SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Petitioner,

For a Judgment under Article 78 of the NY CPLR

– against –

BETTY A. ROSA, *ET AL.*

,

Respondents.

Index No. 902198-24

Motion Sequence No. 1

MEMORANDUM OF
THE CHARTER CENTER,
AND CIVIC BUILDERS, INC.
AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTRODUCTION

Charter schools are free public schools that provide a variety of alternatives to traditional zoned public schools. In New York City today, there are 274 charter schools serving approximately 146,000 students. New York City's charter sector is one of the top performing in the country, consistently narrowing the achievement gap with schools in more affluent suburbs.

The Legislature provides resources for the operation of public charter schools in New York City through two principal mechanisms: a funding mandate under which the City's Department of Education ("City DOE") must transfer a portion of its operating funding to charter schools based on the number of students the charter school serves; and a means for charter schools to obtain physical space in which to educate children. Charter schools in New York City are historically underfunded compared to district schools: The most recent Independent Budget Office of New York City analysis, conducted in 2017, found that NYC charter schools were underfunded by about $1,000 to $5,000 per student per year.[1] Thus, if a school of, say, 1,000 students, is underfunded at just the median gap of $2,500 per student, it would suffer a fiscal deficit of $2.5 million in 2017, an almost unsustainable amount.

Since 2019, district school enrollment for grades K through 12 has dropped by almost 150,000—from 934,000 students to 785,000.[2] During the same period, charter enrollment has

[1] New York City Indep. Budget Off., *With State Formula for Charter School Funding Likely to Change, City Costs to Grow More Than Budgeted* (2017), www.ibo.nyc.ny.us/iboreports/with-state-formula-for-charter-school-funding-likely-to-change-city-costs-to-grow-more-than-budgeted-march-2017.pdf. The magnitude of the disparity differed based on whether the school was co-located, received rental assistance, or received no rental assistance.

[2] *See* New York City Dept. of Educ. Demographic Snapshot for Grades K Through 12 for School Years 2018-19 to 2022-23, N.Y.C. Public Schs. (June 7, 2023), infohub.nyced.org/reports/students-and-schools/school-quality/information-and-data-overview (click on "Demographic Snapshot" to download Excel file); New York State Educ. Dept., Preliminary School Level Data by

(Footnote continued…)

increased by 25,000—from 119,000 students to 144,000. Yet the City DOE has made very little co-located space available to charter schools. In fact, as discussed in the Commissioner's brief, the City DOE routinely denies charter school requests for space. This practice began during the period when Bill de Blasio was Mayor, and it precipitated a crisis.[3] The Legislature responded by enacting Education Law § 2853(3)(e)(5), the provision at issue in this case.[4] Under § 2853(3)(e)(5), if the City DOE denies a charter school a co-location space, it must pay the charter school "the actual rental cost of an alternative privately owned site selected by the charter school," subject to a cap of 30% of the general per-pupil funding it receives from the City.

In this case, the Commissioner correctly applied the statute, awarding the charter school the "actual rental cost" it was incurring. The Commissioner's construction of the statute was consistent with case law, consistent with the practical realities of nonresidential leasing, and consistent with the City DOE's own published policies. Rather than acknowledge the governing legal principal, the City DOE asks this Court to depart from the ordinary and unambiguous meaning of the statute on the basis of speculation that the charter school applicant in this case might do something untoward. But the record is devoid of evidence supporting that speculation, and § 2853(3)(e) is not designed to serve the purpose the City DOE contends. The Commissioner's decision was correct and should be affirmed.

Grade 2023-24 (Mar. 16, 2024), https://www.p12.nysed.gov/irs/statistics/enroll-n-staff/home.html (click on "School Enrollment – All Students" to download Excel file).

[3] Mayor de Blasio had a well-documented antipathy to charter schools. *See, e.g.*, Marc Santora, *Cuomo Vows to Defend Charter Schools, Setting Up Another Battle With de Blasio*, N.Y. TIMES (Mar. 4, 2014); Gloria Alfinez, *A Mom's View: New York City Mayor Bill de Blasio Says He 'Hates' Charter Schools. We Need Less Hate and More Hope for Our Kids' Education*, THE 74 (July 12, 2019); Editorial, *Mayor de Blasio, Once Again, Sticks it to Charter School Students*, N.Y. POST (Mar.16, 2021).

[4] *See* Eliza Shapiro, *Testing New Law, City Charters Appeal to State for Space*, POLITICO (Jan. 7, 2015).

INTEREST OF AMICI

Amici are nonprofit organizations that provide financial and other support to public charter schools in New York City. They are committed to high-quality public schools and support high-quality charters to ensure that zip codes do not determine the quality of a student's education.

The Charter Center is a support and advocacy organization that works to solve charter sector-wide challenges and provide key resources and training to all NYC charter schools. Every day, educators, parents, policymakers, and visionaries pass through the Charter Center's doors, ready to engage the public in achieving a single goal — creating high-quality public school options for our City's children.

Civic Builders, Inc. is a New York City-based charitable organization that works to overcome the major hurdle of affordable, long-term facilities for charter schools. It partners with philanthropists and capital providers to design and manage affordable new financing and development solutions for high-quality schools. Since 2002, the organization has supported the growth of 83 schools educating more than 42,500 students annually. Civic Builders' portfolio represents $1.45 billion invested into economically distressed communities to ensure all students have access to safe, positive, and student-centered learning environments.

Amici have assisted and advised charter schools in renting, building, and renovating facilities in New York City. As such, they are well-positioned to assist the Court by informing it of the practical economic realities of developing and leasing nonresidential space in the City of New York.

ARGUMENT

A. The Commissioner's Construction of the Statute is Correct

The Commissioner properly construed the phrase "actual rental cost of an alternative privately owned site selected by the charter school." As the Commissioner explained in her decision,

the phrase "actual rental cost" "must be interpreted in accordance with its 'usual and commonly understood meaning.'" Commissioner's Decision dated Nov. 7, 2023 at 3 ("Commissioner's Decision") (quoting *Appeal of T.V.*, 62 Ed Dept Rep, Decision No. 18,265); *see Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016) ("In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase.") (cleaned up). As the Commissioner explained, "Merriam-Webster defines the term 'actual,' in relevant part, as 'existing in fact or reality.'" *Id.*

The Commissioner's decision is consistent with *Brooklyn Laboratory Charter School v. New York City Department of Education*, 58 Misc. 2d 726 (Sup. Ct. N.Y. County 2017). In that case, like this one, the City DOE failed to comply with Education Law § 2853(3)(e)(1)'s requirement that it provides space to the charter-school applicant. There, as here, the DOE was ordered to pay the charter school rental assistance.

In *Brooklyn Laboratory Charter School*, the City DOE tried to avoid its payment obligation by arguing that "actual rental cost" only included "base rent," and not "additional rent." *Brooklyn Laboratory Charter School*, 58 Misc. 2d at 729. Some background on the market for nonresidential space in the City of New York is helpful to understand the issue raised by the DOE in that case. In determining the "base rent," a landlord will typically include a prorated (*i.e.,* amortized) portion of its costs in acquiring, constructing, and/or renovating the base building and in constructing improvements (and, in addition, providing a monetary contribution for the tenant to construct its own improvements), plus a level of profit. If a landlord utilizes financing to pay for any of these costs, the debt service is factored into determining the base rent as well. In addition to the base rent, landlords typically pass through a spectrum of other costs they incur in owning and operating the property, including a pro-rata share of the real property taxes and building-wide repair and

maintenance, cleaning, and management. These other charges are generally referred to in leases as "additional rent." Regardless of whether it is called "base rent" or "additional rent," rental income is the only source of revenue that owners of nonresidential real estate have to cover *all* building-related expenses. Therefore, rent must be sufficient to cover the costs of acquisition, construction, improvements, repairs, maintenance, operations, and, to the extent costs are financed, debt service.

In *Brooklyn Laboratory Charter School*, the Court rejected the DOE's attempt to limit the types of expenditures that are included in "actual rental cost" under § 2853(3)(e)(5). The Court held that the costs of improvements and alterations were properly reimbursable as "actual rental costs." It explained: "Giving each word its ordinary import, 'actual rental cost' must mean the costs the charter school actually incurred in renting its facility." *Brooklyn Lab. Charter Sch.*, 58 Misc. 3d at 730.

The City DOE's own policy now confirms that "actual rental cost" includes both "base rent" and "additional rent," including expenses typically included in additional rent, such as "utilities, custodial services, property taxes, and/or extermination services." Ex. A, City DOE, Charter School Rental Assistance Policy ("Rental Assistance Policy") at 2 (2023).

Both the *Brooklyn Laboratory Charter School* case and the DOE's own published Policy are consistent with the intent of § 2853(3)(e)(5) to minimize the burden of a charter school having to rent space when the City DOE has not provided public facilities. When co-located in a City DOE facility, the charter school is not required to pay any facility-related costs. Once forced to find its own space, the charter school's rent must cover all the expenses of operating the facility (including repairs, cleaning, improvements, and so on). As the City DOE acknowledges in its petition, the goal of the rental assistance program is "to ensure that … DOE provides space for the school's authorized grade level expansion '*at no cost to the charter school*.'" Am. Pet. ¶ 14 (quoting § 2853(3)(e)(1)) (emphasis added). The Legislature chose to achieve this goal by enacting a

statute requiring the City DOE to pay the "actual rental cost" incurred by charter schools that do not receive co-located space from the City DOE.

Throughout its papers, the City DOE sprinkles in the term "arm's length." *E.g.*, Am. Pet. ¶¶ 5, 6, 14. The City DOE's position seems to be that affiliated transactions are forbidden. But the term "arm's length" appears nowhere in the statute. If the Legislature had wanted to forbid affiliated transactions, it would have said so. The fact that it did not is obvious from the face of the statute.

Moreover, the City DOE's own policy *allows* affiliated transactions and indeed requires that they be disclosed. The City asks for a statement from each charter school "confirming whether the charter school is affiliated in any way with the landlord," and asks that if the answer is "yes," that the charter school provide additional information. Ex. A, RENTAL ASSISTANCE POLICY 1. Contrary to its position in this proceeding, the City DOE's own policy does not deem existence of an affiliation between landlord and tenant as negating the statutory requirement of showing "actual rental cost."

Simply put, "actual rental cost" is measured by the amount of money that changes hands *in reality*. Nothing in the record of this case calls into question in any way the fact that the amount sought by Hellenic actually changed hands and therefore meets the statutory requirement. (Nor is there any suggestion that the amount sought exceeded the school's 30% cap.)

B. Contrary to the City DOE's Aspersions, the Record Reflects No Wrongdoing by Hellenic

Unable to offer a legal justification for its refusal to reimburse Hellenic for its actual rental cost as required by law, the City DOE casts unseemly aspersion on the school, referring to its sublease with Friends of Hellenic as "artificially inflated," and lacing its submission to the Court with insinuations that Hellenic's actions have been or could become somehow improper. *See*

Pet'rs' Mem. of L. in Supp. of Article 78 Pet. ("Pet'rs' Mem.") at 2, 13–14, 18. However, the record does not reflect *any* misconduct on Hellenic's part.

The City DOE also speculates that Hellenic may behave in bad faith in the future if City DOE properly reimburses it. According to the City DOE, if Hellenic receives the rental assistance it is entitled to by law, "the school would be free to create further related entities to assume the Purported Sublease and then purport to sub-sublease, sub-sub-sublease, and so on, to Hellenic for ever higher amounts, with the taxpayer having to foot the bill in the guise of increased rental assistance payments." *Id.* at 18–19.

Such speculation does not excuse the City DOE's failure to pay legally mandated rental assistance. The speculation fails to account for the Legislature's response to any such concern—the 30% cap in § 2853(3)(e)(5). Under Education Law § 2853(3)(e)(5), charter schools are only entitled to reimbursement of rental payments that are lower than 30% of the product of (i) the charter school's basic tuition and (ii) the number of enrolled students. Any incentive charter schools have to pay extra is limited by that statutory cap. The incentives that Petitioner imagines are also constrained by applicable law, which forbids the submission of false or fraudulent claims. Penal Law. § 155.40; State Finance Law § 189.

The DOE claims without explanation that "[t]he 30% Formula does not serve, and should not be viewed, as a kind of 'backstop.'" Pet'rs' Mem. at 19. But arguments that the 30% cap is insufficient, or that the term "actual rental costs" should be revised to require "arms-length rental costs"—or to impose some kind of market study obligation—should not be directed to this Court. Such arguments are for the Legislature, which has spoken unambiguously.

CONCLUSION

The legal question in this case is whether the entity was *really* paying rent. Substantial evidence in the record supports the Commissioner's conclusion that the answer is "yes." The petition should be dismissed and judgment should be awarded to Respondents.

Dated: New York, New York
July 11, 2024

Respectfully submitted,

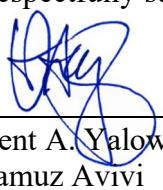

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Exhibit A

Department of Education

Charter School Rental Assistance Policy[1]
April 25, 2023

Policy Overview

This document comprises the New York City Department of Education's (DOE) policy for reimbursing New York City charter schools that are entitled to receive rental assistance pursuant to a decision issued by the New York State Commissioner of Education, binding arbitration, or an Article 78 proceeding (Decision). This policy applies to all charter schools, regardless of authorizer. The framework for the process is based upon §2853(3)(e) of the New York State Charter Schools Act (Act).

Questions regarding this policy can be directed to the DOE Charter Schools Office by submitting a ticket at charterschools.mojohelpdesk.com.

Policy in Detail

Step 1: Submission of Decision and Lease

In accordance with the Act, if an appeal results in a determination in favor of the charter school, the DOE is responsible for providing rental assistance to the charter school.[2]

Charter schools seeking rental assistance must submit the Decision and the signed and dated lease via the form available at https://www.cognitoforms.com/NYCDOECharterOffice/_20232024LeaseAssistanceRequestForm.

In addition to the Decision and the executed lease, charter schools must submit the following documents/information:

- All addenda, amendments, appendices, and exhibits to the lease(s);
- If the lease submitted for consideration is a sublease, then the master lease(s) must also be submitted;
- A statement confirming whether the charter school is affiliated[3] in any way with the landlord (or if a sublease, the sublandlord and/or landlord);
- If the charter school is affiliated in any way with the landlord/sublandlord, provide detailed information verifying that the lease/sublease is no less favorable to the Charter School than could be obtained at the time from a person that is not such an affiliate, member or employee;
- A letter stating the address that rental assistance is being requested for if the address is not clearly stated in the lease;

[1] Effective beginning with FY24 rental assistance requests.
[2] Education Law §2853(3)(e)(5).
[3] A charter school could be affiliated with the landlord/sublandlord by being controlled by or being under common control with the landlord/sublandlord, sharing employees, sharing board members, etc.

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- A letter identifying, in dollar amounts, the listed rental costs for which the charter school is seeking rental assistance in cases where the rental costs set forth in the lease are not in fixed dollar amounts but are instead calculated pursuant to a formula or other reference;
- A letter identifying the rental costs associated with and grade spans occupying each address for any and all addresses set forth in the lease in the event that multiple addresses are referenced in the lease/sublease;
- A letter stating the rental costs per DBN if multiple DBNs share a single site and operate under a single lease;
- A copy of the charter school's current charter agreement with its authorizer;
- Documentation indicating who the rent payment will be remitted to if not specified in the lease; and

All of the above-referenced documents must be signed and dated by all required parties, and, together with the lease(s), these documents comprise a "Complete Lease Submission."

Step 2: Lease Review

Upon receipt of the Decision, the lease, and any supporting documents, DOE will review to ensure that the charter school has provided a Complete Lease Submission and that the lease is in full force and effect for the applicable school year. The DOE will notify the charter school whether the submission is complete, or whether additional information is needed.

Rental assistance cannot be calculated without a Decision and Complete Lease Submission. If any documents are missing, or if additional information is needed, DOE will contact the school. Delays in providing a Complete Lease Submission may delay the payment of rental assistance.

In determining the amount of rental assistance to be paid, the DOE will calculate:

1. The "actual rental cost" of the alternative privately owned site(s) selected by the charter school. "Actual rental cost" may include the base rent amount payable to the landlord specified in the lease, as well as expenses payable to the landlord as additional rent under the lease that are directly and necessarily related to the school's rental of space for providing educational services to authorized, enrolled, eligible students (such as utilities, custodial services, property taxes, and/or extermination services) during a school year in a building that can be lawfully occupied for that purpose during that period. "Actual rental cost" does not include late fees, attorneys' fees, expenses resulting from a breach of the tenant's lease obligation (such as late rent payments, repairs caused by negligence, penalties), staff other than that directly and necessarily related to the school's rental of space, costs for buildings not occupied by authorized, enrolled, eligible students, or other costs that are not directly and necessarily resulting from the rental of space in the manner described in the preceding sentence.

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2. Per Pupil Funding: Thirty percent of the product of the charter school's basic tuition for the current school year and the number of students authorized for payment by the Decision for the current school year.[4]

The DOE will pay the charter school the lesser of its total actual rental cost[5] or thirty percent of the product of the charter school's basic tuition for the current school year for the number of students in approved grades served by the charter school at eligible sites.

Step 3: Issuance of Determination Letter

After reviewing the Decision and Complete Lease Submission, the DOE will send a Determination Letter to the charter school that includes:

1. Estimated total rental assistance to be paid during the school year; and
2. A projected payment schedule.

Note: Following receipt of a Determination Letter, should changes to a school's lease impact the rental assistance calculation, please contact the DOE immediately. The DOE will conduct a new review and issue an updated Determination Letter.

Step 4: Payment Disbursement

The DOE disburses rental assistance in six equal installments throughout the school year as follows:

Payment #	Target Disbursement Date
1	July 1
2	September 1
3	November 1
4	January 1
5	March 1
6	May 1

The Determination Letter will specify when rental assistance payments will begin. Complete Lease Submissions must be received by DOE no later than February 1[6] to be eligible for disbursement in the subsequent Payment 1.

Prior to each payment disbursement, the DOE will re-calculate the Per Pupil Funding amount based on actual student enrollment. If this calculation alters the amount of rental assistance, the charter school will receive an updated Determination Letter.

[4] For a newly authorized charter school, the rental assistance calculation will reference the projected enrollment invoice submitted by June 1 prior to the charter school's opening.
[5] Actual rental cost is calculated from July 1 to June 30 of the relevant fiscal year.
[6] Complete Lease Submissions for FY24 must be received by DOE no later than May 10, 2023 to be eligible for disbursement in the subsequent Payment 1.

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Step 5: End-of-Year Reconciliation

At the end of each school year, the DOE will reconcile rental assistance payments for all charter schools receiving rental assistance. Charter schools are responsible for submitting proof of payment and other documentation by published deadlines. Proof of payment must clearly indicate the entity receiving the rent payments from the charter school, and that the purpose of the payments is solely for rent of the premises. Unclear or incomplete proof of payment may impact the final rental assistance calculation for a charter school. Following the reconciliation process, adjustments may be necessary to make an additional payment or recoup overpayment of funds. Any adjustments will be made in the following school year beginning with Payment #3.