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

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., Petitioners, v. 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, Respondents.	**VERIFIED PETITION** **Index No.**

Petitioners 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, by their attorneys, Advocates for Justice Legal Foundation, hereby allege, as and for their Verified Petition as follows:

PRELIMINARY STATEMENT

1. Petitioners commence this Article 78 proceeding to vacate and annul the actions taken by Respondents Board of Education of the City School District of the City of New York (the City Board or Panel on Education Policy or PEP) and Chancellor David C. Banks[1] (collectively Respondents) (a) to re-site two Upper Manhattan schools, Edward A. Reynolds West Side High School (West Side) and The Young Women's Leadership School of East Harlem (TYWLS), so that the two schools would essentially swap buildings, and (b) to co-locate a transfer high school in Brooklyn into a building that already houses two schools – a transfer high school,[2] Brownsville Academy High School (Brownsville), and a charter school, New Visions AIM Charter High School I (New Visions), because Respondents failed to adequately adhere to multiple statutory requirements, including: (i) Education Law §§2590-g and -h and related regulations; (ii) Title 8 of the Administrative Code of the City of New York, § 8-107, known as

[1] To effectuate mayoral control over education in New York City, the State Legislature significantly amended the Education Law in 2002; many of the powers previously held by the City Board devolved to the Chancellor, with administrative operations assigned to a body denominated by the then mayor as the New York City Department of Education (DOE). Because the Chancellor operates through the DOE, the Chancellor and the DOE are referred to interchangeably herein. Nonetheless, the City Board (known as the PEP) retained its power to ratify collective bargaining agreements. With the 2009 legislative amendments, the PEP must also approve significant changes in school utilization, school closures, and almost all DOE contracts and regulations. The PEP also remains the statutory employer of personnel for the City School District. Earlier this year, and though mayoral control continued, the Legislature expanded the PEP from fifteen members (nine of whom were appointed by the mayor) to twenty-three members (thirteen of whom are appointed by the mayor).

[2] Transfer high schools serve some of the City's most vulnerable students – those who experience academic, social, behavioral, and emotional challenges – by providing "small, full-time high schools designed to re-engage students who have dropped out or fallen behind in credits." N.Y.C. Dep't of Educ., *Transfer High Schools*, N.Y.C. PUB. SCH. https://www.schools.nyc.gov/enrollment/other-ways-to-graduate/transfer-high-schools. Many transfer high schools, including West Side and Brownsville, have high proportions of students with disabilities with Individual Education Programs (IEPs) and require intervention resources and related services.

the New York City Human Rights Law (NYCHR); and (iii) Public Officers Law § 100, *et seq.*, known as the Open Meetings Law (OML).

2. The Chancellor and his administrative arm, the DOE, failed to comply with Education Law §§2590-g and -h, either procedurally or substantively, and ignored the law's statutory purposes: to provide the impacted students, parents, communities, and members of the PEP, with adequate, specific information about all major changes to each school's space and how these changes will impact the education of the existing and prospective students.

3. In addition, the DOE's analysis of school building space relies on a formula that specifically assumes that whatever class sizes a school currently has will continue indefinitely, no matter how large these classes currently are. This flawed assumption directly conflicts with the new Class Size Law (CSL), which requires classes in all schools to be capped at much lower levels.[3]

4. The DOE provided perfunctory and generic Educational Impact Statements (EISs)[4] for the three campuses involved. The EISs do not delineate the existing or future use of classrooms or shared spaces and omit critical information pertaining to the loss of specialized classrooms and intervention spaces,[5] the results of which disproportionately impact students with disabilities in violation of the New York City Human Rights Law.

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[3] The CSL was passed by the Legislature in June 2022 and signed by the governor in September 2022.

[4] Education Impact Statements (EISs), modeled after the State Environmental Quality Review Act's Environmental Impact Statements, are part of a statutorily prescribed process that requires rigorous analysis of the social, economic, administrative, and other effects that a significant change in school utilization is expected to have on student education. *See* Educ. Law §§2590-g -h for the requirements of EISs. Changes in school utilization include re-sitings and co-locations. *See id.*; Chancellor Regulation (C-Reg) A-190.

[5] "Intervention spaces" are classrooms or other dedicated school spaces where mandated special education services are provided to students with Individual Education Programs (IEPs). Many of

5. As a result of the lack of required analyses, Respondents' EISs lacked critical information needed by impacted students, families, and communities; failed to address significant concerns about the proposals; and failed to provide sufficient information to the PEP, which voted to approve these re-sites and co-location in April and May of 2023.

6. The PEP's approval process was also highly problematic. Multiple violations of the Open Meetings Law occurred during both PEP meetings, which provide the Court with good cause to nullify the PEP votes approving the EISs at issue. For example, certain mayoral appointees of the PEP failed to publicly participate or cast public votes, since their cameras were turned off during the PEP meetings; moreover, Respondents failed to record approximately three hours of the April 19, 2023, PEP meeting.

7. As demonstrated herein and because of these multiple, cumulative failures of the EISs, and the PEP meetings and voting process, Respondents' actions were arbitrary, capricious, contrary to law, and must be vacated and annulled.

BACKGROUND

8. On April 19, 2023, the PEP voted to approve the proposal to re-site Aspirations Diploma Plus High School (17K646) (Aspirations) from Building K824 to Building K907 where it would be co-located with Brownsville Academy High School (17K568) (Brownsville) and New Visions AIM Charter High School I (84K395) (New Visions) beginning in the 2023-2024 School Year.

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these mandated services require privacy and dedicated spaces, which preclude their delivery in large, otherwise filled, classrooms or occupied spaces. "Intervention services" include individual counseling, speech and language therapy, occupational therapy, and physical therapy. Privacy and dedicated spaces are also mandated for students who must do classwork or remedial work or take examinations alone or in small groups. Because of the mandates of the IEPs, delivery of these intervention services is precluded in otherwise filled classrooms or already occupied spaces.

9. On May 1, 2023, the PEP voted to approve the permanent re-siting of Edward A. Reynolds West Side High School (03M505) (West Side) from Building M506 to Building M895 beginning in the 2023-2024 school year.

10. On May 1, 2023, the PEP voted to approve the permanent re-siting of The Young Women's Leadership School (04M610) (TYWLS) from Building M895 to Building M506 beginning in the 2023-2024 school year.

11. The PEP voted on these three proposals despite the DOE's failure to address significant impacts in the EISs on the students, parents, and surrounding communities – specifically regarding class size and students with disabilities, which are requirements under Education Law §§2590-g and -h (hereinafter referred to as the EIS law). The DOE failed to adhere to its own procedural requirements, both statutory and regulatory, throughout the EIS process.

12. By its failure to comply with the EIS law, the DOE has intentionally misled parents, the public, and the PEP itself regarding the actual impacts of its proposed re-sitings and co-location, including each schools' ability to comply with impending requirements of the new Class Size Law (CSL), and the ability to deliver IEP mandated related service requirements for students with disabilities.

13. Pursuant to the EIS process, the Chancellor was obligated to 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 could properly consider and vote upon the proposed changes in utilization. That process required 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. 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.

14. Further, a significant consequence of the DOE's policy and practice of refusing to analyze or plan in its EISs for the delivery of students with disabilities' mandated related services requiring dedicated spaces, the re-sitings and co-location have a disparate impact on such students in violation of N.Y.C. Admin. Code §8-107.

15. The PEP hearings and approval processes, including its votes, should be voided because of numerous violations of Article 7 of the Public Officer's Law. Specifically, the PEP failed to properly record its hearings and failed to conduct *public* votes, thereby providing good cause for this Court to declare the PEP votes a nullity and void.

16. Respondents' multiple failures to comply with the law require the PEP's approval of each proposal be voided, annulled, and vacated.

PARTIES

17. Petitioner Anneris Fernandez is a parent of a minor child E.H. attending West Side. Her son has an IEP that includes special testing accommodations.

18. Petitioner Ashley Norman is a parent of a minor child I.C. attending West Side, whose family has strong ties to the West Side community dating back several generations. Her son has an IEP that provides him with extra time for testing and counseling services.

19. Petitioner Chance Santiago is a student attending West Side who is an active member of the school community. Petitioner Santiago has an IEP that provides him extra time for testing in a dedicated test space.

20. Petitioner Grisslet Rodriguez is a parent of a minor child J.T. attending West Side, whose daughter and nephew also attended and graduated from the school. Her son has an IEP that provides him extra time for in-class work, additional breaks, and when appropriate, one-on-one instruction.

21. Petitioner Sarah Frank is a teacher who is currently employed at Edward A. Reynolds West Side High School, which is located at 140 W 102nd St, New York, NY 10025. Petitioner Frank has worked at West Side in various capacities since 2009 and has remains committed to enriching the academic experience of the students at West Side.

22. Petitioner Marissa Moore is a parent of a minor child K.M. attending Brownsville. Her son, who has a history of attendance issues, relies on the quiet environment at Brownsville and the summer and Saturday school programs to receive the credits he requires to graduate.

23. Petitioner Lucie Idiamey-Gaba is a parent of a minor child D.B. attending Brownsville. Because English is her son's second language, he receives extra assistance during academic instruction and extra time when taking tests.

24. Respondent Board of Education of the City School District of the City of New York, denominated by Respondents as the Panel for Educational Policy (PEP), is located at 52 Chambers Street, New York, New York and is a school board organized under and existing pursuant to the Education Law of the State of New York and, for all purposes, serves as the government or public employer of all persons appointed or assigned by it.

25. Respondent David C. Banks is the Chancellor of the New York City Public Schools and as such, under New York Education Law, functions as chief executive officer for the City Board. Pursuant to mayoral control laws, many powers previously held by the City Board devolved to the Chancellor, with the administrative operations assigned to a body denominated by the mayor and Chancellor, which is now known as the New York City Public Schools (NYCPS). Nonetheless for continuity of reference, the NYCPS is referred to as the Department of Education (DOE). Because the Chancellor operates through the DOE, the Chancellor and DOE are referred to interchangeably. The Chancellor is selected by and serves at the pleasure of the Mayor of the City of New York.

JURISDICTION AND VENUE

26. This is a proceeding brought pursuant to CPLR §7803(1) of the New York Civil Practice Law and Rules (CPLR) to compel Respondents to comply with their obligations pursuant to the Education Law §§2590-g, -h and accompanying Chancellor's Regulation A-190.

27. This proceeding is further brought pursuant to CPLR §7803(3) to annul Respondents' determination to change the utilization of five schools by re-siting West Side and TYWLS and co-locating Aspirations with Brownsville and New Visions in violation of the procedures set forth in Education Law §§2590-g, -h, and accompanying Chancellor's Regulation A-190.

28. This proceeding also is brought pursuant to CPLR §3001 for a declaration that Respondents have violated their obligations under Education Law §2590-h, -g, and accompanying Chancellor's Regulation A-190; violated the NYCHRL, N.Y.C. Admin. Code §8-107; and violated the OML, §100, *et seq.*

29. This proceeding is also brought pursuant to CPLR Article 63 for a preliminary injunction to prohibit Respondents from enacting the stated re-sitings and co-location proposals.

30. Venue is proper in New York County since, *inter alia*, relevant determinations complained of were made there, Respondents have refused to perform a duty imposed by law there, and other material events took place there.

SUPPORTING ALLEGATIONS

The Educational Impact Statements (EISs)

31. Recognizing the potential impact on students and the surrounding community when a school's utilization changes significantly, the state legislature was concerned about the vast power wielded by the Chancellor and the PEP in directing re-sites and co-locations and was determined to curb potential abuses. In order to "guarantee [ ] parents, students, staff, and interested community participants a six-month opportunity to review and comment on any proposed school closings and restructuring or co-location and reuse of local school buildings," the Legislature amended Education Law, Article 52-A, to require the Chancellor to conduct a substantive study of the potential impacts of such significant change in school utilization on current and prospective students as well as the community, and report that underlying analysis in an EIS. *See* Ex. 16, Excerpt of New York State Assembly Debate, June 17, 2009, at 82.

32. Education Law §2590-h, which outlines the Chancellor's powers and duties, sets forth the following seven categories of analysis that must be included in the EIS:

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).

33. Education Law §2590-g sets forth the PEP's role[6] in assessing and approving significant changes in building utilization such as re-sitings and co-locations.

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

35. These statutory requirements must be performed for each individual proposed change in utilization.

36. The EIS is not meant to be a collection of boilerplate statements about general DOE practices and policies, but rather an in-depth analysis of the facets of the proposed re-siting

[6] The law and regulations state that it is the City Board (PEP) that shall publish responses to public comments. Educ. Law §2590-g(1)(h)(8)(c). However, while the PEP is the designated response provider by statute, upon information and belief, since PEP members have no staff, and all responses have likely been prepared by DOE attorneys, it is not clear that the PEP was actively involved in the preparation of analyses and responses. Nevertheless, this Verified Petition and accompanying Memorandum of Law refer to the PEP when discussing the public comments since by law they are required to prepare them.

or co-location on that school's existing and prospective students as well as the on the surrounding community. Ex. 8, Norman Aff. ⁋⁋ 16, 22, 23.

37. Despite explicit statutory language requiring a *collaborative* process prior to implementing any significant change in utilization, including specific substantive analysis of the change in utilization's impact on students and the community at large, the DOE published insufficient and incorrect EISs which, among other omissions, did not report on the current class sizes in the existing public schools, did not report the impact of the re-sitings or co-locations on the ability to comply with the class size law, did not report the impact on students with disabilities, and instead, based their estimate of available space explicitly upon an assumption that current class sizes in these schools would continue into the foreseeable future and that necessary classrooms and intervention services spaces would be available for current and future students. Ex. 6, Frank Aff. ⁋⁋ 37, 42.

38. As described later in this Verified Petition, each of the EISs posted by the DOE fails to contain the information and analysis required by Education Law §2590-h(2-a)(b)(i)-(vii). Each contains perfunctory language that provides no analysis of the impact on either students' existing and future class sizes or the ability to comply with IEPs for students with disabilities. While each EIS contains a section titled, "Impact of the Proposal on Students, Schools and Community,"[7] this section in each EIS fails to satisfy the statutory requirements by consistently omitting any meaningful discussion of the ramifications of the proposed change in utilization on students or the community, including the ability of other schools in the affected community district to accommodate current and prospective students should the re-sitings and co-location be approved or to accommodate the IEP specifications of mandated services that necessitate privacy

[7] Ex. 1, Educational Impact Statement, N.Y.C. DEP'T OF EDUC. (Mar. 3, 2023) at 6; Ex. 2, Educational Impact Statement, N.Y.C. DEP'T OF EDUC. (Mar. 3, 2023) at 7.

and private space for such individualized services. Such omissions mean that parents, students, staff, interested community participants – and ultimately, the PEP itself – were not provided the information necessary to meaningfully weigh in on the proposed re-sitings and co-locations and fulfill the collaborative process envisioned by the Legislature in enacting Education Law §2590-g and §2590-h. Ex. 8, Norman Aff. ⁋24; Ex. 9, Rodriguez Aff. ⁋25; Ex. 12, Moore Aff. ⁋11-12.

Deficiencies in the DOE's Instructional Footprint

39. When making decisions pertaining to the number of classrooms and space that each school is allocated, the DOE relies on the "Instructional Footprint" - a product of its own making. The Instructional Footprint has changed over the years. The original 2007 DOE Instructional Footprint, used to guide space allocation and changes in school utilization including re-sitings and co-locations, assumed class sizes of twenty students per class in grades K-3, and twenty-five students in grades 4-5 in non-Title One schools. Ex. 5, Haimson Aff. at ¶11. It did not specify what class sizes were assumed for Title One schools. *Id*. However, after a series of changes,[8] the current version, which was devised in 2015, assumes the continuation of "the current number of classes and class size a school is programming," meaning whatever class sizes a school has will continue forever, no matter how large these classes are and, apparently, despite changes in state law regarding maximum class sizes. Ex. 5, Haimson Aff. at ¶10; Ex. 1, West Side EIS at 16, Appendix B; Ex. 2, Brownsville EIS at 22, Appendix B.

40. As it applies to transfer high schools, the Instructional Footprint specifies small class sizes, capping the number of students at twenty-five. Ex. 5, Haimson Aff.

41. The Instructional Footprint also is used in Building Usage Plans (BUPs), which the DOE requires when a co-location involves a charter school. The Chancellor must develop the BUP that must include, at a minimum:

[8] *See* Ex. 5, Haimson Affidavit at ¶¶12-13.

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 which assures equitable access to such facilities in a similar manner and at reasonable times to non-charter school students as provided to charter school students;
C. justification of the feasibility of the proposed allocations and schedules set forth in clauses (a) and (b) of this subparagraph and how such proposed allocations and shared usage would result in an equitable and comparable use of such public school 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 including the establishment of a shared space committee pursuant to paragraph (a-four) of this subdivision.

Educ. Law §2853(3)(a-3)(2)(A-F).

42. The Education Law also states that the BUP developed by the Chancellor shall be included within an EIS required by §2590-h and is subject to the EIS requirements prior to approval by the PEP. Educ. Law §2853(a-3)(3).

43. Chancellor's Regulation A-190 further specifies that the DOE must publish alongside each co-location EIS a BUP, which must include "[t]he actual allocation and sharing of classroom and administrative space between the charter and non-charter school[s]." Ex. 15, Regulation of the Chancellor No. A-190, N.Y.C. DEP'T OF EDUC. at §(II)(A)(2)(a)(ii)(a) (Aug. 1, 2019) ("Regulation A-190"). Regulation A-190 articulates that the space allocation shall specify the number and type of rooms to be assigned to each school in the building pursuant to the DOE's Instructional Footprint, and that any space not allocated pursuant to the Footprint shall be allocated in the plan equitably among the co-located schools. *Id.*

44. Education Law §2853 and Regulation A-190 further delineate that the BUP must include a proposal for the collaborative usage of shared resources and spaces between the co-located schools, as well as a justification of the feasibility of the proposed allocations and

schedules and how such proposed allocations and shared usage would result in an equitable and comparable use of the public school building. Ex. 15, Regulation A-190 at §(II)(A)(2)(a)(ii)(b) and (c).

45. Regulation A-190 also includes a sample template of information that should be included in the EIS and BUP of a re-siting or co-location proposal. The Regulation specifically mentions:

> viii. Indicate accessibility of specialty classrooms (i.e., computer labs, science labs) for each respective school;
> ix. 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;
> x. Describe the impact on the building's safety and security plan;
> xi. Describe impact on the administrative staff, non-pedagogical, and pedagogical positions that will be created or eliminated as a result of the proposal;
> xii. Reference net impact on positions in the district and/or system;
> xiii. Describe impact of the proposal – or lack thereof – on transportation provided to students (if applicable).

Ex. 15, Regulation A-190, Attachment No. 1B.

46. As described later in this Petition, the Brownsville proposal's BUP fails to articulate what space is being utilized currently and into the future and fails to justify how the proposed allocations will be feasible and equitable going forward. Ex. 12, Moore Aff. ¶¶9-10.

Class Size Constitutes An "Impact" Under the Education Law

47. For decades, the New York courts and Legislature have recognized the importance of reduced class sizes on student learning.

48. Research studies demonstrate that smaller classes lead to improved student outcomes in every way that can be measured, including that students who are in smaller classes receive better grades, better test scores, are more likely to graduate from high school, and are more likely to graduate from college with a STEM degree. The benefits of smaller classes are

especially great for students in poverty, students of color, and students with disabilities, which make up the majority of students in New York City public schools. Smaller classes have also been shown to increase student engagement, reduce disciplinary problems, and lower teacher attrition rates, which then over time contributes to a more effective, more experienced teaching workforce. *See* Ex. 5, Haimson Aff. ¶3; Ex. 8, Norman Aff. ⁋⁋16-17; Ex. 12, Moore Aff. ⁋⁋8-10; Summary of Class Size Reduction Research, CLASS SIZE MATTERS, https://3zn338.a2cdn1.secureserver.net/wp-content/uploads/2019/05/Summary-of-Class-Size-Reduction-Research-NY-updated.pdf.

49. The New York Court of Appeals held in the landmark Campaign for Fiscal Equity (CFE) litigation that New York City public school children were deprived of their constitutional right to a sound basic education in major part because of excessive class sizes. *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003). As the Court wrote, "Plaintiffs presented measurable proof, credited by the trial court, that New York City schools have excessive class sizes, and that class size affects learning." *Id.* at 911. "[P]laintiffs' 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 912 "[T]ens of thousands of students are placed in overcrowded classrooms… . The number of children in these straits is large enough to represent a systemic failure." *Id.* at 914; Ex. 5, Haimson Aff. ¶4; Ex. 12, Moore Aff. ⁋⁋8-10.

50. For years afterward, the New York Legislature attempted to reduce City class sizes through the Contracts for Excellence program (C4E).

51. The C4E Five-Year Class Size Reduction Plan, which set class size reduction targets, was submitted by the DOE and initially approved by the New York State Education

Department (SED) in 2007. In its proposals, the DOE admitted that to reduce class size "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]" and "the 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." Ex. 17, New York City Five Year Class-Size Reduction Plan – Update – Nov. 24, 2008 at 10 (emphasis in original); Ex. 5, Haimson Aff. at ¶5. This acknowledgment demonstrates that even in past efforts to address class size, the DOE 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 class size and the need to reduce class size going forward. Ex. 5, Haimson Aff. at ¶5; Ex. 8, Norman Aff. ⁋⁋16-18. This same logic applies to re-siting of schools as well.

52. However, since 2007, instead of decreasing class size, class sizes increased sharply, and on average they remain larger in most grades than before the C4E law was passed. Ex. 5, Haimson Aff. ¶6.

53. Larger class sizes also impact the work of educators and harm their ability to do their job effectively. Ex. 6, Frank Aff. ⁋⁋13-14.

54. As such, class size reduction has consistently been a focus at the state and local level. At a February 28, 2020, NYC Council Committee on Education hearing on class size reduction, Karin Goldmark, Deputy Chancellor of the Division of School Planning and Development, noted that the DOE knows from the annual school survey "that class size is a concern for teachers and families." Ex. 23, Excerpt of Transcript of the Minutes of the Committee on Education at 17:4-6, Feb. 28, 2020; Ex. 12, Moore Aff. ⁋⁋8-10. The New York City Council Committee on Education similarly noted the "considerable body of research" that

linked small class sizes to short and long-term benefits for students. Ex. 19, Council of the City of New York, Committee Report of the Human Servs. Div. at 2, Feb. 28, 2020. In its Committee Report, the Committee on Education highlighted Tennessee's Student Teacher Achievement Ratio (STAR) experiment, which demonstrated that "small classes had positive impacts not only on test scores, but also on life outcomes in the years after the experiment ended." *Id.* at 3; Ex. 6, Frank Aff. ¶13.

55. In recognition of the need for smaller classes, the fact that the City was now due to receive its long-promised additional school funding to resolve the CFE case, and the realization that the 2007 law was ineffective in bringing class sizes to acceptable levels, the Legislature articulated and established by law maximum classroom sizes, making smaller class sizes explicit New York State policy. Ex. 5, Haimson Affidavit at ¶8. The Class Size Law (Senate Bill 9460) was passed by the Legislature in early June 2022 and signed into law by Governor Kathy Hochul on September 8, 2022. The legislation, which received broad bipartisan and near unanimous support in the legislature, requires that all 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. Ex. 20, N.Y. Educ. Law §211-d(2)(b)(ii)(A).

56. These class size caps must be phased in over a five-year period, requiring an additional twenty percent of classrooms to be compliant each year beginning this September 2023 until full compliance is met by the end of the 2027-2028 school year.

57. In the Governor's approval of the bill, she stated "[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." Ex. 21, State of New York, Executive Chamber, Memorandum No. 16, Ch. No. 556, Sept. 8, 2022.

58. Thus, the statutory requirement of addressing "impacts" on current and prospective students under the EIS law, especially in the case of a proposed re-siting or co-location, necessarily requires information on and discussion of existing class sizes and any impact of the co-location on those class sizes and the ability of the schools to meet the class size caps in the new law as it is phased in. Ex. 6, Frank Aff. ¶¶16-17.

West Side EIS and Public Comment Analysis

59. On March 3, 2023, the DOE published its notice and EIS of the proposed permanent re-siting of West Side to M895. Ex. 22, *The Proposed Re-siting of Edward A. Reynolds West Side High School (03M505) from Building M506 to Building M895 in the 2023-2024 School Year*, Public Notice, N.Y.C. DEPT. OF EDUC. (Mar. 3, 2023); Ex. 1, *The Proposed Re-siting of Edward A. Reynolds West Side High School (03M505) from Building M506 to Building M895 in the 2023-2024 School Year*, Educational Impact Statement, N.Y.C. DEP'T OF EDUC. (Mar. 3, 2023). It published this notice concurrently with a separate notice and proposal to re-site TYWLS from Building M895 to Building M506. Ex. 23, *The Proposed Re-siting of The Young Women's Leadership School (04M610) from Building M895 to Building M506 in the 2023-2024 School Year*, Public Notice, N.Y.C. DEP'T OF EDUC. (Mar. 3, 2023); Ex. 9, Rodriguez Aff. ¶6.

60. Building M506 currently serves West Side. West Side's current building enrollment is 239 students, according to the DOE, a 31% total building utilization. Ex. 4, TYWLS EIS at 6. West Side does not utilize their building, however, with the goal of

maximizing building utilization. West Side's goal is to maximize learning for its students. Ex. 9, Rodriguez Aff. ⁋16.

61. The EIS states that 43% of West Side students have a disability. Many of those students have difficulties learning effectively in a full-size classroom filled with other students. These students have IEPs, which ensure that they are provided with appropriate accommodations, adaptations, and supports. *See* Ex. 30, Individualized Education Program (IEP), N.Y.S. EDUC. DEP'T, https://www.nysed.gov/special-education/individualized-education-program-iep; Ex. 7, Fernandez Aff. ⁋⁋20-21; Ex. 8, Norman Aff. ⁋18; Ex. 9, Rodriguez Aff. ⁋5; Ex. 10, Santiago Aff. ⁋⁋21-22.

62. The EIS also states that building M895 "has the capacity to serve a total of 558 students according to the 2021-2022 Blue Book." Ex. 1, West Side EIS at 2. However, the Blue Book capacity formula – which was changed in December 2021 by the School Construction Authority without any discussion or consultation with educators or affected communities – is currently based upon the unrealistic assumption that each middle and high school can fully schedule every regular classroom and specialty room every period of every day. Ex. 5, Haimson Aff. ¶28; Ex. 8, Norman Aff. ⁋24. This is a purely hypothetical assumption that is not realistic in most schools and bears no relationship to the actual experience and functionality of West Side. *Id*.; Ex. 9, Rodriguez Aff. ⁋20. Accordingly, any reference in the EIS to the Blue Book capacity or utilization is unrealistic and generic, having no relationship to and providing no meaningful information about the actual conditions at West Side. *Id*.

63. As a transfer school, West Side is ahead of the curve regarding the goal of limiting class sizes. Ex. 9, Rodriguez Aff. ⁋4; Ex. 10, Santiago Aff. ⁋⁋21-22; Ex. 7, Fernandez Aff. ⁋⁋20-21. However, there are still a significant number of classes that are larger than the

class size limits set under the Class Size Law. Ex. 5, Haimson Aff. ¶15. Despite this, the EIS does not address the need for smaller class sizes at West Side, nor does it address the Class Size Law. Ex. 7, Fernandez Aff. ¶23. Instead, the EIS explicitly states that "for existing schools, the Footprint is applied to the *current number* [emphasis added] of classes and class sizes a school is programming." Ex. 1, West Side EIS at 16.

64. The DOE has proposed and approved prior re-sitings and co-locations and other changes in school utilization without any mention in the EIS of their potential impact on class size. When questioned, the DOE has taken the position that the Education Law requires only that it discuss projected enrollment and not class size. *See* Ex. 5, Haimson Aff. ¶17; Ex. 26, Email dated Feb. 25, 2019.

65. While the EIS process does specifically require enrollment information, it also requires broad categories of information be provided, including discussion of all impacts on current and prospective students. Thus, the fact that class size or dedicated space for IEP services is not specifically enumerated, considering the much broader requirement to discuss "impacts" does not permit the DOE to obfuscate the impact re-sitings and co-locations will necessarily have on class sizes, or students with disabilities.

66. DOE representatives have admitted that neither the proposed EISs nor BUPs for this coming fall account for existing public schools to lower their class sizes, as the new Class Size Law requires. Ex. 5, Haimson Aff. ¶19.

67. West Side stakeholders raised the lack of information and analysis of the loss of space at the joint public hearing on April 4, 2023, and during the public comment period. *See* Ex. 13, *Public Comment Analysis*, N.Y.C. DEP'T OF EDUC. (Apr. 30, 2023) at 4; 5(a-c); 6(b-c, f); 7; 17; 24; 26; 30; 31(b); 34(b-d); 35(c-e).

68. In response to public comments raising concerns about the EIS proposal's impact on West Side's space, the PEP acknowledged the feedback but summarily dismissed the concerns of the Citywide Council on High Schools' representative, the Citywide Council on Special Education's representative, City Councilmember Gale Brewer, the representative for City Councilmember Shaun Abreu, PEP member Naveed Hasan, CEC 14 President Tajh Sutton, and stakeholder students, teachers, and community members by responding simply that it is not feasible to include many of the programs and services that West Side Students rely on in Building M895. *Id* at 7-8; Ex. 6, Frank Aff. ¶¶43-45. To replace the loss of the LYFE Center and School-Based Health Center ("SBHC"), students will have access to a LYFE Center on 128th Street and the SBHC at Building M506 is at least a half an hour away. *Id*. at 8. However, those locations are both at least a fifteen-minute journey from M895, creating impediments to their utilization. For example, students with children do not want to leave their children in day care, far away from them, and students with other health concerns would be unlikely to travel significant distances. Ex. 7, Fernandez Aff. ¶¶ 8-10; Ex. 10, Santiago Aff. ¶15; Ex. 6, Frank Aff. ¶¶7-8.

69. Additionally, if the re-siting of West Side goes through, West Side stands to lose five full-size classrooms, and all five of its half-size classrooms. Ex. 1, West Side EIS at 9; Ex. 4, TYWLS EIS at 10. No analysis provided in any of the documents that the DOE has prepared states that there will be adequate space for class size reduction as required by state law, or for its students to receive their IEP-mandated services. Ex. 5, Haimson Aff. at ¶26; Ex. 9, Rodriguez Aff. ¶19.

70. The lack of information regarding West Side's class sizes at M895 ignores that the proposed permanent re-sitings will overlap completely with the phase-in of the Class Size

Law. It also ignores that if, in short order, to comply with the Class Size Law the school will require another change in physical space or adjustment of enrollment, that is a significant impact on current and prospective students within the meaning of the EIS law and should have been disclosed and discussed. Ex. 9, Rodriguez Aff. ¶10, 21.

71. Education Law §2590-h 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," suggesting that any proposed re-siting or co-location should also analyze the level of class sizes and/or overcrowding in nearby schools or districtwide. Educ. Law §2590-h(2-a)(vi).

72. Within District 4 in East Harlem, where Building M895 is located, more than 11,000 students, or about 65% of the high school students in that district, are in classes larger than the cap in the Class Size Law. According to DOE data, this demonstrates that more space will likely be needed districtwide to lower class sizes to appropriate levels. *See* Ex. 27, *Updated DOE Class Size Report 2022-2023; District Level Distribution Report*, N.Y.C. DEP'T OF EDUC., https://infohub.nyced.org/docs/default-source/default-document-library/updated2023_pct_classsize_district.xlsx.

73. Additionally, the organizational chart for West Side reveals that more than half, or twenty-two out of thirty-four academic classes, were larger this school year than the twenty-five students per class specified for transfer schools in the Instructional Footprint, which is also the size required by the new state CSL. Ex. 5, Haimson Aff. ¶15. Indeed, five classes were larger than the 34 students per class required by the current union contract. *Id.* Thus, as many as 20 additional classrooms may be needed by the school to lower class size to the levels required by the new state law. *Id.*

74. The DOE mentions but does not ascribe any impact to the fact that West Side is being re-sited specifically so that it may grow. Ex. 9, Rodriguez, Aff. ¶23. The DOE explains that West Side will soon add a dual-language program, claiming that the move to M895 is expected to provide West Side with more potential students due to the higher percentage of Spanish speakers in the area. Ex. 1, West Side EIS at 2 ("The NYCDOE believes that re-siting West Side High School to M895 in District 4 will support the school's efforts to increase enrollment through the addition of a new Spanish dual-language program by moving the school to an area with higher demand."). Yet no enrollment projections are provided for West Side past the first year, presenting the real possibility that the new building will be over capacity sooner rather than later.

75. The DOE does not consider in the EIS that the new students enrolled at West Side due to the dual-language program will move up through the grades, thus rapidly increasing the number of students in each subsequent grade, expanding the space taken by the school, and depriving West Side students with IEPs of even more critical classrooms and spaces. Ex. 7, Fernandez Aff. ¶20; Ex. 10, Santiago Aff. ¶21.

76. Further, the DOE generically asserts in the EIS that "[t]his proposal, if approved, is not expected to impact the current or future academic offerings at West Side High School." Ex. 1, West Side EIS at 6. In the M895 EIS, the DOE fails to account for the fact that West Side will lose its LYFE Center, full-size gym, SBHC, as well as rooms for intervention services. Ex. 5, Haimson Aff. ¶26; Ex. 6, Frank Aff. ¶¶7-9; Ex. 7, Fernandez Aff. ¶¶11-12; Ex. 8, Norman Aff. ¶¶15, 19-21; Ex. 10, Santiago Aff. ¶¶10-11. It also fails to address the impact on students of any or all of these losses.

77. West Side students have largely struggled in their previous academic environments. Ex. 9, Rodriguez Aff. ¶¶11, 15. The individual explanations vary from student to student, but 90% of students at West Side face economic hardship, 43% have disabilities, and 11% are English Language Learners. Ex. 1, West Side EIS at 11. For some of these students, having individualized attention is critical to academic success, something that often requires additional classroom space. Ex. 9, Rodriguez Aff. ¶¶17-18. For students with children, and those with health issues, the LYFE Center and SBHC are crucial. And for students lacking confidence, expressing themselves through sports has been their pathway to success, a path available thanks to the full-size gym on campus at M506. Ex. 7, Fernandez Aff. ¶¶11-12; Ex. 8, Norman Aff. ¶¶13-14; Ex. 10, Santiago Aff. ¶¶10-11.

78. There is almost no mention of the loss of these spaces in the West Side EIS. The EIS directs students to different buildings far away from M895, to certain places that are expected to replace the services previously offered right on West Side's campus. Ex. 6, Frank Aff. ¶11; Ex. 10, Santiago Aff. ¶15.

79. For students with disabilities, the DOE does not provide any specific analysis regarding the use of dedicated space for special education and related intervention services. Ex. 9, Rodriguez Aff. ¶10, 19. Instead, the EIS generically notes 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." Ex. 1, West Side EIS at 6. This boilerplate language appears in the TYWLS and Brownsville EISs as well. Ex. 4, TYWLS EIS at 7; Ex. 2, Brownsville EIS at 6; Ex. 6, Frank Aff. ¶¶12, 16-17. While it is true that schools in New York City may offer these services in these different ways, this boilerplate language provides no information to students, families, and the community about how they are currently being provided at West Side and

whether or how the re-siting impacts the provision of these special education services or the necessity for private classrooms or dedicated spaces, to comply with IEPs. Ex. 8, Norman Aff. ¶24; Ex. 9, Rodriguez Aff. ¶21, 24.

80. Forty-three percent of students at West Side have disabilities and require mandated services. Ex. 1, West Side EIS at 11. Eleven percent of students are English Language Learners. *Id*. While the EIS notes that West Side is currently educating students recommended for Integrated Co-Teaching (ICT), Special Classes (SC), Special Education Teacher Support Services (SETSS), and other related IEP services, these classes and services are not included in the classroom allocations. There are no specific classrooms set aside for speech, counseling or guidance, pull-outs or SETSS sessions, ENL language services, or SEL or behavioral intervention services, many of which require private settings, and separate dedicated spaces. Ex. 5, Haimson Aff. ¶24.

81. Instead, when comparing the EISs for M506 and M895, the DOE states that West Side will gain three quarter-size rooms but lose out on five full-size rooms and all five of its half-size rooms, all of which are needed for speech, counseling, guidance, pull-out/SETSS, ENL language services, and SEL/behavioral intervention spaces, and are mandated by the students' IEPs. Ex. 8, Norman Aff. ¶¶18-21. These services cannot be provided effectively in shared spaces because of the need for privacy and a quiet, focused environment. Such changes not only impact the students receiving these services, but also the teachers and service providers working with these students. The DOE at a minimum should have analyzed in the EIS the reduction and reconfiguration in spaces needed meet the CSL and to provide for mandatory related services.

82. The DOE is encouraging West Side to grow its enrollment numbers by relocating the school to an area with more Spanish speakers in anticipation of the school's new dual-

language program, yet they are giving them less space and fewer resources than their current students use now. Ex. 9, Rodriguez Aff. ¶22.

83. DOE representatives have admitted that there is nothing in any of the EISs produced for these proposed re-sitings, or in the Instructional Footprint upon which the EISs are based, that ensure or even analyze whether there would be sufficient dedicated spaces for students with disabilities to receive their mandated services after the co-locations occur. Ex. 5, Haimson Aff. ¶22; Ex. 9, Rodriguez Aff. ¶¶21, 23.

Negative Effects on Student Transportation Changes Were Not Analyzed or Discussed

84. The EIS law also requires that the DOE describe in the EIS the effect of the proposal on several areas, including transportation. Educ. Law §2590-h(2-a)(b)(iv). The DOE states in the West Side EIS that M895 is "approximately 1.3 miles from M506." Ex. 1, West Side EIS at 1. This "as the crow flies" distance calculation fails to mention that M506 is located near the 1, B, and C subway lines, but M895 is located only near the 6 subway line. Current West Side students can take any of three subway lines, which come from different parts of the City to school. There is no mention in the EIS that these students will now be forced onto one subway line or buses, likely resulting in students needing to rely on multiple trains every day. Ex. 9, Rodriguez Aff. ¶¶12-13. In addition to the inconvenience that many students will suffer, funneling three subway lines worth of students into one will likely cause additional crowding on the subway and buses, potentially creating hazardous situations. Ex. 6, Frank Aff. ¶¶39-42; Ex. 7, Fernandez Aff. ¶¶15-16; Ex. 10, Santiago Aff. ¶17.

85. The DOE states in the EIS that West Side High School "will continue to offer extra-curricular programs based on student interests, available resources, and staff support for those programs." Ex. 1, West Side EIS at 7. This is yet another general statement that provides

no information to impacted students, families, and communities about how the re-siting will affect the current and prospective student experience at West Side. Ex. 9, Rodriguez Aff. ¶16. Indeed, the DOE included this same boilerplate language verbatim in the TYWLS and Brownsville EISs. Ex. 4, TYWLS EIS at 7; Ex. 2, Brownsville EIS at 7.

86. The DOE mentions some specific extra-curricular activities in the West Side EIS but does not provide an explanation of how the school currently accommodates those activities. For instance, West Side offers a great boys and girls basketball program thanks to its full-sized gym on campus, the size of which is not listed in the EIS. Their new building will not have a full-sized gym. Ex. 1, West Side EIS at 7. Ex. 7, Fernandez Aff. ¶12; Ex. 10, Santiago Aff. ¶11. Whether the basketball program will be able to be continued is not mentioned or considered.

87. Such extra-curricular analysis is critical given that students may now need to travel away from campus for extra-curricular activities. There is no mention of the additional travel time that students will face, the fact that these students may now need to enter yet another neighborhood to access their extra-curricular activities and other services, or the fact that this additional travel time and unfamiliarity will add even more stress to students who already are susceptible to struggles at school. The DOE does not mention any effects to extra-curriculars that the students will experience from this proposed move.

88. The additional travel will mean delaying after school programs even later, which can create a gap in supervision for working families. How will that impact working parents who count on afterschool activities to commence immediately after dismissal and end at a certain time and location? The EIS does not say. This additional travel will make it harder for students to participate in these extra-curricular activities and inevitably, West Side may be forced to cut

back, eliminate, or shift its afterschool programs to other locations, none of which is discussed or anticipated in the EIS. Ex. 9, Rodriguez Aff. ¶13.

Negative Effects on Student Safety Were Not Analyzed or Discussed

89. The EIS also barely addresses safety, an issue that is of supreme concern for many of West Side's students. Ex. 18, *Public Comment Analysis*, N.Y.C. DEP'T OF EDUC. (Apr. 30, 2023) at 6(d); 11(b); 13(b); 18; 19; 33(b); Ex. 10, Santiago Aff. ¶¶16-17; Ex. 9, Rodriguez Aff. ¶9.

90. The EIS mentions a few safety and security supports that are available to schools. Ex. 1, West Side EIS at 9. But the safety support that the West Side EIS mentions are mere boilerplate statements that the DOE uses verbatim in the TYWLS EIS. *Id.*; Ex. 4, TYWLS EIS at 11. There are no specific mentions of the different community that West Side will be entering, and what impact that new community will have on West Side students and staff. Ex. 10, Santiago Aff. ¶18.

91. West Side's current campus is on three floors plus a basement level, and there are two student safety agents ("SSAs"). Ex. 6, Frank Aff. ¶17. The space in M895 is spread across five floors of a shared public building, requiring additional SSAs; the DOE is providing only two. *Id.*

92. In Building M895, West Side students would be occupying floors seven through eleven, while the SSAs would be placed at the entrance to the building. *Id.* The SSAs' separation and distance from the students and the school by multiple floors, realistically accessible only by an elevator, is a major safety concern. *Id.* There are also eleven floors of stairwells open to students where they may be able to escape supervision. This situation is dangerous at any school,

but particularly at a transfer school, where many students are older, have emotional and physical disabilities, and will be entering a new and stressful environment. Ex. 9, Rodriguez Aff. ¶¶9-10.

93. Despite statutory obligations to assess personnel needs and impacts, the DOE did not assess how the changed layout of the building results in the need for additional SSAs. (EIS, 13).

94. There also are concerns about physical fights between students, having more hallway space to monitor with fewer SSAs, and the fact that Building M895 is open to the public as a commercial building. Ex. 6, Frank Aff. at ¶¶19-36.

95. The EIS fails to address the lack of security, how that lack of security affects having more space to monitor, or the fact that M895 is a shared space with commercial businesses.

96. Additionally, gang violence is a concern in the neighborhood around Building M895. Ex. 10, Santiago Aff. ¶18. It was an issue brought up at the Joint Public Hearing by City Councilmembers Gale Brewer and Diana Ayala, Assemblymember Edward Gibbs, and multiple West Side students, teachers, and stakeholders. Ex. 13, *Public Comment Analysis*, N.Y.C. DEP'T OF EDUC. (Apr. 30, 2023) at 6(d); 11(b); 13(b); 18; 19; 33(b). The alleged "solutions" the DOE offered in the Public Comment Analysis do not address gang violence at all. The few suggestions the DOE offered were centered around training students and staff to navigate their new neighborhood. Why should these transfer school students and teachers be responsible for learning how to deal with the gang violence around them in a new area? West Side has spent decades fostering a community on the west side, and there is no real plan for what happens to that community and how it will be affected by the move to the east side. Ex. 8, Norman Aff. ¶11.

97. The specific characteristics of the campus, the disparity in age of students to be re-sited, and the prevalence of students with disabilities all present several safety considerations that should have been, but were not, raised in the EIS process. The proposed re-siting would place these vulnerable students in a new environment where students, teachers, parents, community members, and politicians all share concerns about gang violence. *Id*.

98. It is simply inadequate under the EIS law to respond to such community concerns with generic analogies and the promise to create plans and committees in the future.

99. Despite significant gaps in the EIS analysis as highlighted herein, the DOE baldly asserts in the EIS that "[t]his proposal is not expected to impact current or future instructional programming … academic offerings … [or the] budget or costs of instruction at West Side High School." Ex. 1, West Side EIS at 6, 12. This is inaccurate. Nothing in the EIS analyzes the re-siting's impact on the ability of the school to lower class size to mandated levels, or West Side's ability to expand enrollment given its new Dual Language program. Nor does the EIS address after school programs, specific examples of how space will be used, or the absence of the LYFE Center, SBHC, full-size gym, and several classrooms for West Side students for the foreseeable future. Ex. 6, Frank Aff. ¶¶16-17; Ex. 9, Rodriguez Aff. ¶¶22-23.

100. The DOE simply asserted the same blanket language it uses in nearly every EIS that it posts. *See, e.g.*, Ex. 4, TYWLS EIS; Ex. 2, Brownsville EIS.

Brownsville EIS and Public Comment Analysis:

101. On March 3, 2023, the DOE published its notice and EIS of the proposed re-siting of Aspirations to K907, resulting in a merger and co-location with Brownsville and New Visions. Ex. 24, *The Proposed Re-siting of Aspirations Diploma Plus High School (17K646) from Building K824 to Building K907 and Co-location with Brownsville Academy High School*

(17K568) and New Visions AIM Charter High School I (84K395) in the 2023-2024 School Year, Public Notice, N.Y.C. DEPT. OF EDUC. (Mar. 3, 2023).

102. K907 currently serves Brownsville, a public transfer high school, and New Visions, a charter school. The building currently enrolls 232 students, which, according to the DOE, is a 33% building utilization rate. Ex. 2, Brownsville EIS at 5, Table 2. If the proposal is approved and Aspirations is re-sited to K907, the DOE projects a total building enrollment of 330-450 students, yielding a 47-65% building utilization rate.

103. The EIS states that building K907 "has the capacity to serve a total of 697 students according to the 2021-2022 Enrollment, Capacity and Utilization Report, also known as the Blue Book." Ex. 2, Brownsville EIS at 2. However, as explained above, the Blue Book capacity formula was problematically altered and based on unrealistic and impossible assumptions that every classroom can be used every period of every day. Ex. 5, Haimson Aff. ¶28. Accordingly, any reference in the EIS to the Blue Book capacity or utilization bears no relationship to and provides no meaningful information about the actual conditions at Brownsville. *Id.*

104. Much like the West Side EIS, the Brownsville EIS does not discuss how the co-location and loss of available space will affect class sizes. The Brownsville EIS uses the same boilerplate language as the West Side EIS and states that "for existing schools, the Footprint is applied to the *current number* [emphasis added] of classes and class sizes a school is programming." Ex. 2 at 22; Ex. 5, Haimson Aff. ¶10. Once again, the Class Size Law is not addressed.

105. Again, when questioned on the fact that they have not addressed the Class Size Law in their EISs, the DOE has taken the position that the Education Law requires only that they

discuss projected enrollment and not class size. *See* Ex. 5, Haimson Aff. ¶17; Ex. 26, Email dated Feb. 25, 2019.

106. While it is true that the EIS is required to mention enrollment information, there are also broad categories of information required to be provided, including how the co-location will impact current and prospective students. Thus, the fact that class size is not specifically enumerated, considering the much broader requirement to discuss "impacts" does not permit the DOE to ignore the impact co-locations will necessarily have on class sizes.

107. Education Law §2590-h 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," suggesting that any proposed co-location should also consider and analyze the class sizes and overcrowding in other schools in the district. Educ. Law §2590-h(2-a)(vi).

108. Within District 17 in Brooklyn in which Brownsville is located, more than 15,000 high school students, or about 55% of high school students in that district, are in classes that are larger than the cap in the Class Size Law, showing that more space will likely be needed districtwide to lower class sizes to appropriate levels. Ex. 27, Updated DOE Class Size Report 2022-2023; District Level Distribution Report. In fact, several classes at Brownsville already have more students than the cap set under the Class Size Law. Ex. 31.

109. The DOE only provides a single school year projection in the EIS despite the requirement that the impact be assessed for current and prospective students. Educ. Law §2590-h(2-a)(b)(i). The DOE mentions but does not ascribe any impact to the fact that Aspirations is being re-sited specifically so that it may function without facility restrictions. Yet no enrollment

projections are provided for that school past the first year, presenting the real probability that the facilities in the building will soon not be enough for the three schools.

110. Further, the DOE generically asserts in the EIS that "[t]his proposal, if approved, is not expected to impact the current or future academic offerings at Brownsville Academy." Ex. 2, Brownsville EIS at 8. In the K907 EIS, the DOE fails to account for the fact that Brownsville will now share its science lab with an additional co-located school and fails to address the impact of that on students. Ex. 3, Brownsville BUP at 11.

111. A science lab is considered especially important for students to be able to take and pass their required Regents exams. According to the DOE, "[t]he assessments also include a one-hour laboratory performance examination, which tests students' skill using hands-on equipment and materials to answer specific questions."[9] According to the State Education Department, "To qualify to take a Regents examination in any of the sciences, a student must complete 1,200 minutes of laboratory experiences with satisfactory documented laboratory reports."[10] The EIS failed to clearly discuss if and how Brownsville students will have enough access to the science lab to fulfill these requirements.

112. The DOE also does not provide any specific analysis regarding the use of space for special education and intervention services. Instead, the EIS generically notes 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." Ex. 2, Brownsville EIS at 8. This language is boilerplate and appears in the TYWLS and West Side EISs as well. Ex. 4, TYWLS

[9] *See N.Y. State Science Test*, N.Y.C. DEP'T OF EDUC. (2023) available at https://www.schools.nyc.gov/learning/testing/ny-state-science (last accessed June 8, 2023).
[10] *See Science – Frequently Asked Questions*, N.Y. STATE EDUC. DEP'T – OFFICE OF STANDARDS AND INSTRUCTIONS, at ¶13, available at http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/sciencefaq.pdf (last accessed June 8, 2023).

EIS at 7; Ex. 1, West Side EIS at 6. While it is true that schools in NYC may offer these services in these different ways, this language provides no specific information to students, families, and the community about how the programs and services are currently being provided at Brownsville and whether the co-location impacts the current experience.

113. Brownsville stakeholders raised concerns about the lack of information pertaining to the feasibility of sharing spaces. Ex. 14 at 3. PEP went through the motions of acknowledging the feedback but summarily dismissed the concerns of the student, community, and parent stakeholders. PEP responded with more boilerplate language, indicating commitment to their proposal without providing any actual analysis of how their plan is feasible. *Id.* at 8.

114. 26% of students at Brownsville have disabilities and required mandated services. Ex. 2, Brownsville EIS at 15, Table 9. 3% of students are English Language Learners. *Id.* While the EIS notes that Brownsville is currently educating students recommended for Integrated Co-Teaching (ICT); Special Classes (SC); Special Education Teacher Support Services (SETSS); and other related services,[11] these services are not included in the classroom allocations for Brownsville, Aspirations, or New Visions. There are no specific classrooms set aside for speech, counseling/guidance, pull-outs/SETTS, ENL language services, or SEL/behavioral intervention services. Ex. 3, Brownsville BUP at 9; Ex. 11, Idiamey-Gaba Aff. ¶¶8-9; Ex. 12, Moore Aff. ¶9.

115. Instead, according to the BUP, Brownsville will lose twelve full-size rooms, which is a 67% loss of its current full-size room allocation, and it will also lose one half-size room next year. Ex. 3, Brownsville BUP at Table 10. These spaces are needed for speech, counseling, guidance, pull-out/SETSS, ENL language services, SEL/behavioral intervention spaces and are mandated by the students' IEPs. These services cannot be provided as effectively in shared spaces because of the need for privacy and a quiet, focused environment. Such changes

[11] Ex. 2, Brownsville EIS at 6

not only impact the students receiving these services, but also the teachers and providers working with these students. Ex. 11, Idiamey-Gaba Aff. ¶¶6-9; Ex. 12, Moore Aff. ¶9. The DOE at a minimum should have analyzed in the EIS the reduction and reconfiguration in space that is articulated in the BUP.

116. Further, this distribution of rooms is inequitable. Whereas Brownsville is losing twelve full-size classrooms, leaving it with only one more than the Footprint requires, Aspirations will be given three full-size rooms beyond its Footprint. Ex. 3, Brownsville BUP at 9-10, Tables 9-10. Additionally, New Visions, the charter school in K907, will not lose any of its fourteen full-size classrooms, remaining six full-size rooms beyond its Footprint. *Id.*

117. The DOE states in the EIS that "[i]f this proposal is approved, Brownsville Academy will continue to offer extra-curricular… programs based on student interests, available resources, and staff support for those programs." Ex. 2 at 9. This is yet another general statement that provides no specific information to impacted students, families, and communities about how the co-location will affect the current and prospective student experience at Brownsville. Indeed, the DOE included this boilerplate language verbatim in the TYWLS and West Side EISs. Ex. 4, TYWLS EIS at 7; Ex. 1, West Side EIS at 7.

118. The DOE does not provide an explanation of how the school currently accommodates extra-curricular activities. Despite Aspiration's current existence in K824, the DOE makes no mention of the space it uses for existing extra-curricular activities nor what kind of space accommodation it may need for those activities at K907. In boilerplate fashion with absolutely no analysis, the DOE states that "this proposal is not expected to impact any particular extra-curricular activities, special programs, sports or partnerships currently offered for students at Aspirations Diploma Plus" Ex. 2, Brownsville EIS at 7. Once again, the DOE makes a blanket

promise to continue the existence of current programs and services, yet it gives no explanation as to how such continuation would be possible given the reduction in space. Ex. 11, Idiamey-Gaba Aff. ¶6; Ex. 12, Moore Aff. ¶¶11-12.

119. Education Law §2853 and the Chancellor's Regulations provide information that must be included in the BUPs, including "[a] proposal for the collaborative usage of shared resources and spaces between the charter school and the non-charter schools, including but not limited to cafeterias, libraries, gymnasiums and recreational spaces, including playgrounds, which assures equitable access to such facilities in a similar manner and at reasonable times to non-charter school students as provided to charter school students" as well as "justification of the feasibility of the proposed allocations and schedules" and "how such proposed allocations and shared usage would result in an equitable and comparable use of such public school building." Educ. Law §2853; Ex. 15 at §(II)(A)(2)(ii).

120. While the DOE lists out in the K907 BUP a schedule for determining how much time each school will get to use the shared spaces, that is the only proposal of the shared allocation of space in the required EIS law documents. There is no discussion of how the proposed schedule will assure equitable access to the facilities in a similar manner and at reasonable times. Nor does the DOE provide information on how the schedule and shared usage would result in an equitable and comparable use of the space. Instead, like its approach taken in the EIS, the DOE simply states in a perfunctory, conclusory fashion in the BUP that "[b]ased on the explanations provided," the "NYCDOE believes that the proposed Shared Space Plan below is feasible and that each school is being treated equitably and comparably in its ability to use all shared spaces in K907." Ex. 3, Brownsville BUP at 11. Once again, the DOE is merely going

through the motions rather than complying with what the law requires. Thus, the EIS fails to identify how the time allocations will impact Brownsville's current programming.

121. The EIS law further requires that the DOE provide "an outline of any proposed or potential use of the school building for other educational programs or administrative services." Educ. Law §2590-h(2-a)(b)(iii). However, in the Brownsville EIS, the DOE makes no reference to the existing uses of the building for summer and Saturday programs or how the proposed co-location will impact those programs in the future. Ex. 2, Brownsville EIS; Ex. 12, Moore Aff. ¶¶11-12. This should have been discussed in the DOE's proposal. Ex. 12, Moore Aff. ¶¶11-12.

122. Nor does the DOE specifically analyze in the EIS the fact that Brownsville, like West Side, is a transfer school. Transfer high schools are smaller, full-time high schools designed to re-engage students who have dropped out or fallen behind in their credits. Transfer high school students are particularly at risk – they are vulnerable and require additional stability and support. Moreover, the students in transfer high schools greatly benefit from having extra space in the school, because it gives them the room to spread out, focus, and regulate their needs and emotions. Ex. 6, Frank Affidavit. None of these issues were addressed in the EIS. Thus, the EIS and BUP do not adequately discuss the impact on these students and the surrounding community. Ex. 11, Idiamey-Gaba Aff. ¶¶4-5; Ex. 12, Moore Aff. ¶¶8-10.

123. Despite significant gaps in the EIS and BUP analysis as highlighted herein, the DOE presumptively asserts in the EIS that the co-location "proposal is not expected to impact current or future student enrollment, admissions, or programming at Brownsville Academy." Ex. 2, Brownsville EIS at 8. This is inaccurate. Nothing in the EIS analyzes the co-location's impact on the ability of the school to lower class size to mandated levels, or Brownsville's ability to expand enrollment. Nor does the EIS adequately address after school programs, specific

examples of how space will be shared, or the logistics and ramifications of sharing a science lab for Brownsville students.

124. In fact, the DOE has asserted this same blanket statement in at least thirty EISs it has posted since January 2022. Ex. 28, Charts Compiling Recent EISs and BUPs Utilizing Boilerplate Language at 1-5.

125. Further, Educ. Law §2853 requires, as part of compliance with the EIS law, that the BUP describe the impact on the building's safety and security plan. Educ. Law §2853. Instead of discussing any impacts, the Brownsville BUP simply notes that a School Safety Committee will be established and will be responsible for developing a comprehensive School Safety Plan. Ex. 3, Brownsville BUP at 24-25. This vague, boilerplate language does not provide any information for stakeholders to determine the impact that the colocation will have on their safety.

126. This is the same language the DOE has used in at least ten other BUPs since the beginning of 2022. *See* Ex. 28 at 6-7.

127. These perfunctory statements about the formation of a future school safety committee to address the safety of the building fail to satisfy the statute requirement that impacts and issues be identified and analyzed *before* PEP votes, not after the co-location has been rubber stamped.

128. PEP's response to legitimate public safety concerns was that the School Safety Committee would figure it out later: "[E]very school/campus is mandated to form a School Safety Committee (Committee), which is responsible for developing a comprehensive School Safety Plan that defines the normal operations of the site and what procedures are in place in the event of an emergency. This will help facilitate a safe environment in K907 and allow the

Aspirations Diploma Plus, Brownsville Academy, and New Visions AIM I communities to share the building safely, should this proposal be approved." Ex. 14, Public Comment Analysis at 11.

129. This response is insufficient to address the impact of the co-location on safety under the EIS law.

Notice and Conduct of the Public Hearings

130. Not only does the statute require the DOE to analyze the impact of the proposed re-sitings and co-locations, record these findings in an EIS, and ensure that the EISs are publicly available, but the statute also requires that the DOE conduct a public hearing, with an opportunity for comment (jointly with the CECs and SLTs), giving all parties a voice. *See* Educ. Law §2590-h(2-a)(d).

131. The Chancellor's Regulation A-190 further specifies that the CEC and SLT collaborate on the agenda and structure of the Joint Public Hearing. Ex. 15, A-190 at §(II)(B)(1-3).

132. West Side's Joint Public Hearing was held virtually via teleconference, eliminating a lot of the humanity that underscores stakeholders' complaints. 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." Ex. 13, Public Comment Analysis at ¶31(a).

133. There was criticism at West Side's Joint Public Hearing regarding several concerns, ranging from the safety of the new neighborhood to the inequity of the re-sitings to the loss of key resources like the LYFE Center, SBHC, and other facilities unique to M506. Ex. 13, Public Comment Analysis.

134. For Brownsville's Joint Public Hearing, there was criticism of the co-location from stakeholders from both Brownsville and Aspirations. Ex. 14, Public Comment Analysis. Brownsville members did not want to share even more space than they already are, and Aspirations members did not want to leave their established community. *Id.*

135. Because the purpose of Education Law §2590-h is to inject public input into the DOE's and PEP's decision-making process, the statute provides that the DOE may, upon meaningful consideration of concerns and suggestions raised by the community, substantially revise the proposed co-locations. *See* Educ. Law §2590-h(2)(d).

136. At the joint public hearings, speakers identified many of the deficiencies contained in the EIS statements. Ex. 13; Ex. 14. However, the DOE did not revise the EISs to address this public feedback as allowed by Education Law §2590-h(2)(d) and instead rushed forward with the votes as planned.

PEP Votes

137. Only once the DOE has satisfied the statutory requirements discussed above, including performing the impact analysis, issuing the EISs, and conducting the joint public hearings, may the proposed school closings properly be considered for approval by the PEP. *See* Educ. Law §2590-g.

138. Prior to the approval of any proposed item, including re-sitings and co-locations, the PEP must undertake its own review process, and afford the public an opportunity to submit comments on the proposed item. Once the public review process is completed, but before the PEP votes on the proposal, the PEP must make available to the public, including, but not limited to, publication on the DOE's official webpage, an assessment of all public comments concerning the proposal under consideration received prior to 24 hours before the vote is to take place. This

assessment must include: (i) a summary and analysis of the issues raised, and significant alternatives suggested; (ii) a statement of the reasons why any significant alternatives were not incorporated into the proposed item; (iii) a description of any changes made to the proposed item as a result of the public comments received; and (iv) information as to where the full text of any approved item may be obtained. *See* Educ. Law §2590-g(8)(c)(i)-(iv).

139. On April 18, 2023, and April 30, 2023, the days before the respective PEP votes, the DOE published Public Comment Analyses (seemingly prepared by a DOE attorney) for both re-sitings and the co-location. As discussed *supra*, Petitioners have identified numerous deficiencies with the PEP's analysis.

140. On April 19, 2023, and May 1, 2023, the PEP held virtual public meetings to vote on the proposed co-locations. The April 19 meeting was open to public comment, and Brownsville stakeholders spoke for three hours, speaking for less than three minutes at a time. None of the first three hours of this meeting was video recorded. Ex. 29. Only a written, 84-page PDF transcript is provided on the DOE's website, further stripping the criticism of the humanity that would have been present in an in-person meeting.

141. The May 1 meeting was also open to public comment, and West Side stakeholders and backers spoke for more than five hours, speaking for less than three minutes at a time. Ex. 30. It is clear from the hours of comments and dozens of speakers that community support is against both proposals. Hours upon hours of criticism was delivered to the DOE, yet the EISs were not modified one iota.

142. Despite the DOE failing to follow the substantive and procedural prerequisites, the PEP voted in favor of the proposals. Of the twenty-three voting PEP members, twelve voted

to approve the West Side and TYWLS re-sitings, and twelve voted to approve the Aspirations re-siting and co-location with Brownsville and New Visions.

143. The West Side and Brownsville EISs fail to provide the meaningful specific analysis or discussion of the impacts on the community and students required by the statute, leaving stakeholders with more questions than answers. Thus, the DOE has not only violated the statutory mandates but also circumvented the purpose of Education Law §2590-h: to place checks on the DOE's authority by providing transparency and giving the community the information necessary to play a role in the decisions that impact them the most.

Disparate Impact on Students with Special Needs Under NYCHRL

144. 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 spaces for 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).[12] The law 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

[12] It is worth noting that disparate impact claims do not require there to be a discriminatory intent or motivation behind the discriminatory action, only that there is a disparate impact. (*See Levin v. Yeshiva U.*, 754 N.E.2d 1099, 1111 (N.Y. 2001) stating "The City's Human Rights Law goes the additional step of prohibiting policies or practices which, though neutral on their face and neutral in intent, have an unjustified disparate impact upon one or more of the covered groups.")

> (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.

145. Repeatedly, courts and the Legislature have expressed their intent for NYCHRL to be construed liberally in favor of the plaintiff to remove discrimination from the decision-making process. *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)). In fact, the Legislature confirms their intentions in NYC Admin 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).

146. As public high schools, West Side High School and Brownsville Academy are places of public accommodation within the meaning of the New York City Human Rights Law (NYCHRL).

147. Pursuant to the NYCHRL, students with disabilities are protected against any policy or practice that disproportionately and discriminatorily impacts students with disabilities because of their individual disability(ies).

148. 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. The DOE has a legal obligation and responsibility to provide students with disabilities with dedicated space to effectuate the mandates of such students' Individual Education Programs (IEPs). Again, 43% of students at West Side, and 26% of students at Brownsville have disabilities. Despite these sizable demographics, the DOE failed to analyze the causes of the disparate impact on these students. These students rely on the extra spaces their schools currently offer to regulate their needs. Students actively use free space in the school to take a break,

regulate their emotions, and then return to class. Ex. 6, Frank Aff. ⁋⁋ 13, 15. Without the space to do so, these students will face extreme difficulties focusing and staying in class for long periods of time. Further, it is unclear if the proposed re-site and co-location provide the prospective schools with enough space to offer mandated accommodations. Therefore, students with disabilities will face extraordinary challenges if the proposed re-site and co-location occurs. These challenges create a disparate impact on students with disabilities.

149. The Department of Education's EISs repeatedly and consistently fail to provide sufficient analyses or transparency to ensure that students with disabilities will receive their mandated services and resources as required by their individual IEPs.

150. 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.

151. The repeated failures and inadequacies of the DOE's EISs constitutes an ongoing policy and practice that violates the NYCHRL due to its disproportionate impact on students with disabilities in their public schools. As a result of the DOE's ongoing policies and practices to fail to prepare adequate and transparent EISs, the DOE has disproportionately deprived students with disabilities of their ability to receive educational supports and services that require dedicated space(s) as mandated by their IEPs.

152. Both the West Side EIS and the Brownsville EIS suffered from the above-described policy and practice of the DOE's failure to provide sufficient dedicated space(s) for students with disabilities to receive their mandated resources and services.

153. As a result of the DOE's failures, these students with disabilities suffer and will continue to suffer irreparable injury and harm.

154. 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.

Open Meetings Law Violations

155. On April 19, 2023, and May 1, 2023, the PEP held virtual public meetings to, *inter alia*, vote on the proposed re-sitings and a co-location. During each meeting, the PEP committed multiple violations of Article 7 of New York State's Public Officers Law, also known as the "Open Meetings Law." *See* N.Y. Pub. Off. Law § 100 *et seq*. As a result, the votes to re-site West Side and TYWLS, and the vote to re-site and co-locate Aspirations into the same building as Brownsville and New Visions are void. *See* N.Y. Pub. Off. Law §107(1).

156. First, 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). The first three hours of the April 19 PEP meeting were not recorded.[13] *See* Ex. 29. Simply put, this written transcript does not satisfy the requirements of §103-a(2)(g) because the videoconferencing was not recorded.

[13] 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.

157. Second, both the April 19 PEP meeting and the May 1 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). In the April 19 PEP meeting on whether to oppose the Brownsville co-location, several PEP members had their cameras off during the vote. 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 failure to appear on camera when casting their vote. Ex. 29. In the May 1 PEP meeting, this violation continued, with PEP members Chan, Dienstag, Faulkner, and Gladys Ward[14] voting yes on the proposal with their cameras off. Ex. 30.

158. The legislative declaration of the Open Meetings Law is 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. That declaration is the justification for §103-a(2)(d). If members of the public are unable to "see[] [or] identif[y]" PEP members during meetings, particularly while those members are voting, there will necessarily result a failure in the public business that is essential to the maintenance of a democratic society. *Id.*; Open Meetings Law §103-a(2)(d). PEP members having their cameras off during meetings, particularly during a decisive vote, violates §103-a(2)(d) of the Open Meetings Law.

[14] It is worth noting that members Chan, Dienstag, Faulkner, and Ward, as well as members Giordano and Ong, were all appointed to the PEP by the mayor. *See* PEP Members, NYC Public Schools https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy/members. Of the twenty-three voting PEP members, thirteen (or, a majority) are appointed by the mayor. *Id.* Interestingly, in both the West Side and Brownsville votes, zero of the thirteen mayor-appointed PEP members voted against the proposals. Ex. 34; Ex. 35. In narrow votes that received exactly the twelve yeses required to pass, eleven of those yeses were provided by Mayor-appointed PEP members. *Id.*

159. Third, both the April 19 PEP meeting and the May 1 PEP meeting violate §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). 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[15] at 2.

160. The public notices for both the Brownsville and West Side votes make no mention of the locations for the meetings, and do not state that the public has the right to attend the meetings at those locations. *See* Ex. 22; *see* Ex. 24. This omission continued even though the Brownsville public notice was amended once, and the West Side public notice was amended three times. *See* Ex. 22; *see* Ex. 24. 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. This absence of transparency in the of public notice thus violates §104(4) of the Open Meetings Law.

161. 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). The DOE and PEP violated the Open Meetings Law not once, but five times over the course of these

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

two meetings. 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 they violated the Open Meetings Law twice during the May 1 PEP meeting that included the vote to approve the West Side re-siting.

162. Additionally, there is good cause for the court to void these votes. "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). The stakeholders from Brownsville and West Side were aggrieved and prejudiced by these several violations.

163. The stakeholders from Brownsville were aggrieved and prejudiced. The three hours of the April 19 PEP meeting that were not recorded included comments and criticism from both Brownsville and Aspirations stakeholders. Ex. 29. The missing three hours also included commentary from Chancellor David Banks. *Id.* In addition to not capturing the tone, emotions, or visual cues that were undoubtedly present in the videoconference, the transcript is disjointed. Speakers are not clearly labeled, there is no consistent formatting, and again, it is an 84-page PDF rather than a video recording.

164. By denying the public the video recording of the meeting and providing only the written transcript, the DOE and PEP brazenly denied the public the transparency guaranteed by the Open Meetings Law, which is sufficient for a showing of good cause. *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.

165. The stakeholders from West Side were also aggrieved and prejudiced. The vote at the May 1 PEP meeting, like the vote at the April 19 PEP meeting, was not sufficiently transparent for stakeholders from West Side. For over five hours, comments and criticism were raised from concerned students, parents, teachers, politicians, and community members. These individuals were so passionate about this proposal that many of them were willing to wait hours before they were permitted to speak. Yet the proposal clearly did not mean as much to the PEP members.

166. During the vote, several PEP members violated the Open Meetings Law by not turning on their cameras. In addition to being disrespectful, the lack of transparency prejudiced the stakeholders at West Side. Again, the purpose of ensuring that PEP members are visible during meetings is accountability. 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?

167. The passion that West Side stakeholders displayed in waiting hours to comment may fade away 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. By minimizing the impact of public comments, PEP members aggrieved and prejudiced West Side stakeholders, and they have demonstrated good cause under §107(1) of the Open Meetings Law to have the votes annulled.

168. Because of these multiple violations, and because both Brownsville and West Side stakeholders have demonstrated good cause, the court should void the votes from these meetings.

FIRST CAUSE OF ACTION

169. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 168 as if set forth herein.

170. Pursuant to Education Law §2590-g, §2590-h, §2853, and Chancellor's Regulation A-190, Respondents have a duty, before significantly changing the utilization of any school, to conduct a substantive analysis of the reasons for and impact of the proposed change; prepare an EIS containing specific detailed information regarding such analysis; make this EIS publicly available; and conduct a joint public hearing involving impacted CECs and SLTs.

171. Respondents have failed to comply with the provisions of Education Law §2590-g, §2590-h, §2853, and Chancellor's Regulation A-190, by preparing EISs and a BUP devoid of the required impact on students and the community.

172. Petitioners seek an order pursuant to CPLR §7803(1) to compel Respondents to comply with their obligations under the Education Law and accompanying Chancellor's Regulation A-190.

SECOND CAUSE OF ACTION

173. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 168 as if set forth herein.

174. Pursuant to Education Law §2590-g, §2590-h, §2853, and Chancellor's Regulation A-190, Respondents have voted to significantly change the utilization of three school buildings beginning in the 2023-2024 school year.

175. As described herein, Respondents have failed to comply with the substantive requirements necessary prior to voting to approve these changes.

176. Respondents' failures to comply with their statutory obligations is, on its face, arbitrary, capricious, and contrary to law pursuant to CPLR §7803(3), and any vote should be annulled.

THIRD CAUSE OF ACTION

177. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 168 as if set forth herein.

178. Education Law §2590-g, §2590-h, §2853, and Chancellor's Regulation A-190 specify certain requirements that must be met prior to voting to co-locate any school.

179. As described herein, Respondents have failed to comply with these requirements prior to voting to approve these school co-locations.

180. Petitioners seek a declaration pursuant to CPLR §3001 that Respondents have an obligation to comply with the statutory requirements contained in Education Law §2590-g, §2590-h, §2853, and Chancellor's Regulation A-190, and an injunction preventing Respondents from moving forward with the co-location unless and until they have complied with these requirements.

181. Petitioners further seek a declaration that, as described herein, Respondents have failed to comply with these requirements.

FOURTH CAUSE OF ACTION

182. Petitioners repeat and reallege the allegations set forth in Paragraphs 1 through 168 as if set forth herein.

183. Pursuant to the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107, public schools are places of public accommodation within the meaning of the New York City Human Rights Law (NYCHRL).

184. Pursuant to the NYCHRL, students with disabilities are protected against any policy or practice that disproportionately and discriminatorily impacts students with disabilities because of their individual disability(ies).

185. The New York City Department of Education has a legal obligation and responsibility to provide students with disabilities with dedicated space to effectuate the mandates of such students' Individual Education Programs (IEPs).

186. The Department of Education's EISs repeatedly and consistently fail to provide sufficient analyses or transparency to ensure that students with disabilities will receive their mandated services and resources as required by their individual IEPs.

187. 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.

188. The repeated failures and inadequacies of the DOE's EISs constitutes an ongoing policy and practice that violates the NYCHRL due to its disproportionate impact on students with disabilities in their public schools. As a result of the DOE's ongoing policies and practices to fail to prepare adequate and transparent EISs, the DOE has disproportionately deprived students with disabilities of their ability to receive educational supports and services that require dedicated space(s) as mandated by their IEPs.

189. Both the West Side EIS and the Brownsville EIS suffered from the above-described policy and practice of the DOE's failure to provide sufficient dedicated space(s) for students with disabilities to receive their mandated resources and services.

190. As a result of the DOE's failures, these students with disabilities suffer and will continue to suffer irreparable injury and harm.

FIFTH CAUSE OF ACTION

191. Petitioners repeat and reallege the allegations contained in Paragraphs 1 through 168 herein.

192. The purpose of the OML "is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public." *Gernatt Asphalt Prods., Inc. v Town of Sardinia*, 87 N.Y.2d 668, 686 (1996).

193. Pursuant to the OML, "every meeting of a public body shall be open to the general public, with the exception of executive sessions." N.Y. Pub. Off. Law §103(a).

194. The PEP engages in public business during its meetings, particularly when it discusses and determines any and all aspects of the Educational Impact Statements and Building Utilization Plans and when it discusses and determines whether to vote to approve or not approve the EIS proposals.

195. The PEP is a "public body" and, as such, the meetings must be held in compliance with the OML and therefore be open to the public.

196. The PEP and its members have failed to comply with the OML by failing to vote publicly because their video cameras were not turned on so that the PEP members could be seen and identified by the public.

197. Respondents failed to comply with the OML because they failed to record over three hours of the record on April 17, 2023, rendering the record incomplete and the resulting votes void.

198. The PEP's refusal to comply with the OML is arbitrary, capricious, an error of law, and violates the duties and responsibilities required of them by law.

WHEREFORE, Petitioners respectfully request that the Court grant judgment:

(1) declaring that Respondents' failure to comply with Education Law §2590-g, §2590-h, §2853, Chancellor's Regulation A-190, NYCHRL, and the OML is arbitrary and capricious and contrary law;

(2) annulling the votes of the Panel for Educational Policy to change the utilization of challenged buildings;

(3) ordering Respondents to comply with their obligations under Education Law §2590-g, §2590-h, §2853, Chancellor's Regulation A-190, NYCHRL, and the OML; and

(4) for such other and further relief as may be just and proper.

Dated: New York, New York
June 22, 2023

ADVOCATES FOR JUSTICE
LEGAL FOUNDATION

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VERIFICATION

I, Laura D. Barbieri, Esq., an attorney admitted to the Bar of the State of New York, affirm and say that I am attorney for the Petitioners in this proceeding, that I have read the Petition, and that the same is true to my knowledge, information, and belief; this knowledge, information and belief is based on reviewing the record, documents, DOE records and other relevant information, and communications with credible sources of information, including clients.

I affirm on behalf of the Petitioners, Marissa Moore and Lucie Idiamey-Gaba as these Petitioners reside in counties other than New York County, where my office is located.

Date: June 22, 2022
New York New York

/s/ *Laura D. Barbieri*
Laura D. Barbieri