

Matter of Litichevsky v New York City Bd. of Educ.

2011 NY Slip Op 33494(U)

December 28, 2011

Sup Ct, NY County

Docket Number: 108290/11

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 108290/2011
BORIS LITICHEVSKY, ET.
vs.
NYC BOARD OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *petition is decided*
in accordance with the annexed
decision & order.

FILED

JAN 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/28/11

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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In the Matter of BORIS LITICHEVSKY, individually and as a parent and natural guardian of STEVEN LITICHEVSKY, infant, JAMES PAOLICELLI, individually and as a parent and natural guardian of VINCENT PAOLICELLI, infant, ARINA SHABAKAEVA, individually and as a parent and natural guardian of VLADISLAVA SHABAKAEVA, infant, SAEED A. BUFF, individually and as a parent and natural guardian of UMER A. BUFF, infant, WILMEC CHIMBAY, as a parent and natural guardian of JECUI CHIMBAY and JECENIA CHIMBAY, infants, SHEREEN LASHARI, individually and as a parent and natural guardian of MOHAMMOD BILAL and ABDURREHUNAN LASHARI, infants, ROSARIO REDON, individually and natural guardian of VICTOR RENDON, infant, MEI ZHI CHEN, individually and as a parent and natural guardian of AOHUA YANG, infant, AGNES JEON, individually and as a parent and natural guardian of DANNY JEON, infant, YELENA REZNIK, individually and as a parent and natural guardian of ANDREW VOVNOBOY, infant, NANCY RODRIGUEZ, individually and as a parent and natural guardian of KRISTINA RODRIGUEZ, infant, JOSE RICO, individually and as a parent and natural guardian of STEPHEN RICO, infant, JULIANA FLORES, individually and as a parent and natural guardian of ERIC FLORES, WENDY FLORES, EVELYN FLORES, infants, REYNA RAMIREZ, individually and as a parent and natural guardian of MALRA RAMIREZ, infant, AMANDA G. TAPLA, individually and as a parent and natural guardian of VANESSA TAPLA, infant, GUADALUPE MEJIA, individually and as a parent and natural guardian of unnamed infant, DELFINA FUENTES, individually and as a parent and natural guardian of JOSE FUENTES, infant, AUREA MOLINA and ALAN HIRSH, individually and as parents and natural guardians of DAKOTA PRADO, infant, ANISHA DECOTEAU, individually and as a parent and natural guardian of DON JUAN MENDEZ, infant, IRENE GINDA, individually and as a parent and natural guardian of ISOBELE GINDA, infant, YEVGENIYA BOGDONOVA, individually and as a parent and natural guardian of SEMONA BARDMAN, infant, ALLA KAPLAN, individually and as a parent and natural guardian of BORIS KAPLAN, infant, LISA LAU, individually and as a parent and natural guardian of PEONY TEO, infant, ANTONIETTA FIORENTINO, individually and as a parent and natural guardian of MICHELLE FIORENTINO, infant, SILVIA E. MEDINA, individually and as a parent and natural guardian of DANIEL MEDINA, infant, SVETLANA SLONOVSKAYA, individually and as a parent and natural guardian of VLADIMIR SLONOVSKAYA, infant, ESTELA SORIANO, individually and as a parent and natural guardian of YACELYN SORIANO, infant, DALI KHOKHO, individually and as a parent and natural guardian of WTIA KHATIASHUILLI, infant, MARINA SMIRNOV, individually and as a parent and natural guardian of VLADA GUNZ, infant, SVETLANA ROZENTSUIT, individually and as a parent and natural guardian of STANLEY ROZENTSUIT, infant, MARTHA MORENO, individually and as a parent and natural guardian of OSIRIS NANDO, infant, CIELITO EVANGELISTA, individually and as a parent and natural guardian of JUDE EVANGELISTA, infant, DOLORES GONZALEZ, individually and as a parent and natural guardian of BRAHIAN ROMERO, infant, LORENZO BONILLA, individually and as a parent and natural guardian of YESENIA BONILLA, infant, ROEUN (SUSAN) PHYLUONG, individually and as a parent and natural guardian of CINDY ROEUN, infant, JENNY

Index No. 108290/11
(Not E-filed)

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JAN 03 2012

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CHEN, individually and as a parent and natural guardian of JOYCE LIN and ALVIN LIN, infants, ADRIANA SANCHEZ, individually and as a parent and natural guardian of JOCELYN PEREZ, infant, ANGELA SHALUMOV, individually and as a parent and natural guardian of SHAWN SHALUMOV, infant, SHARYANA MILA-SHEVICH, individually and as a parent and natural guardian of KATHERINE MILA-SHEVICH, infant, ANATOLY SHEMPER, individually and as a parent and natural guardian of ANTHONY SEMPER, infant, LANA MARKELA, individually and as a parent and natural guardian of STEPHAN MARKELA, infant, KIMAN KEO, individually and as a parent and natural guardian of TIMOTHY KEO, infant, LUZINETTE RIPARD, individually and as a parent and natural guardian of ISABELLA TIMASH, infant, TASLEEM GHAFAR, individually and as a parent and natural guardian of SHAKIBA GHAFER, infant, OLEG MELTSEY, individually and as a parent and natural guardian of ELIZABETH MELTZER, infant, JAIME PEREZ, individually and as a parent and natural guardian of JOSHUA SANTIAGO and KRYSTAL SANTIAGO, infants, URSULA KOWALCZYK, individually and as a parent and natural guardian of ISABELA GINDO, infant, G. JAGESA, individually and as a parent and natural guardian of NATASHA JAGESA, infant, TONI GERARDI WOFSE, individually and as a parent and natural guardian of STEVEN WOFSE, infant, ANNA KAZARYAN, individually and as a parent and natural guardian of TANYA KAZARYAN, infant, OLGA ROMAINE, individually and as a parent and natural guardian of ALEKSANDRA ROMAINE, infant, KARINE ANDREASYAN, individually and as a parent and natural guardian of DAVIT SAJMKYAN, infant, SHABAIYA WAQAR, individually and as a parent and natural guardian of SAAD AHMED, infant, YELENA FAREA, individually and as a parent and natural guardian of GINA AL AMEN, infant, LUCIANA MARTINEZ, individually and as a parent and natural guardian of CINDY FLORES, GISEL FLORES, SELENA FLORES, infants, CAMILLE WELLONS, individually and as a parent and natural guardian of BWANNA BORGELLA, infant, ANGELA JOHNSON, individually and as a parent and natural guardian of DASHAWN HOLMES, infant, MARITZA PEREZ, individually and as a parent and natural guardian of ANTHONY BUITRAGO, infant, LIVIA SANTIAGO, individually and as a parent and natural guardian of CHYNALYNN SANTIAGO, infant, BARRY ESKENAZI, individually and as a parent and natural guardian of JOEY CRISTINA ESKENAZI, infant, KING TSANG, individually and as a parent and natural guardian of CAITLIN TSANG and KEN TSANG, infants, JULIET MORDUKHAEV, individually and as a parent and natural guardian of REUVEN SHOLOMSON, infant, KIM BLAGBROUGH, individually and as a parent and natural guardian of BRIANNA BLAGBROUGH and SAMANTHA BLAGBROUGH, infants, BRYENTH KURBAN, individually and as a parent and natural guardian of ADRIAN KURBAN, infant, SYED MASUD KHAVER, individually and as a parent and natural guardian of SAMAR MASUD, infant, SAMINA NAJEEB, individually and as a parent and natural guardian of AWAR NAJEEB, infant, LOLA DUSHIN, individually and as a parent and natural guardian of MALIKA NASRIDINOVA, infant, NINA KOMISAR, individually and as a parent and natural guardian of NICOLE KOMISAR, infant, RAQUEL BAUTISTA, individually and as a parent and natural guardian of MELISSA CUAUTLE, infant, ABIDA CHAUDHRY, individually and as a parent and natural guardian of HUMA KAZI, infant, ROBERTO REYES, individually and as a parent and natural guardian of BRENDA REYES, infant, MIGUEL A. SOSA, individually and as a parent and natural guardian of MIGUEL GONZALEZ, infant, DANAE HENDERSON, individually and as a parent and natural guardian of SEAN PICKETT, infant, WILING MA, individually and as a parent and natural guardian of KEVIN LEUNG, infant, AFSHAN MOHAMMED, individually and as a parent and natural guardian of HUSSAM MOHAMMED, infant, FARHAT NASRIN, individually and as a parent and natural guardian of ZAIN FAYYAZ, infant, AMY AUILES, individually and as a

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parent and natural guardian of TIFFANY AUILES, infant, ARACELI MARTINEZ, individually and as a parent and natural guardian of BRENDA COHETERO and KIMBERLY COHETERO, infants, ILMIRA BAKHL, individually and as a parent and natural guardian of KATRINA BAKHL, infant, C. GONZALEZ, individually and as a parent and natural guardian of RUBEN GONZALEZ, infant, HAMID CHOUDRY, individually and as a parent and natural guardian of ABID CHOUDHRY, infant, OLENA STEPANISHCHEVA, individually and as a parent and natural guardian of NIKITA KLIPKOV, infant, YELENA ZAIKA, individually and as a parent and natural guardian of JONATHAN ZAIKA, infant, CELESTE KEYES, individually and as a parent and natural guardian of MARC DAVIS, infant, IRINA KATS, individually and as a parent and natural guardian of DANIEL KATS, infant, BACHAN SINGH, individually and as a parent and natural guardian of SUKHJIT MATHON, infant, TOPGAY SHERPA, individually and as a parent and natural guardian of TENZING SHERPA, infant, and ALEKSANDR FEDOROV, individually and as a parent and natural guardian of CHRISTINA FEDOROV, infant,
 Petitioners,

Pursuant to CPLR Article 78

-against-

NEW YORK CITY BOARD OF EDUCATION, and JOHN B. KING, JR., as the ACTING COMMISSIONER OF EDUCATION FOR THE STATE OF NEW YORK,
 Respondents,

from action of the New York City Department of Education to re-site and co-locate Con Edison Island Preparatory Public Charter School with Existing Schools I.S. 303 Herbert S. Eisenberg, Rachel Carson High School for Coastal Studies, and 75K771, a District 75 School in Building K303.

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Appearances:

PLAINTIFFS	DEFENDANTS
Advocates for Justice	New York City Law Department
By: Arthur Z. Schwartz, Esq.	Michael A. Cardozo, Esq.
Nicholas Gaus, Esq.	By: Charles Orsland, Esq.
225 Broadway, ste 1902	100 Church Street, rm 2-174
New York NY 10007	New York NY 10007
(212) 228-6320	(212) 788-0904

Papers considered on review of these Article 78 proceedings:

	PAPERS	NUMBERED
Amended Notice of Petition, Verified Petition, Exhibits A - EE		1, 2, 3
Verified Answer, Memorandum of Law, Aff. of Service		4, 5, 6
Reply Memorandum of Law		7
Transcript of Sept. 15, 2011 Oral Argument		8

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 In the Matter of ANECIA MCCALL, individually and as a parent and natural guardian of RAEAN COLLYMORE, infant, MICHELLE MORGAN & DAVID MORGAN individually and as parents and natural guardians of OXLEY MORGAN, infant, NANCY CAMERON, individually and as a parent and natural guardian of JORDAN WILLIAMS, infant, DOREEN SINCLAIR, individually and as a parent and natural guardian of MARIO RICHARDS, infant, MYRTLEEN KLASS, individually and as a parent and natural guardian of COLIN KLASS, infant, GLORIA CHUKWUEKE individually and as a parent and natural guardian of AHUOMA CHUKWUEKE and OBINNA CHUKWUEKE, infants, ZAYOLA RODGERS, individually and as a parent and natural guardian of AZALEA RODGERS, infant, ANNE MARIE LAGUERRE, individually and as a parent and natural guardian of GOHSNY LAGUERRE, infant, SHARON CLARKE, individually and as a parent and natural guardian of TYRESE CLARKE, infant, KEVIN NEWERLS & TRACHELLE L. STATEN, individually and as parents and natural guardians of TAMIA NEWERLS, infant, EVELYN WEARING & FRED WEARING, individually and as parents and natural guardians of ONYX WEARING, infant, HILARY BARNWELL, individually and as a parent and natural guardian of SETI BARNWELL, infant STEFANY DE LEON & JAMES SAMUELS, individually and as a parent and natural guardian of KIARA STEPHENSON, infant, MALUON DAVIDSON & CHRISTINA BARIL, individually and as parents and natural guardians of NAISIAH BARIL, infant, NICOLE TOUSSAINT, individually and as a parent and natural guardian of FRITZ TOUSSAINT, infant, MARY SAUL, individually and as a parent and natural guardian of DEGRA SAUL, infant, SOPHIA PLAMER, individually and as a parent and natural guardian of RICHARD WILSON, infant, DARLENE JACOB, individually and as a parent and natural guardian of JOUANI JACOB, infant, SHAMEKA DAVIS, individually and as a parent and natural guardian of TRAVIA DAVIS, infant, ANDREW BAIRD, individually and as a parent and natural guardian of ANDREW BAIRD JR, infant, ANA FIGUEROQ, individually and as a parent and natural guardian of RALLIN FIGUEROQ, infant, AURA MEJIA, individually and as a parent and natural guardian of LAURY DELA ROSA, infant, RANDOLPH PARRIS, individually and as a parent and natural guardian of KYLE GILKES, infant, JOAN MUIR-DAVIS, individually and as a parent and natural guardian of JUSTIN DAVIS and JOSHANE DAVIS, infants, PATRICIA LOCKHART, individually and as a parent and natural guardian of JENIYAH LOCKHART, infant, MILESSA MARCH, individually and as a parent and natural guardian of KRYSTAL REID, infant, MARCIA GOMES, individually and as a parent and natural guardian of ANASTASIA WRRY, infant, MICHEAL PRINCE, individually and as a parent and natural guardian of BRIANNE PRINCE, infant, VANEIETTE MCFARLANE individually and as a parent and natural guardian of KIEIAN MCFARLANE, infant, JASMEEN WILLIS, individually and as a parent and natural guardian of ANDREW GIBBS JR, infant, YVONNE HERIVAUX, individually and as a parent and natural guardian of ROGER HERIVAUX, infant, DAVID BEDEAU & SERANA JAMES, individually and as parents and natural guardians of DAVID JAMES, infant, PIERRE EUGENE, individually and as a parent and natural guardian of HERNAN EUGENE, infant,

Index No. 109315/11
(E-filed)

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Petitioners,

JAN 03 2012

Pursuant to CPLR Article 78,

-against-

**NEW YORK
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NEW YORK CITY BOARD OF EDUCATION, DENNIS WALCOTT, CHANCELLOR,

Respondents,

Seeking Relief from an Action of the New York City Department of Education to Re-Site and Co-Locate Explore Charter School with Parkside Preparatory Academy (a/k/a M.S. 002) and 75K14, a District 75 School, in Building K002.

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FILED**JAN 03 2012****NEW YORK
COUNTY CLERK'S OFFICE****Appearances:****PLAINTIFFS**

Advocates for Justice
 By: Arthur Z. Schwartz, Esq.
 Nicholas Gaus, Esq.
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DEFENDANTS

New York City Law Department
 Michael A. Cardozo, Esq.
 By: Mark Galen Toews, Esq.
 100 Church Street, rm 2-174
 New York NY 10007
 (212) 788-0904

PAPERS

Unsigned Verified Petition [without exhibits], Signed Order to Show Cause
 Aff. of Arthur Z. Schwartz, Signed Verified Petition, Exhibits A - M
 Verified Answer, Exhibits A - E, Aff. of Service
 Respondents' Memorandum of Law, Aff. of Service
 Reply Memorandum of Law dated Sept. 9, 2011
 Transcript of September 15, 2011 Oral Argument

E-FILING DOC. NOS.

2, 3
 *
 4, 4-1 through 4-7
 5, 5-1
 *
 *

* Hard copy versions of these papers were filed with the Part 12 clerk and considered by the court. However, plaintiffs are directed to upload into the NYSCEFS, within 10 days of entry of this order, those documents followed by a *. The documents should be tagged as relating to motion sequence 001. As the signed OSC makes clear, because this is an e-filed matter, New York County protocol requires counsel to upload all supporting papers to NYSCEF system. Failing to do so results in an incomplete official record in the County Clerk's file, as the County Clerk does not retain paper copies of documents in e-filed cases. Questions regarding e-filing should be addressed to 646-386-3610 or newyorkef@courts.state.ny.us.

PAUL G. FEINMAN, J.:

Each of these two proceedings, brought pursuant to Article 78 of the CPLR, involves a challenge to the respondents' determination to co-locate public charter schools in public school buildings. The two proceedings are joined for the purposes of decision. The issue of the co-location of public charter schools in public school buildings has been addressed by this, and other, courts in some detail of late, and some familiarity with the issues is presumed.

In each case, the respondent Board of Education (also addressed as the Department of Education [DOE]), issued an Educational Impact Statement (EIS) and Building Utilization Plan (BUP) with regard to the planned co-location. Each of the EISs and BUPs were amended at least once, public hearings were held, and a determination of the DOE, acting as the Panel on Educational

Policy (PEP), voted, in both instances, to permit the co-locations.

In each instance, the petitioners appealed to the State Education Department (SED) Commissioner (Commissioner), who took evidence and held hearings. In each instance, the Commissioner upheld the DOE's PEP decision, in lengthy and detailed decisions.

Petitioners bring the present Article 78 proceedings to challenge the DOE's PEP vote and, ostensibly, the Commissioner's determination on appeal. However, in *Litichesky*, the petitioners originally named the Commissioner as a respondent, but voluntarily discontinued the petition as to him after the Commissioner promised to move for a change of venue to Albany County Supreme Court. The Commissioner is not named at all in the *McCall* petition, presumably because the inclusion of the Commissioner might result in a change of venue motion.

In *Steglich v Board of Education of the City School District of the City of New York* (33 Misc 3d 304 [Sup Ct, NY County 2011]), this court held that a petitioner appealing a decision of the DOE on a PEP vote must first bring an appeal to the Commissioner, based on concurrent jurisdiction, and the expertise of the Commissioner in dealing with like matters. In that decision, this court specified, twice, that "[i]f aggrieved by the Commissioner's final determination, the parties have appropriate remedies at that juncture to seek judicial review of his actions." *Id.* at 308.

In the present two matters, the petitioners have decided, as a tactical litigation strategy (designed, it is assumed, to avoid being forced to pursue this matter in Albany County), to pass over the decisions of the Commissioner, and direct their Article 78 appeals at the DOE's PEP vote. They argue that they do not have to address the Commissioner's decision at all, or may do so in his absence, because it is really the DOE's PEP vote with which they are concerned.

Respondents move to dismiss the petitions on several grounds. As relevant here, they claim

that the Commissioner is a necessary party under CPLR 1001 and 1003, or that, alternatively, the Commissioner's rulings are res judicata or collateral estoppel on any ruling this court might make.

The petitions must be dismissed as they do not address the final administrative act of the proper agency. When this court held that the Commissioner was the proper party to sue in co-location cases, it was not saying that doing so would be considered a meaningless formality in the future should the Commissioner fail to rule in petitioners' favor. In each of the present cases, the Commissioner, upon hearings and the acceptance of submissions, rendered lengthy decisions addressing every point of the petitioners' complaints. It borders on frivolous to argue that the Commissioner's ruling need not be addressed, or that he need not be a part of these proceedings, merely because that would be more convenient for the petitioners.

There is no scenario here which would allow this court to proceed without the Commissioner. The issue may be addressed under CPLR 1001 and 1003. Under CPLR 1001 (a), necessary parties are those "[p]ersons who ought to be parties if complete relief is to be accorded between the parties who are parties to the action or who might be inequitably affected by a judgment in the action." *See City of New York v Long Island Airports Limousine Service Corp.*, 48 NY2d 469, 475 (1979); *Telesford v Patterson*, 27 AD3d 328 (1st Dept 2006). "In a CPLR article 78 proceeding, the governmental agency that performed the challenged action must be a named party." *Matter of Solid Waste Services, Inc. v New York City Department of Environmental Protection*, 29 AD3d 318, 319 (1st Dept 2006).

The Commissioner's pivotal role in this matter is incontestable. It is his decision which was the proper agency's final word. The Commissioner "performed the challenged action" with regard to petitioners' appeals of the PEP vote. *Id.* To proceed without the Commissioner would be to negate his very existence in the chain of appeal within the proper agencies. To proceed without him would

be to “inequitably affect” his legitimacy as final administrative arbiter in co-location cases, a role this court held to be decisive in *Steglish* (33 Misc 3d 301, *supra*).

Petitioners’ reference to *Joanne S. v Carey* (115 AD2d 4 [1st Dept 1986]) is unavailing. This case did not involve an appeal from a final administrative agency determination, and only discusses which agency among several is the proper one to sue. *Matter of Era Steel Construction Corp. v Egan* (145 AD2d 795 [3d Dept 1988]) is likewise inapt. The issue of whether a party could bypass the final appeal level in the administrative agency in bringing an Article 78 proceeding was not addressed.

Petitioners’ arguments that the Commissioner would only be a necessary party had he granted the appeal, and prohibited the co-location, and that his actions do not make him a necessary party because he did not issue any “executory orders” (*Matter of Litichevsky*, Petitioners’ Reply Memorandum of Law, at 3) are not valid. Denying the petitioners’ appeal was as much an appealable action for Article 78 consideration as granting it would have been.

The failure to join a necessary party “is a ground for dismissal of an action without prejudice.” *Telesford v Patterson*, 27 AD3d at 330, quoting CPLR 1003. Because the petitioners knowingly chartered a procedural course not to name the Commissioner, seemingly to avoid an Albany County venue, this court would be justified in simply dismissing these proceedings and not permitting his belated joinder in these proceedings only perhaps to have them then transferred to another county. However, because outright dismissal could theoretically result in the Commissioner’s determinations on a subject of great public concern evading judicial review as any new proceedings would be time-barred, the court will permit the petitioners an opportunity to amend the two petitions to add the Commissioner as a necessary party (CPLR 1003 [“Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared...”]). Once the Commissioner

is added, the petitions can then be transferred to Albany County Supreme Court pursuant to a so-ordered stipulation, or, if need be, after motion practice. If said joinder of the Commissioner is not accomplished within twenty days of entry of this decision and order, the petitions shall be deemed dismissed.

In short, given the absence of a necessary and, indeed critical, party, it would be inappropriate for the court to address the merits of the petitions at this time. Accordingly, it is

ORDERED that the petitioners in *Matter of Litichevsky, et. al.*, Index No. 108290/11 and *Matter of McCall, et al.*, Index No. 109315/11, shall, within 20 days of entry of this order, file and serve amended petitions naming the Commissioner of the State Education Department as a necessary party; and it is further

ORDERED that if the petitioners fail to amend their petitions in accordance with the foregoing, each petition shall be deemed dismissed, and the Clerk shall then enter judgment accordingly.

Dated: December 28, 2011
New York, New York



J.S.C.

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