No. 16115

The University of the State of New York

The State Education Department

Before the Commissioner

REDACTED

Appeal of JOHN BATTIS, on behalf of his son [redacted] and LYDIA BELLAHCENE, on behalf of her children [redacted], from action of the New York City Department of Education and PAVE Academy Charter School regarding school utilization.

Advocates for Children of New York, Inc., attorneys for petitioners, Rebecca C. Shore, Esq., of counsel

Michael A. Cardozo, Corporation Counsel, attorney for respondent New York City Department of Education, Emily Sweet, Esq., of counsel

Ropes & Gray, LLP, attorneys for respondent PAVE Academy Charter School, Jennifer Scarpati, Esq., of counsel

Petitioners challenge a proposal of the New York City Department of Education ("DOE") relating to the continued co-location and expansion of PAVE Academy Charter School ("PAVE" collectively "respondents") in a public school building. The appeal must be dismissed.

Petitioners are parents of children who attend P.S. 15 Patrick F. Daly School ("P.S. 15") in Brooklyn, New York. P.S. 15 is a public school serving students in grades pre-kindergarten through five that is located in the K015 building in Community School District 15 ("K015 building" or "the building"). PAVE is also located in the K015 building, which, in the 2009-2010 school year, served students in grades kindergarten through two. According to the record, PAVE plans on adding one grade per school year until it serves students in grades kindergarten through

eight, with a third grade being added in the 2010-2011 school year.

P.S. 15 and PAVE have been co-located in the K015 building since the 2008-2009 school year. PAVE's co-location with P.S. 15 was originally scheduled to end after the 2009-2010 school year when PAVE would move into a private facility. However, PAVE does not yet have a private facility, and in May 2009 it approached DOE about extending its co-location with P.S. 15.

To accommodate PAVE's request, DOE developed a proposal that would allow PAVE to remain in the K015 building until the end of the 2012-2013 school year.[1] Under this proposal, PAVE would be allowed to continue its co-location with P.S. 15 and expand one grade per year in the K015 building. In addition, P.S. 15 would continue to exist and serve pre-kindergarten through fifth grade students in the building. However, since PAVE would require additional space, DOE's proposal would require P.S. 15 to give up classroom space in the building.

On December 11, 2009, DOE issued an Educational Impact Statement ("EIS") pursuant to Education Law §2590-h(2-a)(b) which, among other things, proposed that PAVE's co-location be extended until the end of the 2014-2015 school year. On January 19, 2010, a hearing that was attended by approximately 400 people was held on this proposal,[2] and on January 26, 2010, DOE issued a revised EIS (the "January 26 EIS") which reduced the length of PAVE's co-location until the end of the 2012-2013 school year. This revised proposal was then submitted to the Panel for Educational Policy ("PEP") for approval, but the PEP adopted a resolution that was different from DOE's proposal; namely, it approved PAVE's continued co-location until construction of its private facility was complete. Acknowledging that this was an error, DOE issued another EIS on March 26, 2010 which contained the same proposal as contained in its January 26 EIS (extending the co-location through the 2012-2013 school year), but which provided additional

[1] As explained below, DOE originally proposed that PAVE would remain co-located with P.S. 15 until the end of the 2014-2015 school year, but this proposal was subsequently modified.

[2] The record indicates that 56 people spoke at this hearing with 13 people commenting in favor of the proposal and 43 commenting against it. In total, DOE indicates that it received 247 oral and written comments on its proposal, including 82 comments opposing the proposal and 165 comments supporting it.

information. On April 9, 2010, DOE made minor changes to this EIS,[3] and on April 14, 2010, another hearing on respondent's proposal, which was attended by 122 people, was held.[4] On April 20, 2010, DOE's proposal was adopted by the PEP. This appeal ensued.[5]

Petitioners contend that DOE failed to comply with the requirements of Education Law §2590-h(2-a) in a number of respects. In addition, petitioners maintain that the loss of space due to PAVE's co-location has detrimentally impacted the education of P.S. 15 students (especially those receiving special education services), and they argue that the expansion of PAVE will further disrupt the school and its students. Accordingly, petitioners request that I annul the April 20, 2010 PEP vote to expand PAVE and extend its co-location with P.S. 15.

Respondents deny petitioners' allegations and contend that DOE complied with all the requirements of Education Law §2590-h(2-a). In addition, respondents argue that even if DOE failed to fully comply with the statute's requirements, such non-compliance was de minimus and constituted harmless error. Respondents also contend that the K015 building has sufficient space to accommodate the needs of both schools through the 2012-2013 school year.

Initially, I must address several procedural issues, beginning with petitioners' replies and memorandum of law.[6]

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[3] Information regarding a January 2010 walk-through of the K015 building was added to the March 26 EIS. DOE indicates that it added this information in response to comments that it received concerning the impact of the co-location on certain special education services. Since this change was minor in nature and no objections have been raised with respect to it, this change is inconsequential for purposes of this appeal.

[4] The record indicates that six people commented at this meeting in favor of the proposal and 33 people commented against it. In total, DOE indicates that it received 415 oral and written comments during the proposal's second comment period, including approximately 153 emails and 93 phone calls opposing the proposal. In addition, DOE indicates that it received three petitions with a total of more than 1500 signatures opposing PAVE's continued co-location.

[5] Petitioners previously commenced an appeal on February 25, 2010 that challenged, among other things, DOE's January 26 EIS and its actions with respect thereto. However, that appeal was withdrawn and this appeal, which challenges DOE's more recent EIS and actions, was commenced.

[6] Petitioners submitted two replies in this matter - one in response to DOE's answer and one in response to PAVE's answer - but only one memorandum of law.

The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of a Student with a Disability, 46 Ed Dept Rep 540, Decision No. 15,589; Appeal of E.P. and D.P., 46 id. 390, Decision No. 15,542; Appeals of Cass, et al., 46 id. 321, Decision No 15,521). Similarly, a memorandum of law should consist of arguments of law (8 NYCRR §276.4). It may not be used to add belated assertions or exhibits that are not part of the pleadings (Appeal of C.P., 49 Ed Dept Rep __, Decision No. 16,053; Appeal of N.L., 44 id. 216, Decision No. 15,153; Appeal of Smolen, 43 id. 296, Decision No. 15,000). Therefore, while I have reviewed petitioners' replies and memorandum of law in this matter, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in respondents' pleadings.

In addition, by letter dated June 28, 2010, DOE submitted a supplemental affidavit for my consideration in response to an affidavit submitted with one of petitioners' replies. The Commissioner, in his discretion, may permit the service and filing of additional affidavits, exhibits and other supporting papers (see 8 NYCRR §276.5). Since petitioners do not oppose this request, I will accept DOE's supplemental affidavit, but only to the extent that it responds to information properly contained in petitioners' reply to its answer.

Finally, on July 16, 2010, PAVE submitted what is in essence a letter-brief for my consideration which addressed the First Department's recent decision in Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York (__ AD3d __, 2010 WL 2605944 [1st Dept 2010]). Petitioners object to this submission, but since PAVE's letter addresses a decision that was issued after it submitted its memorandum of law, I will accept both PAVE's submission and petitioners' response to it (dated July 20, 2010) into the record.

Turning to the merits, I note that Education Law §2590-h(2-a) was added in 2009 as part of the New York City school governance legislation (Chapter 345 of the Laws of 2009). Among other things, Education Law §2590-h(2-a) requires the Chancellor of the City School District of the

City of New York ("Chancellor") to prepare an EIS for any proposed school closing or "significant change in school utilization" for any public school located within the City School District. An EIS is required to include:

(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 such 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 such school's academic performance including whether

> such 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.

Education Law §2590-h(2-a)(b).

As noted above, on March 26, 2010, DOE issued an EIS for its proposal in this matter which, together with the changes it made on April 9, constitute the EIS at issue in this appeal (referred to herein as the "March 26 EIS"). This March 26 EIS, in general, provided the relevant "factual" data that is required by Education Law §2590-h(2-a)(b) and described DOE's proposal with respect to PAVE's continued (and expanded) co-location with P.S. 15. In addition, the March 26 EIS discussed the capacity of the K015 building, disclosed that P.S. 15 would have to give up space under the proposal (upwards of the equivalent of 12 full-sized spaces according to it), and noted that the way P.S. 15 provided enrichment programming and non-mandated services might be impacted as a result of this loss of space. The March 26 EIS also noted that a space plan for both schools would be developed based on DOE's citywide instructional footprint ("footprint"),[7] that P.S. 15 would ultimately be allocated the equivalent of 29 full-sized spaces, and that while P.S. 15 would have to give up space under the proposal, DOE believed that there was more than adequate space in the building for both schools to serve their students.[8] I find that this level of description and/or detail satisfies the requirements of Education Law §2590-h(2-a)(b).

Specifically, the purpose of requiring that an EIS be created prior to a school closing or significant change in school utilization is to provide sufficient information to the public to inform their comments on a proposal. To this extent, Education Law §2590-h(2-a)(b) requires that an EIS contain a mix of factual/statistical information and subjective information such as the "impacts of the [proposal] to any affected students" or the "ramifications"

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[7] The footprint is described by DOE as a "tool used in the analysis and assessment of space usage in DOE buildings." The EIS contained a link to where this footprint could be found on DOE's website.

[8] DOE also indicated that it felt that the impact on enrichment programs and non-mandated services at P.S. 15 should not be significant.

of such upon the community. With respect to this latter type of information, Education Law §2590-h(2-a)(b) does not indicate what an EIS must include, and DOE is afforded a "considerable measure of discretion in this regard" Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York (__ AD3d __, 2010 WL 2605944 [1st Dept. 2010]). Here, petitioners' complaint with respect to PAVE's continued and expanded co-location with P.S. 15 relates to whether there is sufficient space in the K015 building to accommodate both schools. The March 26 EIS provides information that is both relevant to this issue and sufficient to inform members of the public with respect to their comments. Accordingly, I am unable to find that DOE abused its discretion in this matter.

Petitioners argue that Education Law §2590-h(2-a)(b) requires that an EIS contain more than what DOE provided here and cite to the Supreme Court's decision in Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York (28 Misc.3d 204 [Sup. Ct. 2010]; "Mulgrew I"). I disagree.

In Mulgrew I, the New York Supreme Court held that, among other things, a number of EISs created by DOE failed to comply with the requirements of Education Law §2590-h(2-a)(b). In particular, the Court found that the EISs, which apparently included earlier versions of the EIS at issue here,[9] were deficient because they dealt with issues in a "boilerplate fashion" and failed to provide any meaningful information regarding the impacts on the students (see Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York, 28 Misc 3d 204, __ [Sup. Ct. 2010])(emphasis added). By contrast, the March 26 EIS at issue here provides specific information regarding the proposal at issue, including the amount of space that P.S. 15 stood to lose and an acknowledgment that enrichment programming and non-mandated services might be impacted as a result of this loss. This is precisely the type of information that members of the public need to know in order to inform their comments.

[9] In footnote 3 of its decision, the Court listed 19 schools that were at issue in that matter including "PAVE Academy Charter School - extension of co-location." Since the decision, order and judgment in Mulgrew I was issued on March 26, 2010, however, it is clear that the March 26 EIS at issue here was not encompassed within its decision.

Nor do I find persuasive petitioners' argument that EISs created pursuant to Education Law §2590-h(2-a)(b) require the same level of detail and analysis as environmental impact statements under the laws governing SEQRA. As noted by the New York Court of Appeals, "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making ...." (Coca-Cola Bottling Co. of New York, Inc. v. Bd. of Estimate of the City of New York, et al., 72 NY2d 674, 679). As such, an environmental impact statement is explicitly required to provide "detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such an action" (N.Y. Environ. Conserv. Law §8-0109[2]). By contrast, Education Law §2590-h(2-a)(b) does not require the same level of analysis as an environmental impact statement, and its legislative history does not suggest that such a requirement was intended.[10] Rather, and as noted above, the statute's purpose is simply to provide information to the public for purposes of informing their comments. As a result, what is required in an EIS for purposes of Education Law §2590-h(2-a)(b) will necessarily be different than what is required for an environmental impact statement under SEQRA.

Petitioners cite to Mulgrew I in support of their argument that an EIS under Education Law §2590-h(2-a)(b) requires the same level of detail and analysis as an environmental impact statement under SEQRA. However, I do not find that Mulgrew I requires such a result. While the Supreme Court in Mulgrew I noted that it felt that the body of law governing SEQRA was "instructive" in interpreting the relevant provisions of the Education Law, its holding (that the EISs at issue failed to provide any meaningful

[10] While the sponsor's memorandum in support of Assembly Bill No. A.8903-A, which became Chapter 345 of the Laws of 2009, indicates the Chancellor is required to develop and make public an EIS that "details the impacts of the proposed school closing or significant change in school utilization to the students, staff, building and community" (Sponsor's Mem, Bill Jacket, L 2009, ch 345), this does not suggest that a level of detail akin to an environmental impact statement was intended or required. I also note that Education Law §402-a, which contains an optional procedure for school closings that includes preparation of an educational impact statement, contains no language equating an EIS to an environmental impact statement.

information) did not require that the two laws be compared. In fact, the Appellate Division in Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York (__ AD3d __, 2010 WL 2605944 [1st Dept 2010]; ("Mulgrew II") found that the district had a "considerable measure of discretion" under Education Law §2590-h(2-a)(b) to determine which information an EIS should contain to portray the impact of a proposed action, and it left open the question of whether strict compliance or substantial compliance is the applicable standard of review under the statute.

In addition to challenging the substance of the March 26 EIS, petitioners contend that DOE failed to comply with the notice and filing requirements of Education Law §2590-h(2-a). I disagree. Consistent with Appeal of Andrews, et al. (45 Ed Dept Rep 248, Decision No. 15,312), which was decided under Education Law §402-a, a statute containing optional procedures relating to school closings similar to those at issue here, I find that the appropriate standard of review under Education Law §2590-h(2-a) is substantial compliance, and on the record before me I find that DOE substantially complied with the statute.

In addition to requiring that an EIS be prepared regarding any proposed school closing or significant change in school utilization, Education Law §2590-h(2-a) provides:

> Such [EIS] shall be made publicly available, including via the city board's official internet website, and a copy shall also be filed with the city board, the impacted community council, community boards, community superintendent, and school based management team at least six months in advance of the first day of school in the succeeding school year.
>
> Education Law §2590-h(2-a)(c)

In addition, Education Law §2590-h(2-a)(d) requires that a hearing be held regarding the proposed school closing or significant change in school utilization and provides in pertinent part:

> The Chancellor shall ensure that notice of such hearing is widely and conspicuously posted in such a manner to maximize the number of affected individuals that receive notice, including providing notice to affected parents and students, and shall also notify members of the community boards and the elected state and local officials who represent the affected community district.

It appears from the record that after creating the March 26 EIS, DOE took a number of actions, including making its March 26 EIS available on the Internet and sending a notice of its proposal (which included a link to the March 26 EIS) via a "city-wide e-mail distribution list" to, among others, all community education councils, all school principals (who, as mandatory members of each school leadership team ["SLT"], were asked to forward the notice to all other SLT members), all community boards and all community superintendents. In addition, it appears that DOE sent copies of both its notice of proposal and the March 26 EIS via email to the District 15 Community Education Council, the principals of both P.S. 15 and PAVE, the SLT's of both P.S. 15 and PAVE, the Community Superintendent for Community School District 15, and Community Board 6. Moreover, it appears that the email that was sent to P.S. 15 and PAVE principals (as well as each schools' SLT members) included a letter which, among other things, advised parents that the DOE was proposing to continue PAVE's co-location with P.S. 15, that a copy of an EIS regarding this proposal was available both online and at each schools' main office, and that a hearing on this proposal was scheduled for April 14, 2010 at the K015 building. DOE contends that it instructed both school principals to send both a copy of this letter and a copy of its notice of proposal home with their respective students. I find that these actions, taken together, satisfy the statute's requirements.

Petitioners contend (and DOE does not dispute) that P.S. 15 parents never received the letter and notice of proposal from P.S. 15's principal. However, the record reflects that the proposal to continue and expand PAVE's co-location with P.S. 15 was the subject of an open public debate going back to at least December 2009 when the first

EIS was issued in this matter. Since that time, at least two public hearings were held which were collectively attended by approximately 522 people, and at least 622 oral and written comments were generated in response to DOE's proposal. Moreover, there is no indication in the record that petitioners, who each attended both public hearings and made presentations at them, or anyone else, were unaware of these hearings or were denied an opportunity to comment on the proposal. On the record before me, therefore, I find that the failure of P.S. 15's principal to send the letter and notice of proposal to P.S. 15 parents was de minimus and decline to annul PEP's approval of DOE's proposal for lack of notice (see Appeal of Andrews, et al., 45 Ed Dept Rep 248, Decision No. 15,312).

In addition, petitioners argue that DOE's March 26 EIS was untimely. Specifically, petitioners contend that the March 26 EIS was filed five months and thirteen days before the first day of school in the 2010-2011 school year and, thus, failed to comply with the requirement of Education Law §2590-h(2-a)(c) that EISs be filed at least six months in advance of the first day of school in the succeeding school year. Here again, I disagree.

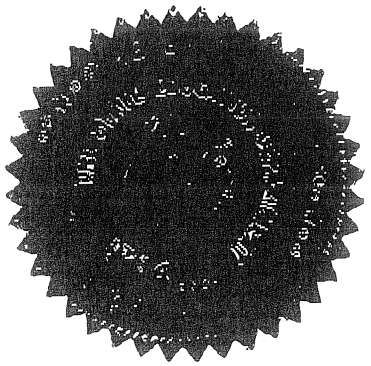
As noted above, Education Law §2590-h(2-a)(c) requires that EISs be filed "at least six months in advance of the first day of school in the succeeding school year" (Education Law §2590-h[2-a][c]). However, Education Law §2590-h(2-a)(d-1) authorizes the Chancellor to substantially revise a proposed school closing or significant change in school utilization so long as a revised EIS is published and filed in the same "manner" as a new one. Time and manner are generally two different things, and treating them otherwise here would only discourage the making of revisions in response to public comments, which would be contrary to the statute's intent. Accordingly, I find that the March 26 EIS was not subject to the same six-month requirement as the initial EISs.

Petitioners assert that the March 26 EIS was not a revised EIS, but was rather a new one because it was issued after the PEP had voted on DOE's proposal on January 26, 2010. As an initial matter, this assertion contradicts claims made in the petition. In addition, since the changes made to the March 26 EIS did not change the nature of the proposal that was described in earlier EISs or adversely impact those for whose benefit the EIS was

created, I find that the timing of the March 26 EIS is irrelevant and deem it to be a revised EIS for purposes of the statute.

Finally, petitioners challenge the merits of DOE's proposal, but I cannot conclude from the record before me that its decision was arbitrary, capricious or lacked a rational basis. Specifically, while petitioners contend that PAVE's co-location with P.S. 15 has had a detrimental impact on its students due to a loss of space and that the K015 building cannot support the continued expansion of PAVE, DOE denies these assertions and contends that, based on its own analysis, that the K015 building can support both schools. In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Brown, 46 Ed Dept Rep 584, Decision No. 15,602; Appeals of Hubbard, 46 id. 533, Decision No. 15,585; Appeal of Darrow, 46 id. 182, Decision No. 15,477). On the record before me, I find that petitioners have not met their burden on this issue.

THE APPEAL IS DISMISSED.



IN WITNESS WHEREOF, I, David M. Steiner, Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 1 day of August 2010.

Commissioner of Education