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

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' REQUEST FOR AN ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: July 18, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page(s)**

Other Authorities **Page(s)**

PRELIMINARY STATEMENT

This action is brought to enforce New York Education Law Sections 2590-g and 2590-q, which together require that the New York City Board of Education's[1] hearing process, including opportunities for public comment, and vote on the FY23 education budget occur before City Council votes to adopt the FY23 budget. This June, however, the order of the votes by the City Board and the City Council was unlawfully reversed. On June 23, 2022, the City Board's vote occurred ten days *after* City Council voted to adopt the education budget on June 13, 2022. By their failure to conduct the City Board's hearing and vote before City Council's, Respondents violated the law; in so doing, Respondents denied City Council its right to hear from the City Board, including from the testimony of approximately seventy stakeholders - parents, teachers, and education advocates, who spoke out during the meeting against the budget cuts, urging the City Board to vote, "No."

The State Legislature mandates the order of the City Board and City Council votes on the education budget for a reason. Respondents, however, ignored the expressed statutory mandates and failed to conduct the votes in proper sequence. Despite the explicit procedure, the Chancellor declared that an "emergency" necessitated the City Board's budget approval process be bypassed and that education funding be sent to schools on June 5, 2022, before the vote of either the City Board or City Council.

Yet Chancellors have invoked this same emergency every year since 2010, in at least twelve out of thirteen years. By its ordinary usage, an "emergency" is defined as "unforeseen," "unexpected," or "unanticipated" necessitating immediate action.[2] And yet, according to past

[1] Hereafter referred to as the "City Board."
[2] *See* Meriam Webster Dictionary at https://www.merriam-webster.com/dictionary/emergency.

Chancellors, such "emergencies" occur routinely. The probability that a true emergency occurs year after year, for the past eleven or twelve years or more, however, is exceedingly low. And, as a consequence of this yearly "emergency" occurrence, the Mayor and the Chancellor have rendered the statutory mandates requiring input of the public and approval of the City Board a nullity.

While the City Board did eventually vote on the budget on June 23, during the meeting the Chancellor repeatedly stated that their vote had no meaning or force, as the City Council had already adopted the education budget.

This year, the consequences of this unlawful sequence of votes are devastating. Irreparable harm has occurred and will continue to occur unless the Court acts to stop these budget cuts from continuing and require reconsideration and revote on the FY23 education budget by City Council. Although the DOE refuses to divulge the total amount that will be cut from each school's budget, its officials admit that the intended reductions total at least $215 million – a reduction in the portion of school budgets derived from the Fair Student Funding (FSF) formula. Unfortunately, the DOE is likely underestimating the impending harm. The New York City Comptroller estimated that approximately 77% of the city's public schools will suffer budget cuts to their Fair Student Funding averaging $402,456, for a total of $469 million. Class Size Matters, a non-profit education advocacy organization, conducted an analysis of each school's overall Galaxy budget as of July 14, 2022, and found that 97% of the city's public schools had lost funding as of that date, averaging $940,268 per school. Although more funding is provided in school budgets later in the year, the amounts are generally limited and cannot be used for staffing. The DOE also confirmed that every school will lose at least $25.81 per student compared to last year, and schools with large numbers of students with special needs and other

challenges will be cut far more, according to the Fair Student Funding formula. Haimson Aff. Exh. 6.

Virtually none of the extent or consequences of the DOE's budget cuts were provided to City Council in enough time to assess the impact of the harmful cuts before it voted on the education budget on June 13, 2022. At least several City Council members have expressed that they were not properly informed by the DOE of the impact the budget cuts would have on New York City's public education system and were told that these cuts would only eliminate as yet unfilled staff positions. That information turns out to be deceptively untrue. Ten days after the City Council voted to approve the budget, when the education budget was finally presented to the City Board of education on June 23, 2022, over seventy stakeholders – parents, teachers, and community representatives spoke out at a post-City Council vote meeting of the City Board; each speaker described the terrible consequences of Respondents' budget cuts that had already been planned. None of those views were heard by City Council before they voted.

Petitioners seek the Court's intervention to remedy unchecked executive power, which must end, especially when the proposed budget cuts are so evidently contrary to the "preservation of student health, safety or general welfare." N.Y. Educ. Law § 2590-g(9). Every public-school child is constitutionally and statutorily entitled to receive a sound basic education. Indeed, the importance of a child's education cannot be overstated. Our courts recognize the "fundamental value of education" and the fact that the State must ensure that public schools are able to teach "the basic literacy, calculating, and verbal skills necessary to enable children." *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 20 (2006).

The City Board and its mandated public participation and hearing process are crucial elements of both the requirement of a sound basic education and our City's democracy. No

"emergency" justified the negation of the public's right to be heard and for the City Board itself to debate and vote on the budget before City Council adopted the education budget, or for schools to be sent their diminished budgets before either of these votes occurred. Moreover, the stated rationale for the budget cuts, carefully considered, was and continues to be unwarranted. The City' s FY23 Budget has approximately $5 billion remaining in unspent federal stimulus funds designated for City schools; and the City has an $8 billion dollar reserve fund. Any of these funds could have and should have been used.

The people of New York City, particularly those most affected by the budget cuts, and their representatives on the City Board (who are selected by an array of elected officials), were deprived of the opportunity to have their voices matter. Indeed, the Chancellor told the attending public and the City Board that their vote, and the public's objections, were of no real consequence – that the vote was just procedural. Yet the law and the statutes that express a legislative purpose should not be rendered inconsequential at the Chancellor's option.

With the loss of these funds, vital programming and support systems within our City's public schools will be discontinued. These losses include classroom teachers; special education initiatives; arts and music classes; assistant teachers; school counselors; academic support teams; and enrichment opportunities like field trips and afterschool programs. The children and teachers of New York City have already lost so much. They endured the uncertainties of remote learning and persevered through countless adjustments in their day-to-day lives. Through it all, schools provided a stabilizing environment for children. Now, through an illegitimate budget voting process, the Mayor and the Chancellor have stripped away even more from public schools. Students will lose the educational support and enrichment necessary for our city to education and ensure the success of its next generation.

Petitioners respectfully call upon the Court to remedy the educational injustices caused by the Mayor and the Chancellor, and issue against Respondents a temporary restraining order and preliminary injunction annulling the City's FY23 education budget, and to require City Council to reconsider and revote on the City's FY23 education budget.

STATEMENT OF FACTS

On April 26, 2022, the Mayor's Executive Budget for FY23 was released, which specified the overall proposed education budget including these cuts. *See* Haimson Aff. ¶ 18, Exh. 10. Yet it was not until May 6, 2022, that the DOE posted its annual estimated education budget on its website. However, the estimated budget provided to the City Board did not include any units of appropriation as required by the Education Law, which would designate specifically how these funds were to be allocate, including to community school education councils. *See* N.Y. Educ. Law § 2590-q(5); VP ¶¶ 4-5, 107. Instead, without units of appropriation, the version of the estimated budget presented to the City Board contained only the total amount to be spent on education, the funding sources (federal, state, and city), how much would be spent on pension and other fringe costs, and how much went towards debt service. VP ¶ 5.

On May 24, 2022, the DOE issued an Amended Public Notice of the estimated education budget. Sheppard Aff. ¶ 27. The Amended Public Notice stated that pursuant to section 2590-g(1)(e) of the New York State Education Law, the City Board must approve the annual estimates of the total sum of money that it deems necessary for the operations of the New York City school district for the following school year, which is a part of the overall final city budget. Barbieri Aff. Exh. 5. The Amended Public Notice provided notice that the City Board meeting would be held on June 23, 2022, and that comments could be submitted until June 22, 2022.

The following week, on May 31, 2022, the Chancellor issued an Emergency Declaration of the estimated budget, without a meeting of or vote by the City Board, and thereby circumvented the requirement that the City Board consider whether to approve the estimated budget and then vote. *See* NY. Educ. Law §§ 2590-g(7), (8); VP ¶ 6. Nowhere does the Chancellor claim that he is required or compelled to send money to school budgets before City Council votes; nowhere does the Chancellor claim that it is necessary to reverse the order of these votes; and nowhere does he explain what the emergency is.

On June 5, 2022, the DOE issued the NYC schools' individual Galaxy budgets, which were posted on the DOE's website. Sheppard Aff. ¶ 35.

On June 13, 2022, the City Council voted to approve the City's FY23 education budget. VP ¶ 13; Sheppard Aff. ¶ 36. Because the City Board had yet to vote on the estimated education budget, the vote by City Council was illegitimate.

On June 22, 2022, nine days following the education budget's approval by City Council, a Public Comment Analysis was posted by the DOE that summarized the written comments it received on the estimated education budget posted on the DOE website. Barbieri Aff. Exh. 4. The comments included complaints that the Chancellor had circumnavigated the budget process by adopting the estimated education budget using an Emergency Declaration. VP ¶ 6; Sheppard Aff. ¶ 31. In response, the DOE stated that "the process of temporarily adopting the "Estimated Budget by Emergency Declaration has been implemented virtually every year for many years." Barbieri Aff. Exh. 4. According to the DOE, because of the timing of the release of projected funding for the City school district used to develop estimate education budget, there was insufficient time to complete the public comment period and obtain the City Board's approval of

the estimated budget before budget allocations needed to be sent to schools, and the FY23 estimated budget needed to be adopted. Barbieri Aff. Exh. 3.

The DOE's statement regarding the necessity of using an emergency process to approve the estimated budget was baseless. *Id.*; and see Barbieri Aff. Exh. 7; VP ¶ 6. Alternatives were available, including either to schedule this City Board vote at an earlier regular meeting of the City Board or hold an emergency vote before these funds were allocated to schools. An emergency vote of the City Board was held in 2009, for example, when the potential illegality of the voting order was brought to the then-Chancellor Joel Klein's attention; the Chancellor properly scheduled an emergency vote of the City Board before the City Council vote on the education budget. Haimson Aff. ¶ 11.

Yet there was no specific emergency invoked, and in fact, in twelve out of the past thirteen years, since at least June 2, 2010, several different New York City Schools Chancellors have invoked a similar "emergency" using the same boilerplate language in order to immediately adopt an education budget prior to a vote of the City Board. Haimson Aff. ¶ 16; VP ¶ 7.

The only explanation offered by the Chancellor for the use of this Emergency Declaration was 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 [i.e., City Board] approval of the Estimated Budget before budget allocations are sent to schools and the FY23 City Budget is adopted." Haimson Aff. ¶ 17; VP ¶ 8.

However, there was no material change to the Estimated Budget submitted to the City Board compared to education funding specified in the overall Executive Budget for FY23 that was released by the Mayor on April 26, 2022. Haimson Aff. ¶ 18, Exh. 10; VP ¶ 9

Thus, the education portion of the Executive Budget could have been posted on the DOE website on April 26, 2022. Even with the required 45-day period for public comment, the City Board public meeting and vote could have been scheduled for June 10, 2022, prior to the City Council June 13, 2022 vote and adoption of the City FY23 Budget. Haimson Aff. ¶ 19; VP ¶ 10.

Instead, according to the Emergency Declaration, the Estimated Budget was posted online and available for public comment on May 6, 2022. Haimson Aff. ¶ 19. Even then, with the required 45-day public comment period, the meeting and vote of the City Board could have been held on June 20, 2022, without an Emergency Declaration, and the City Council vote postponed to June 21, 2022, which is well within the deadline of June 30, 2022, in accordance with the City Charter.[3] Haimson Aff. ¶ 20; VP ¶ 11.

On June 23, 2022, after nearly seventy parents and teachers urged the City Board to vote "No," on the education budget cuts to schools, the City Board voted to approve the education budget. VP ¶ 14; Sheppard Aff. ¶ 38. However, the resulting budget cuts caused and continue to cause irreparable harm to students, parents, teachers, and staff. VP ¶ 15. Not only will class sizes increase, which is antithetical to the intent of the New York State legislature's passage of the mandatory class size reduction bill,[4] but also will cause the loss of programs and services that are critical to the educational and socio-emotional health of New York City students. If not reversed, these devastating cuts, which are occurring all across the City's school system, will continue to cause irreparable harm. VP ¶¶ 15, 21, 58-62, 86, 88-90.

By statute, 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.

---

[3] If for any reason the new budget is not finalized and adopted before June 30, which is the end of the fiscal year, the last year's budget will continue in effect until the new budget it passed.

[4] *See* Assemb. Comm. A10498/S09460, 2022 Leg., Reg. Sess. (N.Y. 2022), which awaits the Governor's signature.

Because of the unlawful process used by the Mayor and the Chancellor, City Council was deprived of its right to hear the public comment during the City Board meeting before it considered and voted on the budget. VP ¶ 19. This unlawful procedure that produced the egregious FY 23 education budget must now be reversed.

ARGUMENT

STANDARD OF LAW

It is well settled that the objective of a preliminary injunction is to maintain the status quo. *Tucker v. Toia*, 388 N.Y.S.2d 475 (N.Y. App. 4th Dept. 1976). In *Moody v. Filipowski*, 537 N.Y.S.2d 185 (N.Y. App. Div. 2d Dept. 1989), when discussing preliminary injunctions, the court stated, "As (was) stated in *Tucker v. Toia,* 54 A.D.2d 322, 325-326, [ ] it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits." (Internal citations omitted).

Where a case involves certain issues of first impression in the courts, a preliminary injunction is appropriate "to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner." *Time Sq. Books v. City of Rochester*, 645 N.Y.S.2d 951 (N.Y. App. Div. 4th Dept. 1996) (quoting *Tucker*, 388 N.Y.S.2d; *State v. City of New York*, 713 N.Y.S.2d 360 (N.Y. App. Div. 2d Dept. 2000); *Sau Ma v. Lien*, 604 N.Y.S.2d 84 (N.Y. App. Div. 1st Dept. 1993)).

Pending a hearing on a preliminary injunction, a temporary restraining order may be granted where it appears that immediate and irreparable injury, loss, or damage will result unless the defendant is restrained before the hearing can be held. N.Y. C.P.L.R. § 6301 (McKinney 2022). A preliminary injunction is warranted pending final disposition of an action

> where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

N.Y. C.P.L.R. § 6301.

The decision to grant a motion for a preliminary injunction is committed to the sound discretion of the trial court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Jiggetts v. Perales*, 609 N.Y.S.2d 222, 223 (App. Div. 1st Dept. 1994). Preliminary relief is appropriate where: (1) there exists the prospect of irreparable injury if the provisional relief is withheld; (2) the moving party is likely to succeed ultimately on the merits of its claim; and (3) the balance of equities tips in the moving party's favor. *Nobu Next Door LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). A preliminary injunction is also 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. To establish her right to a permanent injunction, a plaintiff must show "a violation of a right presently occurring or threatened and imminent." *Lemle v. Lemle*, 939 N.Y.S.2d 15, 21 (N.Y. App. Div. 1st Dept. 2012). 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) (citing *Pride v. Community School Board*, 482 F.2d 257, 264 (2d Cir. 1973); *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966); *Lower East Side Neighborhood Health Council-South, Inc. v. Richardson*, 346 F. Supp. 386, 388-89 (S.D.N.Y.1972) (Lasker, J.).

Here, without a temporary restraining order and preliminary injunction it will be impossible to reverse the budget cuts that the schools are about to undergo.

A. Students, Parents, and Teachers are Suffering and Will Continue to Suffer Irreparable Harm Absent a TRO and Preliminary Injunction

1. The Mayor and Chancellor's failure to adhere to N.Y. Education Law § 2590-q has caused and will continue to cause irreparable harm to the City's public school system

Petitioners seek a temporary restraining order (TRO) and preliminary injunction to prevent the continuing irreparable harm they are individually experiencing caused by the Mayor and Chancellor's violations of law. *See generally* Tucker Aff.; Kotler Aff.; Trust Aff.; Brooks Aff. The Petitioners are also entitled to a TRO and preliminary injunction because properly funding public schools is a significant public interest necessary for "the smooth and efficient running of the school system." *Ross*, 500 F. Supp. at 934–35; *see also N.J. v. New York*, 872 F. Supp. 2d 204, 214–15 (E.D.N.Y. 2011) (finding that, after a child's home was destroyed by fire, a preliminary injunction was appropriate because the ability to continue attending school far outweighed a school's enrollment policy; the court was simply "unwilling to gamble with a child's education").

Education financing is an essential public interest; accordingly, 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). 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. It is in the public interest to grant a preliminary injunction to prevent the City's adoption and continued implementation of the FY23 education budget.

The estimated fiscal year 2022-2023 (FY23) budget for the DOE is $37.642 billion. Barbieri Aff. Exh. 4. This 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. Exh. 4. City Council voted on the FY23 budget at the behest of the Mayor and Chancellor, however, before the City Board approved it. VP ¶ 13. The authority of the City Board, whose critical expertise and designated purpose is to determine the necessary budget for New York City public schools, was circumvented and undermined when City Council voted on the City's FY23 education budget. VP ¶ 17, 20. Critically, City Council was denied the necessary input from the public and the City Board that is guaranteed by New York Education Law § 2590-g and -q. N.Y. Educ. Law §§ 2590-g, -q; VP ¶ 17. Not only did the budget adoption result in cuts to education that have and will continue to severely and negatively 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. The City Council violated the New York Education Law by its premature and preemptive vote. Accordingly, this vote and the adoption of the City FY23 education budget must be annulled.

Further, and perhaps more significant, the premature vote on the education budget by the City Council on June 13, 2022, meant that the City Council lacked critical and necessary information concerning the devastating impact the education budget cuts would cause, information brought forward by the witnesses at the City Board's public hearing. VP ¶ 13, 14. This information was presented to the City Board at its public hearing ten days later – public voices City Council did not hear before its critical vote to approve the FY23 education budget. VP ¶ 14.

On June 23, 2022, at the City Board hearings, nearly seventy parents and teachers protested the $215 million budget cuts. VP ¶ 14; Sheppard Aff. ¶ 38. One school advocate described the aftermath of these cuts as "chaos and disruption," as public school teachers and staff announced they would be excessed, and students cried over their teachers being let go due to the new budget cuts. VP ¶¶ 58, 64. Additionally, parents proclaimed that these cuts would negatively impact their children's education, including expectations that their class sizes would sharply and detrimentally increase due to the elimination of teacher positions, VP ¶ 77, and that their school counselors, nurses, social workers, and all of the other school staff that kept children safe in a time of so much loss and uncertainty would be dismissed. Parents expressed their distress that these cuts would devastate their schools and undo any progress that was made in the past year to improve the mental health and wellness of their children and their chances at academic success. *See generally* Barbieri Aff. Exh. 2. As such, the budget cuts have already begun to harm students, parents, and educational professionals throughout the City. If the current education budget remains in place it will lead to even more chaos within the entire New York City public school system, causing irreparable harm to students, parents, and teachers. VP ¶ 15.

The Education Law specifies the order of the City Council and City Board's vote for a reason. Not only does the law express the State Legislature's will and intent, but the approval process also safeguards the public's right to participate in the budgeting process of the DOE through public comment before and at the City Board meetings. N.Y. Educ. Law § 2590-g(7), (8). This right was eviscerated by the Mayor and Chancellor and can only be remedied by the courts. Without court action, the failure of the Mayor and Chancellor to abide by the statutory requirements expressly delineated in Section 2590-g(1)(e) of the New York Education Law,

allows the irreparable harm caused by the budget cuts to the students, parents, and education professionals of New York City public schools to continue without redress.

2. *FY23 budget cuts will negatively impact student learning, including by increasing class size*

The FY23 education budget, if not stayed, directly conflicts with the New York court's determination that excessive class size in New York City schools deny public school students the right to obtain "a sound basic education under the state constitution." *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003); Barbieri Aff. Exh. 20. In *Campaign for Fiscal Equity v. State of New York*, where plaintiffs challenged the funding for New York City schools, the court held, in part, that the inadequate quality of the teachers, the excessive class sizes, the deficiency in instrumentalities of learning, and the rate of school completion in comparison to state and national statistics, results in students not receiving the constitutionally mandated opportunity for a sound basic education. 100 N.Y.2d at 911. Further, the court stated that "large class sizes negatively affect student performance in New York City public schools" and that "plaintiffs' evidence of the advantages of smaller class sizes supports … a meaningful correlation between the large classes in the City schools and the outputs … of poor academic achievement and high dropout rates." *Id.* at 912. Similarly, in *Montgomery-Costa v. City of New York*, the court found that a district-wide decision to lay off 500 school aides created an unsafe school environment, which was in violation of students' right to a sound basic education. 894 N.Y.S.2d at 828. The court held, in part due to the harm students and teachers would face, that not only were the claims justiciable, but also that an injunction was necessary to protect this right. *Id.* at 26.

Research demonstrates that excessive class sizes are detrimental to all children. Barbieri Aff. Exh. 20. Most at risk for harm, however, are children of color, students from low-income

families, students learning English, and children with disabilities. VP ¶¶ 53, 71, 96; Barbieri Aff. Exh. 6, 10, 20. The current decreases in the budget have led to and will continue to lead to teacher positions being eliminated. VP ¶ 58. Fewer teachers will lead to even larger, overcrowded classes. VP ¶¶ 69, 77, 87, 90, 105; Barbieri Aff. Exh. 20 (stating New York City classes are already fifteen to thirty percent larger than the rest of the state).

Class Size Matters has completed surveys and interviews with parents, teachers, and principals who have told them that the smaller classes in their schools this past year, due to enrollment decline and the maintenance of sufficient funding, have been essential in allowing teachers to reconnect with their students and help them begin to recover from the disrupted learning and disengagement that resulted from school closures and remote learning during the height of the pandemic. Haimson Aff. ¶ 23, Exh. 5; VP ¶ 101.

A Kindergarten teacher, who was assigned to a class of nineteen students this year rather than the twenty-five students as in previous years, reported that "the environment is so much calmer and more relaxed. We can give each child individualized attention and care each day... I am able to support and work with more students individually and in small groups. The classroom is less chaotic and loud and there are less behavior problems and disruption with a smaller class size, leading to better learning outcomes and the children's ability to self-regulate and focus while I am teaching." Haimson Aff. ¶ 24; ¶ VP 102.

A fourth-grade teacher said, "this year, there are nineteen kids in my class and the difference is stark. We can give each kid tons of attention. Some of them have made 1.5 to 2 years of growth in reading already... we can give each child individualized attention and care each day." Haimson Aff. ¶ 25; VP ¶ 103.

Class Size Matter's surveys and interviews have also revealed that the smaller classes have been key in providing students with the emotional support necessary to reintegrate into the school community and mend from the distress they suffered as a result of the pandemic. As one parent of a middle school child wrote, "This is the first year (after being in NYC public schools for seven years before this) that the teachers are able to provide individualized attention to my child's social and emotional needs. Her teachers all know her really well for the first time." Haimson Aff. ¶ 26; VP ¶ 104.

If these cuts are made to school budgets, class sizes will likely increase sharply and much of the progress students have gained as a result of small class sizes will be lost in the anonymity of larger classes where their teachers will be once again unable to give them the academic and social-emotional support students need. Haimson Aff. ¶ 27, Exh. 12; VP ¶ 105.

New York courts have also found that policies that interrupt or change a child's school attendance in needed programs, and therefore their ability to receive an education, raise a strong claim for irreparable injury. *See E.G. v. City of New York*, No. 20-CV-9879 (AJN), 2020 WL 7774346 (S.D.N.Y. Dec. 30, 2020); *N.J.*, 872 F. Supp. 2d at 214 (granting a preliminary injunction 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). Any interruption to a student's education constitutes an irreparable harm. *See N.J.*, 872 F. Supp. 2d at 214 (E.D.N.Y. 2011) (citing *Ross*, 500 F. Supp. at 934). The Federal court previously granted injunctive relief to plaintiffs, who represented over 114,000 homeless students in New York City public schools as a class, due to the irreparable harm caused by the City's failure to provide homeless students with Wi-Fi internet access during the Covid-19 pandemic. *E.G.*, 2020 WL 7774346, at *1. The court determined that reliable access to internet is necessary for children to

attend school, and therefore, plaintiffs were granted preliminary injunction due the irreparable harm caused by the homeless students' lack internet access. *Id.* at *5.

Class size increases are not the only negative impact of the FY23 education budget. The Fair Student Funding Formula (FSF), which is included in the FY23 education budget, failed to adequately consider the costs and needs of especially vulnerable populations such as students experiencing homelessness or poverty or student in foster care. VP ¶ 46, 48; Sheppard Aff. ¶ 25. Given that the FY23 budget will negatively affect students from the most vulnerable populations' ability to fully participate in school, injunctive relief must be granted to prevent further harm to students' learning environment. As the courts have stated, regarding the education of homeless students, any policy that affects students' ability to attend school constitutes an irreparable harm and is grounds for preliminary injunctive relief. *E.G.*, 2020 WL 7774346, at *4.

The DOE has confirmed that this year the there was a cut in the Fair Student Funding formula, so that this fall, school principals will get a baseline of at least $4,197.19, a reduction from last year of a minimum of $25.81 per each general education elementary grade student with no learning challenges. Haimson Aff. ¶ 9, Exh. 6.

However, due to the FSF formula use of a weighted average per student, the cut is larger for middle and high school students, by 8% and 3% respectively, and even larger for students who have learning challenges, including English Language Learners and/or students with disabilities. Haimson Aff. ¶ 9, Exh. 6.

For example, the FSF cut for a special needs Kindergarten student in an inclusive class for more than 60 percent of the day, will be more than twice as large as $25.81, due to the weighted amount for that child, which is currently at 2.09. Therefore, these budget cuts will have

especially devastating impacts on schools with large numbers of struggling and/or disadvantaged students. Haimson Aff. ¶ 10.

Parents, teachers, and state and local representatives uniformly assert that the implementation of the budget cuts will have irreparable effects on class sizes and children's learning opportunities. Barbieri Aff. Exh. 20; VP ¶ 15. Adhering to the FY23 education budget has already caused schools to downsize their teaching staff and eliminate necessary and vital programs. VP ¶¶ 64, 66, 74, 82, 87. Therefore, the City FY23 Budget but must be annulled and, following its reconsideration, City Council must revote on the incorporated education budget, so that any further harm that includes the excessing of teachers and consequent increases in class size may be remedied.

3. *FY23 budget cuts have and will continue to cause irreparable harm, including by the elimination of teacher and staff positions*

The FY23 education budget is detrimental not only to the school system and to parents but also the teachers and staff working for New York City public schools. If the FY23 budget remains in place, many educational professionals are slated to be 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. *Montgomery-Costa*, 894 N.Y.S.2d at 826; *Campaign for Fiscal Equity*, 100 N.Y.2d at 911.

Plaintiffs may also show harm if they establish a causal link between the current funding system and proof that the City failed to provide a sound basic education to New York City school children. *Campaign for Fiscal Equity, Inc.*, 8 N.Y.3d at 20. In *Campaign for Fiscal Equity v. State of New York* (2003), the court determined that New York City public schools' inability to attract and retain qualified teachers led to an inadequate learning environment and excessive class sizes in violation of the State Constitution. 100 N.Y.2d at 909-912. The plaintiffs

established insufficient education funding was linked to students receiving an inadequate education by showing that increased funding allowed for more teachers, renovated facilities, and tools for learning that improved student performance. *Id.* at 919- 925.

Here, the FY23 budget cuts imposed are affecting not only students but also are deeply and negatively affecting teachers and staff working in New York City schools. Schools have eliminated the positions of experienced and long-time educators and staff to meet the FY23 budget requirements. Trust Aff. *passim*; Sheppard Aff. ¶ 12. Many of these teachers had continued to work throughout the pandemic to educate the children of New York, placing both themselves and their families at risk. VP ¶ 62. By excessing them, the City has "rewarded" their loyalty with their removal from their designated schools and their positions in the classroom. The Chancellor stated that he "expects for all those excess teachers to get picked up." Barbieri Aff. Exh. 8. But as most schools are facing substantial budget cuts, many will not be hired elsewhere. In any event, teachers who have developed long-term relationships with their students will have those relationships abruptly severed.

B. Petitioners are Likely to Prevail on the Merits

1. The Mayor and the Chancellor violated § 2590 of the Education Law when they denied the City Council its statutorily guaranteed right to approve and vote on the estimated budget after the City Board vote.

a. Powers and Public Review and Participation Requirements of the City Board:

Pursuant to § 2590-g of the New York Education Law, the City Board has the power to: approve standards and policy objectives proposed by the Chancellor directly related to educational achievement and student performances and approve annual estimates of the total sum of money which it deems necessary for the operation of the city district and the capital budget pursuant to § 2590-q. N.Y. Educ. Law § 2590-g(1)(a), (e), (f).

Items requiring the City Board's approval, prescribed in § 2590-g(1), must be by approved by "public vote at a regular public meeting." N.Y. Educ. Law § 2590-g(7). The items will not become effective until after the vote occurs, unless authorized by § 2590-g(9). N.Y. Educ. Law §§ 2590-g(7), (8), (9).

A public review process must be undertaken to provide the public with an opportunity to submit comments on the proposed items. N.Y. Educ. Law § 2590-g(8). The public review process must include "notice of the items under City Board consideration which shall be made available to the public, including by the City Board's official internet website, and specifically circulated to all community superintendents, community district education councils, community boards, and school-based management teams, at least forty-five days in advance of any City Board vote on such item." N.Y. Educ. Law § 2590-g(8)(a). The notice must include (i) a description of the subject, purpose and substance of the proposed item under consideration; (ii) information regarding where the full text of the proposed item may be obtained; (iii) the name, office, address, email and telephone number of a city district representative, knowledgeable on the item under consideration, from whom any information may be obtained concerning such item; (iv) date, time and place of any hearing regarding the proposed item, if applicable; (v) date, time and place of the City Board meeting at which the board will vote on the proposed item; and (vi) information on how to submit written or oral comments regarding the item under consideration. N.Y. Educ. Law § 2590-g(8)(a)(i)-(vi).

If there is a substantial revision to the proposed item at any time after the public notice, the City Board must issue a revised public notice. N.Y. Educ. Law § 2590-g(8)(b). The revised notice must be available "at least fifteen days in advance of any City Board vote on the proposed

item, but in not even shall the City Board vote on any such item within forty-five days from the initial public notice provided pursuant to paragraph (a) of this subdivision." *Id.*

After the public review process and before the vote on any proposed item listed, the City Board "shall make available to the public... an assessment of all public comments concerning the item under consideration received prior to twenty-four hours before the City Board meeting at which such item is subject to a vote." *Id.* at g(8)(c). The assessment must include: (i) a summary and an analysis of the issues raised, and significant alternatives suggested; (ii) a statement of the reasons why any significant alternatives were not incorporated into the proposed item; (iii) a description of any changes made to the proposed item as a result of public comments received; and (iv) information as to where the full text of any approved items may be obtained. *Id.* at g(8)(c)(i)-(iv).

b. Purpose of the City Board

The public nature of the City Board proceedings is intended to promote full stakeholder participation and transparency within the community.[5] In July 2002, the New York legislature approved a new comprehensive governance plan, which eliminated the former school district's 32 community school boards and created the Task Force on Community School District Governance.[6] The new school governance plan was adopted for the purpose of providing "an opportunity for meaningful participation for both parents and the community."[7] In 2003, the Task Force made recommendations to ensure that this goal was being upheld, finding that the new governance structure created a meaningful role for parents and the community by improving

[5] NY Bill Jacket, 2003 S.B. 5688, Ch. 123; *see also* Barbieri Aff. Exh. 13.
[6] N.Y. Educ. Law § 2590-g; *see also* NY Bill Jacket, 2003 S.B. 5688, Ch. 123.
[7] NY Bill Jacket, 2003 S.B. 5688, Ch. 123.

education and enhancing accountability and transparency, accessibility to information, and partnerships between community stakeholders. Barbieri Aff. Exh. 19.

Following the Task Force's recommendations, the New York Education Law was amended to provide for mayoral control, but specifically maintained the City Board with its mandated role in approving the education budget after a public comment period and monthly meeting where stakeholder views could be heard and considered before its vote. All this was required to occur before the City Council met to approve the entire city budget.

The City Board's bylaws reaffirm this commitment to public participation by requiring public meetings at least once per month, in accordance with state law, to provide sufficient time for public comment on an agenda topic prior to a vote, and states that "[t]hese meetings are held to encourage the general public's maximum participation in advising of the [City Board]." Barbieri Aff. Exh. 13. Taken together, the legislative intent and the City Board's bylaws illustrate the importance and necessity of public participation in educational and budgetary decision-making processes.

c. Chancellor's Emergency Declarations

By definition, an emergency is unforeseen, unexpected, or unanticipated necessitating immediate action.[8] If budgeting "emergencies" allegedly occur year after year, such that they become routine rather than unanticipated "emergency" occurrences, then they are simply no longer "emergencies." Instead, they are events that may be anticipated, planned for, and prevented. Here, the Mayor and the Chancellor cannot legitimately claim that "emergency declarations" occur every year, while failing to describe what the actual emergency entailed or to take action to anticipate, plan for, and thereby prevent such occurrences in the future.

[8] See Meriam Webster Dictionary at https://www.merriam-webster.com/dictionary/emergency.

Pursuant to § 2590-g(9), the City Board or the Chancellor has the right to adopt budget estimates through the issuance of an Emergency Declaration. Yet this right can only be exercised if it "is necessary for the preservation of student health, safety or general welfare *and*... compliance with the requirements of subdivision seven or eight would be contrary to the public interest." N.Y. Educ. Law § 2590-g(9) (emphasis added). If an Emergency Declaration occurs, the City Board or the Chancellor must provide a publicly available written justification for their determination. *Id.* The Emergency Declaration "shall only remain in effect for sixty days, during such time the City Board shall comply with the requirements of subdivision g(9) in order for the adoption of the item to become permanent." *Id.*

Section 2590-g(7) and 2590-g(8) delineate the public participation requirements for the City Board. These requirements may only be overridden in a true emergency. N.Y. Educ. Law § 2590-g(9). The likelihood that a true emergency occurred year after year, for the past twelve out of thirteen years, is exceedingly low. And yet, according to this and past Chancellors, it allegedly does.

The public demands that the court intervene to remedy unchecked executive power, which must end, especially when the budget cut is so evidently contrary to the "preservation of student health, safety or general welfare." N.Y. Educ. Law § 2590-g(9).

d. Budgetary and Fiscal Processes

The budgeting and fiscal processes of the DOE occur each and every year. According to the New York Education Law, on the directed date by the Mayor, the Chancellor must submit to the Mayor the estimates that have been adopted by the City Board regarding the total sum of money that it deemed necessary for the "operation of the city district... during the next fiscal year of the city" along with the estimated budgets submitted by the community district education

councils. N.Y. Educ. Law § 2590-q(4)(a). It is the Chancellor's responsibility to "annually advise the community district education councils with respect to the form and content of the budget requests and accompanying fiscal estimates required to be submitted by the Mayor of the city of New York for the next ensuing fiscal year, together with such additional information as he or she may require." N.Y. Educ. Law § 2590-q(1).

All of the estimated budgets submitted by the Chancellor to the Mayor must be "prepared in the manner prescribed by the New York city charter for submission of departmental estimates for current expenses to the Mayor and shall set forth the 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 actives operated by the City Board." N.Y. Educ. Law § 2590-q(5).

e. Legal Precedents Support the Merits of Petitioners' Claims

In the *Matter of New York Public Interest Research Group Straphangers Campaign v. Reuter*, 739 N.Y.S.2 127, 130 (1st Dept. 2002) (internal citations omitted), the court held that the clearest indicator of legislative intent is the statutory text, and it should be giving effect to its plain meaning. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the legislature." *Id.* Moreover, in reviewing a remedial statute, which New York Education Law § 2590 is, it should not be subject to unduly restrictive construction. *Id.* at 165. Moreover, where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. *Bender v. Jamaica Hosp.*, 40 N.Y.2d 560 (1976).

In *Golden v. Koch*, the court held that publicly approved provisions of law, such as City Board meetings, "should be interpreted by applying the traditionally accepted standards of

statutory construction." 49 N.Y.2d 690, 694 (1980). In *New York Public Interest Research Group v. Dinkins,* where City Council and the Mayor tried to modify the City's fiscal year budget to eliminate funding for the Independent Budget Office, the court held that the City Council budget resolutions were not local laws delaying the establishment of funding and did not impliedly repeal the City Charter provision. 83 N.Y.2d 377, 386 (1994). Further, the court issued a mandatory order compelling the City to comply with City Charter provisions because the petitioners had demonstrated a clear legal right to require public officials to perform a duty enjoined upon them by the New York City Charter, and the issuance of a mandatory order lies in the discretion of the court in light of equitable principles. *Id.* (*citing* CPLR 7801, 7803). The court based its decision, in part, on the City Charter's use of mandatory terms, such as "shall," which showed the need for a formal amendment to postpone the establishment or elimination of the IBO. *Id.* at 384. There, the local laws were not enough to establish a formal amendment of the City Charter, and City Council had not expressed the intention of amending the Charter. *Id.*; *see also Matter of Gallagher*, 42 N.Y.2d 230, 234 (1977) (finding the adoption of a budget without an appropriation for a particular office in accordance with the provisions in a County Charter or Administrative Code was not the legislative equivalent of a local law amending the County Charter or Administrative Code to abolish that office).

Here, like in *Golden,* the N.Y. Education Law § 2590-q should be interpreted under traditionally accepted standards of statutory construction. The Emergency Declaration clause, § 2590-g(9), should be read to express that the Emergency Declaration may only be used *if* compliance with subsections seven and eight could not be accomplished without harming public interest. N.Y. Educ. Law § 2590-g(9) (emphasis added). Here, reasonable alternatives existed, such as an emergency City Board meeting and vote, which would have satisfied the statutory

requirements of § 2590. Similarly, the presentation of the DOE's estimates of expenditures as provided in the executive budget could have made to the City Board thereby satisfying the provisions of §§ 2590-g and 2590-q.

Like in *Dinkins*, here there are numerous mandatory terms within § 2590, including the requirement of a public review process and notice of the items under City Board consideration. *See* N.Y. Educ. Law § 2590-g(7), (8). Therefore, under traditional statutory interpretation and considering the language of § 2590, utilizing the Emergency Declaration power consecutively from at least 2011 until now does not qualify as an amendment to the State Education Law § 2590-q. VP ¶ 7; Barbieri Aff. Exh. 15.

C. The Balance of the Equities Favors the Petitioners

On balance, the equities weigh heavily in the Petitioners' favor. The budget has nearly $5 billion remaining in unspent federal stimulus funds designated for the schools, and approximately $8 billion in the city's reserve fund. *See* Barbieri Aff. Exh. 16; Exh. 17; Exh. 18. Accordingly, the likelihood of adverse consequences to the Mayor or Chancellor are few if a preliminary injunction is imposed, and the budget is annulled while City Council reconsiders and revotes on the City's FY23 education budget.

The DOE uses its education budget to operate and maintain about 1,800 schools. This includes primary and secondary education for over one million students associated with elementary, middle, high schools, full-day pre-kindergarten programs, and special education schools. VP ¶ 35, 49. The DOE supplies instructional services, special education, instruction for Multilingual Learners, and career and technical education through the budget. In addition, the DOE uses the budget to provide support services such as free and subsidized transportation, breakfast, and universal free lunch services. *See* Barbieri Aff. Exh. 5.

The Chancellor claimed that "delaying the school-based budget process would have a harmful effect on the operation of schools" if they proceeded in accordance with § 2590-g and § 2590-q and allowed for a public vote and comment period to obtain the City Board approval. *See* Barbieri Aff. Exh. 3. Yet, the legislature mandated the order of consideration of the budget, which expressly mandated that the City Board approval process precede the vote by City Council, specifically to ensure that the community and its stakeholders are provided the opportunity to weigh in on their educational funding needs. And clearly, the budget cuts he imposed on schools has had the "harmful effects on the operations of schools" that be claimed the premature action would prevent.

D. Granting a Temporary Restraining Order is in the Public Interest

In evaluating the balance of equities, courts "must weigh the interests of the general public as well as the interests of the parties to the litigation." *L&M Bus Corp. v. New York City Dept. of Educ.*, 873 N.Y.S.2d 512, at *13 (N.Y. Sup. Ct. 2008) (quoting *DePina v. Educational Testing Services*, 297 N.Y.S.2d 472, 474 (2d Dept. 1969), citing 7A Weinstein Korn and Miller, *New York Civil Practice* ¶ 6301.21); *see also Seitzman v. Hudson River Associates*, 513 N.Y.S.2d 148, 150 (App. Div. 1st Dept. 1987) (finding that, on consideration of the public interests involved, preventing doctors from continuing their medical practice damaged New Yorkers).

Moreover, 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*, 500 F. Supp. at 934–35; *see also N.J.*, 872 F. Supp. 2d at 214–15 (finding that a preliminary injunction was appropriate when a child's home was destroyed in a fire, given that the ability to continue

attending school far outweighed a school's enrollment policy because the court was "unwilling to gamble with a child's education").

E. This Matter is Justiciable

This Court must involve itself in the matter at hand because the violation of § 2590 by the Mayor and the Chancellor is an issue of statutory enforcement rather than education policy. Courts have noted that matters involving the violation of a constitutional or statutory duty or actions by educational authorities rooted in a statutory provision are judiciable. *See, e.g., Montgomery-Costa*, 894 N.Y.S.2d at 826. The courts generally do not involve themselves in educational policy at the discretion of the administration of the public schools. *Id.* at 826. However, if educational authorities create policies that raise issues of law such as "tenure, racial discrimination, and teacher dismissal(s)," the court has recognized these issues as justiciable. *Id.* at 827. For example, the court held that where petitioners challenged the statutory and constitutional validity of 500 school aid layoffs under N.Y. Educ. Law § 2590-h, the petitioners' claims were judiciable since they alleged that the layoff created an unsafe school environment in violation of student's right to a sound basic education. *Id.* at 828 (citing *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (2001)).

In *Dinkins,* the court held, in part, that the lower court did not abuse its discretion in granting mandatory relief when it compelled respondents to adhere to the Independent Budget Office provisions in the City Charter and gave "meaning to the intention of the people as expressed through their vote." 83 N.Y.2d at 386. The court stated that a proceeding regarding a mandamus to compel is available in instances where petitioners have "demonstrated a clear legal right to require public official to perform a duty enjoined upon them by the New York City Charter." *Id.*

In the 2006 case, *Campaign for Fiscal Equity, Inc. v. State*, the plaintiffs challenged the state's funding of New York City public schools. 8 N.Y.3d at 20. There, the court held that the constitutionally required funding for the district included additional operational funds. *Id.* at 57. Although it is necessary for courts "to tread carefully when asked to evaluate state financing plans," the court found that "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress from violation of them." *Id.* at 58 (internal quotations omitted). "We are the ultimate arbitrators of our State Constitution." *Id.* Therefore, when the court reviews legislative and executive acts, it does so to protect rights, not make policy. *Id.*

In *Boung Jae Jang v. Brown*, storeowners sought to compel police to carry out a court order and prevent protestors from congregating within fifty feet of their store. 560 N.Y.S.2d 307, 309 (App. Div. 2d Dept. 1990). The appellants (police force) attempted to argue that the case involved an exercise of the executive branch's authority, so the matter was non-justiciable. *Id.* The court, however, rejected this argument, finding that "merely because a case may have political overtones, involve public policy or implicate some seemingly internal affairs of the executive or legislative branches does not, however, render the matter non-justiciable." *Id.* at 310 (quoting *People v. Ohrenstein*, 549 N.Y.S.2d 962, 1004 (App. Div. 1st Dept. 1989) (dissenting opinion)).

Here, like *Montgomery-Costa*, the issue here is rooted in the violation of a statutory duty by educational authorities. The Mayor and the Chancellor deprived City Council of the City Board vote and public hearing process. VP ¶¶ 2, 19. Also like *Montgomery-Costa*, the Mayor and Chancellor's violation of § 2590 and repeated and routine use of the "Emergency" Declaration instead of adhering to the statutorily required public review process and then vote by

the City Board creates irreparable harm, including teacher excesses and negative impacts on student learning. VP ¶¶ 7-8, 12; Sheppard Aff. ¶ 31.

Like in *Dinkins*, here, the Court would not abuse its exercise of appropriate discretion by granting a temporary restraining order because it would compel the Mayor and the Chancellor to comply with § 2590. By enforcing § 2590, the Court would support the intent of the legislature in its creation of the City Board and the requirement for public notice and public voting.[9] Similarly, as in *Campaign for Fiscal Equity, Inc.* (2006), this Court would be protecting the educational rights of New York City public school students through the enforcement of the statutory requirements, not making new educational policy.

Lastly, like in *Boung Jae Jang*, while this matter has education policy overtones, it is nonetheless justiciable. The core of the matter is the protection of statutorily guaranteed rights. Therefore, this matter is justiciable and should be heard by the Court.

F. A Bond is Not Required

CPLR 6312(b) requires the movant to post a bond contemporaneously with the issuance of a preliminary injunction order. The amount to be posted is a matter within the sound discretion of the court. *Lelekakis v. Kamamis*, 303 A.D.2d 380, 380 (2d Dept. 2003). However, the amount of the undertaking must be rationally related to the amount of the non-movant's potential liability if the preliminary injunction later proves to be unwarranted. *Id.* at 381. The purpose of the undertaking therefore is to secure for the non-movant the actual losses and costs – not theoretical losses, "if it is later finally determined that the preliminary injunction was erroneously granted." *Id.* at 380. Mere conclusory assertions of potential monetary loss are insufficient to justify anything more than a minimal bond. *7th Sense, Inc. v. Liu*, 220 A.D.2d 215,

[9] *See* NY Bill Jacket, 2003 S.B. 5688, Ch. 123 (explain that the intent behind the public nature of the City Board proceedings is to promote full stakeholder participation and transparency to the community).

217 (1st Dept. 1995).

Given the strong public interest in having the City and the New York City Department of Education comply with the New York Education Law and considering Petitioners' limited means and the overwhelming likelihood that Petitioners will be successful in this litigation, Petitioners should not be required to post security pursuant to CPLR 6312(b) before the Court directs the City and the DOE to comply with its legal obligations. The Second Circuit and numerous other courts recognize that a suit brought to advance an important public interest should not be subject to the bond requirement. *See, e.g., Pharmaceutical Society of New York, Inc. v. New York Soc. Servs.*, 50 F.3d 1168, 1174-75 (2d Cir. 1995) (affirming waiver of bonding requirement where action advanced public interest arising out of comprehensive health or welfare statute); *accord Temple Univ. v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991); *Crowley v. Local No. 82, Furniture & Piano Movers*, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

This principle manifestly applies to the present action, which is brought to reinforce a statutory scheme that emphasizes the importance of the public's participation in the City's budgeting process for the Department of Education. *See Borough of Palmyra*, 2 F. Supp.2d at 646 (waiving requirement that plaintiff seeking preliminary injunction post security in action to enforce decision of hearing officer requiring provision of special education services). Petitioners' limited means, and the transparency with which Respondents have violated its legal mandates, further warrants the exercise of the Court's discretion to waive the application of CPLR 6512(b) in this case. *See People of State of Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (upholding waiver of security for non-profit group unable to post substantial bond, which had strong likelihood of success, and which was seeking

to avail itself of private enforcement scheme provided for by Congress); *Moltan Co. v. Eagle Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1985) (posting of security waived where plaintiff had substantial likelihood of success and litigation advanced strong public interest).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a temporary restraining order and preliminary injunction against Respondents in the form requested in Petitioners' Order to Show Cause and Verified Petition.

Dated: July 18, 2022
New York, New York

ADVOCATES FOR JUSTICE
Attorneys for Petitioners

By: _____

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