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May 27, 2010

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

Re: In the Matter of Jessica Santos, et al, from action of the New
York City Department of Education and Girls Preparatory Charter
School of New York regarding the co-location of P.S. 94, P.S. 188,
and Girls Preparatory Charter School
Appeal No. 19108

To the Commissioner of Education,

We represent Jessica Santos, Rosalinda Mendez, Yvonne Walker, Tamika
Felix, Cynthia Bonano, and Guillermina Pizarro, Petitioners in the above-captioned
appeal. Enclosed please find Petitioners' Memorandum of Law in response to New
York City Department of Education's Memorandum of Law.

Respectfully Submitted,

Rebecca Shore

Rebecca C. Shore
Elizabeth Callahan

cc: Emily Sweet, Esq.
Joseph De Simone, Esq.

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REDACTED

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT

In the Matter of JESSICA SANTOS,
on behalf of _____; ROSALINDA
MENDEZ, on behalf of _____
YVONNE WALKER, on behalf of _____
_____ TAMIKA FELIX, on behalf of _____
_____ ; CYNTHIA
BONANO, on behalf of _____
_____ ; and GUILLERMINA PIZARRO,
on behalf of _____ and
_____ from action of the New York
City Department of Education and Girls
Preparatory Charter School of New York
regarding the co-location of P.S. 94, P.S. 188,
and Girls Preparatory Charter School.

APPEAL NO. 19108

PETITIONERS' MEMORANDUM OF LAW
IN RESPONSE TO RESPONDENT NEW YORK CITY DEPARTMENT OF
EDUCATION'S MEMORANDUM OF LAW AND IN SUPPORT OF THE AMENDED
PETITION

Petitioners Jessica Santos, Rosalinda Mendez, Yvonne Walker, Tamika Felix, Cynthia Bonano and Guillermina Pizarro ("Petitioners") submit this memorandum of law in support of their Amended Petition to the Commissioner of Education and Request for Stay, dated April 22, 2010, challenging the February 24, 2010 vote and resolution of the Panel for Educational Policy ("PEP") of the New York City Department of Education ("DOE") to expand the co-location of Girls Preparatory Charter School Lower East Side ("Girls Prep") with P.S. 188 The Island School ("P.S. 188") and P.S. 94.¹

¹ In support hereof, the Petitioners refer the Court to (1) the Affidavit in Support of Petition filed by Jessica Santos, dated March 25, 2010, (2) the Affidavit in Support of Petition filed by Yvonne Walker, dated March 25, 2010, (3) the Petitioners' Exhibits in Support of Petition, (4) the Petitioners' Verified Reply to DOE's Answer, dated May 17, 2010, (5) the Petitioners' Exhibits in Support of Reply, (6) the Affidavit in Support of Petition filed by Lisa Donlan dated May 17, 2010, (7) the Affidavit in Support of Petition filed by Jessica Santos, dated May 17, 2010, (8) the Petitioners' Verified Reply to Girls Prep's Answer, (9) the Petitioners' Exhibits in Support of Reply, (10) the Affidavit in Support of Petition filed by Lisa Donlan, dated May 25, 2010, and Petitioners' Amended Petition.

PRELIMINARY STATEMENT

The DOE is seeking to expand Girls Prep so that it includes a middle school as well as an elementary school, and to increase the space utilized by Girls Prep in a building (“M188”) that is shared by Girls Prep (an all girls charter school), P.S. 188 (a school serving students in grades Pre-K to 8, many of whom receive special education services and counseling) and P.S. 94 (a school serving only students with autism in grades 4-8). In order to expand the space used by Girls Prep, the DOE will need to decrease the space used by P.S. 94 and P.S. 188. To accommodate the expansion, the DOE decided to reduce the enrollment at P.S. 94 at M188 by eliminating the fourth and fifth grades over the next two school years. In addition, each school will need to make adjustments to its programs because of reduced access to certain classrooms and common areas.

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 that its plans for expanding Girls Prep will have a negative impact on children who go to school, or might otherwise have gone to school, in the same building. Without such acknowledgement, affected families have no way to evaluate the proposed expansion or advocate for better alternatives. It is also about the DOE’s disregard for procedures that are aimed at protecting affected communities. Without these procedures, the public does not have a meaningful voice in these important decisions.

New York Education Law sets forth procedures that the DOE must follow in order to implement any “significant change in school utilization,” which includes the phase-out, grade reconfiguration (*i.e.*, the expansion or truncation of grade levels), re-siting or co-location of schools. These procedures include the preparation of an educational impact statement (an

“EIS”), notice of the proposed change to members of the community, including affected parents and students, a public hearing, and a PEP vote.

Under New York Education Law, P.S. 94 at M188 will experience a “phase-out,” or a “grade reconfiguration,” as a result of the elimination of the fourth and fifth grades and a “re-siting” of these grades to other P.S. 94 locations. NY Educ. Law § 2590-h(2-a). Due to these changes, fourth and fifth grade students who would have otherwise attended P.S. 94 at M188 in the next two school years will have to be assigned to alternative school sites and need different transportation arrangements. In addition, although children on the autism spectrum frequently experience difficulty with transitions, these autistic students may now need to attend more schools during the course of their educational career as a result of the Girls Prep expansion. New York Education Law mandates that, prior to a PEP vote, the DOE prepare an EIS for any phase-outs, grade reconfigurations and re-sitings and requires that the community be informed of any such substantial changes and given the opportunity to comment on them. In this case, however, the DOE did not prepare a separate EIS nor did it provide the community with the requisite information identifying the proposed changes for P.S. 94 students and the anticipated impacts of those changes, or hold a separate vote on the P.S. 94 phase-out, grade reconfiguration, and re-siting.

P.S. 188 has already suffered a significant decline in space as a result of the incorporation of Girls Prep at M188 in 2008. In addition to the continued impact of this loss in space, the increased number of students attending the school will impact the availability of space for P.S. 188 students, including in the cafeteria, gym, and rooms for the provision of related services. Moreover, P.S. 188 is anticipating an increased enrollment in the upcoming school years and does not have the space to accommodate the increase under the current terms of the co-location

with Girls Prep. Contrary to the requirements of New York Education Law, the DOE did not inform the community of the ramifications and impacts of the Girls Prep expansion on P.S. 188.

Rather, the DOE issued only an EIS outlining its proposal to expand the number of grades served by Girls Prep and correspondingly expand the space used by Girls Prep at the M188 building (the “Girls Prep EIS”). The Girls Prep EIS did not analyze, *or even identify*, the impact of the proposed Girls Prep expansion on P.S. 94 and P.S. 188. The Girls Prep EIS did not address, among other impacts: (a) the truncation of grade levels at P.S. 94, (b) the names and locations of alternative schools (if any) for incoming fourth and fifth graders that will be unable to enroll at P.S. 94 at M188, (c) the impact of the increased enrollment on the alternative schools that will serve the displaced fourth and fifth graders, (d) the means of transportation to be used by the fourth and fifth graders attending alternative schools if they are outside the district, (e) the availability of the necessary special needs programs at the alternative schools, (f) the sufficiency of the reduced space at P.S. 94 at M188 to meet the academic and social needs and the related service mandates of the remaining students; (g) the changes in personnel in Building M188 as well as at the alternative sites as a result of fewer students attending P.S. 94 at M188; (h) the reduced services and programming for the students at P.S. 188, or (i) the impact on the safety of students and personnel at the schools.

In addition, the DOE did not provide adequate notice of the proposed Girls Prep expansion or the related 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, according to recent case law, is insufficient to constitute notice under the statute. Further, the website referred only to the “Grade Expansion” of Girls Prep and did not refer to its co-location with P.S. 94 and P.S. 188, so

any reference to the website alone would not have put the parents of P.S. 94 and P.S. 188 students on notice of the proposed changes to their schools. The DOE did not send any notices to the parents of current and prospective students at P.S. 94 and sent a notice only to the current parents of P.S. 188 students referring them to the website. 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 clear lack of transparency here by the DOE and, as a result, it has extinguished the community members' ability to voice concerns about the DOE's proposed changes and to suggest alternatives.

BACKGROUND

Jessica Santos is the parent of [REDACTED] a fourth grader at P.S. 94. Jared is classified as autistic. In addition to a self-contained class, his Individualized Education Program ("IEP") mandates occupational therapy, physical therapy and speech therapy. Rosalinda Mendez is the parent of [REDACTED], a sixth grader at P.S. 94. [REDACTED] is also classified as autistic. His IEP also recommends a self-contained class and mandates occupational therapy, physical therapy and speech therapy. Santos Aff. in Support of Petition, dated March 25, 2010, ¶ 1.

Yvonne Walker is the parent of [REDACTED] a female student in fourth grade at P.S. 188. Tamika Felix is the parent of [REDACTED] a male student in fourth grade at P.S. 188. Cynthia Bonano is the parent of [REDACTED] a female student in seventh grade at P.S. 188. [REDACTED] requires special education services and is in a Collaborative Team Teaching ("CTT") class. She also receives counseling. Guillermina Pizarro is the parent of [REDACTED]

..., all male students who attend P.S. 188 in the first, second, fifth and seventh grades, respectively. Walker Aff. ¶ 1.

P.S. 94 is a District 75 special education school consisting of one main site and three off-site locations. The school has a total of thirty-one classes, seven of which are located at M188. P.S. 94 at M188 currently serves forty-one students with autism in seven classes in grades 4-8. Six of the classes have 6:1:1 staffing ratios and one has an 8:1:1 staffing ratio. DOE Answer ¶ 3. According to publicly available data, the student population at P.S. 94 is 81.64% male, and 18.36% female. 37.20% of the students are African-American, 44.93% are Hispanic and 12.08% are English Language Learners (“ELL”).² All students at the school receive special education services, 88% of them in the Most Restrictive Environment, meaning that they are placed in a self-contained class with other special education students. Am. Pet. Ex. A (P.S. M094 Register).

P.S. 188 has 397 students in grades pre-kindergarten through eight. According to publicly available data, 64.23% of the students at P.S. 188 are Hispanic, 30.48% are African American, and 17.88% are ELLs. P.S. 188 has a 89.6% poverty rate. Am. Pet. Ex. C (School Demographics and Accountability Snapshot). 23.8% of the students at P.S. 188 receive special education services. Of these special education students, 5 are educated in self-contained classes, and 79 students are in CTT classes or general education classes with related services. Am. Pet. Ex. D (Special Education Delivery Report 2009-2010). Of the students with disabilities receiving related services, 4 receive Special Education Teacher Support Services (“SETSS”), 37 are mandated to receive counseling, 38 are mandated to receive speech therapy, 10 are mandated to receive occupational therapy, and 2 are mandated to receive physical therapy. Id.

² This data refers to the demographics of P.S. 94 as a whole. The demographics of the students at P.S. 94 at M188 differ in some respects.

Girls Prep is an all-girls charter school that currently serves 261 students in grades K-5 at their location in Building M188. The school primarily serves general education students.³

While 17% of the students in geographic district 1 where Building M188 is located (“District 1”) have IEPs, only 8.2% of the students at Girls Prep have IEPs. DOE Ex. O (Responses to CCSE Questions). According to the school’s website, the school provides special education services only for students who require “SETSS services, push in and pull out interventions, speech therapy, and tutoring.” Reply to Girls Prep Ex. B (Public Prep: Enroll a Student). These services do not address the needs of students who need more restrictive learning environments, such as the students at P.S. 94 and the students in self-contained classes or CTT classes at P.S. 188.⁴ Am. Pet. Ex. E (Public Prep: Enroll a Student). Girls Prep likewise does not serve the needs of students who are English Language Learners (“ELLs”). While 13.6% of students in District 1 are ELLs and 17.88% of the students at P.S. 188 are ELLs, the DOE lists only 1.6% of the students at Girls Prep as ELLs. DOE Ex. O (Responses to CCSE Questions).

The three schools have shared space in Building M188 since 2008. In January 2010, the DOE proposed a plan for Girls Prep to expand the co-location to serve students in grades K-8 and take over a larger part of Building M188, specifically, on the fifth floor where P.S. 94 is located.⁵ To create the additional space, the DOE proposed that P.S. 94 phase-out the fourth and

³ According to the New York State School Report Card for Girls Prep for the 2008-09 school year (Girls Prep. Ex. A), the numbers of students with disabilities and students who are limited English proficient at Girls Prep were both described as “Insufficient Number of Students to Determine AYP Status.” Girls Prep. Ex. A at 8 (2008-2009 New York State School Report Card).

⁴ Furthermore, to the extent that Girls Prep provides special education services to students, those services are limited. See Transcript of Public Hearing at 283-288, *New York State Senate Standing Committee on Corporations Authorities and Commission, Is Our Democratic Vision of Public Education Being Fulfilled? A Decade Later: A Look at the Growing Charter School Industry* (April 22, 2010), Reply to Girls Prep Ex. A (testimony of parent of a Girls Prep student with a disability describing Girls Prep’s “inability to work with a special needs child” and pushing the student out of the school because of her disability).

⁵ The DOE’s Memorandum of Law refers to various discussions regarding the expansion of Girls Prep prior to the publication of the EIS to suggest that Petitioners were included in the process. Notably, the DOE did not inform P.S. 94 parents of the plan to take P.S. 94 space until December 2009, after the DOE had already agreed with Girls

fifth grades. Although the proposal contemplated that by September 2011, P.S. 94 at M188 would not house any fourth or fifth graders, the proposal did not explain what would happen to (a) fourth or fifth grade students at P.S. 94 at M188 who were not promoted to the next grade, or (b) students in the second and third grades who were planning to attend P.S. 94 at M188 in the 2010-2012 school years. The proposal gives Girls Prep 8 new rooms on the fifth floor for the 2010-11 school year, with an eventual expansion to 10 new rooms. The DOE proposed that P.S. 94 reduce its use from 10 to 7 rooms for the 2010-11 school year, with an eventual phase-down to 5 rooms and removal of two grades from Building M188. Am. Pet. Ex. F (Girls Prep EIS), DOE Ex. G (Joint Meeting of NYC Department of Education, P.S. 188, P094, and Girls Prep Charter School, Meeting Minutes; Jan. 5, 2010).

On January 8, 2010, the DOE issued the Girls Prep EIS, which outlined its proposal to gradually increase Girls Prep to a school serving students in grades kindergarten through eight. The Girls Prep EIS was published on the PEP website solely as a statement relating to the grade expansion of Girls Prep. The link to the Girls Prep EIS was listed as “Grade Expansion. Girls Prep Charter School” and the Girls Prep EIS was entitled “Grade Expansion of Girls Preparatory Charter School of New York (84M330)”. The website did not refer to the co-location of Girls Prep with P.S. 94 and P.S. 188 and did not indicate that the proposed expansion would affect anyone other than the parents and students of Girls Prep. Am. Pet. Ex. G (Panel for Educational Policy, Proposals for Significant Changes in School Utilization, February Vote). Further, in spite of the DOE’s assertions that notice was sent to the parents of P.S. 94 and P.S. 188 students, the DOE did not send sufficient notice of the Girls Prep EIS to parents of existing or prospective

Prep on a plan that would impact P.S. 94 at M188. See Affidavit of Lisa Donlan, dated May 17, 2010, and associated Exhibits 1 and 2; Affidavit of Jessica Santos, dated May 17, 2010, and associated Exhibit 3. Moreover, the DOE provided only a “very rough draft” of the EIS in January. DOE Ex. G; Reply to DOE ¶ 71. Since learning of the plan, Ms. Santos and the other Petitioners have continually stated to the DOE their concerns and objections about the expanded co-location, with no adequate response from the DOE. See, e.g., DOE Ex. G; Santos Aff. Ex. 3.

students at P.S. 94 and P.S. 188: (a) the principal of P.S. 94 did not send *any* notices home, and (b) the principal of P.S. 188 sent home notices that (i) did not include a copy of the Girls Prep EIS, and (ii) referred parents to the DOE's website. See Santos Aff. in Support of Petition, dated March 25, 2010, ¶ 7; Reply to DOE ¶ 7; DOE Ex. G at 6 (Joint Meeting of NYC Department of Education, PS. 188, P94, and Girls Prep Charter School; Meeting Minutes; Jan. 5, 2010). Moreover, the website itself was entirely in English. 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. Am. Pet. Ex. G (Panel for Educational Policy, Proposals for Significant Changes in School Utilization, February Vote). And the website provided no links to translations of the EIS into other languages. Id.

On February 11, 2010, the DOE held a public hearing at Building M188. Three hundred ninety people attended the hearing and fifty-four people spoke. Thirty-eight members of the public spoke in opposition to the proposal, describing the impact on students and the community. Am. Pet. Ex. H (Revised Public Comment Analysis; Feb. 24, 2010). The DOE did not respond to these concerns. On February 24, 2010, the PEP voted in favor of the resolution to expand Girls Prep. At no point did the DOE propose, nor did the PEP vote, on a separate resolution to decrease the number of classes or grades of P.S. 94 students in Building M188. Am. Pet. ¶ 8.

On March 26, 2010, the Petitioners filed a Petition and Request for Stay to the New York State Commissioner of Education challenging the PEP vote. On April 22, 2010, the Petitioners filed an Amended Petition to the Commissioner of Education and Request for Stay (the "Amended Petition"), joining Girls Prep as a Respondent. On May 3, 2010, the DOE filed a Verified Answer to the Amended Petition (the "Answer") and a Memorandum of Law in

Opposition to the Amended Petition (the “DOE’s Memorandum of Law”). This Memorandum of Law responds to the arguments made in the DOE’s Memorandum of Law.⁶

ARGUMENTS

I. A Separate Educational Impact Statement and PEP Vote is Required For the Phase-Out, Grade Reconfiguration, and Re-Siting of P.S. 94 at M188.

The DOE issued an EIS that addressed only the impact of the proposed expansion on the students of Girls Prep, but the statute requires the DOE to issue a separate proposal and EIS and hold a distinct public hearing for the phase-out, grade reconfiguration, and re-siting of P.S.94 as a result of the DOE’s plans to expand Girls Prep.

A. Requirements of New York Education Law Section 2590-h(2-a).

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). A “grade reconfiguration” includes “any changes to schools’ current grade levels,” including “either the expansion or truncation of grade levels served at a school.” See <http://schools.nyc.gov/community/planning/reconfiguration/default.htm>. By the DOE’s own definition, “re-siting” includes the moving of some grades of a school from one building to another. See e.g., Reply to DOE Ex. A.

Each EIS must be made publicly available, and within 30-45 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

⁶ On April 12, 2010, Girls Prep served its Memorandum of Law. Petitioners will timely respond to the arguments in Girls Prep’s Memorandum of Law by June 5, 2010.

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).

B. Contary to the DOE’s Position, New York Education Law Section 2590-h(2-a) Applies to District 75 Schools.

The proposed expansion of Girls Prep will result in (a) a “phase-out” of grades 4 and 5 from P.S. 94 at M188, or in other words, a “grade reconfiguration” of P.S. 94 so that it serves

students in grades 6-8 rather than grades 4-8 in Building M188 and (b) a “re-siting” of the fourth and fifth grades currently served by P.S. 94 at M188 to other P.S. 94 locations.

The DOE argues in response that it was not required to issue a separate EIS and conduct a separate hearing regarding P.S. 94 because there is no proposed “significant change in school utilization” for P.S. 94 within the meaning of Education Law § 2590-h(2-a). DOE Br. at 19.

The DOE supports this interpretation of the law based on assertions that: (a) P.S. 94 is a “program” that is not tied to any particular location, (b) P.S. 94 “serves students in grades 4-8 at four locations throughout lower Manhattan,” and (c) there will be no “phase-out” or “grade reconfiguration” of P.S. 94 because the students being displaced can be served in other buildings. DOE Mem. Law at 19-21.

The DOE’s interpretation is wrong and unlawful, and it runs counter to the plain language of the statute. Section 2590-h applies to “*any* public school located within the city district” – without exception. See NY Educ. Law § 2590-h(2-a)(a) (emphasis added). In its Memorandum of Law, the DOE has carved out an exception for District 75 from the protections of the statute. The result would be that District 75 schools, grades, or classes – many of which are co-located with community schools and often in more than one location – could be re-sited, reconfigured, or moved, without any of the protections afforded by the statute.

The New York legislature enacted Section 2590-h to create an “opportunity for those that would be affected by a school closing, expansion or reduction to be consulted by the New York City Board of Education through a public hearing before such action can be taken” and to enable “those that may be affected by a closing to voice their concerns.” 2009 Legis. Bill Hist. NY S.B. 129; see also 2009 NY A.B. 5442. The multi-step procedure of the statute is designed to inject informed public comment into the DOE’s decision-making process by requiring the DOE to

conduct a detailed analysis of the ramifications of its proposal on the community and publicize its analysis so as to permit informed public comment. The DOE cannot selectively choose—as it has done here—which portions of the statute it wishes to follow and which schools are exempt from the protections of the statute.

District 75 schools offer educational, vocational, and behavior support services and programs for students who are on the autism spectrum, severely challenged, and/or multiply disabled, and efforts are made to match special needs students, to the extent possible, with schools located within their communities that offer the prescribed services and programs. Additionally, the opportunities available for the students may differ in each location. For example, although P.S. 94 has grades in four different school buildings, the students at P.S. 94 at M188 have an opportunity to mainstream with general education students in a manner that may not be possible at all P.S. 94 locations. Likewise, the services available at P.S. 94 at M188 are not necessarily available at other sites. See Santos Aff. in Support of Reply to DOE, dated May 17, 2010, ¶ 3.

New York Education Law requires that the EIS disclose “the ability of other schools in the affected community district to accommodate pupils following the school closure or significant change in school utilization.” NY Educ. Law § 2590-h (2-a)(b)(vi). This information is particularly important in evaluating the impact of a significant change in the utilization of a school building related to District 75 students because there may be only a limited number of schools in each community that offer the opportunities and programs subject to closure or relocation. Thus, the DOE must describe in an EIS the impact of the proposed change on the affected students, especially with respect to the differences in the services, programs, and opportunities offered in the various District 75 school locations.

The DOE's interpretation of Section 2590-h would give it free reign over District 75 schools and would extinguish the community members' ability to voice concerns about the proposed changes or to suggest alternatives. Contrary to the requirements of Section 2590-h(2-a), the DOE failed to file an EIS, conduct a public hearing, or hold a PEP vote seeking approval for the re-siting, phase-out and grade reconfiguration of P.S. 94. As noted by John Englert, President of the Citywide Council on Special Education, "District 75 children, who are the most fragile and have the most difficult time making transitions, are always being pushed out of their current schools. Parents of children with disabilities are not being consulted, are not given a choice, and are being forced to deal with final decisions made by others. Furthermore, the parents and school communities which are being impacted are not supporting the changes that are being considered." See Donlan Aff. in Support of Reply to DOE, dated May 17, 2010, ¶ 10 and supporting Ex. 2 (Letter from J. Englert to J. Klein).

In the DOE's Memorandum of Law, the DOE argues that it needs flexibility in dealing with District 75 schools. DOE Mem. Law, pg. 20. The DOE asserts that because District 75 admissions and referrals vary each year, it needs to retain the ability to re-assign grade levels and programs to different sites, even after the start of the school year. This argument is based on a nonsensical premise. First, it is unclear whether the DOE is saying that, as a result of a change in student enrollment in District 75, it will need to: (a) move an entire class or grade, or (b) add an entire class or grade. In either event, it seems highly unlikely that such a large number of students in the same community would be referred to the same type of program at the same grade level after the beginning of the school year, such that an entire class or grade would need to be added. It makes even less sense that the DOE would move an entire grade, let alone two grades –as they are doing here – mid-year to accommodate an emergent need of new students. The

DOE further does not explain why it would need to move an entire District 75 grade or class to make room for another District 75 grade or class. A more likely scenario is that any late-referred students would be integrated into an existing class.

The DOE's papers noticeably do not address the ability or necessity of the DOE to *remove grades* from a particular building. Brown Aff. ¶ 13. Creating or adding a class at a particular location to accommodate incoming students is very different than moving entire grades of students from the location in which they are enrolled. The difference is even greater when considering that the DOE is not, in this instance, re-siting the grades to accommodate a large number of incoming District 75 students, but instead is moving the grades to meet the needs of a charter school. In this situation, the DOE has had months notice of the purported need, and is required to engage in the PEP process for such a move.

Indeed, New York Education Law contemplates an emergent situation such as the one described by the DOE in its papers. Section 2590-h(2-a)(f) allows the chancellor to close a school or execute a significant change in school utilization on an emergency basis for a six month period, which would give the DOE the flexibility to make any changes if, mid-year, the number of new District 75 students increases such that creation of a new grade or class is needed. Thus, an exception should be considered when and as needed – it is not appropriate to interpret the entire statute as offering District 75 students no protection in deference to a hypothetical and dissimilar situation.

The DOE's argument that the statute does not and should not apply to District 75 schools is also undermined by the fact that the DOE found it appropriate to submit EISs in very similar situations where several classes of a District 75 school were being re-sited or phased-out of their existing location. For example, on January 8, 2010 (the same day the Girls Prep EIS was filed),

the DOE filed an EIS for P.S. 138, another District 75 school sited in multiple locations, seeking to re-site the majority of the P.S. 138 students to other locations from the M33 building. In the P.S. 138 EIS, the DOE identified the alternative locations for students being displaced from P.S. 138, analyzed the proposed impact of the re-siting on transportation and personnel, as well as the impact of the transfer on schools that will accommodate the displaced students, and compared the District 75 programs that were offered at the original P.S. 138 location to the programs that will be offered in the new locations. A separate EIS was issued to discuss the impact of an additional school moving into the M33 building. Am. Pet. Ex. G (Panel for Educational Policy; Proposals for Significant Changes in School Utilization; Jan. 8, 2010); The DOE should have done the same here; indeed, it was required to under New York Education Law.

The DOE should not be permitted to circumvent the process for District 75 schools. These students of District 75, autistic students with special needs, deserve just as much protection under the Education Law as other students. The DOE's interpretation would deprive District 75 students of protections made available to all the other students in the school system. There is no basis in the statute and no practical reason for allowing such discrimination. There is no reason that the DOE cannot prepare a similar EIS in each instance of a significant change in school utilization of a District 75 school, and make changes on an emergency basis pursuant to the exception provided in Section 2590-h(2-a)(f).

C. The Girls Prep EIS Was Not an EIS on the P.S. 94 Re-Siting.

The DOE also cannot argue that the Girls Prep EIS was in fact an EIS on the phase-out, grade reconfiguration, and re-siting of P.S. 94. The Girls Prep EIS does not identify which schools will serve the fourth and fifth graders that can no longer attend P.S. 94 at Building 188. In fact, upon reading the Girls Prep EIS, parents would not even know about the proposed phase-out of grades 4 and 5. The Girls Prep EIS fails to satisfy the statutory requirements because it

does not identify the names and locations of alternative schools, the number of seats available in each alternative school location, the capacity of each school to handle the increased student population, the impact of the proposed grade reconfiguration on transportation and personnel, and the differences in the programs and opportunities available at each P.S. 94 location. NY Educ. Law § 2590-h(2-a)(b). As a result, parents of students who planned on enrolling at P.S. 94 in the coming years would have been provided no information regarding whether other schools in the same neighborhood or community district have the capacity to accommodate their children.

Surprisingly, the DOE identifies alternative locations in its Answer and Memorandum of Law (Ans. ¶ 91, 92; DOE Mem. Law pgs. 20, 28)—but that information appears nowhere in the Girls Prep EIS. This information is required by law to be included in the applicable EIS so that the affected community members can voice their concerns regarding the proposal in advance of the PEP’s decision,⁷ but it was not.⁸ Moreover, the information provided in the DOE’s Answer is not sufficient for parents and the affected community to know the availability of seats, locations, and the various programs offered at each school. This violates the mandates of the New York Education Law. See NY Educ. Law § 2590-h(2-a)(b)(vi) (the EIS must include information regarding “the ability of other schools in the affected community district to accommodate pupils following the school closure or significant change in school utilization”).⁹

⁷ 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) (holding that the EISs were insufficient because, among other things, the EISs merely indicated in a boilerplate fashion that the number of seats that were being eliminated by the proposal would be absorbed throughout the city)

⁸ Furthermore, even though the DOE identifies alternative locations in its brief, the DOE is still uncertain as to the impact on affected students, stating that “any loss of seats at P.S. 94 at M188 **should not have** a significant impact on autistic students residing in District 1.” Answer at 28 (emphasis added.) The DOE does not know because they have not analyzed it.

⁹ The DOE also failed to consider the availability of the necessary special education and English as a Second Language (“ESL”) programs at the potential alternative schools. Students at P.S. 94 are entitled to certain programs

Again, the Girls Prep EIS fails to even identify these alternative schools, let alone assure that students will be able to receive the services mandated on the IEPs at another site.

D. The Proposed Expansion of Girls Prep Will Impact P.S. 94.

The statute requires that the DOE describe the effect of the proposed change on any “affected students.” See NY Educ. Law § 2590-h(2-a)(b)(ii). Despite the DOE’s assertions that there will be no effect on P.S. 94 students (DOE Answer at 112-113), Ronnie Schuster, principal of P.S. 94 admitted that P.S. 94 is “impacted more than anyone” by the proposed expanded co-location. Ms. Schuster noted that P.S. 94 would be decreasing the number of sections in the school, “despite the fact that autism is the fastest growing needs [sic] in the nation.” DOE Ex. G (Joint Meeting of NYC Department of Education, P.S. 188, P094, and Girls Prep Charter School; Meeting Minutes; Jan. 5, 2010 at 2-3). Because the DOE’s plan to expand Girls Prep would result in a significant change in school utilization for P.S.94, students that currently attend or expect to attend P.S. 94 are “affected students” under the New York Education Law, and the DOE must address the impact of the Girls Prep expansion on P.S. 94 in a separate EIS. N.Y. Educ. Law § 2590-h(2-a)(b)(ii).

The proposed Girls Prep expansion will result in the truncation of grade levels at P.S. 94 at M188, and the DOE must address the logistical concerns thereof in an EIS. Section 2590-h expressly requires the DOE to disclose in an EIS the impacts on, among others, costs of instruction, transportation, personnel, and safety issues. See NY Educ. Law § 2590-h(2-a)(b) (requiring information relating to the effect on personnel needs, the costs of instruction, administration, transportation, and other support services, the type, age, and physical condition

and services pursuant to their IEPs, and the DOE must ensure that those programs and services are sufficiently available at the alternative locations. In contrast to the Girls Prep EIS, the DOE conducted a more thorough analysis in the P.S. 138 EIS of the programs offered at each P.S. 138 school location.

of the school building, the ability of other schools in the affected community district to accommodate pupils).

With regard to the effect of the proposed change on personnel needs, the elimination of grades 4 and 5 at P.S. 94 at M188 will result in the elimination of fourth and fifth grade teachers and paraprofessionals assigned to those classes at P.S. 94 at M188 and will likely necessitate changes in the schedule of related service providers currently serving the needs of P.S. 94 students at M188. In particular, because there will be fewer students at this P.S. 94 site, the number of related service providers at this P.S. 94 site will likely decrease. It also will likely impact the personnel requirements and number of classrooms needed at the alternative schools that will serve the students who are re-sited from P.S. 94 at M188 as a result of the Girls Prep expansion. However, the DOE did not address any of these impacts in an EIS.

In addition, the DOE must describe the effect of the proposed change on the costs of transportation. See NY Educ. Law § 2590-h(2-a)(b)(iv). To the extent that fourth and fifth grade students would have attended P.S. 94 at M188,¹⁰ they will be sent to schools in other locations, such as Building M015,¹¹ Building M361,¹² or Building M276,¹³ one of which is 2-3 miles away. See DOE Ex. B (Map of P.S. 94 sites).. Some of these proposed alternative schools are not situated in District 1, and as a result, the proposed changes may affect transportation routes and schedules. Id. Further, the impacted students are young students with autism that likely cannot use public transportation without supervision. The DOE should have addressed whether there are public school busses that will be available to transport the students from their

¹⁰ Building M188 is located at 442 East Houston Street (east of Avenue D), New York, NY 10009.

¹¹ Building M015 is located at 333 East 4th Street (between Avenues C and D), New York, NY 10009.

¹² Building M361 is located at 610 East 12th Street (between Avenues B and C), New York, NY 10009.

¹³ Building M276 is located at 52 Chambers Street, New York, NY 10007.

homes to the alternative school locations, and whether such transportation will result in additional costs to the State.

Not only does the DOE need to address the impact of the expansion of Girls Prep on the students currently served by P.S. 94 at M188, it also needs to address the impact on students that would have gone to P.S. 94 in the upcoming years for their fourth and fifth grade classes but are now being re-sited to alternative schools. See NY Educ. Law § 2590-h(2-a)(b)(ii) (requiring the DOE to include in the EIS “the impacts of the proposed school closing or significant change in school utilization to *any affected students*.”) (emphasis added). Second and third grade students that otherwise would attend P.S. 94 at M188 for the fourth and fifth grades will now need to complete their elementary education at another school location. Under the DOE’s proposal, students that expected to enter into P.S. 94 at M188 in the fourth grade and continue in the same school through the eighth grade will no longer be able to remain at a single school location for that extended period of time; rather, those students may be attending more schools during the course of their educational careers, and they will need to transition when entering the fourth grade and transition again when entering the sixth grade.¹⁴

The DOE also needs to discuss the impact on any fourth and fifth grade students at P.S. 94 at M188 who are not promoted to the next grade. Once the fourth and fifth grades are phased out of P.S. 94 at M188, these current students will no longer be able to attend P.S. 94 at M188 and will be forced to move to a different school, possibly for only a year or two before having to move again for middle school – moves that are severely detrimental to students with autism.

Indeed, the impact of the proposed phase-out, grade reconfiguration, and re-siting of P.S. 94 is particularly acute in this case because the grade reconfiguration involves special needs

¹⁴ For example, a student who is referred to District 75 in the fourth grade would otherwise be able to attend P.S. 94 at M188 from grades 4 through 8. Now, the student will have to attend two schools – one for grades 4 and 5 and then move to another school for grades 6 through 8.

students, and specifically, autistic students. Students who are on the autism spectrum frequently have difficulty with transitions, which can cause confusion and anxiety. See Am.Pet Ex. K (*Transitions: Perspectives from Parents of Young Children with Autism Spectrum Disorder (ASD)*), abstract). Autistic students also tend to resist environmental change and change in daily routines, and instead thrive in consistent, structured and familiar environments. See Am.Pet. Ex.. J (*A Parent's Guide to Special Education Services for School Age Children*, ch. 3); Santos Aff. in Support of Petition, dated March 25, 2010. The impact of these transitions on the affected special needs students should have been considered and disclosed by the DOE in an EIS.

Accordingly, the DOE failed to meet the requirements of New York Education Law by disregarding its obligation to submit an EIS describing these impacts (or the lack of such impacts) on the students at P.S. 94 at M188 to the PEP and the community.

II. The Girls Prep EIS is Not in Compliance with New York Education Law Because It Does Not Adequately Describe the Impact of the Girls Prep Expansion on P.S. 94 and P.S. 188.

As explained above, a separate EIS must be issued for the re-siting of P.S. 94. In addition, the Girls Prep EIS failed to meet the statutory requirements for addressing the impact of the expanded co-location to P.S. 188 and the remaining grades at P.S. 94 at M188.

A. New York Education Law Requires the DOE to Provide A Detailed and Meaningful Analysis of the Impact on Affected Students, Including Not Only Girls Prep But Also P.S. 94 and P.S. 188.

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 expansion of Girls Prep affects the current and prospective students at P.S. 94 and P.S. 188 and, therefore, any EIS relating to the expansion must include a discussion of the impact on them.

The amendments to New York Education Law requiring EISs are only a year old, so the caselaw 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 the 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 obligation to take a “hard look” and make a “reasoned elaboration” as the basis for its determination. 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 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. One of the challenged votes was a vote to expand the co-location of a charter school with P.S. 15 in Brooklyn. The New York Supreme Court examined the EISs of these 19 schools and found the EIS’s to be inadequate because “[t]he EISs completely failed to provide information about specific programs existing at the schools proposed to be closed or phased out, or where the students would be able to find such programs.” See Mulgrew, 2010 NY Slip Op 20146 at 9-10.

The Court nullified the PEP votes and required the DOE to reissue EISs for the 19 schools in compliance with New York Education Law.

As in the environmental impact cases and Mulgrew, because the DOE did not take a “hard look” or make a “reasoned elaboration” in forming its determination to expand Girls Prep, the Commissioner should reject the Girls Prep EIS and PEP vote here. See Mulgrew, 2010 NY Slip Op 20146 (using the SEQRA analysis in evaluating the adequacy of an educational impact statement).

B. The Girls Prep EIS Does Not Meet the Statutory Requirements for Analyzing the Impact on the Affected Students of P.S. 94 and P.S. 188.

The Girls Prep EIS submitted by the DOE failed to comply with the requirements of New York Education Law. The Girls Prep EIS contained mere conclusory statements that were not supported by data and documentation, and completely failed to describe the impact of the proposed expansion of Girls Prep on the current and prospective parents, students and teachers of P.S. 94 and P.S. 188.¹⁵ Contrary to the DOE’s assertions in the Girls Prep EIS that “[n]o impacts on P.S. M094 and P.S. 188 personnel are anticipated as a result of this proposal” Am. Pet. Ex. F (“Proposal for a Significant Change in the Utilization of School Building M188 Educational Impact Statement; Grade Expansion of Girls Preparatory Charter School of New York (84M330); Department of Education, Jan. 8, 2010)., there will be a significant impact on the current and prospective students at P.S. 94 and P.S. 188. In fact, the principals of both P.S. 94 and P.S. 188 admitted that their schools will be impacted by the proposed expansion. See DOE Ex. G (Joint Meeting of NYC Department of Education, P.S. 188, P094, and Girls Prep Charter School; Meeting Minutes; Jan. 5, 2010 at 2-3).

¹⁵ For example, the Girls Prep EIS stated that “[t]his proposal will have no impact on the transportation services provided to any student,” without any further discussion, other than referring to the Chancellor’s Regulation that governs pupil transportation, Am. Pet. Ex. F at 7, “[n]o initial costs or savings are anticipated as a result of this proposal,” Id. at 6, and “[a]ll schools will have sufficient space to meet their instructional needs,” Id. at 6.

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 Mem. at 26); however, this argument was rejected in Mulgrew. Similarly, the DOE’s argument that the decisions relating to “[h]ow allocation of space will change to accommodate the additional students and how the shared spaces will be scheduled and programmed are ... ultimately up to the Building Council” (DOE Mem. at 29) is erroneous. New York Education Law clearly details the impacts that must be disclosed in an EIS, and the DOE’s decision to pass the buck to another DOE entity for a later determination does not excuse the DOE’s obligation to disclose the potential impacts in an EIS.

Not only did the DOE fail to adequately address the impact of the proposed expansion and the community’s concerns, but it failed to even *identify* many of the ramifications and impacts. As a result, the DOE did not enable the public to fully understand the nature and consequences of the specific impacts that can be reasonably anticipated as a result of the proposed expansion of Girls Prep and to assess and comment upon the DOE’s analysis.

1. The Proposed Expansion of Girls Prep Will Have an Impact on Students at P.S. 94.

First, the DOE’s discussion in the Girls Prep EIS of the impact on the “Students” in the section entitled “Impact of the Proposed Grade Reconfiguration on the Community, Existing Schools and Students” describes the impact of the proposed expansion only on the students of Girls Prep but *does not even mention* the impact on the students of P.S. 94 and P.S. 188. See Girls Prep EIS, II.C (indicating that P.S. 94 currently serves grades 4-9 and is projected to serve grades 4-9 during the 2010-2011 school year). The students of P.S. 94 qualify as “affected

students” under the statute, and the Girls Prep EIS violated the statute by failing to address the impact of the Girls Prep expansion on them. See NY Educ. Law § 2590-h(2-a)(b)(ii).¹⁶

Second, the Girls Prep EIS does not provide *any* information regarding the truncation of grade levels at P.S. 94 at M188; in fact, it does not even *inform* the public of the proposed grade reconfiguration. The Girls Prep EIS explains that Girls Prep will be expanded over time to include students in grades K-6 during the 2010-2011 school year and students in grades K-8 during the 2012-2013 school year. However, it implies that students in P.S. 94 will not be affected, misleadingly noting that P.S. 94 currently serves grades 4-9 and will continue to serve grades 4-9 during the 2010-2011 school year. Most importantly, the DOE did not disclose that the grades served by P.S. 94 at M188 will be truncated during the next few years nor did it disclose that the grade elimination would be completed by the 2012-2013 school year.¹⁷ See Girls Prep EIS, II.A and C. To the extent the DOE included information regarding the capacity of P.S. 94 generally and not P.S. 94 at M188, such information is disingenuous and violates the spirit of the statute.¹⁸ See NY Educ. Law § 2590-h(2-a)(b)(ii).

Further, the Girls Prep EIS includes the conclusory statement that “P.S. M094 students will graduate and enroll in other schools over the next few years and no students will be

¹⁶ The DOE subsequently indicated in that fifth grade students would no longer be admitted to the P.S. 94 at M188 program; however, this acknowledgement was made in the Revised Public Comment Analysis, dated February 24, 2010 (the same day as the PEP vote) and was not provided to the community members at the time the Girls Prep EIS was filed (January 8, 2010).

¹⁷ While the DOE notes in Part I of the Girls Prep EIS that the students at P.S. 94 “will graduate and enroll in other schools over the next few years” and that “space will be created through graduation of current students,” there is no indication that the number of grades served at P.S. 94 at M188 will be truncated. An equally plausible interpretation of the DOE’s summary is that based on the current enrollment in the earlier grades at District 75 schools, the number of students expected to enroll each year at P.S. 94 is expected to naturally decline over time.

¹⁸ It is worth noting that the DOE’s characterization of the grades currently served and to be served by P.S. 94 is belied by an EIS submitted on the same date as the Girls Prep EIS (January 8, 2010) for the re-siting of P.S. 138 (the “P.S. 138 EIS”). See Santos Aff./ Pet., Ex. A. Similar to P.S. 94, P.S. 138 is a District 75 school that is sited in multiple locations; however, in the P.S. 138 EIS, the DOE acknowledged that P.S. 138 serves grades K-5 at the building M033 location and grades K-12 across all sites. See Santos Aff./ Pet., Ex. A.II.

displaced” and provides that “as P.S. M094 students matriculate, [Building] M188 will have sufficient space for the grade expansion of Girls Prep, and for P.S. M094 and P.S. 188 to operate at full organizational capacity.” See Girls Prep EIS, I. This is simply not true. The students at Girls Prep will not have sufficient space to expand due to the natural matriculation process of P.S. 94 students—rather, Girls Prep will only have sufficient space to expand if grades 4 and 5 are phased out of P.S. 94 and any incoming fourth and fifth grade students that would have attended P.S. 94 at M188 are moved to an alternate location. The EIS does not disclose this crucial fact.

Third, the DOE’s representation that no P.S. 94 students will be displaced is also misleading. The Girls Prep EIS did not address the impact that the phasing out of fourth and fifth grade students will have on the current fourth and fifth grade students at P.S. 94 at M188 who are not promoted to the next grade. Because there will no longer be a fourth or fifth grade at the school, these current students will no longer be able to attend P.S. 94 at M188 and will be forced to move to a different school, possibly for only a year or two before having to move again—moves that are severely detrimental to students with autism.

Fourth, the DOE does not address the fact that the elimination of grades 4 and 5 at P.S. 94 at M188 will result in the elimination of fourth and fifth grade teachers and paraprofessionals assigned to those classes at P.S. 94 at M188, and will also affect transportation routes and schedules for the students who are being re-sited to other P.S. 94 locations and for the remaining students at P.S. 94 at M188, as fewer students will require transportation to Building M188. See NY Educ. Law § 2590-h(2-a)(b)(iv) (the EIS must include information regarding “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”).

Fifth, the DOE failed to describe the impact of the proposed change on the remaining P.S. 94 students. See NY Educ. Law § 2590-h(2-a)(b)(ii). The P.S. 94 student population is primarily male (81.64%),¹⁹ and these students currently share various common areas with students from P.S. 188, which is nearly equally comprised of male and female students (45.6% male). Following the proposed expansion of Girls Prep, the P.S. 94 students will need to share the fifth floor and various common areas with students from Girls Prep, which has an entirely female student population. The P.S. 94 special education students will have fewer opportunities to interact with general education students due to its primarily male student population and the commitment of Girls Prep to remain an all-girls charter school.

Sixth, P.S. 94 students at M188 will also be impacted by the reduction of classroom space and reduced use of the common areas following the expansion of Girls Prep. With the expanded co-location, P.S. 94 and Girls Prep students will be sharing a technology lab, a science lab, a library, and space for the provision of related special education services. P.S. 94, P.S. 188, and Girls Prep will share space that will be used for Occupational Therapy and Physical Therapy services. DOE Ex. I (Room Details for P94 and Girls Prep Middle School). The EIS failed to address or even consider the impact of the decreased access to spaces for these services on P.S. 94 students.

The Girls Prep EIS also failed to describe the effect of the proposed change on costs related to instruction. N.Y. Educ. Law § 2590-h(2-a)(b)(iv). In Exhibit O of its Answer (DOE Responses to CCSE Questions), the DOE discusses several projects that will be completed at Building M188 in order to accommodate Girls Prep on the fifth floor of the building. This includes “wall and ceiling repair,” “re-wiring,” and “installation of vision panels.” DOE Ex. O

¹⁹ This data refers to the demographics of P.S. 94 as a whole. The demographics of the students at P.S. 94 at M188 differ in some respects.

(DOE Responses to CCSE Questions at 3-4). The Girls Prep EIS did not discuss the impact of this construction on P.S. 94 students, the costs of these improvements or identify who was responsible for bearing such costs.

Accordingly, the DOE failed to discuss in the Girl Prep EIS the ramifications of the proposed Girls Prep expansion upon the P.S. 94 community and the impacts on the P.S. 94 students, in violation of New York Education Law.

2. The Proposed Expansion of Girls Prep Will Have an Impact on Students at P.S. 188.

The expansion of Girls Prep will negatively affect the students at P.S. 188, and the DOE failed to describe these impacts in the Girls Prep EIS. Since Girls Prep moved into Building M188, P.S. 188 has suffered a loss of classroom, cluster and office space. For example: (a) the full-time speech and language therapist currently is housed in the back of a classroom and must provide services while the class is in the middle of instruction, (b) one part-time speech and language therapist must provide services in the UFT teacher room, which is also used for small group work by special education teachers, (c) a second part-time speech and language therapist has no designated space and must serve students in the hallway, (d) there is no designated space for the part-time occupational therapist, who is forced to use space in P.S. 94 (which space will be given up to Girls Prep in connection with the proposed expansion), (e) two elementary guidance counselors share a small office with the parent coordinator, which makes it difficult to maintain confidentiality or allow for group counseling, (f) there is inadequate gym space for the number of students currently occupying the building, (g) the cafeteria is too small to accommodate the existing students, (h) there is not enough space to accommodate the after-school programs for each of the three schools, and (i) the bathroom facilities are insufficient to accommodate all of the students and staff in Building M188. See Walker Aff. Ex. 1 (M094

Statistics). In addition, P.S. 188 has already been forced to downscale the Middle School 21st Century Community Learning Center After School program and discontinue the boys' and girls' basketball teams. Id.

The P.S. 188 School Leadership Team's ("SLT") comments to the Girls Prep EIS indicated that the hardships discussed above do not take into account the proposed expansion of Girls Prep. The SLT anticipates that P.S. 188 will face an additional shortage of space because: (a) P.S. 188 will need an additional fifth grade classroom to serve its current fourth grade students, (b) P.S. 188 is anticipating an increase in enrollment by approximately 40 students, and (c) the addition of 300 Girls Prep students would (i) require two additional lunch periods, which would eliminate any use of the lobby-level gym space for instructional purposes during those periods, and (ii) result in a shortage of "supper" timeslots for students in after-school programs in Building M188, which means that there would not be enough time to serve supper to all of the after school students. See Donlan Aff. in Support of Reply to DOE, dated May 17, 2010, Ex. 1 (Resolution of the Community District Educational Council (CEC) for Community School District One). Mary Pree, the principal of P.S. 188, also admitted that the expanded co-location would have an impact on P.S. 188 because "there are 300 more students in the building, which makes shared spaces challenging." DOE Ex. G at 2-3.

The Community Education Council ("CEC") for District 1 also expressed concerns regarding the impacts of the proposed Girls Prep expansion on P.S. 188 (as well as P.S. 94). See Donlan Aff. in Support of Reply to DOE, dated May 17, 2010, Ex. 1 (Resolution of the Community District Educational Council (CEC) for Community School District One). The CEC noted that P.S. 188 has developed a comprehensive network of wrap-around support services for students living in temporary housing shelters and their families, such as mental health

counseling, medical services, computer literacy and ESL classes for parents, extended day programs, Saturday sports, recreation and enrichment, homework help and tutoring with internet access. The reduced capacity of P.S. 188 “may affect these children directly by depriving them access to enrichment programs” and “would severely curtail P.S. 188’s ability to continue offering the programs for which it has been awarded competitive funding.” *Id.* at ¶ 50, 70. The CEC therefore requested that the Office of Portfolio Planning suspend its space planning efforts for Girls Prep until a comprehensive needs assessment is completed. *Id.*

Despite the DOE’s obligation under New York Education Law to disclose the ramifications of the proposed Girls Prep expansion upon the community and the impacts on any affected students, the DOE failed to address any of the aforementioned impacts of the Girls Prep expansion on P.S. 188.

C. The Proposed Expansion of Girls Prep Will Implicate the Safety of the Students in Building M188.

Contrary to the requirements of New York Education Law, the DOE did not accurately reflect the capacity at Building M188 or the impact that expanding Girls Prep could have on the safety of students, teachers and visitors in Building M188. *See* Walker Aff. Ex. 2 (SLT Presentation at the Feb. 11, 2010 Hearing regarding ELS).

In the Girls Prep EIS, the DOE inaccurately asserts that the building capacity in Building M188 is 1010 students. According to the school safety plan, the maximum number of individuals in the building (including staff, students and visitors) is equivalent to the capacity of the building as indicated on the most current Certificate of Occupancy granted by the New York City Department of Buildings. The architecture of Building M188 necessitates that in cases of natural disaster and emergencies, everyone be moved to this first floor, which, according to the most current Certificate of Occupation granted by the New York City Department of Buildings,

has a capacity of only 920. See Walker Affidavit, Ex. 2(SLT Presentation at the Feb. 11, 2010 Hearing regarding ELS). Accordingly, the current population threshold for Building M188 is 920 persons. Id.

There are currently 397 students enrolled in P.S. 188, 41 enrolled in P.S. 94, and 261 enrolled in Girls Prep, which means the total number of students in Building M188 is 689. See Am. Pet. ¶ 4-5; DOE Ans. ¶ 3, . The DOE proposes to expand Girls Prep in spite of the fact that the proposed enrollment of students attending school in Building M188 in the 2012-13 school year would be 1,001. This number, which already exceeds the maximum number of persons allowed, does not include all the corresponding visitors, faculty and staff (estimated to be 208 by the 2012-13 school year) in the building.

The proposal to house an additional 300 students in Building M188, for a total of approximately 1000 students and 200 adults, will jeopardize all students and adults in the building. By permitting Girls Prep to expand beyond the 920 student threshold allowable by both the Department of Education and the New York City Building Code, the DOE is violating the law and endangering students and staff members.

In connection with its Answer, the DOE argued that the Building Response Team and the School Safety Committee will begin to meet now regarding appropriate shelter-in areas that can accommodate the increased student population. See Konstan Aff. ¶ 5. However, New York Education Law requires that the DOE describe *in an EIS* the ramifications of a significant change in school utilization upon the community, and the DOE failed to discuss (a) any potential shelter-in alternatives, or even the fact that the Building Response Team and the School Safety Committee will need to adjust the Building M188 safety and emergency plans, and (b) the likelihood that such alternative will be discovered prior to the 2010-2011 school year and

whether the expansion will go forward in the event such alternatives are not solidified. Moreover, the DOE has not provided any details related to the costs of such modifications and the feasibility of executing the changes in a school that houses a large percentage of special needs students.

Building M188 is over 100 years old and the center of the building has many glass windows, making it unsafe for students to take shelter there in case of an emergency. If there were to be an emergency in Building M188 before the time that the DOE can identify the potential shelter-in alternatives, there likely are no other locations available for students and staff to take safe shelter. Allowing Girls Prep to expand to accommodate an additional 300 students without providing alternative safety and emergency plans would be reckless and irresponsible, and the DOE's failure to inform the affected parties is a violation of New York Education Law.

Accordingly, the Girls Prep EIS failed to comply with the requirements of New York Education Law because it did not include any meaningful discussion regarding the ramifications of the expansion of Girls Prep on the community at large and the impact on affected students and parents. Because the EIS is the starting point in the public process, its inadequacy taints the entire process and the resulting PEP vote should be invalidated. As the DOE itself states, the purpose of the EIS is to "ensure that school officials solicit and obtain community input before exercising their unfettered pedagogical judgment" and to "afford the public information about the nature of the proposal, its underlying purpose, its key consequences for students who are attending or planning to attend affected schools." DOE Mem. Law, pgs. 25-26.

III. 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 notice of the proposed grade expansion of Girls Prep and grade reconfiguration of P.S. 94 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).

Despite these statutory requirements, the DOE did *not* provide adequate notice to: (a) the parents of the students *currently* attending P.S. 94 and P.S. 188, even though those students will be forced to suffer additional overcrowding and reduced use of common areas, (b) the parents of *prospective* students of P.S. 94 and P.S. 188, who will be significantly impacted if they are required to attend alternative schools as a result of the Girls Prep expansion, or (c) the parents of students at the alternative schools that will be taking on the fourth and fifth grade students that are being displaced from P.S. 94, some of which are already overcrowded. See P.S. 361, <http://insideschools.org/index12.php?fs=18&str=361&formtype=name>.

Further, while the DOE's Memorandum of Law asserts that the principals of P.S. 94 and P.S. 188 were instructed to send written notices home with the students (DOE Mem. Law, pgs. 23-24), the DOE did not send *any* notices home to P.S. 94 parents and insufficient notices to P.S.

188 parents. See Santos Aff. in Support of Petition, dated March 25, 2010, ¶ 7; Am. Pet. ¶ 30; Reply to DOE ¶ 101-102. The principal of P.S. 188 sent home notices that: (a) did not include a copy of the Girls Prep EIS, (b) referred parents to the DOE's website, despite the fact that the website did not refer to the co-location of Girls Prep with P.S. 94 and P.S. 188, and in any event, is insufficient to provide the parents with notice of the contents of the EIS, and (c) did not translate the notices into the native language of the parents. See Am. Pet. ¶ 13. Nor did the website provide meaningful access to non-English-speaking parents. Am. Pet. Ex. G (Panel for Educational Policy, Proposals for Significant Changes in School Utilization, February Vote).

B. Publishing the EIS on the DOE's Website Does Not Constitute Compliance With the Statute.

It is not sufficient notice for the DOE to post the EIS and hearing notice on its website. In fact, only two months ago, Justice Lobis considered this very issue in an Article 78 proceeding challenging the DOE's compliance with Article 52-A in connection with the closing and reconfiguration of several schools. The Court rejected the DOE's argument that 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.

Posting a notice on the PEP website is insufficient to put parents of students at P.S. 94 and P.S. 188 on notice of the hearing related to the proposed expansion of Girls Prep. Over 90% of the students that attend P.S. 188 live in the immediate neighborhood, residing in two housing projects and a temporary housing shelter. 93% of the families live in poverty with a median income of \$13,000. See Walker Aff. Ex. 1 (SLT Response to NYCDOE Educational Impact Statement Re Expansion of Girls Prep; Feb. 22, 2010). It seems highly unlikely that these families have access to the internet and could access the Girls Prep EIS via the PEP website. As a result, the DOE should have distributed or made available the Girls Prep EIS to parents of P.S. 94 or P.S. 188 students in another fashion. 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, even if all the parents of P.S. 94 and PS. 188 students had internet access, the website referred to the “Grade Expansion” of Girls Prep and did not refer to P.S. 94 and P.S. 188. Therefore, any reference to the website alone would not have put the parents of P.S. 94 and P.S. 188 students on notice of the proposed changes to their schools.

There are many ways in which the DOE could have maximized the receipt of notice to the parents of current and prospective students of P.S. 94 and P.S. 188. For example, the DOE could have mailed the notice and EIS to parents of children currently attending P.S. 94 and P.S. 188, and to parents whose children may attend P.S. 94 and P.S. 188 in subsequent school years but for the grade reconfiguration. Alternatively, the DOE could have posted notices around the school, passed notices out to parents as they dropped off or picked up their children from school, or taken greater efforts to ensure that the principals of P.S. 94 and P.S. 188 actually sent notices home with the students. Instead, the DOE relied merely on its inadequate website posting.

IV. 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 in decisions regarding the closing or phasing out of schools." 2010 NY Slip Op 20146. To ensure that the DOE provides the proper notice and information to affected communities going forward, the Court 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.

CONCLUSION

For the foregoing reasons, the Petitions respectfully request that: (a) the February 24, 2010 PEP vote to expand Girls Prep be annulled on the ground that it violated the procedural requirements identified in New York State law, (b) the DOE be required to issue a separate proposal, issue a separate EIS and hold a separate public hearing for the grade reconfiguration and re-siting of P.S. 94 at M188, (c) the DOE be required to conduct a PEP vote on the P.S. 94 phase-out, grade reconfiguration and re-siting separately from the vote on the co-location of Girls Prep, (d) the DOE be required to publish a new EIS for the grade expansion of Girls Prep that includes a substantive analysis of the impact of the proposal on the students at all three schools (including, without limitation, a thorough analysis of the number of classrooms that P.S. 94 and P.S. 188 will lose to Girls Prep during its expansion, the resulting loss of instructional space to P.S. 94 and P.S. 188 students and any impact on the two schools' ability to continue to provide related services, including occupational therapy, physical therapy, and counseling, to its students after losing the space), (e) the DOE be required to make the EIS and co-location proposal available to all of the parents of students at P.S. 94, P.S. 188 and Girls Prep and the affected communities, (f) the DOE be required to hold a joint public hearing with the impacted community council and school-based management team at Girls Prep, P.S. 94 and P.S. 188 and allow all interested parties an opportunity to present comments and concerns regarding the proposal, and (g) the DOE be required to conduct a new PEP vote on the expansion of Girls Prep.

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