No. 16116

The University of the State of New York

The State Education Department

Before the Commissioner

REDACTED

Appeal of JESSICA SANTOS, on behalf of her son , ROSALINDA MENDEZ, on behalf of her son , YVONNE WALKER, on behalf of her daughter , TAMIKA FELIX, on behalf of her son , CYNTHIA BONANO, on behalf of her daughter and GUILLERMINA PIZARRO, on behalf of her children and , from action of the New York City Department of Education and the Girls Preparatory Charter School of New York 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

Mayer Brown, LLP, attorneys for respondent Girls Preparatory Charter School of New York, Joseph DeSimone, Esq., of counsel

Petitioners challenge a proposal of the New York City Department of Education ("DOE")[1] relating to the expansion of Girls Preparatory Charter School of New York ("Girls Prep") in a public school building. The appeal must be sustained in part.

[1] Girls Prep is also named as a respondent in this matter. DOE and Girls Prep are collectively referred to herein as "respondents."

Petitioners are parents of children who attend P.S. 94 and P.S. 188 in Manhattan. P.S. 188 is a public school, that serves students in grades pre-kindergarten through eight, at the M188 building in Community School District 1 ("M188" or the "M188 building"). P.S. 94 is a public "District 75 school"[2] that serves students with disabilities in grades kindergarten through eight at multiple locations, including the M188 building, which, in the 2009-2010 school year served students in grades four through eight ("P.S. 94 at M188").[3] Also located in the M188 building is Girls Prep, which is an all-girls charter school.

In the 2009-2010 school year, Girls Prep served students in kindergarten through grade 5. Girls Prep, however, plans to expand over the next several years to serve students in kindergarten through grade eight, with grade six being added in the 2010-2011 school year. To accommodate this expansion, Girls Prep requires more space in the M188 building. Accordingly, DOE developed a proposal that created space for Girls Prep in the M188 building by eliminating P.S. 94's fourth and fifth grades in that building. Specifically, under DOE's proposal, no new P.S. 94 fourth and fifth grade students would be assigned to the M188 building; the P.S. 94 students who would have attended class at M188 would instead attend class at one of P.S. 94's other sites.[4] This way, as the number of fourth and fifth graders in P.S. 94 at M188 are reduced, additional space would be available in the M188 building for use by Girls Prep. Under the proposal, however, all P.S. 94 students who are currently attending class in the M188 building - including fourth and fifth graders - would continue to attend class in that building.

DOE's proposal was developed over a number of months beginning in September 2009 and, on January 5, 2010,

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[2] According to DOE's District 75 superintendent, District 75 provides "citywide educational, vocational, and behavior support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or are multiply disabled."

[3] According to DOE, the grade levels served by P.S. 94 at M188 could also be deemed grades 4-9 (which is what the educational impact statement at issue in this matter indicates) based on chronological age/grade level equivalents.

[4] DOE indicates that these students would remain in their current locations.

members of its staff met with the principals and parent representatives of P.S. 188 and P.S. 94. Revisions to the proposal were later discussed with the principals of P.S. 94, P.S. 188 and Girls Prep, and on February 11, 2010, a hearing on the proposal was held which 390 people attended. On February 24, 2010, DOE's proposal was approved by the Panel for Educational Policy ("PEP"). This appeal ensued.[5]

Petitioners assert that DOE failed to comply with the requirements of Education Law §2590-h(2-a) in a number of respects, including that it failed to create an Educational Impact Statement ("EIS") that assessed the impacts of its proposal on P.S. 94's students.[6] Among other things, petitioners request that the PEP's approval of DOE's proposal be annulled and that I order DOE to both create a new EIS for its proposal regarding Girls Prep and issue a separate EIS for the changes proposed to P.S. 94.

Respondents deny petitioners' allegations and contend that DOE complied with all of the statute's requirements. In addition, DOE maintains that even if it failed to comply with the statute's requirements, due to its "extensive engagement and outreach" surrounding the proposal, any non-compliance was de minimus and constitutes harmless error.

Initially, I must address several procedural issues, beginning with petitioners' replies and memoranda 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;

[5] Petitioners commenced this appeal on March 26, 2010, and thereafter, at the direction of my office of Counsel, joined Girls Prep as a respondent.

[6] Petitioners allege other violations of Education Law §2590-h(2-a), as well, including that DOE failed to adequately assess the proposal's impact on P.S. 188 students or to comply with the statute's notice provisions.

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 memoranda of law, 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, on June 11 and 25, 2010, DOE and Girls Prep, respectively, submitted letters for my consideration in response to petitioners' memoranda of law. The Commissioner, in his discretion, may permit the service and filing of additional affidavits, exhibits and other supporting papers (see 8 NYCRR §276.5). Petitioners do not oppose either request, and I have accepted respondents' letters to the extent they respond to information properly contained in petitioners' memoranda of law.

Girls Prep argues that the parents of students attending P.S. 188 lack standing to maintain this appeal. I disagree. Petitioners challenge DOE's actions relating to the use of the school building where their children attend class. Accordingly, I find P.S. 188 parents have sufficient standing.

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, §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).

On January 8, 2010, DOE issued an EIS for its proposal to make a significant change in utilization of the M188 building. This EIS, in general, described DOE's proposal with respect to M188 and provided much of the objective "factual" data required by §2590-h(2-a)(b). Petitioners allege that DOE was required to issue a separate EIS for

its proposal as it pertains to P.S. 94. I find no support for this contention. Since petitioners' allegations relate to the utilization of a single school building, the statute does not require that two separate EISs be created. However, I am unable to find that the EIS created by DOE in this matter complied with the statute with respect to P.S. 94.[7]

Education Law §2590-h(2-a)(b) does not specify what information an EIS must include in analyzing the impact of a school closing or significant change in school utilization on the affected students and community, 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). However, regardless of what information is required in an EIS, DOE must, at a minimum, address each of the statute's requirements, including the ramifications or impact of a proposed action on the community and students. To that extent, noticeably missing from the EIS created by DOE in this matter is any information relating to where P.S. 94 students who would otherwise have attended class at M188 would be served, or the ability of those alternative schools or locations to accommodate them (see Education Law 2590-h[2-a][b][vi]; see also Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York, __ AD3d __, 2010 WL 2605944 [1st Dept 2010]).[8] In addition, DOE indicates that it strives to align the grade levels of its District 75 students with the grade levels of the general education students in its buildings where possible, and that spreading District 75 schools across multiple sites that are shared with other schools helps "ensure that District 75 students have an opportunity for integration with and exposure to their general education peers." Accordingly, information pertaining to what programs, classes or

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[7] In Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York, __ AD3d __, 2010 WL 2605944 (1st Dept 2010), the Appellate Division, First Department, left open the question of the applicable standard of review under Education Law §2590-h(2-a). As in Mulgrew, that issue need not be decided here because regardless of whether the applicable standard of review is strict compliance or substantial compliance, I find that the statute's substantive requirements were not met in this case.

[8] While DOE indicates in its papers that P.S. 94 students who otherwise would have attended school at the M188 building will instead be educated at other P.S. 94 sites, this information was not provided in the EIS at issue.

opportunities, if any, new P.S. 94 fourth and fifth grade students would have had at M188 and might be impacted should have been addressed in the EIS, but was not (see e.g. Mulgrew v. Bd. of Educ. of the City School Dist. of the City of New York, 28 Misc.3d 204 [Sup. Ct. 2010] [EIS inappropriate because it failed to provide information about specific programs existing at schools to be closed or phased out, or where the students at issue would be able to find such programs]).

DOE argues that it was not required to create an EIS for P.S. 94 because there was no "significant change in school utilization" for P.S. 94 within the meaning of Education Law §2590-h(2-a). Specifically, DOE contends that since P.S. 94 will continue to exist and serve more students than it did in the 2009-2010 school year, albeit with new fourth and fifth grade students served elsewhere, its actions with respect to P.S. 94 do not constitute a "grade reconfiguration" or "phase-out" of the school. DOE's argument, however, ignores the fact that the expansion of Girls Prep admittedly involves a significant change in school utilization and is linked directly to the creation of additional space by placing new P.S. 94 fourth and fifth grade students in other buildings. In a case such as this, where multiple public schools share the same building, the focus is necessarily on the change in utilization of the building, and thus the Chancellor was obligated by Education Law §2590-h(2-a)(b)(ii) to address in the EIS the impact of the expansion of Girls Prep on "any affected students." This would include the future fourth and fifth grade P.S. 94 students who would otherwise have been served in classes at the M188 building.

In addition, DOE suggests that District 75 schools, like P.S. 94, should be excluded from the application of Education Law §2590-h(2-a). Specifically, DOE maintains that, unlike general education schools, it often needs to re-locate programs and grades to accommodate the demand for District 75 seats, and it suggests that if it is required to comply with the statute's requirements - which includes posting EISs at least six months in advance of the first day of school in the succeeding school year[9] - that it will lose the ability to effectively serve District 75 students.

[9] See Education Law §2590-h(2-a)(c).

Education Law §2590-h(2-a) requires that an EIS be created for any proposed school closing or significant change in school utilization for "any public school located within the city school district" (emphasis added). District 75 schools are public schools that are located within the city school district, and Education Law §2590-h(2-a) does not except them from their application. Accordingly, DOE's contention that District 75 schools should be excluded is not supported by the plain language of the statute.

Moreover, Education Law §2590-h(2-a)(f) allows the Chancellor to close a school or adopt a significant change in school utilization on an emergency basis where it is "immediately necessary for the preservation of student health, safety or general welfare." To the extent DOE might need to move a District 75 school (or a part of a District 75 school) to a new location on short notice, the Chancellor may seek to invoke this emergency provision.

Finally, DOE contends that its failure to comply with Education Law §2590-h(2-a) is harmless error. However, as noted above, the EIS at issue in this case does not address what programs, classes or opportunities, if any, P.S. 94 students who would have attended fourth and fifth grade at M188 might be impacted as a result of the DOE's proposal. This involves a substantive failure to analyze the impact of a significant change in school utilization on affected students and can't be characterized as harmless error. Accordingly, putting aside whether Education Law §2590-h(2-a) permits such a finding, I am unable to conclude that DOE's failure to comply with the statute's requirements in this matter was harmless error.

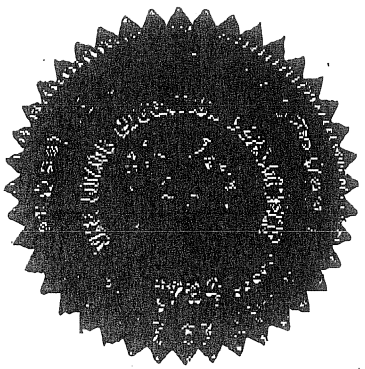
In light of this disposition, I need not consider the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that resolution of the PEP approving the expansion of the Girls Preparatory Charter School of New York is annulled; and

IT IS FURTHER ORDERED that respondents are prohibited from moving forward with any aspect of DOE's proposal regarding the M188 building - including the expansion of

Girls Preparatory Charter School of New York - until DOE complies with the requirements of Education Law §2590-h(2-a), including the preparation of a new Educational Impact Statement that is consistent with the statute and this decision, provided, however, that nothing herein shall be construed as preventing the Chancellor from determining that DOE's proposal is immediately necessary for the preservation of student health, safety or general welfare, and from invoking the emergency provisions of Education Law §2590-h(2-a)(f).



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 3L day of August 2010.

Commissioner of Education