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

---------- x

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, and THE NEW YORK STATE CONFERENCE OF NAACP, THE ALLIANCE FOR QUALITY EDUCATION, RUBEN DIAZ, JR., BILL PERKINS, ERIC ADAMS, TONY AVELLLA, ALAN MAISEL, ROBERT JACKSON, CHARLES BARRON, ERIK MARTIN DILAN, MARK WEPRIN, LETITIA JAMES, RUBEN WILLS, STEPHEN LEVIN, HECTOR NAZARIO, ZAKIYAH ANSARI, JAMES ORR, JANICE LAMARCHE and BELINDA BROWN,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and DENNIS M. WALCOTT, as Chancellor of the City School District of the City of New York,

Defendants.

---------- x

AFFIDAVIT OF JOEL I. KLEIN IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Index No.: 105855/11

(Feinman, J.)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOEL I. KLEIN, being duly sworn, deposes and says:

1. I served as the Chancellor of the City School District of the City of New York from August 2002 to January 2, 2011. As Chancellor, I approved the letter agreement dated July 14, 2010 (the "letter agreement") between the Department of Education ("DOE") and the petitioners in a prior case, Mulgrew v Board of Education of the City School District of New York ("Mulgrew I litigation"), which related to 19 schools proposed for phase-out or

closure during the 2009-2010 school year. I submit this affidavit, which is based on my personal knowledge, in opposition to Plaintiffs' motion for a preliminary injunction.

2. I have been advised by counsel that, among other allegations, Plaintiffs claim that the DOE has not complied with the terms of the letter agreement. I am also advised that Plaintiffs seek, among other things, to prevent the phase-out or closure of 15 of the 19 schools that were the subject of the Mulgrew I litigation. Those 15 schools have again been proposed and approved for phase-out during the 2010-2011 school year.

3. As Chancellor, I approved entering into the letter agreement. At the time I approved the letter agreement, I was aware of and had reviewed Justice Lobis' decision and order in the Mulgrew I litigation. In reviewing Justice Lobis' decision and order, I believed that the order did not preclude the DOE from proceeding with the co-locations that had been approved by the PEP for the 2010-2011 school year. I interpreted the court's order as nullifying the PEP's approval of the phase-outs of 19 schools, but I did not believe the court's order addressed the approval of co-locations in the buildings containing those schools. I understood that the petitioners from that litigation had interpreted the court's order differently.

4. The letter agreement provided, among other things, that DOE would not proceed with some proposed co-locations in school buildings containing some of those 19 schools, and that the petitioners waived any legal claims relating to co-locations in some of those 19 school buildings. Accordingly, we did not proceed with co-locations that had been proposed and approved for ten school buildings listed in the letter agreement, and we also did not proceed with co-locating one of two proposed schools with Norman Thomas High School.

5. The letter agreement also provided that an "Education Plan" would be implemented for the 19 schools in the 2010-2011 school year. The Education Plan has ten

provisions, designed to improve the quality of education in those schools. I understand that Plaintiffs challenge the DOE's implementation of those provisions, a challenge that will be vigorously disputed by the DOE, and to which the DOE will respond with an affidavit from the appropriate official. Plaintiffs, however, mistakenly claim that the letter agreement prohibited the DOE from phasing-out or closing these schools until the Education Plan was fully implemented, and the schools had an opportunity to see if their performance would improve.

6. Plaintiffs' argument reads into the letter agreement a restriction that simply is not there. Nothing in the letter agreement states that the DOE would not propose or approve the phase-out or closure of any of the 19 schools in the 2010-2011 school year, or that proposing or approving phase-out or closure of those schools would be dependent in any way on the implementation or results of the Education Plan -- nor was the creation of such limitations ever our intention in negotiating the letter agreement. The portion of the letter agreement setting forth the Education Plan was meant to ensure that certain additional supports would be provided to the 19 schools during the 2010-2011 school year for the benefit of the students in those schools. Whether or not we would decide to propose phase-out or closure for these schools during the 2010-2011 school year was irrelevant to our intent in providing the additional supports. The letter agreement was never intended to be a mechanism to limit or forestall any of the DOE's determinations as to the necessity of closing or co-locating schools. Rather, the portion of the letter agreement providing for the Education Plan was a mechanism to ensure that the 19 schools, which had a history of poor performance and student outcomes, received additional resources to enrich the students' educational experience.

7. Accordingly, the fact that DOE proposed phase-outs or closures at certain schools referenced in the letter agreement, and that the Panel for Education Policy ("PEP") voted

to approve phase-outs or closures at certain schools referenced in the letter agreement, does not constitute a violation of the letter agreement, and does not suggest bad faith on the part of the DOE. The reasons for proposing those phase-outs and closures were set forth in the relevant Educational Impact Statements. The decision to propose the phase-out or closure of these schools was made in good faith.

8. Plaintiffs' contention that the purported limitation on DOE's ability to phase out or close these schools is a necessary inference arising out of the Education Plan is wrong. A specific agreement to forestall the closing of those schools – in essence to allow them additional time with an eye towards avoiding phase-out or closure – would be so significant and fundamental that it would necessarily have to be included in the agreement itself. The inference suggested by Plaintiffs is patently unreasonable, and certainly was not intended by myself or my senior staff in the course of the negotiation of the letter agreement. I would not have approved the letter agreement if it had contained a provision limiting my authority as Chancellor to propose, or the PEP's authority to approve, phasing out or closing these schools.

9. Moreover, I have been informed by counsel that Plaintiffs allege in their memorandum of law that "[u]nder the agreement, petitioners relinquished (at DOE's request) their challenge to some of the DOE's co-locations and, in exchange, the DOE committed to provide long-awaited and deserved, but withheld, supports to the targeted schools...". See Pl. Mem. at 9. If Plaintiffs are suggesting that this allegation supports their inference that DOE in essence agreed not to close any schools until completion of the Education Plan provisions of the letter agreement, they are wrong.

10. First, Plaintiffs ignore the DOE's important concession in the letter agreement not to proceed with a significant number of co-locations. Thus, to the extent

Plaintiffs' misguided argument is premised on the notion that the Education Plan was the only benefit the petitioners received in the letter agreement, the premise is simply incorrect.

11. Second, Plaintiffs' contention that the "necessary purpose" of the Education Plan portion of the letter agreement was to provide the schools a chance to avoid being phased out or closed is also incorrect. As noted above, the Education Plan was meant to benefit the students who attended those schools, which had a history of failure and which the DOE had been precluded from phasing out. The Education Plan was not meant to prevent the DOE from considering whether the schools themselves should be phased out or closed. It was meant to help the students who were at those schools, including a class of entering ninth graders who, had we been permitted to proceed with phasing out these schools, would not have been attending them.

12. Plaintiffs' reading of the letter agreement is unsupportable and should be rejected by this court.

JOEL I. KLEIN

Sworn to before me
this 17th day of June, 2011

NOTARY PUBLIC
ROBIN FEINGOLD SINGER
Notary Public, State of New York
No. 02SI6104235
Qualified in New York County
Commission Expires Jan. 20, 20 12

Index No. 105855/11

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

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, and THE NEW YORK STATE CONFERENCE OF NAACP, THE ALLIANCE FOR QUALITY EDUCATION, RUBEN DIAZ, JR., BILL PERKINS, ERIC ADAMS, TONY AVELLLA, ALAN MAISEL, ROBERT JACKSON, CHARLES BARRON, ERIK MARTIN DILAN, MARK WEPRIN, LETITIA JAMES, RUBEN WILLS, STEPHEN LEVIN, HECTOR NAZARIO, ZAKIYAH ANSARI, JAMES ORR, JANICE LAMARCHE and BELINDA BROWN,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, and DENNIS M. WALCOTT, as Chancellor of the City School District of the City of New York,

Defendants.

AFFIDAVIT OF JOEL I. KLEIN IN OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007
Of Counsel: Chlarens Orsland, Emily Sweet
Tel: (212) 788-0904, 1171
Matter #. 2011-015148

Due and timely service is hereby admitted.

New York, N.Y. ....., *20*.....

....., *Esq.*

Attorney for.....