

REDACTED

In the Matter of JOHN BATTIS, on behalf of
, and LYDIA BELLAHCENE,
on behalf of
, and
from the resolution of the
New York City Department of Education to
continue and expand the co-location of PAVE
Academy Charter School with P.S. 15 Patrick
F. Daly School.

PETITION TO THE
COMMISSIONER OF
EDUCATION AND
REQUEST FOR STAY

NOTICE:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the Commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three (3) business days after service of the petition.

REDACTED

PETITION TO THE
COMMISSIONER OF
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This Petition is filed on behalf of John Battis and Lydia Bellahcene, parents of children who attend P.S. 15 Patrick F. Daly School (“P.S. 15”) in Brooklyn, New York. Mr. Battis and Ms. Bellahcene (collectively, “Petitioners”) submit this Petition to challenge the April 20, 2010 vote and resolution of the Panel for Educational Policy (“PEP”) of the New York City Department of Education (“DOE”) to continue and expand the co-location of PAVE Academy Charter School (“PAVE”) with P.S. 15.

Background Information Regarding the Petitioners and Schools Involved

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services. She receives physical therapy and occupational therapy at the school. She also receives speech therapy outside of school because P.S. 15 is unable to provide it during the school day.

3. P.S. 15 has 389 students, from pre-kindergarten through fifth grade. According to publicly available data, 50.38% of the students at P.S. 15 are Hispanic, 36.83% are African American and 9.21% are English Language Learners (“ELL”).¹ Approximately 95% of the students at P.S. 15 receive free or reduced price lunch² and one-third (33.50%) of the students receive special education services.³ Of these special education students, 65 are educated in self-contained classes,⁴ 14 are mandated to receive Special Education Teacher Support Services (“SETSS”), 45 are mandated to receive counseling, 75 are required to mandated speech therapy, 33 are mandated to receive occupational therapy, and 10 are mandated to receive physical therapy.⁵
4. P.S. 15 received an overall grade of “A” with an overall numerical score of 95.6 (out of 100) on its 2008-2009 New York City Department of Education Progress Report.⁶ P.S. 15 also

¹ See P.S. 015 Patrick F. Daly Register, <http://schools.nyc.gov/SchoolPortals/15/K015/AboutUs/Statistics/register.htm>, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit A.

² See THE NEW YORK STATE SCHOOL REPORT CARD: ACCOUNTABILITY AND OVERVIEW REPORT 2008-2009, P.S. 015 PATRICK F. DALY SCHOOL, <https://www.nystart.gov/publicweb-rc/2009/12/AOR-2009-331500010015.pdf>, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit B.

³ See Exhibit A.

⁴ *Id.*

⁵ See SPECIAL EDUCATION SERVICE DELIVERY REPORT, P.S. 015 PATRICK F. DALY, (Dec. 31, 2009), http://schools.nyc.gov/documents/teachandlearn/sesdr/2009-10/sesdr_K015.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit C.

⁶ See NEW YORK CITY DEPARTMENT OF EDUCATION PROGRESS REPORT 2008-2009, P.S. 015 PATRICK F. DALY, http://schools.nyc.gov/OA/SchoolReports/2008-09/Progress_Report_2009_EMS_K015.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit D.

received an overall grade of “A” in the 2006-2007 and 2007-2008 reports, with overall numerical scores improving from 66.0 in 2006-2007 to 85.6 in the 2007-2008 report.⁷ It received additional credit for exemplary proficiency gains for special education students, Hispanic students in the lowest third of test scores citywide, and African-American students in the lowest third of test scores citywide.⁸

5. P.S. 15 is located in the K015 building at 71 Sullivan Street in Brooklyn, New York.
6. PAVE Academy Charter School (“PAVE”) is a charter school that has shared the K015 building with P.S. 15 since 2008. Currently, PAVE has 138 students and serves students in kindergarten through second grade.⁹ PAVE’s website does not list any ability to meet the needs of ELLs and special education students.¹⁰ When PAVE moved into the P.S. 15 building at the beginning of the 2008-2009 school year, a commitment was made that the

⁷ See NEW YORK CITY DEPARTMENT OF EDUCATION PROGRESS REPORT 2006-2007, P.S. 015 PATRICK F. DALY, http://schools.nyc.gov/OA/SchoolReports/2006-07/Progress_Report_2007_EMS_K015.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit E; NEW YORK CITY DEPARTMENT OF EDUCATION PROGRESS REPORT 2007-2008, P.S. 015 PATRICK F. DALY, http://schools.nyc.gov/OA/SchoolReports/2007-08/Progress_Report_2008_EMS_K015.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit F.

⁸ See Exhibit D. Students in the lowest third Citywide in English Language Arts scored less than the lowest third Citywide cutoff for their grade on the State ELA exam last year. The lowest third Citywide cutoffs were determined based on the bottom third of students in a grade Citywide based on the 2007 ELA exam. Similarly, students in the lowest third Citywide in mathematics scored less than the lowest third Citywide cutoff for their grade on the State math exam last year, where the lowest third Citywide cutoffs were determined based on the bottom third of students in a grade Citywide based on the 2007 math exam. See EDUCATOR GUIDE, THE NEW YORK CITY PROGRESS REPORT, http://schools.nyc.gov/NR/rdonlyres/DF48B29F-4672-4D16-BEEA-0C7E8FC5CBD5/65798/EducatorGuide_EMS_0804093.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit G.

⁹ EDUCATIONAL IMPACT STATEMENT: EXTENSION TO THE CO-LOCATION OF PAVE ACADEMY CHARTER SCHOOL (84K651) AND P.S. 15 PATRICK F. DALY (15K015) (Dec. 11, 2009), a true and correct printout of which is attached as Exhibit H.

¹⁰ See PAVE Academy Charter School Website, <http://paveacademy.org/academics.html>, <http://paveacademy.org/quick-facts.html>, <http://paveacademy.org/student-faq.html>, accessed May 4, 2010, true and correct printouts of which are attached as Exhibit I.

co-location would last for two school years and would therefore continue until the end of the 2009-2010 school year.¹¹

The Detrimental Impact of PAVE's Co-location on the Education of P.S. 15 Students

7. Since PAVE moved into the building in 2008, P.S. 15 students have had to give up six full rooms and six half-rooms to accommodate the PAVE classrooms.¹² Generally, these losses have resulted in the downscaling or outright termination of academic intervention and enrichment services, as well as a decline in quality of related services. The rooms ceded to PAVE included: full service classrooms; a computer room; a science lab; an occupational therapy room; a full-time speech and language room; a room used for professional development, computers, professional resources, and teacher meetings; a math coach room for academic intervention services and resources; the special education office; a social services room used by Good Shepherd for one-on-one individual and family counseling; and a room used for arts, enrichment, and academic intervention services.¹³ Additionally, the gymnasium, cafeteria, and auditorium must be shared among P.S. 15 and PAVE students. Scheduling difficulties related to the shared gymnasium have led to a loss of physical education time for P.S. 15 students.¹⁴
8. The lost classrooms have had many deleterious effects on P.S. 15. The loss of full service classrooms has forced P.S. 15 to move general education classes into rooms previously used

¹¹ See SUMMARY OF PROPOSAL AND COMMENTS RECEIVED AT THE JOINT PUBLIC HEARING (Jan. 26, 2010), http://schools.nyc.gov/NR/ronlyres/F0043783-8608-433C-855E-99228622A268/76308/K015_PAVE84K651_analysisofcomment_12610_Final.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit J.

¹² See Affidavit of John Battis dated May 4, 2010, attached to this petition ("Battis Aff."), ¶¶ 6-7 and Exhibit 2.

¹³ *Id.*

¹⁴ *Id.*

by other programs.¹⁵ It also has forced P.S. 15 to collapse one class, which increased class sizes.¹⁶ The loss of the rooms used for arts, enrichment, and academic intervention services increased the group sizes for academic intervention services.¹⁷ Because P.S. 15 gave its specially renovated computer room to PAVE, P.S. 15 now uses as a computer room a room that had been used for intervention and testing accommodations for students with special needs.¹⁸

9. The co-location has had a significant impact on students receiving special education services. Many programs now have to share rooms with each other, which reduces the effectiveness of these services. For example, one occupational therapist now shares space in the library with several other clubs and groups.¹⁹ The other occupational therapist shares the computer room.²⁰ The occupational therapists often must work with their students in corners or go into hallways because their therapy requires greater space within which to move.²¹ P.S. 15's two speech therapists now must share the same room.²² Effective speech therapy is difficult when two groups of students occupy the room and speak at the same time.²³ The impact of losing these rooms has gone beyond just the rooms lost, because the losses have created a "domino effect" – a school-wide reorganization of space that has disrupted many of P.S. 15's programs and services.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Affidavit of Nora McGloin ("McGloin Aff."), dated April 26, 2010, attached to this petition.

The DOE Has Consistently Failed to Comply with the Substantive and Procedural Requirements of New York State Education Law

10. New York State law requires that the DOE issue an Educational Impact Statement (“EIS”) regarding any proposed changes in school utilization that includes the impact of the proposed change on any affected students.²⁴ New York Education Law § 2590-h, subsection 2-a(b) states that an EIS “shall include the following information regarding the proposed school closing or significant change in school utilization: ... (ii) the impacts of the proposed school closing or significant change in school utilization to *any affected students*” (emphasis added).
11. In December 2009, the DOE proposed a plan for PAVE to expand and extend its co-location at P.S. 15 for an additional five years, until the end of the 2014-2015 school year. In connection with this proposal, the DOE posted the EIS on the DOE website on December 11, 2009.²⁵ The EIS noted that PAVE “will continue to add one grade per year until it reaches full grade K-8 scale.” The EIS contained a series of vague, general statements regarding the implementation of the co-location, stating only that “[d]ecisions regarding the programming of shared spaces in K015 will be made by school leaders.” The DOE did not mail the EIS, or provide the EIS in written form, to any parents of P.S. 15.²⁶
12. The December EIS’s analysis of the impact of the expanded and extended co-location, merely stated that “[n]o current P.S. 15 or PAVE students will be displaced as a result of this proposal. Students entering kindergarten can apply to PAVE through the charter school

²⁴ NY Educ Law § 2590-h(2-a)(b) (2009).

²⁵ See Exhibit H.

²⁶ See Battis Aff. ¶ 12.

lottery. Students in grades 1-8 can apply to the charter school lottery for available seats.

District 15 students and residents are given priority in the charter school lottery process.”²⁷

13. The December EIS failed to describe the impact that PAVE’s expansion and continued co-location would have on P.S. 15 students. As detailed above, as a result of PAVE’s presence in the building for the past two school years, P.S. 15 has already lost 12 rooms used for professional development, academic intervention services, special education testing, related services, science labs, family support services and instruction.²⁸ The December EIS failed to disclose that PAVE’s continued expansion will undoubtedly result in the loss of more classroom and office space for P.S. 15 students and teachers.

14. The DOE held a public hearing on the proposal on January 19, 2010. At that hearing, a number of parents provided comments, testifying on the impact that the continued co-location of PAVE would have on P.S. 15.²⁹ Approximately 400 people attended the hearing.³⁰ Forty-three members of the community, including the Petitioners, spoke against the proposal, “citing concerns about the large number of special education students served at P.S. 15 and the belief that the Department of Education’s Instructional Footprint does not accurately account for the space required to provide services such as speech, occupational and physical therapy.”³¹

15. On January 26, 2010, the day of the scheduled PEP vote, the DOE issued a new proposal and an amended EIS, stating that after receiving feedback from the public and further

²⁷ See Exhibit H.

²⁸ See Battis Aff. ¶¶ 6-7 and Exhibit 2.

²⁹ See Battis Aff. ¶ 3.

³⁰ *Id.*

³¹ See Exhibit J.

consideration, the DOE had changed the proposal to allow PAVE to remain in the building and to expand until the end of the 2012-2013 school year, rather than until the end of the 2014-2015 school year.³² Specifically, the proposal stated that “[i]f the construction of the new school facility is not completed by the end of the 2012-2013 school year, when PAVE will serve grades K-5, The [sic] Department of Education will re-evaluate the available space in the building to make a determination regarding whether PAVE can remain in the K015 building.”³³

16. The January 26 EIS did not explain why the DOE changed its proposal to limit the continued co-location by PAVE to three more years, rather than five years; nor did the EIS explain how this shorter time would have less of an impact on the school during the three additional years of co-location and expansion.
17. After filing the amended EIS on January 26, the DOE did not hold another public hearing to allow interested parties the opportunity to present comments and concerns before bringing the proposal to a vote before the PEP, as is required by New York Education Law §2590-h (2-a)(d). Instead, the DOE held the PEP meeting as originally scheduled on January 26, 2010. The January 26 meeting included many hours of public comment, and the PEP ultimately voted on January 27.
18. The PEP, however, did not vote on the proposal for P.S. 15 listed on the January 26 EIS or the proposal from the December EIS. According to the resolution published on the DOE

³² See AMENDED EDUCATIONAL IMPACT STATEMENT: EXTENSION TO THE CO-LOCATION OF PAVE ACADEMY CHARTER SCHOOL (84K651) AND P.S. 15 PATRICK F. DALY (15K015) (Jan. 26, 2010), http://schools.nyc.gov/NR/ronlyres/F0043783-8608-433C-855E-99228622A268/76380/K015_PAVE_AmendedEIS_12610.pdf, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit K.

³³ *Id.*

website two days after the meeting, the PEP voted to approve “the proposal to extend the co-location of PAVE Academy Charter School and P.S. 15K until construction of PAVE Academy Charter School’s private facility is complete.”³⁴ The resolution contained no projected end date for PAVE’s co-location with P.S. 15.

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

³⁴ See RESOLUTION REGARDING APPROVAL OF THE PROPOSED EXTENDED CO-LOCATION OF A PAVE ACADEMY CHARTER SCHOOL AND P.S. 15K IN SCHOOL BUILDING K015, <http://schools.nyc.gov/NR/ronlyres/73124321-21E4-4B24-8267-38F257EA3466/76476/PAVEPS15Colocation.pdf>, accessed April 30, 2010, a true and correct printout of which is attached as Exhibit L.

20. In an affidavit dated March 4, 2010, the DOE responded to the Petitioners' request for a stay. In that response, the DOE conceded that the resolution voted upon at the January meeting was not the same as the proposal that the DOE had posted on its website earlier that day. The DOE represented that it would issue an EIS reflecting that the co-location would end in the 2012-2013 school year, hold a new public hearing on the new proposal and put the matter to a vote on April 20, 2010.³⁵ Petitioners agreed to hold their appeal in abeyance until the vote on the new proposal was completed, but reserved all claims related to the notice and hearing process.³⁶

The New EIS Fails to Disclose the Impact on P.S. 15 Students and Does Not Comply with New York Education Law

21. On March 26, 2010, Judge Joan Lobis of the New York County Supreme Court, issued a decision in *Mulgrew v. Board of Education*, a petition brought pursuant to Article 78 of the New York Civil Practice Laws and Rules challenging the PEP's votes with regard to the closing or change of utilization of nineteen schools.³⁷ Judge Lobis ruled that the DOE failed to comply with the requirements of New York State Education Law §2590-h when it issued EISs for the schools, including for P.S. 15, that "failed to provide any meaningful information regarding the impacts on the students."³⁸ Judge Lobis faulted the EISs developed for "fail[ing] to provide the detailed analysis an impact statement mandates,"

³⁵ See Letter from Emily Sweet, Assistant Corporation Counsel, to Rebecca Shore, Attorney for Petitioners, (March 8, 2010), Affirmation of Emily Sweet, dated March 4, 2010 and Affidavit of Debra Kurshan, dated March 4, 2010, true and correct copies of which are attached as Exhibit M.

³⁶ See Letter from Rebecca Shore, Attorney for Petitioners, and Emily Sweet, Assistant Corporation Counsel, to New York State Education Department Office of Counsel (March 16, 2010), a true and correct copy of which is attached as Exhibit N.

³⁷ *Mulgrew v. Bd. of Educ.*, No. 101352/10 (N.Y. Sup. Ct. Mar. 26, 2010), a true and correct printout of which is attached as Exhibit O.

³⁸ *Id.* at 9.

pointing as an example to the complete failure of the EISs “to provide information about specific programs existing at the school.”³⁹ Judge Lobis further held that the DOE failed to comply with the notice requirements of New York State Education Law by failing to file hard copies of the EIS with the appropriate community groups and make the EIS available to parents, ruling that “limiting ‘filing’ to posting on the Department of Education website does not constitute compliance with the express filing requirements of the statute.”⁴⁰

Emphasizing the need for distribution of hard copies of the EISs to the affected communities, the decision noted that “[a]lthough some parents and members of CECs and SLTs may have computer and internet access, certainly not all do.”⁴¹ Judge Lobis held that the votes of the PEP for these nineteen schools were null and void and ordered the DOE to re-issue EISs for the nineteen schools that comply with the requirements of Education Law §2590-h.⁴²

22. On March 26, 2010, the DOE posted on its website a new EIS and Notice of Extension of the Co-Location of PAVE and P.S. 15. The Notice of Extension of the Co-Location of PAVE and P.S. 15 stated that the co-location would be limited to the 2012-2013 school year, “however, if the construction of the new facility is not completed by the end of the 2012-2013 school year, when PAVE will serve grades K-5, the DOE will re-evaluate the available space in the building to determine whether sufficient space exists for PAVE to remain in the building.”⁴³ Despite Judge Lobis’s holding that the posting of an EIS on the

³⁹ *Id.*

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² *Id.* at 14.

⁴³ NOTICE OF REVISED EDUCATIONAL IMPACT STATEMENT: EXTENSION OF THE CO-LOCATION OF PAVE ACADEMY CHARTER SCHOOL (84K651) AND P.S. 15 PATRICK F. DALY (15K015) IN SCHOOL BUILDING K015 (April 9, 2010), <http://schools.nyc.gov/NR/rdonlyres/BD228776-71B2->

DOE's website did not comply with the notice requirements, the DOE did not mail the new notice or EIS to P.S. 15 parents.⁴⁴

23. As with the prior EISs for P.S. 15, the new EIS stated that the co-location would not impact the students at P.S. 15. Significantly, despite the allegations in the Petitioners' February 25 appeal, and despite the comments made the hearing on January 19 and the PEP meeting on January 26, the new EIS still failed to disclose the impact that the co-location would have on students with disabilities. The EIS merely stated that, "The Chief Achievement Office found that there is adequate space in the K015 building to continue to provide all special education and related services required by students as per their Individual Education Plans [sic] as PAVE continues to expand."⁴⁵ However, special education students at P.S. 15 already lack sufficient and appropriate space to receive their legally mandated services.⁴⁶ Taking away more classroom space will only exacerbate the problem.

24. The impact of co-location on students at P.S. 15 is evident:

- a. One occupational therapist provides services in the computer lab and another works in the library, which are both used during school hours for multiple purposes. Some P.S. 15 students have IEPs that mandate that they receive occupational therapy in separate locations in order to limit distractions. The

459E-93C9-BCEEE02F65F5/80804/K015_PAVE_amendedpublicnotice_4910.pdf, accessed on May 3, 2010, a true and correct printout of which is attached as Exhibit P.

⁴⁴ See Battis Aff. ¶12.

⁴⁵ REVISED EDUCATIONAL IMPACT STATEMENT: EXTENSION TO THE CO-LOCATION OF PAVE ACADEMY CHARTER SCHOOL (84K651) AND P.S. 15 PATRICK F. DALY (15K015) IN SCHOOL BUILDING K015 (April 9, 2010), http://schools.nyc.gov/NR/rdonlyres/BD228776-71B2-459E-93C9-BCEEE02F65F5/80802/K015_PAVE_RevisedEIS_Final_4910.pdf, accessed May 3, 2010, a true and correct printout of which is attached as Exhibit Q.

⁴⁶ See Battis Aff. ¶7.

current space limitations prevent the occupational therapists from providing services in the manner which their students require.⁴⁷

- b. Two speech therapists share a small room, making it difficult for them to provide individual and group therapy. Their students are often highly distractible and have auditory issues, emotional disturbances or developmental disabilities. When two different groups work in a small space at the same time, it can be nearly impossible to maintain a therapeutic environment.⁴⁸
- c. The school psychologist shares a half-classroom with the school social worker, making it very difficult for them to complete their assessments and evaluations, which often require privacy to protect students' confidential information.⁴⁹
- d. Ninety-four students at P.S. 15 require special testing accommodations, including time extension, separate locations, read aloud directions and scribing. Due to the co-location, P.S. 15 lacks the necessary space to provide these testing accommodations for its students. For example, in order to create space to meet the needs of students with special modifications for the New York State ELA and Math assessments, the second grade classes arranged field trips so their classrooms could be used to accommodate these students. This lack of space makes the already stressful testing process an even more difficult undertaking for P.S. 15 students with special needs.⁵⁰

⁴⁷ See Affidavit of Sarah Folland, dated April 27, 2010, attached to this petition.

⁴⁸ See McGloin Aff.

⁴⁹ See Affidavit of Sharon Budd, dated April 27, 2010, attached to this petition.

⁵⁰ See Affidavit of Rosemary Leahy, dated April 26, 2010, attached to this petition.

25. The EIS goes on to state that space concerns affecting students with disabilities can be alleviated by incorporating some alternative delivery service models, such as in-class SETSS.⁵¹ This unelaborated and conclusory statement fails to recognize that many students with disabilities have Individualized Education Programs (“IEPs”) that legally require that they receive their services in a location outside the classroom. These programs are created to fit each individual student’s needs. In-class services are often inappropriate for students with difficulties focusing and could detract from the effectiveness of the service.⁵²
26. Further, the EIS notes that “the impact of the continued co-location on additional enrichment programs and non-mandated services should not be significant.”⁵³ However, if PAVE expands according to the proposal outlined in the EIS, P.S. 15 will be left with four half classrooms to house the following programs and staff: one guidance counselor, one mandated counselor, one nurse, two occupational therapy teachers, three speech teachers, one physical therapy teacher, one hearing teacher, one Adaptive Physical Education (“APE”) teacher, one English as a Second Language (“ESL”) teacher, two academic intervention teachers, one SETSS teacher, four school-based support team staff, one district attendance teacher, the Parent Teacher Association (“PTA”), the teachers’ cafeteria, the General Equivalency Diploma (“GED”) program, the dental program, and Good Shepherd Counseling.⁵⁴ It is unlikely that all of these programs can be adequately accommodated in such a small space without causing a significant impact on the quality of services provided to P.S. 15 students.

⁵¹ See Exhibit Q.

⁵² See Affidavit of Patricia Visbal, attached to this petition.

⁵³ See Exhibit Q.

⁵⁴ See Battis Aff. ¶ 14 and Exhibit 3.

27. On April 14, 2010, the DOE conducted a public hearing on the new proposal to expand co-location of PAVE with P.S.15. Thirty-three members of the public submitted comments opposing co-location and six members of the public submitted comments in support of co-location.⁵⁵ The Petitioners submitted comments and testified at the hearing, detailing again the detrimental effect of the co-location on the educational services provided to P.S. 15 students and the potential effects of an extended and expanded co-location.⁵⁶
28. Helaine Doran of the Campaign for Fiscal Equity submitted a report to the DOE, prepared by Mary Filardo of the 21st Century Fund, detailing the flaws in the DOE's analysis of space utilization and testified at the April 14 hearing about the report.⁵⁷ Ms. Filardo is a national expert on school facilities and has participated in school planning as it relates to co-location of schools.⁵⁸ Based on her analysis, Ms. Filardo determined that it would not be possible for P.S. 15 to support the continued expansion of PAVE as contemplated in the DOE proposal. She determined that, with space reorganization, relocation and design modification, it may be possible for P.S. 15 to cede one and one-half classrooms to PAVE without having a negative effect on P.S. 15, but that P.S. 15 would be unable to cede any further space without a negative impact on the P.S. 15 students.⁵⁹
29. On April 20, 2010, by an eight to four vote, the PEP voted in favor of the proposal to continue and expand the co-location of P.S. 15 and PAVE Academy.

⁵⁵ See ANALYSIS OF PUBLIC COMMENT (April 19, 2010), http://schools.nyc.gov/NR/rdonlyres/BD228776-71B2-459E-93C9-BCEEE02F65F5/81589/K015_PAVE_analysis_Final_41910.pdf, accessed May 4, 2010.

⁵⁶ See Battis Aff. ¶¶ 12-14 and Exhibit 3.

⁵⁷ See Campaign for Fiscal Equity, Public Comment on Proposed Extension of the Co-Location of PAVE Charter School (84K651) and P.S. 15 Patrick F. Daly (15K015) in School Building K015, submitted April 14, 2010, a true and correct copy of which is attached as Exhibit R.

⁵⁸ *Id.*

⁵⁹ *Id.*

Legal Allegations

The April 20, 2010 PEP Resolution Did Not Comply with New York State Education Law

30. The information contained in the EIS filed by the DOE in connection with the PAVE/P.S.

15 co-location is insufficient under New York Education Law §2590-h, subsection 2-a(b)

because:

a. It fails to accurately identify the impacts of the proposed change in school

utilization on the students of P.S. 15. Specifically:

i. The EIS's statements regarding building utilization and capacity failed to reasonably assess the current state of space usage in the K015 building.⁶⁰

The numbers fail to take into consideration such factors as P.S. 15's use of certain rooms for special programs such as mandated special education services, academic intervention services and the enrichment programs that have enabled P.S. 15 to meet the needs of students who have historically been difficult to educate. Indeed, the EIS fails entirely to identify the impact that co-location will have on students with special needs.

ii. The EIS failed to address the impact of having to share space within the co-located building. Instead of giving a specific plan for how space will be shared in the building, the EIS states that "[s]hould the proposal be approved by the PEP, all school leaders will meet with the DOE space

⁶⁰ *Id.*

planners to work out a shared space plan and the allocation of specific rooms.”⁶¹ While the EIS properly left space allocation decisions to school leaders, it failed to properly assess the impact of having to share space in the first place. The DOE should have considered more carefully the strain of sharing space on P.S. 15’s programs and its negative impacts on P.S. 15 students.

31. The DOE failed to comply with §2590-h(2-a)(c) of New York State Education Law because it failed to provide proper notice to P.S. 15 parents. The applicable law requires that the DOE make the file the EIS “publicly available” and file it with the impacted community council, community boards, community superintendent and school-based management teams. Despite the holding in *Mulgrew* that posting on a website is not sufficient notice, the new EIS was posted on the DOE’s website, and P.S. 15 parents never received written notice from the DOE about the proposed vote or the new EIS.⁶² By failing to provide appropriate notice to affected community members, the DOE continues to “trivialize the whole notion of community involvement”⁶³ in decisions about significant changes in school utilization.

32. Finally, the DOE failed to comply with §2590-h(2-a)(c) of New York State Education Law, which requires that an EIS be filed six months before the start of the school year. The first day of school for the 2010-2011 school year is September 8, 2010.⁶⁴ Because the DOE filed

⁶¹ Exhibit Q.

⁶² See Battis Aff. ¶12.

⁶³ *Mulgrew* at 12.

⁶⁴ 2010-2011 SCHOOL YEAR CALENDAR (March 2, 2010), <http://schools.nyc.gov/NR/rdonlyres/6F97C8BB-EB9E-46CE-BF48-36B263FEB860/82219/20102011SchoolYearCalendar1.pdf>, May 3, 2010, a true and correct printout of which is attached as Exhibit S.

the new EIS and proposal regarding the co-location of PAVE with P.S.15 on March 26, 2010 – only 5 months, 13 days before the first day of school, the EIS and proposal did not comply with §2590-h(2-a)(c).

33. Petitioners are therefore filing this Petition to request that the Commissioner, among other things, annul the PEP vote approving the continued co-location and expansion of PAVE at P.S. 15.
34. This petition challenges the decisions made by the DOE in connection with the DOE's vote to continue and expand the co-location of PAVE with P.S. 15. Although the actions complained of were committed solely by the DOE and can be decided without the joinder of PAVE as a Respondent, in another matter challenging the DOE's decision to expand co-location, the Commissioner ordered that the co-locating charter school be joined as a Respondent. To ensure that this petition is decided without delay, Petitioners therefore have joined PAVE as a Respondent.

A Stay Pending Decision On The Merits Is Necessary

35. Petitioners are also requesting that the Commissioner stay the proposed expansion of PAVE's co-location pending a final decision on the merits of this Petition.
36. A stay of the proposed expansion of PAVE's co-location is necessary to protect Petitioners' interests pending ultimate determination of this appeal. If a stay is not granted, the PEP's wrongful resolution to allow PAVE to expand into additional classrooms within the K015 building may take effect while the Commissioner's decision is still pending. The resolution that the DOE passed in contravention of New York Education Law § 2590-h should not be

allowed to take effect during the pendency of the very process designed to make the PEP answer for its wrongful conduct.

37. It is in the Commissioner's discretion to grant a stay if necessary to protect the interests of the parties pending an ultimate determination of the appeal.⁶⁵ Courts traditionally consider two factors when determining whether stays pending appeal are appropriate: (1) whether the moving party will suffer irreparable harm absent the stay, and (2) the moving party's likelihood of success on the merits.⁶⁶
38. Petitioners would suffer irreparable harm to their children's educational interests if PAVE is allowed to occupy additional classrooms within the P.S. 15 building.
39. During the 2009-2010 school years, PAVE has served grades K-2.⁶⁷ As a result of the co-location during the 2009-2010 school years, P.S. 15 students have already lost crucial space for educational programs, including loss of professional development, special education testing, related services, science labs, family support services, and instruction.⁶⁸
40. Under the PEP's resolution following the April 20 meeting, PAVE would expand to serve grades K-3 during the 2010-2011 school years.⁶⁹ This expansion would result in PAVE students occupying additional classrooms that P.S. 15 students currently use. This loss

⁶⁵ See 8 NYCRR 276.1(a); see also CPLR § 2201.

⁶⁶ See, e.g., *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 736 (N.Y. App. Div. 3d Dept. 2003).

⁶⁷ See Exhibit Q.

⁶⁸ See Battis Aff. ¶¶ 6-7 and Exhibit 2.

⁶⁹ See Exhibit Q.

would deprive P.S. 15 students of educational space that they currently occupy and educational benefits they currently receive.⁷⁰

41. If the expansion is implemented, P.S. 15 students will lose space for critical educational programs, and, as a result lose education that cannot be replaced. That educational time cannot be regained even if PAVE is eventually ordered to return the classrooms and space.
42. Expansion of co-location inevitably would bring more of the same disruption to P.S. 15's educational programs and services that the school and students have already faced. This additional disruption and its negative consequences on the education of P.S. 15 students would be impossible to reverse. P.S. 15 is a school that serves a population of particularly vulnerable students. Eliminating programs for these students would have incredibly detrimental effects on both the students and the community as a whole.
43. Because the PEP resolution violated clear procedural and substantive requirements of New York Education Law § 2590-h, subsection 2-a, and Petitioners' children face irreparable harm if the PEP's vote to allow PAVE's expansion and co-location continues, a stay is required pending a final decision on the merits of this Petition.

Relief Requested

1. The implementation of the PEP's resolution to expand PAVE into additional classrooms within the K015 building should be stayed pending a final decision on the merits of this appeal.

⁷⁰ See Battis Aff. ¶¶ 6-7 and Exhibit 2.

2. The April 20, 2010 PEP vote to expand PAVE Academy Charter School and extend its co-location with P.S. 15 Patrick F. Daly should be annulled on the ground that it violated the substantive and procedural requirements identified in New York State law.

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Respectfully submitted,

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