

New York Supreme Court
Appellate Division – First Department

In the Matter of

TAMARA TUCKER, and MELANIE KOTLER, individually, and on behalf of all parents and guardians of New York City public school students, and PAUL TRUST and SARAH BROOKS, individually, and on behalf of all similarly situated New York City public school teachers,

Petitioners-Respondents,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and
THE CHANCELLOR OF THE NEW YORK
CITY DEPARTMENT OF EDUCATION, DAVID C. BANKS, in his official capacity,

Respondents-Appellants.

For an Order, Pursuant to Section 6301 and Article 78 of the CPLR and Sections 2590-g and 2590-q of the New York Education Law, Annuling the Adoption of the New York City FY 2023 Budget and the New York City Department of Education FY 2023 Education Budget.

**BRIEF OF AMICUS CURIAE THE NEW YORK CIVIL LIBERTIES
UNION IN SUPPORT OF PETITIONERS-RESPONDENTS**

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PRELIMINARY STATEMENT

There is no dispute in this Article 78 proceeding that the Department of Education (“DOE”) failed to engage in the statutory public comment process and hold the vote by the Panel for Educational Policy (“PEP”) prior to the City Council’s vote on the overall City budget for the 2023 Fiscal Year. The failure to complete the full forty-five-day public comment period and hold the PEP vote in a timely manner denied parents, students, educators, and community members the opportunity to provide details about how the budget would impact them. As a result, City Council members voted for the budget without fully understanding its impact, which will range from the elimination of individual teaching positions to cutting entire programs in some schools, including those for students with disabilities and English Language Learners. The Supreme Court held that this failure to comply with the full PEP process was not justified.¹ This breach violates Education Law § 2590-g and § 2590-q and will have deep and lasting impacts on petitioners as well as all the parents, students, and educators in the New York City public schools.

Amicus writes in support of Petitioners-Respondents to provide context on the critical importance that the legislature has placed on government transparency and public participation in the school budgeting process.² Public comment is a vital part of the school

¹ NY St Cts Elec Filing [NYSCEF] Doc 49, decision and order on motion at 1, in *Tucker et al. v City of New York et al.*, Sup Ct. New York County, August 5, 2022, Frank, L., Index No. 155933/2022. *See also* Affirmation of Stefanie D. Coyle in Support of Motion For Leave to File Proposed Brief of *Amicus Curiae* dated August 25, 2022 (“Coyle Aff.”), exhibit C.

² All references to the school budgeting process refers to the NYC DOE school budgeting process mandated by Education Law §§ 2576 and 2590.

budgeting process because it gives lawmakers more information about how their actions impact the entire school community. Education Law § 2590-g and § 2590-q mandate legislative deliberation and public participation to arrive at better decisions for the community. The amendments to and expansion of Education Law § 2590 in 2009 make clear the legislature's intent in requiring opportunities for public participation in the governance of New York City schools. The 2009 amendments were not merely cosmetic but rather intended to be a critical step in ensuring the City Council benefits from public input when considering changes to the school system, including those to the budget. Here, the DOE's failure to obtain mandatory public input in the budget process directly violated not only the letter and spirit of the Education Law, it also deprived the City Council the benefit of receiving this vital factual information from the public prior to its vote.

The DOE's total disregard for public comment allowed it to make decisions impacting nearly a million public school students without input from any of those students or their families, or any teachers or community members who are directly impacted by proposed DOE funding levels. Therefore, we join in support of the Petitioners-Respondents to urge this Court to vacate the automatic stay granted on August 9, 2022 and uphold the August 5, 2022 order issued below insofar as that order vacated the City's budget for Fiscal Year 2023 Fiscal Year (the "FY23 Budget") as to the Department of Education and reverted spending levels to the those approved in the City's Budget for Fiscal Year 2022.

RELEVANT FACTS & PROCEDURAL HISTORY

The Panel for Education Policy serves as the school board for the New York City Department of Education (NY Educ Law § 2590-b).³ The New York Education Law and the PEP’s own bylaws require a forty-five-day “public review process” for the schools’ budget that includes “notice of the proposed item under PEP consideration at least 45 days in advance of the PEP vote on such item”⁴ (NY Educ Law § 2590-g [8] [a]). This “public review process” also provides for the public to be heard at a meeting of the PEP at which it will vote on the proposed budget. After this public input and vote, the New York City Council then votes on the complete City budget, which includes the DOE budget (New York City Charter §§ 225-258).

³ The PEP is referred to as the “city board” in the Education Law. NY Educ Law § 2590-a.

⁴ PEP Bylaws, *Notice and Comment Period* at Section 10.1, NYC Department of Education, <https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy/pep-bylaws>; *see also* NY Educ Law § 2590-g which provides in pertinent part as follows:

7. All items requiring city board approval shall be by a public vote at a regular public meeting, ... and such items shall not become effective until after such vote occurs except as expressly authorized in subdivision nine of this section.

8. (a) Prior to the approval of any proposed item listed in subdivision one of this section, undertake a public review process to afford the public an opportunity to submit comments on the proposed item. Such public review process shall include notice of the item under city board consideration which shall be made available to the public, including via the city board's official internet website, and specifically circulated to all community superintendents, community district education councils, community boards, and school based management teams, at least forty-five days in advance of any city board vote on such item....

9. In the event the city board or the chancellor determines that immediate adoption of any item requiring city board approval is necessary for the preservation of student health, safety or general welfare and that compliance with the requirements of subdivision seven or eight of this section would be contrary to the public interest, then such proposed item may be adopted on an emergency basis. The city board or chancellor shall provide written justification for such determination and make such justification publicly available including via the city board's official internet web site.... [emphasis added].

This year, the DOE did not undertake a public review process for the budget in advance of the Council’s vote. Instead, the DOE issued an emergency declaration on June 5, 2022 to bypass the public comment and PEP vote on the proposed mayoral budget for the New York City school system prior to the City Council’s vote.⁵ The emergency declaration does not provide any specific facts and states, quoting Education Law § 2590-g [9], that it was “necessary for the preservation of student health, safety or general welfare” of the students and school system as a whole. This is merely a recitation of Education Law § 2590-g [9] and offers no explanation of the nature of the emergency.

This is not the first time the DOE has issued an emergency declaration to bypass public comment—it issued one in at least 11 out of the last 13 years—and thus did not provide an opportunity for the public to weigh in prior to the City Council’s vote.⁶ Unlike the last 13 years, however, this year’s DOE budget proposes significant cuts to the school system.⁷ The approved FY23 Budget would cut more than \$200 million from the education budget, impacting almost 77% of DOE schools (Pet. ¶ 50-51).⁸ The New York City

⁵ See NY St Cts Elec Filing [NYSCEF] Doc No. 41, exhibit C to respondents’ answer, in *Tucker et al. v City of New York et al.*, Sup Ct. New York County, August 5, 2022, Frank, L., Index No. 155933/2022.

⁶ See NY St Cts Elec Filing [NYSCEF] Doc No. 10 at 11, brief for appellants, 1st Dept, Index No. 2022-03313. See also Panel for Educational Policy Emergency Declarations, <https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy/emergency-declarations>. Education Law § 2590-g [9] mandates that if there is an emergency declaration “the city board or chancellor shall provide written justification for such determination and make such justification publicly available including via the city board’s official internet web site.”

⁷ See, e.g. Independent Budget Office of the City of New York, *Tables Denominated Department of Education Spending Since 1990, Full Agency Cost*, <https://ibo.nyc.ny.us/iboreports/2021-education-spending-tables-june-2022.pdf>.

⁸ NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, Sup Ct., NY County, Index No.1555933/2022.

Comptroller calculated that the total cost of the cuts is even higher, averaging \$402,456 per school for a total of \$469 million.⁹

After the City Council voted to approve the FY23 Budget, which included these significant cuts to the DOE budget, the PEP then scheduled a hearing at which community members were able to provide public feedback on the budget cuts. At this hearing, parents, students, and educators testified about the devastating impact the cuts would have to crucial school programs. After this public comment, several City Council members, including Council Speaker Adrienne Adams, admitted that they voted for the budget without understanding its impact.¹⁰ On July 12, 2022, forty-one members of the City Council, including those who did and did not vote to approve the budget, sent a letter to the Mayor and the Chancellor urging them to “immediately restore school budgets to prevent the elimination of key programs and teachers at schools for the upcoming year.”¹¹ When no response was forthcoming from the Mayoral administration, Petitioners-Respondents commenced this Article 78 proceeding.

⁹ *Testimony of New York City Comptroller Brad Lander to the Joint Hearing of the New York City Council Committees on Education and Oversight & Investigations on DOE School Budgets for FY 2023*, New York City Comptroller [June 24, 2022], <https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-lander-to-the-joint-hearing-of-the-new-york-city-council-committees-on-education-and-oversight-investigations-on-doe-school-budgets-for-fy-2023/>.

¹⁰ Cayla Bamberger, *Progressive NYC Council members admit they were ‘wrong’ to vote for city budget that slashed school funding*, NY Post [July 18, 2022], <https://nypost.com/2022/07/18/progressive-nyc-council-members-admit-they-were-wrong-to-vote-for-school-budget-cuts/>.

¹¹ Letter from City Council members to Mayor Adams and Chancellor Banks dated July 12, 2022, <https://council.nyc.gov/press/wp-content/uploads/sites/56/2022/07/Council-Leadership-Letter-to-Mayor-Chancellor-re-School-Budgets-1.pdf>. Coyle Aff., exhibit D.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union (“NYCLU”) is the New York State affiliate of the American Civil Liberties Union, and a non-profit, non-partisan organization with over 85,000 members and supporters. The NYCLU has consistently supported government transparency and the public’s right to petition the government for the redress of its concerns.¹² Through its Education Policy Center, the NYCLU advocates for equitable access to quality education for all young people in New York.

For more than a decade, the NYCLU has advocated for changes to the “mayoral control” system of school governance because the framework has often been used to cut the public out of major decisions about schools. Through public commentary and testimony, the NYCLU has consistently called for expanded public participation and accountability in the New York City school system.¹³

¹² See, e.g., *NYCLU v New York City Transit Authority*, 684 F3d 286, 297 (2d Cir 2012) [holding that adjudicative hearings held by the NYC Metropolitan Transit Authority must be open to the public].

¹³ *Transparency, Accountability Suffer Under Current Mayoral Control Regime* [June 4, 2009], <https://www.nyclu.org/en/publications/transparency-accountability-suffer-under-current-mayoral-control-regime>; *The Price of Power: Civil Liberties and Civil Rights Under Mayoral Control of New York City Schools*, New York Civil Liberties Union [June 13, 2011], https://www.nyclu.org/sites/default/files/MC_NYCLU_final.pdf; Udi Ofer and Johanna Miller, *Testimony Regarding Bullying in New York City Public Schools* [June 13, 2011], <https://www.nyclu.org/en/publications/testimony-regarding-bullying-new-york-city-public-schools>; NYCLU Testimony, *Proposed Changes to the 2012-2013 Citywide Standards of Intervention and Discipline Measures* [June 19, 2012], <https://www.nyclu.org/sites/default/files/releases/NYCLU2012WrittenDiscCodeTestimonyFINAL.pdf>; Samantha Pownall, *A, B, C, D, STPP: How School Discipline Feeds the School-to-Prison Pipeline*, New York Civil Liberties Union [October, 2013], https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf; Johanna Miller, *Senate Education Committee Hearing on Mayoral Control of NYC Public Schools*, New York Civil Liberties Union [March 15, 2019], <https://www.nyclu.org/en/publications/testimony-hearing-mayoral-control-nyc-public-schools>; Johanna Miller and Toni Smith-Thompson, *How to Make NYC Schools*

The NYCLU has also regularly participated as *amicus curiae* in cases regarding students’ rights under the Education Article of the New York Constitution to the opportunity of a “sound basic education,” which are potentially implicated by the deep budget cuts in this case. The NYCLU submitted *amicus curiae* briefs to the Court of Appeals in 1995 and 2003 when the *Campaign for Fiscal Equity* cases were previously before the Court of Appeals.¹⁴ The NYCLU also submitted *amicus curiae* briefs to the Appellate Division, Third Department in both 2017 and 2020 in *Maisto v. State*, a case alleging the violation of the opportunity for a “sound basic education” in eight small cities across New York State.¹⁵

ARGUMENT

I. Government Transparency and Public Participation Are Critical in Deliberations About Public Education.

New York State puts great value on government transparency and public participation, particularly in deliberations about public education (*see* Public Officers Law § 100; *Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307 [1995]).¹⁶ This recognition stems from the “importance of education in our democracy,” (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 901 [2003]), and its role in ensuring

More Democratic, Even Under Mayoral Control, New York Civil Liberties Union [May 17, 2022], <https://www.nyclu.org/en/news/how-make-nyc-schools-more-democratic-even-under-mayoral-control>.

¹⁴ *See Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307 (1995) and *Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893 (2003).

¹⁵ *See Maisto v State*, 154 AD3d 1248 (3d Dept 2017) and *Maisto v State*, 196 AD3d 104 (3d Dept 2021).

¹⁶ *See also* Natalie Gomez-Velez, Comment, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 Villanova Law Rev 297, 348 (2008) [“the public as a whole has an interest in determining the course of public education” (internal citations omitted)].

“meaningful civic participation in contemporary society” (100 NY2d at 905 [internal citations omitted]). Accordingly, New York’s Education Law and the Open Meetings Law provide for robust forms of public participation in educational budgeting processes through local school boards. All school board meetings, both inside and outside New York City, must be open to the public, (NY Educ Law § 1708), and must be conducted in accordance with the requirements of the Open Meetings Law, (NY Pub Off Law § 103 *et seq.*; *see also Thomas v New York City Dept of Educ*, 145 AD3d 30 [1st Dept 2016] [internal citations omitted] [holding that meetings of DOE school leadership teams were “public bodies” within the meaning of the law and therefore subject to the Open Meetings Law]). In particular, discussions of budgetary issues must be disclosed to the public.¹⁷ The New York State Commissioner of Education has repeatedly recognized the value of public participation in the decisions of school boards, emphasizing that “[a] board of education is also obligated... to provide channels of communication through which residents may express their opinions” (*Appeal of Michalski*, 33 Ed Dept Rep, Decision No. 13, 130 [March 10, 1994], <http://www.counsel.nysed.gov/Decisions/volume33/d13130>). The Commissioner has reminded school boards that “[t]he board, of course, represents the school district and, in my judgment, wherever possible should listen to a presentation on the part of the responsible citizens upon any matter under consideration” (*Appeal of*

¹⁷ The Committee on Open Government has recognized that discussions regarding budgeting are “clearly a matter of public business” and, further, that “boards of education are required to...disclose to the public detailed information concerning [] budgets.” (Comm on Open Govt OML-AO-3346 [2001]) [Note: Open Meetings Law Advisory Opinion]; (Comm on Open Govt OML-AO-3222 [2000]) [Note: Open Meetings Law Advisory Opinion].

Wittneben, 31 Ed Dept Rep, Decision 12, 671 [March 20, 1992], <http://www.counsel.nysed.gov/Decisions/volume31/d12671> [internal citations omitted]).¹⁸ And that “[t]he reason for public participation is to enable board members to understand the concerns of the residents they represent” (*Appeal of Martin*, 32 Ed Dept Rep, Decision 12,861 [December 28, 1992], <http://www.counsel.nysed.gov/Decisions/volume32/d12861>).¹⁹

The Education Law also places specific requirements on New York City with respect to public input. Section 2590-h requires that the Chancellor, the head of the DOE, “[p]romote[s] the involvement and appropriate input of all members of the school community . . . including parents, teachers, and other school personnel” At the individual school level, consensus-based decision-making must be the primary means of decision-making, including in consultation on the school budget.²⁰ “[T]he purpose of shared decisionmaking is to foster communication among all parties involved in the critical job of educating our children” (*Appeal of Wilson*, 33 Ed Dept Rep, Decision No. 12, 982 [August 4, 1993], <http://www.counsel.nysed.gov/Decisions/volume33/d12982>). In fact,

¹⁸ To effectuate these rights, of course, “[d]istrict residents and taxpayers have a right to challenge unlawful district policies that adversely affect them.” *Appeal of Handsman*, 58 Ed Dept Rep, Decision No. 17, 596 [March 4, 2019], <http://www.counsel.nysed.gov/Decisions/volume58/d17596>; *see also Appeal of Williams*, 53 Ed Dept Rep, Decision No. 16, 548 [September 5, 2013], <http://www.counsel.nysed.gov/Decisions/volume53/d16548> (“District residents have standing to challenge an allegedly illegal expenditure of district funds” [internal citations omitted]).

¹⁹ “Board members are representatives chosen by the people to govern the affairs of a school district and as such have an obligation to keep the residents informed and to provide channels of communication through which residents may express their opinion. Thus, boards of education should be encouraged to have residents participate in their meetings,” *Appeal of Martin* (internal citations omitted); *see also Appeal of Vendel*, 50 Ed Dept Rep, Decision No. 16, 134 [August 20, 2010], <http://www.counsel.nysed.gov/Decisions/volume50/d16134> (“...a board of education should, whenever possible and appropriate, consider public input on matters under consideration”).

²⁰ Chancellor of Education Regulations A-655 [II] [A] [1], <https://www.schools.nyc.gov/docs/default-source/default-document-library/a-655-english>.

principals are required to “solicit[] input . . . on budget priorities from all members of the school community” (NY Educ Law § 2590-r [b]).

In addition to the Education Law provisions at issue in this case, § 2590-b imposes mandates for ensuring public participation in all monthly meetings of NYC’s school board, the PEP. Specifically, PEP meetings are required to be held at least once a month; at least one regular public meeting must be held in each borough; and the PEP must “consider appropriate public accommodations when selecting a venue so as to maximize participation by parents and the community.” To ensure the public can discuss the issues to be considered at the monthly PEP meeting, Education Law § 2590-b (c) (i) further mandates that notice of the time, place, and agenda for all PEP meetings must be publicly provided at least ten business days in advance of such meeting. Education Law § 2590-b (d) requires that the PEP “shall ensure that at every regular public meeting there is a sufficient period of time to allow for public comment on any topic on the agenda prior to any city board vote.” Finally, Education Law § 2590-b (e) mandates the PEP to keep formal minutes of each meeting and make those minutes publicly available “in a timely manner.”

These statutory requirements underscore the value placed by the legislature on public participation in education decisions and budget deliberations.

a. The PEP was Established by the New York State Legislature to Provide “an Opportunity for Meaningful Participation for Both Parents and the Community” and Education Law § 2590-g Has Been Amended Repeatedly to Reflect this Purpose.

For more than a century, the New York City public school system has cycled through centralized and decentralized forms of leadership.²¹ When control was most recently centralized under the New York City Mayor in 2002, the newly-constituted Board of Education—the PEP—was created to provide “an opportunity for meaningful participation for both parents and the community.”²² At the time, the City noted that “the Mayor and Chancellor believe that parents should have the dominant voice in a new structure that is focused on the educational mission of the schools they represent, rather than mired in inappropriate operational details.”²³ The DOE also noted the new system “will provide a balanced approach that addresses the critical need for parent and community involvement and will serve to enhance accountability and efficiency.”²⁴

However, over the years, the DOE repeatedly attempted to bypass this public participation. Accordingly, the legislature amended the Education Law multiple times to expand public participation and emphasize its importance. In 2003, the legislature amended

²¹ Anemona Hartocollis, *CONSENSUS ON CITY SCHOOLS: HISTORY; Growing Outrage Leads Back for Centralized Leadership*, *NY Times* [June 7, 2002].

<https://www.nytimes.com/2002/06/07/nyregion/consensus-city-schools-history-growing-outrage-leads-back-centralized-leadership.html>.

²² Mem of Assembly Rules Comm, Bill Jacket, L 2003, ch 123 and New York Assembly Memorandum in Support of A 9133, Legislation submitted in accordance with Assembly Rule III, § 1 (f), Coyle Aff., exhibit E. *See also* NY St Cts Elec Filing [NYSCEF] Doc No. 44 at 7, petitioners’ memorandum of law in support of the verified petition and in opposition to respondent’s verified answer, Sup Ct, NY County, Index No.1555933/2022.

²³ Coyle Aff., exhibit E at Bates stamp 000010.

²⁴ *Id.* at Bates stamp 000011.

the law to create “district education councils,” which were additional structures for parents and community members to provide input in public school operations and policies.²⁵ In 2009, the legislature increased the number of PEP members to eight; in 2019 to 15, including a member elected by the district education councils; and in 2022 the number was increased to 23.²⁶

Significantly, in 2009, the legislature amended Education Law § 2590-g to create the process at issue here, requiring the PEP to hold an “extensive public review process . . . to provide information and require a Board of Education response to public comments prior to the adoption of major proposals including [the DOE annual] budget.”²⁷ The legislature explained that it acted to “increase parental participation and input, transparency, and accountability at the school level, community district level, and city district level” and to “increase[e] transparency of actions taken by the Board of Education in order to give parents and other stake-holders greater insight into the operation of the city school district[.]”²⁸

In her letter to then-Governor David Paterson urging passage of the amendments to

²⁵ L 2003, ch 123, as amended; NY Educ Law § 2590-c; *see also Welcome to the Community Education Council Website*, Community District Education Council 26, <https://www.cdec26.org/> (“The CEC serves as an advisory board providing input and comment to the Chancellor and the Panel on Educational Policy regarding the needs of the district and DOE policy, in addition to policy implementation....The Councils were designed to ensure that parents have a voice and are able to provide hands-on leadership and support for public schools. Parents control the majority of the seats on all of the councils; at least 9 out of 12 available seats are held by public school parents.”).

²⁶ L 2009, ch 345, as amended; L 2019, ch 59, as amended; L 2022, ch 364, as amended.

²⁷ Mem of Assembly Rules Comm, Bill Jacket, L 2009, ch 345 and NY Assembly Memorandum in Support of A 8903, Legislation submitted in accordance with Assembly Rule III § 1 (f), Coyle Aff., exhibit F.

²⁸ *Id.*

Education Law § 2590-g, Assemblymember Catherine Nolan, the Chair of the New York Assembly Education Committee, made clear that these provisions were enacted to “give []parents greater and more meaningful participation in their children’s education – at their children’s local schools, the community school districts and the board of education.” As Assemblymember Nolan explained, “Decisions about education in New York City must also be public. *Public process is the very basis of community participation in governance.*”²⁹

What the PEP lacks in independent authority, it has been able to make up for as the City’s primary forum for public comment on education matters.³⁰ Although the PEP does not have binding authority to vote down the DOE budget, public deliberations at PEP meetings and the public PEP vote on the proposed DOE budget provides the City Council a better understanding of its impact on New York City students and school operations.³¹ It is this function of the PEP, as a forum for public discussion, that the legislature has taken pains to enshrine in state law. Parents and students regularly participate enthusiastically in public comment on various issues, pushing PEP meetings to midnight or later.³² In 2021,

²⁹ See Coyle Aff., exhibit F at Bates stamps 000005-000006 (emphasis added).

³⁰ NY Educ Law § 2590-g [“The city board shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils. The board shall exercise no executive power and perform no executive or administrative functions.”]. Accordingly, the PEP’s belated vote on the DOE budget does rectify its failure to comport with the public comment mandates in the Education Law.

³¹ The global New York City budget of \$100 billion covers the operations of some 90 agencies, districts, and boards and over 300,000 government employees. The DOE budget is the largest percentage component of the City’s overall budget, representing up to a third or more of total budgeted spending. See *Mayor’s Office of Management and Budget*, <https://www1.nyc.gov/site/omb/index.page>.

³² See PEP Meeting Archives (showing most meetings last more than 5 hours due to extended public comment periods), <https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy/pep-meetings-archive>.

impassioned public comment, including by students with disabilities, led the PEP to cancel a contract for “gifted and talented” testing to the surprise of the DOE and politicians.³³ This example demonstrates the power the public can exert when given the opportunity to weigh in on matters important to New York City’s schools.

The PEP is not, contrary to Respondents-Appellants’ characterization, a “tangential” entity.³⁴ The New York State Legislature has designed the PEP, and the public comment it must obtain, to serve a highly “meaningful connection to the City Council’s vote on the final city budget.”³⁵ The PEP plays the critical role of providing a public forum for community members to air their concerns and serves as an important source of information regarding the public’s views on education decisions, particularly for the City Council.

b. With the Benefit of Public Input, the City Council Could Have Made an Informed Decision on the City’s FY23 DOE Budget.

Had the DOE followed the proper procedure and allowed for a fulsome public comment period and PEP vote prior to the City Council vote on the overall budget, the councilmembers would have had a more complete picture of the devastation of the budget cuts to education. In particular, the City Council would have received crucial information regarding the DOE’s ability to comply with its obligations to provide a “sound basic

³³ Selim Algar, *NYC Education Panel Rejects Contract for Gifted and Talented Exam*, NY Post [January 28, 2021], <https://nypost.com/2021/01/28/nyc-education-panel-rejects-contract-for-gifted-and-talented-exam/>.

³⁴ See NY St Cts Elec Filing [NYSCEF] Doc No. 10 at 29, brief for appellants, 1st Dept, Index No. 2022-03313. Judge Frank refused to allow the City’s efforts to render the PEP a “nullity.” See NY St Cts Elec Filing [NYSCEF] Doc No. 3 at 94, transcript of Supreme Court hearing, respondents-appellants’ application for interim relief supporting documents including exhibit(s), 1st Dept, Index No. 2022-03313.

³⁵ *Id.* at 3.

education” to all NYC students, as required by New York’s Constitution.

The City Council would have heard concerns such as those from this parent of a student with a disability who testified at the PEP meeting held after the fact:

At my son’s school he flourished under the care of his teacher and his special education teacher. There was also a program that had special education recovery where he was able to stay after school. It didn’t last the whole school year and now with these budget cuts, we don’t know if it’s coming back. What are we doing for these kids, what are we doing for all of the children in our school systems? . . . People are leaving the school system because they’re afraid their children aren’t going to get the services that they need.³⁶

The Council would have also heard from students like this who shared about their classmates’ experiences with mental health and the lack of basic school services noting:

Just this morning I had the opportunity to talk to a friend of mine who has an IEP, or individualized education plan. She was struggling getting through this past year and this was only made worse by the fact that with the school counselor’s office overburdened with cases, there was not enough time to meet with all students individually and they were instead put into larger groups, regardless of differing needs – meaning no one got the support they needed. I wish I could say that this was the only time I’ve heard stories like this...I’ve seen similar displays of stark systemic inequality before. Broken heating systems during the winter, vacancies in critical teaching positions and a lack of school support staff, leading to delays in basic necessities like delivery of school lunch.³⁷

³⁶ *Panel for Educational Policy Meeting Recording* at 1:34:12, NYC Department of Education [June 23, 2022], <https://learndoe.org/pep/archive-pep-jun23-2022/>.

³⁷ *Panel for Educational Policy Meeting Recording* at 1:14:35, NYC Department of Education [June 23, 2022], <https://learndoe.org/pep/archive-pep-jun23-2022/>.

The City Council also would have learned that an analysis by the Petitioners-Respondents showed that schools serving larger proportions of students with disabilities and English Language Learners will face steeper cuts than those without.³⁸ And that there would be significant cuts to additional supports required by certain populations of children, including the elimination of restorative justice programs.³⁹

Additionally, City Council members would have learned that, due to the cuts, some schools are “excessing” teachers,⁴⁰ which will eliminate programs such as science, art, and music, and may also increase class sizes as sections of grade levels are cut.⁴¹ And further, that the DOE’s significant reductions to the FY23 school budgets will hurt those with the greatest needs – Black and brown students, those from low-income communities and families, students with disabilities, and English Language Learners.⁴² Public input into funding allocations for education is particularly important in schools serving these student

³⁸ See NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, Sup Ct. New York County, Index No. 155933/2022 (¶¶ 52-54).

³⁹ See Alex Zimmerman, *Restorative justice funding under threat, NYC schools advocates warn*, Chalkbeat [August 15, 2022], <https://ny.chalkbeat.org/2022/8/15/23307258/restorative-justice-funding-cuts-education-department>.

⁴⁰ Excessing is the process of reducing staff in a particular school when there is a reduction in the number of available positions in a title or license area in that school. There are times when a school reduces the size of its faculty, such as when it experiences an unexpected drop in student enrollment, loses a budget line, or pursuant to state or federal law, is being closed, or phased out. See United Federation of Teachers, *What is excessing? What is the difference between excessing and layoffs?*, <https://www.uft.org/faqs/what-excessing-what-difference-between-excessing-and-layoffs>.

⁴¹ *Testimony of New York City Comptroller Brad Lander to the Joint Hearing of the New York City Council Committees on Education and Oversight & Investigations on DOE School Budgets for FY 2023*, New York City Comptroller [June 24, 2022], <https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-lander-to-the-joint-hearing-of-the-new-york-city-council-committees-on-education-and-oversight-investigations-on-doe-school-budgets-for-fy-2023/>.

⁴² NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, Sup Ct. New York County, Index No. 155933/2022 (¶¶ 52-54).

populations, because schools are often the primary resource families can turn to for support. Cuts to schools serving these populations of students will be felt acutely.

Petitioners-Respondents have also alleged that as a result of the flawed FY23 school budget process, New York City public school students have been denied their respective individual rights to a “sound basic education” under Article XI, § 1 of the New York Constitution (NY Const art XI, § 1; *see also Campaign for Fiscal Equity, Inc. v New York*, 86 NY2d 307 [1995]).⁴³ The Court of Appeals has “equated a sound basic education with ‘the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.’”⁴⁴ The reduction of teaching positions and programming for students are exactly the types of conditions that are considered when evaluating a claim for a deprivation of a student’s right to a “sound basic education.”⁴⁵ The City Council absolutely should have been able to consider whether the DOE’s drastic cuts might force the DOE into a potential violation of its Constitutional obligations to students. This is the value and purpose of expanded public

⁴³ NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, Sup Ct. New York County, Index No. 155933/2022 (¶¶ 91-105).

⁴⁴ *Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893, 905 [2003].

⁴⁵ The “inputs” that a court must consider when evaluating whether a school district is providing a constitutionally-mandated “sound basic education” are “teacher quality—including certification rates, tests results, experience levels and the ratings teachers receive from their principals”... “[s]chool [f]acilities and [c]lassrooms” that “provide enough light, space, heat and air to permit children to learn,” and “[i]nstrumentalities of [l]earning ...including classroom supplies, textbooks, libraries and computers.” (100 NY2d at 909, 911, 913.) Other courts to consider this question have also mandated consideration of “whether additional supplemental services—for example, academic intervention services, language services, extended learning opportunities or additional social workers— must be provided to enable students in each of the districts to attain a sound basic education.” (*Maisto v State*, 154 AD3d 1248, 1255 [3d Dept 2017].)

participation and accountability in the New York City school system – so that the City Councilmembers can understand the perspectives of those directly impacted and then make more informed policy decisions that guarantee the rights of their constituents. Due to the DOE’s failure to comply with state law, the City Council was deprived of this exact information and the students of New York City will suffer the consequences.

It is clear that members of the City Council believe they did not have critical information regarding the impact of the budget cuts due to the DOE’s circumvention of the Education Law requirements for public comment. In response to the community input and outrage on the depth and severity of the cuts after the Council’s vote on the budget, Councilmember Carmen de la Rosa said she apologized “to my parents who are here, who I defended myself to. Our actions have no defense — because we were wrong.”⁴⁶ As Councilmember Shahana Hanif pointed out, the City Council was denied relevant information as it considered the budget stating “[w]e have a budget process that was rushed to stymie organizing efforts, and a series of backroom deals that attempted to mask critical information[] about the devastating cuts to public education.”⁴⁷

The procedures mandated by Education Law § 2590-g are in place to include and empower parents, students, and the public to support informed, deliberative decision-making and to prepare student stakeholders for broader democratic participation. These requirements

⁴⁶ Cayla Bamburger, *Progressive NYC Council members admit they were ‘wrong’ to vote for city budget that slashed school funding*, NY Post [July 18, 2022], <https://nypost.com/2022/07/18/progressive-nyc-council-members-admit-they-were-wrong-to-vote-for-school-budget-cuts/>.

⁴⁷ *Id.*

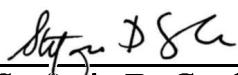
have been deliberately implemented over time by the legislature to ensure public participation in decisions affecting education and cannot be bypassed as an administrative formality. The Respondents-Appellants' actions at issue in this Article 78 have subverted the right of all stakeholders to actively participate in the crucial budgetary processes impacting New York City public education, including the public hearing and PEP vote process.

CONCLUSION

For the foregoing reasons, *amicus curiae* join in support of Petitioners-Respondents to urge this Court to vacate the automatic stay granted on August 9, 2022 and uphold the August 5, 2022 order issued below insofar as that order vacated the City's FY23 Budget as to the Department of Education, reverting spending levels to the those approved in the City's Budget for Fiscal Year 2022.

Dated: August 25, 2022
New York, NY

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

I certify in compliance with Rule 1250.8(j) of the Practice Rules of the Appellate Division that this brief was prepared on a computer using Microsoft Word, the typeface is Times New Roman, the font-size is 14-point type, and the text is double-spaced. The brief contains 5798 words, excluding the sections listed in Rule 1250.8(f)(2).

Dated: August 25, 2022
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