To be Argued by:
MARK LADOV

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New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of

MICHAEL P. THOMAS,

Petitioner-Respondent,

– and –

LETITIA JAMES, Public Advocate for the City of New York,
and CLASS SIZE MATTERS,

Petitioners-Intervenors-Respondents,

For an Order and Judgment Pursuant to
Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK CITY DEPARTMENT OF EDUCATION and CARMEN FARIÑA,
Chancellor of the New York City Department of Education,

Respondents-Appellants.

JOINT BRIEF FOR PETITIONERS-INTERVENORS-RESPONDENTS

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PRELIMINARY STATEMENT

New York State law requires the New York City Department of Education (DOE) to create, as part of its governance structure, a School Leadership Team (SLT) in every public school in the City. The SLT must include representatives of a school's parents, staff and administration, and may also include representatives of local community based organizations. SLT members convene to deliberate and decide on a school's educational policies, and to ensure that the school's budget (which is developed concurrently by the school's principal) is aligned with those priorities.

SLTs also play other important roles as schools' primary vehicle for collaborative decision making. For example, SLTs ensure that parents in schools receiving federal Title I funding have a voice in their schools' educational policies, as required by federal law. SLTs also hold joint public hearings with the DOE to ensure community input into proposed school closings and co-locations.

The lower court properly concluded that SLTs are "public bodies" and, therefore, that their meetings must be open to the public under New York State's Open Meetings Law. SLTs are public bodies because they are part of the formal governance structure of the DOE; they perform a necessary governmental function required by State law; they conduct public business, and require a quorum to do so;

and they have clearly defined authority, including the statutorily-mandated development of each school's comprehensive educational plan.

The lower court's conclusion that SLTs are public bodies is based on a straightforward reading of the State Education Law and the Open Meetings Law. The court's order accords with the New York State Education Department's ruling that SLTs must make decisions about school policy, and not merely advise school principals, to comply with the State Education Law. It accords with the opinion of the Committee on Open Government, the office of the New York Department of State responsible for overseeing the Open Meetings Law, which has advised for over a decade that SLTs are "public bodies" that must comply with the Open Meetings Law. The lower court's ruling is also consistent with guidance offered by the DOE itself, which prior to this litigation instructed SLTs that they must open their doors to the public at large.

This Court should affirm Justice Moulton's well-reasoned holding, that the DOE's current interpretation of the Open Meetings Law is arbitrary, capricious, and in violation of law. The Court should order DOE to comply with the Open Meetings Law and open all SLT meetings to the general public.

QUESTION PRESENTED

Did the lower court properly conclude that School Leadership Teams are public bodies subject to the Open Meetings Law, and that the New York City Department of Education therefore may not limit attendance at SLT meetings to a vaguely defined "school community" while excluding other members of the general public and press?

STATEMENT OF THE CASE

I. SCHOOL LEADERSHIP TEAMS' ROLE IN LOCAL SCHOOL GOVERNANCE

The New York City Department of Education (DOE) has long recognized that school leadership teams (SLTs) are a necessary and important part of the City's public school governance structure. As the lower court emphasized, the by-laws of the Panel for Educational Policy, which replaced the citywide school board of education in 2002, provides that SLTs are part of the "governance structure" of the DOE itself. The by-laws explain:

> The Panel for Educational Policy is a part of the governance structure responsible for the City School District of the City of New York, subject to the laws of the State of New York and the regulations of the State Department of Education. Other parts of the structure include the Chancellor, superintendents, community and citywide councils, principals, and school leadership

> teams. Together this structure shall be designated as the Department of Education of the City of New York.

(R 12-13) (emphasis supplied in lower court's opinion).

Under State law and DOE regulations, every New York City public school must have an SLT. *See* N.Y. Educ. Law § 2590-h(15)(b); Chancellor's Regulation A-655 (R 104-113). The SLT includes representatives of the school's parents, teachers, staff, and administration, *see* Chancellor's Regulation A-655 § III(B) (R 105), and may include "representatives of Community Based Organizations," *id.* § III(C)(2) (R 106). Together, this team makes decisions about "school-based educational policies" and ensures "that resources are aligned to implement those policies." *Id.* § I (R 104); *see also* N.Y. Educ. Law § 2590-h(15)(b-1)(i). The SLT does this, in part, by developing the school's annual comprehensive educational plan (CEP), which establishes the school's goals, needs, and instructional strategies for the year. *See* N.Y. Educ. Law § 2590-h(15)(b-1)(i); Chancellor's Regulation A-655 § II (R 104-105). The SLT must also ensure that the school's budget (which is developed concurrently by a school's principal) is aligned with the CEP, so that the funds spent by a school will further the educational priorities set by the SLT. *See id.*

The SLT also plays an important role as a school's primary vehicle for collaborative decision making. For example, SLTs hold joint public hearings with the DOE to facilitate community input into proposed school closings. *See, e.g.,*

Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York, 75 A.D.3d 412, 414-15 (1st Dep't 2010). Because SLTs allow parents to participate in school policy decisions, they are used by New York City schools to satisfy federal requirements for parental involvement in educational planning and the spending of Title I funds (as set forth in the No Child Left Behind law). *See* Chancellor's Regulation A-655 § XI (R 111); *see also* 20 U.S.C. § 6314(b)(2)(B)(ii) (requiring schools receiving federal Title I funds to involve parents, educators and other community members in planning the school's educational program); N.Y. Educ. Law § 2590-h(15)(b).

II. LEGISLATIVE HISTORY CONFIRMS THAT SCHOOL LEADERSHIP TEAMS ARE PUBLIC BODIES

In its appellate brief, the DOE erroneously contends that legislative history supports its assertion that SLTs are purely "advisory" bodies. In fact, the legislative history merely confirms what the lower court held: SLTs are empowered to make decisions about local school policies and priorities. The legislative history also shows that SLTs were intended to improve transparency in local school governance. Both of these conclusions support Justice Moulton's ruling that SLTs are public bodies subject to the Open Meetings Law.

The legal framework for school leadership teams (and the current school governance structure in New York City generally) emerged from a series of laws

enacted by the New York State legislature since 1996. These laws shifted authority away from New York City's local school boards, and centralized authority into a citywide Department of Education. As part of these reforms, the Legislature sought to improve democratic and transparent decision-making within each individual public school by instructing school districts to work with parent associations, teachers, and other stakeholders to create a plan for school-based management and shared decision-making. *See* NYLS' Governor's Bill Jacket, Ch. 720 of the Laws of 1996;[1] N.Y. Educ. Law § 2590-h(15)(b). In New York City, the "School Leadership Team" was the name given to the leadership body "constituting the 'school-based management team' (SBMT) mandated by section 2590-h." *See Mulgrew*, 75 A.D.3d at 413.

The Governor's approval message for the 1996 amendments explained the important roles envisioned for the new school leadership teams:

> Meaningful parental and staff involvement in local decisionmaking is strengthened in a number of important respects. The bill requires the Chancellor to develop and implement a school-based management/shared-decisionmaking plan, a comprehensive process of school-based budgeting and expenditure disclosure, and a parental bill of rights. The bill also requires parental and staff involvement in the interviewing and screening of candidates for community superintendent and school principal. Coupled with the bill's governance reforms are requirements for training at all levels, which will ensure that all members of the school community are prepared

[1] The DOE erroneously cites this as Ch. 720 of the Laws of 1994.

> for the responsibilities and opportunities provided by this legislation.

NYLS' Governor's Bill Jacket, Ch. 720 of the Laws of 1996, Governor's Approval Memorandum 2. Among other things, the statute was intended to ensure that the New York City Schools Chancellor complies with state and federal requirements concerning parental input into local school management and decision-making. N.Y. Educ. Law § 2590-h(15)(b).[2] It was also meant to improve transparency and facilitate public monitoring of budgetary decisions, as demonstrated by the Governor's reference to "school-based budgeting and expenditure disclosure."

The decision-making authority of SLTs was further clarified by the 2003 amendments to the State Education Law, which "expand[ed] and codif[ied] the powers and duties of the school based leadership teams." *See* NYLS' Governor's Bill Jacket, Ch. 123 of the Laws of 2003, Memorandum in Support 2. Specifically, the Legislature empowered SLTs to

> develop an annual school comprehensive educational plan and consult on the school-based budget . . . . Such school comprehensive educational plan shall be developed concurrently with the development of the

[2] The statute requires school-based management teams to be created "in a manner which balances participation by parents with participation by school personnel in advising in the decisions devolved to schools." N.Y. Educ. Law § 2590-h(15)(b). The DOE cites the use of "advising" in this sentence to argue that SLTs are themselves only making "advisory" decisions. *See* DOE Br. at 22, 31. But the plain meaning of this statute is that both parents and staff should participate equally, as School Leadership Team members, in making SLT decisions. This does not in any way characterize the decisions made by the SLT itself as "advisory."

> school-based budget so that it may inform the decision-making process and result in the alignment of the comprehensive educational plan and the school-based budget for the ensuing school year.

N.Y. Educ. Law § 2590-h(15)(b-1)(i). Justice Moulton properly relied on the SLT's authority over the comprehensive educational plan as the primary example of the SLT's decision-making authority in his ruling below (R 18).

Justice Moulton's opinion also relied on the New York State Education Department's (NYSED) authoritative interpretation of the State Education Law, which was articulated in response to an earlier DOE effort that would have unlawfully disempowered SLTs (R 17). In December 2007, the DOE issued a version of Chancellor's Regulation A-655 that attempted to give principals – rather than SLTs – final decision-making authority over the CEP (R 156-67). Public school parents, later joined by Community District Education Council 26 and the United Federation of Teachers, appealed to the NYSED Commissioner, and challenged the Chancellor's Regulation for taking decision-making authority away from SLTs. *See Appeal of Pollicino*, NYSED Commissioner's Decision No. 15,858 (Dec. 31, 2008) (R 168-174). NYSED agreed with the parents, and ruled that the Chancellor's regulation violated state education law, because it "strips the SLT of this basic, statutorily mandated authority [to develop the CEP] and allows the principal to make the 'final determination on the CEP,' thus allowing the principal to override any judgment of an SLT" (R 173) (citing N.Y. Educ. Law §

2590-h(15)(b-1)). NYSED ordered the DOE to correct its regulation, resulting in the current version of Chancellor's Regulation A-655. *Id.*

The foregoing legislative and administrative history shows that SLTs have decision-making authority under state law, and are not the merely "advisory" bodies depicted by the DOE in its appellate brief. The legislative history also illustrates that SLTs are intended to improve transparency in public school governance. From their inception, SLTs were intended to improve public disclosure of local school spending, and to ensure compliance with federal law (which requires that parents know and have a say in how Title I and other federal discretionary funds are spent).

The 2003 amendments improved transparency further, by instructing that SLT meetings must be held at a time convenient for the team's parent representatives, and by ordering SLTs to "provide notice of monthly meetings that is consistent with the open meetings law." N.Y. Educ. Law § 2590-h(15)(b-1)(ii)-(iii). As the lower court correctly observed, this requirement "means that SLT meetings must be announced to the public at least a week in advance. The required announcement is not limited to the school's 'community,' however that term is defined" (R 14). Former Community Education Council President Lisa Donlan explained in the below proceedings that she has "always understood that the public notice requirement exists to ensure that community members can know about and

attend SLT meetings where various educational policy issues, goals and concerns are discussed and decided upon." Affidavit of Lisa Donlan ¶ 14 [hereinafter "Donlan Aff."] (SR 71).

III. THE DOE HAS RECOGNIZED THE PUBLIC'S RIGHT TO KNOW ABOUT SCHOOL LEADERSHIP TEAM PROCEEDINGS

Despite the position taken in this litigation, the DOE previously encouraged SLTs to open their doors to the public, and at times conceded that SLTs *must* do so. The DOE's prior positions, discussed below, undermine its current claim that complying with the Open Meetings Law, and consistently allowing community members to observe SLT meetings, would represent a "sea change" in departmental policy. *See* DOE Brief at 16.

For example, a DOE training PowerPoint presentation states that "SLT meetings are open to the public. Teams may find that observers from within the school community *or beyond* wish to attend SLT meetings." *See* DOE, "School Leadership Teams: A Foundation for School-Based Planning and Shared Decision-Making" (SR 35) (emphasis added). This presentation, which is undated but from the recent administration of Chancellor Dennis Walcott (who led the DOE from 2011 to 2013), remains available online.[3]

[3] The PowerPoint is available on the LearnDOE website at http://www.learndoe.org/face/files/2012/10/School-Leadership-Teams-Foundation-revised.pdf. The "LearnDOE" website includes the NYC DOE logo, states that it is

The DOE reiterated that SLT meetings were open to the public during a recent dispute over access to SLT meetings. In an article published January 4, 2013, a Bronx reporter described her exchange with the leadership of PS 24 as to whether the press could observe SLT meetings. *See* Tess McRae, "PS 24 in Violation of State Law and City Regulations," *Bronx Press Politics*, http://bronxpresspolitics.blogspot.com/2013/01/ps-24-in-violation-of-state-law-and.html (Jan. 4, 2013). Ms. McRae's article noted that reporters had previously been allowed to attend these meetings, and quoted DOE spokesman David Pena's statement that "[SLT] meetings are open to the public except if an executive session is being held." *Id.*

This transparency is important because a school's education planning process affects not just current school parents and staff, but also potential future parents at the school, and other community members who are concerned with school curriculum, testing, class size, and budget issues. Moreover, SLT meetings may address other controversial community planning issues such as co-locations or school closings. As former Community Education Council (CEC) President Lisa Donlan explained to the lower court:

> I have encountered the most resistance to attending SLT meetings when discussion of controversial DOE policies (such

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produced by LearningTimes, and describes itself as a site for "Online learning by and for NYCDOE professionals." *See* http://www.learndoe.org (last visited Dec. 8, 2015).

> as school closings or co-locations) takes place. I find such meetings to be the most important to attend, because these policy decisions affect the entire larger community, including parents whose children are not currently attending that school, and all residents who recognize the importance of successful schools for our City's development.

Donlan Aff. ¶ 6 (SR 69).

IV. THE PUBLIC ADVOCATE AND CLASS SIZE MATTERS INTERVENED IN THESE PROCEEDINGS AFTER PROTESTING THE DOE'S POLICY

Petitioner Michael Thomas initiated this Article 78 proceeding to challenge the DOE's current policy of excluding members of the public from SLT meetings. The Public Advocate for the City of New York, the Honorable Letitia James (the "Public Advocate"), and Class Size Matters (collectively "Petitioners-Intervenors") later became aware of these proceedings, as well as other instances in which schools denied or attempted to deny members of the public access to SLT meetings. *See Portelos v. Bd. of Educ.*, Index No. 100813/2013, 2013 NY Slip Op. 32842 (U) (Sup. Ct. N.Y. Co. Nov. 4, 2013); Donlan Aff. ¶¶ 7-19 (SR 70-72) (describing September 2013 incident where DOE advised that local CEC President and journalist did not have the right to attend an SLT meeting where school co-location would be discussed).

The Public Advocate, Class Size Matters, and others wrote to DOE Chancellor Carmen Fariña explaining that this exclusionary policy violated the

Open Meetings Law and State Education Law. Their letter asked the DOE to correct its stance and provide the correct legal advice to its schools and employees. *See* Letter from Hon. Letitia James to Chancellor Carmen Fariña, Dec. 16, 2014 (SR 11-15). The DOE's general counsel responded with a short letter declining to address these concerns, *see* Letter from Courtenaye Jackson-Chase to Hon. Letitia James, Dec. 19, 2014 (SR 16-17), thereby requiring the Petitioners-Intervenors to seek judicial intervention.

Petitioners-Intervenors moved by Order to Show Cause for permission to intervene in the Article 78 proceeding in January 2015, and participated in a subsequent hearing on that motion and the underlying petition. The court granted the motion to intervene as part of its Judgment and Memorandum Decision in this case (R 11).

ARGUMENT

I. SCHOOL LEADERSHIP TEAMS ARE "PUBLIC BODIES" SUBJECT TO THE OPEN MEETINGS LAW

The Open Meetings Law expresses its intent through a legislative declaration:

> It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public

> officials and attend and listen to the deliberations and decisions that go into the making of public policy.

N.Y. Public Officers Law § 100.

The provisions of the Open Meetings Law are to be liberally construed in order to prevent public bodies from debating and deciding on public policy behind closed doors. *See Matter of Gordon v. Vil. of Monticello,* 87 N.Y.2d 124, 127 (1995); *Matter of Zehner v. Bd. of Educ. of Jordan-Elbridge Cent. Sch. Dist.*, 91 A.D.3d 1349, 1350 (4th Dep't 2012); *Matter of Holden v. Bd. of Trs. of Cornell Univ.,* 80 A.D.2d 378, 381 (3d Dep't 1981).

The Open Meetings Law requires that "[e]very meeting of a public body . . . be open to the general public." N.Y. Public Officers Law § 103(a). A "public body" is defined as

> any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation . . . or committee or subcommittee or other similar body of such public body.

Id. § 102(2). A "meeting" is "the official convening of a public body for the purpose of conducting public business." *Id.* § 102(1).

In deciding whether an entity is a "public body," the court must undertake an analysis that centers on "the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the

power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies." *Matter of Smith v. City Univ. of New York*, 92 N.Y.2d 707, 713 (1999).

Justice Moulton properly conducted this analysis and concluded that SLTs satisfy the definition of a "public body" and are subject to the Open Meetings Law (R 16). As the lower court explained, SLTs were created under authority of state law as a mandatory and necessary part of the governing structure of the New York City public school system. SLTs have decision-making authority, which they exercise in coordination with other parts of the DOE. SLTs also satisfy all of the Open Meetings Law's other requirements, including requiring a quorum in order to conduct the public's business.

This Court should uphold the lower court's decision and order DOE to comply with the Open Meetings Law, including by affirming SLT meetings must be open to the public.

A. School Leadership Teams Perform a Governmental Function Required by State Education Law

SLTs form an integral, formal, and necessary part of the governance structure of the DOE itself. As Justice Moulton observed, "DOE's own by-laws specify that SLTs are part of the 'governance structure' of New York City's Schools" (R 16). There are many other individuals and institutions, from the Chancellor on down, who are also responsible for setting policy for City schools.

But none of the higher-level district or citywide bodies duplicates the SLT's role in setting policy and making decisions at the individual school level.

The DOE argues that the existence of public comment requirements for some of these other school governance bodies should imply that SLTs are not subject to the Open Meetings Law. This argument fails because it conflates the public participation requirements imposed on some school governance bodies with the transparency required by the Open Meetings Law. The Open Meetings Law requires that *all* public bodies be transparent in their meetings and decision-making. This is separate from the requirement imposed on some public bodies and meetings to receive public comments as part of their proceedings. Whether or not certain school governance meetings require public participation says nothing about the responsibility of all of these public bodies to comply with state transparency laws.

In addition, the DOE's argument incorrectly implies that public school meetings are, by default, closed to the public. The opposite is true: the Legislature has, in fact, ordered that all "social, civic and recreational meetings" held in a school must be "non-exclusive" and "open to the general public." N.Y. Educ. Law § 414(1)(c).[4] This statute defines "civic meetings" to "include, but not be limited

[4] Petitioners cited Education Law § 414 as an independent basis for the court to find that SLT meetings must be open to the general public in the proceedings below. Because the court ruled that SLTs are public bodies subject to the Open

to, meetings of parent associations and parent-teacher associations." *Id.* If PTA and other community meetings must be open to the public, then so should the meetings of SLTs, which are required to meet "on school or DOE premises," Chancellor's Regulation A-655 § VII (R 110), and which play a formal role in school governance.

B. School Leadership Teams have Decision Making Authority

In his discussion of decision-making authority, Justice Moulton highlighted the SLT's "crucial iterative role in developing" a school's comprehensive education plan, and its obligation for "ensuring that CEPs are aligned with the school's budget" (R 17). *See also* N.Y. Educ. Law § 2590-h(15)(b-1)(i). As Justice Moulton explained, the CEP

> is an important blueprint at each school. It describes annual goals concerning student achievement, teacher training, parent involvement, and compliance with federal law – including Title I. The CEP also includes "action plans" to achieve those goals.

(R 18). State education law requires the SLT to set these goals. Although a District Superintendent may have a role in resolving disputes between a school's SLT and its principal regarding the CEP and budget, "the SLT *must* have input into the CEP's development" (R 17) (emphasis added). "In fulfilling this role the SLT acts in conjunction with, and not subordinate to, the school's principal. If it is fulfilling

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Meetings Law, Justice Moulton decided not to reach the merits of this argument (R 18).

its statutory role, a school's SLT is not a mere advisor to the principal." (R 18) (citing *Appeal of Pollicino, supra*).

The DOE concedes, as it must, that SLTs have decision-making authority to set educational goals for a school through the CEP. *See, e.g.,* DOE Br. at 11 (explaining that SLT's statutory "powers and duties" include to "develop an annual comprehensive educational plan"); *id.* at 13 (explaining that SLTs "create educational goals for the school, which are incorporated into the CEP"); *id.* at 24 ("[A]n SLT's most significant responsibility is developing the CEP, which focuses on academic goals for the student body, and pedagogical strategies for achieving those goals."). The DOE's emphasis on instances where an SLT's role is advisory rather than determinative is unavailing: a public body with both advisory and decision-making powers remains subject to the Open Meetings Law. *See Matter of Perez v. City Univ. of New York*, 5 N.Y.3d 522, 530 (2005) (finding that a public college board is a "public body" when it performs functions of "both advisory and determinative natures which are essential to the operation and administration of the college."); *see also* Judgment at 7 (R 16).

As explained above, the DOE has already tried and failed to limit SLTs to an advisory role. In 2008, NYSED required DOE to revise regulations that stripped the SLT of its "basic, statutorily mandated authority [to develop the CEP] and allow[ed] the principal to make the 'final determination on the CEP,'" because this

violated Education Law § 2590-h. *Appeal of Pollicino*, *supra* (R 173); *see also* Judgment (R 17). This prior history undermines the DOE's attempt to once again describe SLTs as merely "advisory." The Court should defer to NYSED on this issue of statutory interpretation, as the reasonable interpretation given a provision of the Education Law by the Commissioner of NYSED is "controlling." *Lezette v. Bd. of Educ., Hudson City Sch. Dist.*, 35 N.Y.2d 272, 281-82 (1974); *see also A.C. Transp., Inc. v. Bd. of Educ. of City of New York*, 253 A.D.2d 330, 336 (1st Dep't 1999) (courts afford a "high degree of deference" to Commissioner's interpretation of Education Law).

C. School Leadership Teams Require a Quorum to Conduct Public Business

Like other public bodies, an SLT requires a quorum to conduct business. *See* Chancellor's Regulation A-655 § XII (R 111-12) (requiring SLT to establish bylaws addressing quorum requirements and methods for making decisions). This requirement is no mere formality. As courts have explained, the presence of a quorum is significant for requiring public access to a meeting under the Open Meetings Law, whether or not any formal action is taken. *See, e.g., Matter of Britt v. Cnty. of Niagara*, 82 A.D.2d 65, 68 (4th Dep't 1981) ("The determinative issue is whether a quorum was present at these meetings which allegedly violated the Open Meetings Law. The statutory requirement of a quorum is paramount because the existence of a quorum at an informal conference or agenda session 'permits the

crystallization of secret decisions to a point just short of ceremonial acceptance.'") (quoting *Matter of Orange Cnty. Pub., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 60 A.D.2d 409, 416 (2d Dep't 1978) *aff'd,* 45 N.Y.2d 947, (1978)).

The quorum requirement also undermines the DOE's argument that it is trying to protect the ability of SLT members to hold "free and frank discussion." DOE Br. at 17. SLT members, like other members of public bodies, are certainly free to have additional conversations outside of formal public meetings in order to gather information and ensure they are making educated decisions. But an SLT meeting is a formal proceeding, where a quorum of the public body's members meet to deliberate and reach final decisions about school policy. Such deliberations and decisions must be aired in public, as is the case for any other public body.

D. State Education Law Requires Public Notice of SLT Meetings

Under state law, an SLT must hold "at least one meeting per month during the school year. Each monthly meeting shall be held at a time that is convenient for the parent representatives." N.Y. Educ. Law § 2590-h(15)(b-1)(ii). Significantly, an SLT must "provide notice of monthly meetings that is consistent with the open meetings law." *Id.* § 2590-h(15)(b-1)(iii); *see also* Chancellor's Regulation A-655 § VII (requiring same) (R 110). As the lower court explained, "[t]his means that SLT meetings must be announced to the public at least a week in advance. The

required announcement is not limited to the school's 'community,' however that term is defined" (R 14) (citing Public Officers Law § 104).

Former Community Education Council President Lisa Donlan explained in the below proceedings that she has "always understood that the public notice requirement exists to ensure that community members can know about and attend SLT meetings where various educational policy issues, goals and concerns are discussed and decided upon." Donlan Aff. ¶ 14 (SR 71). The DOE appears to have previously shared the position that "observers from within the school community *or beyond* [may] wish to attend SLT meetings," based on its earlier trainings for SLT members. *See* DOE, "School Leadership Teams: A Foundation for School-Based Planning and Shared Decision-Making" (SR 35) (emphasis added).

The DOE asserts that the State Legislature knew how to make its intentions clear, and that the Legislature would have ordered SLTs to hold public meetings if it wanted to provide access beyond the "school community." *See* DOE Br. at 31. Of course, the Legislature *did* order SLTs, and other public bodies, to hold public meetings by enacting the Open Meetings Law. But in any event, the DOE's logic does not withstand scrutiny. If the Legislature wanted SLT meetings to be open to *only* a limited public audience, by the DOE's logic, then it should have stated so clearly. The Legislature could have defined the "school community" that it wanted to allow into these meetings. The Legislature also could have specified that SLTs

must provide notice of their meetings only to a school's parents and staff. But the Legislature did none of these things. Instead, it ordered SLTs to comply with the broader notification requirements of the Open Meetings Law. This instruction is fully consistent with the lower court's determination that SLTs are public bodies and must conduct their work in a transparent and public manner.

E. The Open Meetings Law Applies Even if the Court Accepts DOE's Mischaracterization of School Leadership Teams as "Advisory" Committees

The DOE has argued that SLTs are merely "advisory," do not "conduct public business," and therefore are not "public bodies" as defined by the Open Meetings Law. As explained above, the Court should reject the argument that SLTs lack decision-making authority and are not public bodies.

Nevertheless, the Court of Appeals has applied the Open Meetings Law even when a committee's decisions are subject to approval and potential veto by other school or other governmental authorities. *See Perez*, 5 N.Y.3d at 530 (holding that a body charged with making policy *proposals* is subject to the Open Meetings Law). As with the College Senate and Executive Committee described in *Perez*, an SLT's role is an instrumental part of the decision-making process for any school. Even accepting the DOE's characterization of SLTs as "advisory," the fact remains that DOE officials are prohibited by law from finalizing a CEP without first receiving the "advice" of the SLT. Accordingly, the SLT is far different from the

kind of "purely advisory" body, *see id.*, which has been found to be outside the purview of the Open Meetings Law. *Cf. Snyder v. Third Dep't Judicial Screening Comm.*, 18 A.D.3d 1100, 1102 (3d Dep't 2005) (finding that judicial screening committee is not subject to Open Meetings Law because the Governor had legal authority to select judges; had created the advisory committee by Executive Order; and retained absolute discretion to ignore the committee's advice).

For these reasons, the Committee on Open Government[5] found that an SLT, whether or not it is "advisory" in nature, is certainly a public body under the Open Meetings Law. The Committee on Open Government first reached this determination in 2003, before NYSED ordered the DOE to revise Chancellor's Regulation A-655 to clarify that SLTs are not merely advisory. The Committee on Open Government explained that an SLT is a public body, whether or not it has authority to make final determinations, because "according to the Commissioner's regulations, it performs a necessary and integral function in the development of shared decision making plans." *See* Comm. on Open Gov't, Advisory Op. OML-AO-3728, at 3 (Dec. 29, 2003) (SR 51-57). The Committee has consistently ruled since then that SLTs are subject to the Open Meetings Law, a position that has

[5] The Committee on Open Government is the arm of the New York State Department of State that "oversees and advises the government, public, and news media" on the Open Meetings Law. *See* Comm. on Open Gov't, *About the Committee on Open Government*, http://www.dos.ny.gov/coog/ (last visited Dec. 7, 2015).

only been bolstered by NYSED's clarification that SLTs have more than "advisory" powers. *See* Comm. on Open Gov't, Advisory Op. OML-AO-05433 (Dec. 12, 2014), *available at* http://docs.dos.ny.gov/coog/otext/2014/o05433.html ("It has long been [the Committee's] advice that School Leadership Teams are public bodies subject to the Open Meetings Law."); Comm. on Open Gov't, Advisory Op. OML-AO-3828 (June 22, 2004), *available at* http://docs.dos.ny.gov/coog/otext/o3828.htm.

II. DOE'S POLICY-BASED ARGUMENTS FOR EXEMPTING SCHOOL LEADERSHIP TEAM MEETINGS FROM THE OPEN MEETINGS LAW LACK MERIT

The legal question before the Court is whether SLTs are "public bodies" that must comply with the Open Meetings Law. If the Court affirms the lower court's persuasive and well-reasoned ruling, then SLTs must open their meetings to the entire public, and not just to a vaguely defined "school community." The DOE's brief argues, nonetheless, that policy concerns should prevent this Court from reaching the proper legal conclusion. These policy arguments are uniformly lacking in factual support or merit.

The DOE has claimed that SLTs will not be able to function properly if the press and general public are permitted to observe their operations. For example, the DOE argues that without closed meetings, "it is unlikely that anyone would

volunteer to serve as an SLT member." *See* DOE Brief at 4. This assertion is put forth without any evidentiary support, lacks a logical basis, and should be disregarded by the Court.[6]

The DOE also argues that a lack of secrecy at SLT meetings would "chill" confidential discussions about personnel issues, individual student progress and school safety plans. *See, e.g.,* DOE Brief at 4. This claim is a red herring, because SLT meetings are already inappropriate venues for discussing confidential information.

For example, although SLT members must consult on the hiring of a school's principal and assistant principal, such discussions are already governed by strict and detailed confidentiality requirements. *See* Chancellor's Regulation C-30 (R 69-90); *id.* § XI(H) (R 80) (detailing confidentiality requirements for SLT members who participate in principal hiring process). It would be inappropriate for these personnel records to be aired publicly at an SLT meeting, regardless of

[6] The Council of School Supervisors and Administrators (CSA), as proposed amicus curiae, makes similar claims without evidentiary support, and these claims should be similarly disregarded. In addition, CSA's arguments betray a fundamental lack of understanding of the Open Meetings Law. CSA mistakenly suggests that compliance with the Open Meetings Law would transform the general public into so many SLT "participants," each with his or her right to "air grievances" or provide "outside commentary unrelated to the goals of the SLT." CSA Brief at 4-6. The Open Meetings Law only allows the public "to observe . . . and listen to the deliberations of" SLTs, not to participate. N.Y. Public Officers Law § 100.

whether the audience was limited to the "school community." Similarly, complying with the Open Meetings Law will not change an SLT's existing obligation to protect the privacy rights of individual students. Indeed, any information that would be appropriate to share with a "school community" of hundreds, and sometimes thousands, of people must already be appropriate to share with the public at large.

Although it attempts to finesse this distinction, the DOE's argument is not that SLT meetings must be closed to the public, but that the DOE should have the right to decide which members of the public may or may not attend. The DOE, in these proceedings, has defined this "school community," which is not defined by statute or regulation, as a school's current parents and staff. But the DOE has offered no clear or credible legal distinction between the "school community" and other members of the public (such as prospective parents, school neighbors, or anyone else interested in educational and civic matters) who share an interest in the operation of a particular school. Nor has the DOE offered a legal distinction to explain why a current school parent should be allowed to observe supposedly "private" discussions, but not another interested member of the community. Such distinctions were appropriately rejected by the Court below. *See* Judgment at 9 (R 18) ("The proper functioning of public schools is a public concern, not a private concern limited to the families who attend a given public school.").

Even assuming *arguendo* that an SLT is at times compelled to discuss matters not appropriately addressed publicly, the Open Meetings Law specifically allows a public body to engage in private discussions by entering into an executive session. These exemptions address all of the concerns that have been offered by the DOE in these proceedings or in its public comments. *See, e.g.*, N.Y. Public Officers Law § 105(1)(a) (permitting executive session for "matters which will imperil the public safety if disclosed"); *id.* § 105(1)(f) (permitting executive session for "matters leading to the . . . promotion, demotion, discipline, suspension, dismissal or removal of a particular person"). Like other public bodies, SLTs may comply with the Open Meetings Law while using executive sessions to discuss legitimately confidential subjects.

III. THE COURT SHOULD REJECT THE CONTRARY RULING IN *PORTELOS v. BOARD OF EDUCATION*

The DOE has relied on a contrary ruling offered in a separate case, *Portelos v. Bd. of Educ.*, Index No. 100813/2013, 2013 NY Slip Op. 32842 (U) (Sup. Ct. N.Y. Co., Nov. 4, 2013). However, Justice Moulton specifically rejected the *Portelos* decision as "not persua[sive]" (R 18), and for good reason. First, the *Portelos* court rejected the underlying petition as time-barred, so that its discussion of the merits of the DOE's decision to exclude Mr. Portelos from an SLT meeting was *dicta*. Second, the *Portelos* court's conclusion that SLTs are merely

"advisory" was based on a misreading of state education law, as well as an incomplete and inaccurate record that was corrected during the proceedings in the current case. For example, the *Portelos* court was apparently unaware that NYSED has already determined that the role of School Leadership Teams is not merely advisory under state law and regulations.

This Court should reject the *Portelos* ruling on the grounds articulated by the lower court, and clarify that the decision and order in this case will control DOE policy in the future.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision and judgment in this case in its entirety.

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