

EXHIBIT D

SUPREME COURT OF NEW YORK
COUNTY OF KINGS

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In the Matter of

JOANNE ADAMS, individually, and on behalf of her child,
Y.A., who attends P.S. 25; SHAMEKA ARMSTEAD,
individually, and on behalf of her child, D.M., who attends
P.S. 25; and CRYSTAL WILLIAMS, individually, and on
behalf of her two children, H.T. and K.T., both of whom
attend P.S. 25,

Petitioners,

Index No.: 506124/2018

—against—

BOARD OF EDUCATION OF THE CITY OF
NEW YORK,

Respondent,

For an Order, Pursuant to Article 78 of the CPLR and
Section 2590-e(11) of the Education Law, Annulling the
Decision to Close P.S. 25 in the County of Kings.

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**MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION**

Dated: April 20, 2018
New York, New York

ADVOCATES FOR JUSTICE,

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PRELIMINARY STATEMENT

P.S. 25 is a model public elementary school with high academic achievement by means of exceptionally small classes that create a personalized and supportive learning environment.¹ Located in Bedford Stuyvesant, Brooklyn, with a predominantly minority student population – 77% African American, 26% Hispanic, it is Brooklyn’s second best and the City’s fourth best public elementary school, as the City admits in its Verified Answer.² P.S. 25 accomplishes this stellar status even though a third of its students have special needs and Individual Education Plans (IEPs). Approximately one-quarter of its students are in temporary housing (STPs).³ Eighty-five percent (85%) of its students have high economic need, which is twenty-three percent (23%) higher than the City’s average population per school.⁴ Yet remarkably, every year for the past three, P.S. 25 has sharply increased student achievement as measured by its scores on the state exams.⁵ The school outperforms other elementary schools with similar students in proficiency by an astonishing twenty-one percentage points in ELA and Math.⁶ The school also exceeds or meets city standards in “Effective School Leadership”, “Trust”, “Collaborative Teachers”, “Rigorous Instruction”, “Strong Family-Community Ties” and “Supportive

¹ See Comprehensive Education Plan for 2017-2018 at http://schools.nyc.gov/documents/oaosi/cep/2017-18/cep_K025.pdf

² See Ver. Ans. ¶ 12.

³ http://www.icphusa.org/interactive_data/map-new-york-city-interactive-map-student-homelessness/

⁴ https://tools.nycenet.edu/dashboard/#dbn=16K025&report_type=EMS&view=City

⁵ https://tools.nycenet.edu/dashboard/#dbn=16K025&report_type=EMS&view=City

⁶ https://tools.nycenet.edu/dashboard/#dbn=16K025&report_type=EMS&view=City

Environment,” according to the school’s Quality Review and surveys.⁷ Finally, the school has recently been named a Reward school by the New York State Education Department because of its stellar performance.⁸

Despite P.S. 25’s extraordinary quality, the Department of Education (“DOE”) seeks to permanently close it. In so doing, the DOE usurped its authority and violated the law. Because P.S. 25 was the only zoned school in the District and because closing P.S. 25 necessitated changing zoning lines, the DOE was required to present its rezoning proposal to District 16 Community Education Council (“CEC”), whose prior approval was statutorily required.⁹ The DOE, however, bypassed CEC 16 and failed to present to the CEC a proposal to rezone or eliminate the zone for P.S. 25.¹⁰

Instead, between December 18, 2017 and February 5, 2018, the DOE held a series of meetings at P.S. 25, to alert the school community to its proposal to close the school. On February 28, 2018, the Panel on Education Policy (“PEP”) met and heard public comments regarding the DOE’s proposal to close P.S. 25 along with its other proposals. The DOE’s P.S. 25 proposal was made without receiving the Community Education Council’s (“CEC’s”) prior approval to change zoning lines which is required by state law. Entirely eliminating a zoned school and without replacing it with another zoned school, leaving the families in this

⁷ https://tools.nycenet.edu/dashboard/#dbn=16K025&report_type=EMS&view=City

⁸ <http://www.nysed.gov/news/2018/commissioner-identifies-155-high-achieving-and-high-progress-schools-reward-schools>

⁹ See N.Y. Educ. Law § 2590-e(11) and Chancellor’s Regulation 185, a copy of which is annexed as exhibit A to Barbieri Aff.

¹⁰ *Id.*

neighborhood without any zoned school that their children have the right to attend, as occurred in this instance, is the most radical change in zoning lines that can be conceived of.

The PEP voted to closed P.S. 25 by a 8 to 5 vote during an eight hour hearing.¹¹ Because the DOE had not received prior legal authorization to change zoning lines from CEC 16, the actions of the DOE and the PEP violated both N.Y. Educ. Law § 2590-e(11) and Chancellor's Regulation A-185.¹² The Court cannot permit the unlawful actions of the DOE or the PEP vote to stand. A preliminary injunction, though an extraordinary remedy, is warranted.

P.S. 25 is an extraordinary school.¹³ Without a preliminary injunction, the school would be closed at year's end and its students transferred elsewhere, a disruption that is effectively irreversible. Moreover, closing P.S. 25 would cause its students and parents irreparable harm because each child would be uprooted, with his or her education undermined, forced to transfer to another school of lesser academic quality, further away, and with larger class sizes. The school community, including families and teachers, would be disbanded, with students scattered far and wide to other schools, where their chances of receiving a similarly high quality education is simply not available.¹⁴ No school, other than three other elementary schools, one in the Bronx, one in lower Manhattan, and the other miles away in Brooklyn, are equivalent to or better than P.S. 25 in terms of their positive impact on academic performance, according to DOE's estimate.

¹¹ See Ver. Ans. ¶ 79.

¹² See Point II, *infra*.

¹³ See Stmt of Facts, *infra*.

¹⁴ See Point I, *infra*.

Moreover, none of the three have been offered to P.S. 25 parents as possible options to which their children could apply no less attend.¹⁵

The balance of the hardships clearly favor the Petitioners who will suffer immediate and irreparable harm if their families are forced to transfer to different schools. The DOE clearly violated the Education Law and its own regulation by closing a zoned school without the approval of the district Community Education Council. A preliminary injunction is warranted to preserve the status quo, keeping the school open until a hearing may be held by this Court and a permanent injunction may be ordered.

STATEMENT OF FACTS

P.S. 25 is a zoned elementary (K-5) school, located on 787 Lafayette Avenue in Bedford Stuyvesant, Brooklyn, New York. It is currently co-located with one of the Success Academy (“SA”) Charter Schools – SA-Bedford Stuyvesant 3 (currently grades K through 2), meaning that it shares its building with this charter school.

Prior to this school year, 2017-2018, the building also housed a middle school. The DOE moved the middle school out of the building at the end of the 2016-2017 school year. Therefore it should not be heard to complain about low building utilization if the DOE itself is responsible for arranging to reduce the size of the student population.

On December 18, 2017, parents of P.S. 25 were suddenly notified that their school would be closing at the end of the school year. Calls were made to parents and letters were sent home notifying them that a meeting would be held the next day at their school.

¹⁵ *Id.* and *see* Ver. Aff. ¶ 12. The only three elementary schools that have a higher positive impact on student achievement according to the DOE are the Walton Avenue school in the Bronx, P.S. 15 on the Lower East Side of Manhattan, and P.S. 172 Beacon School of Excellence in District 15 in Brooklyn.

Despite less than 24 hours notice, more than seventy members of the school community attended the December 19, 2017 meeting, according to the DOE, which is an extraordinary turnout by any measure. Families expressed strong opposition to the proposal to close the school, and asked what they could do to keep the school open. The DOE encouraged parents to appear and submit comments at the Joint Public Hearing to be held on February 5, 2018.¹⁶ The community was also told the Panel on Education Policy would vote on whether to close the school on February 28, 2018.¹⁷

On February 5, 2018, seventy-five members of the public attended the public hearing to where the proposal to close the school was discussed. Parents were almost unanimous in their opposition to its closure. Sixteen members of the public spoke at the hearing. A member of the School Leadership Team, three students, six parents, several retired teachers and former alumnae of P.S. 25 spoke, all against the proposed closure. One parent specifically said that the staff of P.S. 25 have helped her children succeed in school despite their disabilities.¹⁸

Sixty-eight letters were sent to the DOE from parents, all expressing opposition to closing P.S. 25.

On February 28, 2018 the PEP convened and the DOE presented its proposal to close P.S. 25. This meeting lasted over eight hours. Again, many people spoke against the proposed closure, including parents, educators, P.S. 25 alumnae, and the Council of School Administrators, otherwise known as the principal's union.

¹⁶ See Ver. Ans. ¶ 20.

¹⁷ *Id.*

¹⁸ <http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/221755/K25PCAfinal.pdf>

The DOE admits that the EIS did not contain information concerning P.S. 25's positive impact rating and performance levels.¹⁹ Further, none of the information concerning P.S. 25's stellar academic performance for the past three years was brought before the CEC or before the PEP prior to its having to make critical decisions regarding the future of the school.²⁰

The PEP voted 8-5 to close P.S. 25, with all the Borough President appointees voting against the closure and only the mayoral appointees voting to approve the proposal. Yet none of them had been provided with complete information about the school's from the DOE, including the fact that its positive impact on student achievement exceeded all but three of the 661 public elementary schools in the entire City.²¹ Nor were they informed that P.S. 25 had recently been named a "Reward" school by the NY State Education Department for its exemplary performance.²²

Prior to the PEP vote, no vote by the CEC 16 occurred to change the zoning lines of P.S. 25 by eliminating the zone of the school. Without an authorizing vote by the applicable CEC, the DOE's proposal to the PEP and the PEP's vote were contrary to law – the vote violated state law § 2590-e(11) and Chancellor's Regulation A-185.

Because their actions were contrary to law, the DOE's decision to close P.S. 25 must be annulled. At this juncture, however, it is clear that a preliminary injunction should be ordered and P.S. 25 should remain open until this Court has made a final determination.

¹⁹ See Ver. Ans. ¶ 27.

²⁰ *Id.* as to none of the information being presented to the PEP.

²¹ See Ver. Ans. ¶ 27.

²² *Id.* See Exhibit B to Barbieri Aff., a copy of the Reward School list (see page 3 for P.S. 25).

ARGUMENT

STANDARD OF LAW

Petitioners seek the issuance of a preliminary injunction in the above-entitled cause to preclude the affect of the Panel on Education Policy's vote – the vote to close P.S. 25, until the issue of its legitimacy is more fully resolved after a hearing before this Court. It is well settled that the objective of a preliminary injunction is to maintain the status quo. *Tucker v. Toia*, 54 A.D.2d 322 (4th Dept 1976). While a preliminary injunction is a drastic remedy and may only be used sparingly, the provisions of the CPLR § 6301 allow the issuance of a preliminary injunction “in any action.”

It is also well established that to prevail on an application for preliminary injunction, the petitioner must demonstrate:

1. A likelihood of ultimate success on the merits;
2. Irreparable injury absent the granting of the preliminary injunction; and
3. That a balancing of equities favors (the movant's) position.

See Barone v. Erie, 99 A.D.2d 129, 132 (quoting from *Gambar Enters. v. Kelly Servs.*, 69 A.D.2d 297, 306; *see also Nalitt v. City of New York*, 138 A.D.2d 580 (2d Dept 1988) and *Merrill Lynch Realty Associates v. Burr III*, 140 A.D.2d 589 (2d Dept 1988).

In *Moody v. Filipowski*, 146 A.D.2d 675 (2d Dept 1989), the court in discussing preliminary injunctions stated, “As (was) stated in *Tucker v. Toia*, 54 A.D.2d 322, 325-326, however, ‘it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits. *Hoppman v. Riverview Equities Corp.*, 16 A.D.2d 631; *Weisner v. 791 Park Avenue Corp.*, 7 A.D.2d 75, 78-79 (further cites omitted).”

Most recently in a matter entitled *In the Matter of Merscorp., Inc. v. Romaine*, 295 A.D.2d 431, 743 N.Y.S.2d 562 (2d Dept 2002), the court stated: It is well established that the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44). In exercising that discretion, however, the Supreme court must consider several factors, including whether the moving party has established (1) a likelihood of success on the merits, (2) irreparable harm if the injunction is denied, and (3) a balance of the equities in favor of the injunction. *See CPLR 6301, 6312(a); W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517, 438 N.Y.S.2d 761; *Clarion Assocs. v. D.J. Colby Co.*, 276 A.D.2d 461, 714 N.Y.S.2d 99. Further, the concurring judge, while not agreeing that there was a likelihood of success on the merits, concurred in the granting of the preliminary injunction, as the Supreme Court failed to take into consideration and address the other factors which must be taken into account, namely, irreparable harm to the movant absent the granting of a preliminary injunction, and a balancing of the equities. *See Melvin v. Union Coll.*, 195 A.D.2d 447, 448, 600 N.Y.S.2d 141.

Where, as here, the case involves certain issues of first impression in the courts, it is appropriate to grant a preliminary injunction, “to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner.” *Time Sq. Books v. City of Rochester*, 223 A.D.2d 270, 278, 645 N.Y.S.2d 951, quoting *Tucker v. Toia*, 54 A.D.2d 322, 326, 388 N.Y.S.2d 475; *State v. City of New York*, 275 A.D.2d 740, 713 N.Y.S.2d 360; *Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 604 N.Y.S.2d 84.

POINT I

**THE CHILDREN WILL SUFFER IRREPARABLE INJURY
ABSENT A PRELIMINARY INJUNCTION**

A. Closing the P.S. 25 – And Transferring its Students, Are Traumatic Family Events

Children uprooted from friends and peer groups, losing social and emotional supports, altering planned academic grade progression within a familiar school building, and detaching from principal and supportive teachers lie ahead for vulnerable children and their families unless the status quo is maintained and a preliminary injunction is issued. The trauma of changing schools is not only emotionally and socially difficult on every child, changing schools impacts negatively children's academic growth.²³

Although most of the research on closing schools and its impact on students relates to closing low-performing schools, since high-performing schools such as P.S. 25 are rarely closed, the comprehensive study by Stanford University was one of the few to study the impact of closing a high-performing school on its students. It concluded:

“... closure students who ended up in inferior or equivalent settings were prone to making fewer academic gains than their peers in other low-performing schools that remained open. ... They were pronounced for conventionally most-underserved groups such as black and Hispanic students in poverty. ... if students are sent to schools which are similarly low-performing or even worse than their closed schools, closure generally will result in negative learning outcomes.”²⁴

²³ See *Ross v. Disare*, 500 F. Supp. 928, 934 (S.D.N.Y. 1977) (“interruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling, raises a strong possibility of irreparable injury.”).

²⁴ *Lights Off: Practice and Impact of Closing Low-Performing Schools 2017, Volume II* Stanford University, Center for Research on Education Outcomes, Stanford University, 2017 Last visited 4-20-18 <<https://credo.stanford.edu/closure-virtual-control-records>>.

Negative learning outcomes, therefore, are more likely to result from changing schools, even when moving from a high-performing school to a lower-performing one.²⁵

B. DOE Alternative Schools Are Wholly Inadequate Compared with P.S. 25

P.S. 25 children are more likely to suffer irreparable harm from transferring to alternative elementary schools since each alternative school offered by the DOE is less academically rigorous than P.S. 25.²⁶

a. P.S. 25 Students Were Not Offered Better Transfer Schools.

The DOE did not even pretend to offer P.S. 25 students better elementary school options. In its Educational Impact Statement (“EIS”) for the closure of P.S. 25, where the DOE usually offers students affected by closures and transfers “higher performing” school alternatives, the EIS simply offered P.S. 25 students academic alternatives within the District “whose performance *approaches* P.S. 25’s.”²⁷

So, for example, during the multiple proposals considered by the PEP during the evening of February 28, 2018, all of the school students whose schools were being closed except students from P.S. 25 were offered seats in higher performing schools. See for example,:

- The PEP considered a number of other proposals in addition to the closure of P.S. 25, and unlike students at P.S. 25, in of the proposed closures, the DOE offered students seats in “higher performing” schools. For example:
- The Proposed Closure of New Explorers High School (07X547) in Building X790 at the End of the 2017-2018 School Year-“NYCDOE staff will work individually with current students in grades 9-11, as well as students in grade 12 who are not on track to graduate

²⁵ *Id.*

²⁶ *See* Ver. Ans. ¶ 25, 27.

²⁷ *See* DOE Rawlins Aff., Exh. D., EIS, dated Jan. 26, 2018, p.2.

or who do not meet promotional criteria, to offer those students seats in other **higher performing** high schools.” Page 2.²⁸

- The Proposed Closure of a The Felisa Rincon de Gautier Institute for Law and Public Policy (08X519) in Building X972 at the End of the 2017-2018 School Year – “This will involve an application process by which students will be offered **higher-performing** high school options.” Page 2.²⁹
- The Proposed Closure of Urban Science Academy (09X325) in Building X145 at the End of the 2017-2018 School Year – “NYCDOE staff will work individually with current students in grades 6 and 7, as well as current students in grade 8 who do not meet promotional criteria, to offer those students seats in other **higher-performing** middle schools, as well as the new district middle school 09X594 proposed to open in building X145.” page 2.³⁰
- The Proposed Closure of Urban Assembly School for Wildlife Conservation (12X372) in Building X067 at the End of the 2017- 2018 School Year – “This will involve an application process by which students will be offered **higher-performing** middle school and high school options.” pages 1-2.³¹
- The Proposed Closure of P.S. 92 (12X092) in Building X092 at the End of the 2017-2018 School Year - “NYCDOE staff will work individually with current students in grades K-4, as well as current students in grade 5 who do not meet promotional criteria, to offer those students seats in other **higher performing** elementary schools in District 12 and their district of residence (if different).” page 2.³²
- The Proposed Grade Truncation of P.S. 377 Alejandrina B. De Gautier (32K377) from a K-8 School to a K-5 School Beginning in the 2018-2019 School Year – “NYCDOE staff will work with current grade 6 and grade 7, as well as grade 8 students who do not meet promotional criteria, to ensure that those students are a offered seat in a **higher**

²⁸ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220264/Closureof07X547EIS_vfinal.pdf.

²⁹ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220178/Closureof08X519EIS_vfinal.pdf

³⁰ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220273/Closure_of_Urban_Science_Academy_EIS_vfinal.pdf

³¹ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220054/ClosureofUAWildlifeEIS_vfinal.pdf

³² http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220072/ClosureofPS92EIS_vfinal.pdf

performing middle school option in District 32 and their district of residence (if different).” page 1.³³

- The Proposed Closure of Coalition School for Social Change (04M409) in Building M045 at the End of the 2017-2018 School Year – “This will involve an application process by which students will be offered options at **higher-performing** high schools.” page 2.³⁴
- The Proposed Closure of P.S. 50 Vito Marcantonio (04M050) in Building M050 at the End of the 2017-2018 School Year – “NYCDOE staff will work individually with current students in grades K-4 and 6-7 to offer those students seats in other **higher performing** elementary schools and middle schools in District 4 or their district of residence (if different).” page 2.³⁵
- The Proposed Closure of KAPPA IV (05M302) in Building M136 at the End of the 2017-2018 School Year - “NYCDOE staff will work individually with current students in grades six and seven, as well as current students in grade eight who do not meet promotional criteria, to offer those students seats in a **higher-performing** middle school option in District 5 or their district of residence (if different).” page 1.³⁶
- The Proposed Closure of Academy for Social Action (05M367) in Building M043 at the End of the 2017-2018 School Year- “NYCDOE staff will work individually with current ninth, tenth and eleventh grade students, as well as twelfth-grade students who are not on track to graduate or who do not meet graduation requirements (together referred to as non-graduating throughout this proposal), and those students will be offered seats in other **higher performing** high schools.” page 1.³⁷
- The Proposed Closure of M.S. 53 Brian Piccolo (27Q053) in Building Q053 at the End of the 2017-2018 School Year- “This will involve an application process by which students

³³ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220093/PS377TruncationEIS_vfinal.pdf

³⁴ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220202/Closureof04M409EIS_vFinal1.pdf

³⁵ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220184/Closureof04M050EIS_vFinal.pdf

³⁶ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220067/Closureof05M302EIS_vFinal.pdf

³⁷ http://schools.nyc.gov/NR/ronlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220267/ClosureofASAEIS_vFinal.pdf

will be offered options of **higher-performing** middle schools in District 27 and their district of residence (if different) from which to choose.” page 2.³⁸

- The Proposed Closure of P.S./M.S. 42 Robert Vernam (27Q042) in Building Q042 at the End of the 2017-2018 School Year - “This will include an application process through which students will be offered seats at **higher performing** schools in District 27 and their district of residence (if different), as well as the proposed new district elementary and middle schools, if the concurrent proposals are approved.” page 2.³⁹

This makes sense, since few schools are as good academically as P.S. 25.

b. The Alternative Schools Are Distance-wise Predominantly Unacceptable

The DOE offered P.S. 25 parents a choice of thirty-three (33) schools to apply to.

Eighteen are on Staten Island, many miles away, with estimated commute times by public transportation ranging from an estimated one hour and twenty-three minutes to two hours and sixteen minutes according to Google maps.⁴⁰

c.. Most of the Alternative Schools Offered are Severely Over Crowded

Of the thirty-three schools offered by the DOE, twenty-five of the schools are severely overcrowded, with utilization rates over 100%. This means that the class sizes are much larger than those of P.S. 25, its halls and lunch rooms are crowded, its resources are scarce, and its teachers to student ratios are higher.

None of the schools have as high an impact rating, according to the DOE performance dashboard, and none of them have class sizes as low as PS 25, with 70% with maximum classes of 30 or more.

³⁸ http://schools.nyc.gov/NR/rdonlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220069/Closureof27Q053EIS_vFinal.pdf

³⁹ http://schools.nyc.gov/NR/rdonlyres/AE8473F1-3A8B-4C65-9F8F-3C63C9DA32C9/220156/Closureof27Q042EIS_vfinal.pdf

⁴⁰ See Exhibit C to Barbieri Aff., reflecting the 33 choices for P.S. 25 parents.

P.S. 25 children are used to having small classes. Small classes are one of the factors that makes P.S. 25 special. Small classes allowed teachers to provide P.S. 25 students with more individualized attention, which enhanced their individual academic performance. If an injunction is not issued, these children will be irreparably harmed because they will lose each and every one of these advantages that P.S. 25 provides.

C. Students in Temporary Housing/Homeless Students Have Special “Origin School” Rights

Students in temporary housing (STH) have a statutory right pursuant to N.Y. Education Law § 3209 to stay in the “district of origin” because the law recognizes the trauma of homelessness should not be exacerbated by the trauma associated with changing schools. The pendency provisions of the federal law and state law “grant[] special rights and protections to children experiencing homelessness in order to ensure school stability and academic success”. *L.R. ex rel. G.R. v. Steelton–Highspire School Dist.*, No. 10–CV–468, 2010 WL 1433146, at *5 (M.D. Pa. April 7, 2010).

According to P.S. 25 website, there are twenty-eight STH students, each of whom may exercise the right to stay in their enrolled school.⁴¹

POINT II

**PETITIONERS ARE LIKELY
TO PREVAIL ON THE MERITS**

A. A Preliminary Injunction Must Issue Because the DOE Admits it Violated the Law. Accordingly, P.S. 25 Must Remain Open

1. The Statute: N.Y. Educ. Law § 2590-e(11)

⁴¹ “Origin school district” is interpreted to mean “enrolled school.” *See N.J. v. New York*, 872 F. Supp. 2d 204 (2011).

N.Y. Education Law Section 2590-e enumerates the powers and duties of the community education councils. “[E]ach community council shall have the following powers and duties: “(11) Approve zoning lines, as submitted by the superintendent, consistent with the regulations of the chancellor, applicable to the schools under the jurisdiction of the community district.” N.Y. Educ. Law § 2590-e(11).

The DOE admits the CECs have this statutory authority in its Verified Answer.⁴²

The power to affect zoning was legislated as part of the effort to introduce citizen participation in the administration of the Board of Education, long criticized to have run roughshod over parental participation in citizen government, particularly when it came to decisions affecting their children’s education or to at least be better informed about the decisions the schools were making about their children.

In 2002, when control over the City’s school district changed from a decentralized one to centralized Mayoral control, the then community school boards (CSBs) were replaced with Community Education Councils (CECs). Originally, the CSBs had multiple formal powers including the power to hire and fire principals and superintendents, and control over school budgets. However, these powers eroded over time.⁴³ In 1996, New York State legislation limited these powers to where the only power left to the CSB was the power to approve zoning changes.

⁴² See Ver. Ans. ¶ 103.

⁴³ Task Force on Community School District Governance Reform. (2003). Final Report of the Task Force on Community School District Reform. Albany, NY: New York State Assembly.

When the CEC replaced the CSBs, the powers that remained were: to approve school zoning changes within the district, and to play a role in evaluating the community superintendents and the local instructional superintendents.⁴⁴

Significantly, the composition of the CEC, however, as compared with the CSB, changed. The CECs were comprised primarily of nine public school parents with children within the district, voted by PTA officers, along with two borough president appointees who are residents of or own or operate a business in the district.. This change signified the role of the community –including both parents and members of the community at large - in the exercise of the authority and functions of the CEC.

2. *The Regulation*

Chancellor's Regulation 185 reiterates the statutory power of the CEC to approve zoning lines under the Education Law, and delineates the procedure for obtaining approval for zoning line changes, including time parameters for the superintendent's proposal to the CEC for approval.⁴⁵ The Regulation also requires that the Superintendent consult with the "appropriate school committees, including the parents of children who will be affected by the proposed change prior to submitting the proposal to the CEC."⁴⁶

⁴⁴ Salimi, S., Atwell, J., Culp, J., Poreda-Ryan, R., & Hoglebe, A. (2006). Oversight: Parental Involvement in the New York City School System: New York City Council. (Oversight). New York, NY: New York City Council. Retrieved from http://webdocs.nycouncil.info/attachments/72443.htm?CFID=38435&CF_TOKEN=34771242.

⁴⁵ See Chancellor's Reg. A-185.

⁴⁶ *Id.* at II.A.2. The "appropriate school committees" are the School Leadership Team and the Parent Teachers Association or Parents Association, as applicable.

Chancellor's Regulation 185 reiterates that the CEC must vote on the zoning lines submission by the superintendent within 45 days of the submission.⁴⁷

B. The DOE Past and Present Practices Demonstrate Its Knowledge and Awareness of the Law

On the DOE's website, <http://schools.nyc.gov/community/planning/changes/default.htm>, for "District and Community Planning," it publishes by borough, its proposals made to various CECs of its intended changes in zoning lines, along with openings and closings of schools.⁴⁸ In each example provided, the DOE provides the applicable community district council for the school district affected with its proposal for changes in zoning lines, which typically includes both a PowerPoint presentation by the DOE, and two maps, a "before" and "after" map, so that the CEC can see the way in which the district will be affected.

Further, on each DOE website page, the DOE acknowledges that the CEC will "vote on this proposed rezoning plan at the upcoming meeting".⁴⁹

Significantly, no rezoning proposal is mentioned as having been proposed to the CEC in the past or approved (or will be presented in the future) for the closure of P.S. 25 on the District Planning page for Brooklyn for SY 2017-2018 or SY 2018-2019 for CEC 16. Indeed, the DOE admits no proposal was made, and no vote was taken.

⁴⁷ *Id.* II.B.3.

⁴⁸ *See*, for example, the webpages for the District and Community Planning pages for the Boroughs of Manhattan and Brooklyn, annexed hereto as Exhibits D and E, respectively to Barbieri Aff., demonstrating consistent practices by the DOE whereby the DOE presents to the CECs its rezoning proposals, posts copies of its proposal presentations to the CECs on its website, along with a copies of both maps, the current map and the new map with the proposed changes in zoning lines. *Id.*

⁴⁹ *Id.*

Accordingly, the Court should use the preliminary injunction to enforce the statute and the Chancellor's Regulation, and maintain the status quo, which is to allow P.S. 25 to remain open.

C. The Grinage v. Dept. of Ed. Complaint

On March 24, 2009, the New York Civil Liberties Union, on behalf of multiple parents and the Public Advocate, then Betsy Gotbaum, brought suit against the Department of Education in New York State Supreme Court to stop its unilateral decision to close three zoned schools, two in the Manhattan and one in Brooklyn, which would have eliminated these three schools, and thereby eliminated their respective school zoning lines, without any votes of the respective CECs. The lawsuit sought injunctive and declaratory relief, including that the DOE's actions were a violation of the state education law, § 2590-e(11) and Regulation A-185.⁵⁰

The only legal way to eliminate or change zoning lines is to obtain the approval of the local education council, which the DOE had not done.

By April 24, 2009, the DOE capitulated and announced that it would keep all three schools open.

The fact that the DOE had previously settled a similar suit, and settled so quickly, is indicative of its understanding of the power and authority of the CEC, and the DOE's acknowledgement of the law.

C. Avery Parents' Assoc. Ltd. v N.Y.C. Dept. of Ed.

There no question that the DOE did not obtain authorization from CEC16 to change the zoning lines for P.S. 25. To ignore this law, and further, not to have presented the CEC with the accurate information concerning P.S. 25's achievements, suggests the DOE knowingly flouted

⁵⁰ A copy of the *Grinage* complaint is annexed as Exhibit F to Barbieri Aff.

their obligations to the community. The zoning authority is in the hands of the Community Education Council for a reason. The power to change zoning lines must occur pursuant to a specific procedure within the rules of the CEC, requiring public notices, proposed public resolutions, and public hearings. *See* Chancellor's Regulation A-185. These public processes permit the public the opportunity for rigorous debate concerning whether the zoning lines should be changed or not. None of these processes occurred; nor was the applicable regulation followed.

As Avery Parents Assoc. Ltd. v. N.Y.C. Dept. of Educ., 27 Misc.3d 1220(A) (N.Y. Co. 2010), exemplifies, the DOE is well aware of the regulation and statutory requirements for changing zoning lines. In that case, the DOE admitted that the CEC had the authority to change the zoning lines and that the internal CEC procedures to change zoning lines must be followed. *Id.*

So too, must they be followed here.

POINT III

THE BALANCE OF THE HARDSHIPS FAVOR THE PETITIONERS AND KEEPING P.S. 25 OPEN

On balance, the hardships weigh heavily in the Petitioners' favor. The DOE admits that the circumstances at P.S. 25 do not affect the other elementary schools within District 16.⁵¹ Accordingly, there are no adverse consequences for the DOE if a preliminary injunction is imposed and P.S. 25 remains open.

⁵¹ *See* Ver. Aff. ¶ 86.

The DOE also admits that there are plenty of elementary school seats for future P.S. 25 students should the school be closed at a later date.⁵² So any delay in selecting elementary school seats for P.S. 25 school students will not adversely affect these students either.

Oddly, the DOE argues that 3,000 parents will be inconvenienced by a preliminary injunction or if students do not select their transfer school.⁵³ This argument is specious. First, there are not 3,000 elementary school children whose schools are closing within the City of New York, let alone within District 16, with whom seats for schools would be dependent upon P.S. 25 transfer choices. Elementary school children make up only 756 total students within the school closing population. Second, there aren't 3,000 students whose schools are closing within the entire school district for which P.S. 25's transfer choices would have an effect. The total school closing population is 2,491, and this number includes high schools and middle schools, transfers which have nothing whatsoever to do with P.S. 25 transfer choices. None of these students will have their decisions delayed because P.S. 25 will stay open.

The DOE also oddly argues that this action is based only on the claims of three parents. Given the number of parents who protested at all the meetings, and who sent in letters, for the DOE to make this assertion is frivolous. Nonetheless, *see* Barbieri Exhibit G, a petition of signatures, collected on April 19, 2018, with dozens of parents' signatures, again reiterating their desires to keep P.S. 25 open, along with copies of letters that were prepared but were not sent in time to the DOE for the vote, again evidencing parents' desires not to close the school. Clearly, more than the wishes of three parents are at issue here.

⁵² *Id.*

⁵³ *See* Verified Answer *passim*.

Again, on balance, the hardships favor the Petitioners, who, on the other hand, will be irreparably harmed – along with many other students and their families – if they are forced to transfer to other schools of lesser quality, with larger class sizes.

Finally, the DOE argues that the closure is premised on underenrollment. *See* Affidavits of Autumn Stanford and Marce Ayala, both of whom are pre-K parents, and who have expressed that if P.S. 25 were to remain open they would send their pre-K children to the school. Clearly, P.S. 25 has the ability to grow, just as the DOE has the ability to expand the school with a pre-K program and 3-K program, given the school exceptional quality. The DOE simply must choose to celebrate rather than ignore the academic accomplishments and educational achievements of one of the City's most successful elementary schools. The equities far outweigh any alternatives that would include closure of P.S. 25.

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New York, New York



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