SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK CITY PARENTS UNION; CLASS SIZE MATTERS; NEW YORK COMMUNITIES FOR CHANGE; and LEONIE HAIMSON, NOAH GOTBAUM, STEPHANIE FIELDS, LASHAWN CHERRY, JACQUELINE PEREZ, CHRIS MOSS, AMANDA JACOBS, REGINA TIMBER, JERMAINE BLIGEN, NATASHA HOOPER, CHERYL AND ANGELO BLUE, SHARLENE HALE HALL, AMANDA COLON, ANGELA BALTIMORE, SANDRA E. HARPER, CYNTHIA GRIFFIN, HELENA CLAY, SONYA HAMPTON, ELLIOT WOFSE, HENRY CLEMENTE, YVONE WALKER, CYNTHIA BONANO, FAYE HODGE, and MUBA YAROFULANI, on Behalf of Their Children and Others Similarly Situated,

Plaintiffs,

– against –

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DENNIS M. WALCOTT, as Chancellor of the City School District of the City of New York,

Defendants.

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CLASS ACTION COMPLAINT

Plaintiffs, by their undersigned attorneys, as and for their complaint, allege as follows:

INTRODUCTION

1. This action is brought seeking declaratory and injunctive relief by two public school parent advocacy groups, an organization of poor and working New Yorkers, parents whose children attend New York City public schools where a charter school has been co-located with an existing public school, parents in non-co-located charter schools, and parents with children in

NYC public schools which have suffered cuts in staffing due to a decline in funds available to the NYC Public School system. Plaintiffs complain about:

a. the leasing of space in public school buildings to charter schools at a rent of one dollar ($1) per year and the free provision of services by the Board of Education (hereinafter the "BOE") to charter schools, in violation of Education Law Section 2853(4)(c), which requires that DOE leases for public school facilities and services at such facilities shall be offered "at cost";

b. the planned and existing inequities between charter schools and public schools in co-located school buildings, and the negative impact of many charter school co-locations on children's right to an "adequate education", in violation of Education Law Section 3853(3)(a)(3)(2)(B) and Article XI of the New York State Constitution;

c. the failure of the Defendants to create a "public process with meaningful community involvement regarding the Chancellor's proposals" to co-locate a charter school in an existing public building, in violation of Education Law Section 2590(b), as a result of:

i. filing formulistic, boilerplate Educational Impact Statements ("EIS's") and Building Utilization Plans ("BUP's") at the last lawfully allowable moment;

ii. the repeated, significant amendment of the EIS's and BUP's less than the statutorily required six months before the affected school year;

iii. the failure to address the legitimate criticisms of co-location plans, particularly those made by parents;

iv. the failure to provide professional resources to parents to assist them in making their views effectively heard.

JURISDICTION

2. This Court's jurisdiction is invoked pursuant to CPLR 301 and 3001.

PARTIES

3. Plaintiff New York City Parents Union ("NYCPU") is a New York Not-for-Profit Corporation with members at public schools throughout the City of New York, all of which are under the jurisdiction of the Respondent Board of Education of the City School District of the City of New York ("BOE"). Its business address is 225 Broadway, Suite 1902, New York, New York 10007.

4. Plaintiff Class Size Matters ("CSM") is a tax-exempt not-for-profit corporation which advocates for smaller class sizes in New York City public schools and in the nation. Its address is 124 Waverly Place, New York, New York 10011.

5. New York Communities for Change ("NYCC") is a New York Not-for-Profit corporation, recognized as tax-exempt under Section 501(c)(4) of the Internal Revenue Code, which advocates on behalf of poor and working class people. It has members who have children in public schools throughout the City of New York. To that end, the NYCC actively represents the interests of constituents, including with regard to the proper provision of education services.

6. Plaintiff Leonie Haimson is the parent of a child who attends the School of the Future, a middle school in Manhattan.

7. Plaintiff Noah Gotbaum is the parent of two children who attend public middle schools in Manhattan, the Center School and the Computer School. Plaintiff Gotbaum is also an elected member of the Community Education Council for Community School District 3 in Manhattan.

8. Plaintiffs Stephanie Fields, Lashawn Cherry, Jacqueline Perez, Chris Moss, Amanda Jacobs, Regina Timber, Jermaine Bligen, Natasha Hooper, Cheryl and Angelo Blue, Sharlene Hale Hall, Amanda Colon, Angela Baltimore, Sandra E. Harper, Cynthia Griffin, and Helena Clay are parents of children who attend PS 197, in Manhattan.

9. Plaintiff Sonya Hampton is the parent of children who attend PS/MS 149, in Manhattan.

10. Plaintiff Elliot Wofse is the parent of a child who attends Intermediate School 303, in Coney Island.

11. Plaintiff Henry Clemente is the parent of a child who attends PS 241, in Manhattan.

12. Plaintiff Muba Yarofulani is the parent of a child who attends SMMS 366 in Brooklyn.

13. Plaintiff Faye Hodge is the parent of a child who attends Brooklyn Excelsior Charter School in Brooklyn.

14. a. All of the parents in paragraphs 8–11 supra sue on behalf of a class of all parents in schools where charter schools have been co-located, and the parents in paragraphs 6–12 sue on behalf of a class of all parents in the NYC public school system. Plaintiff Hodge sues on behalf of the parents in charter schools which operate out of their own buildings and have not co-located with a NYC public school.

b. The claims of the plaintiffs are common to all members of the class.

c. The members of each class are too numerous to be joined as plaintiffs in this action.

15. Defendant BOE (also known as the NYC Department of Education, or "DOE") is a school board organized under and existing pursuant to the Education Law of the State of New

York, governing the public schools in the City of New York. It is located at 52 Chambers Street, New York, New York 10007.

16. Defendant Dennis Walcott is the Chancellor of the New York City schools, and, as such, under the New York Education Law, functions as the chief executive of the BOE.

AS AND FOR A FIRST
CAUSE OF ACTION

17. Section 2853(4)(c) of the Education Law allows charter schools to lease public school "buildings and grounds" and to contract for the operation and maintenance thereof, but also provides that "any such contract shall provide such services or facilities at cost."

18. The BOE charges charter schools $1 per year for the use of BOE facilities and for the services provided in those buildings, including cleaning, heat, water, and garbage removal.

19. Their use of public school facilities and services does not reduce the per-student payment made by the BOE to charter schools.

20. About two-thirds of all NYC Charter Schools are in BOE facilities.

21. According to a recent analysis done by the New York City Independent Budget Office ("IBO"), the cost of building use and building services is calculable and, during the 2010–2011 fiscal year, amounted to approximately $2,700 per student.

22. The IBO calculated the average cost of the space and services used by co-located schools for the 2008–2009 school year as follows (on a per-student basis):

Facilities	$ 877
Utilities	272
Safety	217
Debt service	1,346
	$2,712

23. Not only does the failure of the BOE to collect the cost of building space and services violate Education Law Section 2853(4)(c), it causes a loss to the BOE of over $96

million per year, since about two-thirds of charter schools are in district buildings, and the BOE projects that there will be 53,754 charter school students in Fiscal Year 2012.

24. Because of the provision of space and services for free, the IBO also concluded that co-located charter schools received a larger per-student allocation of public funds in 2008–2009 than district public school students by an average of $701 per pupil, not even counting the considerable private funds they raise to further subsidize their programs. The IBO also concluded that because of recent budget cuts to schools since the 2008–2009 school year, which have not been matched by proportional cuts to charter school tuition (the sum paid by the DOE per pupil to each charter school), the disparity is likely to be even greater in the following year. "When complete data from 2010–2011 become available, they are almost certain to show an even greater advantage for those charters housed within public school buildings compared with traditional public schools."

25. The disparity created by the provision of free space and services affects not only public school students; it unlawfully provides greater subsidies to one class of charter schools (those which are co-located) over another class of charter schools (those in their own building).

26. By not charging charter schools the cost of co-locating their facilities, the BOE violates the law and provides an estimated $96 million-per-year subsidy to co-located charter schools, which allows those schools to expand services, provide better equipment, and have smaller classes and a smaller teacher-to-student ratio. At the same time, traditional public schools have seen an approximate 12% budget cut over the last three years, leading to increased class size and loss of programs and public services.

27. Moreover, New York City traditional public schools are facing budget cuts next year including the additional loss of approximately 2,500 teaching positions next year, which will lead to an even sharper increase in class size.

28. The estimated $96 million in space and services that are provided free of charge to charter schools by the BOE (or for only $1) would save most of the teaching positions which the DOE has announced will be eliminated next year.

29. By acting as aforedescribed the BOE has violated, and threatens to continue to violate Education Law Sec. 2853(4)(c).

AS AND FOR A SECOND
CAUSE OF ACTION

30. Plaintiffs restate and incorporate by reference paragraphs 1–29 of this complaint as set forth hereinabove.

31. Section 2853(3) of the Education Law allows co-location of charter schools in New York City public school buildings. Under § 2853(3)(a-3), not only must the Chancellor develop a building usage plan describing the "collaborative use of shared resources and spaces" and a "justification of the feasibility of the proposed allocations," such plans and usage must "assure equitable access to such facilities."

32. Section 2853(a-3)(c) of the Education Law specifically requires that BOE, during the co-location process, prepare an Educational Impact Statement which includes "justification of the feasibility of the proposed allocations and schedules" for shared spaces and "how such proposed allocations and shared usage would result in an equitable and comparable use of such public school building." This phrase (among others) reflected a determination by the legislature that there be equity between regular public schools and co-located charter schools. See, also, § 2853(3)(a-5)(d), requiring that publicly funded improvements and upgrades in space used by

charter schools "be made in an amount equal to the expenditure of the charter school for each non-charter public school within the public school building."

33. In planning a co-location, the BOE must not only provide for the equitable sharing of space, it must also assure that the children in the affected public school receive "an adequate education" after the co-location occurs. The right to an "adequate education" is guaranteed by Article XI of the New York State Constitution. See Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307 (1995) (the CFE litigation). In the CFE litigation the NY State Court of Appeals affirmed rulings by a trial court that the children of NY City were already not recipients of a constitutional mandated "adequate education."

34. Since 2009, despite the requirement that co-location of charter schools be carefully planned, the formulistic approach taken by the BOE to the planning and the public hearing process (see discussion in paragraph 40, *infra*) as part of a rush to co-locate as many charter schools as possible, and its failure to seriously consider and incorporate the input and critique of the parents from the impacted public schools, has resulted in and will continue to result in co-locations where non-charter students are treated inequitably as compared to charter school students, and where the educational needs of public school students are compromised to the point where they right to an "adequate education" is denied. For example:

a. In PS 241, located at 240 West 13th Street in Manhattan, the rooms which house the charter schools underwent extensive renovation, which did not occur in the public school. PS 241 students were moved to classrooms in the basement not originally designed for classrooms, in space adjacent to the boiler room, with only one, single-use toilet. The area is unsafe, poorly heated, has exposed wires and pipes, and has insect and rodent infestations, and has required frequent evaluation of children due to boiler malfunctions. Students with

disabilities and English language learners have lost private classroom space and share one three-quarter size classroom. The guidance counselor works out of a windowless storeroom. PS 241 has also been forced to end its Pre-K program due to lack of space.

b. IS 303, a Coney Island-based middle school, adopted an educational model involving the circulation of teachers, rather than students, with students remaining in a single room for multiple periods. This reform, ordered by the State Education Department to improve results, has resulted in the school getting off the "failing" list (SURR or SINI) and attaining significantly higher levels of student achievement. BOE has proposed moving in a charter school which would use 25 percent of the classrooms in the building. This will end the successful "self containment" program, decrease the needed personal attention now accorded students, increase class size, overcrowd the hallways and lunchroom, and promote confusion and disorganization. In addition, class sizes at this school are currently far above the levels required in the City's mandated class size reduction plan of no more than 23 students per class in grades 6–8. The insertion of a charter school into their building will prevent the City from ever attaining these class size goals.

c. In PS 197, at 2230 Fifth Avenue, in Harlem, the BOE co-located Democracy Prep Charter School. This mixed a K-5 school with a 6th to 8th grade school. Democracy Prep has the entire second floor, which was entirely renovated, with new desks and an improved library. No similar improvements have been made in the PS 197 space. BOE plans to move PS197 to the first floor next to the administrative office and cafeteria, in order to allow Democracy Prep to expand. PS 197 has already lost its art and music rooms. And because middle school children now inhabit the building, there has been increased violence and an increase in visible security.

d. At PS/MS 149, in Harlem, where the BOE co-located the Harlem Success Academy Charter School 1 ("HSA1"), the entire third floor, which had been retrofitted with smart boards prior to co-location, was given to HSA1. None of the smart boards were moveable to PS/MS 149's space. The HSA1 classrooms are air-conditioned; the PS/MS 149 classrooms are not. PS/MS 149 students on the third floor cannot use the third floor restroom because it is "reserved for HSA1 students." PS/MS 149 used to have two sections in each of the 6th, 7th, and 8th grades; now it has only one due to the allocation of space. Similar reductions have occurred at all grade levels. Elementary school students now share common hallways with middle school students and bathrooms with older charter school students. In first grade, in particular, class sizes have increased to 27 per class, compared to only 21 per class two years ago, and 18 per class in 2006–2007.

35. The DOE's actions also fail to address the long term inadequacies of each school district. Charter schools are required to accept students from out of the school district. Those who attend elementary charter schools have the right to continue into a middle school in that district. Many school districts already face the problem of overcrowded middle schools, and overcrowding is expected to worsen in the near future. The addition of charter elementary school students into the district only serves to worsen an already bleak situation.

36. The experiences of these parents and their schools are typical of the manner in which the BOE has handled co-location — creating overcrowding, eliminating any possibility of class size reduction within the public school, giving the co-located charter schools better rooms and providing space and services to the charter schools at no cost (see paragraphs 18 – 28, supra) an unlawful subsidy which allows the charter schools to spend their funds on renovations,

recruitment, air conditioning, refurnishing, adding computers and "smart" boards, and providing smaller class sizes and/or smaller teacher/student ratios.

37. By proposing and carrying out co-location plans which create separate and unequal facilities, and which undercut the ability of local schools to reduce class size, and to provide public school children with an adequate education, the BOE has violated § 2853 of the Education Law and its mandate of equity, and has violated Article XI of the NY State Constitution..

AS AND FOR A THIRD
CAUSE OF ACTION

38. Plaintiffs restate and incorporate by reference all allegations of paragraphs 1–37 set forth hereinabove.

39. Section 2853(3) of the Education Law requires that before a charter school is co-located:

a. The Chancellor must provide the rationale and make that information publicly available.

b. The Chancellor must develop a building usage plan (BUP) which assures equitable access to shared resources and spaces and provides "justification of the feasibility of such allocations and describes collaborative decision making strategies to be used by the co-located schools"; such plan must "be made publicly available."

c. The Chancellor must issue an educational impact statement ("EIS") pursuant to Section 2590-h of the Education Law, six months prior to the start of the affected school year, which:

i. discusses the impact of the co-location;

ii. outlines the use of the school building; and

iii. discusses the effect of such impact on the cost of instruction, administration, and the ability of "other schools" to accommodate pupils.

Such EIS must be made publicly available to the impacted community education council, community board, and others "at least six months in advance of the first day of school in the succeeding school year; between 30 and 45 days after the EIS is issued there must be a public hearing at the impacted school and "all interested parties" are allowed to present comments. The hearing is to be advertised in a manner to maximize the number of affected individuals that receive notice.

d. If the EIS is significantly revised after the hearing, there must be a new public hearing.

e. The co-location must be approved by the BOE, also known as the Panel for Educational Policy.

40. The co-location process is supposed to be a "public process with meaningful community involvement." Mulgrew v. Board of Education, 28 Misc.3d 204 (Sup. Ct. NY County 2010), aff'd 75 AD3d 412 (1st Dept. 2010).

41. Respondents have repeatedly failed to create a "public process with meaningful community involvement" regarding the Chancellor's proposals to co-locate charter schools in existing public buildings, in violation of Education Law Section 2590-h by:

a. filing formulistic, boilerplate Educational Impact Statements ("EIS's") and Building Utilization Plans ("BUP's") at the last lawfully allowable moment;

b. filing significant amendments of the EIS's and BUP's less than six months before the affected school year, prior to any public comment, and then voting to proceed with co-locations less than six months after the revised EIS is published ;

c. failing to provide notices in the languages spoken by parents at affected schools, and failing to translate the EISs and BUPs into the languages spoken by substantial numbers of parents at the affected schools

d. failing to address the legitimate criticisms of co-location plans; and

e. failing to provide professional resources or meaningful assistance to parents to assist them in making their views effectively heard.

42. During the 2011 school year the BOE filed more than 20 EIS's in support of co-location proposals. Generally these EIS's were issued exactly six months before the affected school year, and contained boilerplate discussions of the co-location's impact.

43. The EIS's generally omitted any discussion of the potential impact of the loss of space on class size, a critical factor in student achievement. Class sizes in most public schools into which charter schools have been co-located are likely to increase because of the loss of space, especially as enrollment is growing concurrently.

44. Citywide, kindergarten enrollment has sharply increased over the last two years, with double digit increases in a number of districts. These enrollment increases have led to overcrowding in elementary schools; presently more than 25% of all elementary schools have waiting lists for kindergarten. This is likely to eventually lead to overcrowding in middle schools as well. Despite this fact, none of the EIS's produced by the DOE in 2011 discusses enrollment increases expected for the future, or the class size increases that are likely to result from increased utilization of school buildings by charter schools. The EIS's and BUP's rely, instead, on a formulaic reliance on building capacity utilization figures specifically cited by the Court of Appeals as overstatements of school capacity.

45. None of the EIS's produced in 2011 assessed the damaging impact that the charter insertions might have on children with disabilities, or upon English Language Learners. Instead the EIS's and BUP's are focused entirely on the DOE's Blue Book formula and the instructional footprint, numbers which the Court of Appeals labeled suspect in the CFE case, and do not discuss the provision of space for special services based on the actual number of students who require these services in the affected building.

46. Furthermore in most instances where a significant portion of the parent population speaks a language other than English, the BUP's and EIS's were either not translated, or were translated well into the public process, sometimes within days of the public hearing; in most cases there was not even notice of the EIS and BUP provided in languages other than English in a timely manner.

47. In addition, in most instances the EIS was significantly revised prior to the public hearing; such revisions were done within six months of the affected school year, without concern for the six month requirement in Education Law Section 2590-h(2-a)(c).

48. Generally, despite vigorous, vocal, and pointed criticism from the parent community, the DOE, during the 2010–2011 school year, made few substantive changes to a co-location plan after the public hearing.

49. Pursuant to Education Law § 2853(3)(a-5) and § 310, following DOE approval, any parent "may appeal" the approval to the State Education Commissioner within 30 days, in an adversarial legal procedure. Both the BOE and the affected charter school may respond. This appeal process requires a lawyer and the significant expenditure of legal resources and pits the parent against the well funded legal department of the BOE and the legal resources of the charter school.

50. The appeals process is onerous. As outlined in the lawsuit Michael Mulgrew v. The Board of Education, the complaint of which is incorporated by reference, the State Commissioner in Appeal of Ivana Espinet, Decision No. 16.212 (March 31, 2011), blocked the co-location of a charter school into the building housing PS 9 on the grounds that the EIS failed to include a justification of the feasibility of the proposed allocations of shared space or a discussion of the equities. Seventeen other schools had been the subject of similarly defective EIS's directed to the co-locations, yet no party appealed to the Commissioner. An appeal was filed in the PS 9 case only because several of the affected parents were lawyers. The challenge in the case of the 17 other defective EIS's was left to the United Federation of Teachers, which provided resources for an appeal, albeit an action in Supreme Court.

51. Understanding and navigating complex Building Utilization Plans and EIS's developed by a paid legal and technical workforce which controls and develops the numbers, the school maps, and the building utilization information, in the (maximum) 45 days between the publication of the EIS and the public hearing, and appealing the BOE decision (which, in most if not all cases, is a rubber-stamp approval of the original co-location proposal) is extremely difficult, if not impossible for a non-lawyer parent to accomplish without expert advice, and/ or counsel.

52. By its aforedescribed actions and inactions the BOE, in the co-location process, deprives parents of genuinely meaningful input into the process, violates plaintiffs' children's right to a sound and adequate basic education, and violates Education Law §§ 2590-h and 2853.

DAMAGES

53. By acting as aforedescribed, the BOE has deprived traditional public school students in co-located schools of their right to an adequate education, deprived parents of their

right to a meaningful input into the process, and provided an unlawful, inequitable, and unrecoverable subsidy to co-located charter schools. Such injury is irreparable.

54. By acting as aforedescibed the BOE has failed to collect over $100 million in rent, sums which it should be required to recover.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this court:

1. Enter a declaratory judgment:

a. declaring that the rental charge of public school space to a charter school for space and services of $1 per year, or less, violates Education Law Section 2853(4)(c);

b. declaring that the inequitable and deleterious allocation of space and resources in a public school building, between co-located charter schools and public schools, violates the Constitution of the State of New York, and the Education Law;

c. declaring that the BOE has run the public aspects of the co-location process required by law in a manner which fails to provide a meaningful role for the affected parents and the affected school community, and fails to provide for or allow meaningful collaboration between public schools and charter schools sharing buildings; and

d. declaring that parents and their student children have been and will continue to be deprived of meaningful input into the charter co-location process, and therefore suffer injury to the New York State Constitutional right to an education, because they are not provided with professional resources by the BOE;

2. Enter a preliminary injunction:

a. Restraining and enjoining the BOE from renting space in a public school and providing services in such a school except at actual cost, and directing the BOE to recover proper

rent and fees from charter schools who have been allowed to rent space and receive services in public school buildings;

3. Enter a permanent injunction and judgment

a. Restraining and enjoining the BOE from renting space in a public school and providing services in such a school except at actual cost, and directing the BOE to recover proper rent and fees from charter schools who have been allowed to rent space and receive services in public school buildings;

b. Requiring the BOE to correct the constitutionally unlawful, and inequitable allocation of resources in PS 241, PS 197, IS 303 and PS/MS 149, and any other building housing a co-located charter school and public school;

c. Requiring the BOE to make counsel and expert resources available to parents during the public co-location process; and

d. Restraining and enjoining the co-location of any charter school where the co-location was based on an Educational Impact Statement issued prior to a public hearing less than six (6) months before the beginning of the 2011–2012 school year;

e. Awarding plaintiffs costs and attorneys' fees.

Dated: July 25, 2011

ADVOCATES FOR JUSTICE
Attorneys for Plaintiffs

By:_____
Arthur Z. Schwartz

225 Broadway, Suite 1902
New York, New York 10007
phone: (212) 228-6320
cell: (917) 923-8136
e-mail: aschwartz@advocatesforjustice.net