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June 17, 2010

New York State Commissioner of Education
Office of Counsel
Education Building, Room 148EB
Albany, New York 12234

In the Matter of John Battis and Lydia Bellahcene from the resolution of the New York City Department of Education to continue and expand the co-location of PAVE Academy Charter School with P.S. 15 Patrick F. Daly School.

Appeal No. 19128

To the Commissioner of Education,

We represent John Battis and Lydia Bellahcene, Petitioners in the above-captioned appeal. Enclosed please find Petitioners' Memorandum of Law in Support of Petition.

Petitioners' Memorandum of Law addresses the legal grounds for the Petition and responds to Respondents' arguments that they included in the Answers. Petitioners respectfully request the opportunity to respond to any new arguments that Respondents raise for the first time in their Memoranda of Law and did not include in their Answers.

Respectfully Submitted,

Rebecca Shore/EC
Rebecca C. Shore
Elizabeth Callahan

cc: PAVE Academy Charter School
Emily Sweet, Assistant Corporation Counsel

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT

In the Matter of JOHN BATTIS, on behalf of and LYDIA BELLAHCENE, on behalf of [redacted],

from the resolution of the New York City Department of Education to continue and expand the co-location of PAVE Academy Charter School with P.S. 15 Patrick F. Daly School.

APPEAL NO. 19128

REDACTED

PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF PETITION

Petitioners John Battis and Lydia Bellahcene ("Petitioners") submit this memorandum of law in support of their Petition to the Commissioner of Education and Request for Stay, dated May 4, 2010, challenging the April 20, 2010 vote and resolution of the Panel for Educational Policy ("PEP") of the New York City Department of Education ("DOE") to continue and expand the co-location of PAVE Academy Charter School ("PAVE") with P.S. 15.

PRELIMINARY STATEMENT

In 2008, P.S. 15 ceded some of its space and classrooms to PAVE, a charter school that originally was scheduled to stay in the building through the 2009-2010 school year. In December 2009, however, the DOE put up for a vote an extension of PAVE's co-location with P.S. 15 as well as an expansion of PAVE. The PEP voted on the proposal in January 2010, but the vote did not comply with New York Education Law. On April 20, 2010, the DOE submitted a new proposal to the PEP, which the PEP approved, to continue and expand the co-location until the 2012-2013 school year. To accommodate PAVE's expansion, the DOE intends to reduce

critical educational programming space for P.S. 15. The DOE, however, failed to disclose to the public before the vote the impact that this reduction in space will have on the students and community of P.S. 15.

This appeal is not about charter schools or the ability of charter schools to share space with public schools. It is about the refusal of the DOE to acknowledge and disclose that its plans for continuing and expanding the co-location of PAVE will have a negative impact on children who go to P.S. 15. Without such acknowledgement, affected families have no way to evaluate the proposed co-location and expansion or advocate for better alternatives and the PEP cannot make an informed decision regarding the DOE's proposed changes in utilization.

P.S. 15 has already suffered a significant decline in space as a result of the co-location of PAVE since 2008. PAVE intends to "add one grade per year until it reaches its full grade K-8 scale" and does not have space to accommodate the increase in enrollment under the current terms of the co-location. To do so, it must take more space from P.S. 15. In addition to the continued impact of the loss in space from the current co-location, the increased number of students attending PAVE will impact the availability of space for P.S. 15 students, including the cafeteria, gymnasium, and rooms for the provision of related services.

Contrary to the requirements of New York Education Law, the DOE did not inform the community of the ramifications and impacts of the continued and expanded co-location on P.S. 15. In particular, the Educational Impact Statement ("EIS") failed to address the impact of the co-location on students with disabilities. Special education students at P.S. 15 already lack sufficient and appropriate space; losing more classrooms will only exacerbate the problem.

In addition, the DOE did not provide adequate notice of the proposed continuation and expansion of the PAVE co-location or of the related public hearing. The statutory requirements

are intended to enable those who may be affected by a significant change in school utilization to voice their concerns. In this case, the DOE merely posted the information on its website, which is insufficient to constitute notice under the statute. The DOE did not send any notices or the EIS to the parents of current and prospective P.S. 15 students. Nor was the website posting accessible to non-English speaking parents. The DOE also issued the notice and EIS less than six months before the beginning of the school year. None of this meets the notice requirements of New York Education Law.

The DOE should not be permitted to bypass the statutory procedures for conducting a detailed analysis of the ramifications of its proposal on the community and publicizing its analysis to permit informed public comment. There has been a lack of transparency by the DOE, and as a result, the DOE has extinguished the community members' ability to voice informed concerns about the DOE's proposed changes and to suggest alternatives.

For the reasons set forth below, as well as in the Petition, Petitioners' Replies, and the affidavits and exhibits submitted in support of the Petition and the Replies, Petitioners respectfully request that the Commissioner find that the DOE did not comply with New York Education Law Section 2590-h(2-a) and annul the April 20 PEP vote to continue and expand PAVE's co-location with P.S. 15.

BACKGROUND

John Battis is the parent of a pre-kindergartener at P.S. 15 who is registered to attend kindergarten at P.S. 15 next year. Pet. ¶ 1. Lydia Bellahcene is the parent of three children who attend P.S. 15, including one who requires special education services. Ms. Bellahcene's daughter's IEP mandates that she receive physical therapy and occupational therapy, which she receives at school, and speech therapy, which she receives outside of school. Pet ¶ 2.

P.S. 15 has 389 students, from pre-kindergarten through fifth grade. According to publicly available data, 50.38% of the students at P.S. 15 are Hispanic, 36.83% are African American and 9.21% are English Language Learners ("ELL"). Pet. Ex. A (P.S. 15 Register). Approximately 95% of the students at P.S. 15 receive free or reduced price lunch (Pet. Ex. B (NYS School Report Card)) and one-third (33.50%) of the students receive special education services. Pet. Ex. A (P.S. 15 Register). Of these special education students, 65 are educated in self-contained classes (*Id.*), 14 are mandated to receive Special Education Teacher Support Services ("SETSS"), 45 are mandated to receive counseling, 75 are required to mandated speech therapy, 33 are mandated to receive occupational therapy, and 10 are mandated to receive physical therapy. Pet. Ex. C (Special Education Service Delivery Report).

PAVE is a charter school that has shared the K015 building with P.S. 15 since 2008.[1] Currently, PAVE has 138 students and serves students in kindergarten through second grade. Pet. Ex. H (December EIS). When PAVE moved into the P.S. 15 building at the beginning of the 2008-2009 school year, a commitment was made that the co-location would last for two school years and would therefore continue until the end of the 2009-2010 school year. *See* Pet. Ex. J (Summary of Proposal and Comments Received at January 26 Hearing).

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[1] Although PAVE's website now states that the school "offer[s] services for students with Individualized Education Programs (IEPs) and for English Language Learners (ELLs)"(*see* PAVE Academy Charter School: How to Apply, http://www.paveacademy.org/student-how-to-apply.html), the website does not indicate the type of services the school provides. Petitioners note, however, that the website lists only two of its teachers as being licensed in special education (*See* PAVE Academy Charter School Current Staff, Reply to DOE Exh A.), making it unlikely that by 2012-2013, PAVE "will serve grades K-5 with 12 general education/collaborative team teaching" classes, as the DOE suggests. DOE Answer ¶ 60. A Collaborative Team Teaching ("CTT") class is a classroom that includes students with disabilities and non-disabled students and is taught by two teachers, a general education teacher and a special education teacher, who work together and collaborate throughout the day. *See* A Parent's Guide to Special Education Services for School-Age Children, New York City Department of Education, available at http://schools.nyc.gov/documents/teachandlearn /ELL/Parent_Guide_English.pdf, at 22.

As a result of PAVE's presence in the building for the past two school years, P.S. 15 has already lost 12 rooms used for professional development, academic intervention services, special education testing, related services, science labs, family support services and instruction. *See* Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 6-7 and Ex. 2. Related service providers and school personnel are often disrupted or forced to compete for space while providing related services to special needs students. For example, two full-time speech therapists are confined to a single room in which "it can be close to impossible to maintain a therapeutic environment" when they are each seeing separate groups at the same time. *See* McGloin Aff.; *see also* Tendler Aff. The third speech therapist shares the dental office space two days a week. *See* McGloin Aff. ¶ 3.

Similarly, occupational therapists compete for space in the computer lab and library during school hours with school clubs, Parent Teacher Association ("PTA") meetings, staff meetings, and supervision meetings for the after-school program. Folland Aff. ¶ 3. Even though some students' IEPs mandate the provision of services in a separate location without any distractions, one occupational therapist's "current working conditions prevent [the provider] from reliably providing services in a separate location." *See* Folland Aff. ¶ 4.

Despite these already unfavorable conditions, in December 2009, the DOE proposed a plan to continue and expand PAVE's co-location with P.S. 15 for an additional five years, until the end of the 2014-2015 school year. In connection with this proposal, the DOE posted an EIS on the DOE website on December 11, 2009 (the "December EIS"). The December EIS contained a series of vague, general statements regarding the implementation of the co-location, stating only that "[d]ecisions regarding the programming of shared spaces in K015 will be made by school leaders." Pet. Ex. H (December EIS) at 4. Likewise, the December EIS's analysis of the impact of the expanded and extended co-location stated merely that "[n]o current P.S. 15 or

PAVE students will be displaced as a result of this proposal. Students entering kindergarten can apply to PAVE through the charter school lottery. Students in grades 1-8 can apply to the charter school lottery for available seats. District 15 students and residents are given priority in the charter school lottery process." *Id.* The DOE did not mail the December EIS, or otherwise provide the December EIS in written form, to parents of P.S. 15. *See* Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 12.

The DOE held a public hearing on the proposal on January 19, 2010. Forty-three members of the community, including the Petitioners, spoke against the proposal, "citing concerns about the large number of special education students served at P.S. 15 and the belief that the Department of Education's Instructional Footprint does not accurately account for the space required to provide services such as speech, occupational and physical therapy." *See* Pet. Ex. J (Summary of Proposal and Comments Received at January 26 Hearing).

On January 26, 2010, the day of the scheduled PEP vote, the DOE issued a new proposal and an EIS, stating that after receiving feedback from the public and further consideration, the DOE had changed the proposal to allow PAVE to remain in the building and to expand until the end of the 2012-2013 school year, rather than until the end of the 2014-2015 school year (the "January EIS"). *See* Pet. Ex. K (January EIS). Specifically, the proposal stated that "[i]f the construction of the new school facility is not completed by the end of the 2012-2013 school year, when PAVE will serve grades K-5, The [sic] Department of Education will re-evaluate the available space in the building to make a determination regarding whether PAVE can remain in the K015 building." *Id.* The January 26 EIS did not explain why the DOE changed its proposal to limit the continued co-location by PAVE to three, rather than five, more years; nor did the EIS

explain how this shorter time would have less of an impact on the school during the three additional years of co-location and expansion.

After filing the amended EIS on January 26, the DOE did not hold another public hearing to allow interested parties the opportunity to present comments and concerns before bringing the proposal to a vote before the PEP, as is required by New York Education Law §2590-h (2-a)(d). Instead, the DOE held the PEP meeting as originally scheduled on January 26, 2010 and put the proposal to a vote at the meeting. The PEP, however, did not approve the proposal for P.S. 15 listed on the January EIS or the proposal from the December EIS. Instead, the PEP voted to approve "the proposal to extend the co-location of PAVE Academy Charter School and P.S. 15K until construction of PAVE Academy Charter School's private facility is complete." *See* Pet. Ex. L (Resolution Regarding Approval of Proposed Co-Location in K015). The resolution contained no projected end date for PAVE's co-location with P.S. 15.

On February 25, 2010, the Petitioners filed an appeal to the New York State Commissioner of Education challenging the DOE's actions regarding the January 27, 2010 PEP vote to expand and continue the co-location of PAVE and P.S. 15. They alleged that the DOE failed to comply with New York State Education Law because both EISs failed to properly assess the impact of the co-location on P.S. 15 and PAVE students. The petition identified the negative impact that expanded co-location would have on P.S. 15 students, in particular students with special needs, and asserted that both EISs failed to disclose any of this impact. Petitioners also claimed that the PEP's vote to extend the co-location of PAVE at P.S. 15 for an indefinite period of time violated the procedural requirements of New York State Education Law §2590-h because the resolution that the PEP ultimately approved was never discussed by any EIS and the DOE failed to file an EIS or hold a public hearing on the ultimate resolution. The Petitioners

asked the Commissioner to annul the PEP vote approving the continued co-location and expansion of PAVE at P.S. 15 and requested a stay of the January 27 vote pending the Commissioner's decision on the petition.

In an affidavit dated March 4, 2010, the DOE responded to the Petitioners' request for a stay. In that response, the DOE conceded that the resolution voted upon at the January meeting was not the same as the proposal in the notice and EIS posted on the DOE's website. The DOE represented that it would issue a proposal and an EIS reflecting that the co-location would end in the 2012-2013 school year, hold a public hearing on the proposal and put the matter to a vote on April 20, 2010. Pet. Ex. M (Affidavit of Debra Kurshan), ¶ 7. The DOE also represented that it would work with PAVE to ensure that the notice announcing the PAVE lottery made clear that the siting of PAVE's 2010-2011 kindergarten class in the K015 building was contingent on the outcome of the April 20 PEP vote. *Id.*, ¶ 9. Petitioners agreed to hold their appeal in abeyance until the vote on the new proposal was completed, but reserved all claims related to the notice and hearing process. *Id.*

On March 26, 2010, Judge Joan Lobis of the New York County Supreme Court, issued a decision in *Mulgrew v. Board of Education*, a petition brought pursuant to Article 78 of the New York Civil Practice Laws and Rules challenging the PEP's votes with regard to the closing or change of utilization of nineteen schools, including the January 27 vote to expand PAVE's co-location with P.S. 15. *Mulgrew v. Bd. of Educ.*, No. 101352/10 (N.Y. Sup. Ct. Mar. 26, 2010). Judge Lobis ruled that the DOE failed to comply with the requirements of New York State Education Law §2590-h when it issued EISs for the nineteen schools, including for P.S. 15, that "failed to provide any meaningful information regarding the impacts on the students." *Id.* at 9. Judge Lobis faulted the EISs for "fail[ing] to provide the detailed analysis an impact statement

mandates," pointing as an example to the complete failure of the EISs "to provide information about specific programs existing at the school." *Id.* Judge Lobis further held that the DOE did not comply with the notice requirements of New York State Education Law by failing to distribute hard copies of the EIS to the appropriate community groups and parents, ruling that "limiting 'filing' to posting on the Department of Education website does not constitute compliance with the express filing requirements of the statute." *Id.* at 11. Emphasizing the need for distribution of hard copies of the EISs to the affected communities, the decision noted that "[a]lthough some parents and members of CECs and SLTs may have computer and internet access, certainly not all do." *Id.* Judge Lobis held that the votes of the PEP for these nineteen schools were null and void and ordered the DOE to re-issue EISs for the nineteen schools that comply with the requirements of Education Law §2590-h. *Id.* at 14.

Also on March 26, 2010, the DOE posted on its website a new EIS and Notice of Extension of the Co-Location of PAVE and P.S. 15 (the "March EIS"). The Notice of Extension of the Co-Location of PAVE and P.S. 15 stated that the co-location would be limited to the 2012-2013 school year, "however, if the construction of the new facility is not completed by the end of the 2012-2013 school year, when PAVE will serve grades K-5, the DOE will re-evaluate the available space in the building to determine whether sufficient space exists for PAVE to remain in the building." Pet. Ex. P (April Notice of Revised Educational Statement). Despite Judge Lobis's holding that the mere posting of an EIS on the DOE's website did not comply with the notice requirements, the DOE did not mail the new notice or EIS, or otherwise provide hard copies, to P.S. 15 parents. Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 12. In addition, the website posting failed to comply with the Chancellor's Regulations requirements for translation. While the website provided a link to a translation of the EIS into Spanish, there

were no links that provided translations of the EIS into the other seven most common languages other than English spoken by parents in New York City, as required by Chancellor's Regulation A-663. *See* Reply to DOE Ex. D (PEP Website). And, the link to the Spanish translation was in English, meaning that Spanish-speaking parents may have not understood how to access the Spanish translation. *Id.*

As with the prior EISs for P.S. 15, the March EIS stated that the co-location would not impact the students at P.S. 15. Significantly, despite the allegations in Petitioners' February 25 appeal, and despite the comments made at the hearing on January 19 and the PEP meeting on January 26, the new EIS still failed to adequately address the impact that the co-location would have on students with disabilities. The EIS summarily concluded that, "The Chief Achievement Office found that there is adequate space in the K015 building to continue to provide all special education and related services required by students as per their Individual Education Plans [sic] as PAVE continues to expand." Pet. Ex. Q (April EIS). However, the EIS failed to provide any information regarding the basis for this determination, making it impossible to assess its accuracy. Special education students at P.S. 15 already lack sufficient and appropriate space to receive their legally mandated services. Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 7. Taking away more classroom space will only exacerbate the problem.

On April 14, 2010, the DOE conducted a public hearing on the new proposal to continue and expand the co-location of PAVE with P.S. 15. Thirty-three members of the public submitted comments opposing co-location and six members of the public submitted comments in support of co-location. *See* DOE Ex. L (April Analysis of Public Comment). The Petitioners submitted comments and testified at the hearing, detailing the detrimental effect of the co-location on the educational services provided to P.S. 15 students and the potential effects of an extended and

expanded co-location. Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 12-14 and Exhibit 3.

At the hearing, Helaine Doran of the Campaign for Fiscal Equity testified and submitted a report to the DOE. The report, which was prepared by Mary Filardo of the 21st Century Fund, detailed the flaws in the DOE's analysis of space utilization. Ms. Filardo is a national expert on school facilities and has participated in school planning as it relates to co-location of schools. *See* Pet. Ex. R (21st Century Fund Report). Based on her analysis, Ms. Filardo determined that it would not be possible for P.S. 15 to support the continued expansion of PAVE as contemplated in the DOE proposal. She determined that, with space reorganization, relocation and design modification, it may be possible for P.S. 15 to cede one and one-half classrooms to PAVE without having a negative effect on P.S. 15, but that P.S. 15 would be unable to cede any further space without a negative impact on the P.S. 15 students. *Id.*

On April 20, 2010, by an eight to four vote, the PEP voted in favor of the proposal to continue and expand the co-location of P.S. 15 and PAVE Academy. On May 4, 2010, Petitioners filed this appeal to the Commissioner. Respondents filed their Answers on May 24, 2010 and Petitioners filed their Replies on June 7, 2010.

On June 3, 2010, the P.S. 15 and PAVE Building Council held a meeting to discuss space allocations for the 2010-2011 school year. Elzogbhy Aff. in Support of Reply to DOE ("Elzoghby Aff."), dated June 7, 2010, ¶ 3. At the meeting, however, representatives from the two schools were not permitted to discuss options for space sharing for the upcoming year. Rather, a DOE representative from the Office of Space Planning distributed a completed space plan without allowing input from P.S. 15 Building Council members. *Id.* at ¶ 6.

ARGUMENT

I. THE MARCH EIS DOES NOT COMPLY WITH NEW YORK EDUCATION LAW

A. New York Education Law Requires the DOE to Provide A Detailed and Meaningful Analysis of the Impact on All Affected Students

New York Education Law Section 2590-h(2-a) ("Section 2590-h(2-a)") requires the DOE to "prepare an educational impact statement regarding any proposed school closing or significant change in school utilization, including the phase-out, grade reconfiguration, re-siting, or co-location of schools, for any public school located within the city district." NY Educ. Law § 2590-h(2-a)(a). Each EIS must be made publicly available, and within 30 to 45 days after the filing thereof, there must be a "public hearing with the impacted community council and school based management team, at the school that is subject to the proposed school closing or significant change in school utilization [to allow] all interested parties an opportunity to present comments or concerns regarding the proposed school closing or significant change in school utilization." NY Educ. Law § 2590-h(2-a)(c) and (d). Following the public hearing, the PEP must vote on the proposal set forth in the EIS. *See* NY Educ. Law § 2590-h(e).

In each EIS, the DOE must include the following information:

(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.

See NY Educ. Law § 2590-h(2-a)(b).

The amendments to New York Education Law requiring EISs are only a year old, so the case law interpreting the requirements is limited. *See Mulgrew v. Board of Educ. of the City School Dist. of the City of New York*, 2010 NY Slip Op 20146 at 8 (N.Y. Sup. Ct. Mar. 26, 2010). However, the concept of requiring administrative bodies to prepare impact statements as part of a public process is not new. The concept of educational impact statements is analogous to New York's environmental law, the State Environmental Quality Review Act ("SEQRA"), which contains similar guidelines for preparing environmental impact statements prior to allowing actions that may have an adverse environmental effect. Just as the purpose of the amendments to New York Education Law were designed to give parents, teachers, students and community members an opportunity to understand the reasoning behind the proposed closure, reduction, re-siting, or expansion of a school and to voice their concerns to the DOE regarding the decision-making process, SEQRA requires agency decision-makers to identify the proposed

action's environmental impact, articulate the bases for their decision, solicit comments from the public on the draft impact statement, and, if there is sufficient public interest that would aid in the decision-making process, hold a public hearing. *See* 2009 Legis. Bill Hist. NY S.B. 129; *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-416 (N.Y. 1986). Given the clear relationship between the two frameworks, not only does the analogy make practical sense, the body of law governing SEQRA is "instructive in interpreting the relevant provisions of the Education Law." *Mulgrew*, 2010 NY Slip Op 20146 at 8.

Courts have set a clear standard for evaluating whether an environmental impact statement is adequate. The court must evaluate "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Chinese Staff & Workers Ass'n v. New York*, 68 N.Y.2d 359, 363 (N.Y. 1986). It is the duty of the courts to "assure that the agency itself has satisfied SEQRA, procedurally and substantively." *Id.* In its evaluation, the court should review the record to determine whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination. *Chinese Staff & Workers Ass'n*, 68 N.Y.2d 359, 363 (citing *Jackson*, 67 N.Y.2d 400, 417; *Aldrich v Pattison*, 107 AD2d 258, 265; and *H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 AD2d 222, 232). The court also must determine whether the agency made a thorough investigation and reasonably exercised its discretion. *Id.*

Conducting a "cursory examination" and providing "conclusory statements" that are not supported by data and documentation does not satisfy the agency's obligations. *See Matter of Pyramid Co. of Watertown v. Planning Bd. of Town of Watertown*, 24 A.D.3d 1312, 1315 (N.Y. App. Div. 4th Dep't 2005). Further, an agency's failure to include a detailed, reasoned

elaboration in its analysis is cause for dismissal of the proposed agency action. *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 371 (N.Y. 1988) (noting that if the statutory environmental review requirements of SEQRA are not met, "the governmental action is void and, in a real sense, unauthorized").

In *Mulgrew*, Plaintiffs challenged the PEP's votes to close or co-locate 19 schools, including the co-location of PAVE with P.S. 15. *See Mulgrew*, 2010 NY Slip Op 20146 at 5; *Mulgrew* Petr.'s Br. at 4. Looking to the analysis of SEQRA impact statements, the New York Supreme Court found the EISs of the 19 schools, including the December EIS for PAVE and P.S. 15, to be inadequate because the DOE "failed to provide the detailed analysis an impact statement mandates." The Court explained that although the DOE "provided substantial information in response to the statistical requirements of the statute, such as 'the current and projected pupil enrollment of the affected school' and the 'type, age, and physical condition of such school building, maintenance, and energy costs, recent or planned improvements to such school building, and such building's special features, they have failed to provide any meaningful information regarding the impacts on the students." " *See Mulgrew*, 2010 NY Slip Op 20146 at 9. Because the EISs did not comply with Section 2950-h, the Court nullified the PEP votes and required the DOE to re-issue EISs for the 19 schools in compliance with New York Education Law.

B. The PAVE EIS Does Not Meet the Statutory Requirements for Analyzing the Impact on the Affected Students of P.S. 15

New York Education Law requires the DOE to include in any EIS "the *ramifications* of such school closing or significant change in school utilization upon the community" and "the *impacts* of the proposed school closing or significant change in school utilization to any affected students." *See* NY Educ. Law § 2590-h(2-a)(b)(i) and (ii) (emphasis added). The continued co-

location of PAVE affects the current and prospective students at P.S. 15 as well as the expansion; any EIS relating to the continuation and expansion of the co-location therefore must include a discussion of the impact on them.

Despite the holding in *Mulgrew*, the March EIS submitted by the DOE fails to comply with the requirements of New York Education Law. Although the March EIS contained more information about current and projected space allocations at the K015 building, the March EIS still contains conclusory statements unsupported by data and documentation. Moreover, the March EIS ignores the concerns and impact that had been identified in prior public comments as well as the prior petition.

In the section entitled "Impact of the Proposed Extended Co-location on the Community, Existing Schools and Students," the March EIS states that despite PAVE's expansion and continued co-location, P.S. 15 will "continue to have sufficient instructional space to serve students in K015 per the citywide instructional footprint as PAVE expands." Pet. Ex. Q (April EIS) at 5. However, in the 21st Century Fund report, Mary Filardo stated that even with "the most optimal collaborative planning process and support from DOE" there is still not enough space in the K015 building to support the DOE's proposed expansion of PAVE, which contemplates PAVE adding six class sections. Pet. Ex. R. (21st Century Fund Report). Using the DOE's own information about instructional square footage at K015, Ms. Filardo noted that it may be possible to free up one and one half classrooms without having a negative impact on P.S. 15, but that would still require "some space reorganization, relocation, and design modification of existing spaces to limit the impact of losing these additional spaces." *Id.* The DOE, however, failed to respond to these concerns concluding summarily that

> [t]he DOE's Instructional Footprint was developed by the School Construction Authority, the Office of Portfolio Planning, and the Division of Teaching and Learning to apply a

> standard for the minimum number of rooms a school should be allocated based on the grade level and number of classes the school serves . . . In addition, the report does not discuss how the rooms are programmed or the amount of periods a particular room is used per day. Both of these factors could lead to more efficient programming of spaces so that students can be served. DOE Exh. L.

According to the DOE's own Instructional Footprint, it appears that PAVE will require 16 full-size equivalent rooms (Pet. Ex. Q (April EIS) at 6) and P.S. 15 will require at least 33 full-size equivalent classrooms for the 2012-2013 school year, which does not include space for related services.[2] *See* Reply to DOE ¶ 61 and Ex. B If there are 53 full-size equivalent spaces available in the building, and 5 are already allocated to community-based organizations (*see* Affidavit of Thomas Taratko ¶ 11), it is evident there will not be enough space available to accommodate both PAVE and P.S. 15.

This estimate of space does not include the space that P.S. 15 requires to provide related services to its students. P.S. 15 needs space for two occupational therapists, three speech teachers, one Adaptive Physical Education Teacher ("APE"), one English as a Second Language ("ESL") teacher, two academic intervention teachers and one SETSS teacher. *See* Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 14 and Exhibit 3.

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[2] If enrollment at P.S. 15 stays the same, it will have "3 pre-kindergarten classes, 15 general education/CTT classes and 6 self-contained special education classes." DOE Ans. ¶ 60. According to the 21st Century Report, P.S. 15's classrooms are too small to use a half size room for the self-contained classes (Pet. Exh. R.), so the school will need 24 full size rooms for instructional purposes. Based on the New York City Department of Education Instructional Footprint, P.S. 15 also requires the following rooms:

a. 3 cluster rooms with 1,000 to 1,300 square feet per room, which is larger than the space allocated for a full-size classroom;

b. 2 resource rooms, each with the required square footage of half a classroom;

c. 1-2 classrooms for student support services (i.e. guidance office, records room; college office, parent coordinator room, PTA/Community Partner Office, Conference Room);

d. 1.5 classrooms for storage; and

e. 1.5-3 classrooms for administrative services (general office, principal's office, assistant principal's office, attendance, dean, program office, teacher workroom).

This analysis by the DOE means that, at a minimum, P.S. 15 will require 33 full size equivalent rooms for the 2012-2013 school year. This analysis does not, however, take into account any space required for the provision of related services. *See* NYC DOE Instructional Footprint, Reply to DOE Exh. B.

The March EIS did not describe the full impact that co-location has had and will have on students with special needs. In particular, as a result of the current co-location, P.S. 15 students have already had to give up six full size rooms and six half size rooms to accommodate the PAVE classrooms. Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 6-7 and Ex. 2. This loss in rooms has forced related service providers to share space, which can severely diminish the ability to provide services, especially speech therapy and counseling. *See* McGloin Aff. ¶ 3 and Budd Aff. ¶ 3. The March EIS did not describe this impact at all, stating instead that "P.S. 15 students will not be displaced as a result of PAVE"s continued co-location . . . While the two schools will have to share certain common spaces, . . . there will continue to be sufficient space in K015 to serve all P.S. 15 students, including those requiring special education and other related services." Pet Exh. Q (April EIS) at 8.

The DOE now asserts in its Answer that "related service providers, such as speech and language teachers, occupational therapists, and physical therapists, generally do not require their own dedicated space in a school building." DOE Ans. ¶ 65. Contrary to DOE's belief, speech and language pathologists need to work in an environment that is "quiet, free from distractions" as they work with their respective students.[3] For students with attentional or sensory difficulties, classroom-based services may be impractical. *See* McGloin Aff., ¶ 2. Further, if classroom-based services are appropriate for a student, these services should already be on the student's IEP. Changing a student's IEP based on the space constraints of the school, rather than on the individual needs of the student, violates the intent of the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §1400 *et seq.*

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[3] *See, e.g.*, American Speech-Language-Hearing Association, *Speech-Language Pathology Room, Equipment, Furniture, and Confidentiality*, Appendix C, Table 1, http://www.asha.org/ docs/ html/TR2002-00236.html#sec1.1.

Many students with disabilities have IEPs that legally require that they receive their services in a location outside the classroom. *See* Folland Aff., ¶ 4. In-class services are often inappropriate for students with difficulties focusing and could detract from the effectiveness of the services. *See* Visbal Aff. For example, students in speech therapy need to be able to hear clearly what the provider is saying; speech therapy becomes much more difficult and much less effective if another speech therapy session is happening simultaneously in the same room. McGloin Aff., ¶ 3; Tendler Aff., ¶ 2.. Likewise, students in counseling need confidentiality, but students have no protection of confidentiality if another counseling session is occurring in the same room. *See* Budd Aff., ¶ 3.

When creating an IEP, educators are required under the IDEA to consider the child's individual educational needs, not the space needs of the school. *See* 20 U.S.C. 1400 (d)(1)(A) (The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services *designed to meet their unique needs* and prepare them for further education, employment, and independent living.") (emphasis added). Modifying students' IEPs to allow for PAVE's expansion would not only violate the IDEA but do a grave disservice to P.S. 15's special education students.

The March EIS likewise ignores the impact that the continued and expanded co-location will have on other services provided at P.S. 15 for the community. The loss in space from the current co-location has resulted in downscaling of academic intervention and enrichment services. *See* Battis Aff. in Support of Petition, dated May 4, 2010, ¶ 6 and Exhibit 2. For example, a room that had been previously used for academic intervention, arts and enrichment was lost to PAVE and never replaced. As a result, the availability of arts and enrichment programming decreased and the size of academic intervention groups increased, making it nearly

impossible for the intervention program to run as effectively as it did before the PAVE co-location. *Id.* This impact will continue and likely increase as PAVE expands and adds students in the building. *See e.g.,* Visbal Aff. at 1. Rather than addressing this impact, the March EIS merely stated that "the impact of the continued co-location on additional enrichment programs and non-mandated services should not be significant." Pet. Exh. Q (April EIS) at 7. But, as detailed above, it is extremely unlikely that all of these programs can be adequately accommodated in such a small space without causing a significant impact on the services provided to P.S. 15 students.[4]

Finally, even assuming, *arguendo*, that the DOE's proposal complies with the minimum space allocation set forth in the DOE's footprint, any reductions to the space allocated to P.S. 15 would still be likely to impact the quality of instruction and services provided to the students attending P.S. 15 students. The EIS was required to fully explain to parents and the PEP any such potential ramifications of the proposal and failed to do so.

The DOE maintains that it "has the discretion to decide what information should be included, especially given the broad latitude afforded to school officials' education judgments." (DOE Ans. ¶ 107). As in *Mulgrew*, Petitioners' challenge here is not to "the ultimate decisions with respect to individual schools, but to [the DOE's] alleged failure to follow the statutory prerequisites in making those decisions." *Mulgrew* 2010 NY Slip Op 20146 at 8. As Judge Lobis noted, "where statutory language is clear regarding procedural steps which must be taken

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[4] Indeed, expanded co-location limits the opportunities for members of the community to send their children to P.S. 15 for pre-kindergarten. As indicated in an email from Peggy Wyns-Madison, the principal of P.S. 15, the school received several more applications for pre-kindergarten than the number of available seats. DOE Exh. 1 (Email from P. Wyns-Madison). Last year, the school was able to open another pre-kindergarten class to accommodate the increased need. *Id.* By expanding the co-location of PAVE in the building, and giving additional classrooms to PAVE, the DOE is foreclosing the possibility of increasing the number of pre-kindergarten sections at the school to meet the needs of the community.

by an agency prior to an administrative action, and those steps have not been taken, the administrative action must fail." *Id.* at 12. The Court emphasized that Section 2590-h(2-a)

> mandated the preparation of detailed EISs for schools that the chancellor proposed to close or significantly alter, and created a public process with meaningful community involvement regarding the chancellor's proposals. That entire legislative scheme must be enforced, and not merely the portion extending mayoral control of the schools.

Id. at 13.

Similarly, the DOE's argument that requiring school leaders to work out space allocation plans in advance of a proposal's approval by the PEP "does not make sense" (DOE Ans. ¶ 110) is erroneous. In order for the public to provide meaningful input on the proposal, they must be fully aware of its ramifications. New York Education Law clearly details the categories of impact that must be disclosed in an EIS, and the DOE's decision to pass the buck to the schools for a later determination does not excuse the DOE's obligation to disclose the potential impacts in an EIS. Furthermore, although the DOE purports to leave many of the space allocations to the school Building Council, the P.S. 15/PAVE Building Council has not been allowed to make these determinations. Rather, DOE officials created their own space plan for the building without allowing input from the schools. *See* Elzoghby Aff. ¶ 3-5.

Accordingly, the March EIS failed to address the ramifications of the continued and expanded PAVE co-location upon the P.S. 15 community and the impact on the P.S. 15 students, in violation of New York Education Law.

C. This Appeal Is About the DOE's Failure to Comply with New York Education Law

PAVE asserts in its Answer that if the Commissioner annuls the April 20 vote, "182 students would be displaced only months before the scheduled start of the 2010-2011 school

year." PAVE Ans. ¶ 54. PAVE cannot excuse the DOE's failure to comply with the procedures set forth in the law by arguing that PAVE students will be harmed by a finding that the DOE did not comply with the law. The DOE must first comply with the procedures set forth in the New York Education law *before* the proposed expansion of PAVE becomes effective. NY Educ. Law § 2590-h(2-a)(e). To be sure, the Petitioners are not seeking to harm or negatively impact any of the students at PAVE; rather, the Petitioners are merely requesting that the DOE be required to follow the procedures set forth in New York Education Law.

Moreover, PAVE and its students were on notice that any continued or expanded co-location was dependent upon the DOE's compliance with the procedural requirements of Section 2590-h (2-a). In the DOE's response to Petitioners' Request for a Stay in their first petition challenging the January 27 resolution of the PEP, the DOE stated that it would work with PAVE to ensure that the notice announcing PAVE's lottery for the 2010-2011 class made clear that the siting of the class in K015 would be contingent upon the outcome of the April PEP vote. Based on this notice, parents applying to PAVE should have been on notice that the seats for their children were not guaranteed, but rather contingent upon the proper voting process. *See* Pet. Ex. M (Affidavit of Debra Kurshan), ¶ 9.

II. THE DOE FAILED TO COMPLY WITH STATUTORY NOTICE REQUIREMENTS.

A. The DOE Did Not Provide the Requisite Notice of the Hearing to Affected Parents and Students

The DOE failed to provide adequate notice of the proposed extension and expansion of PAVE co-location with P.S. 15 to all interested parties in violation of New York Education Law. Pursuant to Section 2590-h(2-a)(d):

> the chancellor … shall hold a joint public hearing with the impacted community council and school based management team, at the school that

> is subject to the proposed school closing or significant change in school utilization, and shall allow all interested parties an opportunity to present comments or concerns regarding the proposed school closing or significant change in school utilization. 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.

(emphasis added).

Judge Lobis considered the sufficiency of notice under Section 2590-h(2-a)(d) in *Mulgrew* and rejected the DOE's argument that solely posting the EIS and notice on the DOE's website was sufficient under the statute: "Posting the EISs predominantly on the DOE's webpage ensured that many community members would be left in the dark, violating a key Legislative precept behind the amendments: informed participation by the public, not mere notification of the DOE's ultimate goal." *Mulgrew*, 2010 NY Slip Op 20146 (holding that posting the information solely on the DOE website "does not constitute compliance with the express filing requirements of the statute.") Indeed, it is clear from the text and legislative history of the statute that the DOE must post notice "widely and conspicuously" in such a manner as to *maximize* the number of affected individuals that receive notice so that those affected have an opportunity to voice their concerns. *See* NY Educ. Law § 2590-h(2-a)(c); 2009 Legis. Bill Hist. NY S.B. 129; 2009 NY A.B. 5442.

Despite these statutory requirements and the prior holding in *Mulgrew* as to the deficiencies of the DOE's notice of the December EIS, the DOE did *not* provide adequate notice to the P.S. 15 parents and other affected communities. Instead, the DOE again relied primarily on the posting of the EIS on its website for notice and did not send any notices or the EIS home to P.S. 15 parents. *See* Aff. of John Battis in support of Reply, dated June 7, 2010, ¶ 2 and Aff.

of Lydia Bellahcene in support of Reply, dated June 7, 2010, ¶ 4. Posting a notice on the PEP website did not maximize the number of P.S. 15 parents who received notice of the hearing regarding the proposed expansion and extension of the PAVE co-location of P.S. 15. 93.9% of the enrollment at P.S. 15 currently lives in poverty and the number of P.S. 15 students living in temporary housing increased over 235% in recent years. *See* Reply to DOE Ex. C (School Demographics and Accountability Snapshot. The DOE should expect that many of these families do not have access to the internet and could not access the March EIS via the PEP website, if they even had notice to check the DOE website for the posting. As a result, the DOE should have distributed or made available the March EIS to parents of P.S.15 students in another fashion to maximize the number of affected parents who received the notice of the proposal. *See Mulgrew*, 2010 NY Slip Op 20146 at 11 (""Although some parents and members of CECs and SLTs may have computer and internet access, certainly not all do.").

Moreover, the website itself was in English. 9.21% of the students at P.S. 15 are English Language Learners (*See* Pet. Ex. A (P.S. 15 Register)), but the website did not translate the notice into the native language of the parents. Although the website had a link to the EIS in Spanish, the link itself was in English and therefore did not enable Spanish-speaking only parents to access the EIS. Reply to DOE Ex. D (PEP Website). In addition, the website provided no links to translations of the EIS into other languages, including the eight most common languages other than English spoken by parents in New York City, as required by Chancellor's Regulation A-663. *Id.* Thus, many of the parents would likely not have understood the website, even if they did have access to the internet.

B. The DOE Failed to File the March EIS Six Months Before the Start of the School Year

New York State Education Law §2590-h(2-a)(c) states, in relevant part, that an EIS must be made "publicly available . . .at least six months in advance of the first day of school in the succeeding school year."

The first day of school for the 2010-2011 school year will be September 8, 2010. Pet. Ex. S (School Year Calendar). To comply with Section 2590-h(2-a)(c), the DOE was required to file the proposal and EIS by March 8, 2010. The DOE filed the new EIS and proposal regarding the co-location of PAVE with P.S. 15 on March 26, 2010, only 5 months and 13 days before the first day of school. As such, the EIS and proposal did not comply with the requirements of §2590-h(2-a)(c).

In its Answer, the DOE claims that it complied with the law because the DOE made an "initial" EIS public on December 11, 2009 and the "six months in advance" requirement does not apply to revised EISs, citing in support Section 2590-h(2-a)(d-1),which addresses revisions of EISs. Because the March EIS was not a revised notice and EIS, this paragraph does not apply.

The EIS filed by the DOE on March 26, 2010 was a new EIS, and should be subject to the six-month rule. Although the statute permits the chancellor to "substantially revise" EISs, certainly any revisions must occur prior to a PEP vote on the proposal and EIS. Here, the PEP voted on the first proposal and EIS on January 27. Once the PEP voted, the DOE cannot "revise" the already voted upon proposal. Instead, any changes to the voted upon proposal must be through the issuance of a *new* proposal and *new* EIS, and with a new PEP vote.

The statute contemplates that revisions may be made to an EIS "after receiving public input." NY Educ Law § 2590-h(2-a)(d-1) (2009). In this case, the March EIS and April PEP vote was not the result of public input, but rather, an acknowledgement of errors that occurred

during the January 27 vote. The DOE should not be allowed a "second bite at the apple" and have the opportunity to re-do an illegal PEP vote when the statutory timeframe to do so has expired. The PEP had already voted on the first EIS, so the time for the DOE to revise it had already passed before the DOE issued the March EIS. As such, the EIS issued on March 26, 2010 was a new EIS for purposes of the statute, and the six-month rule applies.

Notably, the DOE had time to issue a new proposal and EIS prior to the March 8 deadline. On March 4, the DOE acknowledged the errors of the January vote and announced that it would issue a correct proposal and EIS for the PAVE co-location and hold a new hearing and vote. *See* Pet. Ex. M (Affidavit of Debra Kurshan), ¶ 9. Rather than issue the proposal and EIS four days later and within the six month timeframe, the DOE decided to wait until March 26 to issue the proposal. March 26 was the last day of school before the spring vacation began, further decreasing the likelihood that parents would review or see the proposal. *See* 2009-2010 School-Year Calendar, http://schools.nyc.gov/NR/rdonlyres/F5C4C865-B4FF-45BE-A396-536C0695EEDB/64858/20092010SchoolYearCalendarRev.pdf.

If taken to its logical conclusion, the DOE's argument would allow it to issue an EIS six months before the start of school, and then make repeated substantial revisions to EISs for as long as the DOE sees fit – even after a PEP vote. Such an interpretation would stretch the plain meaning of the statute. *See Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation and that judicial review must end at the statute's unambiguous terms (internal citations omitted)").

III. THE DOE'S VIOLATIONS OF NEW YORK EDUCATION LAW ARE SIGNIFICANT AND SHOULD NOT BE TRIVIALIZED.

In the DOE's Memorandum of Law, the DOE argues that any failure to comply with Section 2590-h(2-a) is harmless because they were able to obtain "informed public input" in this

case. *See* DOE Mem. Law. The DOE therefore suggests that any technical or procedural errors are *de minimis* in nature and the PEP vote should be upheld.

The *Mulgrew* Court rejected the same arguments the DOE makes here, finding that the DOE "appear[s] to trivialize the whole notion of community involvement." 2010 NY Slip Op 20146. To ensure that the DOE provides the proper notice and information to affected communities going forward, the Commissioner must ensure that the DOE follow the proper procedures in each instance. If the Commissioner were to agree with the DOE that any lack of compliance is of a *de minimis* nature that should be dealt with only prospectively, then the DOE would be tempted to circumvent the statutory requirements in every case. "Where statutory language is clear regarding procedural steps which must be taken by an agency prior to administrative action, and those steps have not been taken, the administrative action must fail." *Mulgrew*, 2010 NY Slip Op 20146 (citing *Siegal v. N. Y. State Div. of Hous. and Community Renewal*, 143 A.D.2d 430 (2d Dept. 1988)). In any event, as described above, the DOE's failure to comply with the statutory requirements will result in a significant impact upon the community and is more than a *de minimis* failure.

Accordingly, it is critical that the Court enforce the substantive and procedural mandates of the statute to ensure that the affected communities are able to play a meaningful role in the decisions regarding school closings and significant changes in school utilization.

IV. PAVE IS A PARTY TO THIS APPEAL

This Petition challenges the decisions made by the DOE in connection with the DOE's vote to continue and expand the co-location of PAVE with P.S. 15. Although the actions complained of were committed solely by the DOE, in another matter challenging the DOE's decision to expand co-location, the Commissioner ordered that the co-locating charter school be joined as a Respondent. *See* Letter from Mary Gammon, Appeals Coordinator, to Rebecca Shore, re: Santos et al, v. DOE, Appeal No. 19108, dated April 19, 2010. Petitioners therefore joined PAVE as a Respondent here. Regardless of whether PAVE is a party, any significant change in utilization of public school space is subject to Section 2590-h, and any expanded co-location is contingent upon the DOE properly complying the procedures of Section 2590-h. Thus, the DOE cannot take space from P.S. 15 and give it to PAVE without fully complying with Section 2590-h. NY Educ Law § 2590-h(2-a)(e) (2009).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the April 20, 2010 PEP vote to expand PAVE and extend its co-location with P.S. 15 Patrick F. Daly should be annulled on the ground that it violated the substantive and procedural requirements identified in New York State Law.

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