

As a follow up to our discussion during the capacity interview, we've put together the below to provide some additional context and legal analysis that we hope will be helpful to the Department in making a determination to grant us a charter for Ember:

### **What are the potential charter structures for Ember Charter School?**

While we've initially requested that TFOA's current charter be "merged" into Ember's new K-12 charter upon its issuance by the Regents, we assert that there are several structural approaches the Regents could adopt under the law that would effectuate the overall design intention proposed in our application. We've outlined two such approaches below, highlighting the attendant statutory language that supports the efficacy of each structure:

#### **A) Department recommends the Regents issue the new K-12 Ember charter and then concurrently consolidate TFOA's existing K-6 charter into Ember's new charter as requested in the application.**

Section 223 of the Education Law permits the Regents to consolidate two or more corporations chartered under their authority into a single entity:

§ 223. Consolidation of corporations. Any two or more corporations chartered under the powers of the regents or incorporated under a special act of the legislature or under a general law for purposes for which a charter may be granted by the regents may enter into an agreement for the consolidation of such corporations, setting forth the terms and conditions of consolidation, the name of the proposed corporation, the place or places where the institution or institutions to be maintained is or are to be located, the number of its directors, which may be five or more, the time of the annual election and the names of the persons to be directors until the first annual meeting.

In issuing a K-12 charter for Ember, and then subsequently consolidating TFOA's existing K-6 charter into the newly formed K-12 Ember charter, the Regents would accomplish the merger request outlined in our initial Ember charter application.

At the capacity interview, NYSED counsel raised Education Law's Section 2854(3)(b-1) as a potential challenge to this merger approach. Education Law's Section 2854(3)(b-1) declares that the right to collective bargaining attaches to a school where the enrollment of a newly issued charter exceeds 250 students within its first two years. Yet in accordance with Education Law Section 216 (a)(4), the merger provisions of the N-PCL control in this situation and thus mitigates against the application of this provision in the case of such an approved merger of a newly issued K-12 Ember charter and the existing K-6 TFOA charter, both issued by the Regents:

N-PCL Section 905(b)(1) states: "When such merger or consolidation has been effected: (1) [s]uch surviving or consolidated corporation shall thereafter, consistently with its certificate of incorporation as altered or established by the merger or consolidation, possess all the rights, privileges, immunities, powers and purposes of each of the constituent corporations."

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Therefore Section 905(b)(1) holds that Ember as the surviving consolidated entity would retain the rights, privileges, immunities, powers and purposes of TFOA, which in this case would mean Ember retains TFOA's privileged exemption to, and/or immunity from the application of Education Law's Section 2854(3)(b-1) since TFOA did not exceed 250 students within the first two years of its charter, thus earning this right of perpetual exemption to, and/or immunity from this provision.

**Exemption under Education Law's Section 2854(3)(b-1)(ii):** Still further, the Regents could also choose to invoke Education Law's Section 2854(3)(b-1)(ii), which contains a provision that allows for the Regents to waive the applicability of Section 2854(3)(b-1) for up to ten charters.

**B) Department recommends the Regents issue Ember's charter as a second charter to TFOA, one spanning Grades 7-12, and concurrently authorizes TFOA to operate both charters under a single education corporation.**

Education Law Section 2853 1(b-1) states:

“An education corporation operating a charter school shall be authorized to operate more than one school or house any grade at more than one site, provided that a charter must be issued for each such additional school or site in accordance with the requirements for the issuance of a charter pursuant to this article and that each such additional school or site shall count as a charter issued pursuant to subdivision nine of section twenty eight hundred fifty-two of this article; and provided further that: (A) a charter school may operate in more than one building at a single site; and (B) a charter school which provides instruction to its students at different locations for a portion of their school day shall be deemed to be operating at a single site.

Under this provision and approach, TFOA would possess two charters that we would be able to operate as one K-12 school, serving students across multiple sites. The newly issued 7-12 charter would not exceed 250 students within its first two years, thus avoiding the application of Section 2854(3)(b-1).

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In both approaches (A) and (B) above, we would achieve the overarching design aim outlined in our Ember Charter application, which would be to realize the opportunity to grow into a K-12 charter with sufficient planning and operational runway to achieve the innovative structural components described therein. Each of these approaches would also permit us to manage the K-6 and 7-12 entities under one budget and fiscal blueprint, maximizing our operational and financial efficiencies.

**Is Ember's proposed study abroad program considered a separate school operating abroad?**

No, Ember's proposed study abroad program will NOT be operated as a separate school operating abroad. Students will always be, and shall remain enrolled at Ember in Brooklyn, and in fact will spend most of the school year in Brooklyn. In many ways the Ember study abroad component is simply an extended field trip, with students traveling for less than 50% of our standard school year. Upon their return to Brooklyn each semester, students will continue to receive instruction at our Brooklyn school location.

While an issue of regulator oversight was raised at the capacity interview insofar as the distance involved in the study abroad component might present a significant impediment to regulatory oversight, we assert that there is actually no such oversight issue, as school field trips, extended or otherwise, are not and have not been subject to regulator oversight that would require such a regulatory visit. Indeed if a school were to take their 8<sup>th</sup> grade students on a 5-week expedition tracing the Underground Railroad from Mississippi to Ohio, learning and exploring the history, culture and economic circumstances of the 18<sup>th</sup> and 19<sup>th</sup> centuries in the Western Hemisphere, regulators would not endeavor to visit and inspect the hotels, college campuses, museums, historic sites, etc. that would be involved in such a field trip. Ember's proposed travel to Ghana should be viewed no differently as it will in many ways resemble such an exploratory extended field trip.

**Is it legal for Ember to expend state and federal funds on the study abroad component?**

Yes. In reviewing the law, we have found nothing to indicate that there are any legal impediments to using public funds to support the study abroad component of Ember's proposed educational program.<sup>1</sup>

In examining this question, our legal team has determined that this analysis revolves around two important factors: use of state funds and use of federal funds. In both sets of analysis, we have found that as long as funds are expended within the context of achieving the programmatic goals outlined in the Ember charter, expenditures of state and federal funds on the international component are fully permissible.

Use of state funds: even in the context of the most narrow interpretation of the existing New York State Charter Schools Act, our legal analysis has determined that it is permissible for Ember to expend its funds allocated by the state on the study abroad component. From New York State's perspective, expenditures out of the country are viewed similarly to expenditures out of state, and therefore any expenditure that would be permissible by Ember on products or services from out of state vendors should be viewed similarly as expenditures by Ember on products or services from international vendors. For example, expenditures by Ember for the purchase of a subscription from MathsPathways, a company based in Australia, for access to its online personalized math learning platform would be viewed and treated similarly to the purchase of a subscription from Dreambox Learning, a company based in Washington State, for access to its online personalized math learning platform. Similarly the expenditures associated with the cost of renting dormitory rooms from the University of Ghana for our students during their study abroad experience would be viewed and treated similar to renting dormitory rooms from the University of Virginia for our students during a college tour across the south.

In fact under Section 2854-1(b) of the New York State Charter Schools Act, charter schools are otherwise exempted from the regulatory constraints otherwise applicable to public or private schools, even school districts, except as otherwise highlighted in the Charter Act. Given that the Charter Act contains no explicit bar to expending funds in this manner, and conversely implies that

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<sup>1</sup> The one caveat to the above analysis for both state and federal use of funds is that Ember's expenditures in the international context could not be conducted with any countries and/or entities otherwise limited or prohibited from such business transactions by entities and citizens of the United States in accordance with any treaty, sanctions or other international resolution to which the United States is a signatory.

public funding be expended in service to the program outlined in the proposed charter, Ember's use of funds would appear self authorizing insofar as the various uses of such funds for student's study abroad experience would fall within the scope of achieving the program described in Ember's submitted charter proposal.

Finally, there are a wide variety of state funded colleges, universities, private and public schools that sponsor (in whole and in part) study abroad programs for students.

Use of federal funds: our analysis of the use of federal funds is similar to that of our analysis for state funds, insofar as such federal funds must be expended for and on behalf of achieving the educational program objectives as outlined in Ember's charter, particularly in meeting the needs of at-risk and vulnerable students for which the federal funds have been allocated. As Ember's entire study abroad program is designed to meet the needs of at-risk and vulnerable students, Ember's use of funds for the study abroad experience would appear to be self authorizing insofar as the various uses of such funds for student's study abroad experience would fall within the scope of achieving these programmatic purposes as described in Ember's submitted charter proposal.

Again, there are a vast number of federally funded colleges and universities that fund study abroad programs, often directly with federally funded student financial aid applied directly to the cost associated with the study abroad program.

**What happens to students who parents decline to allow their student to participate in the study abroad component?**

Ember will serve all enrolled students whether or not they opt into the study abroad component.

**What happens to students who for one reason or another, need to return to Brooklyn in the midst of the study abroad component?**

Ember will serve all enrolled students whether or not they participate in the study abroad component, and thus we will be prepared to continue to serve students' instructional needs should they need to return in the midst of the study abroad component.

**Why a "merger" into a new K-12 NYSED charter school?**

There are three major reasons why we've chosen to merge our existing K-6 TFOA charter into a new NYSED K-12 charter:

- 1) Ongoing commitment to current students: the issuance of a new K-12 charter in 2016 would permit us to continue growing one grade at a time contiguously, with no gaps in service for our current and first cohorts of students who started with us in August 2011;
- 2) Maximize planning and preparation time: the issuance of a new K-12 charter in 2016 would position us to maximize the planning and preparation time for the most innovative portions of our growth model: the intensive study abroad and boarding school components. Without the operational certainty of a K-12 charter it would be difficult to obtain necessary and timely partnerships and related financing to achieve either of these components:

Study Abroad: if we are awarded our new charter in June 2016, we will have 14-months to execute the programming and operational plans for the intensive study abroad components. Alternatively, if we are forced to wait for the NYC DOE's next renewal and revision process, we could be left with a mere 4-month execution window, which would make achieving the study abroad program for the 2017-18 school year nearly impossible, creating a ripple effect that would ultimately deprive our first cohort of students (current 5th Grade students) of their opportunity to study abroad.

Boarding school: it is well known that facilities projects in New York City can take several years to complete, placing a high premium on maximizing the available timeline to achieve construction project milestones. While we have already completed two years of preliminary planning for a facility capable of providing sufficient space for a state of the art dormitory, the issuance of a new K-12 charter in 2016 would give us both a 3-year window for project completion, as well as the necessary finance footprint (driven by enrollment) that will enable us to have sufficient financing for such a project. Alternatively, if we are forced to wait for the NYC DOE's next renewal and revision process, we could lose nearly a year of critical operational planning and execution time.

- 3) Need for a forward-thinking authorizer: as the NYC DOE is no longer a charter school authorizer, we are seeking a relationship with an authorizer who has a long term view, investment and commitment to fostering innovation in public schooling via an active and positive engagement of its charter school authorizing mechanism. Not unlike Google or Apple's choice to locate their organizations in Silicon Valley, we hope to achieve something similar in garnering a new K-12 charter from NYSED in 2016, becoming a member of a community of public school organizations doing our part to help further advance New York State's (and by extension NYSED's) role as the Silicon Valley of education innovation.

### **Why does Ember have a boarding school component?**

The Mid-Continent Regional Educational Laboratory (McREL) has 200 standards and 3,093 benchmarks for evaluating K-12 education. Based on these standards and benchmarks, McREL determined that over 15,000 hours of instruction would be required to adequately prepare students. A typical 180-day-school year with 5.6 hours of instruction for 13 years (K-12) provides only 13,104 hours of instruction. Nonetheless, this is assuming that the instruction is at 100% efficiency.

A study by Learning 24/7, determined that most classrooms are only between 21% and 69% efficient with their school hours, and at 69%, 13,104 hours become 9,042 hours. At 21% efficiency, students receive only 2,752 hours of training, and that is assuming that the students are coming in at grade level. Therefore, even if the students are already at grade level, it is virtually impossible to properly prepare students within the typical American school structure. And, this does not take into account the "Summer Slide."

The Summer Slide has been well documented. In short, by middle school, the gap between low and middle-income students is two to three years no matter how much learning happens during the academic year. This gap is due to the opportunities middle-income children have during their summers to continue and build upon the

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information they learned within the year – including visits to museums and summer camp– while low income children swiftly lose the material they learned during the school year, because of a lack of intellectual stimulation during the summer.

Almost 100% of our students come from low- income households. We want to give our students the opportunities that they would never be afforded to them unless they were born into other families. The SEED public boarding school has had great success using a boarding model in DC, and its other campuses. At SEED, 91% of ninth graders eventually graduate, and 97% of graduating seniors are accepted to four-year colleges. We believe we can have similar success with our boarding school model in Brooklyn.