

January 17, 2006

BY FEDERAL EXPRESS

Kathy A. Ahearn, Esq.
Deputy Commissioner for Legal Affairs
Counsel to the Board of Regents
New York State Education Department
112 Education Building
Albany, NY 12234
Attn: Ms. Kirti Goswami

Dear Ms. Ahearn:

Re: Objections to Proposed Disposition of Assets/N-PCL §§ 510-511
Petitioner: Japanese Educational Institute of New York
Objector: Japanese School of New York PTA

Dear Ms. Ahearn:

The Japanese School of New York PTA (“PTA”) respectfully submits these objections to the request by the Japanese Educational Institute of New York (“JEI”) for consent or waiver of notice in connection with JEI’s application to the Supreme Court of the State of New York for the approval of the disposition of all or substantially all of its assets pursuant to N-PCL §§ 510-511.¹ See Verified Petition verified on December 28, 2005 (“Petition”).²

JEI is a New York State education corporation that operates the Japanese School of New York (“JSNY”), a private day school.³ JEI is the fee simple owner of a 16.5 acre educational campus in Greenwich, Connecticut which is JSNY’s home. JEI seeks Supreme Court approval of a proposed sale of the Greenwich Campus to a favored bidder for a price that is at least \$6.8

¹ The Commissioner of Education receives notice and review the application pursuant to Educ. Law § 216-a(4)(d)(3). In my letter to you dated December 6, 2005, I wrote that the PTA anticipated a request from JEI would be forthcoming and said that the PTA sought notice of the request and an opportunity to submit objections that would be considered before the Commissioner of Education made a decision.

² JEI’s counsel sent you a copy of the Petition for delivery to the State Education Department on December 30, 2005, the eve of the New Year holiday weekend.

³ The school is also known as the Greenwich Japanese School (“GJS”). JEI application also uses the terminology, “New York Japanese School” and “NYJS.”

million below fair market value. The Commissioner of Education (“Commissioner”) should withhold consent to this transaction and actively oppose it in the Supreme Court because:

- The consideration and terms of the proposed sale are not fair and reasonable.
- JEI’s plan for a sale and lease back of the Greenwich Campus fails to promote JEI’s not-for-profit educational corporate purposes and is actually detrimental to those purposes.
- The vote of the JEI Board of Trustees on November 29, 2005 allegedly approving the sale did not meet statutory requirements and must be disregarded.

The PTA⁴ is providing the Commissioner with considerable evidence supporting its objections. First, the PTA commissioned an independent appraisal of the property determining its fair market value as of the contract date. Enclosed is a copy of the expert report, entitled “Complete Appraisal and Self-Contained Report dated January 17, 2006,” by Christopher K. Kerin, MAI, CCIM (“Kerin Appraisal”). Second, the PTA’s President, Emil F. Jachmann, is submitting a comprehensive and detailed affidavit sworn to on January 17, 2006 (“Jachmann Affidavit”) with supporting documentation.

I will briefly summarize the legal and factual bases for each of the three separate grounds of objection. But first I would like to highlight the glaring defect with JEI’s application as regards the adequacy of consideration.

JEI’s Non-Disclosure of the Greenwich Valuation

JEI is asking the Commissioner to consent to the sale of the Greenwich Campus for \$20 million. Relying on a stale 2004 appraisal and a dubious “update,” JEI alleges that the fair market value of the Greenwich Campus is \$21.7 million, even though JEI admits that in March 2005 it received an offer for \$23 million. What JEI does not disclose to the Commissioner is that on November 23, 2005, the Township of Greenwich issued a determination that the fair market value (“FMV”) of the property was \$28,286,100 (the “Greenwich Valuation”). While the notice may not be a conclusive value determination in these proceedings, it certainly is a material fact that the trustees had to learn about and take seriously.⁵ Furthermore, an education corporation should disclose such a material fact in an application to the Supreme Court under N-PCL §§ 510-511.

⁴ The PTA is comprised of the parents whose children are enrolled in JSNY, and of the school’s pedagogical staff. There are approximately 170 families that have one or more children in the school. The parents from these families make up a large majority of the PTA members. These JSNY families are beneficiaries of the corporation that was created by the University of the State of New York.

⁵ The Petition does not even aver that the Greenwich Valuation was reported to each of the trustees before they voted on this transaction on November 29, 2005, or before JEI signed the contract on December 12, 2005

After the Greenwich Valuation was issued, the PTA commissioned a highly qualified independent expert to appraise the market value of the Greenwich Property as of the contract date. The result is the enclosed Kerin Appraisal, which determines that the FMV of the Greenwich Campus is \$26.8 million. Hence, JEI's proposed sale of the Greenwich Campus for \$20 million will reduce the corporation's net worth by \$6.8 million.

The Legal Standard

There is a well-established two-prong test that a not-for-profit organization must pass in order for it to obtain judicial authorization pursuant to N-PCL §§ 510-511 of a proposed sale of substantially all of its assets:

- (1) The consideration and terms of the transaction must have been fair and reasonable, and
- (2) The purposes of the corporation or the interests of the members will be promoted by the transaction.

Attorney General, Charities Bureau, "Guide to Sales and Other Dispositions of Assets Pursuant to Not-for-Profit Corporation Law §§ 510-511," p. 3.

In evaluating the first prong, the fairness and reasonableness of the consideration and terms of the transaction are to be evaluated at the time that the contract to sell is entered into. Church of God of Prospect Plaza, 76 A.D.2d 712, 717-718 (2d Dept. 1980). Current market value is the most reliable index for calculation of what constitutes a fair consideration for real property, absent any special circumstances. Wolkoff v. Church of St. Rita, 132 Misc.2d 464, 471, 505 N.Y.S.2d 327, 333 (Richmond Co. 1986), aff'd, 133 A.D.2d 267, 518 N.Y.S.2d 1020 (2d Dept. 1987) (petition of sale denied because sale price below appraised value); Rose Ocko Foundation, Inc. v. Lebovits, 259 A.D.2d 685, 686 N.Y.S.2d 861 (2d Dept. 1999) (sale disapproved because of inadequate consideration).

Under the second prong, the courts look at the transaction as a whole and determine whether or not it furthers the corporation's purposes. Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 186 Misc.2d 126, 151, 715 N.Y.S.2d 575, 593 (N.Y. Co. 1999) ("MEETH") (denying approval to sell property). The court will determine whether the board has fulfilled its "fiduciary obligation to act on behalf of the corporation... and advance its interests in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." Id., 186 Misc.2d 126, 151.

The Commissioner also has a unique legal review role pursuant to Educ. Law § 226(4). Because the University of the State of New York granted JEI its charter, the Commissioner on behalf of the Regents of the State of New York has a responsibility to investigate facts brought to

its attention that may indicate that a chartered education corporation is failing properly to “carry into effect its educational purposes” or that its officials are engaging in “neglect of duty” within the meaning of the statute.

Fair Consideration is Lacking

JEI’s proposed sale fails the first prong of the test. By far the most reliable measure of the FMV is the Kerin Appraisal, at \$26.8 million. The Greenwich Valuation is even higher, at \$28.3 million.

JEI tries to argue that \$20 million was the best price it could get in the real world of the market. This claim is demonstrably false, as shown in detail in the Jachmann Affidavit. JEI made a tentative deal for a sale and lease back with Westchester Fairfield Hebrew Academy (WFHA) in late 2003 or early 2004. Thereafter, JEI never used due diligence to test the market. WFHA became JEI’s favored buyer even before the JEI board of trustees authorized negotiating for a sale. Even after JEI was presented with an offer by another school to pay \$23 million for the property, including a four-year lease back, JEI failed to leverage that offer into a higher price from WFHA. The Petition is hopelessly vague on why with an offer of \$23 million in March 2005 it settled for a price of \$20 million in December 2005.

Finally, a decision to sell assets at substantially below market price cannot be countenanced if there are alternatives that will meet the organization’s needs. In the instant case the PTA has demonstrated that JEI can easily raise substantial revenues by renting out unused space at the Greenwich Campus. For example, the PTA itself produced a written offer from an established company that operates private schools around the world, pursuant to which it would pay JEI \$500,000 per year in rent and about \$300,000 in maintenance costs. If JEI had used due diligence to rent out the unused space it undoubtedly would have produced similar proposals. Rather, JEI’s failure to pursue alternatives and its immediate rejection of the offer the PTA facilitated, confirm that JEI has been fixated for two years on selling the property to a favored bidder, and does not really want to have superior alternatives presented to it.

The Purposes of the Corporation Will Not Be Promoted

JEI conjures up a financial crisis and tries to blame it on JEI’s ownership of the Greenwich Campus. Then, using flawed reasoning and a dearth of hard financial facts, JEI incorrectly asserts that the sale of the Greenwich Campus at below fair market value will resolve the supposed crisis.

In his affidavit, Mr. Jachmann demonstrates that the JSNY is not the cause of JEI’s alleged deficit. Then he shows that the alleged \$1.1 million in saving that would result from the deal is a myth.

In truth, the proposed sale and lease back deal will substantially reduce JEI's net worth, it will worsen its ongoing financial prospects by giving up a rapidly appreciating asset that could also be generating substantial rental income, and it will discourage families from enrolling their children in JSNY.

The Board of Trustees Approval Is Not Valid

N-PCL § 510 requires a vote of the Board of Trustees approving the proposed sale. The vote must be an informed vote, or else the trustees are violating their fiduciary duty of care. MEETH. In the instant case, it is apparent that the trustees were not presented with and did not consider a crucial material fact -- the Greenwich Valuation of \$28.3 million -- when they voted on November 29, 2005.

The Board of Trustees is also invalid because it is the product of a governance structure and practice at JEI that does not satisfy basic standards applicable to an education corporation. JEI's board of trustees is comprised of 37 Japanese business corporation executives, one corporate lawyer, one Japanese diplomat, and JEI's chief executive officer. According to its charter and by-laws, JEI has no members. In fact, approximately 37 of the 40 trustees are representatives of 37 different corporations that have many business and cross-ownership interrelationships.⁶ The de facto members of JEI are the corporations in this business group plus the Consulate General of Japan. Jachmann Affidavit ¶¶ 21-27.

Not one of JEI's 40 trustees is academically or professionally trained as educational administrator, elementary/secondary school teacher; developmental psychologist, private school recruitment/admissions director, or private school development professional.⁷ There is no representation on the board for the beneficiaries of the corporation, i.e., the mothers and fathers of the children enrolled in JEI programs. JEI has not even placed on its governing board a non-voting trustee chosen by any of the parent groups or any of the PTAs existing at JEI's four programs. Board meetings are conducted in Manhattan. Few of the Trustees have visited the Greenwich Campus or observed the school program. Id.

The all-male JEI board follows the common practice in the Japanese business corporate world of letting a small control group make decisions. Unanimous support for the control group's policies and decisions is expected and the voting record shows that unanimous decisions are the rule. Although the trustees nominally serve as individuals, for the most part they are

⁶ Upon information and belief the law firm of the attorney trustee has represented some of the businesses corporations whose executives fill 37 seats on the board, and the diplomat trustee works for a Japanese consulate which lends assistance to Japanese business interests in the United State.

⁷ It is possible that a minor exception is JEI's new Executive Secretary, who also is listed as a trustee.

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neither independent of their corporate employers that put them on the board of trustees nor of the JEI control group. Id.

In deciding to sell the Greenwich Campus, and then deciding to sell it to a favored buyer at a loss of \$6.8 million, as in all or virtually all other decisions at JEI, individual trustees did not exercise independent judgment. Their loyalties are with the business corporations that de facto appointed them to the JEI board, and to the control group of trustees at JEI who make the decisions and expect and receive unanimous support from their business and diplomatic colleagues. The November 29th vote is not valid because it is the product of a governance structure and practice which does not satisfy the standards of the Education Law.

Conclusion

JEI's proposed sale of substantially all of its assets does not pass either prong of the two-pronged test under N-PCL §§ 510-511. Its governance process does not satisfy the standards of the Education Law. The Commissioner should not consent to the application and should actively oppose it before the Supreme Court.

Please feel free to contact me if you need any further information or analysis. Thank you for your consideration of these objections.

Respectfully submitted,
SZOLD & BRANDWEN, P.C.

By: Arthur R. Block, Esq.

ARB/anh

enc.

cc: Douglas T. Schwarz, Esq. (letter by fax and mail; encs. by hand)
Emil F. Jachmann, PTA President (by e-mail w/o encs. & mail)