SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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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 Sesction 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.

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RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATION TO VACATE THE COURT'S ORDER OF JULY 22, 022

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PRELIMINARY STATEMENT

Respondents submit this memorandum of law in support of their application to vacate the preliminary injunction issued by the Court on July 22, 2022 (the "Order")[1] which enjoins Respondents from implementing the budget approved by the City Council for the New York City Department of Education ("DOE") for the 2022-23 school year, and requires Respondents to spend at levels approved for the 2021-22 school year.[2]

As discussed more fully below, Respondents respectfully submit that the Court should have denied Petitioners' application for injunctive relief as Petitioners have not satisfied the exacting standard for the award of interim relief. Petitioners' purported harm is entirely grounded on the reduction of funds allocated to DOE in the budget approved by the City Council on June 13, 2022. Thus, Petitioners sought and the Order awarded mandatory injunctive relief in the form of a restoration of such funds. Yet, as the caselaw firmly establishes, monetary relief cannot support the irreparable harm that is essential to the award of an injunction.

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[1] Although Petitioners' Proposed Order to Show Cause contained a request for injunctive relief that was styled as a motion for a temporary restraining order ("TRO"), the Order issued by the Court is in the nature of a preliminary injunction. As set forth in CPLR 6301, a court may grant a TRO "pending a hearing for a preliminary injunction." Here the Court has issued injunctive relief "pending the hearing of this matter," currently scheduled for August 4, 2022. (Signed Order to Show Cause, NYSCEF No. 21, at 4).

[2] In line with past practice, and as was indicated in an email to the Court from the undersigned counsel on Thursday, July 21, 2022, Respondents had anticipated that they would have had an opportunity to orally argue in opposition to Petitioners' application for temporary injunctive relief prior to the signing of Petitioners' proposed Order to Show Cause. Respondents regret any inconvenience that has been caused to the Court and appreciate the Court's consideration of the arguments set forth herein as well as in the accompanying Affidavit of Benjamin Schanback, DOE Interim Acting Chief Financial Officer, sworn to July 25, 2022.

Additionally, the irreparable harm asserted by Petitioners in support of their application is entirely speculative and grounded on the unfounded assumptions that if given the opportunity, the Panel for Educational Policy ("PEP")[3] would have rejected the DOE's Estimated Budget and that the City Council would reject the City's budget, and restore the funding included in last fiscal year's budget.

Furthermore, Petitioners' application should have been denied due to their unreasonable and unexcused delay in seeking relief. Indeed, the budget cuts of which they now complain were well known as early as February 16, 2022, when the Mayor announced his Preliminary Budget. Additionally, a budget agreement was announced on June 10, 2022, and notice of the City Council's vote was then posted. Affirmation of Jeffrey S. Dantowitz, dated July 25, 2022, at ¶ 5. However, Petitioners did nothing until initiating this proceeding on July 18, 2022, by which time DOE and its administrator had already begun preparing for and implementing the actions necessary for the 2022-23 school year.

Significantly, DOE has already allocated initial school budgets, which implemented most of the school-based reductions contained in the City's budget. These school budgets are used by principals to plan for the coming school year, a process which is already well underway. Compliance with the Order will not only require this work to stop, but far more impracticably, will compel DOE to re-allocate initial school budgets. Principals will then be required to re-start the process of planning for the coming school year which now begins in just a few weeks. If Petitioners are then ultimately not successful on the merits of this action, the budget allocation process will need to be re-done yet again. All of this creates a tremendous amount of

[3] The Panel for Educational Policy" (or "PEP") is the name that the NYC Board of Education has been using for itself since the beginning of Mayoral control system established in 2002.

uncertainty for principals, teachers and parents – including for Petitioners themselves – regarding placement and programs as the hiring and programming process continues throughout the summer, then may lurch in a different direction, then, in all likelihood, lurches yet again. Indeed, separate from the Order's substantial risk of operational confusion at best and chaos at worst, the interim relief will have the paradoxical effect of harming a significant proportion of schools under the budget now enjoined from further implementation: approximately 300 schools actually received more money for the 2022-23 school year than they had received for the 2021-22 school year. Given (i) that Petitioners' delayed filing this litigation; (ii) that the harms of which Petitioners complain can be later rectified if they should prevail on their underlying claim; (iii) that those putative harms purportedly prevented by the Order will, in fact, be exacerbated by its effects; and (iv) that the Order's effective requirement that DOE immediately cease further implementation of FY 2023 budget commitments already made (and actions in reliance already taken throughout the City's public school system) will impose upon DOE nearly insuperable operational challenges, it is apparent that the balance of equities tips in Respondents' favor.

Given that the harms of which Petitioners complain can be later rectified if they should prevail on their underlying claim that those harms, purportedly protected by the Order will, in fact, be exacerbated by its effects; and that the Order's requirement that DOE reverse the budget actions already taken will impose upon DOE nearly insuperable operational challenges, it is apparent that the balance of equities tips in Respondents' favor.

Finally, by imposing specific spending amounts that were not approved by the City Council, the Order improperly usurps the authority of the executive and legislative branches to make policy decisions, thereby violating the separation of powers among the branches of City government.

For all these reasons, Petitioners' application should have been denied and the Order should be vacated.

FACTS

The City's Budget Process

The City's budget process is set forth primarily in Chapter 10 of the New York City Charter, §§ 225-258, and involves the Mayor, Comptroller, Office of Management and Budget, City Council, borough presidents, local community boards, agency heads, other stakeholders and the public. Provisions relating to the expense budget, including the process for modification, are found in Chapter 6, Sections 100-111. Provisions relating to the capital budget are found in Chapter 9, Sections 225-258.1. A general summary as is relevant to this proceeding is set forth below.

Toward the start of each calendar year, the Mayor issues a Preliminary Budget, detailing proposed operating and capital expenditures and forecasting revenues for the City for the upcoming fiscal year, plus three subsequent years.

In considering whether the Preliminary Budget meets the needs of the City's constituent agencies and its residents, the City Council invites public comment and conducts public hearings at which agency heads may testify regarding their ability to effectively operate and provide required services under the allocations contained in the Mayor's budget proposals. In addition, members of Community Boards, advocacy groups, lobbyists and members of the public also may testify in person or submit written comments in support of or in opposition to various aspects of the budget proposal.

As set forth in Chapter 10, § 249 of the City Charter, by April 26 of each year, the Mayor is to present to the City Council, *inter alia*, a proposed Executive Budget for the upcoming

fiscal year. Thereafter, the City Council again holds public hearings and receives public comments. The City Council also conducts negotiations with the Mayor concerning a final budget.

Negotiations concerning the budget take into account not only the fiscal needs of each City agency, but the current and projected fiscal condition of the City as a whole, including all projected expenditures and anticipated sources of revenue. Thus, the City budget is the product of careful planning, and reflects considered policy choices by the executive (Mayor) and legislative (City Council) branches of government concerning the services to be provided to the City's millions of residents, a process that requires extremely nuanced and careful balancing of critically important political and fiscal interests and concerns, advancing political goals and commitments while remaining ever-mindful of the City, state and national economic condition and the obligation of the Mayor and other elected officials to be responsible fiscal stewards of public funds. Ultimately, however, the authority to decide the budget rests with the City Council (although the Mayor may veto it subject to override by the Council). NYC Charter, § 254.

On February 16, 2022, Mayor Eric Adams announced the City's Preliminary Budget of $98.5 billion. The Preliminary Budget detailed budget reductions for nearly all of the City's agencies, including DOE. The reductions to DOE's budget were affected by various factors. For example, the federal government previously had provided DOE with financial assistance, but only as part of a one-time infusion of stimulus relief during the COVID-19 pandemic (though some of this decrease was offset by an increase in City funding). DOE's budget aoso was reduced as a result of the significant decrease in student enrollment. As a result of these (and other) factors affecting revenue and expenses, the Preliminary Budget proposed to reduce the DOE budget by approximately $215 million from the previous fiscal year. The impact of the Preliminary Budget

on DOE was widely reported, and sparked protests by some lawmakers and members of the public.[4]

In March 2022, the City Council began its review of the Preliminary Budget, and conducted public hearings, including a hearing on March 21, 2022 specifically concerning the budget proposed for DOE. None of the Petitioners testified, either in person or through written testimony. On April 1, 2022, the City Council presented its formal response to Mayor Adams.[5]

On April 26, 2022, Mayor Adams presented an Executive Budget, of $99.7 billion, which retained the $215 million in spending cuts to DOE initially announced in the Preliminary Budget more than two months earlier, on February 16, 2022.[6] Thereafter, the City Council conducted public hearings on the Executive Budget, including a hearing on May 10, 2022 specifically concerning the budget proposed for DOE. Again, none of the Petitioners testified, either in person or through written testimony.

On May 6, 2022, the DOE issued its Estimated Budget and posted notice of its next regularly-scheduled monthly meeting on June 23, 2022 of the PEP. Among the items on the June 23 meeting agenda was a vote by the PEP to adopt or reject the Estimated Budget. The DOE's Estimated Budget was based on the Executive Budget, and contained the same revenue figures as set forth in the Executive Budget. As N.Y. Educ. Law § 2590-g(7) provides for the DOE's Estimated Budget to be the subject of a vote by the PEP at a regularly-scheduled meeting, and

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4 *See, e.g.*, https://www.gothamgazette.com/city/11147-city-council-hearings-mayor-adams-fy23-preliminary-budget; https://council.nyc.gov/budget/wp-content/uploads/sites/54/2022/04/Fiscal-2023-Preliminary-Budget-Response-.pdf

5 Available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2022/04/Fiscal-2023-Preliminary-Budget-Response-.pdf

6 Available at https://www1.nyc.gov/site/omb/publications/finplan04-22.page

N.Y. Educ. Law § 2590-g(8) requires a public comment period of 45 days before the vote, this posting was timely.

On May 18, 2022, the PEP approved the Fair Students Funding Formula, from which the portion of the DOE budget dependent on student enrollment is determined, and until it is determined, an Estimated Budget cannot be formulated. Thereafter, on May 31, 2022, DOE Chancellor David Banks issued an Emergency Declaration pursuant to N.Y. Educ. Law § 2590-g(9), adopting the Estimated Budget on an interim basis. In so doing, the Chancellor explained that "Due to the timing of the release of projected funding for the city school district used to develop the Estimated Budget, there is not sufficient time to complete the public comment period and obtain [PEP] approval of the estimated budget before budget allocations are sent to schools and the FY23 City Budget is adopted." Because "[d]elaying the school-based budgeting process would have a harmful effect on the operation of schools," the Emergency Declaration was "necessary to preserve the health, safety and general welfare of the students and the school system as a whole."

Accordingly, and pursuant to the Emergency Declaration, the Chancellor adopted the Estimated Budget for a period of 60 days or until the PEP voted on its approval following the forty-five day comment period, whichever came first. On June 5, 2022, DOE announced the allocation of budget funds to each school, prompting objection from members of the public and others.

On June 10, 2022, the Mayor and City Council announced agreement on a budget deal. On June 13, 2022, the City Council voted 44-6 to approve the proposed budget for Fiscal Year 2023, which included the amounts set forth in the Executive Budget for DOE. On June 23, 2022, at its regularly-scheduled meeting, the PEP held a hearing and took comments regarding,

inter alia, the DOE's Estimated Budget. Notably, although the public comment period began on May 6, 2022, only a single written comment was received concerning the budget, and that only to complain that the issuance of the Emergency Declaration circumvented the budget process. (Schanback Aff., ¶ 36).

Over 70 people made comments at the PEP meeting in opposition to the PEP's approval of the Estimated Budget or otherwise voicing concerns about it. Notably, none of the Petitioners submitted comments, (*Id.*) Nonetheless and despite this opposition, the PEP voted 10-4 to approve the Estimated Budget.

DOE's Actions Following Adoption of the Budget

Following adoption of the Executive Budget, DOE administrators and school officials began the careful planning necessary to their operations in the upcoming 2022-23 school year. These included central offices and school principals setting their budgets, new teachers being hired based on available funding for FY 2023, contracts being registered, and goods/services being ordered based on available funding for FY 2023. (Schanback Aff., ¶ 13) Where school budgets were reduced, schools decided which programs or positions should be eliminated. Consistent with the collective bargaining agreement with the teacher's union, teachers were required to be notified by June 15, or as soon thereafter as practicable, if they were being excessed from their positions. These teachers could then look for employment in other schools that had vacancies.

This Proceeding

On July 18, 2022, Petitioners commenced this proceeding by proposed Order to Show Cause alleging, *inter alia*, that Respondents violated N.Y. Education Law §§ 2590-g and 2590-q by failing to convene a meeting of the PEP (and hold a related public hearing and receive public comment) concerning the DOE's proposed budget for Fiscal Year 2023 and to vote on adopting that budget prior to the City Council's vote to adopt the City budget. Among other things,

Petitioners seek a permanent injunction containing various declarations of Respondents' alleged violations of law, annulling the City Council's approval of the entire City budget, and mandating the City Council to reconsider and re-vote on the DOE's FY 23 budget.

Included in Petitioners' proposed Order to Show Cause was a request for a preliminary injunction enjoining Respondents (i) "from any further implementation of the funding cuts contained in the adopted City FY23 Budget, which approved the DOE FY 23 education budget for the 2022-2023 school year," and (ii) "from spending at levels other than as required by the prior year DOE FY 22 education budget."

Although Respondents had requested to be heard as part of the Court's consideration of Petitioners' application, the Court issued the Order to Show Cause on July 22, 2022 (the "Order") without hearing from Respondents, and awarded the injunctive relief described immediately above. When Respondents brought this to the Court's attention, the Court invited Respondents to submit this application to vacate the Order.

ARGUMENT

LEGAL STANDARD

An application for preliminary injunction is an "extreme remedy" that is only to be granted where a petitioner can show "(1) it will suffer irreparable injury if the preliminary injunction is not granted; (2) the likelihood of success on the merits; and (3) the balance of equities are in favor of the petitioner's application." *Golden Ring Tr., Inc. v. City of New York*, 2005 N.Y. Misc. LEXIS 8587, at *11 (Sup. Ct. N.Y. Co. Aug. 12, 2005). Such emergency injunctive relief is intended as a "drastic" measure to "preserve the status quo pending a trial," and "should be used sparingly." *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 715 (2d Dep't 2011). Nor should a mandatory injunction issue where the movant would be afforded the ultimate relief sought in the

proceeding. *St. Paul Fire & Marine Ins. Co. v. York Claims Serv.*, 308 A.D.2d 347, 349 (1st Dep't 2003).

Here, the Order does the exact opposite of preserving the status quo – implementation of the Order will require completely revamping already allocated school budgets thereby upending the planning process, already well underway, for the 2022-23 school year which starts in just seven weeks. Moreover, the Order provides Petitioners with far greater relief – de facto rejection of the approved City Council budget and substitution of last year's budget – than Petitioners seek in the Petition (in which they request a revote by City Council, the results of which are far from certain).

Moreover, as discussed more fully below, Petitioners' application should be denied because (i) the harms of which Petitioners complain – including reduction of programs and reassignment of staff – can be cured (as they specifically seek) through an increase of the DOE's budget to last year's spending levels, monetary relief which is an insufficient basis to support the award of an injunction as a matter of law, (ii) their purported irreparable harm is entirely speculative and based on assumptions that may not come to pass, and (iii) the relief they have now obtained should be vacated given their delay and the resulting harm to Respondents, and because such relief requires this Court to improperly usurp the roles of the Mayor and City Council, vested in them by the City Charter, in making the careful policy choices reflected in the City's budget.

POINT I

PETITIONERS CANNOT DEMONSTRATE IRREPARABLE HARM

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc. 3d 1216(A), 2010 N.Y. Misc. LEXIS 5200, * 30 (Sup. Ct. N.Y. Co. Sept. 16, 2010) (quotation omitted). Irreparable harm

is "a continuing harm resulting in substantial prejudice by the acts sought restrained if permitted to continue pendente lite." *Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569 (1st Dep't 1978). It is well established that injuries compensable by monetary damages are not irreparable. *See 444 E. 86th Owners Corp. v. 435 E. 85th St. Tenants Corp.*, 93 A.D.3d 588, 589 (1st Dep't 2012). *See Chiagkouris v. 201 W. 16 Owners Corp.*, 150 A.D. 3d 442, 442 (1st Dep't 2017) ("Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable.") (internal quotation marks and citation omitted).

Moreover, the damage sought to be enjoined through a preliminary injunction must be likely and not merely possible. *See Dist. Council 82 v. Cuomo*, 64 N.Y.2d 233, 240 (1984) ("where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is non-justiciable as wholly speculative and abstract"); *Hichez v. United Jewish Council of the E. Side*, 2020 N.Y. Misc. LEXIS 2440, * 7 (Sup. Ct. N.Y. Co. May 27, 2020) ("movant must establish not a mere possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied") (internal quotation omitted).

A. Petitioners Seek Monetary Relief Which Cannot Support a Preliminary Injunction

In support of their application, Petitioners complain that the reductions to DOE's budget as approved by the City Council will result in the elimination of various school programs and "excessing" of staff.[7] To prevent these alleged harms, Petitioners sought to enjoin Respondents from implementing funding cuts contained in the City's budget for DOE for the 2022-23 school year, and to require spending at the same levels as required in last year's budget. In

[7] DOE staff who are "excessed" are not terminated from employment but are required to seek other positions within DOE.

issuing the Order and awarding the requested injunction, the Court directed the City and DOE to expend funds for DOE at the same level as last year and, in doing so, to increase spending for DOE above the amount approved by the City Council.

By increasing the allocation of funds to DOE in the City's budget to last year's levels, the Order plainly awarded Petitioners monetary relief. Indeed, Petitioners must concede this plain fact, as this is the very relief they sought in their application -- more money for DOE. As monetary relief cannot support a finding of irreparable harm, Petitioners' application should be denied. *See Ogdensburg Professional Firefighters' Ass'n, Local 1799 v. City of Ogdensburg*, 2021 N.Y. Misc. LEXIS 1896 (Sup. Ct. St. Lawrence Co. Jan. 11, 2021) (denying preliminary injunction seeking to enjoin reduction in staffing levels adopted as part of upcoming City budget, holding, *inter alia*, alleged damages could be recompensed by monetary award).

B. <u>Petitioners' Purported Irreparable Harm Is Speculative</u>

As noted above, speculation does not suffice to meet the movant's high burden required for the issuance of a preliminary injunction. *See Golden v. Steam Heat*, 216 A.D.2d 440, 442 (2d Dep't 1995) ("the irreparable harm must be shown by the moving party to be imminent, not remote or speculative"); *see also Valentine v. Schembri*, 212 A.D.2d 371 (1st Dep't 1995) (reversing grant of preliminary injunction because allegations of irreparable harm from loss of health insurance were speculative).

Here, Petitioners' allegations of irreparable harm are grounded entirely on two dubious assumptions that provide insufficient bases on which to grant the requested injunctive relief. First, and crucial to Petitioners' argument, is the assumption that had the PEP voted on the DOE's Estimated Budget before the City's Council voted to adopt the Executive Budget, the PEP

would have rejected the DOE's Estimated Budget. The available record, however, belies this speculation.

The impact of the proposed DOE budget had been known since February 16, 2022, when Mayor Adams announced the City's Preliminary Budget which, as proposed, would have significantly reduced the DOE's budget. Following issuance of the Preliminary Budget, the City Council prepared a detailed report dated March 21, 2022 specifically concerning the proposed DOE budget, analyzing numerous areas, and raising various issues and concerns.[8] Following the Mayor's issuance of the Executive Budget on April 26, 2022, the City Council again prepared a detailed report, dated May 10, 2022, again specifically dedicated to reviewing the proposed DOE budget.[9] The City Council also conducted hearings on March 21, 2022 and May 10, 2022, specifically concerning the Preliminary Budget and Executive Budget, respectively, and the DOE.

Moreover, although DOE invited public comment following its posting of its Estimated Budget on May 6, 2022 (which is based on the Mayor's Executive Budget published on April 26, 2022), it received only a single comment until the date of the PEP's meeting on June 23, 2022, which did not address the substance of the budget.

At the heart of Petitioners' assumption is their contention that "nearly 70 members of the public, including parents, teachers, and education advocates urged the [PEP] not to approve

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[8] Report on the Fiscal 2023 Preliminary Plan and the Fiscal 2022 Mayor's Management Report for the Department of Education, available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2022/03/DOE.pdf

[9] Report to the Committee on Finance and the Committee on Education on the Fiscal 2023 Executive Plan and the Fiscal 2023 Executive Capital Commitment Plan, Department of Education, available at https://council.nyc.gov/budget/wp-content/uploads/sites/54/2022/05/DOE-SCA-1.pdf

the proposed DOE FY 23 estimated education budget." (Complaint, ¶ 14). Specifically, Petitioners concede, as indeed they must, that "information provided at this public hearing addressed the consequences and irreparable harm caused by Respondents' FY 23 cuts to the 2022-2023 school year education budget." (*Id.*, ¶ 19).

Yet, notwithstanding all this information, the PEP approved the Estimated Budget by a vote of 10-4. Although Petitioners suggest that the PEP may have approved the budget because members allegedly were told that their vote was merely procedural, there is nothing in the record to support this rank speculation. Indeed, it bears noting that 4 members (or over 28% of the voting members) voted "no" and others could have if they had so chosen. Accordingly, there is nothing to support Petitioners' assumption that the PEP would have voted to reject the DOE's Estimated Budget had it voted prior to the City Council's vote, or that such a vote would have impacted the Mayor's negotiation with City Council.

Second, Petitioners also assume that the City Council would not have approved the City's budget had the PEP voted first. (Petitioners' Moving Brief, NYSCEF No. 16, at NYSCEF pg. 14, Complaint, ¶ 19). Because many people testified at the PEP meeting in opposition to the Estimated Budget or voiced concerns about the Estimated Budget, the unstated inference Petitioners wish to draw is that the City Council was somehow ignorant of such objections or concerns and would not have approved the overall Executive Budget if the Council had been aware of them. Again, however, such a conclusion is speculative and finds no support in the record.

The Preliminary Budget and Executive Budgets were well vetted by various entities including, *inter alia*, the Comptroller's Office, the Independent Budget Office and the Borough presidents, as well as by the City Council in the reports described above. Moreover, the City Council held hearings at which Council members were free to ask (and did ask) questions of

various DOE officials (including the Chancellor, First Deputy Chancellor and Chief Financial Officer) about DOE's portion of the Preliminary Budget and Executive Budget. Notably, Petitioners neither testified at the hearings nor submitted written comments.

On June 5, 2022, the DOE issued individual schools' budgets. Although Petitioners contend that the City Council did not have sufficient time to review the material in advance of its vote, the City Council did not seek to delay its vote, either in response to the issuance of these budgets, or so that it could wait for the PEP's vote. On June 13, 2022, the City Council voted 44-6 to approve the proposed budget for Fiscal Year 2023.

Though it has been reported that some Council members have expressed surprise at the contents of the budget they approved, statements given by Council members at the time suggest otherwise. For example, at a Finance Committee hearing held on June 13, 2022, ahead of the final vote, City Council Member Gale Brewer (who was a member of the budget negotiating team) noted, "This is the most open, transparent, and the most discussion that took place in all of [my previous] years passing budgets."[10] Similarly, City Council Speaker Adrienne Adams stated, "This budget was so thought over, and so carefully negotiated with intense meetings, sometimes literally from sunup to sundown."

Specifically with respect to DOE, on June 13, 2022 Speaker Adams, Education Committee Chair Rita Joseph, and Oversight and Investigations Chair Brewer released a statement ("Joint Statement") explaining that "The change in school budgets released last week is the result of one-time federal stimulus funds running out, causing the City to return to its existing school

[10] City & State New York, "Adrienne Adams' City Council Passes Its First Budget," available at https://www.cityandstateny.com/policy/2022/06/adrienne-adams-city-council-passes-its-first-budget/368135/

budget formula that it had suspended because of these pandemic-related federal funds."[11] Significantly, the Joint Statement further noted "This Council will be pursuing every avenue available to address this issue of lost federal funding," including "bringing the full weight of the Council to ensure critical gaps left by lost federal funding and school-specific enrollment are filled when the numbers are updated in September."

Thus, any suggestion that the City Council was ignorant of the DOE budget proposed in the Executive Budget (which is more detailed than the DOE's Estimated Budget) or its impact finds scant support in the record. Rather, it is apparent that the City Council overwhelmingly passed the City's budget, fully aware of the decrease in DOE's budget for the 2022-23 school year, as well as the reasons for and the impact of those reductions. Moreover, the Council's stated express intention, as reflected in the Joint Statement, of addressing the reduction of DOE's budget through other means further demonstrates the speculative nature of Petitioners' claims and the ill-advised intrusiveness of a judicial order in matters of political and fiscal complexity appropriately left to the Legislative branch.[12]

Given the size of the City budget, the many months of intense negotiations that resulted in an approved budget agreement ("sometimes literally from sunup to sundown"), the many different City constituencies involved, the pending start of the next fiscal year, the City's current and anticipated financial condition, and the City Council's awareness of concerns regarding the proposed DOE budget, there is no support for Petitioners' speculation that the City Council would have voted to reject the proposed City budget. Moreover, if the City Council

[11] New York City Council Statement, issued June 13, 2022, available at https://council.nyc.gov/press/2022/06/13/2196/

[12] For example, the Court can take notice of the recent widely-reported negotiations between the Mayor and the City Council addressing the dispute concerning the DOE's budget.

rejected the budget and restored DOE's funding to last fiscal year's levels, it is entirely uncertain that school administrators would choose to use these funds in the same manner, nor at the same level, as last year. Thus, restoration of such funds would not necessarily mean that such moneys will actually be expended, or used to fund the programs and staff impacted by the cuts to FY23 budget approved by the City Council.

As Petitioners' purported irreparable harm is entirely speculative, they cannot meet the high bar to justify an award of injunctive relief, and their application should therefore have been denied.

POINT II

THE INTERIM RELIEF AWARDED TO PETITIONERS IS NOT AVAILABLE

A. Petitioners Unreasonably Delayed in Seeking Relief

Importantly, preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. "Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). *See Mercury Serv. Sys., Inc. v. Schmidt*, 50 A.D.2d 533 (1st Dep't 1975) ("Denial of an injunction *pendente lite* against solicitation of plaintiff-appellant's customers is amply justified by delay of three and one-half months in seeking this relief. In the interval, had plaintiff moved with dispatch consonant with a threat of truly irreparable harm, all issues could well have been resolved at a plenary trial."); *Matter of Raffe*, 42 Misc 3d 1236[A], 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").

Indeed, even a short delay may undermine a movant's assertion of irreparable harm sufficient to warrant denial of interim relief. *See, e.g., Garland v. N.Y. City Fire Dep't*, 2021 U.S. Dist. LEXIS 233142, *22 (E.D.N.Y. Dec. 6, 2021) (denying interim relief where plaintiffs delayed 33 days in seeking injunction against City's COVID vaccine mandate for municipal employees, noting "Plaintiffs' claimed need for injunctive relief is belied by their own delay in seeking that relief."); *see also Broecker v. N.Y.C. Dep't of Educ.*, 2021 U.S. Dist. LEXIS 226848, *27 (E.D.N.Y. Nov. 24, 2021) (declining to enjoin DOE from enforcing COVID-19 vaccination mandate against employees, noting that "Plaintiffs' inaction [of 44 days] does not convey a looming, irreparable harm, and does not invoke the urgent need for speedy action to protect the plaintiffs' rights") (internal quotations omitted).

Relatedly, laches is an equitable doctrine defined as

> such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. The essential element of this equitable defense is delay prejudicial to the opposing party.

Schulz v. State of New York, 81 N.Y.2d 336, 348 (1993) (quoting *Matter of Barabash*, 31 N.Y.2d 76, 81(1972) (internal quotation marks and ellipsis omitted). The challenge in *Schulz* would have required the recall and refund of public bonds. The Court noted that challenges to public financing plans must be brought promptly and "[t]o relax this procedural safeguard could disproportionately incur or threaten a greater harm to the public weal than the alleged constitutional transgression itself." *Schulz*, 81 N.Y.2d at 348-49. *See Sheerin v. New York Fire Dep't Arts. 1 & 1B Pension Funds*, 46 N.Y.2d 488, 496 (1979) ("laches is designed to introduce flexibility into the process of determining when rights have been asserted so unseasonably that a point at which they should be barred has been reached.")

Here, Petitioners' assertion of irreparable harm is negated by their lack of diligence in pursuing relief. Petitioners were well aware of the significant proposed cuts to the DOE's budget as early as February 16, 2022 when the Mayor issued the Preliminary Budget. Such cuts essentially continued with each subsequent iteration of the City's budget, resulting in the budget approved by the City Council on June 13, 2022. Yet Petitioners did nothing to address any concerns about the proposed cuts at the time, foregoing the opportunity to testify before the City Council. This is noteworthy given that, pursuant to its contract with the United Federation of Teachers, excessing decisions were required to be made by June 15.

Moreover, on May 6, 2022, DOE posted notice on its website of the June 23, 2022 PEP meeting. The Mayor and City Council announced a budget deal on June 10, 2022, and the City Counciol then posted notice of the June 13, 2022 vote. Thus, by that date Petitioners knew that the City Council was scheduled to vote on the City budget before the PEP's vote on DOE's Estimated Budget. Yet, rather than seeking to enjoin the City Council's vote or to obtain other injunctive relief, Petitioners did nothing, waiting over two months, until July 18, 2022, to commence this proceeding -- after the adoption of the City's budget for FY 23, after the adoption of City agencies' budgets, after the PEP meeting, and after each agency began the extensive planning necessary for the new fiscal year. Petitioners' failure to act timely is fatal; they were simply too late, and by awarding Petitioners the interim relief they sought, the Order undoes the careful and delicate planning involved in formulating City and agency budgets and wreaks havoc on the City's and DOE's operations. *See Sheerin*, 46 N.Y.2d at 495-96 (in Article 78 proceeding, proof of unexcused delay without more may be enough to invoke laches).

B. A Balance of the Equities Weighs In Favor of Respondent

In deciding a motion for interim relief, 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."

Western New York Motor Lines, Inc. v. Rochester-Genesee Regional Transp. Auth., 72 Misc. 2d 712, 717 (Sup. Ct. N.Y. Co. 1973). Here, Petitioners cannot establish that a balancing of the equities lies in their favor, as they cannot demonstrate "that the irreparable injury to be sustained . . . is more burdensome to [them] than the harm caused to [Respondents] through the imposition of the injunction." *Nassau Roofing and Sheet Metal Co. v. Facilities Development Corp.*, 70 A.D.2d 1021, 1022 (3rd Dep't 1979), *app. dismissed*, 48 N.Y.2d 654 (1979). *See Gulf & Western Corp. v. New York Times Co.*, 81 A.D.2d 772, 773 (1st Dep't 1981) (reversing trial court and denying preliminary injunction where plaintiffs failed to demonstrate that "'the balance of convenience and relative hardship -- the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it' tips in plaintiff's favor") (quoting *Edgeworth Food Corp. v. Stephenson*, 53 A.D.2d 588 (1st Dep't 1976)).

In evaluating the balance of the equities, "courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *See Amboy Bus Co. Inc. v. Klein*, 2010 N.Y. Misc. LEXIS 2445, at *38 (Sup. Ct. N.Y. Co. Apr. 28, 2010) (citations omitted). Here, the injunctive relief demanded by Petitioners would cause significant hardship to the City. Such relief would upset the careful budget process and impact the planning and delivery of City services to millions of residents which already has begun.

For example, schools are already well down the road of budgeting for next year with corresponding staffing, student assignment, and scheduling decisions. Freezing or altering budgets now could create a domino effect with schools attempting to reverse mutually agreed-to transfers and hires of teachers and other staff. For example, if PS 1, which has a higher budget hired a teacher through a mutually agreed-to transfer from PS 2 (not necessarily an excess teacher)

and now cannot hire that person, or is not sure it can, then the teacher goes back to PS 2 which in turn may need to reassign another teacher who transferred there or was newly hired.

The ripple effect of reversing one hiring decision could impact multiple staff and schools. With over 75,000 teachers and 23,000 paraprofessionals DOE always has a dynamic staffing situation in the summer that is impacted not just by budgets but also staff attrition, staff transfers, and staff going out on and returning from leave. (Schanback Aff., ¶ 15)

Further, even if the number of students in a school remains the same, there are always shifts in mandates and student programming (course) needs. It is very rare for a school to also have the same number of students in each grade from year to year. *Id.*, ¶ 18. At a basic, conceptual level, freezing school budgets and consequent staffing could have detrimental effect. For example, such a freeze could prevent a school from hiring enough paraprofessionals for their incoming students with disabilities population. Multiply these scenarios by DOE's 1400 public schools, and the scale of the chaos and confusion the Order will cause if left in effect becomes clear. *See also* Schanback Aff., ¶¶ 15-19 for further examples of the extreme harm and confusion caused by the Order).

Although Petitioners blithely contend that the City can use some of the unspent federal stimulus funds or moneys in the City's reserve fund (Petition, ¶ 21), this argument is shortsighted and takes a cavalier approach to City finances. Indeed, any unbudgeted money that is used now reduces the amount later available for other needs. Using that money now ignores the significant financial impact that such spending (and corresponding reduction in future revenue) will have in successive years.

Also, money in the reserve fund is used to address significant costs resulting from unanticipated and planned financial needs and to guard against reduced revenue (for example, as

the result of rising inflation, declining stock market.) As set forth on page 5 of the "Local Government Management Guide, Reserve Funds," published by the New York State Office of the Comptroller in February 2022[13]:

> A reasonable level of unrestricted, unappropriated fund balance provides a cushion for unforeseen expenditures or revenue shortfalls and helps to ensure that adequate cash flow is available to meet the cost of operations. Combining a reasonable level of unassigned fund balance with specific legally established reserve funds provides resources for both unanticipated events and other identified or planned needs.

Reducing those funds to satisfy Petitioners' needs is unwise and ignores the larger interests of the City.

C. The Court Does Not Have Authority to Make Budget Decisions

In it Order, the Court enjoined Respondents from implementing the budget approved by the City Council for the New York City Department of Education for the 2022-23 school year. In so doing, the Court inserted itself into the budget process, usurped the authority of the Mayor, whose prerogative it is to establish the position and make decisions in budget negotiations with the City Council, as well as the authority of the Council itself, which the City Charter empowers to determine the City's budget, and directed the City to expend funds for DOE at a specific level – *i.e.*, the same level as last year.

Pursuant to the City Charter, however, such budget decisions and the allocation of funds among the various City agencies result from a political process vested in the executive and legislative branches, and involve complex policy decisions concerning the delivery of agency services and programs. It is well-settled, that the "judiciary [should] not undertake tasks that the

[13] Available at https://www.osc.state.ny.us/files/local-government/publications/pdf/reserve-funds.pdf

other branches are better suited to perform. . . . Generally, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches of our tripartite system." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-36 (1984).

In *Jones v. Beame,* 45 N.Y. 2d 402, 406 (1978), the Court of Appeals admonished courts against entangling themselves in decisions left to the executive and legislative branches, lest they violate the constitutional balance of powers:

> In each [appeal] the plaintiffs would embroil the courts in the administration of programs the primary responsibility for which lies in the executive branch of government. In each the courts are obliged to decline the invitation. Accepting the responsibility would violate the constitutional scheme for the distribution of powers among the three branches of government and involve the judicial branch in responsibilities it is ill-equipped to assume.

As the First Department has recognized, the need for courts to abstain "is particularly true in those cases that involve political questions, which involve those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches" *Roberts v. Health & Hospitals Corp.,* 87 A.D.3d 311, 323 (1st Dep't 2011), *lv. denied* 17 N.Y.3d 717 (2011) (internal quotation omitted).

Courts have been particularly reluctant to substitute their judgment for those of the other branches of government in the field of education.

> We had thought it well settled that the courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools. Indeed, we have previously stated that the courts will intervene in the administration of the public school system only in the most exceptional circumstances involving gross violations of defined public policy.

Hoffman v. Bd. of Educ., 49 N.Y.2d 121, 125-26 (1979) (internal quotation and citations omitted).

As the Court of Appeals admonished, "The judiciary must take a disciplined perception of the proper role of the courts in the resolution of our State's educational problems, since primary responsibility for the provision of fair and equitable educational opportunity within the financial capabilities of our State's taxpayers unquestionably rests with [the Legislature]." *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 50 (1982). For this reason, "[t]he determination of the … objectives of expenditures of public moneys for educational purposes, … presents issues of enormous practical and political complexity … . It would normally be inappropriate, therefore, for the courts to intrude upon such decision-making." *Id.* at 38-39.

Finally, by imposing on the DOE (and, by extension, the City) specific spending amounts above those that were not approved by the City Council, the final authority on the City's budget, the Order improperly supersedes the careful and deliberative policy decisions that are fundamental to the budget process and vested in the executive and legislative branches, thereby violating the separation of powers among the branches of City government. This problem is highlighted by the legal reality that the City is required to balance its budget, and a one-sided judicial decree to maintain spending for the school district above the appropriate level jeopardizes this requirement. Section 8(1)(a) of the NYS Financial Emergency Act (of which the relevant portion is pasted below) requires the City's expense budget to be "prepared and balanced" so as not to show a deficit under generally accepted accounting principles. The City Charter contains a similar requirement in section 258(a). *See also* Charter § 1516(a) (fixing of real property tax rates to produce a balanced budget consistent with GAAP). Thus, the Order cannot be viewed in isolation from other governmental powers and decisions. If the Order remains in place for any material period, it could implicitly force upon the Mayor and City Council corresponding cuts or

real property tax increases so as to maintain budgetary balance over the long term – this implicates fundamental policy powers that are not vested in the judicial branch.

The interim relief set forth in the Order necessarily overrides the careful and considered policy choices and decisions made by the Mayor and City Council and reflected in the City's budget. The Court should have declined to substitute its judgment concerning such matters. *See Jones*, 45 N.Y.2d at 407 (plaintiff's case raises "questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena.").

CONCLUSION

For the foregoing reasons, City Defendants respectfully request that this Court vacate its Order of July 22, 2022, deny Petitioners' motion for a temporary restraining order and preliminary injunction in its entirety, and award Respondents such other and further relief as the Court may deem just and proper.

Dated: New York, New York
July 25, 2022

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