

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date: 7/28/2022

Case # 2022-03187

Title Tamara Tucker et al., Petitioners v.

Index/Indict/Docket # 155933/2022

of

Matter The City of New York, et al., Respondents

Appeal Order Judgment of Supreme Surrogate's Family Court entered on July 27, 2022

Name of Judge Hon. Lyle E. Frank

Notice of Appeal filed on

If from administrative determination, state agency

Nature of action or proceeding Article 78 proceeding challenging implementation of NYC Department of Education approved budget for upcoming 2022-2023 school year

Provisions of order judgment decree appealed from Temporary restraining order that (a) enjoined any further implementation of funding cuts in the approved 2023 budget and (b) enjoined spending at levels different from 2021-2022 budget.

This application by appellant is for CPLR 5704(a) review by a single Justice to vacate ex parte temporary restraining order.

If applying for a stay, state reason why requested The temporary restraining order prevents DOE from taking steps necessary to ensure that the school system is prepared for the upcoming school year.

Has any undertaking been posted If "yes", state amount and type

Has application been made to court below for this relief No Disposition
Has there been any prior application here in this court No and nature

Has adversary been advised of this application Yes Does he/she consent No

Attorney for Movant

Attorney for Opposition

Name New York City Law Department

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Appearing by Tahirih Sadrieh, Jeffrey Dantowitz

Laura D. Barbieri

(Do not write below this line)

DISPOSITION

Justice

Date

Motion Date _____ Opposition _____ Reply _____

EXPEDITE _____ PHONE ATTORNEYS _____ DECISION BY _____

ALL PAPERS TO BE SERVED PERSONALLY.

Court Attorney

New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No.
2022-03187

TAMARA TUCKER and MELANIE KOTLER, individually and on behalf of all parents and guardians of New York City public School Students, and PAUL TRUST and SARAH BROOKS, individually and on behalf of all similarly situated New York City public school teachers,

Petitioners-Respondents,

against

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, David C. Banks, in his official capacity,

Respondents-Appellants,

For an order Pursuant to Section 6301 and Article 78 of the CPLR and Sections 2590-g and 2590-q of the New York City Education Law, Annuling the Adoption of the New York City FY 2023 Budget and the New York City Department of Education FY 2023 Education Budget..

**APPLICATION TO VACATE TEMPORARY
RESTRAINING ORDER UNDER CPLR 5704(a)**

HON. SYLVIA O. HINDS-RADIX
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of the City of New York
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CLAUDE PLATTON
TAHIRIH M. SADRIEH
of Counsel

July 28, 2022

New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No.
2022-03187

TAMARA TUCKER and MELANIE KOTLER, individually and on behalf of all parents and guardians of New York City public School Students, and PAUL TRUST and SARAH BROOKS, individually and on behalf of all similarly situated New York City public school teachers,

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**NOTICE OF MOTION TO VACATE TEMPORARY
RESTRAINING ORDER UNDER CPLR 5704(a)**

PLEASE TAKE NOTICE that upon the annexed memorandum and affirmation, The City of New York, The New York City Department of Education and the Chancellor of the New York City Department of Education will move this Court, located at 27 Madison Avenue,

New York, New York 10010, on _____, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order under CPLR 5704(a) vacating the ex parte temporary restraining order of Supreme Court, New York County entered on July 22, 2022, and for such other relief as the Court may deem just and proper.

Dated: New York, New York
July 28, 2022

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel
of the City of New York
Attorney for The City of New
York, The New York City
Department of Education and
the Chancellor of the New York
City Department of Education

By: 

TAHIRIH M. SADRIEH
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To: Laura Barbieri
ADVOCATES FOR JUSTICE
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212-285-1400, ext. 112
Attorney for Petitioners

New York Supreme Court
Appellate Division: First Department

In the Matter of

Case No.
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Respondents-Appellants,

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, David C. Banks, in his official capacity

**AFFIRMATION IN SUPPORT OF
APPLICATION TO VACATE TRO UNDER CPLR 5704(a)**

TAHIRIH M. SADRIEH, an attorney admitted to practice in the courts of this state, affirms under the penalties of perjury as follows.

1. I am an Assistant Corporation Counsel in the Appeals Division of the New York City Law Department. I am familiar with this matter based on my review of this office’s files and conversations with staff and officials of the New York City Department of Education. I submit this affirmation in support of the application of the City of New York, the New York City Department of Education, and its Chancellor (collectively “DOE”) for an order under CPLR 5704(a) vacating the ex parte temporary restraining order (TRO) of Supreme Court, New York County (Frank, J.) entered on July 22, 2022 (*see* Exhibit 1). Supreme Court’s TRO enjoins DOE from “any further implementation of the funding cuts in the approved budget” for the 2022-2023 school year and from “spending at levels other than as required by the FY 2021-2022 Department of Education budget” (*see id*).

INTRODUCTION

2. Due largely to the reduction of pandemic-related federal funding, and notwithstanding increases in city and state funding, DOE’s budget for the upcoming 2022-2023 school year is substantially lower than the budget for the 2021-2022 school year.

Petitioners—two parents of City public school students and two City public school teachers—object to the spending cuts necessitated by this loss of funding. They challenge the budget on procedural grounds, asserting that the City Council voted on and adopted the budget before DOE’s Panel on Educational Policy (PEP) had completed its own review and vote on the budget. And they seek a purely procedural remedy for this alleged violation: a revote by the City Council on DOE’s FY23 budget, which they hope will result in more funding being added to the budget.

3. While DOE is aware of this Court’s disinclination to intervene in matters soon to be revisited again by Supreme Court, this case is that extraordinary one in which each passing day under the sweeping and ambiguous strictures of the TRO paralyzes DOE in preparing for the fast-approaching school year. As discussed more fully below and in the accompanying affidavit of DOE’s Acting Interim Chief Financial Officer Benjamin Schanback, sworn to July 28, 2022 (Exhibit 3), (“Schanback Affidavit”) with each passing day, DOE is losing another critical opportunity to make urgently necessary decisions about the funding of new programs, the

movement of teachers to schools where they are needed, the resolution of disputes and questions raised by individual school about their budgets, and a host of other urgent matters.

4. The sweeping TRO does not merely freeze the status quo, as Supreme Court may have intended, but instead effectively locks DOE into spending levels that no longer reflect incoming student enrollment, new programs and initiatives, changes in staffing, and innumerable other factors that go into ensuring that DOE's 1,400 schools can educate the school system's more than 900,000 students (*see* Exhibit 3). Under the TRO, DOE will be barred from allocating funding where it is needed—for example, to schools that have an increase in enrollment over last year, schools planning for the arrival of new teachers, and schools expecting a rise in the number of students with disabilities (*id.*). Every working day of the summer, DOE schools and administration make literally thousands of budget decisions. All of those decisions depend on knowing the level of funding for each school and category of funding (*id.*). Because of the TRO, the Chancellor is “gravely concerned

about [DOE's]ability to assure the orderly opening of schools this September" (Exhibit 4).

5. Petitioners cannot justify the enormous harm the TRO is already working on the school system and its students. If petitioners ultimately prevail and the City Council votes again on DOE's budget, any increase in the school budget that results could be used to offset the spending cuts that petitioners bemoan. But the disruption caused right now by the TRO cannot readily be undone. Petitioners purport to bring this action to advance the interests of school children and staff, yet the TRO they have obtained is contrary to the interests of DOE's students, staff, and schools.

6. Moreover, the relief ordered greatly exceeds the courts' proper role, infringing on the policy-making functions of the Mayor and the City Council. It also awards relief far beyond, and fundamentally untethered to, the remedy that would be available as the ultimate relief in the proceeding.

BACKGROUND

A. The DOE's budget for the 2022-2023 school year

7. The City's budget process begins with the Mayor's issuance of a Preliminary Budget, detailing proposed operating and capital expenditures and forecasting revenues for the City for the upcoming fiscal year, and three subsequent years. The City Council then invites public comment and conducts public hearings at which agency heads may testify regarding the impact of the proposed allocations on their operations. By April 26 of each year, the Mayor presents a proposed Executive Budget for the upcoming fiscal year to the City Council. Charter Chapter 10, § 249. The proposed Executive Budget is also the subject of public hearings and comment. The City Council then negotiates with the Mayor concerning a final budget.

8. These negotiations consider both the fiscal needs of the various City agencies and the fiscal condition of the City as a whole. Thus, the City budget is the product of careful planning, and reflects considered policy choices of the Mayor and the City Council necessitated by the balancing of political goals and commitments

and fiscal interests and concerns. Ultimately, the authority to approve a final budget rests with the City Council (although the Mayor may veto it subject to override by the Council). NYC Charter, § 254.

9. The proposed Executive Budget presented by Mayor Adams in the spring of 2022 contained budget reductions for nearly all of the City's agencies, including a substantial reduction to DOE's budget as compared with the previous fiscal year (see Exhibit 3). These reductions were affected by various factors. Most notably, while the federal government had previously provided DOE with financial assistance, because this was part of a one-time infusion of stimulus relief during the COVID-19 pandemic, those funds were no longer available. In addition, DOE experienced a significant decrease in student enrollment.

10. DOE then issued an Estimated Budget. Thereafter, on May 31, 2022, DOE Chancellor Banks issued an Emergency Declaration pursuant to N.Y. Educ. Law § 2590-g(9), adopting the Estimated Budget on an interim basis until the PEP could have a

final vote on the budget. Thereafter, DOE announced the allocation of budget funds to each school.

11. The Mayor and City Council then announced agreement on a budget deal and the City Council voted 44-6 to approve the proposed budget for Fiscal Year 2023, which included the amounts set forth in the Executive Budget for DOE. Following the required 45 days of public comment on the Estimated Budget, on June 23, 2022, the PEP held a hearing and took comments regarding the DOE's Estimated Budget (*see* Exhibit 3). At the hearing's conclusion, the PEP voted 10-4 to approve the Estimated Budget.

B. This proceeding

12. On July 18, 2022, petitioners commenced this proceeding by proposed Order to Show Cause alleging, *inter alia*, that Respondents violated N.Y. Education Law §§ 2590-g and 2590-q by failing to hold a hearing of the PEP, and receive public comment, concerning DOE's proposed budget for Fiscal Year 2023, and to vote on adopting that budget, prior to the City Council's vote to adopt the City budget (Exhibit 5(1) and (2)). In addition to requesting various forms of declaratory relief, the petition seeks an

order requiring the City Council to reconsider and re-vote on the DOE's 2022-2023 budget (Exhibit 5(1)).

13. The Order to Show Cause included a request for a preliminary injunction enjoining DOE (i) “from any further implementation of the funding cuts contained in the adopted budget for the NYC Department of Education for the 2022-2023 school year,” and (ii) “from spending at levels other than as required by the FY 2021-2022 Department of Education budget” (Exhibit 5(1)). Supreme Court granted the requested relief and signed the Order to Show Cause on July 22, 2022, without holding oral argument at which respondents could be heard in opposition, and without submission of papers by DOE (Exhibit 1).

14. Thereafter, in a call to chambers on Friday, July 22nd with the parties in attendance, DOE requested and Supreme Court permitted DOE to submit an application to vacate the TRO. After the submission of papers by both sides, the court issued a short-form “interim decision & order on motion” declining to vacate the TRO.

ARGUMENT

THIS COURT SHOULD VACATE THE TRO UNDER CPLR 5704(a)

Emergency injunctive relief of the kind Supreme Court imposed here is intended as a “drastic” measure to “preserve the status quo pending a trial,” and “should be used sparingly.” *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 715 (2d Dep’t 2011). To establish entitlement to a TRO, a petitioner must show that “(1) it will suffer irreparable injury if the preliminary injunction is not granted; (2) the likelihood of success on the merits; and (3) the balance of equities are in favor of the petitioner’s application.” *Golden Ring Tr., Inc. v. City of New York*, 2005 N.Y. Misc. LEXIS 8587, at *11 (Sup. Ct. N.Y. Co. Aug. 12, 2005).

Here, rather than preserving the status quo and preventing irreparable harm, the TRO has upended and effectively paralyzed DOE’s normal operations, thus causing immediate and continuing harm to DOE’s ability to fulfill its fundamental mission to educate the City’s children—a harm that only increases each day that it remains in effect. In doing so, the TRO exceeds the judiciary’s proper role by intruding on education matters that are reserved to

the legislative and executive branches. The Court should grant immediate relief under CPLR 5704(a) by vacating the TRO.

A. The TRO is causing immediate, irreparable harm to DOE that increases each day that it remains in effect.

15. Every day that it remains in effect, the TRO is causing significant, irreparable harm to DOE, preventing it from properly preparing for the upcoming school year and jeopardizing its ability to be ready for arrival of the school system's over 900,000 students on September 8 (see Exhibit 3 and 4). The principals of DOE's 1,400 schools face the prospect of having to meet their responsibilities to their students without funding properly matched to their current needs and priorities (see Exhibit 3). Indeed, the Chancellor is "gravely concerned about [DOE's] ability to assure the orderly opening of schools" (Exhibit 4).

16. The fundamental problem is that the TRO freezes spending at the last school year's levels and precludes DOE from implementing the 2022-2023 budget approved by the City Council. But schools' budgets do not remain the same from year to year, changing primarily in response to changes in the makeup of their

student populations, particularly enrollment (*see* Exhibit 3). DOE's approved budget for the current fiscal year is therefore substantially different from last year's budget—allocating more funds to some schools and programs and less to others, based on differing enrollment and priorities, as well as to new programs just getting off the ground (*id.*). By freezing DOE's budget at last year's funding levels, the order effectively prevents DOE from allocating funding appropriately for the upcoming school year and stymies the implementation of important new initiatives (*id.*). In a system with close to one million students, and commencement of classes just six weeks away, this is untenable.

17. In this short period before the school year begins, the DOE, as part of its normal operations, identifies schools that have needs that cannot be met in their existing budget and allocates additional resources to those schools (*id.*). The Department identifies teachers who have been excessed from one school so that they may be hired by other schools (*id.*). Also during this time, DOE hires staff for new programming in accordance with budget allocations for this year (*id.*). All of these actions involve spending

in accordance with this year's approved budget, not last year's (*id.*). Accordingly, they are all in jeopardy due to the TRO.

18. Thus, as explained more fully in the Schanback Affidavit (Exhibit 3), the TRO, by freezing funding at last year's levels, is having the following "immediate deleterious impact[s] on DOE's ability to plan for the opening of school in September," among many others:

- Barring the provision of additional funding to schools experiencing enrollment growth that exceeds projections; indeed, hundreds of schools will lose funding they are entitled to under the current budget;
- Interfering with DOE's dynamic staffing process by preventing schools from responding to staff attrition, transfers, and leaves, as well as reassigning teachers to schools that need them; the result could be a ripple effect as reversed hiring decisions affect multiple staff and schools;

- Preventing the allocation of funding to schools for new programming, including new dyslexia programs and career and technical education;
- Blocking the reallocation of funding to respond to schools' changing populations of students with increased needs, such as students with disabilities and multilingual learners;
- Preventing the shifting of funding within schools among existing programs and priorities to ensure that funding meets current student needs;
- Stopping adjustments to funding for the Summer Rising program that is currently taking place in school buildings;
- Precluding DOE from providing additional funding to schools that have demonstrated financial needs for mandated instructional services and operational requirements that cannot be met within their existing budgets.

19. The sheer number of budgeting decisions frustrated by the TRO is staggering. During the crucial working days in the summer months leading up to a new school year, individual schools and DOE administrative offices daily engage in 3,500 budget actions involving programming, staffing, and other matters (*see* Exhibit 3). Together, these budget actions enable the school system to prepare for the coming school year.

20. The temporary nature of the order only exacerbates the problem(*id.*) . Even if DOE could determine what it is entitled to spend money on under the terms of the TRO, and even if the TRO could grant DOE the authority to spend more money than the City Council has allocated to it, that authority could evaporate with the resolution of the proceeding. This is because the ultimate relief requested by the petition—a revote by the City Council—could easily leave DOE with the same budget that it had a week ago. DOE cannot make the decisions it needs to make now, in hiring and assigning staff and distributing resources, on the basis of fiscal resources that haven't actually been allocated by the City Council, and are likely to disappear upon a final ruling by Supreme Court.

21. Supreme Court may have intended DOE to comply with the order by increasing spending to offset the budget cuts, but DOE does not have the authority to spend funds that have not been allocated to it. The City, moreover, cannot simply reallocate funds from one agency without going through a budget process involving a vote by the City Council and the approval of the Mayor. Further, the City is required by law to have a balanced budget, so additional funding for DOE would have to come from some other part of the City's budget. Section 8(1)(a) of the NYS Financial Emergency Act; City Charter § 1516(a).

22. At bottom, the source of the shortfall is a decrease in federal funding. The approved budget for the 2021-2022 school year contained substantial amounts of federal stimulus funding (*see* Exhibit 3). That funding is no longer available at the same levels and cannot simply be made to reappear. Indeed, the state and city governments provided more funding in the current school year's budget than they did for the 2021-2022 budget, but that funding did not fully offset the loss of federal pandemic-relief funds (*id.*).

23. Every single day that this TRO remains in effect is a day that these necessary steps to prepare for the school year are halted and exacerbates the damage to DOE's ability to provide for the education of the City's students. Accordingly, the TRO simply upends DOE's functioning with no clear path forward.

B. The TRO does not advance petitioners' stated goals.

24. By disrupting DOE's ability to prepare for the coming school year, the TRO fundamentally fails to preserve the status quo and advance petitioners' stated goal of protecting students and staff from the effects of budget cuts. Under these circumstances, the balancing of the equities clearly tips in favor of vacating the TRO. *See Gulf & Western Corp. v. New York Times Co.*, 81 A.D.2d 772, 773 (1st Dep't 1981) (reversing trial court and denying preliminary injunction where plaintiffs failed to demonstrate that the harm to plaintiff from denial of the injunction, as against the harm to defendant from granting it, tips in plaintiff's favor).

25. To begin, the TRO is fundamentally counterproductive. Petitioners, as parents and teachers of public school students,

necessarily have an interest in there being a functioning school system that is able to make rational decisions on hiring and resource allocation based on known resources prior to the start of the school year. But that requires DOE to be able to allocate funds to schools and programs in accordance with current needs and priorities. It also requires that DOE be able to allocate additional resources to individual schools beyond what is available in their existing budgets, as it normally does at this time. But because these present funding needs are not reflected in last year's budget, DOE cannot make them while the TRO remains in place.

26. Further, the order causes these harms without preventing any irreparable harm to petitioners: unlike the harm DOE faces from the continuation of the order, any harm that petitioners claim to face as a result of the approved budget could potentially be remediable if they were to prevail in this proceeding. If petitioners prevail and the City Council were to vote again on DOE's budget and allocate additional funding for the DOE, and the Mayor approves that budget, DOE would be able to hire additional teachers and restore programs. The possibility that petitioners

could be made whole precludes them from establishing entitlement to injunctive relief. *Cf. Ogdensburg Professional Firefighters' Ass'n, Local 1799 v. City of Ogdensburg*, 2021 N.Y. Misc. LEXIS 1896 (Sup. Ct. St. Lawrence Co. Jan. 11, 2021) (denying preliminary injunction seeking to enjoin reduction in staffing levels adopted as part of upcoming city budget, holding, *inter alia*, alleged harm could be recompensed by monetary award).

27. In contrast, budget decisions that schools might take in reliance on the TRO, while it is pending, would be far harder to undo. For instance, schools that lost funding compared to last year under the approved budget might attempt to retain excessed teachers or hire new staff, only to discover later, if respondents prevail, that those transactions must be reversed (*see* Exhibit 3). The effect would be severe disruptions to staffing and programming right before the start of school (or even after the school year has already started). This asymmetry of outcomes strongly supports immediate vacatur of the TRO.

C. The TRO’s relief exceeds both the Judiciary’s proper role and the ultimate relief available on the merits of the petition.

28. Finally, the TRO should be stayed because it vastly exceeds the court’s proper role, treading on essential matters of education policy that are properly reserved to the Mayor and the City Council. Further, petitioners have made no showing that they are entitled to the TRO’s relief—relief which far exceeds what petitioners would be entitled to if they were to ultimately succeed on the merits of the petition.

29. The underlying article 78 petition asserts that there was a procedural defect in the approval process for the 2022-2023 DOE budget in that the PEP did not vote on the proposed budget prior to the New York City Council’s vote. Even assuming *arguendo* that petitioners are correct, this would not authorize an order that usurps the policy-making responsibilities of the Mayor and the City Council and imposes its own judgment on a complex budget process.

30. Rather, the law is settled that the “judiciary [should] not undertake tasks that the other branches are better suited to perform.” *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-36 (1984).

This includes leaving the determination of how best to address “complex societal and governmental issues ... to the discretion of the legislative and executive branches of our tripartite system.” *Id.*

31. Accordingly, since the “expenditures of public moneys for educational purposes, ... presents issues of enormous practical and political complexity ... [i]t would normally be inappropriate ... for the courts to intrude upon such decision-making.” *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 50 (1982).

32. Notably, the petition itself does not seek the imposition of judicial will on the City budget as its ultimate relief. Rather, it seeks the City Council’s reconsideration and revote on the DOE’s budget for the current fiscal year (Exhibit 5(1)). That ultimate relief is very different from what the TRO does on an interim basis—overruling the budget determinations made by the City’s elected officials and imposing a different judgment. *See Jones v. Beame*, 45 N.Y. 2d 402, 407 (1978) (plaintiff’s case raises “questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena”).

33. The interim remedy imposed by Supreme Court is all the more unwarranted because the additional funding that petitioners seek through this proceeding is not guaranteed even if they prevail. Rather, it involves a number of uncertainties: Petitioners must first establish entitlement to another vote by the City Council; the City Council must then vote to provide DOE with additional funds; and the Mayor must then approve that budget or the City Council must override a mayoral veto. Various outcomes are possible at any of these steps, but a reinstatement of last year's budget is not a reasonably likely possibility.

34. Accordingly, petitioners have not shown any reasonable entitlement to relief that has been granted to them. *See Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 240 (1984) (“where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is non-justiciable as wholly speculative and abstract”); *Golden v. Steam Heat*, 216 A.D.2d 440, 442 (2d Dep’t 1995) (“the irreparable harm must be shown by the moving party to be imminent, not remote or speculative”); *Valentine v. Schembri*, 212 A.D.2d 371 (1st Dep’t

1995) (reversing grant of preliminary injunction because allegations of irreparable harm from loss of health insurance were speculative).

WHEREFORE, DOE respectfully requests that this Court grant DOE's application for an order under CPLR 5704(a) vacating the ex parte temporary restraining order of Supreme Court, New York County entered on July 22, 2022.

Dated: New York, New York
July 28, 2022



TAHIRIH M. SADRIEH
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EXHIBIT 1

E

At a Special Term Part 11 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 80 Centre St., New York, New York, on the ___th day of July, 2022.

PRESENT: HON. Cyle E. Grand
Justice of the Supreme Court
SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter of

TAMARA TUCKER and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students, and PAUL TRUST and SARAH BROOKS, individually, and on behalf of all similarly situated New York City public school teachers,

Petitioners,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and the CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, David C. Banks, In his official capacity,

Respondents,

For an Order, Pursuant to Section 6301 and Article 78 of the CPLR and Sections 2590-g and 2590-q of the New York Education Law, Annulling the Adoption of the New York City FY 2023 Budget and the New York City Department of Education FY 2023 Education Budget.

-----X

Upon the annexed Verified Petition, dated July 17, 2022, and the supporting documents annexed thereto, the annexed Affirmation of Laura D. Barbieri, dated July 17, 2022, and the

**ORDER TO SHOW CAUSE
AND REQUEST FOR A
TEMPORARY
RESTRAINING ORDER**

Index No.: 155933/2022

✓ dated July 7, 2022

supporting documents annexed thereto, the annexed Affidavits of Tamara Tucker, Melanie
 dated July 5, 2022 dated July 6, 2022 dated July 6, 2022 dated July 11, 2022 dated July 17, 2022
 Kotler, Paul Trust, and Sarah Brooks, Tom Sheppard, and Leonie Haimson, and there being good
 and sufficient cause being duly ^{alleged} shown therein, Respondents are hereby—

LET RESPONDENTS

~~ORDERED TO~~ SHOW CAUSE, at the Supreme Court, State of New York, County of

New York, Part II, Room 308, at 80 Centre Street, New York, New York, on

the ^{4th} ~~2nd~~ ^{August} day of ~~July~~, 2022, at 10 o'clock in the forenoon of that date or as soon as thereafter

as counsel may be heard, why an Order should not be entered, pursuant to § 6301 and § 7802(d)

of the Civil Procedure Law and Rules:

- a) Declaring that Respondents DOE and Chancellor violated New York Education Law Section 2590-q(4)(a) by their failure to require the adoption of the DOE FY23 estimated education budget by the City Board (which the DOE refers to as the Panel for Education Policy) prior to the vote by New York City Council on the City FY23 Budget, adopting that budget, thereby depriving the City Council of the benefit of the public hearing, public comments, and vote by the City Board, whose adoption was required to occur prior to the City Council's consideration and vote on the DOE FY23 education budget.
- b) Declaring that the New York City Charter and/or New York Education Law were violated by Respondents DOE and Chancellor by the failure of the Chancellor to convene a meeting of the City Board, hold a public hearing, and receive public comments, for the purposes of voting on the proposed DOE FY23 estimated budget prior to the vote by the City Council to adopt that budget pursuant to New York Education Law §§ 2590-g(7), (8) and 2590-q(5).

- c) Declaring that Respondents violated New York Education Law §§ 2590-g(1)(e), and 2590-q(4)(a), (5), (6) by failing to provide the City Board with sufficient information to allow the evaluation and determination of the impact of the proposed budget cuts in the DOE FY23 education budget, which should have included estimates for total amounts proposed for programs or activities of the community district education councils in units of appropriation separate from those set forth for programs or activities operated by the City Board, and which should have been provided in or with the presentation of the DOE FY23 education budget to the New York City Council prior to City Council's vote on its adoption;
- d) Declaring Respondent City violated New York Education Law §§ 2590-q(4)(a), (5), (6) by its adoption of the City FY23 Budget by the New York City Council and the Mayor before the vote by the City Board approving the DOE FY23 estimated budget;
- e) Declaring Respondents have failed to meet their constitutional mandate to provide a sound basic education to New York City public school students.
- f) Annuling the vote by City Council on and the Mayor's approval of the City FY23 Budget, which incorporated the DOE FY23 education budget;
- g) Mandating as soon as practicable the reconsideration and revote by the New York City Council on the DOE FY23 education budget, to thereafter be incorporated by the City into the adopted City budget for FY23;
- h) Granting to Petitioners their costs, attorneys' fees, and expenses; and
- i) Granting such other further relief as may be just and equitable; and it is further,

ORDERED that pending the hearing and determination of this matter, the Respondents are

- a. Enjoined from any further implementation of the funding cuts contained in the approved budget for the NYC Department of Education for the 2022-2023 school year;
- b. Enjoined from spending at levels other than as required by the FY 2021-2022 Department of Education budget; and it is further

ORDERED that the NYC Department of Education should as soon as practicable send a letter to all school employees and parents informing them of the temporary restraining order on the implementation of the City's Department of Education budget for the 2022-2003 school year, and that the Department of Education budget for the 2021-2022 school year will remain in effect until the Court renders a final decision on this application, with this letter copied to the Court and to the Petitioners' attorneys; and it is further

ORDERED that service of this Order to Show Cause, and the papers upon which it is granted, be made by personal and electronic service on the City of New York and the New York City Department of Education and Chancellor through the Department of Law for the City of New York, on or before the 26th day of July 2022, and shall be deemed good and sufficient service; and it is further

ORDERED that Respondents shall file, and serve by email their responsive papers, if any, on or before the 26th day of August 2022 on all parties; and it is further


HON. LYLE E. FRANK
JSC

JSC


~~26th~~ August
ent

ORDERED that Petitioners shall file, and serve by email, their reply papers, if any, on or before the 2nd day of ~~July~~ ^{August} 2022.

ENTER:



Justice of the Supreme Court

Oral Argument
Directed 

JSC
HON. LYLE E. FRANK

HON. LYLE E. FRANK
J.S.C.

Index No. 155933/2022

EXHIBIT 2

APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT
SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

-----X

In the Matter of

TAMARA TUCKER and MELANIE KOTLER,
individually, and on behalf of all parents and guardians
of New York City public school students, and
PAUL TRUST and SARAH BROOKS, individually, and
on behalf of all similarly situated New York City public
school teachers,

Dkt. No.
2022-03187

Originating Court
No. 155933/2022

Petitioners,

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION, and the
CHANCELLOR OF THE NEW YORK CITY
DEPARTMENT OF EDUCATION, David C. Banks,
In his official capacity,

Respondents,

AFFIDAVIT IN SUPPORT

For an Order, Pursuant to Section 6301 and Article 78
of the CPLR and Sections 2590-g and 2590-q
of the New York Education Law, Annulling the
Adoption of the New York City FY 2023 Budget and
the New York City Department of Education
FY 2023 Education Budget.

-----X

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

BENJAMIN SCHANBACK, under penalty of perjury, declares that the following is
true and correct:

1. I am the Interim Acting Chief Financial Officer of the New York City Department
of Education (“DOE”). I have served in this role since June 27, 2022. Previously, I was
Managing Director in the Office of the Chief Financial Officer. I have been employed by the
DOE since July 2014.

2. In both my prior and current roles, I am deeply involved in the development and implementation of budgets at all levels of DOE, from individual schools up through citywide operations of DOE Central and the Chancellor's office.

3. I also have worked closely on every fiscal year budget for DOE since fiscal year ("FY") 2015.

4. As such, I am familiar with both NYC's and DOE's budget processes, and the facts and circumstances set forth below.

5. I submit this affidavit in support of vacatur of the temporary restraining order issued by the lower court on July 22, 2022 (the "TRO"), which enjoins Respondents from implementing the budget approved by the City Council for DOE for the 2022-23 school year and requires Respondents to spend at levels approved for the 2021-22 school year.

THE TEMPORARY RESTRAINING ORDER IS DISRUPTING DOE OPERATIONS

6. The sweeping nature of the TRO fails to account for the complex ecosystem of how DOE's funds are allocated and spent. While the City's Adopted Budget sets spending levels for broad categories, such as instruction, transportation, food, and special education, individual school budgets change not only from one school year to the next, but also within the same school year based upon factors such as enrollment. As a result, even if the City's Adopted Budget sets spending levels at the exact same amount two years in a row, any given individual school budget in each of those years is not likely to be the same. Yet the TRO both limits the DOE from "further implementation of the funding cuts in the approved budget," and also "enjoin[s] [the DOE] from spending at levels other than as required by the FY 2021-2022 [DOE] budget," failing to take into account that each year the needs of schools are different, and the budget for one school year does not account for the budget needs in a subsequent year.

7. Implementing the Court's injunction is not a simple matter of telling schools and offices to spend based on last year's budget. Money is generally allocated to schools using detailed formulas and/or specific criteria for allocation. A school's budget is primarily driven by the makeup of its student population. If a school has increased or decreased enrollment or needs, even if the City's Adopted Budget for the 2022-23 school year were the same as the 2021-22 school year, funding for the school will be different than the funding allocated in the 2021-22 school year.

8. The unclear wording of the TRO makes it impossible to determine what spending is permitted and what spending is restricted, and thus is creating havoc and confusion for DOE's day-to-day operations and spending decisions that are necessary to properly prepare for the fast-approaching 2022-23 school year. As detailed below, DOE's efforts to create or fund certain programs, including allocating new funding to schools, are being hindered because the funds necessary for such programs are not explicitly authorized by the FY 2022 (*i.e.*, last year's) budget.

9. The immediate harm caused by the TRO is significantly exacerbated by its uncertain duration. While it is set to expire by its terms on August 4, 2022, there is no guarantee that it will not be continued until a determination of the underlying Petition. Moreover, even if Petitioners are ultimately successful on the merits, there is no assurance that DOE's overall funding will be increased to last year's levels, as the Petition does not seek this relief, but rather seeks a revote on the DOE's FY 2023 budget by the City Council, which may determine to continue the amounts it already has approved.

10. Work during the summer months (particularly late July and all of August) at all levels of the DOE, from individual schools up to central administration, is especially critical to

an orderly opening of schools in September. Every day, decisions need to be made about programming and staffing by staff ranging from school principals to senior leadership. Every day actions must be taken to hire and move staff and order goods and services. On average, every working day in summer sees over 3500 actions by schools and administrative offices in our budgeting system.

11. There are numerous instances where the TRO is having an immediate deleterious impact on DOE’s ability to plan for the opening of school in September. The following crucial budget actions anticipate spending at levels “other than as required by the prior year DOE FY 22 education budget:”

- i. **Routine release of new enrollment funding to support the needs of school that are experiencing enrollment growth in excess of projections.** Schools may notify DOE Central, at any point after their initial budgets are set, if they face enrollment growth beyond the projection used to develop initial budgets. Additional funding must be provided before the start of the school year so these schools can hire teachers and create programming for the upcoming year in alignment with their enrollment.
- ii. **Routine release of funds to schools that need to replace one type of teacher with another and/or excess staff that are not required for the school’s instructional program.** The ripple effect of reversing one hiring decision could impact multiple staff and schools. With over 75,000 teachers and 23,000 paraprofessionals, DOE has a dynamic staffing situation that is impacted not just by budgets, but also by staff attrition, staff transfers, and staff going on and returning from leave. And assigning excess staff to new locations (*i.e.*, moving excess teachers off of an individual school’s budget and making them available to other schools with need) is necessary

for schools that have vacancies for the fall to find candidates to meet instructional needs for the upcoming year.

- iii. **New budget allocations to schools for new programming, which supports staffing and supplies for new programs prior to school opening in September.** Allocations in this category include funding for two schools that have taken initial steps to begin new dyslexia programs but have not yet received the planned funding. It also includes funding for: schools to provide new Career and Technical Education (“CTE”) student pathways; the psychologist-in-training program (which places psychologists in schools to provide special education services); and changing populations of students with disabilities. The injunction also threatens planned programmatic expansions, such as growth in pre-K programs, an increase in the number of therapists in schools to provide services to students and building out other programs for students with disabilities.
- iv. **Routine school-level adjustments to the uses of existing allocations based on changing needs.** Principals may move funding within their existing budget from current programs to other priorities to ensure that funding is provided to meet current students’ needs (*e.g.*, changes caused by additional students being added to the school register, new classes) and that staff is paid in a timely manner for hourly or per session/per diem work. Routine budget transactions at the school level needed for the opening of school include the creation of vacancies, per session postings, orders for textbooks and supplies, and other needed items. Planned spending may differ from the spending level in the FY 2022 budget for either programmatic reasons or budgetary reasons. Delayed creation of vacancies can result in missing staffing

deadlines—the Open Market Transfer period (“OMT”), which allows teacher to transfer between schools on the “open market” without explicit signoff from their current Principal, closes on August 8, 2022.

- v. **Routine transfer of funds from school budgets to central program offices to cover centrally managed services (e.g., Core Curriculum and Bilingual Paraprofessional Services).** These are normal administrative transactions to cover central costs on behalf of schools, that fluctuate depending on the factors referenced above, as well as the choices of Principals about their own instructional priorities among other considerations.
- vi. **Funding to support routine staffing transactions (e.g., terminal leaves), which cannot be effectively predicted.**
- vii. **Routine adjustments to the Summer Rising Program school budget allocations,** which are currently taking place in school buildings. The budget for this program, and the budget allocation methodology, differ from the funding levels in FY 2022.
- viii. **Routine release of funding to schools based upon their appeals for additional funding for items other than those reviewed above:** At this time of year, DOE typically provides additional funding to schools that have demonstrated financial needs for mandated instructional services and operational requirements that cannot be met within their existing budget. This funding is meant to address deficits in a school’s budget caused by such special circumstances, such as student breakage (where there are additional students who must be assigned to an additional class, thereby requiring the hiring of an additional teacher) or unique conditions posed by a school’s layout that impose additional costs on the school. Without funding being

allocated in a timely manner, schools cannot hire teachers to meet these needs.

However, the funding we would allocate this year (currently over \$30 million) exceeds the FY 2022 amount budget for this purpose (\$20 million).

12. With the TRO in effect, the DOE cannot clearly communicate to schools, superintendents, or the field when the above actions will take place. Delay of these essential actions and decisions causes delay of other decisions. For example, the appeals funding process referenced above consists of several rounds of appeals, with different timeframes. Subsequent rounds cannot be effectively and accurately completed until the initial round has been completed.

13. The TRO also affects:

- i. the allocation of new revenue being transferred from other city agencies where this revenue differs from the levels required in FY 2022.
- ii. processing of new grant allocations and rolling funding into the FY 2023 budget for summer grants ending on August 31, 2022, as these grants and rollover levels may differ from the levels required in FY 2022; and
- iii. new allocations to support critical purchasing to prepare for school opening, including air filters, funding for Community Schools, 3K expansion, and Special Education compensatory services, to the extent that these allocations are at levels that differ from the levels in FY 2022.

14. Moreover, if school budgets must be changed, even temporarily to their 2021-22 school-year levels by the TRO:

- i. Hundreds of schools will lose funding as compared to last year. As school budgets are primarily driven by enrollment, many schools actually saw projected increases of

enrollment in FY 2023 compared to FY 2022, and millions of dollars were allocated to those schools to support their growth.

- ii. Schools that lost students, and therefore funding, compared to last year may attempt to retain teachers or hire new staff—only to find that, if the Court rules in favor of Respondents, that those transactions must be reversed, resulting in last-minute changes to staffing and programming only weeks before school starts, a tremendous burden on principals.
- iii. Schools will be inequitably funded, as a school’s budget will not be directly tied to the projected enrollment and needs of the school, but rather the enrollment and needs of prior years, regardless of changed circumstances for the upcoming school year. Even if the number of students in a school remains the same, there are always shifts in mandates and student programming (*i.e.*, course) needs. This has significant implications, as the population of students with disabilities, multilingual learners, and students in temporary housing also shifts year over year. For schools that have increased enrollment in any of these populations, the DOE would want to provide increased funding to meet students’ needs.

ABOUT NYC BUDGET PROCESS

15. It bears emphasizing that development of each annual fiscal year budget is an almost continuous, year-round process. City budgets are based on a five-year financial plan. The Mayor must propose a balanced budget for the upcoming fiscal year as part of the Preliminary Budget in January. That budget is then updated in the Executive Budget and finalized in the Adopted Budget. After the Adopted Budget, the Mayor’s Office proposes amendments in November, January, April, and again as part of the subsequent year’s Adopted Budget.

16. Pursuant to N.Y. Education Law- 2590-r, DOE (and, in particular, the Chancellor, or his designees) is required to engage in a months-long process of engagement with stakeholders at every level of DOE, including school principals, superintendents, and Community Education Councils (which are composed of parents and community members selected from among the families and community members engaged with local schools).

17. DOE, like other agencies, advises City Hall of its anticipated budget needs for the upcoming fiscal year, but it is City Hall that decides what funding levels to propose in the Mayor's executive budget. The Chancellor does not have a veto over this decision, and neither state education law nor the NYC Charter requires the Mayor to take any particular action in response to or after receiving.

18. Significant percentages of DOE's budget are:

- i. Funded by the state and federal government, based on decisions over which New York City has no or limited direct authority;
- ii. Dedicated to mandatory expenditures such as debt service and pension costs, which are centrally paid by the Office of Management and Budget, and nondiscretionary expenses such as charter school tuition and special education settlements.

19. Mayor Adams' Preliminary FY 2023 Budget, announced in February 2022, proposed to reduce DOE's city tax levy budget by approximately \$557 million, including \$375 million in systemwide savings from enrollment changes, from the previous FY 2023 baseline, which had been published in the Financial Plan released in November 2021.

20. Following that announcement, DOE sent an e-mail on February 18, 2022 to all principals noting the Mayor's preliminary budget and how schools would be funded for the

upcoming school year, and explaining that initial budget and Fair Student Funding allocations in FY 2023 will reflect projected enrollment and all schools will be maintained at 100% Fair Student Funding. The proposed reduction was also reported in the media.

21. DOE timely posted its Estimated Budget on May 6, 2022, ensuring the statutorily required 45 days of public notice of the budget estimate would take place before the Panel for Educational Policy (“PEP”) voted on it at the regular, calendar meeting scheduled for June 23, 2022.

22. On May 31, 2022, DOE Chancellor David Banks issued an Emergency Declaration pursuant to N.Y. Educ. Law § 2590-g(9), adopting the Estimated Budget on an interim basis. In so doing, the Chancellor explained that “Due to the timing of the release of projected funding for the city school district used to develop the Estimated Budget, there is not sufficient time to complete the public comment period and obtain Panel approval of the estimated budget before budget allocations are sent to schools and the FY 2023 City Budget is adopted.” Because “[d]elaying the school-based budgeting process would have a harmful effect on the operation of schools,” the Emergency Declaration was “necessary to preserve the health, safety and general welfare of the students and the school system as a whole.”

23. Pursuant to the Emergency Declaration, the Chancellor adopted the Estimated Budget for a period of 60 days or until PEP voted on it following the forty-five-day comment period, whichever came first.

24. On or about June 5, 2022, following the release of the Executive Budget on April 26, 2022, principals and school communities received their FY 2023 initial budgets, which showed the preliminary impact of enrollment loss on their individual school budgets.


25. On June 13, 2022, City Council voted to adopt the budget for FY 2023 (which began July 1, 2022).

26. The FY 2023 budget for NYC is \$101.1 billion and includes the FY 2023 DOE budget of \$37.6 billion.

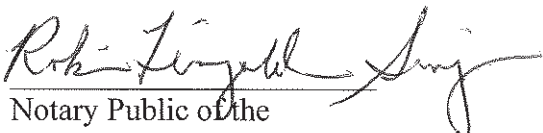
27. The final FY 2023 DOE budget includes increased revenue from the City and State; the decrease in DOE's bottom-line budget was primarily attributable to a reduction of federal dollars, which has been provided to DOE as a one-time infusion of pandemic-related relief over several years.

28. Notably, DOE is not authorized to spend more funds than allocated to it in the City budget approved by the City Council on June 13, 2022. Thus, although the TRO would seemingly require DOE to increase its spending, there is no authority for it to do so, or to fund the programs and staffing described above.

By reason of the foregoing, it respectfully requested that the Court vacate the TRO entered on July 22, 2022.


Benjamin Schanback

Sworn to before me this
28th day of July, 2022


Notary Public of the
State of New York

ROBIN FEINGOLD SINGER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02SI6104235
Qualified in New York County
My Commission Expires January 20, 2024

EXHIBIT 3

APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT
SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of

TAMARA TUCKER and MELANIE KOTLER,
individually, and on behalf of all parents and guardians
of New York City public school students, and
PAUL TRUST and SARAH BROOKS, individually, and
on behalf of all similarly situated New York City public
school teachers,

App. Div. Dkt. No
2022-03187

Petitioners,

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION, and the
CHANCELLOR OF THE NEW YORK CITY
DEPARTMENT OF EDUCATION, David C. Banks,
In his official capacity,

Respondents,

AFFIDAVIT IN SUPPORT

For an Order, Pursuant to Section 6301 and Article 78
of the CPLR and Sections 2590-g and 2590-q
of the New York Education Law, Annulling the
Adoption of the New York City FY 2023 Budget and
the New York City Department of Education
FY 2023 Education Budget.

-----X

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

DAVID C. BANKS, under penalty of perjury, declares that the following is true and
correct:

1. I am the Chancellor of the New York City Department of Education (“DOE”), a
role which I have held since January 1, 2022, and I have been an educator for over 30 years.
2. In my role as Chancellor, I am fully familiar with the operation of the New York
City public schools. I have reviewed the Temporary Restraining Order dated July 22, 2022 (the

“TRO”), and have grave concerns about the negative impact it will have on schools, students and families if it remains in effect.

3. In order to open schools in an organized, effective fashion, every single day of planning and preparation during the summer months is critical.

4. It is over the summer that Principals start to finalize their register (meaning, total student enrollment numbers) for the coming fall.

5. This tells them: what the mix of their students will be by age, grade, specific needs, and other factors; what kind and volume of textbooks and other materials they will need to have in place; whether there are new legal or programmatic mandates they must fulfill; whether they need additional supports and programs to serve their mix of students; whether their school building will have particular challenges or issues with space and facilities, that need resolution before the first day of school, and more.

6. Every one of these decisions involves funding considerations. Principals, who received their initial budgets in early June, are asked to schedule their budgets by the end of June—that is, have a plan for how to use the funding allocated to them.

7. When registers are larger than expected, principals submit an appeals request to DOE Central, these requests are reviewed and DOE Central would generally seek to add additional money back into the school’s budget. Similarly, when students have IEP or other needs that were not budgeted for, principals work with local DOE budget representatives to add funding to comply with legal mandates.

8. Principals are then responsible for hiring teachers and other staff, posting vacancies, interviewing and selecting applicants during our “open market” period which closes in early August. They also contract with service providers during the summer to provide additional programming, such as after-school arts programs.

9. The planning and preparation process extends through the summer with August being the busiest and most critical time to ensure preparedness for the first day of school.

10. This planning is already well underway. The interruption of this process that is being caused by the TRO is creating a major risk of hindering the orderly opening of schools by delaying the filling of staff positions, putting programs in limbo, and leaving supplies and services not ordered—all resulting in an inability to have schools open in an organized and orderly process in September.

11. In addition to the disruption to this crucial planning, I have been advised that we must pause actions at the central level because they are based on our funding decisions made pursuant to fiscal year 2023 budget if they are at levels which are different from those in fiscal year 2022.

12. That vague, sweeping language is extraordinarily difficult to interpret and is severely disrupting our system's daily functioning and preparation for school year 2022-2023.

13. Among a long list of things I am advised are currently being negatively impacted by the TRO are: the launch of critical, priority new programming to combat dyslexia; the release of certain significant sources of funding that we have planned to make available to schools that require register adjustments; the implementation of changes to certain program schedules (and therefore spending) meant to strengthen those programs; and even processing the placement of teachers who were excessed from their original schools.

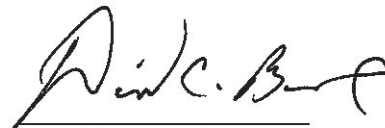
14. After the pandemic-caused disruptions of the last three school years, it is imperative that NYC's more than 900,000 students and their families experience an orderly and effective return to school in September.

15. This means that children must be welcomed back to their schools on schedule, by teachers with whom they can be expected to work for the entire school year, with programs and

materials in place that allow for the immediate start of their core work of learning and building relationships with their peers; and with leadership and administrators who have confidence in the stability of their operational conditions.

16. Because of the direct impact of the TRO on all aspects of DOE's functioning, I am gravely concerned about our ability to assure the orderly opening of schools this September. I cannot overstate how consequential, and even disastrous this is for our City's children.

By reason of the foregoing, I respectfully request that the Court vacate the TRO entered on July 22, 2022.



David C. Banks

Sworn to before me this
28th day of July, 2022



Notary Public

ROBIN FEINGOLD SINGER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02SI6104235
Qualified in New York County
My Commission Expires January 20, 2024