

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART: 25

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JOANNE ADAMS, et al,

Plaintiffs,

- against -

Index No.
506124 / 2018E

BOARD OF EDUCATION OF THE CITY
OF NEW YORK,

Defendant.

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360 Adams Street
Brooklyn, New York 11201
Thursday, May 24, 2018

B E F O R E : HONORABLE KATHERINE LEVINE,
Supreme Court Justice

A P P E A R A N C E S :

ADVOCATES FOR JUSTICE

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BY: CAROLYN KRUK, ESQ.
JARED ARADER, ESQ.

DAWN S. BOONE
SENIOR COURT REPORTER

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1 THE COURT: I was making some preliminary remarks
2 and they basically consist of noting that McKinny's, which
3 I usually look to, didn't have Education Law 2590E11, but
4 you say it's been in existence since 2003 when the whole
5 kind of set up changed from Community School District to
6 Community Education Council, correct?

7 MS. BARBIERI: Yes, your Honor.

8 THE COURT: So we have that and the Chancellor's
9 Regulation. I indicated what I need to figure out today,
10 and I just had the benefit of getting The City's papers now
11 is, A, substantially whether you really have a cause of
12 action or whether it's more pattern and practice; whether
13 there is any case law specifically interpreting 2590E11 and
14 the Chancellor's Regulation, and whether those regulations
15 and provisions of the law which deals with having CEC input
16 for change of zoning lines implicates the specific question
17 here, that's A.

18 B, it may or may not, and if not, is there a
19 pattern and practice, because you list around twenty
20 examples of the closing of schools and giving the community
21 notice, whether that creates some kind of legal right and
22 3, your basic -- I'm kind of unclear what's going on in
23 District 16, because I thought I read something in your
24 papers that there aren't other elementary schools or there
25 are but they just don't meet the caliber of this school and

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1 the physical proximity.

2 Assuming that we figure all this out, then I have
3 to deal with a preliminary injunction because assuming I
4 find some merit, I have to balance the equity. We know
5 that the end of school is approaching, so the parents need
6 to know where their kids are going and the Department of
7 Education has to deal with this. I'm curious where the UFT
8 is in this, because you note that the teachers are
9 supposedly going into the ATR --

10 MS. BARBIERI: That is correct.

11 THE COURT: -- if they aren't given the
12 opportunity. I'd like to know a little about how many kids
13 are in school and finally, what do the regulations or
14 statutes say about class size? In other words, I know
15 there is probably a maximum. Is there a minimum? What
16 gives the DOE authority to just shut down a school?

17 Let's start addressing all of this. You go first
18 because you are the petitioner.

19 MS. BARBIERI: Thank you, your Honor.

20 I'm not sure I can answer all of your questions
21 but I will try the best I can. The first is this statute
22 itself. I can give you have a copy of the statute --

23 THE COURT: No, we got it. We're good.

24 MS. BARBIERI: The statute is very clear. The
25 Community Education Counsel is a separate legal body that

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1 is elected and it alone has the right to change zoning
2 laws, zoning lines.

3 THE COURT: Zoning lines?

4 MS. BARBIERI: Zoning lines.

5 THE COURT: And does zoning lines mean a community
6 school district or does it mean a specific school within
7 the district and the attendance zone, which sounds like a
8 different thing than a zoning line; you tell me.

9 MS. BARBIERI: Zoning lines are the attendance
10 catchment, which is the district zoning line. For example,
11 School District 16 has zoning lines; if I can show you a
12 map?

13 THE COURT: Okay.

14 MS. BARBIERI: And I can submit this, if you like,
15 so you can see District 16's zoning line.

16 THE COURT: Do you have a copy of that counsel for
17 The City and DOE?

18 MS. BARBIERI: I don't, but I'm happy to --

19 THE COURT: I'm sure you have it somewhere.

20 MS. KRUK: It's fine.

21 MS. BARBIERI: And District 16 exists in -- all
22 the schools that exist within that district, including P.S.
23 25. The attendance zone for P.S. 25 is within District 16.

24 THE COURT: Right.

25 MS. BARBIERI: The attendance zone is a smaller

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1 zone that is for parents, people who live within that
2 attendance zone, that go to that school, who are assigned
3 to go to that school.

4 THE COURT: All right, so --

5 MS. BARBIERI: There is a Chancellor's Regulation
6 and that provides for zoning.

7 THE COURT: Is there any Chancellor Regulation or
8 law which speaks about this attendance zones within the
9 zoning line?

10 MS. BARBIERI: Yes.

11 THE COURT: Okay.

12 MS. BARBIERI: And they speak to children who are
13 within a zoned school, who have the right to go to their
14 zone school.

15 THE COURT: What regulation is that?

16 MS. BARBIERI: I believe it is 185, but I could be
17 wrong.

18 THE COURT: I looked at 185 and it talks about the
19 zoning lines, maybe that encompasses that but it doesn't
20 say --

21 MS. BARBIERI: Just one second, and I will look at
22 Chancellor 185 zoning laws.

23 THE COURT: I got it. Zoning line -- okay, it says
24 definition of zone district school and zoning line.

25 A zone district school is a school where

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1 legibility to attend is based solely on residence within a
2 defined geographical area within a district. So that seems
3 that it could include an attendance zone?

4 MS. BARBIERI: Correct.

5 THE COURT: Okay.

6 MS. BARBIERI: They also acknowledge, meaning the
7 DOE, acknowledges within A185, that it is only the CEC,
8 Community Education Counsel, that has the right to approve
9 zoning lines. There is other -- there are other chancellor
10 regulations that discuss the way in which children are
11 assigned zoning -- zoned schools.

12 This is the Chancellor's Regulation that talks
13 specifically about zoning lines for elementary and middle
14 schools. This is the Chancellor's Regulation--I'm
15 referring to A185, that discusses the way in which zoning
16 lines are changed.

17 The law is, in 259011E, that the CEC can change
18 zoning lines, can approve zoning line changes consistent
19 with the Chancellor's Regulation and this is the Chancellor
20 Regulation that applies.

21 THE COURT: So what authority, if any, does the
22 DOE or the PEP or whatever decided this case have in terms
23 of dealing with attendance?

24 MS. BARBIERI: In terms of dealing with
25 attendance --

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1 THE COURT: The attendance zone, because you keep
2 on talking about the school as an attendance zone school.

3 MS. BARBIERI: That is correct. In other words,
4 it is a zoned school.

5 THE COURT: Right, but you call it attendance zone
6 in your papers. In any event, according to you, the PEP or
7 some body, a centralized body, made a decision.

8 MS. BARBIERI: That is correct.

9 THE COURT: Are you saying they don't even have the
10 authority to make a decision on an attendance zone or are
11 you saying CEC has to have input first?

12 MS. BARBIERI: I'm saying two things; one, they
13 cannot vote to eliminate a school.

14 THE COURT: Who can't vote, the PEP?

15 MS. BARBIERI: The PEP cannot vote to close a
16 school that eliminates a zoned school by eliminating the
17 zone.

18 THE COURT: I don't understand that argument.

19 MS. BARBIERI: Okay.

20 THE COURT: Can they close the school?

21 MS. BARBIERI: If they close the school and it
22 also, at that time eliminates the zone.

23 THE COURT: How does it eliminate a zone?

24 MS. BARBIERI: Because it's the only zoned school
25 in the zone.

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1 THE COURT: Meaning within the attendance zone?

2 MS. BARBIERI: Correct, so these children have no
3 school to go to.

4 THE COURT: Isn't that by definition what an
5 attendance zone is?

6 MS. BARBIERI: Yes.

7 THE COURT: I mean by definition, you have a school
8 with an attendance catchment area as one school.

9 MS. BARBIERI: There could be more, that is the
10 whole point.

11 THE COURT: So there are other areas where there
12 is a choice of two or three within attendance zone?

13 MS. BARBIERI: Correct.

14 THE COURT: We're not talking about all of
15 Community District 16, which is very large?

16 MS. BARBIERI: Correct.

17 THE COURT: We're talking about an attendance
18 zone?

19 MS. BARBIERI: Correct.

20 THE COURT: So within Community School District
21 16, other than this attendance zone, how many other
22 attendance zones are there?

23 MS. BARBIERI: Within District 16?

24 THE COURT: Yes.

25 MS. BARBIERI: I don't know but there are many,

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1 but there are some instances, what happens is the DOE
2 replaces a school. In other words, it doesn't eliminate a
3 school, doesn't close the school. What it does is it
4 creates a new school.

5 THE COURT: Why would they get rid of a school and
6 create a new school if that is the only school? That
7 doesn't make sense to me.

8 MS. BARBIERI: The DOE does that all the time.

9 THE COURT: That doesn't make sense, especially if
10 the school is functioning.

11 MS. BARBIERI: They do that all the time.

12 THE COURT: You are saying that because this is
13 the only school within the attendance zone, they can't do
14 that because they are eliminating zoning line?

15 MS. BARBIERI: That is correct.

16 THE COURT: Okay.

17 MS. BARBIERI: And they cannot do that because
18 only the CEC can approve zoning line changes.

19 THE COURT: Okay.

20 MS. BARBIERI: That is according to the law.

21 THE COURT: Okay, so that is your legal argument?

22 MS. BARBIERI: Correct.

23 THE COURT: A, and B, and then I'm going to hear
24 from you on this substance, B, assuming that -- well you
25 have alternative relief you want to ask. The other

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1 objection you have is that there is nothing that exists in
2 District 16 which is comparative to this school?

3 MS. BARBIERI: Correct, and the reason is if you
4 look at Exhibit B in my papers that I served, you'll see a
5 list of schools and that list of schools not only gives --
6 it's this exhibit.

7 THE COURT: There is a lot of Exhibit Bs.

8 MS. BARBIERI: I know, I'm sorry. It's the one
9 that I served last, on May 16th, maybe.

10 THE COURT: In any event is --

11 MS. BARBIERI: It looks like this.

12 THE COURT: I don't know. There is a brief --
13 this is part of Exhibit B. I don't know where it is.

14 MS. BARBIERI: Okay. It's Exhibit B to my
15 affidavit.

16 THE COURT: All right.

17 In any event, Exhibit B to your affidavit.

18 MS. BARBIERI: Exhibit B, you know where it is?

19 MS. KRUK: I got it.

20 MS. BARBIERI: Okay.

21 THE COURT: Go ahead.

22 MS. BARBIERI: Exhibit B shows two things. It
23 shows the list of schools that the DOE considers that are
24 other schools that the children can go to. This is a list
25 of transfer schools.

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1 THE COURT: That is 29 minutes travel time. There
2 is one that is 5 minutes.

3 MS. BARBIERI: Yes. However if you look at the
4 potential of what the school is in terms of its potential
5 performance, the potential performance is not up to the
6 same performance level.

7 THE COURT: You tell me what potential performance
8 is; this is a new term. I know that when I was looking for
9 my kids, you know, you want to know what the reading scores
10 are, you want to know the attendance rate, you obviously
11 want it to be above the city average. You want the kids to
12 be 70 percent and 90 percent, not 30 percent and 34
13 percent.

14 MS. BARBIERI: Right.

15 THE COURT: I think you are talking about
16 something else here.

17 MS. BARBIERI: This is called the impact score.

18 THE COURT: What does an impact score mean?

19 MS. BARBIERI: This is what the DOE measures when
20 it measures the scores of its children by a variety of
21 measurements to determine, essentially, how the children
22 perform on various tests.

23 THE COURT: Okay.

24 MS. BARBIERI: And they compare these impact
25 scores in a quality review and determine, based on

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1 comparative bases of children across the community, across
2 the city, across the boroughs and they give you a score,
3 and that's how this school, P.S. 25 is based. Its impact
4 scored is a 93, and that's how --

5 THE COURT: How is this formulated, this 93?

6 MS. BARBIERI: Well I just said, they are basing
7 it on --

8 THE COURT: You're claiming this is the best
9 performing school in Brooklyn. Does that mean that it has
10 the highest reading and math scores or just based on all
11 the factors, it reaches its potential?

12 MS. BARBIERI: This is based -- well it also has
13 highest reading and math scores.

14 THE COURT: In the whole --

15 MS. BARBIERI: Second highest in Brooklyn and the
16 fourth highest in city.

17 THE COURT: You are telling me that if I had
18 nothing better to do at night than to compare all the
19 scores of Brooklyn elementary schools, this school would
20 have the highest reading and math scores in all of
21 Brooklyn, exceeding P.S. 195 in Manhattan Beach, which is a
22 very small school and always gets high scores; is that what
23 you are telling me?

24 MS. BARBIERI: If you look at the impact score,
25 which is the DOE's metric and you look at the exhibits that

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1 are appended to my affidavit, you'll see on the chart where
2 all of these elementary schools, their performance is
3 measured. These are all the elementary schools in the
4 city.

5 THE COURT: Okay, that is exhibit what?

6 MS. BARBIERI: This is their achievement method.

7 THE COURT: What exhibit is that?

8 MS. BARBIERI: That is in the actual petition
9 itself.

10 THE COURT: Okay.

11 MS. BARBIERI: And it is a diagram in the
12 petition.

13 THE COURT: I have an Exhibit C with a lot of
14 charts. Is that what you are talking about, enrollment --
15 performance information.

16 We'll deal with this later. You're going to give
17 me a complete set of papers that we're not downloading from
18 the computer with different exhibit As that don't belong.
19 I'm going to waste time now. It's not going to happen.

20 MS. BARBIERI: Do you want me to hand this up?

21 THE COURT: No, no. Everybody is going to hand me
22 a nice copy that is bound so I don't have these things
23 sticking up.

24 MS. BARBIERI: Whatever you want.

25 THE COURT: The next question is, and then I want

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1 to hear from you, under what provision of the law or under
2 The New York State Constitution or under, you know, the
3 campaign for fiscal equities lawsuit, whatever, does any
4 student have the right to be placed in a comparative school
5 if their school is closed? You tell me where that right
6 arises from.

7 MS. BARBIERI: Okay, well you asked about
8 practice, the DOE's practice.

9 THE COURT: Right.

10 MS. BARBIERI: And I gave almost a dozen examples
11 of the DOE's practice of example after example of the DOE
12 giving, in its education impact statement, its practice of
13 placing students in schools with higher performing students
14 time and time again.

15 THE COURT: Right, but does that presume that
16 those schools exist near to the school which is closing or
17 does that mean that the kids have to be schlepped over all
18 the city?

19 MS. BARBIERI: That's because it only closes
20 schools that are not performing well. Not that they are
21 closing schools that are performing well, which is why it's
22 so arbitrary that they are closing this school.

23 THE COURT: What is the rationale for the closing
24 of this school?

25 MS. BARBIERI: They claim three things; they claim

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1 it's small --

2 THE COURT: So is P.S. 195 in Manhattan Beach.

3 MS. BARBIERI: Yes. They claim that children
4 don't want to go there, that parents don't want to send
5 their children there, and yet that statistic is belied by
6 the reality. The DOE actually admits that, I think it's
7 47 percent of the parents have chosen that school out of
8 the parents who can choose a school.

9 THE COURT: I don't know what that means. You're
10 just telling me that this is the zoned school for people in
11 this attendance catchment area?

12 MS. BARBIERI: Correct.

13 THE COURT: So that is the school they go to
14 unless they choose, by lottery, another school?

15 MS. BARBIERI: You can choose, actually, in
16 elementary school, what school you go to.

17 THE COURT: Within the district.

18 MS. BARBIERI: There are fourteen elementary
19 schools in District 16 to choose from.

20 THE COURT: Okay.

21 MS. BARBIERI: So theoretically, if you have
22 fourteen schools, the probability of choosing each school
23 is about 7 percent.

24 THE COURT: And how many have chosen this as their
25 first choice?

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1 MS. BARBIERI: 47 percent. I think it's
2 47 percent.

3 THE COURT: And is that out of all of District 16
4 or just within this attendance area, the 47 percent?

5 MS. BARBIERI: Out of the parents who chose to go
6 to school.

7 THE COURT: In District 16?

8 MS. BARBIERI: In kindergarten.

9 THE COURT: Right, but this is the thing--one of
10 your basic arguments is that not only are there schools
11 that don't rate as highly, but this is the only school
12 within the attendance area. Meaning that for those parents
13 who live there, it's the closest school. Also, according
14 to that chart which is in one of the exhibits, many of the
15 schools they offer are like 29 minutes away.

16 MS. BARBIERI: Correct, but it's not as good.

17 THE COURT: Right, so when you say 47 percent of
18 the parents chose this for their choice as kindergarten,
19 are those parents who live anywhere in District 16 or are
20 those parents who live --

21 MS. BARBIERI: All over the district. They are
22 traveling to get there.

23 THE COURT: Let me hear your response on
24 substance.

25 MS. KRUK: Just an initial matter, I am not

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1 familiar with the 47 percent figure so that is something
2 that I can't comment on. I don't know where that came
3 from.

4 MS. BARBIERI: I am a little sketchy on that one,
5 okay.

6 MS. KRUK: To go back to the very beginning, this
7 is a peculiar case because petitioners are challenging it
8 focused on this zoning argument rather than arguing that
9 this is arbitrary capricious decision that's contrary to
10 sound educational policy.

11 THE COURT: They have sound educational policy all
12 over their papers.

13 MS. KRUK: But they are focusing on zoning. Their
14 argument is that this is a violation of education law. If
15 you read the education law that has to do with CEC's power
16 to amend zoning lines.

17 This was a decision by the panel on education
18 policy to close a school, any incidental effect that that
19 might have on the CEC in amending the zoning lines is
20 irrelevant.

21 THE COURT: Why is it irrelevant? If they have
22 the right to deal with any change in zoning lines, why is
23 it irrelevant if the import of what the PEP does is to
24 change the zoning line?

25 MS. KRUK: There is separate decisions.

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1 THE COURT: You tell me what the separate
2 decisions are.

3 MS. KRUK: The decision to close the school, which
4 is based on low demand, low attendance. Last year -- this
5 school year, there is 94 students attending the school; the
6 year before, it was 100. It's been consistently dropping.
7 The demand simply isn't there.

8 As my friend represented, there are fourteen other
9 schools in the district; parents are free to choose
10 whichever school they want.

11 THE COURT: That sounds weird. If what she is
12 saying is that the school has amazing results, it doesn't
13 make sense that the demand is so low.

14 MS. KRUK: It might seem inconsistent --

15 THE COURT: It does.

16 MS. KRUK: But it's the facts. We're not making
17 up the numbers. The demand just isn't there.

18 THE COURT: All right.

19 MS. KRUK: Moreover, the case law is simply
20 absent.

21 THE COURT: I haven't seen any case law one way or
22 the other.

23 MS. KRUK: Exactly. This has never been litigated
24 because there is simply no relationship between the closing
25 of the school and the decision to amend the zoning line.

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1 They haven't been amended. They are currently in
2 existence, there is just no school within it.

3 THE COURT: Her argument is, I think, that somehow
4 or other, zoning lines can encompass the small attendance
5 zone within the community school district. Is that what
6 you are arguing, because I don't see the clear connection,
7 but that's your argument?

8 MS. BARBIERI: Zoning lines include attendance
9 zones.

10 THE COURT: Where is the definition of that? I
11 don't see that in your brief. I don't see any cases that
12 say zoning lines include attendance zones.

13 MS. BARBIERI: All zoning lines -- that is the
14 zoning line.

15 THE COURT: Okay, that is what you are saying. I
16 looked at the brief and I didn't see a case that said it.
17 That's a novel interpretation. Maybe this has never been
18 interpreted before, but I don't see any cases -- is this
19 like a novel interpretation?

20 MS. BARBIERI: Wait. Wait, let's look at
21 Chancellor's Regulation --

22 THE COURT: I saw 185; it is what it is.

23 MS. BARBIERI: I think Chancellor's Regulation 185
24 will clarify and I think I can also bring you examples of
25 prior practice by the DOE.

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1 THE COURT: This prior practice, but can prior
2 practice become the law? That's what I'm asking. Let's
3 say that I don't know where to go in interpreting this.
4 There is no case law; it's novel.

5 MS. BARBIERI: Okay, so I can bring you prior
6 practice of the DOE where they -- I gave you two examples,
7 by the way. I gave you Greenwich, where it was a case
8 that--it was a complaint that had been filed --

9 THE COURT: I know, it's a complaint that's filed
10 and they settled and, of course, when we get a full set of
11 papers, I can look at it.

12 MS. KRUK: Your Honor, there was no settlement.

13 THE COURT: So what happened in Greenwich?

14 MS. BARBIERI: There was a settlement.

15 MS. KRUK: Are we talking about in Greenwich?
16 There was absolutely no settlement. The case is still
17 pending, it's dormant.

18 THE COURT: Where is it?

19 MS. BARBIERI: There was settlement --

20 THE COURT: In any event, there is nothing
21 written, there is no polished decision which defines what
22 you are asking me to rule on.

23 MS. BARBIERI: Okay.

24 THE COURT: Correct, from both sides?

25 MS. KRUK: Correct.

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1 THE COURT: So you're saying that it operates on
2 two different tracks. Are you saying that you have the
3 inherent power to just close a school without getting
4 community input?

5 MS. KRUK: No, absolutely not, your Honor.

6 THE COURT: Where is the community input as to
7 what happened here?

8 MS. KRUK: We have plenty. We have lots of
9 community input as required under the law.

10 THE COURT: What was the community input? You
11 tell -- again, I don't have the benefit of your papers.
12 You tell me when this decision was made, how the community
13 was notified? Did you ever notify the CEC, because that is
14 supposed to be the representative body?

15 MS. KRUK: Yes, your Honor.

16 THE COURT: Even if it doesn't have the authority
17 that the community school districts have, it's supposed to
18 be representative body of the community, so how did they
19 have any say, if at all, in what happened?

20 MS. KRUK: Your Honor, attached to my papers at
21 Exhibit A is a letter from the head of the CEC 16
22 approving, agreeing with the closure of this school.

23 THE COURT: Is that true?

24 MS. BARBIERI: There is a letter. However, I can
25 also provide the CEC's minutes and I can provide an

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1 affidavit wherein the CEC has never issued any resolution,
2 had any meeting and that this particular letter was not
3 authorized by the CEC officially by any --

4 THE COURT: Basically you are telling me that
5 there are two tracks and that this PEP can just do its
6 thing and somehow notify the CEC without getting formal
7 approval and its done.

8 And you're telling me that any time this zoning
9 line, as you interpret it, is impacted, the PEP is
10 irrelevant and the CEC has to vote.

11 MS. BARBIERI: That is correct.

12 THE COURT: But the CEC doesn't have the authority
13 to close school, only the PEP does.

14 MS. BARBIERI: That is correct.

15 THE COURT: So how do you close the school?

16 MS. BARBIERI: What happens is --

17 THE COURT: What do you think should happen under
18 the scenario?

19 MS. BARBIERI: What has to happen is very clear.
20 It is in Chancellor's Regulation. It's also --

21 THE COURT: Where does 185 talk about closing a
22 school?

23 MS. BARBIERI: Well, it's in another Chancellor's
24 Regulation. However, it's also in -- but it is in the
25 process of the Chancellor's Regulation where you talk about

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1 the zoning line changes.

2 THE COURT: You see, you can change zoning lines
3 but that doesn't intrinsically mean that a school is being
4 closed.

5 MS. BARBIERI: I agree with you, your Honor, so
6 I'm going to need to see, as we go along in this case, the
7 setup by which the department gives it the statutory
8 authority to close schools and what has to be done, and
9 that is in your papers?

10 MS. KRUK: Yes, and I can summarize it for your
11 Honor today.

12 THE COURT: Okay.

13 MS. KRUK: So in addition to the letter from the
14 CEC approving the closure, there were public hearings,
15 multiple public hearings, and parents and others in the
16 community were invited to submit any concerns, objections,
17 their feedback, which were all responded to by the
18 Department of Education.

19 THE COURT: But did you listen to what they said,
20 because according to the petitioners, there was
21 overwhelming consensus that this school should not be
22 closed.

23 MS. KRUK: There was objections. There were
24 concerns.

25 THE COURT: But you are arguing that you don't

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1 even have to listen to it, right? You have the inherent
2 authority to do what you want to do?

3 MS. KRUK: Respectfully, your Honor, the
4 Department of Education, Board of Education does listen and
5 did listen.

6 THE COURT: Okay.

7 MS. KRUK: But it doesn't change the demand and
8 the attendance.

9 THE COURT: Are you saying that based on the
10 demand and the attendance, you have the inherent right,
11 under whatever provision you are citing, to close the
12 school?

13 MS. KRUK: Yes, as long as it follows the correct
14 procedures.

15 THE COURT: What provision of the law is it? What
16 are you banking your argument on?

17 MS. KRUK: State Education Law 2590H2A.

18 THE COURT: Okay, so without getting -- what is
19 your argument? What do you have to say about pattern and
20 practice, assuming that, you know, I look at this and I say
21 I don't know where to go. She gave me fifteen schools
22 where you plan to close it and you offered different
23 options.

24 MS. KRUK: The options provided here are, to the
25 extent possible -- these are good schools. There is a long

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1 list attached to --

2 THE COURT: What does that mean, these are good
3 schools?

4 MS. KRUK: That are close in ranking grading to
5 the extent possible. Some of them are outside of
6 District 16 in order to provide the parents with an option
7 of a school that is higher performing than K 25.

8 THE COURT: Well I don't think that -- how far
9 away are these schools? I mean do they have to go to
10 Staten Island? No, really.

11 MS. KRUK: I'm prepared to answer that.

12 Two students who were attending K 25 live in
13 Staten Island and they were the only students from K 25 who
14 were given options to attend schools --

15 THE COURT: Is that because their grandparents in
16 Brooklyn and the parents live in Staten Island or what is
17 that about?

18 MS. KRUK: I don't know the basis of the decision
19 to attend K 25 in the first place.

20 THE COURT: This involves a lot of educational
21 policy and I really have to think about this. Now are
22 there regulations governing--I want to know and I'll be
23 totally frank, let's say if this was a school which was
24 90 percent White and 10 percent Black and there was a
25 violation of the Constitution or there was something

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1 discriminatory going on in terms or it was 90 percent Black
2 and 10 percent White and that school was closed and there's
3 a school that 90 percent White and 10 percent Black, it's
4 not closed; same scores, same amount of students, there
5 would be a constitutional violation, right, or there may be
6 a statute that I could look at and say okay. Here, it's
7 very amorphous, it's amorphous.

8 I ask you this and you didn't give me an answer;
9 what gives these students the right to attend a school
10 that's comparative? I know the equity and is it income
11 based, is it that not everybody can afford Chapin or one of
12 these nice private schools, and what is that school in Bay
13 Ridge, Poly Prep--not everybody can afford that, so then
14 the question is what do you afford to these students, and
15 do you have some kind of the statutory rights once the kids
16 are afforded a good education with high scores to get these
17 kids into the similar school, and under what statute or
18 constitutional provision do you put these arguments, other
19 than the fact that it makes sense?

20 MS. BARBIERI: I think that you have to say that
21 they have the right to the same quality education that they
22 previously were receiving.

23 THE COURT: Do you agree with that?

24 MS. KRUK: Your Honor, this isn't a constitutional
25 case --

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1 THE COURT: No, I'm asking you do you disagree
2 with that?

3 MS. KRUK: I think that's an--we're not talking
4 about citation to the New York Education Law, the general
5 principle, of course. Here, we were talking about
6 specifics that I could properly respond to, but we're
7 talking about three petitioners in the abstract.

8 THE COURT: No, they are not abstract, they are
9 actual parents.

10 MS. KRUK: They are but we're not talking about
11 their list or where we've placed them.

12 THE COURT: Well they haven't been placed yet
13 because there is a stay.

14 MS. KRUK: Correct, so once --

15 THE COURT: Look, I can't really figure out who is
16 correct yet. I really have to think about this.

17 Let's go on to this preliminary injunction. I
18 haven't even read your papers yet and your papers, when
19 they come out through E-file are completely convoluted, so
20 we need to fix that up.

21 That being said, you have all your arguments but
22 the affidavits are A,B, C, D, attached to petition is your
23 affidavit.

24 Let's go through preliminary injunction. Let's
25 say that I believe you make a plausible argument. My main

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1 thing here is balancing of the equities. I want both sides
2 to speak to the fact that this is May 23rd. There were how
3 many kids in the school?

4 MS. BARBIERI: 128.

5 THE COURT: That is a very small school. What is
6 it, like one class per grade?

7 MS. BARBIERI: Yes.

8 THE COURT: And did anybody provide me with
9 statistics as to what the enrollment of this school has
10 been over the past 10 years?

11 MS. BARBIERI: No.

12 MS. KRUK: There is information --

13 MS. BARBIERI: But we can provide that.

14 THE COURT: I think that would be helpful,
15 because I also -- I see people shaking their heads in the
16 back. I think there is even a dispute amongst everybody as
17 to whether there is really decreasing enrollment or not.
18 It would seem to me that if this school had these amazing
19 scores, people would want to go to it and maybe that's why
20 it's doing so well, because it's small and it doesn't have
21 35 kids, half of which are really Special Ed kids without
22 sufficient backup services. I don't want to put kids in
23 that district into that situation either.

24 Would you concede that maybe one of the reasons
25 this school is doing so well is because it has small class

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1 size?

2 MS. KRUK: I can't speak to that.

3 THE COURT: You tell me; ten years ago, does
4 anybody know what the enrollment in this school was?

5 AUDIENCE MEMBER: 10,113.

6 THE COURT: 10 years ago; 10 years ago, how many
7 kids were in there? There's 128 students now. Does
8 anybody know how many kids were there 10 years ago. I'm
9 talking to the attorneys; you are the mouth pieces for
10 everybody.

11 MS. KRUK: Your Honor, I don't have that
12 information.

13 THE COURT: But don't you think you would, the
14 Board of Ed would have that? Wouldn't it have to do a
15 linear examination of what is going on before determining
16 that, in fact, the school is losing kids and that's one of
17 the reasons it should be closed?

18 MS. KRUK: Yes, your Honor, and there is that
19 pattern of recent years, it's been constantly --

20 THE COURT: Recent years meaning when?

21 MS. KRUK: I think the last three or four years.

22 THE COURT: Okay.

23 MS. KRUK: However --

24 THE COURT: I'm curious, is there any reason --

25 MS. BARBIERI: Your Honor --

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1 THE COURT: I'm just curious, why wouldn't The UFT
2 be part of this lawsuit if its teachers are going to be put
3 into the rubber rooms and the ATRs? Has The UFT taken a
4 position on this, I'm just curious? No, they are not
5 involved in this.

6 MS. BARBIERI: We haven't approached The UFT yet.

7 THE COURT: Tell me what the statistics are.

8 MS. KRUK: During the 2014-2015 school year, 164
9 students. During the 2016-2017 school year, 94 students.

10 THE COURT: So now it's increased.

11 MS. KRUK: And 2017-2018 school year -- it was
12 164, went down 100 and then this year it's 94.

13 THE COURT: She said it's 128.

14 MS. BARBIERI: I thought it was 128. I have that
15 figure.

16 MS. KRUK: That is inconsistent with the
17 information that I have.

18 THE COURT: I want facts. I want to have the
19 actual enrollment things -- was there a public hearing? Do
20 you have minutes of the deliberation of the PEP?

21 MS. BARBIERI: That's online, you can get the
22 video --

23 THE COURT: I'm not going online. I want to see
24 that. In your answer, did you provide me minutes of the
25 PEP or something where they actually discussed and debated

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1 it and had people from the community come in and say yeah
2 we agree or we don't; is that part of your papers?

3 MS. KRUK: Yes, your Honor. There is a public
4 comments analysis which includes --

5 THE COURT: Tell me what is going on. If I were
6 to close this school, it's not going to reopen; that is the
7 problem. Once you shut something down, it's like a
8 homeless shelter or anything else. If you close--listen to
9 me, if I say yes, I'm going to lift the stay, then you're
10 going to send your notices to the kids about their choice,
11 what are you going to do? There is an incoming class and
12 then there's all the kids that attended. Let's talk about
13 what goes on now.

14 MS. KRUK: Today, we have stopped, we have not
15 sent out any of the placement letters to all of the
16 students who are attending schools that are closing at the
17 end of this school year. That is approximately 3,000
18 students.

19 THE COURT: But that has nothing to do with this
20 school. Where are you getting 3,000, that irrelevant to
21 this.

22 MS. KRUK: Your Honor, it's our desire to inform
23 the students at the same time and not do it in piecemeal.

24 THE COURT: Where are you getting 3,000? I'm just
25 concerned about closing this school. Why are you talking

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1 about 3,000? What does that have to do with this?

2 MS. KRUK: Because practically speaking, when we
3 inform students, we do it all at once.

4 THE COURT: No, well you go and inform all of the
5 students except the 100. That's ridiculous. I don't want
6 you to give me an argument that because, you know, we're
7 here today and I have to figure out what is going on, that
8 if I don't make a decision, that 3,000 students are harmed.
9 I'm not dealing with any other school but this school, so
10 there is no stay on you informing everybody but these 100
11 kids or whatever, 128.

12 Let's talk about this now. If I say that, you
13 know, the equities are on her side, this school stays open,
14 what is the damage? You have to keep the school open for
15 another year.

16 MS. KRUK: Correct.

17 THE COURT: If I close it, then what happens? You
18 just randomly assign kids to another school?

19 MS. KRUK: With all due respect, it's not random.

20 THE COURT: What do you do?

21 MS. KRUK: We provide options to the parents so
22 they can do their due diligence, their investigation and
23 choose approximately a school that they select, which could
24 be based on --

25 THE COURT: Isn't it cleaner for this school to be

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1 open for another year? Because I mean, obviously--just
2 hear my thinking. You can't close it in the middle of the
3 school year, you need consistency. I have to figure this
4 case out because it's a kind of novel case. Nobody is
5 giving me a decision which says Judge Levine, this is what
6 governs it, this isn't. You are arguing parallel things,
7 you are arguing this is what has to happen.

8 The worst that happens if I keep the stay on is
9 that the kids will have the benefit of this school for
10 another year. Now what are you going to tell me,
11 financially, it helps the DOE if I close it? What is the
12 argument other than the fact that you think this school
13 should be closed? What is the downside to me keeping it
14 open? Forget about 3,000, we're talking about 100. What
15 is the downside?

16 MS. KRUK: It's simply, it's a reiteration it was
17 a low demand, there's a low attendance and we're keeping
18 the school open and there is a lack of resources, you know,
19 information --

20 THE COURT: No. I'm not hearing -- do you have
21 anything in your papers that say this school really stinks
22 and there is no resources for this school so four kids are
23 suffering? What resources are lacking? They are learning
24 and they are doing well.

25 MS. KRUK: It's a very small school; it's too

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1 small. The utilization rate is --

2 THE COURT: Okay, that is the only harm; it's too
3 small, but the harm if I close it is that these kids have
4 to go elsewhere and if I ultimately decide that this school
5 should stay open because I buy her interpretation, they are
6 lost. What are we going to do? Close the school down and
7 then in October or whenever I write a decision after I get
8 all the papers assembled and I say this school should stay
9 open, then they are missing the school for a year. Once
10 you close it, how are you going to open it? The school
11 could be used for something else.

12 What I am doing now is I'm keeping the stay in
13 place because I'm not convinced one way or another about
14 the arguments yet. Now if I read your papers and I have an
15 epiphany that you are so right on the law, that there is no
16 merit here, then I could lift the stay but I can't do that
17 now.

18 MS. KRUK: Okay, understood, and your Honor, I
19 would stress even if the equities don't weight in the
20 Department of Education's favor --

21 THE COURT: They don't.

22 MS. KRUK: Your Honor, I would stress that there
23 is simply no validity, no merits to their argument and the
24 fact that this has not been litigated is an indication that
25 there is no -- there is nothing there.

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1 THE COURT: But she is saying that there is a
2 pattern of practice of other schools being offered to the
3 kids that are equivalent and that hasn't happened here. Is
4 not that one of your arguments?

5 MS. BARBIERI: Yes, and I gave you all the
6 examples in my papers.

7 THE COURT: How many schools did they offer --
8 well they haven't offered anything to the kids yet, right?

9 MS. KRUK: Respectfully your Honor, that is a
10 separate issue from the closure of the school. We're
11 conflating providing --

12 THE COURT: You know what, right now I can't --
13 let me leave that. She had an alternative. If I were to
14 hypothetically say that these kids have to be offered the
15 same or better schools or the same equivalent, would that
16 satisfy you?

17 MS. BARBIERI: They would have to go to the Bronx.

18 THE COURT: No. What about P.S. 195; they can go
19 to Manhattan Beach or Staten Island but who would provide
20 the transportation? Would DOE provide school buses for the
21 kids to go to Staten Island?

22 MS. KRUK: Your Honor, I don't want to make any
23 representations without talking to my client, but simply,
24 because of the ranking of the school--it has a high
25 ranking, it's simply unrealistic to provide all the

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1 students better schools, but we're going to give -- they
2 have the option of some outside of District 16 and that is
3 left to the parents to decide.

4 THE COURT: What are the options? You tell me
5 what the options are. What I'm curious about is since
6 there's been a stay on this, how do we know what the
7 options even are?

8 MS. KRUK: The options are provided at Exhibit B
9 to Petitioners -- sorry, to the affirmation of Laura
10 Barbieri.

11 THE COURT: Can you please hand that up again? I
12 just want to see that and we'll make a copy.

13 When was this drawn up? Who did this?

14 MS. BARBIERI: I did.

15 THE COURT: But you don't know--how would you know
16 what options they have for you? Isn't it up to the DOE
17 to --

18 MS. KRUK: Those are the potential schools that
19 the children could be transferred to within the district.

20 THE COURT: But you're having District 14 in here.

21 MS. KRUK: Some of them are within the district,
22 some of them are outside of the district in order to give
23 them better options.

24 THE COURT: Who decided on this? Why would this
25 list exist if there's a stay on this? Did you, in

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1 contemplation that I would lift the stay, draw up this and
2 give it to her?

3 MS. KRUK: Your Honor, this has been in the
4 plannings for months. This petitioner only filed their
5 motion in April, so this is not a --

6 THE COURT: Okay, so let's look, and again, the
7 performance school score, which of these columns
8 indicates --

9 MS. BARBIERI: The first column.

10 THE COURT: Impact score so .93 means what?

11 MS. BARBIERI: That means that's the proficiency
12 score.

13 THE COURT: All right, so the only schools that
14 are above -- let's see, there is a .78. You wouldn't want
15 to send anybody to a .31 or a .48. Let's say that I buy
16 your argument they are entitled to something that is
17 similar, there is a .80, the Chapin School, hypothetically.
18 Now that is 48 minutes away. How are these elementary
19 school kids supposed to get there?

20 MS. KRUK: Your Honor, it depends on what the
21 parents decide.

22 THE COURT: Please --

23 MS. KRUK: Your Honor, they might decide to travel
24 further to attend a better school or they might make a
25 decision --

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1 THE COURT: I know enough to know that if they
2 attended a school within District 16, they'd get bussing,
3 correct?

4 MS. KRUK: Yes.

5 THE COURT: But if they choose to go to a school
6 outside of the district, they don't get bussing, correct?
7 Is that correct?

8 MR. ARADER: I'd have to check with our
9 operations in order to know that, your Honor.

10 THE COURT: No, this is how it used to be. The
11 main thing is that you can't get bussing unless there is an
12 exception. There are always exceptions because there are
13 some schools that are underutilized in other districts and
14 they want to attract kids to a district so they would get
15 bussing.

16 Let me take the argument that, you know, we want a
17 school that is similar.

18 MS. BARBIERI: What is the capacity in that
19 school, your Honor?

20 THE COURT: I don't know, I'm just looking at this
21 hypothetically. So .80 is the Chapin school which is 48
22 minutes away and the school utilization rate is
23 132 percent, which means that there is big class sizes,
24 right?

25 MS. BARBIERI: Correct. It means that the school

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1 is over capacity.

2 THE COURT: Now what about this Jesse Owens
3 School, that has a .78. It's performance score is .50,
4 whatever that means.

5 MS. BARBIERI: That means it's half as good as the
6 school.

7 THE COURT: And it's 50 percent utilization,
8 which means it's small and it's 9 minutes away. Average
9 class size is 18.

10 MS. BARBIERI: That means it's half as good.

11 THE COURT: Okay, so that's one option. This is
12 what I'm doing right now. I cannot --

13 MS. KRUK: Your Honor, my apologies for
14 interrupting. I just want to reinforce that this is a
15 separate issue, that is not in their position, this is not
16 the basis --

17 THE COURT: Listen, I read their position and I
18 read the order to show cause. She has like six different
19 options as to what can be done and I thought one of them
20 had to do with getting the kids over to comparative
21 schools.

22 MS. KRUK: This is an Article 78 challenging the
23 PEP's decision to close P.S. 25.

24 THE COURT: Since you are very adamant as to what
25 it is, I'm not going to close the school now. I'm going to

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1 keep the stay on until I figure out what is going on. I
2 have to read your papers, and I may ultimately find that
3 you are correct, but right now, I'm kind of like on an even
4 scale and I see the disruption to be much more enduring to
5 their favor then keeping the school open for another year
6 and figuring out what the case is about. That's what I'm
7 doing.

8 I do not want to be in the situation where I have
9 all these parents making these random choices of where they
10 want to send their kids and ultimately deciding the school
11 should be open and then it won't be opened again. That is
12 the reality of the case.

13 I would like, as soon as possible, for each side
14 to send me a bound copy of your papers with the exhibits in
15 the right order so I know what you are referring to. I
16 want the briefs to be separate, not part of, you know, a
17 stack this big, so I can see the briefs.

18 I want you to provide me official statistics as to
19 what was going on in the school in terms of attendance
20 rates and I want you and you to respond, what you are
21 telling me about, you know--I need some case law. There is
22 no case law in your brief other than what is, you know, the
23 standard for a preliminary injunction. That's why we are
24 here, but this thing is going to have to be more adequately
25 developed now that I get into the substance.

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1 MS. BARBIERI: The only case that I cited was
2 Avery against New York City Department of Education and --

3 MS. KRUK: Which has nothing to do with closing of
4 the school.

5 MS. BARBIERI: No it doesn't have to do with
6 closing of the school, but it does delineate the way in
7 which Chancellor's Regulation 185 operated, and in so
8 doing, it did, in my opinion, it gives The Court an example
9 of the way in which the Department of Education admitted
10 essentially that the Community Education Counselor has to
11 approve the zoning line.

12 THE COURT: I'll read it and you say no and
13 I'll --

14 MS. KRUK: No, we agree that the CEC has that
15 authority. It's just that there is no relationship to the
16 PEP's decision to close the school. One does not effect
17 the other.

18 THE COURT: What you are going to have to show me
19 in your brief is that this the line of cases we rely on.
20 Now has a school closing ever been challenged in this way?

21 MS. KRUK: It was challenged in the Greenwich
22 case --

23 THE COURT: Which is the bowels of some court's
24 basement.

25 MS. KRUK: Correct.

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1 THE COURT: It's dormant.

2 MS. KRUK: Nothing happened on that.

3 THE COURT: How about other schools? There are
4 lots of litigious parents in The City of New York.

5 MS. KRUK: There certainly are but they are not
6 dealing with this case, this type of issue, this issue is
7 one --

8 THE COURT: Forget about this case. Are you
9 telling me there's never been, within the DOE's history,
10 since the Community School Districts were eviscerated and
11 replaced with the CEC, that parents have challenged the
12 closing of a school, whether under your line of cases or
13 her line of cases and what the results were? There must be
14 something on this?

15 I need something other than looking at, you know,
16 Black's Law Dictionary and figuring out whether an
17 attendance zone is within a changing of the zoning line,
18 because I'm going to tell you that a zoning line, I don't
19 know what that means. What does that mean, that before
20 Community School District improved Bergen Street and
21 Prospect Avenue, if it doesn't include it before and they
22 want to change the line, I understand that, that's
23 clear-cut.

24 Are you making some kind of fortuitous argument
25 that if you close the school then, by definition, the

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1 zoning lines are changed because kids no longer have a
2 school to attend and therefore there is a different zoning
3 line? What I'm pondering is whether this Chancellor's
4 Regulation just deals with the parameters of a full
5 district or it deals with all the little districts inside.

6 MS. BARBIERI: All of them.

7 THE COURT: Where are you getting that
8 interpretation? That's what you are creatively arguing but
9 where are you getting that? Either there's legislative
10 history or there's something to back you up.

11 MS. BARBIERI: Okay.

12 THE COURT: Counsel, that is the crux of this
13 argument. She is claiming somehow under these attendance
14 zones are part of zoning lines and if you close the school,
15 inextricably zoning lines are changed and you disagree, so
16 convince me otherwise. I am just dealing with --

17 MS. KRUK: Respectfully, the onus is on
18 petitioner. There is simply no case law which again
19 suggests --

20 THE COURT: There may be no case law because there
21 is no case law or maybe the parents are smart enough to
22 challenge this one, I don't know. That is what we're
23 doing. The stay is continued.

24 You two have to figure out, A, when you are going
25 to get me organized papers and, B, you need to beef up your

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1 briefs.

2 MS. BARBIERI: Okay.

3 MS. KRUK: Could we issue--pick a date today so
4 that we're all on the same page?

5 THE COURT: You two pick a date, but the
6 school--my gut sense is that the school is going to operate
7 for a year and it may be very well closed the following
8 year if you don't pass the legal muster, but right now I
9 have to do what equity requires and I can't see closing it
10 if I'm going to ultimately determine it should be opened.
11 You're just telling me it's a pain in the neck, but you are
12 going to have pay those teachers any way. They are not
13 going to be thrown out. There have protections so they
14 have to be paid.

15 Thank you.

16 MS. BARBIERI: Thank you your Honor.

17 THE COURT: You two figure out amongst yourselves
18 and since you two are able to work with each other in
19 extending the stay, just extend it. If I have an epiphany
20 at some point, within the next few weeks that, you know,
21 there is no legal merit to what you are arguing, I'm going
22 to listen but I can't do it now.

23

24 (Continued to next page to include Reporter Certification.)

25

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MS. KRUK: Thank you.

* * * * *

The preceding transcript is certified to be a true and correct
record of the proceedings in this matter.



DAWN S. BOONE
SUPREME COURT REPORTER

(NOT CERTIFIED WITHOUT ORIGINAL SIGNATURE)