STATE OF NEW YORK
NEW YORK STATE EDUCATION DEPARTMENT

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.; TANESHA 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).	:

MEMORANDUM OF LAW IN FURTHERANCE OF CORRECTED PETITION

Dated: September 9, 2024
New York, New York

THE LAW OFFICE OF LAURA D. BARBIERI, PLLC
Laura D. Barbieri
115 W73rd Street, Ste. 1B
New York, NY 10023
(914) 819-3387
Laura@LDBarbLaw.com

PRELIMINARY STATEMENT

Petitioners, individually and collectively, by their attorneys, The Law Office of Laura D. Barbieri, PLLC, in response to the "Verified Answer," dated August 12, 2024 (hereafter "Answer"), and in support and in furtherance to their Corrected Petition previously submitted to the Commissioner, the Verified Reply, submitted herewith, and finally, in support of the relief requested therein

As an initial matter, Petitioners acknowledge that as a result of their Petition, Respondents modified and expanded their Virtual and Blended Courses Guidance to further clarify and make explicit that the Respondents were expressly prohibited from scheduling and/or enrolling a student in a virtual or blended learning class without obtaining prior, express, written, parental consent.

Petitioners, however, continue to assert their claims for the purposes of respectfully making several recommendations regarding the contents of the new guidance and the parents' consent forms, which Petitioners contend will further assist parents who are presented with offers by Respondents to enroll their children in a virtual or blended courses. Specifically, Petitioners recommend the following additions and/or revisions to the operative documents published by the DOE:

1. The parent consent form should, in addition to seeking express, written consent, make explicit the opportunity to revoke consent by a date certain (to be identified by the school, *i.e.*, by the drop/add date, or by the first marking period, or at the parent teacher conference date).
2. For those parents whose children have IEPs, both the parent consent form and the DOE's guidance should clarify and remind parents that they may request an IEP meeting to determine whether the supports identified in the IEP are sufficient and/or

that the IEP goals and objectives are appropriate for a virtual or blended course offered to their student.

3. For those classes offered at/as home online instruction, the parent consent form (or another form of acknowledgement) should explicitly provide the opportunity for parents to confirm that their student has (a) available internet, (b) a working computer or laptop, and (c) dependent upon the age of the student, that there is sufficient supervision in the home for the student. If the student has neither a laptop nor internet service at home, the school must be obligated to provide those instrumentalities of learning to the student if the student is to be scheduled for such a class.
4. Finally, each of these additional aspects of the consent form and guidance should be separately identified and explained within the Frequently Asked Questions document published by the DOE on its website as a continuously available resource for parents to access at any time.

Significantly, in their Answer to the Petition, Respondents do not contend that Petitioners' requests are ill conceived or that the Commissioner lacks authority to impose or recommend the requested revisions. Instead, Respondents raise purported procedural impediments to the imposition of the requested relief. For the reasons provided herein, each of these alleged procedural impediments should be rejected and the requested revisions and recommendations should be issued.

ARGUMENT

I. PETITIONERS' CORRECTED PETITION SHOULD NOT BE CONSIDERED A NULLITY

Respondents claim that Petitioners have no "right" to amend their Petition nor do the regulations permit Petitioners to move to amend. *See* R-Ans. at fn. 1. However, the initial Petition was properly served and filed. Further, subsequent to service, to add a missing

verification by Petitioner Amy Ming Tsai to her existing affidavit, which was not received by counsel until a day later, and to correct minor errors in the initial Petition, the Petition was corrected, re-served, and filed.[1]

Significantly, Respondents do not allege either harm or prejudice by virtue of their receipt of the corrected petition or by their acceptance of the slight revisions made therein. Accordingly, Petitioners respectfully request that the Commissioner accept the corrected petition as the operative pleading and that it be considered timely filed.

Whether the Commissioner accepts the additional affidavit and/or the minor corrections and considers either the initial Petition or the Corrected Petition as the operative document, the result should be the same. Indeed, Respondents acknowledge that the changes are minor. See R-Ans. at ¶66.[2] . Accordingly, the Petition should be accepted as valid as it asserts valid and viable claims by Petitioners against Respondents; the relief requested therein should be granted in all respects for the reasons further explained and established herein.

II. PETITIONERS HAVE STANDING INDIVIDUALLY AND AS CLASS REPRESENTATIVES

Respondents also contend that Petitioners lack standing. See R-Ans. at fn. 2, wherein Respondents assert that Petitioners lack standing to demand a remedy in the abstract – for example, Petitioners' suggesting that parents be reminded that they may request IEP meetings if their student has an IEP and is placed in a remote or blended learning environment.

[1] Petitioners contend that the affidavit of Amy Ming-Tsai Affidavit may have been filed without the corresponding verification, along with the other Petitioners.' Had that occurred, the Commissioner has discretion to allow additional time to add the missing verifications, while considering the filing as timely. Given this discretion, and courtesy frequently extended to Petitioners, Petitioners respectfully request the Commissioner exercise her discretion and permit the filing of the Corrected Petition *nunc pro tunc* and retroactively, on behalf of Petitioners. *See Appeal of V.B.*, 41 Ed. Dept. Rep. 451, Decision No. 14,743; *Appeal of P.R. and C.R.*, 41 *id. 46,* Decision No. 14,611.

[2] The allegedly "substantive" changes in Petition ¶¶13, 26, upon review, reflect minor changes and simply conform to the petition to the affidavits.

Generally, an individual may not maintain an appeal pursuant to Education Law Section 310 unless she is aggrieved in the sense that she has suffered personal damage or injury to her civil, personal, or property rights. *Appeal of Wenger*, 37 Ed. Dept. Rep. 5; *Appeal of Szymkowiak*, 36 Ed. Dept. Rep. 204; *Appeal of Shabot*, 35 Ed. Dept. Rep. 289. Each of the Petitioners demonstrates that she is aggrieved and that hers and her children's interests are at stake. As parents of students within the public school system, it is not required for harm to have occurred to demonstrate standing. It is sufficient that the harm may potentially occur by virtue of their status as parents, and their children attending public school within the City public school system.

Each Petitioner's verified affidavit recounts particularized concerns and potential harm that may occur to each of the Petitioners and to those similarly situated. See Verified Affidavits passim. As the virtual and blended courses will be offered to hundreds of schools, with thousands of students and parents, the number of potential petitioners is too numerous for sufficient joinder, such that class representation is optimum. Further the issues of law and fact are the same as those identified in the Petitioners' Verified Petition. Accordingly, Petitioners have both individual standing as well as able to represent all similarly situated parents within the City School District.

III. PETITIONERS' CLAIMS ARE NOT MOOT

Respondent claims that Petitioners' claims are moot since the DOE modified the guidance following the receipt of Petitioners' Petition to further clarify the necessity for explicit parent consent prior to scheduling and enrolling a child in virtual or blended courses. Despite the revisions, and while we are heartened that in response to our Petition, the DOE strengthened their guidance to require parent consent, Petitioners remain concerned that this issue be further addressed, clearly and emphatically, so that no more confusion remains. In addition, the documents published by the DOE must be consistent and comprehensively address all aspects of

potential parent concerns. Accordingly, the issues addressed herein remain ripe for consideration by the Commissioner and are not moot.

Moreover, the U.S. Supreme Court and the Second Circuit have recognized that claims that are "capable of repetition, yet evading review" provide an exception to the mootness doctrine. In *Russman v. Board of Education of the Enlarged City School District of the City of Watervliet* ("Russman"), for example, the Second Circuit stated:

> The capable-of-repetition principle applies only "where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."

Russman, 260 F.3d 114, 119 (2001) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (internal quotation marks omitted)); *see also Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-715 (1980). Petitioners met this burden and established that the instant scenario fits within the exceptions to the mootness doctrine. *Application of the Board of Education of the Beekmantown Central School District*, 59 Ed Dept Rep, Decision No. 17,718; *Appeal of the Board of Education of the Greenwood Lake Union Free School District*, 58 Ed. Dept. Rep., Decision No. 17,549; *Appeal of C.H.*, 52 Ed. Dept. Rep., Decision No. 16,465.

Here, these issues raised are readily and apparently likely to reoccur repeatedly throughout the system, each and every semester and potentially, multiple times during the year, should changes in consents occur. Moreover, Petitioners' circumstances raised in this appeal would typically evade review or that resolution of this dispute would address a novel issue of public concern is evident by the recency of the usage of virtual and blended courses within the DOE. *Application of the Board of Education of the Beekmantown Central School District*, 59 Ed Dept Rep, Decision No. 17,718; *Appeal of the Board of Education of the Greenwood Lake Union Free School District*, 58 *id.*, Decision No. 17,549.

IV. PETITIONERS' RECOMMENDED MODIFICATIONS AND/OR REVISIONS[3]

A. Notify Parents of Their Ability to Revoke Consent

Petitioners are concerned that the current notice to parents regarding their ability to revoke their consent once given may be insufficient or not as effective as it could be.

Currently, in the principals' guidance, principals are advised as follows:

> *o When schools are considering offering a virtual/blended course, they should consider how to serve the students who opt out of the offering or want to switch mid-term. Will the school need another teacher who is teaching the same course in person? Will the classes run concurrently? What room in the school will they use? What technology will they need?*
>
> *o Schools are responsible for communicating a clear add/drop policy to parents and students before the start of the school year. Schools are advised to start slow by offering one or two virtual/blended courses while they refine their processes.*
>
> *o Schools should consider setting deadlines for parents to send back the Letter of Intent and/or Parent Opt-In Form that allows them enough time to finalize student programs.*

See R-Ans. Exh. 1.

However, in the sample parent opt-in form (see p. 27) the parent is advised as follows:

> *If you choose to have your student participate in virtual/blended learning and realize it is not the learning environment that best fits your student after the course has started, reach out to us to discuss what other options might be available. [insert details about school's add/drop policy here including procedure, key dates etc.].*

See R-Ans. Exh. 1, at 27.

Petitioners respectfully request that the Commissioner require the DOE make it clear in their guidance to principals and in the parent consent forms that parents can revoke their consent and have their child transferred out of an online class if the child is struggling academically, and further provide particular deadline dates that include (a) the drop/add date, which would optimally be a date shortly after the first parent-teacher conference in November for half-year or

[3] Petitioners' recommended modifications and revisions apply to any and all documents or webpages applicable to Virtual and Blended Courses.

full year courses; or shortly after the subsequent parent-teacher in March for spring courses. . Further, Petitioners recommend that principals be required to remind parents of the deadlines within a week of the operative date, by email, text, and/or backpack notice.

B. Notice to Parents with IEP Students

Petitioners recommend the DOE make explicit in the parent consent forms or in an alternate communication to parents that those with students with IEPs have the right to request an IEP meeting to discuss the student's goals, services, and supports, applicable to virtual and/or blended courses. *See e.g.*, Petition, ¶10. For example, in the principal's guidance, the DOE states:

> As needed, IEP meetings should be held to consider whether the student requires changes to the recommended program or services (e.g., SETSS to support a general education virtual course or modifications to assistive technology) to reflect the virtual/blended program. … and: • If the student's needs cannot be met in the virtual/blended program (including with any recommended accommodations/supports), the student must be offered a full, in-person program.

Further, p. 54 of the guidance states: "Schools must take affirmative steps to ensure that Multilingual Learners/English Language Learners (MLs/ELLs), students with IEPs, and students with 504 plans can meaningfully participate virtual/blended learning."

All of this information should be provided to parents, either within the consent form, or as a separate communication to all parents for several reasons. First, the number of students with IEPs continues to grow within the DOE. Second, many parents, particularly immigrant parents, and non-English speaking parents, are not aware of their IEP meeting rights or do not necessarily consider them when completing forms requested by their children and/or the DOE. Accordingly, to assist parents and ensure that the needs of children with IEPs are served, the DOE should provide this reinforcing information, which would be helpful and beneficial to all parents.

C. Parent Acknowledgements for Home Classes

For home-based virtual and blended courses, neither the guidance nor the regulation memorandum states the method or means by which schools should determine that students have

adequate access to the internet and computers. Accordingly, both the parent consent form and the principal guidance should ensure that the student has access to working internet service, and that the student has a working computer or laptop, and depending on the age of the student, adequate supervision at home. Specifically, the DOE should be mandated to ensure that students have sufficient capabilities to engage in virtual and blended learning courses when scheduled. Accordingly, in the parent consent form, or in an accompanying form for classes that will be home-based, the DOE must obtain explicit confirmation from the parent that the student has (a) working internet at home; (b) a working computer and/or laptop; and (c) dependent on the age of the student, sufficient supervision within the home to enable the student to manage the class. If the parent fails to acknowledge any of these capabilities, or states they do not have such capabilities, the student should not be scheduled to take a remote class unless the DOE provides them with a laptop and internet access, which if applicable, should be documented on the consent form as well.

Currently, Respondents state,

> "Schools that offer virtual and/or blended instruction must ensure that students enrolled in such instruction have access to the digital, internet-connected technology and internet access necessary to receive and participate in instruction."

See NYSED P-12 Education Committee, November 30, 2023 Memorandum, fn 1.

> "*if a student does not have the internet or computer capabilities to receive remote and/or blended instruction, then Respondents will take measures to ensure that the student receives their educational program notwithstanding those impediments. And in any event, as repeatedly stated, a parent has the choice to decline to opt-in to remote and/or blended learning in the first place*."

Id.

However, this guidance is insufficient to ensure that the student has the capabilities necessary to be successful with a home-based virtual or blended learning course. Petitioners therefore respectfully request that the above-stated revisions and modifications are appropriate

for such circumstances. Specifically, the DOE should be required to verify that the student has access to the internet and a laptop BEFORE asking for parent consent to enroll the student in an online class at home.

CONCLUSION

For all the reasons stated herein and in the papers submitted in furtherance of this Petition, the Commissioner is respectfully requested to grant Petitioners' requested relief in all respects.

Dated: September 9, 2024
New York, New York

THE LAW OFFICE OF LAURA D. BARBIERI, PLLC

By: Laura Dawn Barbieri
Laura D. Barbieri
115 W73rd Street, Ste. 1B
New York, NY 10023
(914) 819-3387
LDBarbLaw@gmail.com
Laura@LDBarbLaw.com

cc: The NYC Department of Law
Corporation Counsel
Via Electronic Mail

TO:
Mr. David S. Thayer, Esq.
Assistant Corporation Counsel
Counsel for Respondents