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,

Index No. 155933/2022
IAS Part 11
(Frank, J.)

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

**MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO VACATE THE TEMPORARY RESTRAINING ORDER**

Dated: July 26, 2022
New York, New York

ADVOCATES FOR JUSTICE,
Laura D. Barbieri
lbarbieri@advocatesny.com
Attorneys for Petitioners
225 Broadway, Suite 1902
New York, NY 10007
(212) 285-1400 - office
(914) 819-3387 – cell

## PRELIMINARY STATEMENT

Respondents completely ignore the actual chaos and disruption that is occurring throughout the public school system due to Respondents' budget cuts, the amount of which is still unknown because the DOE refuses to provide this specific information. Respondents also ignore the *Verified* Petition which was supported by multiple sworn to affidavits of Petitioners who are actually experiencing firsthand the devastating effects of the cuts to their school budgets. See Petitioners' Aff. in Support of the Order to Show Cause.

Respondents instead recount a myriad of *potential* events that *might* occur should the TRO continue. See Schanback Aff., *passim*. Nowhere in Schanback's Affidavit does he provide actual specifics regarding the alleged chaos that Respondents claim will befall the school system should the TRO continue. Schanback instead hypothesizes regarding decisions that schools may or may not be able make should the TRO not be vacated. As Respondents so aptly state, speculation cannot form the basis of a TRO. Petitioners meet that standard. Respondents do not.

On July 18, 2022 by Order to Show Cause this action was commenced by two parent petitioners and two teacher petitioners requesting a temporary restraining order and preliminary injunction, along with a request for an expedited briefing schedule as a consequence of the existing and impending harm being caused by the unlawful vote of City Council, which improperly preceded the New York City Board of Education of the School District of the City of New York, hereafter referred to as the City Board. Without argument, the Court issued the requested TRO on July 22, 2022. Doc. No. 21. Thereafter, Respondents requested and were provided with an opportunity to move to vacate the TRO. Their supporting papers were filed

yesterday, July 25, 2022.[1] Doc. No. 22, 23, and 24. This memorandum of law and supporting affidavits are filed by Petitioners in response to Respondents' motion to vacate the TRO.

Throughout their motion papers, Respondents err in referring to the DOE as a "city agency." R-Mem. at 5. The DOE is not a city agency, nor are they a mayoral agency. See Schanback Aff. ¶¶ 10, 23, referring to the DOE as an agency of the City. Rather, the DOE is a separate legal entity established pursuant to the New York State Education Law and is subject to State statutes, which Respondents implicitly acknowledge by their affiant Schanback's repeated references to sections of the New York State Education law that must be followed. *Id.* ¶¶ 22, 29, 35.

Further, as the Affidavits of the CEC Presidents attest, there were no collaborative communications with the DOE regarding the CEC budgets, no months-long budgeting discussions with the CECs, nor any process of collaboration regarding the DOE's estimated budget, contrary to Schanback's Aff. ¶ 22. And there certainly were no budgets received containing units of appropriation as required by Section 2590.

Respondents also err in arguing that school budget funds are the type of "monetary relief" considered by a court in determining whether a TRO or Preliminary Injunction is appropriate. See R-Mem. at 1, 10-11. Monetary relief that precludes a TRO or PI means damages. See Petitioners' response *infra* at Point I-A. This argument was rejected by the Court during arguments on July 22, 2022 and should be rejected again now.

Finally, Respondents ignore the basic thrust of this action: namely, that the budgeting process did not comply with state law as required. Because the process was fundamentally

[1] Petitioners note that Respondents quarrel with the denomination of the issued Order as a TRO, arguing that the Order is instead a Preliminary Injunction. R-Mem at 1, n. 1. This argument in many respects a distinction without a difference since the standard governing both devices is substantially the same.

flawed, the resulting education budget must stayed until the hearing on the Preliminary Injunction. That is the relief requested Petitioners requested and that was the appropriate relief as ordered by this Court.

## PROCEDURAL HISTORY

On July 18, 2022, Petitioners commenced this action by filing an Order to Show Cause and Verified Petition alleging that Respondents violated New York Education Law §§ 2590-g and 2590-q by failing to allow the City Board to vote on the Department of Education's ("DOE") estimated budget for Fiscal Year 2023 ("FY23") prior to the City Council's vote. On this same day, Petitioners also filed a memorandum of law in support of their request for an Order to Show Cause and Temporary Restraining Order. In their Order to Show Cause, Petitioners requested that the Court enjoin Respondents from any further implementation of the budget cuts and from a hearing can occur on the request for a preliminary injunction and spending at levels beyond what is required by the DOE Fiscal Year 2022 education budget until this matter can be heard and determined on its merits. On July 22, 2022, the Court issued the Order to Show Cause (the "Order") that enjoins Respondents from implementing the DOE FY23 education budget pending a hearing and determination on the matter. On July 25, 2022, Respondents filed a memorandum of law in support of their application to vacate the Court's Order. This reply memorandum of law is submitted in opposition to Respondents' allegations that Petitioners have failed to satisfy the standard for the award of interim relief.

## SUMMARY OF FACTS

### Issuance of the Budget Cuts

Petitioners incorporate their statement of facts therein and provide only a limited recitation herein.

**The City Council Vote**

On June 13, 2022, the City Council voted to approve the DOE's FY23 education budget without the City's Board's prior review or vote. VP ¶ 13; Sheppard Aff. ¶ 36. The City Council vote was illegitimate because the City Board had yet to hold public meetings and cast its own vote on the estimated budget. By statute, the City Council should have voted only after the City Board heard from the public, voted on the budget, and made the record of the process available. VP ¶¶ 2-3, 19. With a record of public comments and the City Board's vote available to it, the City Council would have been able to make a more informed and legitimate decision as to whether or not to approve the estimated budget. The City Council was therefore deprived of its right to hear the opinions and reasoning of the citizens they were elected to serve. *See* Barbieri Aff., dated 7/18, Exh. 4.

**Public Comments**

Approximately a week after City's Council's vote, on June 22, 2022, the DOE posted a Public Comment Analysis that summarized the submitted comments it received from the public on the estimated education budget. Barbieri Aff., dated 7/18, Exh. 4. The comments criticized the fact that the Chancellor circumnavigated the legitimate budget approval process by adopting the estimated education budget using an Emergency Declaration. VP ¶ 6; Sheppard Aff. ¶ 31. In response, the DOE stated that the FY23 estimated budget needed to be adopted quickly because, due to the timing of the release of projected funding for the City school districts used to develop the estimated education budget, there was insufficient time to complete the public comment period and obtain the City Board's approval before budget allocations needed to be sent to schools. Barbieri Aff. Exh. 4. However, no emergency actually occurred.

**The City Board Vote**

On June 23, 2022, the City Board voted to approve the education budget, ten days after the City Council had already done so. VP ¶ 14; Sheppard Aff. ¶ 38. The resulting budget cuts caused and continue to cause irreparable harm to NYC public school students, parents, teachers, and staff as a result of eliminated programs and services that are crucial to the educational and socio-emotional health of students. VP ¶ 15. Further, long-time teachers were excessed severing the valued and close relationships they had formed with their students. Thereafter, finding a lawyer, and one who would work pro bono, simply took time which Petitioners contend was entirely reasonable and caused no harm to Respondents.

**When Petitioners Found Out About the Budget Cuts**

Contrary to Respondents' assertions, Petitioners did not find out about the budget cuts until in or about June, 2022. *See* Tucker Aff., dated 7/26.

**The Impact of the Budget Cuts on Petitioners and NYC Public Schools**

As a direct result of the FY23 budget cuts, Petitioners and NYC public schools across the entire school system have suffered and will continue to suffer harm. *See* Casaretti Aff., dated July 26, 2022, Exh. 2.

**Stakeholder Engagement**

Respondents' allege in their affidavit that, in deciding on the education budget, the DOE is required to engage in a months-long process of engagement with stakeholders at every level of DOE, including Community Education Councils ("CECs"). Schanback Aff. dated July 22, 2022. The CECs are composed of parents and community members elected from the body of individuals involved with local schools. *Id*.

However, the DOE does not in fact actively seek community input or collaboration from CEC members. *See* Casaretti Aff. ¶ 3; McLean Aff. ¶ 3. In presenting the education budgets to CECs, the DOE simply tells the CECs what the budget will be, providing only basic and general information. *See* Casaretti Aff. ¶ 7; McLean Aff. ¶ 6. Further, the DOE communicates to the CECs through an email address that many CEC members are unable to access. Casaretti Aff. ¶ 4–5. The DOE also does not confirm dates or times when it will give the presentations, and is extremely uncommunicative with the CECs whenever they reach out. Casaretti Aff. ¶ 10; McLean Aff. ¶¶ 5, 9. DOE representatives who present the budget to the CECs also rarely can answer CEC members' questions. Casaretti Aff. ¶ 9. Contrary to Respondents' assertions, the DOE does not seek the CEC's contributions in any meaningful way. Casaretti Aff. ¶ 11; McLean Aff. ¶ 10–11.

## ARGUMENT

## STANDARD OF LAW

While the legal standard for a temporary restraining order (TRO) is the same as a preliminary injunction, there are key difference in their procedural natures. "The grant of a temporary restraining order is frequently *ex parte*, generally made on papers alone and in an expedited manner under severe constraints." *In re Keene Corp.*, 168 B.R. 285, 292 (Bankr. S.D.N.Y. 1994). By contrast, a preliminary injunction "requires notice, an evidentiary hearing and more extensive review of the underlying merits of the case." *Id.* The validity of a TRO in a case must be judged separately from the right to preliminary injunctive relief. *Id.* The two forms of relief have different purposes: the purpose of a TRO is to "preserve an existing situation *in status quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. *Garcia v. Yonkers School Dist.*, 561 F.3d 97, 107 (2d Cir. 2009) (internal

quotations omitted). Further, a TRO may be properly granted where a party seeks to affirmatively prevent harmful actions against others. *Basank v. Decker*, 449 F.Supp.3d 205, 216 (S.D.N.Y. 2020).

Despite a different interpretation, both a preliminary injunction and a TRO require four elements: (1) a likelihood of success on the ultimate merits of the lawsuit; (2) a likelihood that the moving party will suffer irreparable harm if the TRO is not granted; (3) that the balance of hardships tips in the moving party's favor; and (4) that the public interest is not disserved by the relief granted. *Id.* A motion to grant or to vacate a TRO is addressed to the sound discretion of the court, and a party claiming error in a ruling on such a motion must show an abuse of discretion. [See, e.g.], *A.D. Bedel Wholesale v. Phillip Morris Inc.*, 272 A.D.2d 854 (N.Y. App. Div. 4th Dept 2000) (where the court did not abuse its discretion in denying a cross motion to vacate a TRO where the plaintiff demonstrated "immediate and irreparable injury, loss, or damage" should the TRO not be issued pending a hearing on the motion for a preliminary injunction); N.Y. C.P.L.R. 6301, 6313, 6314 (McKinney 2022).

## I. RESPONDENTS' FAILED TO REBUT THE STANDARD REQUIRED FOR A TEMPORARY RESTRAINING ORDER.

### a. Petitioners Have Met Standards for Irreparable Harm

The Petitioners have met the standard for granting a preliminary injunction by demonstrating that there is a prospect of irreparable injury if the provisional relief is withheld. *Nobu Next Door LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). A preliminary injunction is appropriate when a plaintiff can show that a defendant "threatens or is about to do, or is procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action." C.P.L.R. § 6301. Finally, as here, a party has a right to a preliminary injunction when the issue is a significant public interest, such as "the smooth and efficient

running of the school system." *Ross v. Disare*, 500 F. Supp. 928, 934 (S.D.N.Y. 1977) (internal citations omitted).

Because education financing is an essential public interest, the court, while not a legislative body, will step in to "define," "safeguard," and "redress" the funding policies that violate the State Constitution. *Montgomery-Costa v. City of New York*, 894 N.Y.S.2d 817 (N.Y. Sup. Ct. 2009) (holding petitioners seeking declaratory relief in the form of enjoining the DOE from laying off more than 500 school aids due to budget cuts was justiciable). The court will also provide declaratory relief by enjoining budget cuts and establishing sufficient funding where petitioners demonstrate the funding policy creates an irreparable harm. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003) (determining that because excessive class sizes denied students' thier state right to a "a sound basic education under the state constitution," the state budget was subject to reform so that every New York City School met the new criteria); *See also E.G. v. City of New York*, No. 20-CV-9879 (AJN), 2020 WL 7774346, at *5 (S.D.N.Y. Dec. 30, 2020) (holding that plaintiffs were entitled to injunctive relief due to the irreparable harm caused by the City's failure to provide homeless students with Wi-Fi internet access); *N.J. v. New York*, 872 F. Supp. 2d 204, 214 (E.D.N.Y. 2011) (granting a preliminary injunction to prevent DOE from disenrolling homeless students where the city failed to ensure homeless students "attended" school by allowing these students to fully participate in learning at public school similar to housed students).

The Respondents claim that the Petitioner's application does not meet the standard for harm is unfounded since (1) the Petitioners are requesting a stay of the FY23 Budget and not monetary relief and (2) Petitioners have demonstrated actual harm, in the form of eliminating

programs and services and excessing teacher positions, which are a direct result of the FY23 budget cuts. R-Mem. at 9.

A. Petitioners request a restoration of the status quo budget, not monetary relief.

Because children have a constitutional right to a sound basic education and the current funding policies substantially interfere with that right, the irreparable harm to the New York City school system caused by the FY23 education budget must be preempted via preliminary injunction. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003).

Respondent errs by asserting that Petitioners seek monetary relief and thus are barred from seeking a preliminary injunction. See R-Mem. at 12; *Ogdensburg Prof'l Firefighters' Ass'n, Local 1799 v. City of Ogdensburg*, 2021 N.Y. Misc. LEXIS 1896 (Sup. Ct. Jan. 11 2021). Rather, Petitioners seek a temporary restraining order and preliminary injunction to bar any further budget cuts, in line with other New York cases seeking injunction on irreparably harmful funding policies. *See generally, E.G. v. City of New York*, No. 20-CV-9879 (AJN), 2020 WL 7774346, at *5; *Montgomery-Costa v. City of New York*, 894 N.Y.S.2d 817; *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893.

B. Petitioners provide evidence of actual harm caused by budget cuts via demonstrating that elimination of programs and services and excise teaching positions in schools.

Despite the estimated FY23 budget for the DOE being $37.642 billion, the estimated cuts reported have ranged from $215 million to 1.7 Billion.[2] Barbieri Aff., dated 7/18, Exh. 4. This

[2] *See* Testimony of New York City Comptroller Brad Lander to the Join Hearing of the New York City Council Committees on Education and Oversight & Investigations on DOE School Budgets for FY 2023, New York City Comptroller (June 24, 2022) https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-lander-to-the-joint-hearing-of-the-new-york-city-council-committees-on-education-and-oversight-investigations-on-doe-school-budgets-for-fy-2023/ (stating a "net reduction of $489 million" between FY 2022 and FY 2023 and that "1,166 schools lost a total of $469 million." ); Cayla Bamberger, *NYC Council Members Protest Budget Loss of at Least $215M to Schools*, NEW YORK POST, https://nypost.com/2022/06/24/nyc-council-members-protest-loss-of-at-least-215m-to-schools/ (June 24, 2022) (reporting $215 million); Class Size Matters (June 19, 2022) https://classsizematters.org/galaxy-budget-cuts-to-schools-at-more-than-1-7b-far-larger-than-reported/ (reporting $1.7 billion).

money is crucial to supporting nearly a million public school age children by providing instructional services, special education programs, multilanguage, career and technical skill development, and a host of other free services while also providing the operational budget to pay the thousands of staff, teachers, and pensions of DOE personnel. VP ¶¶ 15, 35, 82; Barbieri Aff., dated 7/18, Exh. 4.

Not only did the budget adoption result in cuts to education that have and will continue to severe and negative impact the City's ability to continue funding necessary programs that support New York City's diverse and growing student population, the cuts directly interfere with the continued employment of operational staff and education professionals at their assigned schools. VP ¶¶ 58, 66, 82; *see also* Casaretti Aff., dated July 26, 2022, Exh. 2. If the FY23 budget remains in place, many educational professionals are slated to be excessed, in addition to those already excessed. VP ¶¶ 25, 60, 63, 67. The court has previously found that eliminating teacher positions constitutes a harm to the public interests of students that must be remedied. *See Montgomery-Costa*, 894 N.Y.S.2d at 826; see *also Campaign for Fiscal Equity*, 100 N.Y.2d at 911. Here, the Mayor and Chancellor violated the New York Education Law § 2590. Accordingly, this vote and the adoption of the City FY23 education budget must be annulled.

Respondents' claim that Petitioners' claim for irreparable harm is speculative; however, the Petitioners provided concrete evidence that budget cuts were made, which have already begun to affect programs and teacher positions. *See generally* Tucker Aff.; Kotler Aff.; Trust Aff.; Brooks Aff.; Haimson Aff., dated 7/18, Exh. 7. Thus, the cited cases used by the Respondent are not applicable to this case. *See Golden v. Steam Heat, Inc.*, 628 N.Y.S.2d 375 (1995) (dismissing plaintiff's claim for injunctive relief where plaintiffs provided *no* evidence of adverse harm); *Valentine v. Schembri*, 622 N.Y.S.2d 257 (1995) (reversing grant of plaintiff'

TRO where the plaintiff states *if* he suffered harm through termination, he was entitled to backpay and reinstatement) (emphasis added). Finally, Respondents claim that it is speculative as to whether City Council would have voted not to approve the estimated budget had they known of the budget's effects. R-Mem. at 14. However, City Council has already stated that, had they been made aware of "significant reductions to school budget," over forty of the Council members would not have approved the budget. City Council Letter to Chancellor David C. Banks (July 12, 2022).

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

The clearest indicator of legislative intent is the statutory text. *Matter of New York Public Interest Research Group Straphangers Campaign v. Reuter*, 739 N.Y.S.2d 127, 168 (App. Div. 1st Dep't 2002). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the legislature." *Id.* There, the court affirmed the granting of a preliminary injunction requiring the New York City Transit Authority to adhere to Public Authorities Law § 1205(5) by giving public notice, conducting a public hearing, and getting approval of its board prior to eliminating or reducing staffing hours. *Id.* at 168. The court looked toward various documents that revealed legislative intent, which reflected "a statutory purpose to prevent the [Transit Authority] from arbitrarily closing subway stations or restricting access thereto without notice to the public." *Id.* at 166.

Likewise, in *Mulgrew v. Board of Education of the City School District of the City of New York*, the New York Supreme Court granted the plaintiff's preliminary injunction when the respondents failed to comply with Education Law § 2590-h(2-a) by deviating from the requirement of public engagement by various stakeholder groups when a decision is made to close a school or there is a significant change in school utilization. 902, N.Y.S.2d 882, 886, 890

(Sup. Ct. 2010), *aff'd* 75 A.D.3d 412 (App. Div. 1st Dept 2010). Through interpretation of statutory language and comparisons to the Court of Appeals' analysis of a similarly worded statute, the court concluded that any deviation from the procedural requirements "would appear to trivialize the whole notion of community involvement in decisions regarding the closing or phasing out of schools." *Id.* at 888; *see also Williamsburg Around the Block Assn. v. Giuliani*, 644 N.Y.S.2d 252 (N.Y. App. Div. 1st Dept. 1996) (finding that an injunction was correctly issued when the respondents failed to comply with requirements of the statute. Accordingly, their actions were declared null and void). By mandating compliance with the procedural steps of the statute, the court made clear that it was not limiting the respondents' power to close schools, but instead, only required that they comply in good faith with the procedure set forth by the Legislature, which ensured "meaningful community involvement." *Id.* at 889.

Here, the Chancellor unlawfully declared an "emergency" to bypass the City Board's vote to send funding to schools on June 5, 2022. *See* N.Y. Educ. Law §§ 2590-g(7), (8); VP ¶ 6. Although the City Board did eventually vote on June 23, 2022, their vote occurred ten days after the City Council's vote on June 13, 2022 – an unlawful reversal of the procedure. VP ¶¶ 2-3, 19. Further, at the City Board's meeting on June 23, the Chancellor repeatedly stated at the meeting that this vote was merely procedural and did not have any meaning or force because the City Council had already adopted the education budget. Casaretti Aff., dated July 26, 2022; McLean Aff., dated July 26, 2022.

However, a proper vote by the City Board is imperative to the procedural process because it promotes full stakeholder participation and transparency within the community. In 2002, the New York legislature established the City Board by adopting a new governance plan to provide "an opportunity for meaningful participation for both parents and the community." N.Y. Bill

Jacket, 2003 S.B. 5688, Ch. 123. Upon review of the governance plan, while some changes were made, the law preserved the City Board and mandated that it must approve the education budget after a public comment period and that there be a monthly meeting where community members could be heard and considered before any vote. *Id.* Furthermore, the City Board's bylaws require public meetings at least once per month and that there is sufficient time for public comment on an agenda topic prior to a vote, stating that these "meetings are held to encourage the general public's maximum participation in advising of the [City Board]." Barbieri Aff., dated July 18, 2022, Exh. 13.

By declaring an "emergency," the Mayor and Chancellor improperly circumnavigated the budget process, including public engagement and the ability for the City Board and City Council to make informed votes. Petitioners request a preliminary injunction to remedy the unchecked executive power, which was used to thwart the statutorily proscribed procedure and contradicts the requirement for community stakeholder participation.

Contrary to Respondents' assertion that Petitioners request a complete reconsideration of the budget, instead, Respondents request that the budget cuts be stalled while the City Council has the chance to has a chance to hold an informed vote in compliance with the statute. Furthermore, in support of the assertion that "a significant portion" of schools will be negatively affected by this request, Respondents contend that 300 schools will be receiving more money. R-Mem. at 3. However, one sixth of the entire city public school system is *not* a "significant portion," especially in comparison to the Comptroller's estimate that 1,166 schools are losing a total of $469 million.[3]

[3] *Testimony of New York City Comptroller Brad Lander to the Join Hearing of the New York City Council Committees on Education and Oversight & Investigations on DOE School Budgets for FY 2023*, New York City Comptroller (June 24, 2022) https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-

### c. PETITIONERS' ARE SEEKING RELIEF WITHIN A REASONABLE TIMEFRAME

Petitioners are seeking relief within a reasonable timeframe. Respondents claim that the budget cuts have been known by the Petitioners since February 16, 2022. However, the public was not informed of the actual impact of the budget cuts until after June 5, 2022, when the Chancellor sent the budgets to schools. Even then, it takes weeks before the school community – i.e., teachers, parents, and students actually became aware of the cuts. Tucker, Kotler, and Trust were not informed of the budget cut until June 13, 2022. Tucker Aff., dated 7/26; Trust Aff., dated 7/26; Kotler Aff., dated 7/26. Even so, Kotler did not receive details regarding the budget cut from the principal until June 28, 2022. Kotler Aff., dated 7/26.

In *Commissioners of State Ins. Fund v. Ramos*, the court held that the defense of laches was unavailable to the defendants because the defense only pled a "bare legal conclusion without supporting facts." 63 A.D.3d 453 (2009). Here, Respondents base their defense in meritless claims that Petitioners were "well aware" of the budget cuts since February 16, 2022 and the "assertion of irreparable harm is negated by their lack of diligence in pursuing relief." R-Mem. at 18. In stark contrast, Petitioners were not made aware of the budget cuts until earliest June 2022. Respondents claim that Petitioners "did nothing, waiting over two months, until July 18, 2022, to commence this proceeding" yet Respondents fail to note that Petitioners did not have notice of the proposed cuts until about one month prior to the commencement of the proceeding. R-Mem at 18.

---

lander-to-the-joint-hearing-of-the-new-york-city-council-committees-on-education-and-oversight-investigations-on-doe-school-budgets-for-fy-2023/

Respondents are correct in that a delay in seeking the enforcement a preliminary injunction "tends to indicate at least a reduced need for such drastic speedy action." *Citibank, N.A. v. Citytrust*,756F.2d273,276 (2d Cir.1985); *Matter of Raffe*, 42 Misc 3d 1236l, l,2014 N.Y. Misc. LEXIS 1081, *5 (Sup. Ct. Nassau Co. Mar. 7, 2014) ("an inordinate delay in seeking injunctive relief is itself antithetical to irreparable harm in the absence of a preliminary injunction"). Here, however, there was no "inordinate" delay,

In error, Respondents relied on *Garland v. N.Y. City Fire Department*, where the court denied injunctive relief against the City after a 33-day delay and *Broecker v. N.Y.C. Dep't of Educ*., where the court declined to enjoin the DOE due to the plaintiffs' 44 days of inaction. *Garland v. N.Y. City Fire Dep't,* 2021 U.5. Dist. LEXIS 233142, *22 (E.D.N.Y. Dec. 6, 2021); *Broecker v. N.Y.C. Dep't of Educ*., 202l U.S. Dist. LEXIS 226848, *27 (E.D.N.Y. Nov. 24, 2021). Any delay was entirely reasonable and without prejudice to Respondents. Tucker Aff., dated 7/26; Trust Aff., dated 7/26; Kotler Aff., dated 7/26.

In *Schultz v. State of New York*, where the appellants asserted a lawsuit within one year of the adopt of a fiscal year budget, the court barred the constitutional challenge due to respondents' use of a laches defense. 81 N.Y.2d 336, 347 (1993). As Respondents noted, the *Shultz* court hinged its decision on whether the delay was prejudicial to the opposing party. *Id*. at 348 (citing *Matter of Barabasft*, 31 N.Y.2d 76, 81 (1972). There, the court found that the delay was prejudicial to the opposing party because the appellants commenced the action on April 29, 1991, which was well within the 1990-1991 fiscal year that the was being challenging. *Id*. Here, that was not the case. Petitioners brought this lawsuit within weeks of being informed of the budget cuts. Tucker Aff., dated 7/26; Trust Aff., dated 7/26; Kotler Aff., dated 7/26.

Lastly, Respondents relied on *Sheerin v. New York Fire Dep't Arts. I & 1B Pension Funds*, stating that in an Article 78 proceedings providing more than proof of an unexcused delay is not necessary to invoke a laches defense. 46 N.Y.2d 488, 495-96 (1979). As in an Article 78 case, the statute of limitations is four months; thus, Respondents cannot legitimately claim that Petitioners delayed when they initiated their action in a timely fashion, within a month of the harmful cuts.

**d. THE BALANCE OF THE EQUITIES FAVORS THE PETITIONERS**

As Respondents correctly stated, the court "must weigh the relative hardship that may be imposed upon each of the parties by the issuance or denial of a preliminary injunction." R-Mem at 19 (citing *Western New York Motor Lines, Inc. v. Rochester-Genesee Regional Transp. Auth.*, 72 Misc. 2d 712, 717 (Sup. Ct. N.Y. Co 1973). On balance, the equities weigh heavily in the Petitioners' favor. Respondents are incorrect in their evaluation of the balance, stating that the irreparable harm to students, teachers, and the public school system is outweighed by the inconvenience to the City through the disruption of "the careful budget process and... the planning and delivery of City services." R-Mem. at 20. Petitioners have demonstrated that irreparable harm has and will continue to occur as a result of the budget cuts. *See Nassau Roofing and Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 (3d Dept 1979) (stating that "in order for a preliminary injunction to issue it must be shown that the irreparable injury to be sustained by the plaintiff is more burdensome to it than the harm caused to defendant through imposition of the injunction").

Respondents refuse to acknowledge the importance of providing appropriate funding to schools, arguing that the unbudgeted money should be saved to be "available for other needs." R-Mem. at 21. They further state that "using the money now ignores the significant financial

impact that such spending…will have in successive years." *Id*. Yet, on balance, the immediate and irreversible harm currently occurring to students, teachers, and the school system outweighs theoretical future "needs" the City may have.

Further, Respondents incorrectly claim that Petitioners are requesting that the City "use some unspent federal stimulus funds or moneys in the City's reserve funds." R-Mem. at 21. In fact, Petitioners are not telling the city how to spend its money; rather, Petitioners ask that no further cuts be made and that a new vote can be held in compliance with the New York Education Law § 2590.

**e. THIS MATTER IS JUSTICIABLE**

The Court has authority to decide this matter because the Mayor and Chancellor's violation of Education Law § 2590 is not an issue of policy but of statutory enforcement. Contrary to Respondents' position that Petitioners are requesting the Court to decide the education budget, since the budget approval process circumvented requirements by law, Petitioners instead ask that the budget cuts be prevented while City Council has the chance to hold a re-vote pursuant to statutory requirements.

A matter that involves public policy or implicates the executive or legislative branch does not make a matter non-justiciable. *Buong Jae Jang v. Brown*, 560 N.Y.S. 2d 307 (App. Div. 2d Dep't 1990). Moreover, when a matter involves a violation of a constitutional or statutory duty or an action by educational authorities rooted in statutory provisions, it is justiciable. *Montgomery-Costa*, 894 N.Y.S.2d at 827 (finding that because petitioners "do not ask this [c]ourt to substitute its judgment for that of the Chancellor" and instead allege constitutional violations, the claims are justiciable). Here, Petitioners do not request that the court mandate how the City should spend its money. Instead, Petitioners assert that Respondents violated a

statutorily mandated process and as such, request that future budget cuts be prevented and that a new vote pursuant to statutory requirements can be held.

Respondents rely on *Klosterman v. Cuomo*, 61 N.Y.2d 525 (1985) and *Jones v. Beame*, 45 N.Y.2d 402 (1978) for the proposition that the court does not have the authority to decide this matter because it would encroach on the powers delegated to the executive and legislative branch. R-Mem. at 23. Likewise, Respondents assert that the court has no authority over matters of public policy because courts "may not substitute their judgment…for professional judgment of educators or government officials." *Hoffman v. Board of Education of City of New York*, 49 N.Y.2d 121, 123 (1979); R-Mem. at 23-24. Respondents misconstrue the issue in this matter. Petitioners do not dispute that certain matters of policy are non-justiciable. Again, Petitioners do not request that the judiciary "undertake tasks that the other branches are better suited to perform." *Klosterman*, 61 N.Y.2d at 535. Here, however, Respondents violated § 2590 by circumventing the process of the City Board by having City Council vote prior to a public hearing and vote by the City Board. The court is not imposing "itself into the management and operation of public enterprises" because it is not evaluating the propriety of FY23's budget nor is it involved in the intricacies of the budget process or altering the actual budget amounts that were decided by the Mayor or City Commissioner. *Jones*, 45 N.Y.2d at 407-08. The court is asked to determine whether the budget process was followed and, since it was not, to annul the unlawful budget and reconsider it. This matter concerns the violation of a statutory provision due to the unlawful budget process that subsequently approved the FY23 budget. Accordingly, here, the matter is justiciable.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court upholds its Order of July 22, 2022, granting Petitioners' motion for a temporary restraining order and preliminary injunction.

Dated: July 26, 2022
New York, New York

ADVOCATES FOR JUSTICE
*Attorneys for Petitioners*

By: /s/

Laura D. Barbieri
Special Counsel
225 Broadway, Suite 1902
New York, New York 10007
Tel.: (212) 285-1400, x112
Cell: (914) 819-3387
Fax: (212) 285-1410
Lbarbieri@advocatesny.com