



The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of IVANA ESPINET, on behalf of her son [REDACTED], REBECCA HERZ, on behalf of her children [REDACTED] and [REDACTED] CATHERINE JHUNG, on behalf of her daughter [REDACTED] LEANDRE M. JOHN, II, on behalf of his son [REDACTED] STEPHANIE KEITH, on behalf of her daughter [REDACTED], MARIA MCGRATH, on behalf of her son [REDACTED], and CAROL SHELDRAKE HERNANDEZ, on behalf of her son [REDACTED], from action of the New York City Department of Education and the Brooklyn East Collegiate Charter School regarding school utilization.

Michael A. Cardozo, Corporation Counsel, attorney for respondent New York City Department of Education, Chlarens Orsland and Emily Sweet, Esqs., of counsel

Whiteman Osterman & Hanna, LLP, attorneys for respondent Brooklyn East Collegiate Charter School, Carrie E. Flynn, Esq., of counsel

Petitioners challenge a determination of the New York City Department of Education ("DOE") relating to the co-location of the Brooklyn East Collegiate Charter School ("BECCS" collectively "respondents") in a public school building. The appeal must be sustained in part.

Petitioners are the parents of children who attend P.S. 9 Teunis G. Bergen School ("P.S. 9") in Brooklyn, New York. P.S. 9 serves students in grades pre-kindergarten through five and is located in the K009 building in Community School District 13 ("K009 building" or "the building"). P.S. 9 is currently co-located in the K009

building with M.S. 571, which serves students in grades six through eight.

During the 2010-2011 school year, BECCS served 80 fifth-grade students and was temporarily co-located with two charter high schools in the K343 building in Community School District 17. However, respondents explain that this arrangement is not intended to be permanent as the K343 building cannot accommodate BECCS's planned expansion to serve grades six, seven and eight.

On December 20, 2010, DOE issued an Educational Impact Statement ("EIS") and Building Usage Plan ("BUP") (collectively referred to as the "December 20 EIS") pursuant to Education Law §§2590-h(2-a) and 2853(3)(a-3). Among other things, the December 20 EIS proposed that, starting in September 2011, P.S. 9, M.S. 571 and BECCS would be co-located in the K009 building. The December 20 EIS referenced a separate EIS, issued on the same day, in which DOE proposed that M.S. 571 would close at the end of the 2012-2013 school year due to poor performance.¹ The December 20 EIS stated that, during M.S. 571's phase-out and closure, BECCS would expand to serve grade six in the 2011-2012 school year, grade seven in the 2012-2013 school year, and grade eight in the 2013-2014 school year.

On January 21, 2011, DOE issued an amended EIS and BUP (collectively referred to as the "January 21 EIS"). In its verified answer, DOE explains that the January 21 EIS corrected typographical errors and formatting, deleted redundant language, and "corrected projected enrollment ranges to better reflect the DOE's enrollment projections for the schools that would be served in building K009." On January 24, 2011, a public hearing ("hearing") was held regarding the January 21 EIS, and on February 3, 2011, the Panel for Educational Policy ("PEP") approved the proposal.² This appeal ensued. By letter dated March 9, 2011, petitioners were directed to join BECCS as a necessary party pursuant to §275.1 of the Commissioner's regulations.

Although the petition is not entirely clear, petitioners appear to argue that DOE's "proposal process

¹ Petitioners do not challenge the EIS regarding the phase-out and closure of M.S. 571, which was approved by the Panel for Educational Policy ("PEP") on February 3, 2011.

² The record indicates that eight PEP members voted in favor of the proposal, while four members voted against it.

was flawed" based on its failure to consider proposals for P.S. 9's expansion and to consult with P.S. 9's school leadership team ("SLT"), parent teacher organization ("PTO") and administration prior to issuing the December 20 EIS. Petitioners also contend that no PEP members were present at the hearing. Petitioners further allege that the January 21 EIS contained substantial revisions and argue that DOE thus failed to comply with the notice and hearing requirements of Education Law §§2590-g(8)(b) and 2590-h(2-a)(d-1) and the Chancellor's Regulations. Petitioners also maintain that the January 21 EIS "contains a number of mistakes and oversights"³ and "erroneously" characterizes the impact of the proposed co-location on P.S. 9 students. Finally, petitioners contend that the PEP's approval of the proposal was "premised on misinformation" provided by DOE. Petitioners request annulment of the determination to co-locate BECCS in the K009 building.

Respondents deny petitioners' allegations and contend that DOE complied with all statutory requirements. In addition, respondents maintain that any errors in the EIS were de minimus and/or promptly corrected and that petitioners were not prejudiced thereby. BECCS argues, inter alia, that the appeal must be dismissed as untimely.

Preliminarily, I note that this appeal was commenced pursuant to Education Law §2853(3)(a-5), which was added in 2010 (Chapter 101 of the Laws of 2010) and provides for an expedited process for appeals to the Commissioner of Education regarding the location or co-location of a charter school within a public school building in the City School District of the City of New York. Specifically, the expedited process is available for appeals involving:

the determination to locate or co-locate a charter school within a public school building[,] the implementation of and compliance with the building usage plan developed pursuant to

³ In its verified answer, DOE acknowledges that the January 21 EIS includes several typographical errors identified by petitioners, including references to building K332 (rather than building K009), a statement that building K009 has two gymnasiums (rather than one), and a statement that building K009 was built in 1967 (rather than 1957).

[Education Law §2853(3)(a-3)] ...
[and/or] the revision of a building
usage plan ... on the grounds that such
revision fails to meet the standards
set forth in [Education Law §2853(3)(a-
3)(2)(B)] (Education Law §2853[3][a-
5]).

Initially, I must address several procedural issues. 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 Caswell, 48 Ed Dept Rep 472, Decision No. 15,920; Appeal of Hinson, 48 *id.* 437, Decision No. 15,908; Appeal of Baez, 48 *id.* 418, Decision No 15,901). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Together with its verified answer, DOE submitted an affidavit from its Deputy Executive Director of the Office of Portfolio Planning ("deputy director"). In their reply, petitioners object to the deputy director's affidavit on the grounds that it contains hearsay statements and is "argumentative, full of citations, and rife with conclusions of law and fact." Petitioners argue that the affidavit "is nothing more than a supplemental pleading that the Commissioner did not authorize" and should be stricken from the record. I disagree. Section 275.13 of the Commissioner's regulations sets forth the process by which a respondent must serve its answer, "together with all of respondent's affidavits, exhibits and other supporting papers." As a result, I find that the deputy director's affidavit was properly submitted in support of DOE's answer.

I find no merit to BECCS's contention that the appeal is untimely. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 *id.* 343, Decision No. 15,879). The record indicates that the determination from which petitioners appeal, the PEP's

approval of the January 21 EIS, occurred on February 3, 2011. As a result, petitioners had to commence their appeal on or before March 5, 2011, which was a Saturday. Where, as here, the 30-day period in which to commence an appeal ends on a Saturday, Sunday or a public holiday, a petition may be served on the next succeeding business day (8 NYCRR §275.8[a]). Petitioners, therefore, had until March 7, 2011 to serve their petition, which they did. In addition, by letter dated March 9, 2011, my Office of Counsel directed petitioners to join BECCS as a necessary party by personal service no later than March 11, 2011. Petitioners complied with this directive. Accordingly, I find the appeal to be timely.

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. Education Law §2590-h(2-a) also prescribes notice and filing requirements for such statements. As I concluded in Appeal of Battis (50 Ed Dept Rep __, Decision No. 16,115), 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's notice and filing requirements.

I find no merit to petitioners' claims that DOE failed to consult with P.S. 9's SLT, PTO and administration prior to issuing the December 20 EIS and that no PEP members were present at the public hearing. 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 Aversa, 48 Ed Dept Rep 523, Decision No. 15,936; Appeal of Hansen, 48 *id.* 354, Decision No. 15,884; Appeal of P.M., 48 *id.* 348, Decision No. 15,882). DOE correctly maintains that there is no statutory requirement for such consultation or the attendance of PEP members at the public hearing. Indeed, other than conclusory assertions, petitioners provide no evidence or legal authority to support their claims. Although early consultation and collaboration regarding co-

location is encouraged wherever practicable, absence of such does not warrant annulment of DOE's determination.

Petitioners also maintain that, because P.S. 9's SLT, PTO and administration were not informed prior to the release of the December 20 EIS about DOE's plans to phase-out and close M.S. 571 and co-locate BECCS in the K009 building, those groups were denied any opportunity to present alternative proposals, including the potential expansion of P.S. 9. However, as noted above, there is no requirement that DOE conduct such consultation and/or solicit alternative proposals prior to issuing an EIS. Rather, under the statutory scheme, the EIS process itself is intended to provide an opportunity for public information and comment (see Appeal of Battis, 50 Ed Dept Rep __, Decision No. 16,115).

Petitioners further claim that DOE failed to consider a letter submitted at the hearing proposing the expansion of P.S. 9 to serve students up to grade eight. While the parties dispute whether such letter was actually submitted and/or read at the hearing, DOE acknowledges that public comments were made in support of P.S. 9's expansion and maintains that it addressed such comments in a February 2, 2011 Public Comment Analysis ("analysis"). Specifically, the analysis noted that "some parents and students prefer the continuity of education that K-8 schools could provide" but stated that "[a]t this time, the DOE is unaware that any formal proposal to expand the grades served or programs offered at P.S. 9 was made." Contrary to petitioners' assertions, however, such statements do not indicate that DOE improperly ignored or failed to provide P.S. 9 with the opportunity to submit expansion proposals. Rather, these statements appear to have been made as part of DOE's explanation of the process by which principals must apply to expand the grades served at a particular school. For example, DOE's analysis also notes that "[p]rincipals had been notified about the previous deadline to apply for grade expansion" and that DOE "encourages the P.S. 9 principal to contact the school's Network Leader to discuss such changes that could be implemented at the school." Based on the record before me, therefore, I find that petitioners have failed to carry their burden of establishing that DOE failed to properly consider proposals received through the public comment process to expand P.S. 9.

Petitioners further allege that the January 21 EIS contained substantial revisions and argue that DOE failed to comply with the notice and hearing requirements of Education Law §§2590-g(8) and 2590-h(2-a) and Chancellor's Regulation A-190 applicable to such revisions.⁴ Specifically, Education Law §2590-h(2-a)(d-1) provides that, after receiving public input, DOE may "substantially revise" a proposed school closing or significant change in school utilization. In such cases, DOE must publish and file a revised EIS and must hold a public hearing "[n]o sooner than 15 days following the filing of such revised" EIS (Education Law §2590-h[2-a][d-1]).⁵ Moreover, Education Law §2590-g(8)(a) provides that, prior to its approval of a proposed school closing or significant change in school utilization, the PEP must undertake a public review process "to afford the public an opportunity to submit comments on the proposed item." If such proposal is "substantially revised at any time following the public notice[,]" the PEP "shall issue a revised public notice[,]" which shall be "available at least fifteen days in advance" of any vote on the proposed item (Education Law §2590-g[8][b]).⁶

The crux of the dispute among the parties is whether the January 21 EIS was a substantially revised EIS, thereby triggering the notice and hearing procedures required by Education Law §§2590-g(8)(b) and 2590-h(2-a)(d-1). Petitioners contend that the January 21 EIS contained "significant changes" including increased student enrollment projections, a "whittled down" description of the proposal's impact on P.S. 9 students, and the removal of footnotes regarding P.S. 9's admission of out-of-zone students. To the contrary, DOE maintains that the January 21 EIS was amended rather than revised and that such amendments "cannot fairly be said to have significantly impacted the EIS or the decision-making process."

Based on the record before me, petitioners have not carried their burden of establishing that the January 21

⁴ Although the Chancellor's Regulations have not been submitted as part of the record in this appeal, I take administrative notice of the regulations posted on the official website of the New York City Department of Education. I also note that petitioners cite to Chancellor's Regulation A-190 "section B4." However, this provision relates to DOE's obligation to provide notice of the hearing and provides no support for petitioners' position.

⁵ Chancellor's Regulation A-190(II)(B)(5) conforms to this provision.

⁶ Chancellor's Regulation A-190(II)(C) conforms to this provision.

EIS constituted a substantial revision triggering the requirements of Education Law §§2590-g(8)(b) and 2590-h(2-a)(d-1). For example, in response to petitioners' contention that the January 21 EIS contained a "whittled down" description of student impact, DOE explains that "the section [from the December 20 EIS] explaining the collocation's impact on P.S. 9 was combined with other text ... to align it to the DOE's format for all EISEs [sic] involving elementary and middle schools. No language about the impact on P.S. 9 was actually deleted however." Petitioners have produced no evidence to the contrary and have failed to identify specific information that was allegedly "whittled down."

Additionally, the deputy director explains that the December 20 EIS estimate of 600-650 students at P.S. 9 in the 2013-2014 school year "reflected a mathematical error" that was corrected in the January 21 EIS. She further states:

Upon further analysis, [DOE] determined that it was necessary to adjust P.S. 9's enrollment ranges for the individual grade levels to be consistent with a more precise model for determining EIS projections, which include a range of five students below and five students above a school's current enrollment.... Additionally, the total projected enrollment for [BECCS] in the original EIS reflected a range of students, rather than the actual number of students authorized by [BECCS's] charter. The amended EIS includes the enrollment plan that was approved in [BECCS's] charter.

In both the December 20 EIS and the January 21 EIS, DOE explained that the K009 building has the capacity to serve 1,192 students and that, during the 2009-2010 school year, it operated with a building utilization rate of 63%. Based on the December estimates, DOE provided a target building utilization rate of 84% by the 2013-2014 school year; based on the amended January estimates, DOE accordingly adjusted the target building utilization rate to 86%. While the adjusted enrollment numbers caused an increase to the projected building utilization rate, such

increase amounted to two percentage points and the building utilization rate remains well below 100%. Other than their assertion that the enrollment ranges were adjusted, petitioners provide no evidence that such adjustment constituted a substantial revision to the EIS.

Finally, petitioners object to the removal of a footnote relating to P.S. 9's admission of out-of-zone students from the December 20 EIS and the inclusion of new text in the January 21 EIS. Other than their general objection to the footnote's removal, petitioners provide no explanation of the meaning or impact of such on the co-location proposal. In her affidavit, the deputy director explains that the deletion of the footnote was "not intended to deliberately obfuscate information" and notes that in its analysis, DOE "acknowledge[d] that this [co-location proposal] may mean families residing outside of the [P.S. 9] zone may no longer be able to register their children at P.S. 9."

Moreover, DOE explains that it included new text in the January 21 EIS in order "to more accurately explain that the Chancellor reserves the right to relocate [BECCS] to an alternate location geographically proximate to K009 if P.S. 9's enrollment increases beyond current projections or if the number of families residing in the zoned area increases." While petitioners contend that the addition of this explanation to the January 21 EIS "served to change the proposal significantly from a permanent co-location to a potentially temporary co-location that could be disruptive on students from both P.S. 9 and BECCS," they provide no support for this position. Petitioners assert in their reply that this change is "material," in part, because it "belatedly recognizes the unaddressed issues posed by the dynamic growth of the neighborhoods comprising District 13 and their future impact on P.S. 9." However, such statement actually lends support to DOE's contention that it included such language in the January 21 EIS to clarify that it had considered the issue of P.S. 9's potential future growth. For these reasons, I therefore cannot conclude that petitioners have carried their burden with respect to this claim.

Turning to petitioners' substantive claims, Education Law §2590-h(2-a) (b) requires that an EIS 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.

Further, after a public school building has been selected for a proposed co-location, Education Law §2853(3)(a-3) requires that DOE develop a BUP that must be included within the EIS. At a minimum, the BUP must include the following information:

- (A) the actual allocation and sharing of classroom and administrative space between the charter and non-charter schools;
- (B) a proposal for the collaborative usage of shared resources and spaces between the charter school and the non-charter schools, including but not limited to, cafeterias, libraries, gymnasiums and recreational spaces, including playgrounds which assures equitable access to such facilities in a similar manner and at reasonable times to non-charter school students as provided to charter school students;
- (C) justification of the feasibility of the proposed allocations and schedules set forth in clauses (A) and (B) of this subparagraph and how such proposed allocations and shared usage would result in an equitable and comparable use of such public school building;
- (D) building safety and security;

- (E) communication strategies to be used by the co-located schools; and
- (F) collaborative decision-making strategies to be used by the co-located schools including the establishment of a shared space committee... (Education Law §2853 [3] [a-3] [2] [A-F]).

I find that the January 21 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 the co-location, including the capacity of the K009 building. Likewise, the BUP provided information regarding building safety and security, communication and decision-making strategies and the actual allocation and sharing of classroom and administrative space between the charter and non-charter schools as required by Education Law §2853(3)(a-3)(2).

I find no merit to petitioners' contention that the January 21 EIS's "failure to consider enrollment levels beyond three years in the future is a significant deficiency" in DOE's analysis of the proposal's impact on students. Petitioners cite no authority for their position; indeed, Education Law §2590-h(2-a) does not require that the EIS include a particular range of future enrollment projections.

Similarly, petitioners have failed to carry their burden of proof with respect to their claim that the January 21 EIS underestimates the demand for seats at P.S. 9. Petitioners allege that 194 kindergarten applications were submitted to P.S. 9 for the 2011-2012 school year, "far exceeding" the previous year's enrollment. The deputy director's affidavit explains that P.S. 9 has received a total of 175 kindergarten applications for the 2011-2012 school year and that, based on Chancellor's Regulation A-101, regarding admission preferences for zoned students, the January 21 EIS estimates that P.S. 9 will enroll approximately 110 to 120 kindergarten students in the 2011-2012 school year. Petitioners have provided no evidence that such projection fails to meet the requirements of the Education Law.

Nor does the record support petitioners' claim that the January 21 EIS fails to adequately assess planned capital projects, including improvements to P.S. 9's school yard and drainage system. The January 21 EIS indicates that a description of planned capital projects for the K009 building was included as required by Education Law §2590-h(2-a)(b)(v). Moreover, the deputy director's affidavit explains that construction schedules for any such projects will be developed to ensure minimal impact on the schools in the K009 building. The deputy director also states that, because the K009 building is "currently underutilized, there would be ample swing space to minimize any disruption" caused by such projects. Other than petitioners' assertions that such projects will impact space allocations and instructional programming at P.S. 9, they have provided no evidence that DOE failed to properly analyze the impact of such projects in relation to the co-location.

However, I agree with petitioners that the January 21 EIS fails to adequately address the allocation of shared spaces such as the gymnasium and library. Petitioners note that DOE's proposal reduces P.S. 9's weekly gymnasium time to 9.75 hours⁷ and its weekly library time to 4.5 hours. Petitioners also allege that DOE's proposal fails to assess other factors that may further impact P.S. 9 students' access to shared spaces, including that (1) the building's school yard is currently closed due to a construction project and is therefore unavailable for use as a gymnasium; and (2) BECCS operates an extended school day and would conduct its physical education classes during the time P.S. 9 uses the gymnasium for an after-school enrichment program.

As noted above, the January 21 EIS described DOE's co-location proposal and generally provided much of the information required by statute, including a detailed description of DOE's method of allocating classroom and administrative space based on DOE's citywide instructional footprint. Nevertheless, I am unable to conclude that the EIS created by DOE in this matter complied with the statutory requirements regarding the equitable allocation

⁷ Petitioners contend that the proposal reduces P.S. 9's current gymnasium access by 48%, while the deputy director asserts that this represents a 37% reduction.

of shared spaces such as the gymnasium and library. Specifically, I find that the January 21 EIS fails to provide a "justification of ... how [its] proposed allocations and shared usage would result in an equitable and comparable use of [the K009] building" as required by Education Law §2853(3)(a-3)(2)(C).

The BUP contains only a table indicating the "proposed" amount of time per week each co-located school would have access to the gymnasium, library and cafeteria and makes only general statements, including that:

This proposed plan illustrates how the population size of each co-located school will be used to determine a proportional allotment of time in each shared space. Building Councils are free to deviate from the proportional allotment of time to accommodate the specific programmatic needs of all special populations or groups within each school as is feasible and equitable....

The BUP includes no justification for how the proposed allocations result in "equitable and comparable" use as required by the statute. Notably, DOE's proposal allocates only 4.5 hours of weekly library time for the 550-610 kindergarten through grade five students expected to attend P.S. 9 during the 2011-2012 school year, while allocating 6.75 hours of weekly library time for the 158 students expected to attend BECCS during the 2011-2012 school year, but provides no justification for the equity and comparability of such proposal in light of those enrollment figures. Similarly, DOE does not explain how its proposed allocation of 9.75 hours of weekly gymnasium time to both P.S. 9 and BECCS, despite their significantly different enrollment projections, is equitable.

DOE explains in its verified answer that the "proposed plan for the use of shared spaces is simply that - a proposal - and will be refined and finalized by the principals of the co-located schools, who will tailor their schedules to meet the specific needs of each school in the course of the school year." DOE also states that the BUP's "proposed scheduling of the library is subject to a final determination by the schools' principals, who will jointly

determine the most equitable use of K009's facilities during the actual school year."

I recognize that DOE's proposal for the allocation of shared spaces may require adjustment by officials of the co-located schools based on programming and need, and that Education Law §2853(3)(a-4) requires that a shared space committee in the co-located school review implementation of the BUP every four months. However, I remind DOE that Education Law §2853(3)(a-3) requires that an EIS provide more than just a proposal for the collaborative use of shared spaces. Indeed, as noted above, Education Law §2853(3)(a-3)(C) specifically requires that the EIS also include a "justification of the feasibility of the proposed allocations and schedules" and "how such proposed allocations and shared usage would result in an equitable and comparable use of such public school building." As noted in the First Department's decision in Mulgrew, et al. v. Bd. of Educ. of the City School Dist. of the City of New York, et al. (75 AD3d 412, 414 [1st Dept 2010]), "[t]he discussion of one [of the substantive requirements of Education Law §2590-h(2-a)(b)] does not obviate the need for a discussion of the other." Likewise, the inclusion of a proposal for the collaborative use of shared spaces, as required by Education Law §2853(3)(a-3)(2)(B), does not obviate the need for the discussion of the justification of feasibility and equitable and comparable use required by Education Law §2853(3)(a-3)(2)(C). Indeed, it is just such information, which should be available to the public as part of an EIS, prior to any hearing, that affords meaning to the process set forth in Education Law §2853(3)(a-3).

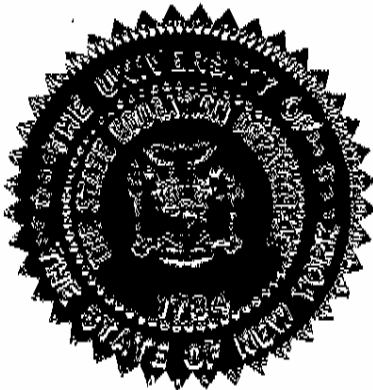
DOE contends that any failure to comply with the Education Law is harmless error. However, as explained above, the BUP at issue in this case fails to address how the proposed allocation of shared spaces in the K009 building ensures equitable and comparable use for impacted students as required by Education Law §2853(3)(a-3)(2)(C). This involves a substantive failure to analyze the impact of a significant change in school utilization on the affected students and cannot be characterized as harmless error (see Mulgrew, et al. v. Bd. of Educ. of the City School Dist. of the City of New York, et al., 75 AD3d 412 [1st Dept 2010]). Accordingly, I am unable to conclude that DOE's failure to comply with the statute's requirements in this respect 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 the resolution of the PEP approving the co-location of the Brooklyn East Collegiate Charter School in the K009 building is annulled; and

IT IS FURTHER ORDERED that DOE is prohibited from moving forward with any aspect of the proposal regarding the co-location of the Brooklyn East Collegiate Charter School in the K009 building until DOE complies with the requirements of Education Law §2853(3)(a-3)(2)(C), including the preparation of a new Building Usage Plan that is consistent with the statute and this decision.



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 31 day of March 2011.

A handwritten signature in black ink, appearing to read "D. Steiner", written over a horizontal line.

Commissioner of Education