SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Shannon Marie Smith, 808 Chesapeake Street, S.E. – Apartment 304 Washington, D.C., 20020 **Karlene Armstead,** 559 Foxhall Place, S.E. Washington, D.C., 20020 **Marlece Turner**, 711 Varnum Street, N.W. Washington, D.C., and **Brenda Williams**, 5744 Blaine Street, N.E. Washington, D.C. 20019. **Ericka S. Black** 4231 Eads Street, N.E. Washington, D.C. 20019. Plaintiffs, vs. **KAYA HENDERSON, CHANCELLOR,** **VINCENT C. GRAY, MAYOR,** and **THE DISTRICT OF COLUMBIA** Defendants. **Serve: Irvin B. Nathan** **D.C. Attorney General** 441 – 4th Street, N.W. Washington, D.C. 20001	:	Civil Action No. No. 2013 CA _____ B

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a Temporary Restraining Order and Preliminary Injunction,

prohibiting Defendants Kaya Henderson, Chancellor of the District of Columbia Public Schools, Vincent C. Gray, Mayor of the District of Columbia and the District of Columbia, (collectively "Defendants") from executing a School Closings Plan (The DCPS Consolidation and Reorganization Plan) submitted by Defendant Henderson on 13 January 2013, embraced and promoted by Defendant Mayor Gray and presented as policy of Defendant District of Columbia.

INTRODUCTION

The public schools may not be closed to avoid the effect of the law of the land … An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them.

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964).

The 2013-2014 "DCPS Consolidation and Reorganization Plan" ("The Plan") will have a startlingly disparate impact on students of color, special education students and students who live in low income communities; and that disparate impact violates the United States Constitution, the D.C. Human Rights Law and applicable federal laws. There is a striking juxtaposition between how the Plan treats students "East of the Park," those in predominantly minority, low income communities, and yet spares students "West of the Park," those in predominantly Caucasian, affluent communities. The same is true with respect to how the Plan treats schools housing special education students. School Closures are not immune to judicial scrutiny.

A local government may not, when it comes to equal access to education, treat some classes of its citizens different than it treats another class. On its face, the impact of the proposed closings treat students of color, those with disabilities and those who live in low income neighborhoods disproportionately and disparately. ***See the Affidavit of Attorney Mary Levy, Exhibit A, annexed.***

The Supreme Court in a 1964 *per curiam* decision unanimously ordered the schools reopened in Prince Edward County Virginia when the local government had closed them in order

to avoid integrating them. The Supreme Court ruled that 1) the district court was empowered to enjoin further use of grants and credits, 2) the court could superintend the board's taxing and appropriation powers, and 3) moreover it could order the public schools reopened. "For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia," *Griffin v. School Board of Prince Edward County*, 377 US 218 (1964).

Defendant Kaya Henderson in a proposed action endorsed and embraced by Defendant Mayor Vincent Gray and presented as policy by Defendant District of Columbia, unless enjoined, will close ten percent of the District's public schools, implicating the Constitution and various local and federal laws; bringing the proposed action on four squares with the prohibited action in the *Griffin* case. The Court in *Griffin* did not allow such action, and this Court should not allow such action.

In 2008 the District closed 23 public schools. Those closures followed the closing of some 55 public schools, beginning in 1976. On 13 January 2013, Defendant Chancellor Kaya Henderson announced yet another round of closings, 15 in total, an incredible ten percent of all remaining D.C. Public Schools, including 13 at the end of this school year and two additional schools at the end of next school year. For close to four decades Defendants and their predecessors have shaped a pattern and practice of closing schools that has overwhelmingly and disproportionately only affected children of color, those with disabilities and those who live in low income neighborhoods. This pattern and practice of discretionary discrimination is in violation of the United States Constitution, implicates a number of federal and local statutes and regulations and has had significant and severe educational, social and even physical impacts on

these otherwise protected classes of individuals.

It is clear and undisputable that the closings since 1976, those in 2008 and those scheduled for 2013 and 2014 have had and will have a disproportionate impact on students of color, individuals with disabilities and those who live in low income communities. These school closings have been and are being undertaken by these Defendants and their predecessors without demonstrating educational necessity and without considering other, equally and perhaps more effective measures to reduce costs at a lesser burden on the affected classes.

The courts in the District of Columbia have established a long and rich tradition, *One Standard,* when it comes to public education. As Judge J. Skelley Wright stated in a storied opinion, "[T]he minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality," *Hobson v. Hansen*, 269 F. Supp. 491 (D.D.C. 1967), affirmed sub nom., *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The *Hobson* case followed the case of *Bolling v. Sharpe*, 347 U.S. 497 (1954) --- a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954) --- which outlawed the segregated school system in Washington, D.C. that existed prior to 1954. And in 1972, Judge Cornelius Waddy ruled that "Constitutional rights must be afforded citizens despite the greater expense involved . . . the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources, *Mills v. Board of Education of the District of Columbia,* 348 F. Supp. 866 (D. DC 1972).

The Chancellor's Plan, if allowed to stand, would return the District of Columbia School System back to a time before the 1954 *Brown* decision inasmuch as it promotes a dual system denying the same and equal access to education for some school children based upon their race, disability and where they live, when it should not. And, the Plan does so under the guise of sparing expense, when it does not. The *Griffin* case is particularly instructive on this point.

In 2008 the District of Columbia Government proposed a similar plan, targeting 23 public schools for closure. Ultimately a total of 28 schools were closed, all primarily affecting students of color, those with disabilities and those in low income communities. In the wake of those closings, achievement test scores have not improved, performance among those students affected by the closings has declined and instead of saving $23 million as projected, the closings resulted in losses of $40 million. Nothing good or positive educationally has come from those 2008 closings and money has been lost rather than saved. Yet instead of following a different course, one that might put the School System on the path to better schools and equal access to education for all its students, the Chancellor's current Plan repeats the mistakes of the past. Similarly to the 2008 closings, the proposed 2013-2014 closings will not save a significant amount of money, if any; may well result in financial losses rather than gains; will not likely result in improvements in performance or achievement; and runs counter to the evidence that smaller public schools are only slightly more costly than larger schools. ***See Affidavit of Financial Analyst Soumya Bhat, Exhibit B, annexed, and the March 2013 Report by Ms. Bhat, Exhibit C, annexed***. And while repeating those mistakes of the past, the current Plan does so in a prohibited, discriminatory manner that is causing imminent, particularized, irreparable harm to Plaintiffs. Worse, the Plan lacks vision in that, according to the Chancellor's own published data, some 30,000 additional students will enter the public school system within the next decade. Closing more schools will make it difficult to place those students in the future who by law must attend school.

BACKGROUND

While the United States Constitution requires colorblind policies and practices to promote equal educational opportunity these proposed school closings do not. Indeed, these school closings promote less educational opportunity for students of color, individuals with disabilities and those who live in certain parts of the District. At the same time, these proposed

closings continue to promote a dual and disparate school system within the D.C. Public Schools.

Of the 6,375 students affected by the 2008 school closings, 5,818 or 91.3% were Black; 509 or 8.0% were Latino or Hispanic; 33 or 0.5% were other people of color; 880 or 13.8% were special education; and only 15 or 0.2% were White. Of those, 4,895 or 76.8% were low income. The disparate and discriminatory effect of those closings is so clear and so obvious that the data speaks, without more.

Worse, there has been no examination by the District Government of the impact of the 2008 closings, despite a requirement in the Public Education Reform Act of 2007, a law that transferred the D.C. Public Schools to the authority of the Mayor, the so-called Mayoral Takeover Law. Under that Law, such an examination must take place at the end of five years, twice each decade. Moreover, as indicated, rather than saving resources, a recent Report indicates that the 2008 closings actually lost resources.

This pattern and practice of discretionary discrimination is even worse with the proposed 2013-2014 school closings. Of the 2,792 students affected, 2,600 or 93.1% are Black; 180 or 6.4% are Latino or Hispanic; 13 or 0.5% are Asian or other people of color; both schools serving special education students will be closed; and only 2 or 0.1% are White. Of the total, 2,295 or 82.2% are low income, living in certain parts of the District. Moreover, the Chancellor's Plan fails to explore less drastic measures (*i.e.*: proven, effective community-based turnaround models with adequate time for implementation; and fails to provide an adequate relocation plan ensuring that relocated students will be better served and have access to higher performing schools. Again, Judge Waddy's words in the *Mills* case are as instructive today as they were when the commonly called *Waddy Decree* was declared, "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded

from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child. Plaintiffs' entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it."

Similarly, the words of the United States Supreme Court in *Brown v. Board of Education* resonate today as surely as they did more than a half century ago, "… today education is perhaps the most important function of state and local governments . . . In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education."

The following Chart created by Mary Levy, an Attorney and Education Expert, also speaks, without more. The Chart is also embodied in Exhibit A, annexed.

The Chart was prepared using Defendant Chancellor Kaya Henderson's own, recent, published data:

	Number of group in closed schools	Group as % of all students in closed schools	Total number of group	Group as % of all students	Percent of group in closed schools
School Closings 2013					
All students Fall 2011	2,832	100.0%	45,191	100.0%	6.3%
Blacks	2,663	94.0%	30,889	71.5%	8.6%
Hispanic	159	5.6%	6,230	14.0%	2.6%
White	1	0.0%	4,175	9.2%	0.0%
Asian/Other/unknown	12	0.4%	1,661	3.7%	0.7%

	Number of group in closed schools	Group as % of all students in closed schools	Total number of group	Group as % of all students	Percent of group in closed schools
All students Fall 2012	2,495	100.0%	45,557	100.0%	5.5%
Low-income	2,393	82.3%	34,354	75.4%	5.3%
ELL	86	3.4%	4,533	10.0%	1.9%
All levels spec ed	565	22.6%	6,484	14.2%	8.8%
Levels 3 & 4 spec ed	248	9.9%	1,983	4.2%	12.8%
School closing 2013 and 2014					
All students SY 2012	3,053	100.0%	45,191	100.0%	6.8%
Blacks	2,861	93.7%	30,889	68.4%	9.3%
Hispanic	180	5.9%	6,230	13.8%	2.9%
White	2	0.1%	4,175	9.2%	0.0%
Asian/Other/unknown	13	0.4%	1,661	3.7%	0.8%
All students SY 2013	2,686	100.0%	45,557	100.0%	5.9%
Low-income	2,596	96.6%	34,354	75.4%	7.6%
ELL	99	3.7%	4,533	10.0%	2.2%
All levels spec ed	743	27.7%	6,426	14.2%	11.6%
Levels 3 & 4 spec ed	425	15.8%	1,935	4.2%	22.0%

Race/ethnic numbers based on School Year 2011-12 reports; ELL and special education based on School Year 2012-13 reports.

As is evident from this 2013-2014 School Closings Plan, these ordinarily protected classes of students will no longer have neighborhood schools; will have to negotiate longer

distances to attend school at costs to safety and personal resources when they are already disproportionately exposed in those regards; and as the 2008 experiment demonstrates, will likely have less resources and fewer educational tools in their new school environments.

Moreover, the closings do not take into account the irrefutable value of educational continuity that neighborhood schools allow. Librarians, art and music teachers and enhanced recreation and after school programs now absent are not likely to magically appear when saving money rather than educating children is the driving force.

Poverty is the most accurate predictor of poor performance. Failing to understand this widely recognized view, the Chancellor by these closings disproportionately punishes Black, Brown and poor people and students with disabilities in ways that the law does not permit.

BACKGROUND

These school closings clearly have a negative impact on the protected classes. ***See Affidavits of Shannon Marie Smith, Marlece Turner and Brenda Williams, Exhibits D, E and F, annexed.*** Students in the neighborhoods with closed schools will be forced to travel longer distances to schools than other students. This will often require walking through unfamiliar and even dangerous neighborhoods. In other cases it will require car or public transportation at a burdensome cost to families.

In addition, in some cases students will be transferred to schools that, by the District's own measurements, are performing no better than their closed neighborhood school had been. These consolidated schools will be overwhelmed with the sudden influx of greater percentages of new students and students with disabilities. Any delay in the provision of special education services to affected students will have a compounding adverse impact on students with disabilities from both the closed schools and the new transferring schools and likely lead to greater failures of the District to provide a free and appropriate public education.

The school closures also promote what has been described by a recent, credible study as "churn and instability." Turnover of teachers in the District of Columbia has been unusually high since 2009. With the kind of "churn" being experienced comes instability. The study's results, "How Teacher Turnover Harms Students' Achievements," indicate that students in grade-levels with higher turnover score lower in both ELA and math and that this effect is particularly strong in schools with more low-performing and Black students. Moreover, the results suggest that there is a disruptive effect of turnover beyond changing the distribution in teacher quality

Given the pervasive racial and special education disparities in the school closures, it is incumbent upon the School District to demonstrate that the closures are educationally necessary. However, to date, the District has made no real effort to show that, in the face of significant disparities, the closures were nevertheless educationally or financially necessary. Indeed, the credible evidence supports the view that school closings are not a legitimate means of school turnaround and that they do not raise student achievement. There is no evidence of school closings resulting in any substantial long-term improvement on student performance. Additionally, respectable academic studies suggest that student achievement often falls during the final months of a closing school's existence. Moreover, the proposed closures are not financially necessary. There is no way of knowing at this point the true financial impact of school closures in the District of Columbia. Past reports indicate that the 2008 school closings resulted in a loss of $40 million rather than the expected gain of $23 million. In addition, at least one national study of the financial impact of closing schools has raised serious questions about the financial savings that result from closing schools, in part because the savings associated with closing schools are offset with enormous expenses, including maintaining the sites for resale or future use, transporting school property like computers and desks, and making improvements at the schools slated to receive the displaced students. Selling or leasing the surplus buildings also tends to be difficult.

Finally, to explain that these schools were slated for closure primarily because they happened to

be the schools with the oldest buildings that had fallen into disrepair and thus costly to maintain, is no answer. If that is indeed true, then it is only evidence of long term disparate treatment of these protected classes. One cannot remedy decades of discrimination in the form of neglect of schools in certain neighborhoods by choosing to close the schools in those neighborhoods in their entirety.

FACTS

According to the Plan, the defendants will close schools in two phases: First, 13 schools will close near the end of the 2012-2013 academic school year ("2013 Closings"); and Second, 2 additional schools will close at the conclusion of the 2013-2014 academic school year ("2014 Closings").

The 2013 Closings would result in the closure of public schools attended by 2,571 local students. Of those, in both years, a disproportionate number are minorities, students with disabilities, and low-income students.

The 2013 Closings will result in the closure of the public schools attended by 2,402 black students, 159 Latino students, 12 students of Asian or other ethnicity, and only 1 white student; 2,104 of the students in the affected schools are low-income, and 596 are special education students.

As a group, black students make up 93.4% of students enrolled in schools that will be closed by the Plan in 2013; Latinos are 6.2%, Asian and other are 0.5%, and whites are 0.0%. Special education students make up 33.8% of students in those schools, and 81.9% of students in those schools are low income.

The 2014 Closings would result in the closure of public schools attended by 2,792 local students. Of those, a disproportionate number are minorities, students with disabilities, and low-income students.

The 2014 Closings would result in the closure of the public schools attended by 2,600 black students, 180 Latino students, 13 students of Asian or other ethnicity, and only 2 white students; 2,295 of the students in the affected schools are low-income, and 778 are special education students.

As a group, black students make up 93.1% of students enrolled in schools that will be closed by the 2013 Closings; Latinos are 6.4%, Asian and other are 0.5%, and whites are 0.1%. Special education students make up 27.9% of students in those schools, and 82.2% of students in those schools are low

income.

Contrary to the assertions from the Plan, schools with smaller enrollments do not cost much more, if more at all, than schools with larger enrollments. Contrary to the assertions from the Plan, the proposed closures will not result in substantial savings and likely will result in no savings at all, indeed likely will result in losses. Contrary to the assertions from the Plan, the proposed closures will not likely result in more and better resources for the receiving schools.

ARGUMENT

A plaintiff may demonstrate its entitlement to temporary and preliminary injunctive relief by showing that (1) it has a substantial likelihood of success on the merits, (2) it would suffer irreparable injury if injunctive relief is denied; (3) injunctive relief would not substantially injure the opposing party or other third parties; and (4) injunctive relief would further the public interest. *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) and *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "These factors interrelate on a sliding scale and must be balanced against each other." *Davenport v. AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). Thus, "[a]n injunction may be justified … where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). The purpose of temporary injunctive relief "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The instant matter satisfies all four prongs of this standard.

Plaintiffs are likely to succeed on the merits

The proposed actions of the Defendants violate the United States Constitution and implicate numerous Local and Federal laws and Regulations and if those proposed actions are allowed to stand, a court will surely find that Defendants have violated the law. "Substantial likelihood of success" does not necessarily imply that a party needs to demonstrate a 50% chance or better of

prevailing on appeal. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Instead, a party can satisfy that element by raising a "serious legal question . . . whether or not the [party] has shown a mathematical probability of success." *Id.* Put another way, "it will ordinarily be enough that the [party] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir.1953)); *Jewish War Veterans v. Gates*, 522 F. Supp. 2d 73, 76 (D.D.C. 2007). And see *People for the American Way Foundation v. U.S. Dep't of Ed.*, 518 F. Supp. 2d 174 (D.D.C. 2007).

The District of Columbia Human Rights Act

D.C. Code § 2-1402.73 provides, "Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race... disability... or place of residence..." It is clear that the proposed school closures are inconsistent with this mandate.

Under D.C. Code§ 2-1402.68, otherwise known as the "Effects Clause," the D.C. Human Rights Act provides for claims against unintentional discrimination which have a discriminatory effect. The Act was enacted to "secure an end in the District of Columbia for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race…disability…and place of residence or business." To that end, the Effects Clause prohibits facially neutral practices which "bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason." *Gay Rights Coalition of Georgetown Univ. Law Ctr. V. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987). the school closures will have a disproportionate adverse effect in terms of race, disability and place of residence.

Under D.C. Code § 2-1402.41 it is unlawful for an education institution, "to deny, restrict or to abridge or condition the use of, or access to, any of its facilities, services, programs, or benefits of any program or activity to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the actual or perceived: race…and disability of any individual."

With respect to race, over 93% of the students who will be affected by the school closings are African American versus .05% white. This gives rise to the claim that the proposed closing of 15 schools is racially discriminatory in nature. To support this claim, plaintiffs must establish a prima facie case of discrimination by introducing either direct or indirect evidence of intentional discrimination. Where no direct evidence exists, "plaintiffs can use statistical evidence to establish the type of intentional discrimination that is necessary to prove a disparate treatment case…," *Forman v. Small*, 271 F.3d 285, 292 (D.C. Cir. 2001). In D.C., "a statistical disparity measuring 1.96 standard deviations or greater is statistically significant enough that the disparity alone can establish a prima facie case of discrimination." See *Palmer v. Shultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987). Here, the school closings will affect over 90% of African American students compared to .05% of white students. The school closings will have a much more significant impact on African-American students in comparison to their white counterparts. Defendants cannot articulate a legitimate, nondiscriminatory justification for their actions. The DCHRA carves out a narrow exception based on "business necessity."

The proposed school closings will only affect neighborhoods East of Rock Creek Park. Over 80% of the students in these neighborhoods come from low-income households. As such, the proposed school closings will leave the students in these underserved communities void of the types of educational opportunities that are available to students from other areas of D.C., specifically West of the Park. Over 90% of the displaced students from these neighborhoods are African-Americans who will now have to pay more and travel further to attend a school that is more populated than their former school. The impact of these factors is magnified for students with

disabilities.

The absence of compliance with ANC Notice and Great Weight and the Sunshine Amendment

Notice to ANCs of certain actions or proposed action by the District government is governed by sections 13(b) and (c) of the *Advisory Commissions Act of 1975*, effective October 10, 1975, D.C. Law 1-21, as amended by the *Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000*, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.) (collectively, the ANC Act)

ANCs "occupy a special position in the District of Columbia." *Bakers Local Union No. 118 v. District of Columbia Board of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981). The issues and concerns raised by ANC officials "shall be given great weight during the deliberations by the governmental agency and those issues shall be discussed in the written rationale for the governmental decision taken." *D.C. Code Section 1-309.10(d)(3)(A)* (2001 Edition, as amended). That Section of the Code actually states, "The issues and concerns raised in the recommendations of the [Advisory Neighborhood] Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgment of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns." "[G]reat weight" implies explicit reference to each ANC issue and concern as such, as well as specific findings and conclusions with respect to each, *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1384 (D.C. 1977). However, section 1-261(d) "does not require special deference to the views of an ANC but, rather, that an agency address its concerns with particularity." *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177 (D.C. 1982).

Notice of pending governmental action and an opportunity to express views about that pending action are fundamental, inescapable statutory due process requirements when it comes to the role of ANCs. In the instant case, no notice was given to the subject ANCs and thus no opportunity to

express their views was provided. Notice to ANCs of certain actions or proposed action by the District Government is governed by sections 13(b) and (c) of the *Advisory Commissions Act of 1975*, effective October 10, 1975, D.C. Law 1-21, as amended by the *Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000*, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.) (collectively the "ANC Act"). Subsection (b) states:

> "Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single member district affected by said actions, and to each affected Ward Councilmember, except where shorter notice on good cause made and published with the notice may be provided or in the case of an emergency and such notice shall be published in the District of Columbia Register. In cases in which the 30-day written notice requirement is not satisfied, notification of such proposed government action or actions to the Commissioner representing the affected single member district shall be made by mail. The Register shall be made available, without cost, to each Commission. A central record of all such notices shall be held by the Office of Advisory Neighborhood Commissions."

Notice of actions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation, must be given to each affected Commission area. See *D.C. Official Code § 1-309.10 (a) and (b) (2004 Supp.)*. Notice must also be given to each affected Commission "before the award of any grant funds to a citizen organization or group, or before the formulation of any final policy decision or guideline with respect to grant applications, comprehensive plans**,** requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area, the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems." See *D.C. Official Code § 1-309.10(c)(1) (2004 Supp.)*. (Emphasis supplied). The District of Columbia Court of Appeals has interpreted the ANC notice provisions to require written notice of every proposed government decision affecting neighborhood planning and development for which a prior hearing is required by law, *Kopff v. District of Columbia ABC Board,* 381 A.2d 1372, 1381 (D.C. 1977).

The Sunshine Amendment of the D.C. Self Government and Governmental Reorganization Act states, "(a) all meetings (including hearings) of any department, agency, board or commission of the District government, including meetings of the District Council, at which official action of any kind is taken shall be open to the public. *No resolution, rule, act, regulation or other official action shall be effective unless taken, made, or enacted at such meeting*." The District of Columbia Self Government and Governmental Reorganization Act, Section 742, 87 Stat. 831 (1973). All final, relevant decisions regarding the proposed school closings were done in the dark.

Violation of the Americans with Disabilities Act, 42 U.S.C.A. § 12132

The Americans with Disabilities Act (ADA) prohibits any public entity from discriminating based on disability. The Act provides that no person shall "by reason of such a disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132.

A claim for intentional discrimination under the ADA can be sustained by showing that: 1) the plaintiff is a qualified individual with a disability; 2) the plaintiff was denied the benefits of or prohibited from participating in the services, programs or activities of a public entity; and 3) the denial or prohibition was "by reason of" her disability. The ADA also makes cognizable claims stemming from a disparate impact on qualified individuals with a disability. The decision to close 15 schools, although facially neutral, will have a disproportionately adverse effect on students with disabilities. While special education students comprise only 14.4% of all students, they make up 23.2% of students in schools scheduled for 2013 Closings. When looking at the 2014 Closings, special education students make up 27.9% of students in those schools.

Violation of the Rehabilitation Act of 1973

The school closings are in violation of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a) which provides that "No otherwise qualified individual with a disability in the United States…shall, solely by reason of her or his disability, be excluded from the

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…" The regulations relating to Section 504 of the Rehabilitation Act provide that "a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped" child in its jurisdiction. 34 C.F.R. 104.33. Plaintiff Brenda Williams is a qualified individual with a child with a disability under the Rehabilitation Act. Defendant District of Columbia receives Federal financial assistance. The operations of Defendant District of Columbia are a "program or activity" within the meaning of Section 504 of the Rehabilitation Act. 29 U.S.C. § 794(b)(1)(A).

Defendants' failure to maintain a free and appropriate education in Plaintiff's neighborhood schools slated for closure, considering the relevant and unnecessary burdens thrust upon Plaintiff by closing these schools, demonstrate both bad faith and a gross departure of accepted standards. Such treatment of special needs students rises to the level of discrimination based solely on the disabilities of Plaintiff's child. Taking into account the outcome of the 2008 school closings, the proposed Plan to close fifteen additional schools is a demonstration of bad faith. Of the 2,792 students expected to be impacted by these closures, a full 27.9% are special needs.

Violation of the IDEA Act

Defendants violated IDEA by significantly impeding the parents' right to participate in the decision-making process by issuing a written notice of their intent to close certain schools and move the special education children without parental involvement. Defendants further violated IDEA by failing to identify an appropriate educational program for the special education students because they have failed to identify an existing program that could meet the needs of the severely disabled special education students

Violation of Title 42, U.S.C. § 1983

Title 42 U.S.C. § 1983 provides, "Every person who under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress."

A claim under § 1983 can be sustained because Defendants' Plan denies students of color, those with disabilities and those residing in low income neighborhoods equal protection in violation of the 14th Amendment to the United States Constitution as applied to the District of Columbia through the 5th Amendment to the United States Constitution.

Violation of Title VI of the 1964 Civil Rights Act

Title VI of the 1964 Civil Rights Act and the Department of Education regulations implementing that Act, like the D.C. Human Rights Law, prohibit recipients of federal funding from discriminating based on race, color, or national origin, 42 U.S.C.A §§ 2000d-2000d-7.

Under Department of Education regulations, schools and districts violate federal law when they adopt and implement facially neutral policies, and the policies nonetheless have an unjustified effect on students on the basis of race or disability. Any fair analysis of the facts in the instant situation clearly demonstrates the presence of a prima facie case of disparate impact. As a consequence, it is within the jurisdiction of this Honorable Court to mandate that appropriate District of Columbia Government authorities take steps to ensure compliance with Title VI.

In addition to the likelihood of success on the merits, which Plaintiffs have shown, Plaintiffs also must demonstrate that: (1) that there is an imminent threat of irreparable harm should the relief be denied; (2) that more harm will result to plaintiffs from the denial of the injunction than will result to the defendant from its grant; and (3) that the public interest will not be disserved by the issuance of the requested order. *Id.*; *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255-56 (D.C. 2003);

District of Columbia v. Eastern Trans-Waste of Maryland, Inc., 758 A.2d 1, 14 (D.C. 2000). While the factors are typically evaluated on a sliding scale, and "a strong showing of one factor may excuse a relatively weaker showing on another," *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011).

Plaintiffs will suffer irreparable injury if Defendants are not enjoined

Since the goal is to minimize the risk of harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Plaintiffs have shown that the harms they allege are "certain," rather than speculative, or that the "alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin," *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

The Mayor has submitted his Budget. The D.C. Council will soon take a final vote on that Budget. Activities are already taking place to implement the proposed Plan. Once the D.C. Council votes on the Budget, the Plan will become operational, and we will have arrived at a point of no return; final preparations to close schools will begin, teachers and administrators will be terminated; students will be forced to scramble to secure places in new schools; parents, i9ncluding these Plaintiffs will be lost in a swirl of closure activity. The irreparable harm is palatable.

Defendants will not suffer substantial harm if the requested relief is issued

A court's "first step" is to balance the likelihood of irreparable harm to the plaintiff with the likelihood of harm to the defendant, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). "If a decided imbalance of hardship should appear in plaintiff's favor," a lesser demonstration of likelihood of success would be required," *Blackwelder Furniture Company v.*

Selig Manufacturing, Inc., 550 F.2d 189, 195 (4th Cir. 1977). "The plaintiff need only raise questions going to the merits … as to make them fair ground for litigation and thus more deliberate investigation," *Id.* Defendants claim to expect savings of roughly $8 million as a result of the proposed closures. Against the backdrop of the District's $417 million surplus, that is a small amount when compared to the harm the closures will cause. Moreover, according to the Bhat Affidavit and Report, Exhibits B ands C, annexed, the likelihood of any savings by the District as a result of the closures is dubious. Indeed, it is more likely, as with the 2008 closures, that the District will lose money. Defendants will suffer no harm if the planned closures are halted and certainly will not suffer substantial harm.

The public interest favors granting relief

The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. See generally *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90 (D.D.C. 2011). At the same time, it is always in the public interest to insure that … regulations and policies [laws] are properly followed, *Air Terminal Services, Inc. v. Department of Transportation, 400 F.Supp. 1029 (D.D.C. 1973) aff'd 515 F.2d 1014 (D.C. Cir.1975).* It is by now Black Letter Law that courts sitting in equity have the discretion to weigh the public interest in granting or denying injunctive relief, *Oakland Cannabis*, 532 U.S. at 496 (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The public interest favors granting declaratory and injunctive relief when an Agency fails to competitively secure services as required, *Aero Corporation v. Department of the Navy*, 558 F. Supp. 404 (D.D.C. 1983). Here, the public interest is best served by ensuring as little disruption as possible in the education process, particularly when the Plan would save little or no money. Measured against the serious and significant disruption to the educational process, the public interest is best

served by halting the Plan.

A Permanent Injunction is appropriate

Temporary relief in this case is urgently needed however such relief would be both illusory and inadequate. So long as this litigation continues, Plaintiffs can only be protected and made whole by the granting of the relief sought, on a permanent basis. For the reasons given, Plaintiffs' Application for a Temporary Restraining Order and their Motion for a Preliminary and Permanent Injunction should be granted, without delay. Proposed orders are filed herewith.

Respectfully submitted,

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