

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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PARENT TEACHERS ASSOCIATION OF PUBLIC  
SCHOOL, M 539 a/k/a NEST, EMILY ARMSTRONG,  
LUIS GASCO, MICHELLE BUFFINGTON and  
ABBY HOROWITZ,

Petitioners,

Index No.: /06

-against-

JOEL KLEIN, as Chancellor of the New York City  
Department of Education and in his Capacity as Charter  
Entity under the Charter School Act of the State of  
New York, THE NEW YORK CITY DEPARTMENT  
OF EDUCATION and BOARD OF REGENTS OF  
THE STATE UNIVERSITY OF NEW YORK,

Respondents,

For a Judgment Pursuant to Article 78 of the CPLR.

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**PETITIONERS' MEMORANDUM OF LAW  
IN SUPPORT OF PETITION**

Petitioners, Parent Teachers Association of Public School, M 539 a/k/a NEST, Emily Armstrong, Luis Gasco, Michelle Buffington and Abby Horowitz (the "Petitioners"), by their attorneys, Hass & Gottlieb, hereby submit this memorandum of law in support of their petition under CPLR Article 78 (the "Petition") to *inter alia*, nullify a decision made by respondents Joel Klein, as Chancellor of the New York City Department of Education ("J. Klein" or the "Chancellor") and the New York City Department of Education (the "DOE") to place a newly formed charter school in a fully occupied school building that currently houses one of the highest-performing public schools in New York City. The effect of the decision made by the Chancellor and the DOE will be to displace students from a successful public school, to limit the admission of new students to the public school and to cause an unlawful increase in the average class size in the public school to twenty-eight students per class, while at

the same time enabling the newly formed and untested charter school to occupy part of the same facility and maintain an average class size of only seventeen students per class.

The Petition also seeks to revoke the charter issued to the newly formed charter school, as granted by the Chancellor with the approval of respondent The Board of Regents of New York State.

### **THE PARTIES**

The Petitioners are several residents and taxpayers of the City of New York and are all parents of children who are attending Public School M539 also known as New Explorations into Science Technology and Math or NEST +M (hereinafter "NEST") as well as the Parent Teacher Association of NEST.

The respondents are Joel Klein, the appointed Chancellor of the New York City Department of Education, in charge of administering the City of New York Public Schools, as well as the DOE. The remaining respondent is Board of Regents of the University of the State of New York (the "Regents"), in its capacity, and for its actions taken under the New York Charter Schools Act of 1998 (l. 1998, ch. 4 §1 *et seq.*, as amended; hereinafter the "Charter School Act").

### **BACKGROUND**

This Article 78 proceeding revolves around two related matters: a) a decision made by the Chancellor and the DOE to place a newly formed and untested charter school into a fully occupied public school building that houses a public school known as NEST +m; and b) the grant of a charter under the Charter School Act by the Chancellor and the Regents to Ross Global Academy Charter School (the "Charter School").

The decision made by J. Klein and the DOE will enable the Charter School to use the public school building and maintain classes with an average of seventeen students per class at the expense of NEST's Middle School and High School students who will, as a result, have a reduced curriculum and an increase in class size to an average of thirty-one students per class (from an average of twenty). At the same time, the Charter School was formed against the explicit provisions of the Charter School Act.

### **The NEST +m Public School**

NEST is a public school that was founded in 2001 by a resolution adopted, on May 16, 2001, by The Board of Education of the City of New York and duly executed by former Chancellor Harold Levy and by Judith Rizzo, David Klasfeld and Chanté Vignola (the "Resolution"). The school was established after Chancellor Levy requested one Celenia Chevere, a long-time educator with a stellar track record in establishing and administering schools in New York City, to create a new school that would be the only K-12 public school in New York City housed in a single school building, with the intention of enabling a seamless K-12 integrated curriculum. The school, if successful, was designed to serve as a model of a public school with the intention that other schools using the same approach would be established in each borough of New York City.

The plan that established NEST provided for the following key features: (a) NEST would have an admission process that would assure equal access to the community and insure that the school's enrollment would be reflective of the diversity of School District One and of New York City as a whole; and (b) the school would occupy an entire school building. (EA)

NEST commenced its first year as a New York City Public School in September of 2001, with a student population of 130. In the present school year, there are 739 students enrolled. In school year 2006-2007, and pursuant to a revised estimate submitted by the school, NEST intends to maintain over 1,000 students.

NEST has become a model of excellent public school education. This year's scores in a variety of tests administered by New York State and New York City (and yet unpublished by the DOE), ranked NEST in the top three schools in New York City.

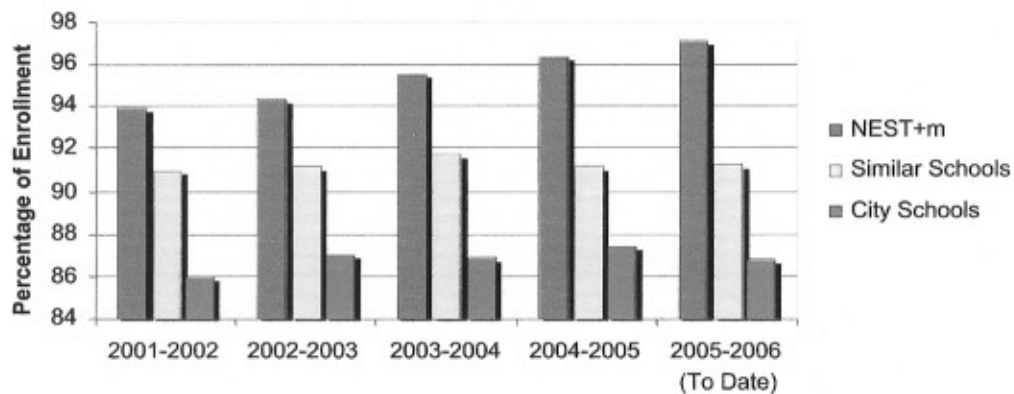
In fact, based on data provided by the DOE and as further testament to NEST's excellence, the Standardized Test Scores of NEST's students show consistent improvement, as follows: (LG)

- In 2003, based on the test scores in the English Language Arts (ELA) test administered by New York State and New York City, only 58 percent of NEST'S students achieved the highest performance levels available. By 2005, in the same ELA testing, 99.1 percent of NEST's students achieved the highest performance levels available.
- In 2002, based on the test scores in mathematics tests administered by New York State and New York City, only 41.5 percent of NEST's students achieved the highest performance levels available. By 2005, in the same mathematics' tests, 97.4 percent of NEST's students achieved the highest performance levels available.
- In 2003, based on the test scores in the English Language Arts exam for 8<sup>th</sup> grade administered by New York State (the "State ELA Test"), 37 percent of NEST's students achieved the highest performance levels available. By 2005, in the same New York State ELA Test, 96.8 percent

of NEST's students achieved the highest performance levels available on this test.

- In 2003, based on the test scores in the mathematics for 8<sup>th</sup> grade test administered by New York State (the "State Math Test"), 76 percent of NEST's students achieved the highest performance levels available. By 2005, in the State Math Test, 100.0 percent of NEST's students achieved the highest performance levels available.
- In 2003, based on the test scores in Science for 8<sup>th</sup> grade test administered by New York State (the "State Science Test"), 82.6 percent of NEST's students achieved the highest performance levels available. By 2005, in the State Science Test, 100.0 percent of NEST's students achieved the highest performance levels available.

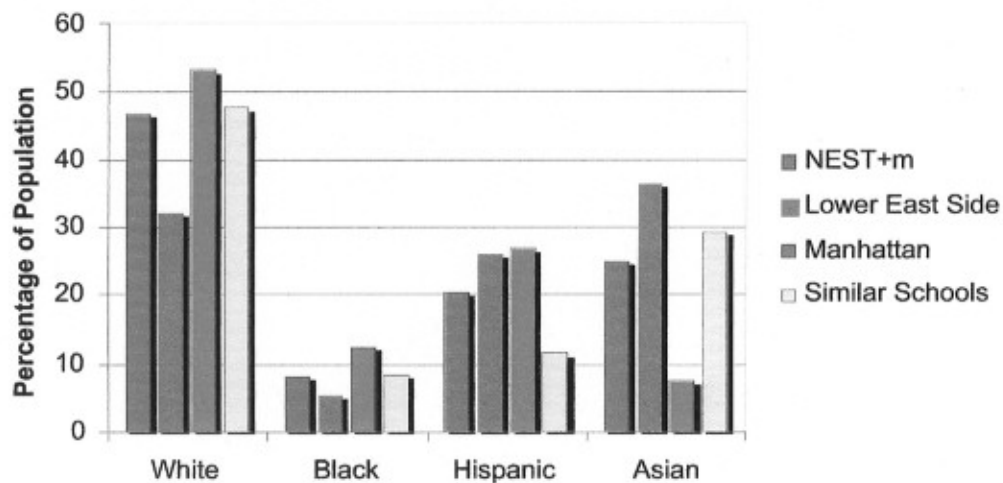
The achievement of NEST is not only academic. As illustrated below, NEST's attendance rate since its inception is the best in New York City. (LG)



Most of NEST's student population resides in District 1 and in the adjacent District 2 (which in many cases is physically closer to the School). In fact 40.3% percent of the student population of NEST resides within a 1 mile radius of NEST, and 60.8% percent of the student population of NEST resides within a 2 mile radius.

As such, NEST is truly a neighborhood school serving both the Lower East Side and Lower Manhattan.

Based on data provided by the DOE (as indicated in the chart below), NEST, a neighborhood school and the ethnic/racial background of NEST's student body, resembles that of New York City, the Lower East Side and is much more diverse than the profile of schools that are similar to NEST:



Based upon data available from the DOE, testing scores achieved by NEST's students exceed scores of schools that are similar to NEST who accept students based on screening. However, some of these similar schools, such as Hunter and Anderson, for example, admit students primarily based on an IQ-type testing. In fact, to be accepted into any of these programs, a kindergarten student must test in the top ONE OR TWO PERCENTILE in the Sanford-Binet Test or equivalent. Unlike the Hunter and Anderson programs however, NEST admits kindergarten students based on a three-hour play group in which each child's ability is observed and evaluated. Similarly, the admission policy for NEST Middle School and High School is more "holistic" as NEST looks more at the potential and motivation of each applicant rather than at any given I.Q. or other standardized test score.

The miracle of NEST is that it has been able to take “ordinary” students who are disciplined and motivated and turn these students into “Gifted and Talented” students. In recognition of NEST’s achievement in 2004, the DOE awarded NEST the status of a “Gifted and Talented School.” In fact, NEST is an example of public education at its best and should serve as a model for other public schools.

### **The Columbia Street Facility that Houses NEST**

Part of the resolution that founded NEST, provided that NEST would occupy a public school building located at 111 Columbia Street, New York, New York 10002 (the “Columbia Street Facility”). The Columbia Street Facility at that time housed two schools, the Leadership Secondary School and District 1 Collaborative High School, which at the time, had fewer than 250 students. NEST’s plan called for it to occupy the entire building and not to share the space. The Resolution closed both of the schools and NEST, with its 163 students, became the sole occupant of the Facility.

In order to enable NEST to operate as a K-12 facility, significant work was done on the Columbia Street Facility. Science and biology labs that were necessary for the school to fulfill its mission to focus on, *inter alia*, science and technology were built. In addition, when the Columbia Street Facility was first provided to NEST’s staff, it was infested with vermin. Many of the buildings windows were sealed and many rooms were not capable of usage. Lights, windows, plumbing and doors were broken. The school grounds were not useable and served as a garbage dump for the adjoining neighborhood and also served local drug users, dealers and prostitutes. In fact, in rehabilitating the Columbia Street Facility, used syringes and even a dead body were found on school grounds.

Part of the success of NEST is credited to a dedicated parent body. This parent body exerted significant physical labor and invested over \$600,000 in privately raised funds, the majority of which were donated by parents, to convert an abandoned rat infested building into a beautiful and thriving school. The parents, *inter alia*, provided funding to purchase and install the following unique items: dining hall, school kitchen, air conditioners for class rooms, outdoor playgrounds, video camera security system, dance studio, HS basketball courts, library, much of the painting and lighting. With parental assistance, the Columbia Street Facility was converted from an under-utilized dilapidated facility, into a fully occupied thriving public school.

### **The Charter School**

Some time prior to October of 2005, three employees of two private organizations, the Ross Institute for Advanced Study and Innovation in Education (hereinafter “Ross Institute”) and New York University (“NYU”), submitted an application to be granted a “charter” to operate a K-12 school under the Charter School Act. Two of the applicants for the charter did not reside in New York State and only one resides in the Upper West Side of the City (collectively, the “Applicants”). The Applicants submitted the application as part of their employment with the Ross Institute and New York University. Thereafter, the Applicants formed a “partnership” with their employers, so that the Ross Institute would eventually earn licensing and curriculum fees from the Charter School. At the same time, the other institutional partner of the charter school, NYU, would have (by its own admission in documents submitted to the DOE), an educational lab to experiment and a school that would serve to train teachers.



The Applicants and the institutional partners do not have the necessary experience and qualifications to manage, operate and run a K-12 school.

However, one of the driving forces behind the charter school is one Courtney Ross (“C. Ross”) the widow and beneficiary of the fortune of Steven J. Ross, the founder of Time Warner. C. Ross, who over the years has apparently developed a personal relationship with Chancellor Klein and his family, had decided to open and operate a chain of schools throughout the world that would maintain a “global” curriculum based upon the new “Multiple-Intelligences” theory of education. The Ross Institute formed by C. Ross is developing curricula that will be sold and/or licensed to the “Ross Global Academies.”

The Charter School is thus the first of such global chain of schools that the Ross Institute plans to form.

## **II. ARGUMENT**

### **REVOCATION OF THE CHARTER ISSUED TO ROSS GLOBAL ACADEMY**

#### **THE CHARTER SCHOOL SHOULD BE REVOKED BECAUSE RESPONDENT DID NOT PROVIDE APPROPRIATE NOTIFICATION TO THE LOCAL SCHOOL DISTRICT AND TO PUBLIC AND PRIVATE SCHOOLS IN THE DISTRICT**

The charter (the “Charter”) issued to Ross Global Academy (“Ross Academy” or the “Charter School”) should be revoked because at each significant stage of the chartering process, timely notice was not provided to public and non-public schools in the same geographic area where the proposed charter is to be located, such notice was not provided to NEST which was the principal school targeted by the DOE to house the charter school. and such notice was not provided to the local school district.

**§2857. Notice; review and assessment**

1. The board of regents **shall** distribute information announcing the availability of the charter school process described in this article to each local school district and public postsecondary education institution. At each significant stage of the chartering process, the charter entity and the board of regents **shall** provide appropriate notification to the school district in which the charter school is located **and** to public and nonpublic schools in the same geographic area as the proposed charter school. Prior to the issuance or renewal of a charter, the school district in which the charter school is located shall be given an opportunity to comment on the proposed charter to the community in connection with the foregoing.

New York Education Law §2857(1) (emphasis supplied).

Accordingly, Education Law §2857(1) imposes an affirmative, unwaivable obligation upon both: (a) the "charter entity" (i.e., the Respondent Chancellor) pursuant to Education Law §2851(3)(a), in the case at bar); and (b) on the Board of Regents to provide notice as set forth in the statute.

The Application contains numerous references to the Charter School's intention to be located on the Lower East Side of Manhattan in an area served by School District 1. See, e.g. Application at pp. 53, 57 and 102.

Indeed, the Application notes that prior to its submission to the charter entity "[T]he NYC DOE has committed to provide public school space for Ross Global Academy Charter School in Region 9 should such space be feasible within the Department's physical plant. The DOE has indicated that potential feasible locations in the preferred regions have been identified and community engagement efforts and space validation is currently under way to confirm the availability of the space and secure local support in the region.... Members of the Design Team are continuing

discussions with ... the superintendent of Region 9 regarding potential locations." Application at p. 102.

Thus, the first "critical step" in the chartering process was the actual submission of an application after the completion of pre-submission discussions between the DOE and the applicant and where the DOE had identified potential feasible facilities in the Lower East Side. Accordingly, notice of the proposed charter should have been provided by Chancellor Klein to all public and private schools in the Lower East Side, certainly to schools which had been targeted by the DOE such as NEST, and to the local district which is the Manhattan Community Board Number 3 a/k/a the Manhattan Lower East Side District (the "District").

In the case at bar, the DOE did not provide notice at this initial, critical step of the process to the District, did not provide such notice to other public and private schools in the area and certainly failed to supply notice to NEST, as such would be directly impacted by the proposed Charter School.

Later in the application process, in response to a letter from the New York State Education Department, the Applicant stated that with respect to the latest efforts to secure a location within the Lower East Side, "the DOE has indicated that potential, feasible locations in the preferred regions (i.e., the Lower East Side) have been identified". Application at p. 1773.

Accordingly, another critical step occurred during the application process once the DOE identified specific space within the Lower East Side. During such critical stage of the process, the charter entity, pursuant to Education Law §2857, must provide notice to local schools and to the local community. In the case at bar the charter entity, Chancellor Klein, did not provide any such notice to NEST, to other public and private school in the area and to the local District.

Another critical stage of the application process is the approval by the Regents. At that stage, the Regents must make sure that appropriate notice is provided. Education Law §2857(1), imposes an obligation to provide notice on **both** the "charter entity and board of regents." Here, where it is apparent from an application that a proposed charter school is targeted for a specific area, and the DOE has identified specific locations within that area, the Regents must provide additional notice to schools in the area as well as to the District. Here the Regents failed to provide the requisite notice.

The notice provisions of Education Law §2857 are material to the entire application process. Where a relatively simple statute provides individuals the power to commence the operation of a school that will be financed with government funds, it is vital that the community and local schools receive notice and have an opportunity to comment. Education Law §2852(2)(a) specifically provides that, "a charter school **SHALL not be approved**" unless that charter entity finds that the charter school described in the application meets the requirements set out in this article. In the case at bar, by failing to provide appropriate notice, the requirements set forth in Article 16 of the Education Law were not met and the charter must be revoked. See, e.g., In the Matter of the Board of Education of the Roosevelt Union Free School District et al. v. Board of Trustees of the State University of New York et al., 287 A.D. 2d 858, 731 N.Y.S. 2d 524 (3rd Dept. 2001) (where premised upon a strict interpretation of the statute, the lower court's determination was reversed, holding that the Regents in the resolution approving the charter failed to make the specific finding as mandated by the Education Law, that the charter school would "improve learning").

**THE CHARTER SHOULD BE REVOKED BECAUSE IT WAS  
EFFECTIVELY SUBMITTED BY TWO INSTITUTIONS,  
NOT INDIVIDUAL COMMUNITY MEMBERS AND  
THEREFORE FAILS TO COMPLY WITH THE  
PROVISIONS OF ARTICLE 16 OF THE EDUCATION LAW**

Education Law §2851 describes the entities that are eligible to apply for a charter school. The statute provides:

**§2851. Eligible applicants; submission**

1. An application to establish a charter school may be submitted by teachers, parents, school administrators, community residents or any combination thereof. Such application may be filed in conjunction with a college, university, museum, educational institution, not-for-profit corporation exempt from taxation under paragraph 3 of subsection (c) of section 501 of the internal revenue code or for-profit business or corporate entity authorized to do business in New York state. For charter schools established in conjunction with a for-profit business or corporate entity, the charter shall specify the extent of the entity's participation in the management and operation of the school.

Education Law §2851(1).

Accordingly, it is a prerequisite that an application for a charter school must be filed by individuals such as teachers, parents, school administrators or community residents. The plain language of the statute reveals that an application may not be independently filed by a corporation, a university or an educational institution or a not-for-profit corporation or any other entity. Any such institutional entity may only join an application of an applicant who is eligible to file an application.

The Charter with Ross Global was executed by Jennifer Chisdey ("J. Chisdey"), as the main applicant. The Application also has two co-applicants, Robert Durkin ("R. Durkin") and Megan Silander ("M. Silander").

J. Chisdey is an Education Associate and M. Silander is a Director of Education and Outreach at the Ross Institute, with the latter providing the Ross Institute as her mailing address in the Application. R. Durkin is employed by New

York University and lists NYU's Metropolitan Center for Urban Education, which also serves as his mailing address for the Application.

According to the Application, the Charter School will have the Ross Institute as an institutional partner organization. See, Application at p. 24. However, the Application is replete with references to another institution that has made commitments to the school, NYU's School of Education. See, e.g., Application at p. 32. In fact the Regents, in their Summary of Applicant Information, determined that the Charter School will, "also form a partnership with New York University" See Regents Summary annexed as an Exhibit to the Affidavit of Luis Gasco.

Moreover, in correspondence dated December 9, 2005 from Dean Mary Brabeck of the NYU's Steinhardt School of Education, addressed to a staff member of the DOE, she admitted that NYU took part in the design and planning of the charter school through Robert Durkin (one of the co-applicants) and another NYU graduate student. Dean Brabeck herself is on the Board of the Charter School, which Board is controlled by the Ross Institute and NYU. See, Dean Brabeck's letter, Application at p 1619. For a description of the Board, see Exhibit A to the Application which provides that the Board has four members who are from the Ross Institute, including C .Ross, and three members from NYU. The remaining two members are long-time affiliates of C. Ross.

One of the institutional partners, the Ross Institute, has contracted with the Charter School to provide certain "professional development" and "curriculum resources." See, Application, p. 39. Under an agreement between the parties, the Charter School, will pay an escalating fee to the Ross Institute (the "institutional partner") reaching \$320,000 per year as of year four. Application, p. 39. Moreover, the institutional partners did not provide any funding to the newly formed Charter

School and only provided some services as well as a loan in the amount of \$632,000 made by the Ross Institute. The loan will accrue interest at a rate of five (5%) per year. Accordingly, the loan made by the Ross Institute will be used to finance the establishment of a school that will purchase services from the Ross Institute in the amount of \$320,000 per year.

The Application also notes that the other institutional investor in the chartering process, NYU, enjoys a relationship with the Charter School that will serve New York University's own "self-interest" in that it will provide opportunities for research efforts and internship opportunities for NYU students. Application, p. 1619. As further noted in the Application, Ross Global will serve as a "lab" for NYU and the Ross Institute. Application, p.102 (the charter school "will serve as a lab school for professional development as part of NYU's teacher education program") See also, correspondence dated December 9, 2005 from Dean Mary Brabeck of NYU's Steinhardt School of Education to the Department of Education stating that the relationship between NYU and the Charter School, "will be founded on mutual self-interest" (Application at p. 1619).

The resume of the primary applicant M. Silander (Application at p. 122), provides additional evidence that the Applicants were acting on behalf of the institutional partners. It provides that she joined the Ross Institute in 2005. It notes under "Experience," that M. Silander has: "co-authored an application to the NYC Department of Education to open a new K-12 New York City Charter School.... has researched and analyzed successful school programs to inform charter school design... met with education experts to determine best practices in planning schools education program and...in addressing other startup challenges." Clearly, her only

task at the Ross Institute, the institutional partner, was to work on the Ross Global Application.

Accordingly, looking at the totality of circumstances, two private organizations, Ross Institute and NYU, operating through their employees, formed a charter school that will provide the Ross Institute \$320,000 in fees derived from the State of New York and provide NYU's professors a "lab" to conduct research and publish articles. NYU will also have a school that can serve as a training ground for NYU students. See, correspondence from NYU, Application, p. 1619. Moreover, these two institutions have complete control of the Charter School's board through employees of the institutions who will also serve on the board.

As clearly illustrated herein, the Applicants submitted the Application in their capacity as employees of the institutional partners. The institutional partners not only paid these employees for their work on the charter application, but also funded expenses incurred in the formation process.

Education Law §2851(1) clearly provides that community members must apply for a charter while an institutional partner can only join such application. To hold that employees of an institution can apply for a charter as part of their employment, would serve to void the plain meaning of that provision of the statute. That statute simply does not provide that any community member or institution can apply for a charter school. By contrast, it sets forth that the institution must *join* an application of an applicant who is a member of the community, a teacher or a parent.

Institutions operate through their employees and other organs. Accordingly, the actions of the organs of NYU and Ross Global must be attributed to these



institutions. An organ of an institution that applies for a charter school and spends significant part of her/his working time working on an application, cannot be said to be a community applicant within the plain meaning of §2851(1). If so interpreted, any institution would be able to start a charter school.

Since here, an institution started the Charter School, the Application does not comply with the requirements of Education Law §2851(1). A charter entity may only approve a charter that meets all the requirements set out in Article 16 of the Education Law. See Education Law §2852(2). Accordingly, because the Applicants are institutions, the Application did not meet the requirements of Section 2851(1). Hence, Chancellor Klein's approval of the Application and grant of the Charter, together with the Regents' determination to approve the Charter is in violation of the statute, arbitrary and capricious and should be set aside.

**THE CHARTER SHOULD BE REVOKED BECAUSE IT  
WAS NOT SUMMITTED BY COMMUNITY MEMBERS  
AND THEREFORE FAILS TO COMPLY WITH THE  
PROVISIONS OF ARTICLE 16 OF THE EDUCATION LAW**

As noted above, Education Law §2851(1), provides that an application for a charter is to be submitted by any one of the following parties: "[T]eachers, parents, school administrators, community residents or any combination thereof." Here, the Application was submitted by lead applicant M. Silander, who is not a resident of the State of New York. Co-applicant, R. Durkin, is likewise not a resident of the State of New York.

The case at bar raises a question with respect to the nexus to the specific community that an applicant must have in order to be able to apply for a charter school under §2851(1). Under the plain meaning of the statute, for example, an

individual who lives in London, England after abandoning his only child in France can apply for a charter school in New York because that person is a "parent."

The legislature could not have intended to enable any person who has no biological child, and is therefore a "parent," to apply for a charter school in New York. One must therefore look to other provisions of the statute to assist in the interpretation of §2851.

Education Law §2850 serves to elucidate the Charter School Act. It provides in §2850(2), that the purpose of the Act is to "provide opportunities for teachers, parents **and** community members to establish and maintain schools" that will be independent of the existing public school system. As such, the legislature expressed its intent that a community member must be involved in the application for a charter school.

None of the applicants involved in the instant case is currently a teacher or school administrator. Application, pp. 116-123. In addition, two of the Applicants live outside of the State of New York and the other lives in an affluent neighborhood on the West Side of Manhattan. Accordingly, none of the Applicants is a member of the Lower East Side community where the Charter School insists on being located. Finally, the Application does not indicate if any of the Applicants is a parent.

As noted above, Education Law §2852(2) provides that a charter entity may only approve a charter that meets all the requirements set out in Article 16 of the Education Law. Accordingly, the Applicants in the case at bar do not meet the requirements specified in §2851(1). Hence, Chancellor Klein's approval of the Application and grant of the Charter, as well as the Regents' determination to approve

the Charter, are both in violation of the statute, arbitrary and capricious and should be set aside.

**THE CHARTER SHOULD BE REVOKED BECAUSE THE  
APPLICANT FAILED TO SHOW THAT IT CAN OPERATE  
A SCHOOL IN AN EDUCATIONALLY SOUND MANNER**

In order for an application to be approved, the charter entity as well as the Regents must find that the applicant has demonstrated the ability to operate a school in an educationally sound manner.

Principal applicant M. Silander has been an employee of the Ross Institute since 2005. Based on her resume attached to the Application, since graduating from college in 1998, she has not maintained any job for much longer than two years (Application, p. 122). She has written an administrative survey, analyzed data and conducted visits as a research associate at the Evaluating and Training Institute in Los Angeles, California. She has worked on education policy and legislation relating to education. She has volunteered on behalf of the Peace Corps and has worked for the Ross Institute for the primary purpose of co-authoring the Application that serves as the basis for the dispute in this proceeding. It cannot be credibly argued that M. Silander, the primary applicant, has demonstrated that she has the ability to operate a school in an educationally sound manner. (See, Resume of Ms. Silander (Application at p. 122), that provides under "Experience," that M. Silander has: "co-authored an application to the NYC Department of Education to open a new K-12 New York City Charter School).

Similarly, co-applicant J. Chisdey, who executed the charter together with the DOE, does not have the experience to operate the Charter School in an educationally sound manner. Her employment history reveals that she has fewer than four years of

teaching experience. Her other positions in schools and education amount to approximately two years of experience at the Ross private school in the Hamptons. These positions did not involve school administration or teaching. Since January, 2005, J. Chisdey has worked as a director of education and outreach at the Ross Institute in New York, while still holding the position of "Leadership Counsel" at the Ross Private School in the Hamptons. Application, p. 116. Her resume and other information in the Application do not provide any detail as to the nature of her duties as "Leadership Counsel" or as "Director of Education Outreach."

There is very little information provided in the Application about J. Chisdey and it cannot be said in any way that she has demonstrated the ability to operate a school in an educationally sound manner as required by Education Law §2852(2)(b).

Co-Applicant R. Durkin, a disgraced former high school principal, is not a teacher or school administrator. According to information obtained from *The New York Times*, he was removed from his position as school principal for Washington Irving High School in Manhattan after an investigation **found** that he allowed nineteen students to graduate although they had failed required courses and had pressured teachers into giving students passing grades or had changed the grades himself without consulting them. According to *The Times* R. Durkin, was later reinstated after then-Chancellor Cortines expressed his, "profound concerns about the professional judgment he exercised in certifying nineteen students for graduation despite their failure of required courses." R. Durkin had been close to Mayor Giuliani, who according to *The New York Times*, lobbied Chancellor Cortines for his reinstatement. R. Durkin retired from active education administration and is now an employee of NYU at the Equity Assistance Center.

In what can only be deemed a glaring omission, the Application fails to disclose information about R. Durkin's past suspension after a serious offense. Clearly, in light of the foregoing, it cannot be said that the Application demonstrates that R. Durkin has the ability, at this stage of his career, to operate a school in an "educationally sound manner."

The principal "official" institutional partner of the proposed Charter School is the Ross Institute. Based on information provided in the Application, the Ross Institute does not have, and did not demonstrate the ability, to operate a school in an educationally sound manner. According to the Application, the Ross Institute was founded in 1996 and "offers instructional support, professional development and technical assistant services to partner institutions." Application, p. 39. The Ross Institute developed the curriculum that it proposes to offer for a fee, in 2004. According to the Application, the Ross Institute has never actually operated a school. The Application does not even specify or provide any information about the instructional support and professional development services that the Institute provides.

The certificate of incorporation of the Ross Institute was filed with the Secretary of State of Delaware on October 20, 2004, contradicting any assertion in the Application relating to the formation of the Ross Institute in 1996. Application, p. 1706. Neither the Chancellor nor the Regents questioned the Ross Institute relating to the discrepancy between information presented in the Application and supporting documentation, thus casting doubts on the entire Application review and approval process.

Further, a review of the Ross Institute's expenses for 2003 (the only financial data submitted with the copy of the Application that has been obtained), indicates that the Ross Institute spent, *inter alia*, \$214,935 on consultants, \$116,374 on promotion and public relations, \$80,339 on food and meals, and \$23,429 on lodging. With the bulk of its budget spent on promotion, food and lodging, how did the Ross Institute develop a curriculum and other models and educational materials that it intends to license to the Charter School it formed for more than \$325,000 per year of New York State funds?

Moreover, the same financial statements indicate that in 2003, the Ross Institute owed to the Ross Private School in the Hamptons, \$580,920. How could it be that the Ross Institute, which is supposed to provide materials to the publicly funded Charter School for \$325,000 per year, owes over \$500,000 to the private school that supposedly succeeded because of the Ross Institute? Could public funds derived from the Charter School be used to pay back debts to the private school? The financial statements cast doubt on the level of review applied by the Chancellor and Regents and also demonstrate that the Ross Institute cannot operate a school in an educationally or fiscally sound manner.

Exhibit C of the Application captioned "Ross Institute Track Record," purports to present to the Chancellor and the Regents the experience of the institute in providing "instructional and professional development programs, school curriculum development and student support programs." Application, p. 166. However, that exhibit deceptively provides the track record of the Ross Private School in the Hamptons. The Ross Private School however, was founded years before the Ross Institute was founded.

Exhibit C sets forth all of the accomplishments of the Ross Private School in the Hamptons. The Exhibit does not provide any detail of the Ross Institute's contribution to the success of that school and in any event, does not even allege that the Ross Institute has operated the Ross Private School. Similarly, Exhibit C to the Application describes the "Tensa Gymnasium in Stockholm" (the "Gymnasium"), but does not provide any meaningful tangible information about the role of the Ross Institute in the Gymnasium and does not assert that the Ross Institute had operated, managed or run that school.

The Ross Private School and the Ross Institute do not have any meaningful experience with K-3 classes. Application, p. 1761. In addition, as noted above, the Ross Institute has only in the past provided limited assistance to two existing schools: the Ross Private School in the Hamptons and the Gymnasium. According to the Application, the Ross Institute has never, operated or managed a school and has never started a school. No information was provided in the Application about NYU and its ability to operate a school in an educationally sound manner.

Education Law §2852(2) provides that a charter school shall not be approved unless the applicants can demonstrate the ability to operate the school in an educationally sound manner. In the instant proceeding, as clearly indicated above, the Applicants and the institutional partner have not demonstrated any track record or provided any data that can lead to the conclusion that any one of them can operate a school in an educationally sound manner. On the contrary, the voluminous Application (which numbers nearly 2,000 pages) is misleading and was meant to disguise the simple fact that no such track record can be demonstrated.

Accordingly, the decision by Chancellor Klein and the Regents to approve the Application and to grant the Charter is arbitrary and capricious, is against the law and should therefore be set aside.

**THE CHARTER SCHOOL WILL DISCRIMINATE  
AGAINST JEWISH STUDENTS AND EMPLOYEES**

The Application, as well as materials distributed by the Charter School, provide that it will offer a mandatory Saturday program that will be part of the regular schedule. See, Application, p. 1751 together with sample "Memorandum of Understanding between the Charter School and Student families Of The School," thereby forcing the parents and students who desire to attend the Charter School to execute a statement stating that "the child will participate in all aspects of the required school programming including...Saturday morning program". The document is attached as an exhibit to the affidavit of Luis Gasco.

Moreover, the Charter School intends to serve the Lower East Side of Manhattan and indeed demands that the DOE provide space in that part of New York City. While the Lower East Side is an ethnically diverse neighborhood, it still has a large Jewish population.

Education Law §2854(2) provides that a "charter school shall not discriminate against any student, employee or any other person...on any basis that would be unlawful if done by a school." Moreover, §2854(1)(b) provides that a charter school shall meet the same civil rights requirements applicable to public schools.

The Charter School has discriminated against Jews who comprise a large part of the population of New York City and the Lower East Side, in that any Jewish school-age child who observes the Sabbath, will not be able to attend the Charter



School. Moreover, the Charter School will use public funding to operate a school on Saturday.

Accordingly, the Charter School does not meet the requirements of Education Law §2854 and by virtue of Education Law § 2852, the Charter should not have been approved because it does not meet the requirements set forth in Article 16 of the Education Law and other applicable law. The Chancellor's and the Regents' decision to approve the application are, therefore, in violation of applicable law and the Charter should be revoked.

**THE DEPARTMENT OF EDUCATION DECISION TO PLACE THE  
CHARTER SCHOOL AT THE COLUMBIA STREET FACILITY THAT  
HOUSES NEST SHOULD BE REVOKED**

It cannot be disputed that NEST is one of the best schools in New York City, with a diverse student body that mirrors both the diversity of New York City as well as the diversity of the Lower East Side of Manhattan.

Likewise undisputed are the terms of the Resolution of the Board of Education, adopted by the prior administration and approved by former Chancellor Levy, providing that NEST will be a K-12 school. The explanation of the Resolution (as annexed to it and presented by Chancellor Levy), states that the "school will provide students with quality education programs through a lower, middle and upper school model housed at the same site. An essential element of the school will be a seamless K-12 approach."

Thus, as the Resolution provides that although NEST is "an academy" housed in one building that offers a seamless K-12 curriculum, the school is actually comprised of a lower school, a middle school and a high school with each school being allocated its own separate space. At the same time, due to a shortage of rooms in the building, the three schools share a part of the facility, such as the gym, the library, the kitchen, the dining room, the nurse's facility as well as some of the science labs. In addition, it is required to have separation between the lower school students and middle and upper school students so that, for example, a high school student does not share the same bathrooms with a kindergarten student.

The Facility has two floors with classroom space. The lower floor, commencing in the 2006-2007 school year, will serve five kindergarten classes, four first grade classes, three second grade classes, three third grade classes, three fourth grade classes and three fifth grade classes. The lower floor also houses the school's library (which is shared by the three schools), a small room that serves as a special language arts and library for the younger lower school students, a music room, a lower school science lab as well as a nurse's office and other offices that serve all three schools. The lower school's enrollment for the 2006/2007 school year will be 465 students. In the lower school, each class, as is typical in all lower schools in New York City, has an organic classroom. Typically, the students have all of their classes in the organic classroom and are in a specialty period outside of the classroom for one period of the day.

Applying the DOE's own current formula for school building usage (which formula, curiously, has been changed for NEST during each of the past years of operation), the lower floor of the school that houses the lower school is at full

capacity. If the DOE will decide to take any rooms from the lower school, or if as a result of the DOE's action any of the classes will have to be used by the upper schools, the class size of the remaining classes will increase. The DOE, in a letter to the school, has not demanded any classrooms for the charter school from the lower floor. However to the extent that such a demand will be made, or if the DOE will move any of the upper school classes to the lower floor, the arguments set forth herein with respect to the upper floor of the school will apply.

The "official" DOE determination with respect to the facility that will house Ross Global at NEST's Columbia Street Facility, was made on April 26, 2006. In that determination, the DOE concludes that it will appropriate the entire east side of the upper floor of the building that houses the NEST Middle School and High School.

This east section of the building that will be provided to the Charter School, consists of 11 classrooms and two offices. This section of the building will now house the Charter School's 160 students. In addition, the Charter School will have to share some of the building's facilities such as the gym, the cafeteria, the playgrounds and perhaps the library and school nurse. This leaves NEST with 23 classrooms for its 52 Middle School and High School Students.

For the reasons set forth below, the DOE's determination to house the Charter School at the Columbia Street Facility was: (a) an abuse of discretion; (b) arbitrary and capricious; (c) effected by an error of law; and (d) made in violation of applicable law and should be set aside.

**A. THE DEPARTMENT OF EDUCATION DETERMINATION WAS  
AT THE EXPENSE OF PUBLIC EDUCATION**

In order to garner approval of the Application, the Applicants submitted three separate budgets for the Charter School. As noted in the Application, "the first budget assumes that the school would be housed in a DOE facility... The second budget assumes that the school would lease, at a subsidized rate, a non-DOE facility" Application, p. 103.

The third budget assumed a market rate lease. Exhibit Q to the Application captioned "Budget Narrative – Market Rate Leased Facility," provides substantial insight and sheds light on the DOE's decision. The exhibit provides that "as a result of funds being redirected to cover lease costs," class size would increase to 24 students per class instead of the 20 per class desired by the Charter School. Application, p. 1672. Moreover the number of specialty teacher will grow only to seven in year four instead of ten because there will be less in funds available for teachers as a result of the lease payments. Application, p. 1673 note 31.

By letter dated November 14, 2005, the Applicants wrote to the New York State Department of Education to describe how the lease payments would "materially detract from the vision and mission of the charter school". The correspondence provides that: *"[T]he lease payments would [cause] the following impact: reduction in classroom instruction teachers from 17 to 13 in year 1... This would require a change to the programs we could offer either through a reduction in electives or by eliminating, for example, daily wellness. Delay in hiring a Director until the second year. The President would need to serve as a Director in the interim and would not*

*be able to focus as much on development needs... higher class size and less personal attention for each student".* Application, p. 1773.

Additionally, in the Application itself, the Applicants state that the cutbacks associated with lease payments will "result in increased class sizes, which will adversely impact the learning environment" Application p. 103.

According to the Application, the class size in the Charter School will be twenty (20) students per class. Because of the adverse impact resulting from the lease payments, as noted above, the Applicants opined that they would "prefer to be located in Department of Education space on the historic Lower East Side of Manhattan." Application, p. 102. Accordingly, early in the application process, "the NYC DOE has committed to provide public school space for Ross Global Academy Charter School in Region 9.... [and has] indicated that potential, feasible locations in the preferred regions have been identified." Application, p. 102.

Thus, in order to appease the desires of the Charter Schools (or those of C. Ross), the Chancellor and the DOE met the following demands of the Charter School all to the detriment of NEST:

- to locate a school on the "historic Lower East Side of Manhattan";
- to preserve the Charter School's class size of 20;
- to enable the Charter School to hire a director in the first year so that the president would not have to serve in a dual role;
- to retain the "daily wellness" program (whatever that may);
- to maintain all the electives desired by the Charter School;
- to enable the Charter School to pay licensing and curriculum fees to the Ross Institute

- to hire a director and president at an annual salary of \$225,000

**And, in order to satisfy each and every one of the foregoing demands, the Department of Education left NEST's middle school and high school students with 17 classrooms for 527 students as opposed to the Charter School's 11 classrooms for 160 Students. Moreover, the cutbacks will cause NEST to increase average class size for the upper floor that houses the high school and middle school TO 31 STUDENTS PER CLASS (from 20 students per class), reduce its curriculum and offer fewer classes and electives.**

Clearly, the DOE has significantly compromised one of the best performing public schools in order to preserve funds for the Charter School so that it may:

- **pay the Ross Institute licensing fees;**
- hire a director and president at a salary of \$225,000 per year;
- maintain class size at 20 instead of 24;
- preserve its wellness program;
- pay unusually high salaries to administrators; and
- **serve as a training ground for its institutional sponsors.**

The decision by the DOE is contrary to the very essence of the Education Law and the charter school concept because it will not "improve learning and achievement" of NEST's students. See, Education Law §§ 2850 and 2852 (2)(c). The decision and actions taken by the DOE are not only in violation of applicable law but are also: (a) an abuse of discretion; (b) arbitrary and capricious; and (c) effected by a error of law and should be set aside.

**B. THE DEPARTMENT OF EDUCATION HAS DESCRIMINATED  
AGAINST PUBLIC SCHOOLS**

The decision by the DOE to locate the Charter School at the Columbia Street facility discriminates against public school children and public school education.

The DOE has used one set of calculations to fix the capacity of NEST at 1,407 students. See Letter, attached as an exhibit to the affidavit of Luis Gasco, dated April 10, 2006, written by Garth Harries ("G. Harries"), Chief Executive Officer, Office of New Schools, New York Department of Education, and addressed to NEST parents: ("According to standard Department of Education Calculations, which are applied to every DOE school building, the classrooms and configuration at the building at 111 Columbia Street should support a student population of 1,407 Students"). This calculation made by the DOE assumes, under the DOE formula, a class size of 30 students per class. Once the 11 rooms set aside for the Charter School are taken away, NEST's students will average, based on the *Department's own formula*, 31 students per class.

The Department has allocated 11 classrooms to the Charter School in order to enable an average class size of twenty students per class. This class average was demanded by the Charter School in the Application, which is replete with assertions and commitments that it would have a class size of twenty students per class. See e.g., Application, p. 33.

In fact, contrary to the Application, the Charter School will only have 160 students in the first year leading to a class size of 17 students per class (based on 11 rooms allocated to the school). Moreover, the Application contains evidence that the Applicants assured the New York State Department of Education that the class size

would not exceed twenty and has committed to the State officials that such officials may inspect the school once opened to verify that the class size will not be above twenty students per class. Application, p.1775.

As set forth above in this Memorandum, the Charter School has asserted in the Application that it *prefers* not to pay for space because, "as a result of funds being redirected to cover lease costs," class size would increase to 24 students per class instead of the 20 per class desired.. Application, p. 1672. The Applicants then assert that an increase in class size from twenty to 24 would hurt the Charter School's education. Application at p, 103 (the funds needed to support a lease "will result in increased class size, which will adversely impact the learning environment").

In calculating the total enrollment of the Charter School, the DOE has used a formula of twenty students per class (the "Charter School Formula"), while using a formula of thirty students per class for NEST. However, if one were to apply the Charter School Formula to NEST, NEST's capacity is only 992 students and accordingly NEST, by application of the Charter School Formula, is at full capacity.

At least one court has held that the formulas actually employed by the DOE, "actually overstate schools' capacity." Campaign for Fiscal Equity et al. v. State of New York et al., 187 Misc.2d 1, 50, 719 N.Y.S.2d 475, 508 (Supreme Court, New York County 2001). Thus, the DOE applied one formula that overstates capacity of the school for purposes of evaluating NEST and another Charter School Formula that benefits learning and education to the Charter School.



This discrimination by the DOE against public school children in favor of a charter school is against applicable law. Education Law § 2850 provides that the purpose of Article 16 of the Education Law is to enable the establishment of charter schools, to *inter alia*, "improve learning and achievement." In addition, Education Law § 2852 (2) (c) makes it clear that **a charter can be approved only if "granting the application is likely to improve student learning and achievement and materially further the purposes set forth in Section 2850."**

It is well established that there is a meaningful correlation between the large classes in the [New York] City schools and poor performance. See, Campaign for Fiscal Equity v. State of New York, 295 A.D.2d.1, 744 N.Y.S.2d. 130, \_\_\_ (1st Dept. 2002) (stating, in part that, "class size has an effect on student outcomes and the smaller class size can boost student achievement").

Accordingly, the DOE cannot circumvent its obligation to use charter schools to improve learning, and benefiting such schools by discriminating against public schools in a way that will cause significant overcrowding and curriculum reduction on a public school. The DOE, therefore, cannot implement the Charter School in a way that will not improve overall education and learning in accordance with applicable law.

Therefore, DOE's determination to provide a part of the Columbia Street Facility to the Charter School that was based on discrimination between NEST students and the Charter School students, was: (a) an abuse of discretion; (b) arbitrary

and capricious; (c) effected by an error of law; (d) made in violation of applicable law and should be set aside.

**C. THE DEPARTMENT OF EDUCATION DETERMINATION WILL  
ADVERSLY AFFECT NEST STUDENTS' OVERCROWDED  
CLASSES AND  
DECREASE EDUCATION OPPORTUNITIES FOR NEST STUDENTS**

NEST's professional administration has concluded that if NEST will lose eleven classrooms, it will significantly adversely affect NEST by increasing class size, cause cutbacks of the curriculum and will decrease the number of college preparatory elective classes that the high school student take. Moreover, NEST's common spaces such as the gym, library and dinning room are overcrowded. For example, the complexity of scheduling dining room time for the lower, middle and high schools has already resulted in lunch for some high school students a 9:30 a.m.

The foregoing conclusions have been reached by a professional administration that in five years has built the best performing school in New York City. This professional administration, lead by NEST's principal and parent representatives, has attempted to explain its conclusions to the DOE. In a meeting among G. Harries, Chancellor Klein, Speaker Silver, and NEST's principal and parent representatives, held on Friday, April 21, 2006, NEST's administration explained the scheduling complexity and the adverse effect that the Charter School would have upon NEST. C Harreis and Chancellor Klein responded that the placement of the Charter School will not increase class size and will not alter NEST's curriculum. They stated that by the

following Monday morning (April 24<sup>th</sup>, 2006), G. Harries would return with a detailed plan showing how this could be achieved.

However, that following Monday morning, contrary to the promise made before Speaker Silver, G. Harries did not return with a plan. He simply made blanket statements that NEST could give up eleven rooms and would not be adversely affected because it could facilitate a system of "rotating" students and teachers.

The fact that at both of these meetings the DOE did not have a coherent plan as to how to coordinate the Charter School with NEST, indicates that the DOE never considered the impact on NEST and simply provided the Charter School with classrooms based on the twenty students per class formula requested, essentially directing to NEST make do with what remained.

The decision by the DOE, without considering all factors without having any plan and a decision that will ultimately have a serious adverse impact on NEST's students was (A) an abuse of discretion; (B) arbitrary and capricious, (C) effected by an error of law; (D) made in violation of applicable law and should be set aside.

**D. THE CHARTER SCHOOL ACT PROHIBITS ALLOCATION  
OF SPACE TO A CHARTER SCHOOL IN A BUILDING THAT IS  
COMPLETELY USED BY A PUBLIC SCHOOL PARTICULARLY  
WHERE THE CHARTER SCHOOL CAN PAY FOR A FACILITY OUT  
OF FUNDS THAT IT RECEIVES FROM THE STATE OF NEW YORK**

It is clear that the DOE's determination will adversely impact NEST student and student learning. Regardless of the "capacity" formula that the DOE decides to use for NEST this year, the entire Columbia Street Facility is used by NEST.

The ground floor of the school has a cafeteria, a gym, a lower school science lab and an exercise room for the younger students (K and first grade.) The lower floor of the Facility is completely used as it houses K-5 grades, plus NEST's library. The upper floor of the school is also completely used as it houses grades six through twelve. Every classroom is used almost every period of the school day for education purposes.

The facts outlined in the simultaneously submitted affidavits and Petition clearly demonstrate that annexing eleven rooms from NEST adversely impacts NEST's proven curriculum and will increase NEST's class size.. In addition, NEST uses every part of the Columbia Street Facility and the Charter School in its Application did represent that it will pay for space.

Under these circumstances, the DOE may not grant space to the Charter School in the Columbia Street Facility. Education Law § 2853(3) does provide that "charter school **may** be located in part of an existing public school building, in space provided on a private worksite, in a public building or any other suitable location. Thus, § 2853 (3)(a) **does not** provide that a public school **must** be housed in a public school building.

Education Law § 2853(3)(c) likewise provides that the "office of general accounting services will publish an annual list of vacant and unused building and vacant and **unused portions of buildings.**" Moreover, that section also provides that at the request of an applicant, "a school district shall make available a list of vacant and unused school building and vacant **and unused portions of school buildings**".

The provisions of § 2853(3)(c) qualify the provisions of §2853(3)(a). While the former section makes the general statement that a charter school may be located in a part of an existing school building, §2852(3)(c) indicates that the legislature intended that charter schools occupy only *vacant and unused portions of buildings*. Otherwise, the legislature could have mandated a district to publish a list of all of its buildings.

This interpretation of §2853(3)(a) of the Education Law coincides with the purpose and spirit of the Charter School Act and with its explicit provisions and mandate to, "improve student learning and achievement" See, Education Law §§2852 and 2852(c). The legislature, in §2852(3)(a), clearly did not intend to enable the placement of a charter school in a public school facility that is being used so that the placement of the charter school in the facility would increase class size and adversely impact the existing school and its curriculum.

Moreover, in the case at bar the Charter School submitted an application and represented three proposed budgets, one with a DOE building, one with a subsidized lease and one with a full market price lease. The Charter School obtained a charter based on the premise that it can (and is willing to), pay for a lease. The Charter School cannot now claim that it cannot pay for a building or that when submitting the Application, it did not intend and did not really have funds for a building (the DOE or Regents cannot grant a charter to an Applicant that cannot lease space). The Charter School does not have a "right" to obtain any part of a public school building. The students in the Columbia Street Facility have a right to a public education of the same quality and with the same curriculum and the same class size that they had in prior years.

Accordingly, the DOE's determination to place the Charter School in the

Columbia Street Facility was: (a) an abuse of discretion; (b) arbitrary and capricious; and (c) effected by an error of law and should be set aside.

**E. THE DECISION MADE BY THE DOE WAS MADE WITHOUT  
CONSIDERATION OF ALTERNATIVES WITHIN THE LOWER EAST SIDE  
AND OTHER PARTS OF NEW YORK CITY**

The DOE's decision was made without considering alternatives, including enabling the charter school to use its funds to lease facilities.

In the Application, the Applicants stated that the school preferred, "to be located in Department of Education space on the historic Lower East Side of Manhattan." Application, p. 102. The Application (submitted prior to October, 2005) stated that "the NYC DOE has committed to provide public school space for Ross Global Academy Charter School in Region 9.... [and has] indicated that potential, feasible locations in the preferred regions have been identified". Application, p. 102. Later in the application process, in response to a letter from the New York State Education Department, the Applicants stated that in regard to the latest efforts to secure a location within the Lower East Side, "the DOE has indicated that potential, feasible locations in the preferred regions [the Lower East Side L.G] have been identified." See, Application at p. 1773.

Moreover, it is apparent that because of the DOE's early commitments, private lease options were not pursued by the Applicants. Application p. 1752.

At that time, NEST had received certain budget approvals to have the school increase in size to over 1,000 students during school year 2006/2007. Moreover the DOE, which had previously insisted that NEST's capacity was 1300, had increased building capacity to approximately 1,400.

Finally, on or about March 31<sup>st</sup>, 2006, a representative of Speaker Sheldon's Silvers office told NEST parent leadership that the DOE has decided to place a charter school in the building. The school leadership contacted the DOE about this situation.

Thereafter the DOE took the following actions:

- by letter dated April 5<sup>th</sup>, 2006 from the DOE to NEST's principal, the DOE limited enrollment of the school to 899 students for school year 2006/2007;
- sent employees to the school, on April 5<sup>th</sup>, 2006, the and took lists of all students that had been accepted by NEST for school year 2006/2007;
- again advised the principal of NEST, on April 5<sup>th</sup>, 2006, the, that she should limit her enrollment despite the plan to grow the school to approximately 1,060 students in school year 2006/2007;
- started to call parents of students who had been accepted to NEST to ask if they intended to matriculate for the upcoming school year. At least in one instance the parent was told that NEST was having problems and could close down; and

- Changed the "official" capacity of the school from 1,300 students to 1,407 students.

Accordingly, long before announcing its decision to house the charter school at the expense of NEST's students, the DOE took steps to limit the enrollment of NEST, the most successful school in New York City.

Only after the NEST community discovered the DOE's intent, did G. Harries, the "Chief Executive Officer, Office of New Schools of the Department of Education," visit the Columbia Street Facility in an attempt to prove his point that NEST did indeed have room to house the Charter School.

Subsequently, in a letter to the NEST parents, G.. Harries wrote that NEST could house 1,407 students. He also stated that the DOE had not yet made a specific proposal to NEST about how the space would be used. He thus noted: "We have never suggested that transportable classrooms would be necessary and our goal [is]... not an increase class size...NEST has space to share". Accordingly, G. Harreis did not deny that the Columbia Street Facility had not been selected; he only indicated that his "goal" was not to increase NEST's class size.

Subsequently, a meeting was held with G. Harries, Chancellor Klein, Speaker Silver (NEST resides in the Speaker's district), the principal of NEST and parent representatives.

In that meeting, when other alternative locations for the Charter School were raised by the parent representatives, locations that were, in their opinions available, it was clear that the DOE had not conducted research to find a more appropriate location for the Charter School. Accordingly, G. Harries agreed to look into those locations over the weekend.



In addition, the DOE never considered other areas of New York City and simply decided to grant the Charter School's desire to locate in the "historic Lower East Side of Manhattan."

It is clear from the Application that the Applicants, from the time that the Application was submitted, had discussions with the DOE and understood that space would be provided to them within Region 9. No attempt was made by Applicants to lease space or to explore possibilities outside of their preferred area.

The totality of circumstances as outlined above make it clear that at the onset of the Application process, the DOE had located NEST and never made any attempt to locate another school and never followed any proper process or attempted to truly find a location for the school that would not adversely affect public education. The DOE's premature decision also prevented the Charter School from any meaningful attempt to find facilities that it could rent.

Finally, the Charter School stated in the Application and to questions raised in information sessions by NEST parents, that it would go anywhere in the City of New York designated by the DOE. In this respect, based on the Application and budget calculations contained therein, at least thirty percent (30%) of the Charter School's prospective students will come from the Bronx. Based on information obtained from the Charter School's information sessions, more than fifty percent (50%) of the Charter School's enrolled students do not reside in District 1 because the Charter School was open for enrollment to all New York City residents.

The DOE and the Charter School should have looked for other alternative locations all over New York City. No meaningful effort was made to look at schools throughout the City in order to appease the desires of the Ross Institute, C.Ross and NYU.

Accordingly, The DOE's decision was therefore: (a) an abuse of discretion; (b) arbitrary and capricious; (c) effected by an error of law; and (d) made in violation of applicable law and should be set aside.

**THE DECISION TO HOUSE THE CHARTER SCHOOL AT THE  
NEST FACILITY ENABLES THE CHARTER SCHOOL TO DOUBLE-  
DIP INTO PUBLIC FUNDS AND OBTAIN MORE THAN ITS SHARE  
OF PUBLIC FUNDS THAN PROVIDED  
UNDER THE CHARTER SCHOOL ACT**

According to the Application, the Charter School assumed that it would be housed at a DOE facility. The Charter School, in the Application and attached documents assumed that it would be housed in a public school building.

The Charter School was so certain that it would be housed in a public school building, that its budget does not include payment for utilities, maintenance, security and other services typically provided in a public school building.

Under the Charter School Act, all charter schools get a set amount per student pursuant to a formula prescribed by under the Charter School Act. The formula under the Charter Act provides a certain amount per month per student enrolled at the school.

The funds obtained by the Charter School are meant to enable the Charter School to pay for all operating expenses.

In the case at bar, the Charter School did not budget for the services outlined herein because it expected to be housed in a public school building and expected the DOE to pay for utilities, food, maintenance and other support. The Charter School is getting in-kind the foregoing services from the State of New York. However, the Charter School is also getting money from the State of New York to purchase these very same services. While the Charter School Act authorizes the State to enable the Charter School to be located at an unused facility, the Charter School Act does not

authorize the State to provide additional benefits such as utilities and maintenance, security and other services. Moreover, the Charter School expects to operate on Saturdays and every summer vacation during the month of July. Accordingly, by housing the Charter School in a DOE building, the expenses associated with services provided will be increased as more electricity will be consumed, overtime custodial and security service will be paid and all other expenses associated with expanded operations.

Thus, by housing the Charter School in NEST, the DOE will enable the Charter School to collect significant services in-kind, which are paid by for by the DOE despite the fact that the Charter School is obtaining funds to pay for these services from the State of New York. Under these circumstances, the decision of the DOE to provide the charter school a facility with all the amenities that the Charter School must purchase was: (a) an abuse of discretion; (b) arbitrary and capricious, (c) effected by an error of law; and (d) made in violation of applicable law and should be set aside.

For all of the foregoing reasons the charter should be set aside and the DOE's determination to place the Charter School at the Columbia Street Facility should also be set aside.

Dated: Scarsdale, New York  
May , 2006

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