

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

Rubnelia Agostini, Deborah Alexander, Reeshema Brightley, Laura Cavalleri,
Johanna Garcia, Aurora Ronda, Naila Rosario, JoAnn Schneider,
Litza Stark, on Behalf of Themselves and their Children, Class Size Matters,
And Alliance for Quality Education,

02351-18
Index No. _____
RJI No. _____

NOTICE
OF PETITION

Petitioners,

ORAL ARGUMENT REQUESTED

-against -

MARYELLEN ELIA, New York State Commissioner of Education
Carmen Farina, Chancellor, New York City Department
of Education and the New York City Department of Education,
New York City Board of Education,

Respondents.

PLEASE TAKE NOTICE, that upon the annexed verified petition, dated April 12, 2018, an application will be made to the Supreme Court, Albany County, at the Albany County Courthouse, Albany, New York, at 9:30 a.m. on the 4th day of May, 2018, for an Order and Judgment pursuant to *CPLR* Article 78 determining that the December 19, 2017 decision of the respondent Commissioner of Education in *Appeal of Agostini, et al.*, Decision No. 17286, which decision was issued pursuant to the Commissioner's authority under Education Law §310, was affected by an error of law and/or was arbitrary and capricious.

PLEASE TAKE FURTHER NOTICE, pursuant to *CPLR* §7804(c), and unless otherwise agreed to by the parties and ordered by the Court, answering papers, if any, must be

served five (5) days before the return date of this petition, and reply papers, if any, shall be served one (1) day before the return date of this petition.

The venue of this proceeding is in Albany County pursuant to CPLR §506(b).

Dated: April 12, 2018



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Johanna Garcia, Aurora Ronda, Naila Rosario, JoAnn Schneider,
Litza Stark, on Behalf of Themselves and their Children, Class Size Matters, and
Alliance for Quality Education,

Petitioners,

-against-

MARYELLEN ELIA, New York State Commissioner of Education
Richard Carranza, Chancellor, New York City Department
of Education and the New York City Department of Education,
New York City Board of Education,

Respondents.

VERIFIED
PETITION

Index No. 02351-18
RJI No. _____

Petitioners Rubnelia Agostini, Deborah Alexander, Reeshema Brightley, Laura Cavalleri,
Johanna Garcia, Aurora Ronda, Naila Rosario, JoAnn Schneider, Litza Stark, Class Size Matters
and Alliance for Quality Education, by their undersigned counsel, and for their petition allege as
follows:

The Parties

1. Petitioner Rubnelia Agostini is a resident of the Bronx. During the 2016-17 school
year, her son was a second grade student in P.S. 277, District 7. Her son receives special education
services under an Individual Education Plan (“IEP”). His class size in second grade was 25. His
IEP requires placement in a small class, but there are no small classes at P.S. 277. In the 2016-17

school year, class sizes in P.S. 277 were as large as 27 children. His large class size prevented him from receiving the personal attention necessary for him to succeed in school.

2. Petitioner Deborah Alexander is a resident of Queens.. During the 2016-17 school year, her children were in 4th grade and first grade at P.S. 150, District 30. Their class sizes were both 30. Both children felt unnoticed in their classes, and therefore declined to participate, owing to the large sizes. During the 2016-17 school year, classes in P.S. 150 were as large as 31.

3. Petitioner Reeshema Brightley is a resident of Manhattan. During the 2016-17 school year, her child was in kindergarten in P.S./I.S. 76 in District 3. Her child's kindergarten class was 24. Her child's teacher was unable to individualize instruction and had difficulties with classroom management, all as a result of the large class size. During the 2016-17 school year, class sizes in P.S./I.S. 76 were as large as 28 students.

4. Petitioner Laura Cavalleri is a resident of Staten Island. During the 2016-17 school year, her children were in 11th grade and 9th grade at Ralph McKee Career and Technical High School, 31R600, District 31. Her children were in classes of 31 students, with the exception of CTE shop classes, which are limited to 28. Classes in the school can be as large as 34 students. Many students in her childrens' classes have disabilities and need individualized attention and support. The classes at the school are too large, impeding the ability of teachers to meet students' needs.

5. Petitioner Johanna Garcia is a resident of Manhattan. During the 2016-17 school year, she had two children at P.S./I.S. 187, District 6. One child, who receives Special Education Teacher Support Services, Occupational Therapy and Speech Therapy under an IEP, was in second grade. During the 2016-17 school year, his class size was 28 students. She also has a child who

was in fifth grade that year, with a class size of 31. During the 2016-17 school year, class sizes in P.S./I.S. 187 were as large as 32 children.

6. Petitioner Aurora Ronda is a resident of Bronx. During the 2016-17 school year, she had a child in fifth grade at P.S. 72, District 8. Her child's class size was 35.

7. Petitioner Naila Rosario is a resident of Staten Island. During the 2016-17 school year, she has a child in fourth grade at P.S. 172, District 15. Her child's fourth grade class had 32 children, the largest class size in the school. Her child has been in large classes since kindergarten. She remains concerned that her child has not been able to receive the attention and feedback needed from her teachers. During the 2016-17 school year, her teacher often could not respond to students' questions given the size of the class.

8. Petitioner JoAnn Schneider is a resident of Queens. During the 2016-17 school year, her child was in the fourth grade at P.S./I.S. 113Q, District 24. Her child receives special education services under an IEP. Her's son's fourth grade class had 31 students. Due to the size of the class, her son did not receive the individual attention he needs and, as a result, was making only minimal progress in school. During the 2016-17 school year, class sizes in P.S./I.S. 133Q were as large as 33.

9. Petitioner Litza Stark is a resident of Queens. She has two children at P.S. 85, District 30. During the 2016-17 school year, her child in kindergarten had a class size of 28 students, and her child in second grade had a class size of 29. The class sizes cause excessive stress on teachers and students alike. When her older child was in a kindergarten class of 18, the class was more productive and nurturing than the experience both children are experiencing in larger classes. During the 2016-17 school year, the class sizes at P.S. 85 were as large as 32.

10. Petitioner Class Size Matters (“CSM”) is a non-profit organization that advocates for smaller classes in New York City and the nation’s public schools. Its office is located at 124 Waverly Pl., New York, NY 10011. CSM provides information on the benefits of smaller classes, particularly for at-risk children, to improve student engagement and learning, and reduce classroom disruption and disciplinary referrals. CSM also advocates for alleviating school overcrowding and more parent decision-making in education policy.

11. Petitioner Alliance for Quality Education (“AQE”) is a grassroots advocacy and community organizing coalition, with an office at 726 Broadway, 5th Floor New York, NY 10003. AQE works with communities in New York City and across New York State to assist parents, teachers and others to advocate for a high quality public education for all students.

12. Respondent MaryEllen Elia is the Commissioner of Education of the State of New York, and is named in that capacity as a respondent in this proceeding.

13. Respondent Board of Education (“BOE”), located at 52 Chambers Street, in New York County, is a school board organized and existing pursuant to the Education Law of the State of New York. The BOE has facilities, including schools, in every borough of the City of New York.

14. The Respondent Richard Carranza is Chancellor of the New York City Department of Education, with offices at Tweed Courthouse, 52 Chambers Street, in New York County.

15. The Respondent New York City Department of Education (“DOE”) is located at Tweed Courthouse, 52 Chambers Street, in New York County. DOE is responsible for the governance and administration of the public schools in the New York City School District (“District”), including compliance with the class size reduction requirements in the C4E law and implementing regulations.

16. The BOE, Chancellor Carranza, and DOE are responsible for the governance and administration of the public schools in the New York City School District (“District”), including compliance with the class size reduction requirements in the C4E law and implementing regulations. These Respondents are referred to herein as “District Respondents.”

Statement of Facts

Class Size Reduction Requirements

17. In Campaign for Fiscal Equity v. State (“CFE II”), 100 N.Y.2d 893, the New York Court of Appeals ruled that excessive class size was among the factors that contributed to the denial of New York City public school students’ right to a “sound basic education” under Article XI, §1 of the New York State Constitution. The Court found that overcrowded classes in District schools contributed to inadequate student performance and determined that reasonable class size is an essential resource for the provision of a constitutional sound basic education in the District. CFE II, 100 N.Y.2d at 911-12, 914.

18. In response to the CFE rulings, the New York Legislature enacted the C4E law in 2007. The C4E law established accountability measures to ensure those school districts receiving increases in funding under the Legislature’s new school funding formula utilized those funds to deliver the essential resources identified in the CFE rulings. N.Y. Education Law §211-d.

19. The C4E law requires every district receiving increased state funds pursuant to paragraph 1(a) of the statute to annually develop a spending plan and submit the plan for approval by the Commissioner. The spending plan – called the Contract for Excellence -- must demonstrate that the district will spend the funding increases on specifically enumerated “allowable programs,” which include reducing class size. The law also requires any district that submitted a plan in the previous year to do so in the current school year. N.Y. Education Law §211-d (1)(e). The law

prohibits use of C4E funds to supplant funds previously allocated by the district for such purposes. N.Y. Education Law §211-d (6).

20. Under the C4E law, districts are required each year to present their proposed annual Contract for Excellence spending plan for public comment. N.Y. Education Law §211-d (4). The Contract for Excellence must show how the district will spend funds on allowable programs, including reducing class size. N.Y. Education Law §211-d (3).

21. The C4E law also directs the District to develop and submit to the Commissioner for approval, as an element of the Contract for Excellence, a five-year plan to reduce class size in District schools. The statute requires the plan reduce average class size in three distinct grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school. The plan must also reduce class size in schools designated by the District as low performing and overcrowded. The plan must specify the methods to be used to reduce class size, including the renovation, addition and construction of new classrooms and/or school buildings. The requirement to develop, submit and implement the class size reduction plan is not conditioned on the receipt of increases in state funding. N.Y. Education Law §211-d(2)(b)(ii).

22. The regulations implementing the C4E law require the District to align the approved class size reduction plan with the District's capital plan for school facilities. The class size reduction plan must also provide for continuous reduction of class size in the District-identified low-performing and overcrowded schools. 8 NYCRR 100.13(b)(1).

23. The C4E law and implementing regulations require class size be reduced in accordance with the approved plan within five years. N.Y. Education Law §211-d(2)(b)(ii); 8 NYCRR 100.13(b)(1).

24. The class size reduction provision of the C4E law that applies to the District, N.Y. Education Law §211-d(2)(b)(ii), has never been amended to remove or alter either the requirement to reduce class size averages in three grade spans or the five year timeline.

The 2007 Class Size Reduction Plan

25. In response to the the C4E law and regulations, the DOE, in November 2007, submitted the District's five-year class size reduction plan ("2007 Plan") to the Commissioner for review. New York City Five Year Class Size Reduction Plan, Update, November 24, 2008, http://schools.nyc.gov/NR/ronlyres/3F12A337-2FAF-492B-AEBB-59509284098A/0/NYCDOECSR5YR_YR2_FINAL.pdf. A copy of the plan is attached as Exhibit A; Class Size Projection Chart, attached as Exhibit B.

http://www.p12.nysed.gov/mgtserv/C4E/doc/nyc_class_size_reduction_plan/2008_2009/FY09_C4E_School_List_Class_Size_projections_090121_Ex5_SED.pdf

26. The 2007 Plan established class size averages for District schools to be achieved in five years, or by 2011-12: no more than 20 students per class in Kindergarten to grade 3; no more than 23 students per class in grades 4 to 8; and no more than 23 students in high school.

27. The 2007 Plan also established set annual interim targets to ensure progress in meeting these class size averages within the five year timeframe.

28. The 2007 Plan included baseline class size data for every school to measure progress in reducing class size to the prescribed averages. The Plan also established specific class size targets for 75 schools designated by the District as overcrowded and low-performing. The Plan specified that class size would be reduced in these schools from 29 or greater to fewer than 25 students.

29. The 2007 Plan also specified the DOE would “incorporate class size reduction in all grades among the priorities” in the District’s capital plan for school facilities improvement and construction.

30. On November 19, 2007, the Commissioner approved the 2007 Plan. Memo from Johanna Duncan Poitier, November 29, 2007, <http://www.regents.nysed.gov/common/regents/files/documents/meetings/2007Meetings/December2007/1207emscvesidd5.doc> . A copy of the November 29, 2007, Memo is attached as Exhibit C.

31. In September 2008, the New York State Education Department (“SED”) reported that the DOE did not achieve the citywide class size reduction interim targets for the 2007-08 school year as set forth in the 2007 Plan. Moreover, the SED found that in 70 schools that received over \$20 million to reduce class size, class sizes and student/teacher ratios increased. Based on SED’s findings, the New York State Board of Regents (“Regents”) directed the DOE to “improve implementation of the second year of its class size plan” by preparing a corrective action plan to achieve the 2008--09 average class size and pupil-to-teacher ratio limits set in the 2007 Plan. NY State Education Department, Memo from Johanna Duncan-Poitier, September 8, 2008. <http://www.regents.nysed.gov/common/regents/files/documents/meetings/2008Meetings/September2008/0908emscd4.doc>. A copy of the September 8, 2008 memo is attached as Exhibit D.

32. In November 2008, the Commissioner approved an amendment to the 2007 Plan to increase average class size for core academic classes in District high schools from 23 to 25 students per class. New York City Five Year Class-Size Reduction Plan, Update, November 24, 2008. Exhibit A.

33. On December 12, 2008, the DOE reported on class size in the District's schools to the New York City Council. The DOE data revealed that citywide class size averages were not reduced in 2008-09 as required by the 2007 Plan, but rather increased. The DOE data also revealed that class sizes in the three grade spans increased. The class size average in Kindergarten to grade 3 significantly increased, from 20.9 to 21.4, while the increases in other grade spans were smaller.

2007-08 NYC DOE Class Size Average Report, Citywide Summary.
<http://schools.nyc.gov/NR/exeres/ABAC905B-331F-4128-B13A-FB87C1FB89CB.frameless.htm?NRMODE=Published>; 2008-09 NYC DOE Preliminary Class Size Report, Citywide Summary,
<http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize12122008.htm>.

34. On November 15, 2009, the DOE reported that class sizes had again increased in 2009-10 in all grade ranges. In Kindergarten to grade 3, the increases were larger than in 2008-09.

2009-10 NYC DOE Preliminary Report , Citywide Summary,
<http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize112709.htm>.

35. In February 2010, the Commissioner authorized the DOE to temporarily suspend the 2007 Plan for the 2010-11 year because of "the current economic climate." Letter from Commissioner Steiner to NYC Schools Chancellor Joel Klein, February 23, 2010, attached as Exhibit E. See also, November 8, 2010 letter from Commissioner Steiner to Chancellor Klein, attached as Exhibit F. For 2010-11, the Commissioner allowed DOE to certify that for the 75 lowest performing and overcrowded schools, class size in those schools would not increase above the approved class size levels for 2009-10 or, in some cases, would not increase more than 50% of the Citywide average increase. The Commissioner required the DOE to submit a written amendment to the 2007 Plan for the 2010-11 year. Exhibit E.

36. In a presentation on its 2011-12 Contract for Excellence Proposed Plan, the DOE announced that, while bound to the C4E law to reduce class size, “it is necessary to reevaluate” the 2007 Plan. The DOE represented that, with the guidance and approval of SED, it would “monitor” class size in District schools in 2011-12 and would provide “updated information” on Plan implementation. A copy of the 2011-12 Proposed Plan is attached as Exhibit G. No reevaluation of the 2007 Plan or update on implementation in 2011-12 was subsequently posted or otherwise made public by the DOE. Moreover, DOE did not present a class size reduction plan that would reduce the District’s class size averages, within five years, in the three specified grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school.

37. In a presentation on its 2012-13 Contract for Excellence Proposed Plan, the DOE reported that it would continue to monitor class size in District schools. The DOE also informed the public that it would update its class size plan. A copy of the 2012-13 Proposed Plan Attached as Exhibit H. No update on the 2007 Plan or implementation of the Plan in 2012-13 was subsequently posted or otherwise made public by DOE. Moreover, DOE did not present any amended or alternative class size reduction plan to comply with the law by reducing the District’s class size averages, within five years, in the three specified grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school.

38. In a presentation on its 2013-14 Contract for Excellence Proposed Plan, the DOE reported that it would focus on reducing class size in 75 low performing and overcrowded schools, but provided no details about what specific actions if any would be taken. Moreover, DOE did not present any amended or alternative class size reduction plan to reduce the District’s class size averages, within five years, in the three specified grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school. A copy of the 2013-14 Proposed Plan is attached as Exhibit I.

39. The DOE also represented that SED directed the DOE to provide an update on class size in the 75 schools previously identified by DOE as low performing and overcrowded. According to the DOE, the SED further required the DOE to certify that class size would not increase in 2013-14 “by more than half of the citywide average increase over the 2012-13 class size.” Contract for Excellence Proposed Plan FY 2014. Exhibit I. No update on class size reduction in the 75 low performing, overcrowded schools was subsequently posted or otherwise made available to the public by DOE, and the DOE plan to increase class size citywide as well as in the 75 low performing and overcrowded schools did not conform to the C4E law.

40. In 2013, the DOE created a working group to improve the formula for calculating school capacity and utilization, a basic element for developing the District’s capital plan for school facilities. The working group recommended aligning the District’s school capacity and utilization formula with the class size averages in the 2007 Class Size Reduction Plan. Blue Book Working Group Recommendations, July 28, 2015, Recommendations Attached as Exhibit J. This recommendation was rejected. The current formula uses a class size averages of 28 in grades 4-8 and 30 in high school, well above the averages established in the 2007 Plan, and larger than the averages that currently exist in those grades. See New York City Council, Planning To Learn, March 2018, pp. 19, 42, 47, attached as Exhibit K.

41. In a presentation on its 2014-15 Contract for Excellence Proposed Plan, the DOE reported it would “help” reduce class size in 75 District schools in 2014-15, without identifying those schools. Again, DOE did not present an amended or alternative class size reduction plan to reduce the District’s class size averages, within five years, in the three specified grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school. A copy of the Contract for Excellence Proposed Plan FY 2015 is attached as Exhibit L.

42. In a presentation on its 2015-16 Contract for Excellence Proposed Plan, the DOE reported that it would “focus” on reducing class sizes in low performing schools identified by DOE as Renewal Schools in 2015-16. The DOE did not specify any of the measures or goals that would be implemented to reduce class size in the Renewal Schools. Moreover, DOE did not present an amended or alternative class size reduction plan to reduce citywide class size averages, within five years, in three distinct grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school. A copy of the DOE’s Contract for Excellence FY16 Proposed Plan is attached as Exhibit M.

43. In a presentation on its 2016-17 Contract for Excellence Proposed Plan, the DOE reported that it would continue to “focus” class size reduction in the District’s low performing Renewal Schools in 2016-17. The DOE did not specify the measures that would be implemented to reduce class size in the Renewal Schools. Moreover, DOE did not present an amended or alternative class size reduction plan to reduce the District’s class size averages, within five years, in the three specified grade ranges: Pre-K to grade 3; grades 4 to 8; and in high school. A copy of the Contract for Excellence FY 2017 Proposed Plan is attached as Exhibit N.

44. From the 2007-08 to 2016-17 school year, the District Respondents have not reduced class size in District schools to the averages established in the 2007 Plan, including in schools identified by DOE as low performing and overcrowded. Instead, class sizes are substantially larger than in 2007-8 in all three grade spans. The DOE also has not submitted any amended or alternative class size reduction plan since the 2010-2011 school year that conforms to the requirements of the C4E law. N.Y. Education Law §211-d(2)(b)(ii).

45. From the 2007-08 to 2016-17 school year, the District Respondents failed to align the District’s capital plan for school facilities with the 2007 Plan, as required by the C4E law and

regulations. 8 NYCRR 100.13(b)(1).

Class Size in District Schools

46. Numerous reports and analyses show the District Respondents have not reduced class size in District schools to the averages established in the 2007 Plan, including in low performing, overcrowded schools identified by DOE.

47. A June 2016 report by Education Law Center shows that: 1) class size in District schools was significantly higher in all grade spans in 2015-16 when compared to 2007-08, and class size in each grade span were well above the targets set in the 2007 Plan; 2) since 2007, class size in the prescribed grade spans more likely increased rather than decreased; 3) in 2015-16, only 5% of Kindergarten to grade 3 children are in schools with average class size below the levels set in the 2007 Plan; 4) in 2015-16, only 12% of grade 4 to 8 students were in class size that met levels set in the the 2007 Plan; 5) in 2015-16, only 25% of high school students were in classes that met the levels set in the 2007 Plan and more than half of all high school students were in core classes with 30 students or more. Reducing Class Size: Promise vs. Practice, Education Law Center, June 2016, attached as Exhibit O.

48. The Education Law Center report, using DOE data, also analyzed the increases in average class size in District schools by grade span since 2007, and compared average class size to the targets in the 2007 Plan. The analysis shows average class size consistently remain well above the class size targets in the 2007 Plan in all grade spans and substantially larger than existed in 2007, when the Contract for Excellence law was passed:

Table 1. Average Class Size by Year and Grade Span

	Grade Span			
	K-3	4-5	6-8	9-12
C4E Goal	19.9	22.9	22.9	24.5
2007-08	20.9	23.8	25.9	26.1
2008-09	21.3	23.8	26.3	26.2
2009-10	22.1	24.6	26.3	26.6
2010-11	22.9	25.2	26.9	26.5
2011-12	23.9	25.5	27.2	26.4
2012-13	24.4	25.7	27.3	26.3
2013-14	24.7	26.0	27.1	26.4
2014-15	24.6	26.1	27.0	26.6
2015-16 (prelim.)	24.6	26.2	27.1	26.7

Reducing Class Size: Promise vs. Practice, Education Law Center, June 2016, Exhibit O, p.4.

49. Between 2007 and November 2016, class size averages in grades K-3 increased 15.8%, class size averages in grades 4-8 increased 6% and class size averages in grades 9-12 increased 1.5%. 2007-08 NYC DOE Class Size Average Report, Citywide Summary. <http://schools.nyc.gov/NR/exeres/ABAC905B-331F-4128-B13A-FB87C1FB89CB,frameless.htm?NRMODE=Published>; 2016-17 NYC DOE Preliminary Class Size Average Report, Citywide Summary, http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2016_11_15.htm

50. Between 2007 and November 2016, the number of students in grades 1 through 3 in classes of 30 or more increased approximately 4000%. 1,185 first through third graders in 2007 were in classes of 30 or more. In 2016, 43,219 first through third graders were in classes of 30 or more. 2007-08 NYC DOE Class Size Report, Citywide Distribution, <http://schools.nyc.gov/NR/exeres/ABAC905B-331F-4128-B13A-FB87C1FB89CB,frameless.htm?NRMODE=Published>; November 2016 NYC DOE Preliminary

Class Size Report, Citywide Distribution ,
http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2016_11_15.htm

51. In 2007, DOE did not report on how many kindergarten classes exceeded 30 students. DOE only reported the number of kindergarten students in classes of 25 or more. In 2007, 11,174 kindergarten students were in classes of 25 or more. In 2016, the number almost doubled to 21,519 kindergarten students in classes of 25 or more. 2007-08 NYC DOE Class Size Report, Citywide Distribution, <http://schools.nyc.gov/NR/exeres/ABAC905B-331F-4128-B13A-FB87C1FB89CB,frameless.htm?NRMODE=Published>; November 2016 NYC DOE Class Size Report, Citywide Distribution ,
http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2016_11_15.htm

52. The number of students in grades 1 through 8 in classes of 30 or more nearly doubled between 2007 and 2016. In 2007, there were 84,240 students in classes of 30 or more in grades 1 through 8. By 2016, the number increased to 162,549 students. 2007-08 NYC DOE Class Size Report, Citywide Distribution, <http://schools.nyc.gov/NR/exeres/ABAC905B-331F-4128-B13A-FB87C1FB89CB,frameless.htm?NRMODE=Published>; November 2016 NYC DOE Preliminary Class Size Report, Citywide Distribution ,
http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2016_11_15.htm

53. DOE data from 2016 on the District's low performing Renewal Schools show that average class size did not decrease between 2014 to 2016 in 40% of the Kindergarten to Grade 8 schools. Only two of 57, or 3.5%, of these schools capped class size at the levels prescribed by the 2007 Plan. The DOE data further show that 29% of Renewal high schools did not reduce class size between 2014-16 and 39% reduced class size by two or fewer students. Only one of the 28

Renewal high schools, Orchard Collegiate Academy, capped class size at the level prescribed by the 2007 Plan. 2014-15 NYC DOE Preliminary Class Size Report, Detailed School Level Data, http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2014_11_14.htm ; 2016-17 NYC DOE Preliminary Class Size Report, Detailed School-Level Data, http://schools.nyc.gov/AboutUs/schools/data/classsize/classsize_2016_11_15.htm

54. Former Chancellor Farina, in testimony before the New York City Council on May 28, 2015, reported that that class size in low performing, Renewal middle schools was about 29 students, exceeding the target levels set in the 2007 Plan. Transcript of the Minutes of the City Council Committee on Finance Jointly with Committee on Education, May 28, 2015 , p. 34, <http://legistar.council.nyc.gov/View.ashx?M=F&ID=3820568&GUID=C17A693A-0040-4164-910D-FE55BC0DAA78>.

Commissioner's Petition

55. On July 6, 2017, Petitioners served and filed a petition with Respondent Elia, pursuant to N.Y. Education Law §211-d(2)(b)(ii) and New York Education Law §310(7). A copy of the petition is attached as Exhibit P .

56. On August 9, 2017, District Respondents served and filed a Answer and Memorandum of Law. A copy of the Answer is attached as Exhibit Q . A copy of the Exhibits to the Answer is attached as Exhibit R. A copy of the Memorandum of Law is attached as Exhibit S.

57. On August 21, Petitioners served and filed a Reply and Reply Memorandum of Law. A copy of reply is attached as Exhibit T. A copy of the Exhibits to the Reply is attached as Exhibit U. A copy of the Petitioners' Reply Memorandum of Law is attached as Exhibit V. A

copy of the Appendix to Petitioners' Reply Memorandum of Law is attached as Exhibit W.

Commissioner's Decision

58. On December 19, 2017, Respondent Elia rendered a decision dismissing the petition. A copy of the decision is attached as Exhibit X. Petitioners' attorney received the decision on January 2, 2018.

59. In her decision, the Commissioner concluded that the District Respondents no longer had a legal obligation to reduce class sizes to the averages set forth in the class size reduction plan for the District approved in 2007. The Commissioner's decision was arbitrary, capricious and affected by error of law.

60. The Commissioner concluded that the 2007 Plan was "permanently suspended" in 2010, then "superseded" by subsequent plans, before reaching the five year time frame for implementation of the 2007 Plan in 2011-12. The conclusion that the 2007 Plan was "permanently suspended" is contradicted by the then-Commissioner Steiner's determination to temporarily suspend the 2007 Plan, a determination recognized by the Respondent DOE. Exhibit F; Exhibit T, p. 56. (stating that "the Class Size Reduction Plan requirements for a reduction in district-wide average class sizes have been temporarily suspended..."). Thus, determination was arbitrary, capricious and affected by error of law.

61. The Commissioner's conclusion that the "plans" put forth by the DOE after 2011-12 "superseded" the 2007 Plan has no rational basis in law or fact. None of these "plans" conform to the requirements of the C4E law because they fail to establish citywide class size reduction targets for the specified three grade spans in the required five-year deadline for implementation.

See *supra*, ¶¶36-38, 41-43.

62. The Commissioner also erred in concluding that the District Respondent's obligations under the class size reduction requirements of the C4E law, N.Y. Education Law §211-d(2)(b)(ii), "expired" in 2012. A statutory obligation, especially one implicating an essential resource for a constitutional sound basic education, does not – and cannot -- end simply because the party under that obligation fails to comply with the statutory deadline. See Exhibit V, pp. 3-9. To contend that the District Respondents' obligations expired, in the face of the undisputed inaction to comply, would render the requirements to reduce the District's class size within the statutorily prescribed timeline set forth in N.Y. Education Law §211-d(2)(b)(ii) meaningless.

63. The Commissioner further erred in concluding that Petitioner's claims are time-barred. Exhibit X, p.8. The District Respondents' obligation under N.Y. Education Law §211-d(2)(b)(ii) is ongoing and did not expire in 2012. Moreover, the District Respondents' failure to either fulfill the 2007 Plan or secure the Commissioner's approval of an amended or alternative plan that conforms to the requirements of N.Y. Education Law §211-d(2)(b)(ii) constitutes a continuing violation of law. Thus, the Statute of Limitations does not apply in this matter.

64. The Commissioner also erroneously dismissed Petitioners' claim that the District Respondents violated C4E by failing to align the District's capital plan with the class size averages set forth in the 2007 Plan, as required by 8 N.Y.C.R.R. 100.13(b). Contrary to the Commissioner's contention, the Petitioners' allegations of this failure were not conclusory. The Commissioner did not dispute that the District Respondents failed to align the District's capital plan to the class size averages set forth in the 2007 Plan. New York City Council, Planning To Learn, March 2018, Exhibit K, p. 19 and Table 5 on p. 20.

65. New York law requires challenges to the class size requirement under New York Education Law 211-d be first brought to the Commissioner. Once petitioners exhaust administrative remedies, they may file a petition in state supreme court. Mulgrew v. Board of Educ. of City School Dist. of City of New York, 88 A.D.3d 72, 78 fn. 1 (1st Dep't 2011). Petitioners have satisfied this requirement.

WHEREFORE, Petitioners respectfully request that an order and judgment be entered as follows:

1) Reversing the Respondent Commissioner of Education's December 19, 2017 decision dismissing their appeal;

2) Ordering that the District Respondents by the 2018-19 school year commence reducing class size averages in accordance with the 2007 Plan approved by the Commissioner or, in the alternative, submit and obtain the Commissioner's approval of an amended or alternative class size reduction plan that conforms to the specific requirements of New York Education Law §211-d 2(b)(ii), within a five-year timeline and with annual targets for reducing class size pursuant to the approved plan, and commence implementation of the amended or alternative plan by the 2018-19 school year;

3) Ordering the District Respondents to align the district's capital plan and school capacity formula with the class size averages set forth in the 2007 Plan or an approved amended or alternative plan, in the 2018-19 school year; and

4) Such other relief that the Court may deem appropriate, including the costs and disbursements of this proceeding.

Dated: April 12, 2018



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Attorney for Petitioners

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of an Article 78 Proceeding

Rubnelia Agostini, Deborah Alexander, Reeshema Brightley, Laura Cavalleri,
Johanna Garcia, Aurora Ronda, Naila Rosario, JoAnn Schneider,
Litza Stark, on Behalf of Themselves and their Children, Class Size Matters,
and Alliance for Quality Education,

VERIFICATION

Petitioners,


-against-

MARYELLEN ELIA, New York State Commissioner of Education
Richard Carranza, Chancellor, New York City Department
of Education and the New York City Department of Education,
New York City Board of Education,

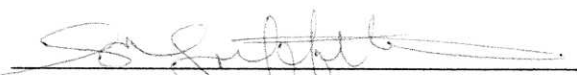
Respondents

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

LEONIE HAIMSON, being duly sworn, deposes and says that she is Executive Director of Class Size Matters, a petitioner in the above proceeding; deponent has read the foregoing petition and knows the contents thereof, the same is true to deponent's own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters she believes them to be true.


LEONIE HAIMSON

Subscribed and sworn to before me
this 9th day of April 2018


Notary Public - State of New York

