

STATE OF NEW YORK  
NEW YORK STATE EDUCATION DEPARTMENT

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In the Matter of an Appeal to the NYS Commissioner of :  
Education, AMANDA VENDER, individually, and o/b/o :  
her minor children, M.V.-W. and N.V.-W.; TIA SCHELLSTEDE, :  
individually, and o/b/o her minor child, W.R.; TANESA :  
GRANT, individually, and o/b/o her minor child M.M.; :  
NAILA ROSARIO, individually, and o/b/o her minor :  
child, L.R.; AMY MING TSAI, individually, and o/b/o her :  
minor children, M.M.2, J.M., M.-L.M., and M.-Y.M., and all :  
similarly situated NYC Public School Parents/Guardians and their :  
respective children; and CLASS SIZE MATTERS, :

PETITIONERS, :

Pursuant to Section 310 of the N.Y. Educ. Law, :

-v- :

THE BOARD OF EDUCATION OF THE CITY :  
SCHOOL DISTRICT OF THE CITY OF NEW :  
YORK, THE NEW YORK CITY DEPARTMENT :  
OF EDUCATION, AND CHANCELLOR DAVID :  
C. BANKS, in his official capacity, :

RESPONDENTS, :

From the Action of the Respondents Regarding Their Issuance of :  
the Virtual and Blended Courses Guidance, which Unlawfully :  
Permits the Respondents to Assign and Place Petitioners' :  
Respective Children in Virtual or Blended Classes :  
Without First Obtaining Express Written Consent from :  
Petitioner Parents/Guardians, in Violation of the NYSED :  
Regulations of the Commissioner, Section 100.2(u). :

**VERIFIED  
PETITION**

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**TO THE COMMISSIONER OF THE STATE EDUCATION DEPARTMENT:**

Petitioners, individually and collectively, by their attorneys, The Law Office of Laura D.

Barbieri, PLLC, hereby allege as and for their Verified Petition as follows:

**PRELIMINARY STATEMENT AND SUMMARY OF THE APPEAL**

1. Petitioners are five (5) parents, who bring this Appeal, individually, and on behalf

of their respective child or children, namely, AMANDA VENDER, individually, and o/b/o her minor children, M.V.-W. and N.V.-W.; TIA SCHELLSTEDDE, individually, and o/b/o her minor child, W.R.; TANESA GRANT, individually, and o/b/o her minor child M.M.; NAILA ROSARIO, individually, and o/b/o her minor child, L.R.; AMY MING TSAI, individually, and o/b/o her minor children, M.M.2, J.M., M.-L.M., and M.-Y.M., individually and collectively on behalf of all similarly-situated New York City Public School Parents/Guardians, and their respective children attending New York City public schools; and by Petitioner CLASS SIZE MATTERS, a non-profit, non-partisan organization of parents and concerned citizens founded in 2000 and dedicated to achieving smaller class sizes, principally in New York City (“NYC”) public schools, by its Executive Director, Leonie Haimson.

2. Petitioners believe their individual and collective experiences and views as presented herein are typical and representative of a significant majority of New York City public school parents; accordingly, their requests to Commissioner for relief are applicable not only to themselves and their respective children, but are made for and on behalf of all New York City parents with children in New York City Public Schools.

3. This Verified Petition challenges the legality and use of a New York City Public Schools’ Guidance, entitled “Virtual and Blended Learning Courses Guidance” (the Guidance), dated May 15, 2024, which was recently issued by Respondents. *See* Haimson Aff., Exhibit D.

4. As currently written, the Guidance directly conflicts with the New York State Board of Regent’s recently approved regulations of the Commissioner of the New York State Education Department. Specifically, Sections 100.1, 100.2, and 100.5 of the Commissioner of Education’s regulations relating to virtual and blending learning instruction were amended. *See* Haimson Aff., Exhibit C.

5. The Commissioner’s regulations provide that “Parents . . . may opt-in to receive virtual instruction and/or blended instruction if such instruction is offered.” *See* 8 NYCRR § 100.2(u)(1); *see also* Haimson Aff., Exhibit C.

6. In contrast, Respondents’ Guidance provides the following:

***30. Can schools program students in STARS for virtual/blended courses prior to receiving a parent opt-in decision? (New May 13, 2024)***

*Yes. Schools can program students for virtual/blended courses in STARS in anticipation of getting back Parent Opt-In Forms. This allowance is meant to ease the administrative burden for schools as they complete STARS programming. Final student schedules that include virtual/blended course(s) must have parental consent on file for all scheduled classes.*

***31. If a school does not receive a response from the parent by the first day of school (or term), what should they do? (New May 13, 2024)***

*Schools should make every effort to engage parents in understanding the benefits and expectations of virtual/blended courses in order to make an informed decision. If a school does not receive a response by the first day of school, they should continue reaching out to the parent through the school’s normal communication channels such as email and phone. **The student may remain in the virtual/blended course in accordance with the school’s existing add/drop policies or until the parent declines to have their student participate in the virtual/blended course, whichever occurs first.** [emphasis added.] Schools should try to minimize any disruption to student’s schedule in this process.*

*See* Haimson Aff., Exhibit D.

7. The Guidance at issue explicitly conflicts with the newly amended regulations because the Guidance changed the State’s regulation, which required an “opt-in” consent procedure, necessitating written parental consent prior to Respondents’ assigning and placing public school students into virtual or blended learning classes, to an “opt-out” consent procedure, permitting Respondents to assign and place students in virtual or blended learning classes *without* explicit parent consent. As concerning, the Guidance permits the Respondents to keep the students in virtual or blended learning classes until they receive explicit written denials of consent by the student’s parent. *Id.*

8. Petitioners contend that Respondents have no authority to amend or change the Commissioner of Education's regulations, which have the force and effect of law. Nor can Respondents fail to comply with the Commissioner's regulations by issuing or engaging in policies, procedures, or practices that conflict with the Commissioner's regulations.

9. Accordingly, Petitioners respectfully request that the Commissioner take the following actions: (a) revoke, vacate, and nullify the Guidance issued by Respondents; (b) prohibit and enjoin Respondents from further dissemination of the Guidance in its current form; (c) direct Respondents to revise the Guidance so that it is consistent with Commissioner regulations, including the regulation's opt-in consent requirement; (d) prohibit and enjoin Respondents from assigning or enrolling any student in virtual or blended learning classes without having received explicit written parental consent; (e) direct Respondents to provide a means for parents who previously consented to revoke their consent; and (f) direct that if Respondents receive a revocation of consent from a parent, Respondents must reassign such student to an in-person class within a reasonable time period.

10. The Commissioner is further requested to direct Respondents to take the following additional actions for those students with an Individual Education Plan (IEP), whom Respondents plan to assign and place in a virtual or blended learning class. Specifically, Petitioners respectfully request that the Commissioner (a) require express parental written consent prior to assigning that student to a virtual or blended learning class as the regulations require; and (b) direct Respondents to conduct an IEP meeting with parental participation for that student prior to assigning the student to the online class, if and as appropriate (for example, by considering whether the IEP's goals are applicable and measurable in a virtual or blended

learning setting or whether the IEP goals would be difficult to implement or measure if the student were assigned and placed in a virtual or blended learning environment.

11. Finally, for those circumstances where the Respondents plan to have students engage in a virtual or blended learning course(s) from their respective homes, Petitioners respectfully request that the Commissioner (a) direct Respondents to obtain written acknowledgments from parents that each student has (i) a reliable internet service; (ii) an available and working laptop or computer for the student's use; and, (iii) depending on the age of the student, that the student will be properly supervised while at home during the class.

### **STATEMENT OF FACTS**

12. On or about April 24, 2024, the New York State Board of Regents adopted regulations concerning Virtual and Blended Instruction.<sup>1</sup> The regulations require explicit parental consent (“opt-in”) prior to the child (the student) from being assigned and placed in a virtual or blended learning class. *See* Haimson Aff., Exhibit C.

13. On or about April 28, 2024, the New York State Education Department (NYSED) approved the regulations at issue, one of which required parental consent before a student could be placed in a virtual or blended learning class. *Id.*

14. Upon information and belief, Petitioners contend that Respondents seek to utilize virtual or blended learning courses in an effort to comply with the Class Size Reduction Law.

15. Indeed, the use of virtual or blended learning is one of the strategies listed by Respondents in the New York City Department of Education Class Size Reduction Plan. *See* [https://www.p12.nysed.gov/mgtserv/C4E/doc/nyc\\_class\\_size\\_reduction\\_plan/2023-24/nycps-class-size-reduction-plan-2023-24.pdf](https://www.p12.nysed.gov/mgtserv/C4E/doc/nyc_class_size_reduction_plan/2023-24/nycps-class-size-reduction-plan-2023-24.pdf).

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<sup>1</sup> *See* Haimson Aff., Exhibit C.

## **The Significance of Small Class Sizes**

16. Many research studies conclusively show that smaller classes lead to better student outcomes in every way that can be measured. Students who are in smaller classes achieve better grades, get better test scores, are less likely to be suspended or experience disciplinary problems, are less likely to drop out of high school, and are more likely to go on to college and get a four-year degree. Smaller classes have also been shown to lead to increased student engagement and lower teacher attrition rates, which over time contribute to a more effective, more experienced, teaching workforce. Those students who see the greatest benefit from smaller classes are students of color, English Language Learners, students with disabilities, and those from low-income families, which is why class size has been proven to be an effective way to narrow the achievement/opportunity gap. See Haimson Aff., ¶8 and Exhibit A, *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>.

17. In the landmark *Campaign for Fiscal Equity* case, the Court of Appeals concluded in 2003 that NYC public school students were deprived of their rights under the State Constitution in part because their classes were too large. The Court wrote: “[P]laintiffs presented measurable proof, credited by the trial court, that New York City schools have excessive class sizes, and that class size affects learning.” *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 911 (2003) (“CFE II”). It continued: “[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... and provided with inadequate

facilities and equipment. The number of children in these straits is large enough to represent a systemic failure.” *Id.* at 914. Haimson Aff., ¶9.

18. As a result of this court decision and the fact that the Governor and the Legislature agreed to send more than one billion dollars to New York City in additional Foundation Aid to address these substandard conditions, a new state law was passed in April 2022, requiring the Department of Education to phase-in smaller class size caps over five years, starting in the fall of 2023 (Class Size Reduction Law). Haimson Aff., ¶10.

19. In 2023, the Class Size Working Group was organized and authorized by Chancellor Banks to develop proposals to implement the Class Size Reduction Law. Expanding online learning was not among the Working Group’s recommendations. Instead, the Working Group proposed that NYC DOE create more space in overcrowded schools by capping their enrollment at lower levels when there are underutilized schools with the same grade levels nearby, and by implementing an accelerated and expanded capital plan to build more school seats.<sup>2</sup> Haimson Aff. ¶12.

### **Petitioners’ Concerns Regarding Virtual Classes, Blended and Online Learning**

20. Respondents’ plan to aggressively expand their virtual and blended learning course portfolio raises a number of concerns for Petitioners specifically, and for other New York City Public School parents, generally, including the manner and means by which Respondents are implementing the new course offerings in New York City Public Schools.

21. As Petitioners’ individual and collective experiences demonstrate, remote learning can lead and has led to negative outcomes and results for many students during the pandemic. In

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<sup>2</sup> Class Size Working Group Final Report, December 11, 2023  
[https://drive.google.com/file/d/1gSiFUcuLOjJ49PLCMptkroFjXBHow2b\\_/view](https://drive.google.com/file/d/1gSiFUcuLOjJ49PLCMptkroFjXBHow2b_/view).

addition, the expanded use of virtual and online classes exposes students to data breaches, where student personal data files are breached and student data is exposed, which has occurred in the past. *See* Haimson Aff., ¶17 and fn.6.

22. Further, and in general, online learning generated poor results according to the research, especially for students struggling with academics and for those who did not have strong consistent adult supervision at home. Haimson Aff., ¶14, and fn. 4.

23. Thus the expanded use of virtual instruction is likely to worsen rather than improve the opportunity/achievement gap among public school students and undermine many of the benefits of class size reduction that would otherwise be expected.<sup>3</sup>

24. For example, Petitioner Tsai explained that although two of her four children had positive experiences with online learning, one of her children who had an Individualized Education Plan (IEP) did not do well with virtual online classes. Tsai Aff., ¶¶6-8. Respondents did not provide the specific assisted technology devices necessary and required by her son's IEP, and as a result, he could not effectively participate in the virtual classroom. Tsai Aff., ¶8.

25. Further, by the time the Respondents corrected the problems, her son had already suffered regression and experienced poor academic, social, and emotional outcomes. Tsai Aff., ¶¶8-9.

26. Petitioner Rosario's daughter also had a negative experience with virtual classes during the pandemic, and Petitioner Rosario, like the other Petitioners, is concerned that the quality of education may be undermined by the increased use of virtual classes. Rosario Aff., ¶¶2, 4; Tsai Aff., ¶3; Schellstede Aff., ¶¶4, 6; Grant Aff., ¶4, 6; Vender Aff., ¶11, 12.

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<sup>3</sup> *Id.*



27. These support Petitioners requested relief that the Commissioner require Respondents to conduct IEP meetings with parents of students with disabilities prior to their being assigned to virtual or online learning classes, to ensure that appropriate technologies are provided and that the student's goals and measurement parameters are appropriately provided for and applicable to a virtual environment. Tsai Aff., ¶¶8-9; Schellstede Aff., ¶6.

28. Petitioners are also concerned that many NYC public school families lack reliable internet and laptops or computers at home. And, though most NYC students have smart phones, taking online classes using a smart phone is simply not feasible.

29. Therefore, Petitioners request that the Commissioner require the Respondents receive written acknowledgments from parents of students assigned to remote online courses that their children have reliable internet services and available laptops or computers to use for their student's classes. Vender Aff., ¶¶8-10, 12; Grant Aff., ¶¶9-10; Haimson Aff., ¶¶24-25.

30. Petitioners are also concerned that remote education negatively affects social and emotional health of students. Haimson Aff., ¶14; Tsai Aff., ¶¶8-9.

31. Again, these negative outcomes undermine the benefits that smaller classes provide to students and should be minimized or avoided altogether by ensuring effective manners and means for providing explicit parental consent and a manner and means to revoke the consent should the effects of online learning not benefit the student. *See, e.g.*, Haimson Aff., ¶16.

32. For these reasons, Petitioners believe that the Commissioner should require the Respondents to provide a procedure for parents who have provided consent to revoke their consent should their child experience negative outcomes as a result of the online classes. Haimson Aff., ¶25.

33. All of these concerns emphasize the importance and significance of ensuring Respondents not assign students to virtual or blended learning classes without parental knowledge and expressed consent. This requirement is integral to the Commissioner's regulations and must be adhered to by Respondents.

34. Without requiring explicit parental consent, Respondents have no incentive to ensure that parents are made aware of their child's being assigned and placed in an online class, so that parents can either withhold their consent, or having given consent, be able to monitor their child's progress, and if necessary, revoke their consent, requiring the return of their child to an in-person class.

### **RELIEF REQUESTED**

35. Accordingly, pursuant to the powers of the Commissioner to oversee and ensure that local school districts comply with its rules and regulations, here 8 NYCRR § 100.2(u)(1), Petitioners request the Commissioner grant this Appeal in its entirety as follows:

**WHEREFORE**, based on the submissions of Petitioners, individually and collectively, and for all the reasons stated herein, Petitioners respectfully request that the Commissioner grant the following:

- (1) revoke and nullify the Guidance issued by Respondents;
- (2) prohibit and enjoin Respondents from further dissemination of the Guidance in its current form;
- (3) direct Respondents to revise the Guidance so that it is consistent with Commissioner regulations, including the regulation's opt-in consent requirement;
- (4) prohibit and enjoin Respondents from assigning or enrolling any student in virtual or blended learning classes without having received explicit written parental consent;

- (5) direct Respondents to provide a means for parents who previously consented to revoke their consent; and
- (6) direct that if Respondents receive a revocation of consent from a parent, Respondents must reassign such student to an in-person class within a reasonable time period;
- (7) direct Respondents to take the following additional actions for those students with an Individual Education Plan (IEP), whom Respondents plan to assign and place in a virtual or blended learning class:
  - a. require express parental written consent prior to assigning that student to a virtual or blended learning class as the regulations require; and
  - b. direct Respondents to conduct an IEP meeting with parental participation for that student prior to assigning the student to the online class, if and as appropriate (for example, by considering whether the IEP's goals are applicable and measurable in a virtual or blended learning setting or whether the IEP goals would be difficult to implement or measure if the student were assigned and placed in a virtual or blended learning environment);
- (8) Where the Respondents plan to have students engage in a virtual or blended learning course from their respective homes,
  - a. direct Respondents to obtain written acknowledgments from parents that each student has the following:
    - i. a reliable internet service provider;
    - ii. an available and working laptop or computer for the student's use; and,
    - iii. depending on the age of the student, that the student will be properly supervised while at home during the class;

(9) any and all additional and further relief that the Commissioner deems just and proper.

Dated: June 12, 2024  
New York, New York

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