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

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ANNERIS FERNANDEZ, individually and on behalf of her minor child E.H.; ASHLEY NORMAN, individually and on behalf of her minor child I.C.; CHANCE SANTIAGO; GRISSLET RODRIGUEZ, individually and on behalf of her minor child J.T.; SARAH FRANK; MARISSA MOORE, individually and on behalf of her minor child K.M.; and LUCIE IDIAMEY-GABA, individually and on behalf of her minor child D.B.,

Index No.:

Petitioners,

–against–

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DAVID C. BANKS, as Chancellor of the City School District of the City of New York,

Respondent.

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MEMORANDUM OF LAW IN SUPPORT OF
PETITIONERS' VERIFIED PETITION AND PRELIMINARY INJUNCTION

Dated: June 22, 2023
New York, New York

ADVOCATES FOR JUSTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

ARGUMENT 4

I. SECTIONS 2590-H AND 2853 REQUIRE THAT EDUCATIONAL IMPACT STATEMENTS AND BUILDING UTILIZATION PLANS INCLUDE SPECIFIC ANALYSES 5

II. BY FAILING TO PRESENT SPECIFIC INFORMATION ON THE RE-SITINGS' AND CO-LOCATION'S IMPACT, RESPONDENTS HAVE FAILED TO COMPLY WITH §2590-H AND 2853 8

A. Respondents Used Non-Specific Language Regarding Enrollment and Admissions 8

B. Respondent Failed to Analyze Class Size 9

C. The DOE Did Not Assess the Re-Sitings' and Co-Location's Impact on School Safety and Staffing 13

III. RESPONDENTS HAVE VIOLATED THE NEW YORK CITY HUMAN RIGHTS LAW 19

IV. RESPONDENTS VIOLATED SEVERAL PROVISIONS OF THE OPEN MEETINGS LAW 21

A. The DOE Failed to Record Three Hours of the April 19, 2023 PEP Meeting 22

B. PEP Members Did Not Have Their Cameras On During Either PEP Meeting At Issue 22

C. The Locations of the Relevant PEP Meetings Were Not Disclosed 23

D. For Both Brownsville and West Side, Good Cause Exists to Nullify the PEP's Votes 24

V. RESPONDENTS HAVE FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF §§2590-G AND H 27

VI. INJUNCTIVE RELIEF IS NECESSARY TO ENFORCE THE LAW AND PROTECT PETITIONERS FROM IRREPARABLE INJURY 28

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Bd. Of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ., 91 N.Y.2d 133 (1997)............. 4

Bravo v. De Blasio, 75 Misc. 3d 373, 167 N.Y.S.3d 708 (N.Y. Sup. Ct. 2022)........................... 19

Campaign for Fiscal Equity v. State, 100 N.Y.2d 893 (2003) 9

CFE v. State, 86 N.Y.2d 307 (1995).. 9

Chinese Staff & Workers Ass'n v. City of N.Y., 68 N.Y.2d 359 (1986) 4

Cong Machon Chana v. Machon Chana Women's Inst., Inc., 162 A.D.3d 635 (2d Dep't 2018)... 29

Lynch v. New York City Civilian Complaint Rev. Bd., 171 N.Y.S.3d 482 (2022)........................ 25

Matter of Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400 (1986) 4

Melman v. Montefiore Med. Ctr., 98 A.D.3d 107, 946 N.Y.S.2d 27 (2012)................................ 19

Mulgrew v. Bd. of Educ. of the City School Dist. of the City of N.Y., 28 Misc. 3d 204 (Sup. Ct. N.Y. Cnty. 2010), *aff'd*, 75 A.D.3d 412 (1st Dep't 2010) 4, 6, 27, 28

New York State Nurses Ass'n v. State Univ. of New York, 960 N.Y.S.2d 631 (Sup. Ct. 2013).... 25

Nobu Next Door, LLC v. Fine Arts Housing, 4 N.Y.3d 839 (2005) 28

Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64 (1st Dep't 1996)......... 4

Statutes

Education Law § 2590-g.. 1, 2, 26, 27

Education Law §211-d... 11

Education Law §2590-h.. passim

Education Law §2853 .... passim

NYC Administrative Code §8-101 19

NYC Administrative Code §8-130 19

NYCHRL §8-107.. 3, 19

Open Meetings Law §100.. 23

Open Meetings Law §103-a 21, 22, 23

Open Meetings Law §104 23

Open Meetings Law §107 .... 24, 25

Public Officer's Law Article 7 3

Rules

CPLR §7803(1) 4

CPLR Article 63 28

PRELIMINARY STATEMENT

The New York City school district has taken its statutory obligation to engage in a transparent and interactive public process *before* making any significant changes to the utilization of City public schools and reversed it. [Instead of analyzing the foreseeable impacts on student services and programs resulting from the proposed re-sitings and co-location to determine *whether* the changes should be approved, and receive meaningful input from students, educators and other stakeholders on the analysis, Respondents instead employ boilerplate language to avoid discussion of specific impacts, including increased class sizes, loss of specialized rooms and its effect on students with disabilities, and building safety.] When stakeholders later question this, Respondents defer the issues without analyzing them. Moreover, the fundamental proposed allocation of space is based on an abstract formula created in 2015 – the "Instructional Footprint" – which assumes current classes sizes, no matter how large, will persist indefinitely. In short, Respondents prefer to blindly create unacknowledged issues now and worry about solving them another day. That is not, however, what the law requires.

This Court has already held that Education Law §§2590-g, -h, and 2853 require that school-specific information about the actual impact on current and prospective students and surrounding schools be identified and discussed in the statutorily mandated Educational Impact Statements (EISs) and Building Utilization Plans (BUPs) before the City Board of Education (referred to as the Panel for Educational Policy (PEP)) can properly vote on the proposed changes. As explained below, Respondents have flagrantly disregarded these mandates and related regulations to rush through re-siting and co-location proposals that were treated as foregone conclusions, not as options to be meaningfully assessed.

When faced at public hearings with numerous questions from stakeholders – regarding, *inter alia*, class size, delivery of critical services, extra-curriculars, and safety – the DOE's consistent response has been that those topics will be addressed later. None of these issues have been addressed in the EISs or BUP. The Education Law requires more than mere lip service. The Education Law requires that the Chancellor of the City School District (Chancellor) conduct an individual substantive analysis and engage in both a collaborative and transparent procedural review process for each re-siting and co-location *before* the PEP can properly consider and vote upon the proposed changes in utilization. Pet. ¶13. That process requires the Chancellor to (i) prepare an EIS to report on the impact of the re-sitings and co-location on affected students as well as the community at large; (ii) hold joint public hearings with the impacted Community Education Councils (CECs), School Leadership Teams (SLTs), and community; and (iii) address substantive feedback provided through public comment and at the joint public hearings. Educ. Law §§2590-g, -h. *Id.* This process is intended to ensure that the Chancellor has analyzed the specific impacts of the individual school, and that parents and the surrounding community of that school have an opportunity to provide input into the Chancellor's and PEP's decision-making process. *Id.*

Petitioners bring this Article 78 proceeding to vacate and annul the actions taken by the DOE to re-site two schools, both in Upper Manhattan, and to co-locate another, in Brooklyn, because of its failure to adequately adhere to the statutory requirements of §§2590-g, -h, and 2853 and related regulations. Respondents have failed to comply with the law both substantively and procedurally. The DOE has provided EISs and a BUP for the proposals which are perfunctory, generic, neglect to delineate the existing use of classroom and shared space, provide erroneous and incomplete enrollment information, and omit descriptions of the actual current

usage of rooms. These details matter because these permanent re-sitings and co-locations will begin the same year the new class size reduction law (CSL) begins and will overlap with the law's phase-in. The DOE neglected to provide any information about either the new law or the current class sizes in its EISs and failed to alert the public and PEP to these issues.

Additionally, the DOE has violated New York City Human Rights Law (NYCHRL) §8-107. The proposed re-sites and co-location will have a disparate impact on students with disabilities within Individualized Education Programs (IEPs) which require dedicated space. Under NYCHRL, policies are unlawful if they have a disparate impact on a protected class (here, students with disabilities).

The DOE has also violated several sections of Article 7 of the Public Officer's Law (hereinafter known as the Open Meetings Law or OML). Respondents have failed to comply with the requirements set forth in §§103-a(2)(g), 103-a(2)(d), and 104(4) in conducting the two PEP meetings on April 19 and May 1, 2023. Because of these violations, good cause exists for the court to void the re-siting and co-location votes.

In totality, the DOE's actions were arbitrary, capricious, and contrary to law and should be held unlawful.

STATEMENT OF FACTS

Petitioners respectfully refer the court to the Verified Petition and annexed Affidavits of Leonie Haimson, Anneris Fernandez, Ashley Norman, Chance Santiago, Grisslet Rodriguez, Gladis Yupaugui, Sarah Frank, Marissa Moore, and Lucie Idiamey-Gaba for a complete statement of the alleged facts. To avoid unnecessary repetition, key facts are incorporated into the argument below.

ARGUMENT

Article 78 of the New York Civil Practice Law and Rules allows for judicial review of administrative actions to determine whether they are contrary to law or constitute an abuse of discretion. CPLR §7803(1) and (3). *See Bd. Of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ.*, 91 N.Y.2d 133, 139 (1997) (reciting standard).

Where the law provides specific actions, requirements, and procedures to be followed by the government, strict adherence is required, for incomplete compliance would undermine the purposes of the law and tempt agencies to circumvent statutory mandates. *See Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 73-74 (1st Dep't 1996) (nullifying respondents' actions for failure to strictly comply with public comment mandates of SEQRA, and for allowing only limited public participation and scrutiny); *Mulgrew v. Bd. of Educ. of the City School Dist. of the City of N.Y.*, 28 Misc. 3d 204, 214 (Sup. Ct. N.Y. Cnty. 2010), *aff'd*, 75 A.D.3d 412 (1st Dep't 2010) (nullifying PEP vote because DOE failed to comply with specific requirements of Educ. Law §2590-h when seeking to close nineteen schools). The role of the court is "to assure that the agency itself has satisfied [the law] procedurally and substantively." *Id*. at 210 (citing *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986)). If the agency failed to comply, the Court of Appeals has concluded that "the appropriate remedy is to find the agency action null and void." *Id*. (citing *Chinese Staff & Workers Ass'n v. City of N.Y.*, 68 N.Y.2d 359, 369 (1986)).

Here, Respondents' multiple failures to comply with the law render invalid the PEP's April 19 and May 1, 2023 votes.

I. SECTIONS 2590-H AND 2853 REQUIRE THAT EDUCATIONAL IMPACT STATEMENTS AND BUILDING UTILIZATION PLANS INCLUDE SPECIFIC ANALYSES

Section 2590-h requires the DOE to perform a statutorily prescribed process to announce and consider significant changes in school utilization – which include new re-sitings and co-locations – and meaningfully engage the public on those decisions before the PEP votes on them. A co-location occurs when more than one school is housed within a single DOE facility, such that the co-located schools are required to share space. This process requires a school-specific analysis and report of such considerations and facts in an EIS for each significant change. These EISs – modeled after environmental impact statements under SEQRA – form the basis of the public's ability to evaluate and meaningfully comment upon the DOE's proposed actions.

Per Educ. Law §2590-h(2-a)(b)(i)-(vii), there are seven areas of consideration that <u>must be included in every EIS:</u>

> i. the current and projected pupil enrollment of the affected school, the prospective need for such school building, the ramifications of such school closing or significant change in school utilization upon the community, initial costs and savings resulting from such school closing or significant change in school utilization, the potential disposability of any closed school;
> ii. the impacts of the proposed school closing or significant change in school utilization to any affected students;
> iii. an outline of any proposed or potential use of the school building for other educational programs or administrative services;
> iv. the effect of such school closing or significant change in school utilization on personnel needs, the costs of instruction, administration, transportation, and other support services;
> v. the type, age, and physical condition of such school building, maintenance, and energy costs, recent or planned improvements to the school building, and such building's special features;
> vi. the ability of other schools in the affected community district to accommodate pupils following the school closure or significant change in school utilization; and
> vii. information regarding the school's academic performance, including whether the school has been identified as a school under registration review or has been identified as a school requiring academic progress, a school in need of improvement, or a school in corrective action or restructuring status.

Educ. Law §2590-h(2-a) (b)(i)-(vii). The law further specifies that when a co-location involves a

charter school (here, the Brownsville EIS) the Chancellor must develop a BUP, which must include, at a minimum:

A. the actual allocation and sharing of classroom and administrative space between the charter and non-charter schools;
B. a proposal for the collaborative usage of shared resources and spaces between the charter and non-charter schools including but not limited to cafeterias, libraries, gyms, and recreational spaces including playgrounds;
C. justification of the feasibility of the proposed allocations and how the shared usage would result in an equitable and comparable use of the building;
D. building safety and security;
E. communication strategies to be used by the co-located schools; and
F. collaborative decision-making strategies to be used by the co-located schools.

Educ. Law §2853(3)(a-3)(2)(A)-(F).

Chancellor's Regulation A-190 also includes a template of information to be provided, specifically to:

i. "Indicate accessibility of specialty classrooms (i.e. computer labs, science labs) for each respective school;"
ii. "Describe the impact on shared spaces such as the gymnasium, cafeteria, library and playground. Include an example of how such space can be shared between or among the proposed co-located schools;"
iii. "Describe the impact on the building's safety and security plan;"
iv. "Describe impact on the administrative staff, non-pedagogical, and pedagogical positions that will be created or eliminated as a result of the proposal;"
v. "Reference net impact on positions in the district and/or system;"
vi. "Describe impact of the proposal – or lack thereof – on transportation provided to
i. students (if applicable)."

Petition Ex. 20, Attachment No. 1B.

Section 2590-h further requires that every proposed significant change in school utilization not be considered final until and unless the statutory analysis, notice, and joint public hearings have been satisfied and the PEP votes to approve them. Educ. Law §2590-h(2-a)(e).

Courts have made clear that the requirements of §2590-h cannot be complied with piecemeal. *See Mulgrew*, 28 Misc. 3d at 214 (finding the DOE failed to fully comply with Educ. Law §2590-h, nullifying subsequent PEP vote). In *Mulgrew*, the court stated that "[u]nless

respondents follow the mandatory provisions of Education Law §2590-h, the CECs, SLTs and community boards will be foreclosed from any meaningful role in the decisions regarding school closings and significant changes in school utilization." *Id.* at 213. The court explained:

> the 2009 amendments to the Education Law were borne out of the legislative process that also provided for continuing mayoral control of the City's schools. The result was legislation that mandated the preparation of detailed EISs for schools that the chancellor proposed to close or significantly alter, and created a public process with meaningful community involvement regarding the chancellor's proposals. **That entire legislative scheme must be enforced,** and not merely the portion extending mayoral control of the schools.

Id. (emphasis added). The court also made clear that generic, boilerplate EISs are insufficient and do not satisfy the law. *Id.* at 211 ("[The DOE] has failed to provide any meaningful information regarding the impacts on the students or the ability of the schools in the affected community to accommodate those students."). Thus, as the DOE should well know, it cannot pay lip service to the EIS law's requirements. It must address each component of the law with specificity in the EISs. It is that specificity that enfranchises the impacted community as the Legislature intended.

Section 2590-h(2-a)(d-1) also provides for instances where, as here, the public identifies deficiencies in an EIS, providing that "the chancellor, after receiving public input, may substantially revise the proposed school closing or significant change in school utilization" by preparing a revised EIS and allowing for additional public hearings and feedback. Educ. Law §2590-h(2-a)(d-1). Thus, the law is designed to provide the DOE the opportunity to rectify omissions and inaccuracies in the original EISs. The DOE failed to do so.

II. BY FAILING TO PRESENT SPECIFIC INFORMATION ON THE RE-SITINGS' AND CO-LOCATION'S IMPACT, RESPONDENTS HAVE FAILED TO COMPLY WITH §2590-H AND 2853.

In addition to specifically listed information such as enrollment projections, the EIS law requires that the DOE analyze "the impacts of…[the] significant change in school utilization to any affected students." Educ. Law §2590-h(2-a)(b)(ii). Yet, as detailed in the Verified Petition, the DOE either omitted or incorrectly stated statutorily required information from the EISs proposing co-location at a building in Brooklyn - already housing Brownsville Academy (Brownsville), a public transfer high school, and New Visions Aim Charter High School I (New Visions) - and a re-siting of two schools in Upper Manhattan - The Young Women's Leadership School (TYWLS), a public high school, and Edward A. Reynolds West Side High School (West Side), a public transfer high school.

As set forth below, rather than properly identify and analyze impacts on students, the DOE's approach was to provide EISs with boilerplate language that sweepingly denied any impact. When issues were raised by stakeholders, the DOE summarily deferred the issues until after the implementation of the re-sitings and co-location. Such generic answers and deferrals fail to satisfy the statutory process which requires that potential impacts be identified and considered as part of the process to determine *whether* to approve the re-sitings and co-location.

A. Respondents Used Non-Specific Language Regarding Enrollment and Admissions

Regarding Brownsville, the DOE has made generic, lackluster statements about enrollment. Rather than providing a detailed analysis about the impact co-location would have on Brownsville's enrollment, the EIS vaguely and generically asserts, "this proposal is not expected to impact current or future student enrollment, admissions, or programming." Petition Ex. 2, Brownsville EIS at 8; Pet. ¶ 123. In fact, the DOE has asserted this blanket statement in at least

thirty EISs it has posted since January 2022. Petition ¶124. The DOE fails to conduct a detailed analysis of the extent to which co-location will impact admissions and enrollment at Brownsville.

B. Respondent Failed to Analyze Class Size

While not specifically listed by name, class size squarely falls within the statutory mandate that EISs assess all "impacts" on students. This is necessarily the case where the proposed change is to co-locate another school in the same building, thus limiting the space available to the existing school(s). Here again, the DOE fails to address current class sizes or analyze how they will be impacted by the re-sitings and co-location. Instead, the DOE based its estimate of available space explicitly upon the faulty DOE "Instructional Footprint" assumption that the current class sizes (whatever they may be) would continue into the foreseeable future unchanged, without any need to lower class size to levels required by the CSL. Petition ¶39.

i. Class Size Is an Impact Within the Meaning of the Statute

In 2003, this state's highest court held that students are entitled to "classrooms which provide enough light, space, heat, and air to permit children to learn." *Campaign for Fiscal Equity ("CFE") v. State*, 100 N.Y.2d 893, 911 (2003) (citing *CFE v. State*, 86 N.Y.2d 307, 317 (1995)); Petition ¶ 49. The Court of Appeals further held there was "measurable proof" that City "schools have excessive class sizes, *and that class size affects learning*" and that "evidence of the advantages of smaller class sizes supports the inference sufficiently to show a meaningful correlation between the large classes in City schools and the outputs of [test results and graduation rates]." *Id.* at 911-12 (emphasis added); Pet. ¶49. "[T]ens of thousands of students are placed in overcrowded classrooms…[t]he number of children in these straits is large enough to represent a systemic failure." *Id.* at 914; Pet. ¶49. In short, large class sizes have a profoundly negative impact on students, the quality of education they receive, and their life outcomes.

For years afterward, the Legislature made efforts to reduce City class sizes through the Contracts for Excellence (C4E). Pet. ¶50. As required by C4E, the DOE submitted class size reduction plans for state Education Department approval in 2007 and again in 2008. In these plans, the DOE promised that "decisions regarding the co-location of a new school or program in an existing building *will explicitly take into account the decisions and plans [to reduce class size]*" (emphasis added) and "[DOE] will *not* place a new school or program in a building at the expense of those schools and programs already operating within the building." Pet. ¶51. Thus, the DOE has recognized that co-location decisions are inextricably linked to class sizes and that, to reduce class size, all co-location decisions must necessarily take account of existing and future class sizes. *Id.*

Indeed, at a February 2020 NYC Council Committee on Education hearing, Karin Goldmark, Deputy Chancellor of the Division of School Planning and Development, stated that the annual School Survey reveals class size is a concern for teachers and families. Pet. ¶54. The NYC Council Committee on Education similarly acknowledged the "considerable body of research" linking small class sizes to short and long-term benefits for students. *Id*. Research also shows that smaller classes positively affect student achievement and significantly increase the probability of attending college, earning a college diploma, and earning degrees in a STEM field. Pet. ¶48. Reduced class size is linked with increased student engagement, reduced disciplinary problems, and lower teacher attrition rates. *Id.* Teachers of small classes are able to get to know each student better and give them the individualized support they need, which contriubutes to a more effective, more experienced teaching workforce. *Id.*

ii. <u>The New CSL Means Co-locations Must Account for Future Class Sizes</u>

Nineteen years after CFE, the Legislature fulfilled the spirit of that holding by codifying maximum class sizes. The CSL was passed by the Legislature in June 2022 and signed by Governor Hochul on September 8, 2022, receiving broad bipartisan and near unanimous support. Pet. ¶55. The law requires that classrooms in kindergarten through grade three have no more than twenty students; grades four through eight have no more than twenty-three students; and grades nine through twelve have no more than twenty-five students. Educ. Law §211-d(2)(b)(ii)(A); Pet. ¶55. The mandate will be phased in over a five-year period, starting in the fall of 2023, and will require an additional 20% of classrooms comply each year until fully implemented in 2027-2028. Pet. ¶56.

In approving the bill, the Governor stated that "[t]he plan would allow for flexibility based upon teacher availability, financial feasibility, and classroom space availability, however the latter would also require planning to ensure that enough classroom space is being added to accommodate the increased number of classes." Pet. ¶57. Given that class sizes have a profound impact on the quality of education students receive, and that additional classroom space will be necessary to meet the benchmarks in the law, it necessarily follows that the DOE must articulate how the proposed re-sitings and co-location might impact the ability of affected schools to meet the new CSL caps. To be clear, Petitioners do not seek to force the DOE to prematurely comply with the CSL in every school. Rather, parents and educators should know whether and how the proposed re-sitings and co-location will impact the schools' ability to comply. Simply, will the co-location leave them enough space to comply without having to again change the space allotted to these schools or artificially reduce their enrollment over the next five years?

iii. By Not Addressing Class Size, Respondents Have Failed to Comply with §2590-h

Here, the DOE did not include any analysis in the EISs of the impact on class size of the proposed re-sitings and co-location. Pet. ¶¶ 70,104. The problem with failing to address the class size issue is that these proposed re-sites and co-location are permanent, not temporary. Moreover, the law requires the DOE to begin phasing in smaller classes next fall, at the same time that the re-sitings and co-location will occur. The attitude that the DOE has five years to get this done disregards the purpose of the phase-in and the fact that compliance will take preparation. An analysis of class sizes at West Side and Brownsville reveals that a significant number of their classes are far larger than the class size cap in the new law. Pet. ¶108; Ex. 5, Haimson Affidavit at ¶16. Thus, an analysis of the impact of these re-sitings and co-location on the projected class size of the existing schools and whether or how they will be able to lower class size in compliance with the new law should have been provided in the EISs.

The EIS law also requires that the EIS should describe "the ability of other schools in the affected community district to accommodate pupils following the … significant change in school utilization," meaning that any proposed co-location should also consider the class sizes and/or overcrowding in nearby schools or districtwide. Pet. ¶71. In Brownsville's District 17, more than 15,000 students, or 55% of high school students in that district, are in classes which exceed the cap, showing that more space will be needed districtwide to lower class sizes to appropriate levels. Pet ¶108. Similarly, about 65% of high school students in District 4, where West Side will be re-sited if the proposal is approved, are in classes larger than the cap set out in the Class Size Law. Pet ¶72. This data was not, but should have been analyzed in the EISs as more space in the respective Districts will be needed to meet the class sizes caps in the law.

Despite Governor Hochul's caution that compliance requires advance planning, and the DOE's prior admission that co-locations must be viewed with an eye towards achieving class

size goals, the DOE has purposefully kicked the class-size can down the road without providing stakeholders or the PEP any meaningful information on the issue. The PEP, which votes on the re-sitings and co-locations, and affected students, parents, and community members have a statutory right to know now whether the DOE is setting their school up to require a waiver of the class size caps, or worse yet, is creating a scenario where further disruption will be required through subsequent changes in utilization in the near term. As such, the DOE is violating §2590-h by not articulating now how it will address the requirements of the CSL for the proposed re-sitings and co-location.

C. The DOE Did Not Assess the Re-Sitings' and Co-Location's Impact on School Safety and Staffing

The DOE's statutory obligation includes the requirement to describe a proposal's impacts on "[b]uilding safety and security." Educ. Law §2853(3)(a-3)(2)(D); Petition Ex. 20 at §(II)(A)(2)(ii)(d). The EIS law also requires that the DOE address the effects on personnel needs. Educ. Law §2590-h(2-a)(b)(iv). Rather than describe any impact on West Side or Brownsville safety or security, the DOE again includes boilerplate language for both proposals.

The BUP for Brownsville includes language vaguely purporting to describe the impact of the proposed co-location on the building's safety. Pet. ¶125. The language used is identical to at least ten other BUPs released by the DOE since the beginning of 2022. Pet. ¶126.

In light of concerns about school safety amid the nationwide rise in school shootings, there are significant security issues regarding the potential impact of the co-location on Brownsville that should have been thoroughly addressed. Despite this, the DOE did not analyze safety concerns beyond the boilerplate language. Brownsville's BUP broadly states that a School Safety Committee will be established and a comprehensive School Safety Plan will be developed. Pet. ¶125. Nowhere in the Brownsville EIS or BUP does the DOE engage in a

meaningful analysis of how a co-location would impact the safety of their students, which should never be overlooked.

Additionally, the DOE overlooked the safety concerns of those impacted by the potential re-site of TYWLS and West Side. Given that gang violence is ever present in New York City, the DOE should have analyzed the potential gang conflicts that would arise through such re-siting. Once again, the DOE utilizes boilerplate language when discussing safety concerns in the West Side EIS. There is no mention of gang violence, nor any other safety concerns in the West Side EIS. When concerns about gang violence were brought up during the Joint Public Hearing by City Councilmembers Gale Brewer and Diana Ayala, Assemblymember Edward Gibbs, and multiple West Side students, teachers, and stakeholders, the DOE once again responded with vague safety plans without mentioning gang violence. Pet. ¶96. Thus, the DOE failed to engage in a meaningful analysis of the impact that re-siting would have on West Side students.

Further, despite the statutory obligations to assess personnel needs, the DOE does not assess the needs of West Side for School Safety Agents (SSAs) or the re-siting proposal's effect on those needs. Pet. ¶¶ 91-94. Currently, the West Side campus is on three floors and a basement of M506. If re-sited, West Side will overtake five floors of its new building - floors seven through eleven. Pet. ¶91. The DOE has only guaranteed the presence of two SSAs. Pet. ¶91. However, because West Side would be on floors seven through eleven, and the SSA would be stationed in the lobby, there are further concerns about safety. When a fight breaks out, there will be no security response until the SSA is notified, and then ascends to the floor of the incident. It is not simply that there are more floors for an SSA to navigate, but also that those floors are more distant from the SSA at M895 than at M506. Further, there are eleven floors to police in a commercial building, open to the public and students. Again, without sufficient analysis or

discussion, the EIS fails to adequately address ensuring West Side students and staff can and will be safe.

D. The DOE Did Not Assess the Re-Sitings' and Co-Location's Impact on Specialized Rooms

The DOE's own regulations require it to "[i]ndicate accessibility of specialty classrooms (i.e. computer labs, science labs) for each respective school." Pet. ¶45. However, the DOE does not provide specific analysis regarding specialized classrooms, including the use of space for special education and intervention services. The Brownsville EIS and BUP fail to address that current students will be sharing the science lab with Aspirations. Pet. ¶110. No specific information has been provided regarding if the time allotted to Brownsville for use of the science lab will be sufficient for students to fulfill the lab experience requirement to pass their Regents exams. Pet. ¶111. This lack of information reveals another manner in which the EIS is fundamentally flawed, and deprives stakeholder groups – and most critically, PEP members– of the information required before their vote.

Regarding special education, the Brownsville, TYWLS, and West Side EISs all generically state that "[t]hese programs and services may be provided in general education and/or special education classrooms, as well as separate settings depending on need." Pet. ¶79. While it is true that schools in NYC may offer these services in these different ways, this language provides no information about how these mandated services are actually being provided at the schools and whether the re-sitings and co-location will cause the schools to lose these rooms. Indeed, DOE officials have admitted that there is nothing in any of the EISs produced for these proposed re-sitings and co-locations, or in the Footprint, that ensures or even analyzes whether there will be sufficient dedicated spaces for students with disabilities to receive their mandated services after the re-sitings and co-location occur. Pet. ¶83. Given that 26% of

students at Brownsville and 43% of students at West Side High School have disabilities, many of which require extra space to accommodate, there are legitimate doubts as to whether the schools would continue to be able to provide all necessary accommodations in their smaller spaces.

While the EISs note West Side and Brownsville are currently educating students entitled to special education and other related services, these services are not included in the classroom allocations for either school. Pet. ¶ 83, 97. There are no classes set aside for speech, counseling/guidance, pull-outs/SETTS, ENL language services, or SEL/behavioral intervention services. *Id*. Further, according to the BUP, Brownsville would lose twelve full-size rooms and one half-size room next year, all of which are needed for these services and are mandated by the students' IEPs. Pet. ¶152. These services cannot be provided as effectively in shared spaces because of the need for privacy and a quiet, focused environment. *Id*. The Brownsville EIS at a minimum should have analyzed the reduction and reconfiguration in space articulated in the BUP.

Similarly, the West Side EIS does not discuss the current use of specialized rooms. According to the room counts in the EISs, West Side will lose five full-size classrooms, all five of its half-size classrooms, as well as on campus access to its LYFE Center, full-size gym, and SBHC while only gaining three quarter-size rooms. Petition Ex. 5, Haimson Affidavit at ¶26. This space is essential to ensure the safety and continued learning of West Side students and should have been discussed in the EIS. Further, as a transfer school, these students need additional resources, support, and space. The EIS makes no meaningful analysis of how the loss of these spaces will impact the students, their attendance, and enrollment.

E. The DOE Failed to Address Impacts on Utilization of Shared Spaces, Including Extra-Curricular Activities, and Summer Programs

In addition to the broad requirement to discuss all impacts on students, Education Law §2853 and Chancellor's Regulation A-190 delineate that BUPs must specifically include a proposal for the collaborative usage of shared resources and spaces between the schools, as well as a justification of the feasibility and equitability of the proposed allocations and schedules. §2853; Petition Ex. 20 at §(II)(A)(2)(a)(ii)(b) and (c). Brownsville's BUP simply provides a total number of minutes each space will be available to each school and states in perfunctory fashion that each school is being treated equitably and comparably (which Petitioners dispute), without any analysis of how the schedule would work in practice or demonstration that the proposal is in fact equitable. Pet. ¶120. Such rote analysis not only fails to comply with the law, but is also a disservice to the PEP and the community who are relying on these documents to understand how the proposals will affect them.

Brownsville's, West Side's and TYWLS's EISs state that if their respective proposal is approved, the school "will continue to offer extra-curricular programs based on student interests, available resources, and staff support for those programs." Pet. ¶¶ 85, 117. This is yet another boilerplate statement that provides no meaningful information to the impacted communities. If re-sited, West Side will lose its full-size gym. The EIS fails to conduct an in-depth analysis as to if and how the sports programs will be affected by the loss of the gym.

The Brownsville and West Side EISs do not explain how the school currently accommodates those activities, and they fail to note that there are existing space constraints for those activities. Pet. ¶86, 118. Specifically, Brownsville's EIS does not present Aspirations' extra-curricular needs and how they may compete with Brownsville's. Petition ¶101. In the Brownsville EIS, the DOE makes no reference to the existing uses of the building for summer and Saturday programs and how the proposed co-location will impact those programs in the

future. Pet. ¶118. This should have been discussed in the DOE's proposal; however, the EIS does not even mention the summer program. Pet. ¶121.

F. The DOE Failed to Adequately Consider the Additional Needs of Transfer Schools

Finally, the EISs and BUP provided by the DOE are insufficient because they do not adequately consider that West Side and Brownsville are transfer schools. Transfer Schools take in students who have extra needs, whether those needs are because of a disability or an extreme life circumstance requiring extra academic support. Often these students are older than the typical student in their grade. Therefore, more than in a traditional high school, these students need additional support, stability, and autonomy. Pet. ¶122.

The boilerplate language of West Side's and Brownsville's EISs do not take into account the extra need for stability and support of the transfer students. The perceived and potential loss of stability has already had a negative impact on student performance at West Side. Ex. 8, Fernandez Affidavit ¶25.

The DOE failed to consider the extent to which transfer students rely on the resources offered in West Side High School's current building. Many West Side students are parents. Access to an on-site day care is essential to their academic success. The DOE failed to analyze how the loss of such a crucial resource will affect students who are parents and their ability to attend school.

The DOE also failed to consider the extent to which transfer students rely on the resources offered at Brownsville. As a transfer school many Brownsville students also have disabilities and IEPs that require dedicated spaces for their mandatory related services. Pet. ¶114. The DOE did not analyze how the loss of two thirds of classrooms, critical spaces for these mandatory services, will affect these students and their ability to attend school.

III. RESPONDENTS HAVE VIOLATED THE NEW YORK CITY HUMAN RIGHTS LAW

The DOE violated the New York City Human Rights Law (NYCHRL) because the proposed re-sites and co-location will have a disparate impact on students with disabilities who have IEPs and require dedicated space for their education and mandatory related services. New York City Administrative Code §8-101 prohibits discriminatory actions against a protected class pertaining to housing, employment, and public accommodations. N.Y.C. Admin. Code §8-101. Students with disabilities are a protected class under the law. N.Y.C. Admin. Code §8-101. Under NYCHRL, policies that have a disparate impact on a protected class are unlawful. N.Y.C. Admin. Code §8-107(17). The NYCHRL defines disparate impact as the following:

> (1) The commission or a person who may bring an action under chapter 4 or 5 of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and
>
> (2) The covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact.

Id.

In cases that are broad and unique, such as this one, the Legislature intended disparate impact claims to be construed liberally in a petitioner's favor. *Bravo v. De Blasio*, 75 Misc. 3d 373, 167 N.Y.S.3d 708 (N.Y. Sup. Ct. 2022) (citing *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 946 N.Y.S.2d 27 (2012)). The law should be construed in such a way as to eliminate discrimination from the decision-making process, whenever reasonably possible. *Id.* In fact, the Legislature confirms its intention in New York City Administrative Code §8-130(a), which states that claims under the NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes…." N.Y.C. Admin Code §8-130(a).

The DOE's proposed re-siting of West Side and co-location of Brownsville violates NYCHRL because it will have a disproportionate impact on students with disabilities. Pet. ¶4. Again, 43% of students at West Side, and 26% of students at Brownsville have disabilities. Despite these sizable demographics, the DOE failed to consider or analyze the resulting disparate impact that the EISs proposed would have on these students. As a matter of policy and practice, the DOE does not explain how there will be enough space for the respective schools to provide the mandated services to which students with disabilities are entitled. Pet. ¶69 The DOE uses the same language in each EIS, with blanket statements that students with IEPs will still receive their accommodations, but with no details about how or where. Why should stakeholders believe such a claim without any analysis to determine if these mandated services and accommodations can be provided in dedicated rooms in the far smaller space?

Despite the DOE's blanket statement, the proposed Brownsville co-location and the West Side re-site will disproportionately impact students with disabilities. Through the DOE's proposals, both Brownsville and West Side will be losing many full-size classrooms and half sized spaces. Pet. ¶69, 116. Dedicated space is crucial for students with disabilities. Pet. ¶79. Students with disabilities also rely on extra physical space to get through the day. Pet. ¶80. Many students use empty classrooms to take breaks, often legally mandated by their IEPs, to regulate their emotions, or simply to focus. Ex. 6, Frank Affidavit ¶13. Students with disabilities struggle focusing and even staying in class throughout the day. The extra classroom space provides these students with the agency to make their own decisions about when, where, and how to regulate their social-emotional needs. *Id.* at ¶15. Without such space, they will no longer be able to stay actively engaged with their academics. *Id.* at ¶13. Taking away this essential space from students with disabilities will be detrimental to their academic success. Thus, by forcing students with

disabilities into smaller spaces where they may not receive all their accommodations, they face a disparate impact of the EIS proposed once implented. Moreover, students with disabilities have IEPs that mandate dedicated space for the provisions of their education and related services. The DOE as a matter of policy and practice repeatedly fail to account for these mandates. Thus, disproportionately impacting these students on the basis of their disabilities.

While students without disabilities may not be so impacted by the loss of space, students with disabilities are, in many instances, legally required by their IEPs to have dedicated spaces where they can receive their mandated services. The EISs do not address the harm to these students, or the fact that they are harmed to a greater degree than students without disabilities by the loss of space.

Students with disabilities at West Side and Brownsville deserve the liberal interpretation of the law that the Legislature intended. The issues of re-siting and co-location and how they disparately impact students with disabilities are novel, and should have been analyzed in the EISs. The Legislature intended for the law to be construed in favor of unique situations, such as the ones students with disabilities at West Side and Brownville are facing.

IV. RESPONDENTS VIOLATED SEVERAL PROVISIONS OF THE OPEN MEETINGS LAW

The violations of the Open Meetings Law provide good cause to nullify the PEP's votes. Respondents violated multiple provisions of the Open Meetings Law at both the April 19, 2023 PEP meeting and the May 1, 2023 PEP meeting. As detailed in the Verified Petition, the PEP meetings were both held virtually via video teleconference, and as a result, the meetings are subject to the standards ascribed in §103-a of the Open Meetings Law. Pet. ¶156.

Rather than uphold and comply with the legal standards governed by the Open Meetings Law, the DOE's approach was to conduct these PEP meetings without transparency and in

blatant disregard of the relevant law. Multiple PEP members conducted business with their cameras off at undisclosed locations that were not open to the public. Additionally, the PEP failed to upload a recording of the April 19 meeting, instead posting a difficult to decipher 84-page PDF transcript of the first three hours of the meeting. Pet. ¶140. This lack of transparency and disregard for the Open Meetings process fail to satisfy the statute that declares that, "[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials." Open Meetings Law §100. Pet. ¶158.

A. The DOE Failed to Record Three Hours of the April 19, 2023 PEP Meeting

The April 19 PEP meeting violated §103-a(2)(g) of the Open Meetings Law. That section states, in relevant part, that: "the public body shall provide that each meeting conducted using videoconferencing shall be recorded." N.Y. Pub. Off. Law §103-a(2)(g); Pet. ¶156. The first three hours of the April 19 PEP meeting were not recorded. *See* Petition Ex. 34; Pet. ¶156. Instead, the PEP provided an 84-page PDF of the transcript of the three-hour segment of the meeting. *Id.* A written transcript is not an adequate substitute for a video and audio recording. Tone, emotion, and visual cues are not captured by a transcription. Simply put, this written transcript does not satisfy the requirements of §103-a(2)(g) because the videoconferencing was not recorded.

B. PEP Members Did Not Have Their Cameras On During Either PEP Meeting At Issue

Both the April 19, 2023 PEP meeting and the May 1, 2023 PEP meeting violated §103-a(2)(d) of the Open Meetings Law. That section states, in relevant part, that: "the public body shall ensure that members of the public body can be heard, seen and identified, while the meeting is being conducted, including . . . any . . . matter . . . voted upon." Open Meetings Law § 103-

a(2)(d); Pet. ¶157. In the April 19, 2023 PEP meeting, which included the vote on the proposed Brownsville co-location, a number of PEP members had their cameras off during the vote, meaning they could not be seen or identified. *Id*. PEP members Aaron Bogad, Lily Chan, Marjorie Dienstag, Gregory Faulkner, Anthony Giordano, and Alan Ong apparently all voted "yes" on the proposal despite their individual failures to appear on camera when casting their individual vote. Ex. 34; Pet. ¶157. During the May 1, 2023 PEP meeting, which included the vote on the proposed West Side re-siting, this violation also occurred, with PEP members Chan, Dienstag, Faulkner, and Gladys Ward apparently voting "yes" on the proposal with their cameras off. Petition Ex. 35; Pet. ¶157.

If members of the public are unable to "see[] [or] identif[y]" PEP members during meetings, particularly while those members are voting, the result is a failure in the transparency required to participate in a public meeting that is essential to a democratic society. Open Meetings Law §§100, 103-a(2)(d); Pet. ¶158. PEP members having their cameras off during meetings, particularly during a decisive vote, violated §103-a(2)(d) of the Open Meetings Law.

C. The Locations of the Relevant PEP Meetings Were Not Disclosed

Both the April 19, 2023 PEP meeting and the May 1, 2023 PEP meeting violated §104(4) of the Open Meetings Law. That section states, in relevant part, that: "[i]f videoconferencing is used to conduct a meeting, the public notice for the meeting shall . . . identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations." Open Meetings Law §104(4); Pet. ¶159. Shoshanah Bewlay, the Executive Director of the New York State Committee on Open Government, stated in an Advisory Opinion that this law applies

"even if members of the public body are participating by videoconference from a 'private' location such as a private home or while on vacation." OML AO 5641[1] at 2; Pet. ¶159.

The public notices for both the Brownsville and West Side votes make no mention of the locations where the PEP members attended remotely for the meetings, and do not state that the public has the right to attend the meetings at those locations. Pet. ¶160. This omission continued despite the fact that the Brownsville public notice was amended once, and the West Side public notice was amended three times. *See* Petition Ex. 27; *see* Petition Ex. 29. The DOE and PEP were clearly capable of amending their public notices, given they amended both public notices to reschedule meetings and votes. Yet, they did not amend those same public notices to comply with the law. Pet. ¶160. The lack of specificity and transparency in the public notices violates §104(4) of the Open Meetings Law.

D. For Both Brownsville and West Side, Good Cause Exists to Nullify the PEP's Votes

Ultimately, it is within the power of the court to void the West Side and Brownsville votes. Section 107(1) of the Open Meetings Law states that "if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void." Open Meetings Law §107(1); Pet. ¶161. The DOE and PEP violated the Open Meetings Law not once, but five times over the course of these two meetings. *Id.* They violated the Open Meetings Law three times during the April 19 PEP meeting that included the vote to approve the Aspirations re-siting and co-location with Brownsville and New Visions, and they violated the Open Meetings Law twice during the May 1 PEP meeting that included the vote to approve the West Side re-siting. *Id.*

[1] Annexed as Ex. 32 and may be accessed at https://docsopengovernment.dos.ny.gov/coog/otext/O5641.pdf.

Additionally, there is good cause for the court to void these votes because of the previously described violations of the Education Law and the NYCHRL. "A showing of 'good cause' generally requires . . . a showing that petitioners were aggrieved or prejudiced by the violation." *Lynch v. New York City Civilian Complaint Rev. Bd.*, 171 N.Y.S.3d 482, 486 (2022); Pet. ¶162. As demonstrated herein, the stakeholders from Brownsville and West Side were aggrieved and prejudiced by all of these several violations.

i. <u>The Court Has "Good Cause" to Void The Brownsville Vote</u>

The stakeholders from Brownsville were aggrieved and prejudiced. The April 19, 2023 PEP meeting that was not recorded included comments and criticism from both Brownsville and Aspirations stakeholders as well as Chancellor David Banks. Ex. 34; Pet. ¶163. In addition to not capturing the tone, emotions, or visual cues that were undoubtedly present in the videoconference, the transcript is difficult to understand. *Id.* Speakers are not clearly labeled; there is no consistent formatting; and again, it is an 84-page PDF rather than a video recording. *Id*.

By denying the public the video recording of the meeting and providing only the written transcript, the DOE and PEP denied the public the transparency intended by the Legislature in enacting the Open Meetings Law. Pet. ¶161. That denial of transparency is sufficient for a showing of good cause. *See New York State Nurses Ass'n v. State Univ. of New York*, 960 N.Y.S.2d 631, 637 (Sup. Ct. 2013). "The people must be able to remain informed if they are to retain control over those who are their public servants." Open Meetings Law §100. Because Brownsville stakeholders were deprived of information and control over the process, they were aggrieved and prejudiced, and they have good cause under §107(1) of the Open Meetings Law.

ii. <u>The Court Has "Good Cause" to Void The West Side Vote</u>

The stakeholders from West Side were also aggrieved and prejudiced. The vote at the May 1, 2023 PEP meeting, like the vote at the April 19 PEP meeting, was not sufficiently transparent for stakeholders from West Side. Pet. ¶165. For over five hours, comments and criticism were raised from concerned students, parents, teachers, politicians, and community members. Ex. 35. Many of the West Side stakeholders waited hours before they were permitted to speak. Pet. ¶165. The waiting did not dampen their spirits or their passion in providing their testimoney to the PEP.

During the vote, several PEP members violated the Open Meetings Law by not turning on their cameras. Pet. ¶166. This lack of transparency prejudiced the stakeholders at West Side. *Id.* Again, the purpose of ensuring that PEP members are visible during meetings is accountability and transparency. *Id.* If PEP members are permitted to have their cameras off during meetings, how will stakeholders know that their concerns are being heard, let alone intently listened to and considered? Additionally, how will stakeholders know that the votes cast during the meeting were actually made by the PEP members?

West Side stakeholders displayed genuine passion while waiting hours to testify before the PEP. Such democratic participation is jeopardized in future PEP meetings if there is no guarantee that there are people listening on the other end of the conversation. Public comments are an integral part of the approval process for proposed significant changes in school utilization. §2590-g; Pet. ¶167. Because their public comments were minimized, West Side stakeholders were aggrieved and prejudiced, and they have good cause under §107(1) of the Open Meetings Law.

V. RESPONDENTS HAVE FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF §§2590-G AND H

The EIS Law also requires that the DOE conduct prescribed activities to ensure all affected parties have a voice in the proposals. Such activities include a public hearing with an opportunity for comment (jointly with the Community Education Council (CEC) and Student Leadership Teams (SLT)). The public hearing for West Side High School was held virtually via teleconference, meaning PEP voters would not come face to face with the affected students, parents, teachers, and community members who had a direct stake in the proposal. Pet. ¶132. PEP member Naveed Hasan even stated at the Joint Public Hearing that he wished everyone could have witnessed a previous in-person community meeting, which he said was "more personal than this virtual hearing." *Id.* A virtual hearing, where participants may also be muted with their cameras off, completely distanced and disconnected from the process, flies in the face of what the Legislature envisioned and what the law requires of the DOE.

Not only were the public hearings inadequate, so too was the PEP's Public Comment Analysis (PCAs). As required by Educ. Law §2590-g(8)(c):

> Following the public review process pursuant to paragraph (a) or (b) of this subdivision but prior to voting on any proposed item listed in subdivision one of this section, the city board shall make available to the public, including via the city board's official internet web site, 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.

For both the West Side and Brownsville EISs, the PEP made zero changes after the public comment period. Pet. ¶136. The court in *Mulgrew* ruled that:

> [A]lthough respondents have provided substantial information. . . such as 'the current and projected pupil enrollment of the affected school' (Education Law § 2590-h [2-a] [b] [i]) and 'the type, age, and physical condition of such school building, maintenance, and energy costs, recent or planned improvements to such school building, and such building's special features' (§ 2590-h [2-a] [b] [v]), they have failed to provide *any meaningful information regarding the impacts on the students or the ability of the schools in the affected community to accommodate those students.*

Mulgrew, 28 Misc. 3d at 211 (emphasis added). The court should find the same here. The EISs for both West Side and Brownsville did not provide meaningful information regarding the impacts on students, specifically students with IEPs and those who are most vulnerable to the proposed changes. The EISs also did not provide sufficient specifics regarding the accommodations that those students would be given, and how the proposed changes would affect those accommodations. The EISs merely used boilerplate, generic explanations that provide no real information to concerned stakeholders. There were plenty of concerns raised in the public hearings. Pet. ¶¶133-134. The purpose of these hearings is to inject public input into the DOE's and PEP's decision making process. Pet. ¶135. The DOE and PEP simply rushed the proposals and failed to properly address the public comments with meaningful responses. As such, they failed to provide the requisite analysis for these properly submitted public comments.

This lack of transparency is antithetical to the entire EIS process. By not properly addressing these comments, the DOE seeks to push these impacted students, parents, teachers, and community members by the wayside. Pet. ¶136. The legitimate concerns of these affected groups are not being taken seriously, and the DOE and PEP cannot be allowed to brush these vulnerable individuals aside.

VI. INJUNCTIVE RELIEF IS NECESSARY TO ENFORCE THE LAW AND PROTECT PETITIONERS FROM IRREPARABLE INJURY

Article 63 authorizes this Court to issue an injunction where plaintiffs can demonstrate (1) a likelihood of success on the merits; (2) the prospect of irreparable injury if injunctive relief is denied; and (3) that the equities favor injunctive relief. CPLR Article 63; *Nobu Next Door, LLC v. Fine Arts Housing*, 4 N.Y.3d 839, 840 (2005). Petitioners satisfy each factor.

As demonstrated *supra*, Petitioners are likely to prevail on the merits. Respondents clearly violated the EIS law, NYCHRL, and Open Meetings Law. Second, Petitioners will be

irreparably harmed without injunctive relief. For the students at West Side, the day-to-day classroom activities of current students would be disrupted by the move to an unsafe, unfamiliar neighborhood and the loss of several key centers and classrooms on which transfer students depend. For the students at Brownsville, they would suffer severe disruption due to overcrowding and the loss of two thirds of their classrooms. Pet. ¶¶ 76, 83, 99. Further, should the buildings require renovations to accommodate the changes, those renovations may not be easily reversible and will cost money that public schools rarely – if ever – receive. Reconfiguring the rooms of a building, including specialized rooms, costs time and resources and cannot be readily reversed. The 2023-2024 school year is fast approaching, and without an injunction these students will be forced to uproot their lives and routines in a way that may be hard to untangle.

The equities also favor injunctive relief because, while Petitioners face irreparable injury, Respondents face no meaningful injury from being preliminarily enjoined from moving forward with their proposals. In evaluating the equities, courts will consider the need to maintain the status quo between the parties. *See Cong Machon Chana v. Machon Chana Women's Inst., Inc.*, 162 A.D.3d 635, 637-38 (2d Dep't 2018) (explaining that equities favored granting a preliminary injunction "to maintain the status quo pending the resolution of the action"). Here, the equities strongly favor Petitioners. Without a preliminary injunction, the status quo would be entirely upended. The Court thus should issue a preliminary injunction to prevent Respondents from prematurely enacting these co-location and re-siting proposals.

CONCLUSION

Based upon the foregoing, as well as the Verified Petition and exhibits thereto, and the Affidavits of Leonie Haimson, Anneris Fernandez, Ashley Norman, Chance Santiago, Grisslet Rodriguez, Gladis Yupaugui, Sarah Frank, Marissa Moore, Lucie Idiamey-Gaba, and the exhibits

thereto, Petitioners respectfully request that this Court issue a judgment pursuant to Article 78 of the Civil Practice Law and Rules (1) holding that Respondents' failure to comply with the Education Law, New York City Human Rights Law, Open Meetings Law, and Chancellor's Regulation is arbitrary and capricious; (2) annulling each vote the PEP took approving the re-siting of West Side and TYWLS and the re-siting and co-location of Aspirations with Brownsville and New Visions; (3) ordering Respondents to comply with their obligations under the Education Law, New York City Human Rights Law, Open Meetings Law, and Chancellor's Regulation; (4) enjoining Respondents from conducting any re-siting or co-location renovations or alterations; and (5) for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
June 22, 2023

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