no longer is using the Facilities, the usage and priority provisions of Education Code section 17078.62 shall apply. The Charter School shall reasonably cooperate and assist with any transition that may take place pursuant to the priority provisions.
- E. The State and School District shall not have any obligation for construction work or improvements on or to the Facilities. The Charter School has made a thorough and independent examination of the Facilities and all matters related to its decision to enter into this Agreement. The Charter School is thoroughly familiar with all

aspects of the Facilities and is satisfied that they are in an acceptable condition and meet its needs.

- F. The Charter School, its officers, members, partners, agents, employees and contractors shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religion, creed, national origin, culture, physical disability (including HIV and AIDS), mental disability, medical condition (cancer or genetic characteristics), sexual orientation, political affiliation, position in a labor dispute, age, marital status, and denial of statutorily-required employment-related leave. The Charter School, its officers, members, partners, agents, employees and contractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code section 12990 (a-f) et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, title 2, section 7285 et seq.).

3.3 Facility Location and Suitability

- A. The Charter School's Facilities are located in the county listed in the attached Staff Summary, Exhibit "D" of this Funding Agreement, and are more particularly described in the "Project Description" section of the summary.
- B. The property is physically located within the geographical jurisdiction of the School District in which the Facilities are located, which is listed in Exhibit "D", and the school attendance area generating eligibility for funding, if applicable.
- C. The Charter School has satisfied itself as to the suitability of the Facilities by its own inquiries and tests. The Charter School shall, by entering into and occupying the Facilities, be deemed to have accepted the Facilities and to have acknowledged that they are in good order, condition and repair.

3.4 Title to the Facilities

- A. The School District has obtained or will obtain upon release of funds from the State, good, absolute and marketable title to the Facilities in fee simple, free and clear of any mortgage, deeds of trust, liens (monetary or otherwise), claims, charges or other encumbrances or matters of any nature what so ever other than those included in the title report on the terms and conditions of this Agreement. The Charter School agrees to obtain and transfer title in accordance with the requirements of Article III Section A of the Memorandum of Understanding.
- B. Title to the Facilities shall be conveyed to, and vested in trust for the benefit of the California State public school system.
- C. The Charter School and School District will at all times protect and defend, at its own cost and expense, the title from and against all claims, liens and legal processes of creditors, and keep all the Facilities and the title free and clear of all such claims, liens and processes except for the liens created or expressly permitted by the Security Provisions of this Agreement and the CSFP.
- D. Any sale, contract to sell, option to purchase, conveyance or other transference of the Facilities must first be approved by the State in writing.

- E. The Charter School will execute, acknowledge and record all documents, certificates and agreements, including without limitation any grant deed, bill of sale or assignment as necessary to effectuate a transfer to the School District title to the Facilities, as provided herein, and provide copies of all documents, certificates and agreements to the State as required by this Agreement or as otherwise requested by the State.

3.5 Insurance Requirements

A. Types of Insurance

- 1. The Charter School shall, at its sole cost and expense, obtain and maintain at all times during the construction and occupancy of the Facilities, the following types of insurance on the Facilities, naming the State and School District loss payee and additionally insured:
 - a. All Risk (special-causes-of-loss) property and fire insurance (with extended coverage endorsement including malicious mischief and vandalism and sprinkler leakage).
 - b. Commercial general liability insurance (broad form) covering claims for bodily injury, personal injury, death and property damage based on or arising out of the ownership, use, occupancy or maintenance of the Facilities and all areas appurtenant thereto.
 - c. Rental value insurance.
 - d. Worker's compensation insurance
 - e. Other types of insurance or endorsements to existing insurance as may be reasonably required from time to time by the School District or the State.
- B. The Charter School shall not do anything, or permit anything to be done, in or about the Facilities that would: (i) invalidate or be in conflict with the provisions of or cause any increase in the applicable rates for any fire or other insurance policies covering the Facilities (unless it pays for such increased costs); (ii) result in a refusal by insurance companies of good standing to insure the Facilities in amounts reasonably satisfactory to the School District; (iii) result in injury to any person or property by reason of the Charter School's operations being conducted in the Facilities; or (iv) result in the cancellation of or assertion of any defense by the insurer to any claim under any policy of insurance maintained by or for the benefit of the School District.
- C. The Charter School, at its own expense, shall comply with all rules, orders, regulations or requirements of the American Insurance Association (formerly the National Board of Fire Underwriters) and with any similar body that shall hereafter perform the function of such Association.
- D. All of the insurance policies required shall be issued by corporate insurers licensed or qualified to do business in the State of California and rated A:X or better by A.M. Best Company, and shall be in form acceptable to the School District and the State.

- E. All certificates of insurance shall be delivered to the School District and the State, along with evidence of payment in full of all premiums required. All such certificates shall be in form acceptable to the State and School District and shall require the insurance company to endeavor to give to the State and School District at least thirty (30) days' prior written notice before canceling the policy for any reason. Certificates evidencing all renewal and substitute policies of insurance shall be delivered to the State and School District, along with evidence of the payment in full of all premiums, at least thirty (30) days before termination of the policies being renewed or substituted.
- F. The State and School District shall be entitled to assignment and payment of all claims, causes of action, awards, payments, proceeds and rights to payment arising under or derived in connection with any insurance policy required to be maintained by the Charter School and any other insurance policies payable because of loss sustained to all or part of the Facilities, together with all interest which may accrue on any of the foregoing, provided, however, if the loss sustained to the Facilities can be repaired or constructed with the proceeds of the insurance policy (plus any additional funds needed and supplied by the Charter School), then, provided the Charter School is not in default hereunder, upon request of the Charter School, the proceeds of the insurance policy and such additional funds may be used for such repair and reconstruction of the Facilities, if agreed to by the State and the School District.
- G. The State and the School District shall immediately be notified in writing if any damage occurs or any injury or loss is sustained to all or part of the Facilities, or any action or proceeding relating to any such damage, injury or loss is commenced. The State and the School District may, but shall not be obligated to, in its own name appear in or prosecute any action or proceeding to enforce any cause of action based on warranty, or for damage, injury or loss to all or part of the Facilities, and may make any compromise or settlement of the action or proceeding, provided that no compromise or settlement of any action or proceeding that materially affects the Charter School shall be entered into or agreed to without the Charter School's prior written consent, which may not unreasonably be withheld.
- H. Waiver of Subrogation
 - 1. Notwithstanding anything to the contrary in this Agreement, the Charter School releases the School District and the State and their respective agents, employees, successor, assignees and subtenants from all liability for injury to any person or damage to any property that is caused by or results from a risk (i) which is actually insured against, to the extent of receipt of payment under such policy (unless the failure to receive payment under any such policy results from a failure of the Charter School to comply with or observe the terms and conditions of the insurance policy covering such liability, in which event, such release shall not be so limited), (ii) which is required to be insured against under this Agreement, or (iii) which would normally be covered by the standard form of "all risk-extended coverage"

casualty insurance, without regard to the negligence or willful misconduct of the entity so released.

2. The Charter School shall obtain from its insurers under all policies of fire, theft, and other property insurance maintained by it at any time during the term insuring or covering the Facilities, a waiver of all rights of subrogation which the Charter School's insurers might otherwise, if at all, have against the State and School District, and the Charter School shall indemnify the State and School District against any loss or expense, including reasonable attorneys' fees, resulting from its failure to obtain such waiver.
- I. No approval by the School District or the State of any insurer, or the terms or conditions of any policy, or any coverage or amount of insurance, or any deductible amount shall be construed as a representation by the State of the solvency of the insurer or the sufficiency of any policy or any coverage or amount of insurance or deductible and the Charter School assumes full risk and responsibility for any inadequacy of insurance coverage or any failure of insurers.
- J. The Charter School is liable for all duties and obligations with respect to its purchase and development of the Facilities, and it shall bear the risk of any loss or claim relating to the Facilities. The State and the School District shall assume no liability or risk of loss.

3.6 Consent for Assignment

- A. The State's and the School District's (in accordance with the California Education Code) written consent shall be required before the Charter School may directly or indirectly, voluntarily or by operation of law, sell, assign, encumber, pledge or otherwise transfer or hypothecate all or any part of its interest in or rights with respect to the Facilities or permit all or any portion of the Facilities to be occupied by anyone other than itself or sublet all or any portion of the Facilities. Such consent shall not be unreasonably withheld. No sublease or assignment nor any consent by the State and the School District shall relieve the Charter School of any obligation to be performed under this Agreement or under the CSFP.
- B. The Charter School shall not be permitted to assign any of its rights or liabilities under this Agreement without the written consent of the State. A transfer of control shall be deemed to have occurred if there shall be any of the following: (i) a transfer of the ultimate beneficial ownership of fifty percent (50%) or more of the equity or other ownership interests in the Charter School or of any class of equity interests in the Charter School, including, without limitation, by the issuance of additional shares or other equity interests or other ownership interests in the Charter School, (ii) a transfer of the right to receive fifty percent (50%) or more of any category of distributions made by the Charter School, or (iii) a transfer of the right to direct the management, policies or operations of the Charter School, by contract or otherwise.
- C. Except as provided in Education Code Section 17078.62, in no event shall this Agreement be assigned or assignable by operation of law or by voluntary or involuntary bankruptcy proceedings or otherwise and in no event shall this

Agreement or any rights or privileges hereunder be an asset of the Charter School under any bankruptcy, insolvency, reorganization or other debtor relief proceedings.

ARTICLE IV – REPORTING

A. The Charter School shall:

1. Report to the State any material adverse change in its financial and/or operational condition that could adversely affect its ability to make its payments under this Agreement and the CSFP;
2. Report to the State if the Charter School's charter has been revoked or has not been renewed within 30 days of notification of such action, including providing a copy of the document provided by the chartering authority notifying the Charter School of such action;
3. Provide audited financial statements within 120 days of the end of each fiscal year. Charter School may submit a written request for an extension from the State;
4. Notify the State when the Charter School incurs any borrowing of \$50,000 or more, with a duration of over one year. At its discretion, the State may conduct a financial soundness review; and
5. Comply with the State's requirements for reporting any civil or criminal matters.
6. Provide to the California School Finance Authority quarterly reports detailing all disbursements and interest earned as it relates to the separate CSFP account referenced in section 2.2, item 10 of the Funding Agreement.

ARTICLE V – DEFAULT AND REMEDIES

5.1 Events of Default

The occurrence of any of the following shall constitute a "Default" or "Event of Default" under this Agreement:

- A. Failure by the Charter School to commence to use and occupy the Facilities for the operation of a charter school within one (1) year of receipt of the certificate of occupancy.
- B. Failure by the Charter School to make any payment when due, and such failure continues for a period of thirty (30) calendar days after receiving written notice by the State;
- C. Failure by the Charter School to maintain insurance on the Facilities or to provide reasonable evidence of insurance as required, and where such failure continues for a period of thirty (30) calendar days after receiving written notice by the State;
- D. Failure by the Charter School to provide reasonable evidence of compliance with all legal requirements whether expressly stated under this Agreement or otherwise imposed by the State under the CSFP or other applicable law, or failure to observe

or perform any other applicable covenant, condition or agreement, where such failure continues for thirty (30) calendar days after receiving written notice by the State. If thirty (30) calendar days is insufficient, and the Charter School has instituted corrective action, the State, in its discretion, may extend this period up to one hundred and eighty (180) calendar days;

- E. The Charter School shall be or become insolvent, or admit in writing its inability to pay its debts as they mature, or make an assignment for the benefit of creditors; or the Charter School shall apply for or consent to the appointment of any receiver, trustee or similar officer for it or for all or any substantial part of its property; or such receiver, trustee or similar officer shall be appointed without the application or consent of the Charter School, as the case may be, where possession is not restored in sixty (60) calendar days; or the Charter School shall institute (by petition, application, answer, consent or otherwise) any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution, liquidation or similar proceeding relating to it under the laws of any jurisdiction; or any such proceeding shall be instituted (by petition, application or otherwise) against the Charter School (unless, in the case of a petition filed against the Charter School, the same is dismissed in sixty (60) days) or any judgment, writ, warrant of attachment or execution or similar process shall be issued or levied against a substantial part of the Charter School's Facilities; provided, however, in the event that any provision of this paragraph is contrary to any applicable law, it shall be of no force and effect, and not affect the validity of the remaining provisions;
- F. The determination by the State that any material representation or warranty made by the Charter School was untrue in any material respect when made;
- G. The Charter School's charter is not renewed or is revoked, or the Charter School ceases to use the Facilities for a charter school purpose. Nothing in this section shall affect a Charter School's rights and obligations pursuant to Education Code Section 17078.62 if the Charter School ceases to use the facility after a revocation and/or non-renewal;
- H. The Charter School shall abandon the Facilities; and/or
- I. If the performance of the payment obligations of the Charter School is guaranteed, the actual or anticipatory failure or inability, for any reason, of the Guarantor to honor the guarantee as required, and the Charter School's failure to provide written alternative assurance or security, which when coupled with the Charter School's then-existing resources, equals or exceeds the combined financial resources that existed at the time this Agreement is executed. The Charter School shall have sixty (60) calendar days following written notice by the State, to provide the written alternative assurance or security.
- J. Failure by the School District to acquire title of the Facilities as required prior to release of certain funds under Education Code Section 17078.63 or within 30 days of receipt of CSFP funds for site acquisition or final apportionment.

5.2 Remedies on Default

- A. The parties acknowledge and agree that this Agreement represents a unique situation that is not limited by the landlord's remedies provided by Sections 1951.2 and 1951.4 of the California Civil Code. Whenever any Event of Default shall have occurred, any one or more of the following respective remedies, which are not exclusive but cumulative, may be pursued:
1. If the Event of Default is solely because the charter authority has revoked or declined to renew the Charter School's charter, the Charter School shall remain liable for the performance of all of the obligations of the Charter School including, without limitation, the obligation to make payments to the State when due, so long as the Charter School continues to use and occupy the Facilities.
 2. On the termination of this Agreement for any reason, any steps the School District takes to comply with Education Code section 17078.62 shall in no way release the Charter School from its payment obligations that accrued prior to the last date upon which the Charter School had beneficial ownership and use of the facility ("Termination Date") or from the Charter School's obligation for any holdover. Assumption of this Agreement shall in no way release the Charter School from its payment obligations that accrued prior to the Termination Date or from the Charter School's obligations for any holdover.
 3. The State may proceed by appropriate court action to enforce specific performance by the Charter School of its covenants under this Agreement and under the terms of accepting funding under the CSFP, or to recover damages for the breach thereof, including without limitation for the recovery of all past due payments together with interest and late charges, and all other sums due the State. The Charter School shall pay or repay to the State all costs of such action or court action, including, without limitation, reasonable attorneys' fees and costs.
- B. In the event of the Charter School's default, the State shall have the right to recover from the Charter School via the intercept mechanism described in Section 17199.4 of the Education Code via the intercept mechanism described in Section 17199.4 of the Education Code (i) the amount of all unpaid payments or other obligations (whether direct or indirect owed by the Charter School to the State), if any, which are then due and owing, together with interest and late charges, and (ii) any other amounts due from the Charter School to the State, including indemnity payments, taxes, charges, reimbursement of any advances and other amounts payable by the Charter School to the State.
- C. Notwithstanding anything to the contrary, the State may take whatever action at law or in equity that may appear necessary or desirable to enforce its rights with respect to this Agreement or the Facilities, and the Charter School, as applicable, shall pay or repay to the State all costs of such action or court action, including, without limitation, reasonable attorneys' fees and costs as provided in this Agreement or as otherwise permitted by law.

- D. No remedy herein conferred upon or reserved to the parties is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or existing at law or in equity. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient. In order to entitle either party to exercise any remedy reserved to it in this Article, it shall not be necessary to give any notice other than such notice as may be required under this Agreement. All remedies herein conferred upon or reserved to the parties shall survive the termination of this Agreement.
- E. No waiver of any provision of this Agreement shall be implied by any failure to enforce any remedy for the violation of that provision, even if that violation continues or is repeated. Any waiver of any provision of this Agreement must be in writing and will affect only the provision specified and only for the time and in the manner stated in the writing.
- F. The State, in its discretion, may provide the Charter School the opportunity to cure Default for up to a thirty (30) calendar day period. If thirty (30) calendar days is insufficient, and the Charter School has instituted corrective action, the State, in its discretion, may extend this period up to one hundred and eighty (180) calendar days.

ARTICLE VI – RELEASE OF LIABILITY AND INDEMNIFICATION

6.1 No Liability

- A. To the fullest extent permitted by law, the Charter School, on its behalf and on behalf of its officers, members, partners, agents, employees, and contractors, waives all claims it may have now or in the future (in law, equity, or otherwise) against the State, officials, directors, officers, attorneys, accountants, financial advisors, staff and employees arising out of, knowingly and voluntarily assumes the risk of, and agrees that the State shall not be liable for any of the following:
 - 1. Injury to or death of any person; or
 - 2. Loss of, injury or damage to, or destruction of any tangible or intangible property, including the resulting loss of use, economic losses, and consequential, incidental, punitive or penal or resulting damage of any kind from any cause.
- B. The State shall not be liable under this clause regardless of whether the liability results from any active or passive act, error, omission, or negligence of any party; or is based on claims in which liability without fault or strict liability is imposed or sought to be imposed.
- C. The State shall not be liable for any latent, hidden, or patent defect of the Facilities, or any part thereof, or any failure of the Facilities or any part thereof to comply with any legal requirement.

6.2 No Representations/Warranties

The Charter School does not rely on, and the State does not make any express or implied representations or warranties as to any matters including, without limitation, (a) the physical condition of the Facilities, (b) the existence, quality, adequacy or availability of utilities serving the Facilities, (c) the use, habitability, merchantability, fitness or suitability of the Facilities for the intended use, (d) the likelihood of deriving business from the location or the economic feasibility of the business, (e) Hazardous Materials on, in under or around the Facilities, (f) zoning, entitlements or any laws, ordinances or regulations which may apply to the use of the Facilities, or (g) any other matter relating to the Facilities.

6.3 Release of All Claims and Demands

The Charter School releases the State from any and all claims, demands, debts, liabilities, and causes of action of whatever kind or nature, whether known or unknown or suspected or unsuspected which the Charter School or any of its employees or agents may have, claim to have, or which may hereafter accrue against the released parties or any of them, arising out of or relating to or in any way connected with Hazardous Materials presently in, on or under, or now or hereafter emanating from or migrating onto or under the Facilities. In connection with such release, the Charter School hereby waives any and all rights conferred upon it by the provisions of Section 1542 of the California Civil Code, which reads as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

6.4 Indemnification

- A. To the fullest extent permitted by law the Charter School shall at the Charter School's sole cost and expense with counsel acceptable to the State as applicable, indemnify, defend and hold the State harmless from and against any and all losses, costs, liabilities, claims, judgments, liens, damages (including consequential damages), actions, causes of action (whether in tort or contract law or equity or otherwise), charges, assessments, fines, penalties and expenses, including, without limitation, reasonable attorneys' fees and costs, and reasonable investigation costs (collectively "Claims"), incurred in connection with or arising from: (a) any breach or default by the Charter School in the observance or performance of any of the terms, covenants or conditions of this Agreement on the Charter School's part to be observed or performed; (b) the construction, operation, maintenance, alteration, use or occupancy of the Facilities by the Charter School; (c) the condition of the Facilities, and any occurrence on the Facilities, from any cause whatsoever; (d) any acts-omissions or negligence of the Charter School, its employees, agents or contractors in, on or about the Facilities; and (e) any breach in the Charter School's representations or warranties provided under this Agreement.
- B. The indemnification provided in this section shall apply regardless of the active or passive negligence of the State and regardless of whether liability without fault or

strict liability is imposed or sought to be imposed; provided, however, that the right of indemnification shall not apply to the extent that a final judgment of a court of competent jurisdiction establishes that a claim was proximately caused by gross negligence or willful misconduct.

- C. In case any action or proceeding be brought, made or initiated against any of the State relating to any matter covered by the Charter School's indemnification obligations, the Charter School, shall at its sole cost and expense, resist or defend such claim, action or proceeding by counsel approved by the State. Notwithstanding the foregoing, the State may retain its own counsel to defend or assist in defending any claim, action or proceeding, and the Charter School shall pay the reasonable fees and disbursements of such counsel. The Charter School's obligations to indemnify the State shall survive the expiration or earlier termination of this Agreement. The State is an intended third-party beneficiary of this article, and shall be entitled to enforce the provisions hereof.
- D. The Charter School's obligation to indemnify the State may not be construed or interpreted as in any way restricting, limiting, or modifying the Charter School's insurance or other obligations under this Agreement and is independent of the Charter School's insurance and other obligations. The Charter School's compliance with the insurance requirements and other obligations under this Agreement shall not in any way restrict, limit or modify the Charter School's indemnification obligations under this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Funding Agreement on the dates set forth below adjacent to their respective signatures. The effective date of this Funding Agreement shall be the last date set forth below.

THE STATE:

STATE ALLOCATION BOARD:

Date: _____

By: _____

Name: _____

Title: _____

CALIFORNIA SCHOOL FINANCE AUTHORITY:

Date: _____

By: _____

Name: Katrina Johantgen

Title: Executive Director

THE CHARTER SCHOOL:

EAST BAY INNOVATION ACADEMY

Date: _____

By: _____

Name: _____

Title: _____

Exhibit A
Schedule of Apportionments

Apportionment	Date	Amount
Preliminary		
Advance		
Final		

Exhibit B Payment Schedule

Exhibit C
Title Documentation

Exhibit D
Staff Summary

**CHARTER SCHOOL FACILITIES PROGRAM
MEMORANDUM OF UNDERSTANDING**

By and Among:

**East Bay Innovation Academy,
(CDS Code # 01-61259-0129932)
a California Charter School**

and

**Oakland Unified School District,
a California Public School District;**

and

**The State of California,
State Allocation Board and California School Finance Authority**

ARTICLE I – PURPOSE AND LIMITATION

- A. This Memorandum of Understanding (“MOU”) is made and entered into as of _____, (“Effective Date”) by and among the State Allocation Board and the California School Finance Authority (individually or collectively referred to as the “State”); the charter school identified above, a California Charter School operating as a non-profit public benefit corporation, in accordance with Education Code Section 47604 (“Charter School”); and the California Public School District identified above (“School District”). The provisions of this MOU shall be effective from and after the Effective Date and shall continue until all duties and obligations of the parties, as stated in this MOU, are carried out.
- B. The Charter School has applied to the State for financing of its charter school facilities project (“Facilities”) under the Charter School Facilities Program (“CSFP”) established pursuant to Article 12 of Chapter 12.5 of Part 10 of the California Education Code and the regulations for its implementation provided in Title 4, Cal. Code Regs., Section 10151, et seq., and Title 2 Cal. Code Regs., Section 1859.160, et seq., attached hereto and incorporated by reference. A copy of the Funding Agreement is attached as Exhibit “A”. A copy of the Authority’s Staff Summary is attached to the Funding Agreement as Exhibit “D” and incorporated herein by reference as a means of defining the Facilities.

- C. This MOU is intended to tie together two (2) separate legal agreements: (i) a Funding Agreement by and between the State and the Charter School; and (ii) a Facilities Use Agreement by and between the School District and the Charter School. In accordance with the CSFP, the State is the lender of certain monetary funds to the Charter School to enable the Charter School to acquire real property and/or construct improvements thereon. This loan transaction is set forth in the Funding Agreement of which the School District is not a party to because it is not a lender and does not have obligations under said Funding Agreement. In accordance with Section 17078.57(a)(3)(A) of the California Education Code, the School District must hold title to the Facilities, acquired with the funds loaned by the State under the CSFP, in trust for the benefit of the state public school system. Pursuant to the CSFP, the School District as the holder in trust of the Facilities must provide the use of the Facilities to the Charter School for a charter school educational program and, hence, is the basis for the Facilities Use Agreement between the School District and the Charter School.

A copy of the Funding Agreement, attached hereto as Exhibit "A", and the School District's Facilities Use Agreement, attached hereto as Exhibit "B", are incorporated into this MOU solely for the purpose of setting forth the separate instruments for this transaction and not for the purpose of making the State a party to the Facilities Use Agreement and the School District a party to the Funding Agreement. This MOU, the Funding Agreement and the Facilities Use Agreement (collectively, the "Agreements") set forth the entire agreements between the parties regarding the loan of funds and use of the real property pursuant to the CSFP. There are no understandings, agreements, representations, or warranties, express or implied, not specified herein regarding this MOU, the Funding Agreement and the Facilities Use Agreement; provided, that in the event any portion of this MOU, the Funding Agreement and/or the Facilities Use Agreement is held unenforceable by a court of competent jurisdiction, the remainder of the applicable agreement shall remain in full force and effect and shall not nullify the intent of the CSFP

- D. This MOU is being entered into in accordance with the requirements of the CSFP. To the extent this MOU is inconsistent or in conflict with the provisions of the CSFP and the implementing regulations, the CSFP and implementing regulations shall prevail.
- E. Notwithstanding any provision contained herein, the duties and obligations of the State and the School District shall be limited to the following:
1. The State. The State shall be responsible to administer the CSFP and determine eligibility of and compliance by the Charter School to the requirements of the CSFP. The School District shall have no duty or obligation to administer, monitor or enforce any requirements imposed upon the Charter School under the CSFP.
 2. The School District. The School District's duties and obligations under the CSFP shall be limited to the following:

- a. Accept title to the Facilities, as defined below, as trustee for the State of California public school system. Title shall be conveyed by an instrument acceptable to the School District; and
- b. In the event the Charter School, or any subsequent charter school, ceases to use the Facility or an Event of Default occurs, the School District shall observe the requirements of Section 17078.62 of the California Education Code as set forth in Section 4.2 below.

Other than the duties set forth in this Article I, E(2), no duties or responsibilities shall be imposed upon the School District as the result of it holding title to the Facility in trust for the California public school system except for that which is expressly contained in this Agreement.

3. Securing Approvals, Permits and Other Entitlements. Notwithstanding State supplied bond funds, the State and the School District shall have no duty or obligation to secure, or expend funds or incur costs to secure, any approvals, permits and other entitlements for the Facility and operation of the Charter School. This limitation on duty and obligation shall apply to any repair, maintenance, modification, renovation, addition, expansion, re-construction or re-habilitation occurring after the completion of initial construction of the Facility ("Future Work").
4. Construction. The State and the School District shall have no duty or obligation to construct all or any portion of the Facility or any Future Work. In the event of abandonment or any failure to complete the construction of the Facility or any Future Work for any reason, the School District, as trustee, will secure the site while it observes the requirements of Section 4.2 below.
5. Additional Funds. Other than the grant and the loan approved and provided under the CSFP, the State shall not be obligated to provide additional funds or financing for the planning, design, construction (including change orders and completion of construction), operation or maintenance of the Facility. The School District, by virtue of holding title to the Facility as trustee for the California public school system, shall not be obligated to provide additional funds or financing for the planning, design, construction (including change orders and completion of construction), operation or maintenance of the Facility.
6. Cooperation. In the event Charter School fails to complete construction or rehabilitation of the Facilities for any reason or fails to operate a school at the Facilities for any reason, the School District agrees that as the owner in trust of the Facilities for the public school system, the School District shall cooperate with the State in its efforts to complete the construction of the Facilities or its effort to have a charter school operate from the Facilities; provided, that nothing in this MOU, the Funding Agreement, if applicable, and the Facilities Use Agreement shall require the School District to incur

any costs or liabilities, or increase the School District's duties, obligations or exposure to liability, unless agreed to in writing by the School District.

ARTICLE II – FINANCING OF THE CHARTER SCHOOL'S PROJECT

2.1 Fifty Percent Local Matching Share Obligation

- A. The Charter School's Application for preliminary apportionment for the Facilities has been approved by the State. The Charter School's Apportionment ("Apportionment") is contingent upon the Charter School paying its 50% Local Matching Share obligation, which will be paid to the State by way of payments pursuant to the Funding Agreement.
- B. The Charter School's Application for a preliminary, advance, or final apportionment for the Facilities has been approved by the State. The State will provide as a grant funding for fifty percent (50%) of the approved costs for the Facilities and the Charter School will be responsible for fifty percent (50%) of the approved costs for the Local Matching Share for the Facilities. The Final Apportionment Amount will be reduced by any amounts received by the Charter School through an Advance Apportionment(s). The amounts of the Preliminary, Advance, and Final Apportionments are set forth in Exhibit "A" of the Funding Agreement.
- C. The Charter School will receive initial funding from the State for the local matching share, less any lump sum payments made by, or on behalf of, the Charter School.

2.2 Conditions for Release of Funding

The following conditions must be satisfied before the State will release funding:

- A. The Charter School shall comply with all funding release conditions contained in the Funding Agreement to the satisfaction of the State.
- B. The Charter School has agreed to utilize its Apportionment for purposes consistent with the CSFP, and consistent with the purposes for which it was approved. The Charter School shall comply with any and all requirements and conditions imposed upon it for the development and operation of the Facilities by any applicable governmental agency.
- C. Each party is duly authorized to execute, deliver, and perform this MOU, the Funding Agreement, as applicable to the appropriate parties, and the Facilities Use Agreement, as applicable to the appropriate parties.
- D. Pursuant to the provisions in Education Code Section 17199.4, the charter school's governing board approves the use of the intercept mechanism to make CSFP payments to the State. Evidence of filing of the intercept notice pursuant to 17199.4 in a form satisfactory to the Authority.

2.3 Charter School Facilities

- A. The Charter School's Facilities includes the real property and all improvements, repairs, replacements, substitutions, and modifications located or to be constructed on the property, and built or acquired with State funds, as described in its application for funding under CSFP.

- B. The Charter School's Facilities are located or will be located within the boundaries of the School District identified above in the city and county as in Exhibit "D" of the Funding Agreement.
- C. The Facilities are physically located within the geographical jurisdiction of the School District and the school attendance area generating eligibility for funding, if applicable.
- D. The Charter School has satisfied itself as to the suitability of the Facilities by its own inquiries and tests. The Charter School shall, by entering into and occupying the Facilities, be deemed to have accepted the Facilities and to have acknowledged that they are in good order, condition and repair.
- E. The Charter School represents and warrants that it, by and through its officers, employees, agents and consultants, has made a thorough and independent examination of the Facilities and all matters related to its decision to enter into this Agreement. The Charter School is thoroughly familiar with all aspects of the Facilities and is satisfied that they are in an acceptable condition and meet its needs. The Charter School is solely responsible for identifying the real property, evaluating the condition of the title and suitability of the land for the Charter School's intended purpose, and negotiating and closing the acquisition of the real property. In addition, the Charter School is solely responsible for the construction of all improvements, repairs, replacements, substitutions, and modifications located or to be constructed on the real property

The State and/or the School District shall not have any obligation for construction work or improvements on or to the Facilities, to insure completion of construction, or provide additional funding in the event the Charter School determines it has insufficient funds to complete construction or operate the charter school. Pursuant to the CSFP, the School District is obligated to take title to the Facilities in trust for the benefit of the state public school system but such obligation does not make the School District a guarantor or warrantor of the Facilities and shall not impose any duty upon the School District to administer or oversee the construction of the Facilities by the Charter School, or in the event of any default prior to completion of construction, demolish all or any portion of the Facilities.

2.4 Payment

- A. The Charter School shall make payments to the State, as provided in the Funding Agreement in satisfaction of the requirements of the CSFP.
- B. This MOU, the Funding Agreement and the Facilities Use Agreement shall not be deemed to constitute a debt or liability or obligation of the State, the School District, or any political subdivision thereof, or a pledge of the faith and credit or taxing power of the State or any political subdivision thereof, but shall be a special obligation payable solely from the payments made by the Charter School. The obligation to make payments does not constitute an indebtedness of the Charter School or the School District, within the meaning of any constitutional or statutory debt limitation or restriction and in all cases shall be made solely from legally available funds.

- C. Pursuant to the provisions in Education Code Section 17199.4, the Charter School's governing board approves the use of the intercept mechanism to make CSFP payments to the State.

ARTICLE III – SECURITY PROVISIONS

- A. If title to the real property is already held by the Charter School:
1. the Charter School, at its sole cost and expense, shall cause to prepare a conveyance instrument, acceptable to the School District and the State, which shall convey title to the real property from the Charter School to the School District as trustee on behalf of the state public school system. The Charter School will convey to and the School District will accept conveyance of the good, absolute and marketable title to the Facilities in fee simple, free and clear of any mortgage, deeds of trust, liens (monetary or otherwise), claims, charges or other encumbrances or matters of any nature what so ever other than those included in any other provisions of this MOU. Prior to release of final apportionment, the Charter School must provide evidence to the State that title to the real property has been transferred to the School District. If Charter School fails to meet this requirement, Charter School will be in default of this MOU.
 2. The Charter School shall provide proof satisfactory to the State and the School District that all liens and encumbrances that may arise from the construction of the Facilities have been released and/or satisfied.
 3. The Charter School shall submit to the State and the School District for its review and acceptance a title report and a copy of each instrument listed in said title report. The title report shall be issued no more than thirty (30) calendar days prior to the date of submittal.
 4. The Charter School shall provide to the State and the School District for its review and acceptance an American Land Title Association ("ALTA") survey which together with (3) above, shall be sufficient for the Charter School,, at its sole cost and expense, shall provide the School District with a ALTA owner's policy for the benefit of the School District and the State.
- B. If title to the real property is not held by the Charter School, the School District, at its sole cost and expense, shall cause to prepare a conveyance instrument, acceptable to the State, which shall convey title to the real property in trust on behalf of the state public school system. The School District will accept conveyance of the good, absolute and marketable title to the Facilities in fee simple, free and clear of any mortgage, deeds of trust, liens (monetary or otherwise), claims, charges or other encumbrances or matters of any nature what so ever other than those included in any other provisions of this MOU.
- C. The School District shall provide to the State for its review and files the original Final California Department of Education ("CDE") approval subject to waivers and/or exemptions to the use of real property as a school facility; provided, that if CDE has provided the Charter School any waivers and/or exemptions the Charter

School shall obtain from CDE and provide to the School District a valid assignment of such waivers and/or exemptions. The purpose of the assignment is to ensure that the conveyance of fee title from the Charter School to the School District will not result in a situation whereby the Facilities then become non-compliant because of the transfer of fee simple title to the School District due to those requirements and standards that are typically imposed upon the School District.

- D. The School District shall provide to the State for its files the original “No Further Action” or “Further Action Letter” from the California Department of Toxic Substance Control (“DTSC”); provided, that if DTSC has issued a Further Action Letter, the Charter School shall provide to the School District proof satisfactory to the School District that all requirements of the Further Action Letter have been satisfied. Simultaneously with the delivery of the foregoing, the Charter School shall deliver to the State a copy of the documents delivered to the School District.
- E. The School District shall provide to the State for its review and files the final approval issued by DTSC for the final Preliminary Environmental Assessment (“PEA”) for the real property, if applicable.
- F. The School District shall provide to the State for its files the final approval of any applicable Federal, State, City or County agency necessary for the acquisition and construction of the Facilities, and the operation of the Facilities for an educational program conducted by the Charter School. As an example, and not as means of limitation, a charter school may require approval from the California Coastal Commission if a project will be located within its jurisdiction.
- G. Simultaneously with the delivery of the documents and instruments required in this Article III.A, the Charter School shall deliver to the State a copy of the same documents and instruments delivered to the School District.
- H. Title to the Facilities shall be conveyed to the School District by a grant deed or bill of sale, if applicable, agreed to and accepted by the School District. Title to the Facilities shall be held solely by the School District in whose boundaries the Facilities are to be located, in trust, for the benefit of the state public school system.
- I. Any person or entity providing a substantial contribution that is applied to the costs of the project in excess of the state share and the local matching share may be granted a security interest, as approved and memorialized in a written instrument executed by the State, to be satisfied from the proceeds, if any, realized when the property is ultimately disposed of. If the contribution was made for the explicit purpose of purchasing any asset with a normal life expectancy of less than twenty years, the security interest will be adjusted to reflect the depreciation of the assets. Contributions used solely to assist the applicant in meeting its local matching share shall not be entitled to a security interest. Where a contribution results in total project funding beyond the state and local matching shares, the contributor’s security interest shall be limited to the amount in excess of the state share and local matching share.
- J. If a default occurs and all payments have not been made, the security interest of any person or entity providing a substantial contribution to the costs of the project

shall be satisfied only after the account is reimbursed for any remaining unpaid local matching share and the School District has been reimbursed for any costs and expenses incurred, if any, as the result of such default.

- K. Simultaneously with the execution of the Grant Deed, the Charter School and the School District shall enter into a Facilities Use Agreement, Exhibit "B". This Facility Use Agreement shall contain as standardized provisions the following, which must be addressed to the satisfaction of the State:
1. The acquisition and maintenance of all required licenses or permits. Any costs associated with licenses or permits shall not become an obligation of the State.
 2. The payment of all fees, and public charges of whatever nature accessed against the Facilities, including the payment of all taxes, and costs associated with telephone, water, sewer, gas, heat, electricity, garbage disposal, trash disposal, and all other services and utilities. Such fees and charges shall not become an obligation of the State.
 3. Prohibited uses of the Facilities, and provisions for the maintenance and repair of the Facilities. The State shall not under any circumstance be required to make any improvements or install any equipment on the Facilities, make any repairs, alterations or replacements of any nature to the Facilities, make any expenditures whatsoever in connection with this MOU or maintain the Facilities in any manner. The State shall not be required to maintain, repair or rebuild all or any part of the Facilities, and the Charter School or School District waive the provisions of Civil Code Sections 1941 and 1942 and any other law that would require the maintenance of the Facilities in a leasable condition or would provide the School District with the right to make repairs and deduct the cost of those repairs from its payments.
 4. The handling of hazardous materials.
 5. Insurance requirements, in addition to those specified in this MOU, for all risk (special-causes-of-loss) property and fire insurance; commercial general liability insurance; rental value insurance; worker's compensation insurance; flood and earthquake insurance as necessary; and such other types of insurance or endorsements to existing insurance as may be required by the School District.

ARTICLE IV – DEFAULT AND REMEDIES

4.1 Events of Default

The occurrence of any of the following shall constitute a "Default" or "Event of Default" under this Agreement:

- A. Failure by the Charter School to commence to use and occupy the Facilities for the operation of a charter school within one (1) year of receiving the certificate of occupancy issued by the Division of the State Architect.

- B. Failure by the Charter School to make any payment when due where such failure continues for a period of thirty (30) calendar days after receiving written notice by the State or the School District;
- C. Failure by the Charter School to maintain insurance on the Facilities or to provide reasonable evidence of insurance as required by the Funding Agreement and the Facilities Use Agreement, and where such failure continues for a period of thirty (30) calendar days after receiving written notice by the State or the School District.
- D. Failure by the Charter School to provide reasonable evidence of compliance with all requirements whether expressly stated in this MOU, the Funding Agreement, or the Facilities Use Agreement or otherwise imposed by the State under the CSFP or other applicable law or failure to observe or perform any other applicable covenant, condition, or agreement, where such failure continues for thirty (30) calendar days after receiving written notice of the failure. If thirty (30) calendar days is insufficient and the Charter School has instituted corrective action, the State, in its discretion, may extend this period up to one hundred and eighty (180) calendar days;
- E. The Charter School shall be or become insolvent, or admit in writing its inability to pay its debts as they mature, or make an assignment for the benefit of creditors; or the Charter School shall apply for or consent to the appointment of any receiver, trustee or similar officer for it or for all or any substantial part of its property; or such receiver, trustee or similar officer shall be appointed without the application or consent of the Charter School, as the case may be, where possession is not restored in sixty (60) calendar days; or the Charter School shall institute (by petition, application, answer, consent or otherwise) any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution, liquidation or similar proceeding relating to it under the laws of any jurisdiction; or any such proceeding shall be instituted (by petition, application or otherwise) against the Charter School (unless, in the case of a petition filed against the Charter School, the same is dismissed in sixty (60) days) or any judgment, writ, warrant of attachment or execution or similar process shall be issued or levied against a substantial part of the Charter School's Facilities; provided, however, in the event that any provision of this paragraph is contrary to any applicable law, it shall be of no force and effect, and not affect the validity of the remaining provisions;
- F. A determination is made by the State that any representation or warranty made by the Charter School was untrue in any material respect when made;
- G. The Charter School's charter is not renewed or is revoked, or the Charter School ceases to use the Facilities for a charter school purpose. Nothing in this section shall affect a Charter School's rights and obligations pursuant to Education Code Section 17078.62 if the Charter School ceases to use the facility after a revocation and/or non-renewal;
- H. The Charter School shall abandon the Facilities or breach the Facilities Use Agreement; and/or

- I. If the performance of the payment obligations of the Charter School is guaranteed, the actual or anticipatory failure or inability, for any reason, of the Guarantor to honor the guarantee as required, and the Charter School's failure to provide written alternative assurance or security, which when coupled with the Charter School's then-existing resources, equals or exceeds the combined financial resources that existed at the time this Agreement is executed. The Charter School shall have sixty (60) calendar days following written notice by the State, to provide the written alternative assurance or security.
- J. If an Event of Default occurs and the Charter School continues to occupy and/or possess the Facilities, the Charter School shall remain liable for the performance of all of the obligations of the Charter School under and subject to the Funding Agreement and the Facilities Use Agreement, including, without limitation, the obligation to make payments to the State when due under the Funding Agreement.
- K. Failure by the School District to acquire title of the Facilities as required prior to release of certain funds under Education Code Section 17078.63 or within 30 days of receipt of CSFP funds for site acquisition or final apportionment.

4.2 Remedies on Default

The parties acknowledge and agree that this MOU, the Funding Agreement and the Facilities Use Agreement represent a unique situation that is not limited by the standard landlord's remedies provided by Sections 1951.2 and 1951.4 of the California Civil Code. The parties agree that if any Event of Default shall have occurred, any one or more of the following respective remedies, which are not exclusive but cumulative, may be pursued:

- A. If an Event of Default occurs and the Charter School continues to occupy and/or possess the Facilities, the Charter School shall remain liable for the performance of all of the obligations of the Charter School under and subject to the Funding Agreement, including, without limitation, the obligation to make payments to the State when due under the Funding Agreement.
- B. If the Event of Default is solely because the Charter School's chartering authority has revoked or declined to renew the Charter School's charter, in accordance with Section 17078.62(b)(1) of the Education Code, the Charter School shall.
 1. have that time period specified in Section 17078.62 of the Education Code, as may be amended, to complete the review process contemplated in Section 47607 or 47607.5 of the Education Code, as may be amended; and
 2. so long as the Charter School continues to use and occupy the Facilities, remain liable for the performance of all of the obligations of the Charter School under this MOU, the Funding Agreement, and the Use Agreement, if applicable, including, without limitation, the obligation to make payments to the State when due under the Funding Agreement.
- C. If the Event of Default is solely because the Charter School's chartering authority has revoked or declined to renew the Charter School's charter, the Charter School shall not be liable under the Facilities Use Agreement on the effective date of the last to occur of all of the following:

1. the Charter School completes the review process provided in Section 47607 or 47607.5 of the Education Code and the Charter School fails to obtain a renewal of its charter, or the Charter School relinquishes all rights to pursue or complete the review process provided in Section 47607 or 47607.5 of the Education Code and the Charter School notifies the State and the School District of its election; and
 2. the Charter School vacates the Facilities and relinquishes to the State or the School District all right, title, and interest in the occupancy and use of the Facilities .
- D. Upon the occurrence of Subsection C of this Section 4.2, the Facilities may be used in its “as is” and “where is” condition by another charter school:
1. that the State deems as qualified,
 2. whose charter petition is approved and is in good standing with the School District or charter authorizer; and
 3. that has agreed to a Funding Agreement with the State and a Facilities Use Agreement with the School District.
- E. In the event a successor charter school cannot be identified as provided in Subsection C of this Section 4.2, the School District may:
1. in accordance with Section 17078.62(b)(3) of the Education Code, take possession of and use the Facilities as a public school facility; provided that, the School District shall be required to make payments to the State in accordance with Section 17078.62(b)(4) or the payments shall be reduced or eliminated if the School District satisfies the conditions set forth in Section 17078.62(b)(4)(A) and (B). In the event the payments do not qualify for reduction or elimination in accordance with Section 17078.62(b)(4)(A) and (B), the State and the School District shall enter into an agreement for the School District’s assumption of the payment obligation under the Funding Agreement. Assumption of the payment obligation shall in no way release the Charter School from its payment obligations that accrued prior to the termination of the Funding Agreement or from the Charter School’s obligations for any holdover; or
 2. In accordance with Section 17078.62(b)(5) of the Education Code, if the School District declines to take possession of the Facilities or if the Facilities are no longer needed for public school purposes, the School District shall dispose of the Facilities in accordance with requirements for the disposal of surplus public school sites. The monetary proceeds from the disposal of the Facilities shall be applied in the following priority: (i) repay any unpaid local matching share in favor of the State; (ii) repay any security interest granted pursuant to Section 17078.57(a)(3)(B); and (iii) to the School District to be used for capital improvements in the School District;
 3. disclaims its remainder interest in the Facilities, the State shall succeed to title owner pursuant to its remainder interest.

- F. The State may proceed by appropriate court action to enforce specific performance by the Charter School of its covenants under the Funding Agreement and this MOU and under the terms of accepting funding under the CSFP, or to recover damages for the breach thereof, including without limitation for the recovery of all past due payments together with interest, penalties, and late charges, and all other sums due the State. The Charter School shall pay or repay to the State all costs of such action or court action, including, without limitation, reasonable attorneys' fees and costs. The School District may proceed by appropriate court action to enforce this MOU and the Facilities Use Agreement against the Charter School.
- G. In the event of the Charter School's default and the recovery of the Facilities by the School District, the State shall have the right to recover from the Charter School via the intercept mechanism described in Section 17199.4 of the Education Code (i) the amount of all outstanding payments or other obligations (whether direct or indirect owed by the Charter School to the State), if any, which are then due and owing, together with interest and late charges, and (ii) any other amounts due from the Charter School to the State, including indemnity payments, taxes, charges, reimbursement of any advances and other amounts payable by the Charter School to the State.
- H. Notwithstanding anything to the contrary, the State, the Charter School, and the School District may take whatever action at law or in equity that may appear necessary or desirable to enforce its respective rights with respect to this MOU, the Funding Agreement, or the Facilities Use Agreement, and the party or parties prevailing in the action shall have all of their respective costs of such action or court action, including, without limitation, reasonable attorneys' fees and costs as provided in this MOU, the Funding Agreement, and/or the Facilities Use Agreement or as otherwise permitted by law, paid by the parties against whom the action was brought.
- I. No remedy herein conferred upon or reserved to the parties is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this MOU, the Funding Agreement, and the Facilities Use Agreement or existing at law or in equity. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient. In order to entitle either party to exercise any remedy reserved to it in this Article, it shall not be necessary to give any notice other than such notice as may be required under the Agreements. All remedies herein conferred upon or reserved to the parties shall survive the termination of this MOU, the Funding Agreement, and/or the Facilities Use Agreement.
- J. The State, in its discretion, may provide the Charter School the opportunity to cure Default for up to a thirty (30) calendar day period. If thirty (30) calendar days is insufficient, and the Charter School has instituted corrective action, the State, in its discretion, may extend this period up to one hundred and eighty (180) calendar days.

ARTICLE V – MISCELLANEOUS

5.1 Release of Liability

The State and the School District are hereby released from any and all claims, demands, debts, liabilities, and causes of action of whatever kind or nature, whether known or unknown or suspected or unsuspected which the Charter School or any of the Charter School's employees or agents may have, claim to have, or which may hereafter accrue against the released parties or any of them, arising out of or relating to the Facilities, including those in any way connected with any materials or substances defined as hazardous under any applicable statute, ordinance, rule or regulation, presently in, on or under, or now or hereafter emanating from or migrating onto or under the Facilities. In connection with this release, the Charter School hereby waives any and all rights conferred upon it by the provisions of Section 1542 of the California Civil Code, which reads as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

5.2 Non-waiver

No waiver of any provision of this MOU, the Funding Agreement and/or the Facilities Use Agreement shall be implied by any failure to enforce any remedy for the violation of that provision, even if that violation continues or is repeated. Any waiver of any provision contained in this MOU, the Funding Agreement and/or the Facilities Use Agreement, if applicable, must be in writing and executed by the applicable parties and will affect only the provision specified and only for the time and in the manner stated in the writing.

5.3 Indemnity

- A. Memorandum of Understanding. To the fullest extent permitted by law the Charter School shall at the Charter School's sole cost and expense with counsel acceptable to the School District and/or the State as applicable, indemnify, defend and hold the School District and the State harmless from and against any and all losses, costs, liabilities, claims, judgments, liens, damages (including consequential damages), actions, causes of action (whether in tort or contract law or equity or otherwise), charges, assessments, fines, penalties and expenses, including, without limitation, reasonable attorneys' fees and costs, and reasonable investigation costs (collectively "Claims"), incurred in connection with or arising from: (a) any breach or default by the Charter School in the observance or performance of any of the terms, covenants or conditions of this MOU on the Charter School's part to be observed or performed; (b) the construction, operation, maintenance, alteration, use or occupancy of the Facilities by the Charter School; (c) the condition of the Facilities, and any occurrence on the Facilities, from any cause whatsoever, and (d) any acts omissions or negligence of the Charter School or the Charter School's employees, agents or contractors in, on or about the Facilities.
- B. Facilities Use Agreement. The State is not a party to the Facilities Use Agreement and, as a result, to the fullest extent permitted by law the Charter School shall at

the Charter School's sole cost and expense with counsel acceptable to the State as applicable, indemnify, defend and hold the State harmless from and against any and all Claims incurred in connection with or arising from any breach or default by the Charter School in the observance or performance of any of the terms, covenants or conditions of the Facilities Use Agreement on the Charter School's part to be observed or performed.

- C. Funding Agreement. The School District is not a party to the Funding Agreement and, as a result, to the fullest extent permitted by law the Charter School shall at the Charter School's sole cost and expense with counsel acceptable to the School District as applicable, indemnify, defend and hold the School District harmless from and against any and all losses, costs, liabilities, claims, judgments, liens, damages (including consequential damages), actions, causes of action (whether in tort or contract law or equity or otherwise), charges, assessments, fines, penalties and expenses, including, without limitation, reasonable attorneys' fees and costs, and reasonable investigation costs (collectively "Claims"), incurred in connection with or arising from any breach or default by the Charter School in the observance or performance of any of the terms, covenants or conditions of the Funding Agreement on the Charter School's part to be observed or performed.
- D. The Charter School will at all times protect and defend, at its own cost and expense, the title to the Facilities from and against all claims, liens and legal processes of creditors and keep all the Facilities and the title free and clear of all such claims, liens, and processes except for the liens created or expressly permitted under the Agreements and the CSFP.

5.4 Notice

Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served and received if given in writing and personally delivered or either deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service or facsimile transmission, addressed as follows:

If to the State:

**California School Finance Authority
300 S. Spring, Suite 8500
Los Angeles, CA 90013
Attention: Katrina Johantgen**

If to the Charter School:

**East Bay Innovation Academy
3400 Malcolm Ave.
Oakland, CA 94605-5353
Attention: Michelle Cho**

If to the School District:
Oakland Unified School District
1000 Broadway, Ste. 680
Oakland, CA 94607-4099
Attention: Marcus Battle

Any notice personally given or sent by facsimile transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the next business day following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective three (3) days after deposit in the United States mail.

5.5 Applicable Law

This MOU shall be governed by and construed in accordance with the laws of the State of California.

5.6 Amendments

- A. The terms of this MOU may not be waived, altered, modified, supplemented or amended in any manner except in writing, upon the agreement of all of the parties, or except as otherwise permitted by law.
- B. The terms of this MOU may be amended, or new agreements executed, as necessary, upon the application of the Charter School and the approval by the State and the School District of a final apportionment.

5.7 Force Majeure

The time for the State, the Charter School or the School District to perform any obligation or assert any right under this MOU or the CSFP shall be extended on a day for day basis for any Force Majeure event, which shall include but not be limited to: (1) Acts of God or of the public enemy; and (2) Acts of the federal or State government in either its sovereign or contractual capacity.

5.8 Severability

Should any provision of this Memorandum of Understanding be determined to be invalid, illegal or unenforceable in any respect, such provision shall be severed and the remaining provisions shall continue as valid, legal and enforceable.

THE STATE:

STATE ALLOCATION BOARD:

By: _____

Name: _____

Title: _____

CALIFORNIA SCHOOL FINANCE AUTHORITY:

By: _____

Name: _____

Title: _____

THE SCHOOL DISTRICT: **OAKLAND UNIFIED SCHOOL DISTRICT**

By: _____

Name: _____

Title: _____

THE CHARTER SCHOOL: EAST BAY INNOVATION ACADEMY

By: _____

Name: _____

Title: _____

Exhibit A

Funding Agreement

(attached)

Exhibit B

Facilities Use Agreement

(attached)