UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANNON MARIE SMITH, et al.	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
KAYA HENDERSON, CHANCELLOR, et al.	:	Civil Action No. 13-CV-420
	:	Judge James E. Boasberg
	:	Jury Trial Demanded
Defendants.	:	
	:	
	:	

OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

An Ignored Past, a Different Present

When Ward 3 schools, "West of the Park," were distressingly under-enrolled and underutilized, they were not closed. Instead, the District of Columbia Public School System, a Defendant in this Case, devised innovative solutions to nurse them back to health. Since the early 1970s, while schools "East of the Park" were being closed, not one Ward 3 school has ever been closed.[1]

Plaintiffs through Counsel oppose Defendants' Motion to Dismiss their First Amended Complaint inasmuch as there are a set of facts in support of their claims which would entitle them to relief, and the Court is required to view those facts in a light most favorable to Plaintiffs. Plaintiffs also oppose Defendants' Alternative Motion for Summary Judgment as there are genuine issues as to the material facts articulated by Defendants.

Plaintiffs have sought expedited discovery in order to find and illuminate facts vital to the Court's disposition of these Motions, particularly related to Summary Judgment, however, the Court has

[1] First busing was tried, bringing students from East of the Park into Ward 3 schools. As the Ward 3 school population continued to decline, "The 6 School Complex" was created, combining and coordinating the resources of "six small schools" in order to save and preserve the Ward 3 neighborhood school.

not granted Plaintiffs' requests, and Plaintiffs here repeat their ongoing objection to being forced to proceed in the dark, almost blindly.

Since 1976, when Defendants and their predecessors began the concentrated practice of school closures, 55 District of Columbia Public Schools have been closed. During that period, no school, not one, has been closed in Ward 3 an area "West of the Park," resided in largely by affluent White people. This favorable and unequal treatment of Ward 3 schools has obtained, notwithstanding the fact that at times during that period there has been under-enrollment and under-utilization of the schools in Ward 3, "West of the Park."[2] Because the information on the exact levels of under-enrollment and under-utilization over the years is uniquely within the possession and control of Defendants, and Plaintiffs have not been afforded discovery, Plaintiffs are unable to make precise comparisons between the Ward 3 schools and the schools "East of the Park" that have been closed and are up for closure. That data is not available to the public. On information, knowledge and belief however and with the aid of Dr. Judith Denton Jones' eye-opening, well-researched book, referenced below, Plaintiffs assert the under-enrollment and under-utilization of Ward 3 schools at times has been comparable to those schools that have been closed "East of the Park". And, during that period, that unequal treatment has obtained notwithstanding the fact that Defendants and their predecessors, members of the same protected class as Plaintiffs, have done so while knowingly, willingly, intentionally and unlawfully visiting the closures solely, overwhelmingly and disproportionately on students of color, special education students and students who live in low income communities, "East of the Park."

During the Hearing on Plaintiffs' Motion for a Preliminary Injunction, this Court inquired of Co-Counsel Jamin Raskin if he believed Defendant Chancellor Kaya Henderson, as a Black person, would

[2] This disparate treatment, this intentional discrimination during a certain period of time has been documented in a well-researched book by Dr. Judith Denton Jones, a noted Urban Sociologist with experience in policy planning, evaluation studies and community research. Her Book, *The 6 School Complex: A Successful Innovation in Washington, D.C.'s Public Schools*, published in 1987, Library of Congress Catalog Card Number 87-50814, documents the extraordinary lengths to which the D.C. School System went to keep open 6 public schools in Ward 3 that had a mere 40, 50, two with 80, 90 and 120 White students within boundary when the 6 School Complex was created, a strikingly different treatment of those schools than the treatment afforded schools East of the Park, then and now. Plaintiffs do not have figures for other periods of time because they have not been able to conduct discovery to recover such figures, and they are not publically available.

intentionally discriminate against other Black people. The undersigned Counsel believes Defendant Henderson can and has knowingly, willingly and intentionally directed school closures solely at other Black people and those actions are as devastating and devouring on the future growth and development of affected Black children as Bull Connors fire hoses, dogs, clubs and guns in America's South. Through the lens of the law, that she is Black does not excuse Defendant Henderson of those misdeeds.

As will be demonstrated by Plaintiffs' Memorandum of Points and Authorities which follows, and is adopted and incorporated herein by reference, Plaintiffs' First Amended Complaint should not be dismissed because Plaintiffs have standing, have properly alleged their statutory and equal protection claims and can show, with appropriate discovery tools, that Defendants had discriminatory intent when they weaved their Consolidation Plan. For the same reasons, Defendants' Alternative Motion for Summary Judgment should be denied. Plaintiffs newly-added claims for Breach of Contract and Fraudulent Misrepresentation grow out of diametrically opposite, public positions Defendants have taken on the future use of the school buildings proposed to be closed. Moreover, exhaustion of administrative remedies is not a bar to Plaintiffs' Complaint because no agency has the authority or power to stop the school closings. Only this Court can.

/s/ Johnny Barnes

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DATED: 24 June 2013

Certificate of Service

I hereby certify that a true copy of the foregoing and supporting Memorandum that follows was delivered by electronic transmission on this 24th day of June 2013, to the Court and to the following:

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Notwithstanding being slated for closure in 2013, on 13 June 2013 the students of MacFarland Middle School were recognized by Scholastic for having the highest reading growth of any DC public middle school for the 2012-2013 school year. Starting in the summer of 2012, their students took the first of four quarterly reading assessments (Scholastic Reading Inventory). From there, students worked with members of the literacy committee to set goals and map their growth between each assessment.

There are two studies, not one, that were commissioned by Defendants and the second, earlier study did not outright recommended D.C. Public School closings

Defendants in all of their pleadings, including the instant Motions, and the Court in its decision denying the Preliminary Injunction, rest squarely on the findings of a Study by Education Resources Strategies (ERS) to justify the strikingly disparate treatment of schools in relatively low income communities of color and special education schools when compared to affluent, White Ward 3 communities and schools.

Defendants do not disclose and the Court may not have been aware that there was a Study commissioned and paid for by Defendants which preceded by just six months the Study by Education Resources Strategies. The first Study is publically available to the Court and is attached as **Exhibit A**. There are two things that must be noted about the first Study, released in January 2012. First, Defendants only had the Illinois Facilities Fund (IFF), the first Study, to assess schools and communities

"East of the Park." None were assessed in Ward 3. It is reasonable to conclude and infer from that directive that Defendants always intended to target low income communities of color and special education schools. Second, while recommending that some Charter schools should be closed, the IFF generally recommended against closing public schools. Apparently unhappy with the findings of the IFF, Defendants seized upon the Education Resources Strategies Study which was released in August 2012, six months after the IFF Study, and less than three months later, in November 2012, Defendants released their interim Plan, recommending schools closings. It would be a fair subject of discovery, including depositions to probe the motivation and intent of Defendants in rejecting the IFF recommendations and embracing the ERS Study. Motivation and intent are appropriate subjects to probe when disparate treatment is apparent, as here, and because of the Plan's dramatically unequal racial and demographic impact, an impermissible official purpose can be inferred and the Plan triggers strict scrutiny. See *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

A decision maker who is a member of a protected class can be shown to have intentionally discriminated against members of their own protected class

Chancellor Henderson's motivation and intent and not the motivation and intent of Education Resources Strategies (ERS) is relevant and probative because she and not them made the ultimate decision to close certain schools and not others.[3] Defendants' intent to discriminate cannot be dispelled on the basis that they are also a member of the same protected class (same group discrimination presumption), *Castaneda v. Partida*, 430 U.S. 482, 499 (1977). The Supreme Court has stated that "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Id.* at 483; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998). While historically

[3] In August or September 2011, the Illinois Facilities Fund (IFF) was "commissioned" by Defendants to produce a study of D.C.'s public schools (DCPS & charters), *Quality Schools: Every Child, Every School, Every Neighborhood* ("IFF Study") which was released to the public in January 2012. That Study made recommendations for closing Charter Schools and, if any, D.C. schools based upon criteria entirely different from ERS. The IFF Study, under directives, did not study any schools in Ward 3. It is relevant and probative as to why Defendants opted to use the ERS Study to justify the closures rather than follow the recommendations of the IFF Study. What was their motivation and intent?

discrimination is a result of one race against another, motivations not immediately obvious might enter into discrimination against 'one's own kind.' *Castaneda*, 430 U.S. at 500. Although, Defendant Henderson is a member of the predominant protected classes at issue, the court can still find that she intentionally discriminated against the Plaintiffs. *Oncale* rejects the same group discrimination presumption for race discrimination in the workplace in regards to both same race and same sex situations, 523 U.S. at 118. *Castaneda* rejects same group discrimination theory for jury selection like the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), 430 U.S at 483. The First Circuit also rejects the same-group discrimination presumption because the courts find it "unwise to presume as a matter of law that human beings of one definable group will not discriminate against members of their group." *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002). *Frazier* applies equally the rejection of the same-group discrimination presumption to, as here, scholastic settings. *Id.*

PROCEDURAL BACKGROUND

Plaintiffs adopt the Procedural Background of Defendants, except the editorializing that the Court's Preliminary Injunction Decision was "well-reasoned." Indeed, Plaintiffs argue later in this Memorandum that the Court was mistaken on the facts and law of notice to ANCs as well as its analysis on Defendants' discrimination. In addition, Plaintiffs would add to the Procedural Background the discovery exchange history, to wit, Discovery has yet to be undertaken or allowed by this Court in the instant case; Plaintiffs first brought to the Court's attention the need to undertake discovery during a Conference Call on 3 April 2013. Following a "Meet and Confer" with Defendants' Counsel, Plaintiffs filed an Emergency Motion for Expedited Discovery on 18 April 2013. The Court did not grant that Motion. Counsel for Plaintiffs on 12 April 2013 served notices to take several oral depositions on Counsel for Defendants, and Counsel for Defendants, on that date, acknowledged the receipt of same. At that time, Counsel for Plaintiffs also sought agreement from Counsel for Defendants on an expedited written discovery schedule. Upon the return of Counsel for Defendants from vacation, Counsel for the Parties again "met" telephonically on 17 April 2013, and Counsel for Defendants indicated that

Defendants would not avail themselves of the depositions or written discovery, whereupon the earlier Motion was filed on behalf of Plaintiffs. On 12 June 2013 Counsel for Plaintiffs filed a second Motion for Expedited Discovery in the face of Defendants' pending Motion for summary Judgment. Again, the Court did not grant that Motion.

DIFFERENCES BETWEEN THE COMPLAINT AND THE AMENDED COMPLAINT

There is no ANC Profile that fits the 'Hollywood Casting' Outlined by the Court

There are significant and substantial differences between the Original Complaint and the Amended Complaint. Despite making amendments to the Complaint in part to take into account impactful changed circumstances, and to seek to reach a standing profile outlined by the Court that goes beyond that which is required by law, it must first be stated that, after a survey of 1) each Advisory Neighborhood Commissioner, 2) within each Single Member District, 3) where each of the proposed school closings are located, 4) who was in office at the time the initial proposed closure Plan was announced by Defendant Henderson on 13 November 2012, Plaintiffs found none of those individuals who might otherwise have standing to bring this lawsuit also 5) had a child in one of the affected schools. Indeed, after conducting the same survey of the ANCs in office when Defendant Henderson announced the final proposed closure Plan on 17 January 2013, Plaintiffs also did not find one ANC Commissioner who had a child in one of the affected schools. Thus, under the Court's articulation of the standing requirement, Plaintiffs could find no individual ANC on 12 November 2013 as well as on 17 January 2013 who could meet that virtual "Hollywood Casting" profile, none. Stated another way, under the Court's articulation of the standing requirement for ANC notice and great weight, the instant case could not be brought by anyone, at any time. That articulation turns the branches on their heads, making the court legislative and rendering the legislature impotent.

The new Plaintiff ANCs represent affected school closings within their Single Member District

The two new ANC Commissioner clearly fit the four, beyond the law, standing criteria articulated by the Court. As stated above, there is no ANC that fits the fifth criteria. Plaintiff Palmer

was in office on 17 January 2013 and represents a Single Member District wherein a school is proposed for closing. Plaintiff Kone was in office on 13 November 2012 and represents a Single Member District wherein a school is proposed for closing. Thus, with the addition of these two Plaintiffs, all standing criteria for an ANC articulated by the Court that could be satisfied by any ANC plaintiff have been satisfied. It should again be noted that Plaintiffs believe the Court was mistaken as a matter of law on the standing requirement for ANCs when the Court rendered its decision on Plaintiffs' Motion for a Preliminary Injunction. The reasons the Court was mistaken as a matter of fact and law are more fully explored and detailed below.

The Breach of Contract and Fraudulent Representation Claims

In numerous public pronouncements and throughout the lauded, purported public hearing process, which the Court accepted as "more than a charade," Defendants promised that the schools proposed for closing would remain in the inventory of DCPS.[4] For example, Appendix E of the Preliminary Consolidation Plan, Defendants' Exhibit B, issued on 15 November 2012, indicated that with respect to Ferebee-Hope, Davis, MacFarland, Kenilworth and others, schools impacted by interests of Plaintiffs, Defendants would "Retain in DCPS inventory and reopen should population/demand increase." Similarly, at Page 8 of the Final Consolidation Plan, Defendants' Exhibit E, indicated that, "Most immediately, we will continue to engage the community … in the reuse of the following schools (listing many of the same schools listed in the Preliminary Plan)." Yet on 20 May 2013, just ten days after this Court's Hearing on Plaintiffs' Preliminary Injunction and just five days after this Court's Order denying the Preliminary Injunction to stop the school closings, Defendants announced that eight of the schools proposed to be closed would be made available to private interests, several of them include schools for which the Plaintiffs seek relief. The public relied upon those promises, and the rapid

[4] Indeed, DCPS has stated that 30,000 new students are expected to register for public school over the next nine years. With mandatory school-age attendance, and with 18 of the so-called "surplus" DCPS schools leased to Charter Schools, with more being offered, it is not unreasonable to inquire as to where the 30,000 students will be placed. The District has established a publically available Web Site under the Office of the Deputy Mayor for the "Reuse of surplus school buildings." Long-term leases are being offered for several of the schools impacted by the current propose closings.

reversal of Defendants' position reflects intent entirely different from those promises made to the public, classic breach of promise, classic fraudulent misrepresentation. See **Exhibit F**, annexed.

FACTUAL BACKGROUND

While busing students from East of the Park to fill under-enrolled schools West of the Park DCPS has been Closing Schools East of the Park --- Then and Now

Over the years, a declining White population resulted in under-enrolled and under-utilized schools in Ward 3, West of the Park. According to a 6 January 1982 headline Report by the *Washington Post*, despite an increase in the City's White population, White enrollment in the City's public schools took a sharp drop. Nonetheless no Ward 3 school was closed. Indeed, since at least the early 1970s a disturbing pattern of disparate and discriminatory treatment has emerged from Defendants and their predecessors. Dr. Judith Denton Jones reported, "Considerable numbers of students were being bused from Anacostia [East of the Park] during the late 1960s and early 1970s to under-enrolled schools 'West of the Park'." *The 6 School Complex: A Successful Innovation in Washington, D.C.'s Public Schools*, Page 25 (1987). When busing to Ward 3 schools was discontinued in 1974, three of the six schools in the 6 School Complex had enrollments of less than 50%, at 48%, 45% and even 35%. Yet, none were closed, *Id.* at Page 22. And while nurturing and protecting the Ward 3 schools, closings East of the Park have taken place (55 since 1976) culminating in 23 closures in 2008 and now 15 closures in 2013-2014. Moreover, Wilson High School, the only public high school serving Ward 3, west of the Park, for the first time in years, in 2012 did not accept any students from outside its boundaries. The drawbridge that opened and paved the way to a richly integrated Wilson --- at a time when it was under enrolled --- is being pulled up. The District of Columbia seems to be returning to a segregated public high school system.[5] In 2011, the 11 acre, 7 building Wilson Campus underwent a full $115 million modernization, adding underground parking and some additional building space; making it more attractive to in boundary families seeking refuge from the growing cost of private school education.

[5] See Map of Current D.C. Public High School Boundaries, Plaintiffs' **Exhibit D**.

That is why the stunning announcement on 17 January 2013 by Defendant Henderson to close 15 additional schools east of the Park[6], an incredible ten percent of all public schools, while again closing none West of the Park[7], will only act as an accelerant to what seems to be a rapid return to a dual District of Columbia public school system, the kind that existed before the groundbreaking case of *Bolling v. Sharpe*, a companion to the *Brown v. Board of Education* Case.[8] Twenty-three schools were slated for closure under the 2008 School Closure Plan, ultimately Twenty-eight were closed; all East of the Park; none West of the Park; and all having a disparate impact only on children of color, those with disabilities and those who live in low income neighborhoods. The desirable alternative of integrated public schools articulated in the *Bolling* and *Brown* cases is being replaced by private, yet publically funded Charter Schools.[9] As the Map produced by D.C. Public Schools known as Map 8 demonstrates, there are no charter schools west of the Park and very few students who reside west of the Park attend charter schools.[10] Charter schools have become the province and for some the promise of education for those living East of the Park, while improved public schools have remained the magnet for those living West of the Park. And, the overwhelming majority of residents living West of the Park are White, while the overwhelming majority of those living East of the Park are people of color[11]; and dense poverty is located East of the Park, while little or no poverty exists West of the Park.[12]

The IFF Study – Dueling Expert Reports

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[6] See Map of D.C. Public Schools Slated For Closure in 2013 and 2014, Plaintiffs' **Exhibit E.**

[7] See Map of D.C. Public Schools closed in 2008, all East of the Park, Plaintiffs' **Exhibit F**.

[8] *Bolling v. Sharpe*, 347 U.S. 497 (1954), is a landmark United States Supreme Court case which dealt with segregation in District of Columbia's public schools. Originally argued a year before *Brown v. Board of Education*, 347 U.S. 483 (1954), *Bolling* was reargued in December, 1953, and unanimously decided on May 17, 1954, the same day as *Brown*. The *Bolling* decision was supplemented in 1955 with the second *Brown* opinion, which ordered desegregation "with all deliberate speed." *Bolling* did not address school desegregation in the context of the Fourteenth Amendment's Equal Protection Clause, which applies only to the states, but held that school segregation was unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. In *Bolling,* the Court observed that the Fifth Amendment to the United States Constitution lacked an Equal Protection Clause, as in the Fourteenth Amendment to the United States Constitution. The Court held, however, that the concepts of Equal Protection and Due Process are not mutually exclusive.

[9] Plaintiffs adopt Defendants' statement in the Factual Background part of their Memorandum about the history of the emergence of Charter Schools in the District of Columbia, however Plaintiffs would assert that students residing East of the Park have been forced into the publically funded Charter Schools by virtue of the school closures.

[10] See Plaintiffs' Memorandum I support of their Preliminary Injunction Motion, Exhibit D.

[11] See Plaintiffs' Memorandum Exhibit E.

[12] See Plaintiffs' Memorandum Exhibit F.

While there is of course some overlap, the DCPS schools that could be closed under the IFF Study, attached as **Exhibit A**, differ in many respects from those that should be closed under the ERS Study. This difference notwithstanding the fact that Defendant Mayor Vincent Gray, as part of his One City Action Plan, at page 25, Action 2.2.2: "Develop Strategies To Create Quality Academic Seats In D.C. Public Schools and D.C. Public Charter Schools," stated that "… the District will need to increase the number of educational options or "quality seats" that prepare children for future academic success in both DCPS and D.C. public charter school system. The [IFF] study identified ten neighborhood clusters with a high need for quality academic seats. In conjunction with the report's findings, the DME [Deputy Mayor for Education] will engage the community in conversations to further examine academic needs in each of the neighborhood clusters. At the conclusion of the community conversations, the DME will release a report with recommended strategies to bring forth more quality seats in the District." Just one month before the release of the ERS Study, Defendant Mayor Gray was applauding the IFF Study and promising "community conversations" on the IFF Study. Indeed, just two months after the release of the IFF Study and four months before the release of the ERS Study, the Mayor in a published Letter, bearing the date of 9 March 2012, stated, "With this initial study, we now know precisely where we must focus our efforts and can work in partnership to build upon the findings and recommendations presented." Notwithstanding that applause, Defendants wholly ignored the findings of the IFF Study --- a Study they had commissioned and paid for (with private funds); a Study that virtually challenges the recommendations of the ERS Study. The question is "Why?" Again, in the absence of discovery, the answer remains lodged in the minds of Defendants. Plaintiffs were not able to probe the motivation and intent of Defendants as required by the *Arlington Heights* Case.

The IFF Study divided D.C. Public Schools into four categories, by Tier, absolutely recommending the closure of ten Charter Schools that were not performing well and preferably keeping open but perhaps closing certain D.C. Public Schools that were not performing well. The IFF Study focused on performance and, although aware, did not take school size into account, apparently

untroubled by the reality of small schools. Of its four principal recommendations, the IFF Study stated: 1) Invest in facilities and programs to accelerate performance in Tier 2 schools; 2) Close or turnaround Tier 4 DCPS schools, and close Tier 4 charter schools; 3) Fill seats in Tier 1 schools. Sustain the performing capacity of Tier 1 schools; and 4) Monitor Tier 3 schools. (See the Executive Summary, page 6, IFF Study). The IFF Study further found that "… research shows that despite the range of choices in the District, two-thirds of students attend a school within or adjacent to their neighborhood cluster. The pattern suggests that most students prefer to attend a school close to their home…" *Id.* That is precisely why the IFF Study promoted preserving public schools over closing them, a recommendation at odds with the ERS Study. And, that is precisely why the absence of discovery in the instant case has handcuffed the Plaintiffs. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the United States Supreme Court created some guidelines for proving "motivation" and "intent." In order to prove motivation and intent, under the *Arlington Heights* Case, a plaintiff can rely on the following types of evidence: (1) disparate impact, (2) historical background, (3) the specific sequence of events, (4) any departure from normal procedures, and (5) legislative history. Assessing this case on the basis of those guidelines leads squarely into a prohibitive motivation and intent: 1) disparate impact is indisputable; 2) the muddied history of treating Ward 3 schools different and better than schools East of the Park, 55 closures since 1976, cannot be denied; 3) a chronology which demonstrates a focus only on schools East of the Park as consideration for change within the Public Schools; 4) nurturing and preserving Ward 3 schools, through the 6 School Complex and other policies and practices while allowing other schools to die on the vine; and 5) a legislative history of promoting charter schools, even when the evidence shows no markedly better performance for many such schools, and the IFF Study recommends closing many of them.

The Court's Mistake of Facts and Mistake of Law

The Court found that Plaintiffs ANC Commissioners Karlene Armstead and Ericka Black did not have standing in this case as individual commissioners. The Court in its Opinion stated, "Because

standing appears an insurmountable hurdle for the ANC Commissioners, the Court need look no further at their claims." [Dkt. # 14, at page 8]. Indeed, in denying the Preliminary Injunction Motion of Plaintiffs, the Court found that, "As standing is a necessary "predicate to any exercise of [the Court's] jurisdiction," *Fla. Audubon Soc'y*, 94 F.3d at 663, the Commissioners and their claims have no likelihood of success on the merits." [Dkt. # 14, at page 13]. The Court also found that substitute notice, by e-mail, to the ANCs was sufficient. Because the Court's decision on Plaintiffs' Preliminary Injunction Motion with respect to the ANCs turned squarely on the Standing Issue, it is here addressed. The ANC Notice issue is addressed later in this writing.

ANC Commissioners Armstead and Black individually have standing because they are a part of the whole ANC Commission body, which has a direct stake in the school closings. According to D.C. Code § 1-309.10(a) [also known as D.C.Code § 1-261(d)]: "Each Advisory Neighborhood Commission may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to *all* proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, *education*, health, safety, budget, and sanitation which affect that Commission area." (emphasis supplied).

With respect to the two Plaintiffs, ANC Commissioners, individual commissioners are able to initiate legal action as citizens, and the Court has found that individual commissioners have standing to assert the rights of an ANC. *D.C. Code §1-309.10(g) (2001)*; *Kopff v. District of Columbia ABC Board*, 381 A.2d 1372, 1376-77 (D.C. 1977). Further, as the D.C. Court of Appeals has stated, "[W]hile injury in fact is generally required for standing, the very purpose of the notice provisions obviate[s] the need for this requirement for standing to challenge compliance with notice specifications. One without notice is rarely in a position to complain of his ignorance, being unaware of the ignorance," *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 314, 318 (D.C. 1979). Moreover, even with Defendants' claim that the Plaintiff ANCs were provided "actual notice," a

claim disputed by Plaintiffs, nonetheless, a petitioner with actual notice does have standing to raise a deficiency in notice to others. *Id., Dupont Circle Citizens Association* at 318-19. "By considering [the concerns] about lack of proper notice, we are not merely granting petitioners third-party standing. In these circumstances it is likely that the lack of notice to others has caused petitioners actual harm. The very purpose of rulemaking is for an agency to consider plausible options and only adopt a proposal after a comment period." C*hocolate Manufact. Association v. USDA*, 755 F.2d 1103, (4th Cir. 1985).

With respect to the schools not initially represented in Plaintiffs' Original Complaint, the Court should note that an Amended Complaint has been filed with the Court, naming Plaintiffs for some of the proposed school closures, thereby rendering Defendants' charge of lack of standing moot. But even if an Amended Complaint had not been filed, it is by now well settled that an association or organization may sue on behalf of its members when its members would have standing in their own right, the interests at stake are germane to the purposes of the group, and neither the claim nor the relief requested requires the participation of the individual members, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Indeed, according to a recent pronouncement by the United States Supreme Court, "… no harm need occur for a citizen suit to lie." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000), citing *Laidlaw*, another Federal Court ruled that, "… the threshold question of citizen standing under the CWA is whether an individual can show that she has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm". *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000). In fact, it has been said that *Laidlaw* "treats citizen suits as a valued and legitimate form of litigation . . . [which] sends positive signals to lower courts about the value of citizen suits . . ." Jeffrey G. Miller & Chris Hilton, *The Standing of Citizens to Enforce Against Violations of Environmental Statutes in the United States*, 12 Journal of Environmental Law 370, 379 (2000).

Standing is the legal right to initiate a lawsuit. A party must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. There are three requirements for Article III standing: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Def of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

In deciding whether a party has standing, a court must consider the allegations of fact contained in the complaint and affidavits in support of the party's assertion of standing. See *Warth v. Seldin*, 422 U.S. 490, 501 (1974). And, see *Warth*, 422 U.S. at 501 (when addressing motion to dismiss for lack of standing, both district court and court of appeals must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing). Standing is founded "in concern about the proper--and properly limited--role of the courts in a democratic society. "*Warth*, 422 U.S. at 498. When a party seeks to avail himself of the courts to determine the validity of a governmental action, he must show that he "is immediately in danger of sustaining a direct injury." *Ex parte Levitt*, 302 U.S. 633, 634 (1937). This requirement is necessary to ensure that "federal courts reserve their judicial power for `concrete legal issues, presented in actual cases, not abstractions.'" *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting *United Public Workers*, 330 U.S. at 89), cert. denied, 112 S. Ct. 1670 (1992).

Even using Defendants' claim that Plaintiffs must show 1) concrete personal injuries that are actual or imminent; 2) that are traceable to defendant's conduct; and 3) that are "likely" to be redressed if the relief sought is granted, Plaintiffs meet the standing requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). With the affidavits of Plaintiffs, the statements from others in support of Plaintiffs

position, the exhibits annexed to the Plaintiffs' Pleadings, at this stage, the actual or imminent threat of personal injuries test is met. These are probabilistic injuries. And, these injuries are traceable to the Final Consolidation Plan submitted by Defendant Henderson. Moreover, at this stage --- consideration of the Motion to Dismiss --- Plaintiffs' burden is at a point where the Court must, "… presume that general allegations embrace the specific facts … necessary to support the claim," *Lujan* at 561.

Standing may be shown where *individuals or members of organizations* face a concrete risk of harm, as here, due to the government's decision. *Sierra Club v. EPA*, 292 F.2d 895, 900 (D.C. Cir, 2002). In the instant case, standing is "self-evident," *Id.* At 900. Indeed, "one may infer" actual or imminent injury, *National Resources Defense Council Defense Council, Inc. v. U.S. Environmental Protection Agency*, 464 F.3d 1, 7 (D.C. Cir. 2006), *Rehearing denied*. As the United States Supreme Court has observed, imminent harm encompasses "threatened" as well as "actual" injury, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). And see *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 99 (1979). Even a "small probability" of harm is sufficient to take a lawsuit out of the category of "hypothetical," *Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Indeed, "relatively minor increments of risk" qualify for standing and meet the *Lujan* requirements, *Mount. States Legal Foun. v. Glickman*, 92 F.3d 1228, 1231-1234 (D.C. Cir. 1996).

Standing was recently found and it was ruled that harm would result even when crops were not actually infected, satisfying the injury-in-fact prong because the harm was sufficiently concrete to meet the constitutional standing analysis, *Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057 at 10. The "possibility" that sales could not be made to prospective customers and that injuries could be redressed by an order from the court constituted a concrete, particularized, imminent injury, traceable to the challenged action and creating Article II standing. In a very recent case in 2011, *Bond v. United States*, 564 U.S. ___ (2011), the U.S. Supreme Court held a criminal defendant has standing to challenge the federal statute that he or she is charged with violating as being unconstitutional under the *Tenth Amendment*. Earlier in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S.

765 (2000), the Court endorsed the "partial assignment" approach to standing to sue, allowing private individuals to sue on behalf of the U.S. government for injuries suffered solely by the government.

Given that these Plaintiffs, parents and ANC Commissioners, have standing and that the injuries they face are probabilistic, imminent, concrete, particularized and traceable to the challenged action, this Court, as the Court acknowledged, is empowered to rule on the entire Final Consolidation Plan, even to issue an injunction against closing any of the schools.

Under the Code, the D.C. Government must give each ANC the "'great weight' to which it is entitled. . ." *Foggy Bottom Ass'n v. Dist. of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 77 (D.C. 2002); See also *Kopff v. Dist. of Columbia ABC Bd.*, 381 A.2d 1372, 1376-77 (D.C. 1977). The "great weight" requirement mandates that the "views of the ANC be specifically addressed, and not ignored or overlooked. . ." *Foggy Bottom Ass'n*, 791 A.2d at 77. "Great weight" should be very individualized to each ANC based on the proposed matter. *Id.* at 76. "[A]n agency must elaborate, with precision, its response to the ANC issues and concerns .... the agency must articulate why the particular ANC itself, given its vantage point, does-or does not-offer persuasive advice under the circumstances.... "[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." *Id.*; See also *Kopff v. Dist. of Columbia ABC Bd.*, 381 A.2d at 1384. "However, section 1-261(d) [1-309.10(a)] "does not require special deference to the views of an ANC but, rather, that an agency address its concerns with particularity." *Id.*; See also, *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1194 (D.C.1982). Additionally as a unit, "Each Advisory Neighborhood Commission. . . may advise the District government on matters of public policy. . ." D.C. Code § 1-207.38(c)(1).

Although the ANC Commissioners have standing on the basis of their representation in the Commission as an entity, all the commissioners cannot sue together. The entire Commission may not sue together because, "the Commission shall not have the power to initiate a legal action in the courts of the District of Columbia or in the federal courts, provided that this limitation does not apply to or

prohibit any Commissioner from bringing suit as a citizen, D.C. Code § 1-309.10(g). However, the statute does not expressly state that individual Commissioners in their Commissioner capacitates cannot sue. Here school closings are an education issue that directly impacts the responsibilities of the ANC Commissioners and their ability to perform their duties to their Ward. The ANC Commissioner Plaintiffs were independently injured by virtue of the fact that they did not receive official notice of the Plan and were thus prevented from having their official views, and the views of their constituents, integrated in the decision-making process and accorded the statutory "great weight" consideration. *See D.C. Code §1-309.10(g).* The Court should find it odd that no ANC Commission filed formal statements regarding the school closings, calling into question the perilous process of notice by e-mail. Indeed, in the Declaration of Shanita Burney, Defendant's Exhibit D, Ms. Burney admits, "DCPS did attempt to locate information sufficient to contact Ms. Armstead. However, DCPS could not locate Plaintiff Armstead's contact information at that time." Moreover, at what point should the ANCs have weighed in; when the IFF Study was released; at the release of the ERS Study; when the Preliminary Closure Plan was submitted; when the Final Closure Plan was submitted?

In any case, because each ANC's advice on "all proposed matters" is entitled to be considered with "great weight," and particular scrutiny, the ANCs and their Commissioner subparts have standing on the proposed School Closings Plan. D.C.Code § 1-207.38(a) provides for division of the District of Columbia into "neighborhood commission areas" and for the establishment of an elected ANC for each such area. Each elected ANC may "advise the District government on matters of public policy regarding planning" and other matters in its neighborhood commission area. *Kalorama Citizens Ass'n v. Dist. of Columbia Bd. of Zoning Adjustment*, 934 A.2d 393, 396 (D.C. 2007). When an individual ANC commissioner's area is affected by a proposed policy, their views and recommendations should be given great weight. *Neighbors United for a Safer Cmty. v. Dist. of Columbia Bd. of Zoning Adjustment*, 647 A.2d 793, 798 (D.C. 1994). According to the District of Columbia, ". . . the intent of the ANC legislation is to ensure input from an advisory board that is made up of the residents of the

neighborhoods that are directly affected by government action. In *Kopff v. Dist. of Columbia ABC Bd.*, 381 A.2d 1372, 1376-77 (D.C. 1977); the *C*ourt determined that ANC Commissioners as individuals have legal standing to sue in court to vindicate the essential statutory rights of their office, which they possess "[f]or the benefit of the neighborhood residents they represent. The School Closings Plan was officially presented to the public on 17 January 2013. The 2013-2015 ANC Commissioners elect, including Karlene Armstead entered their offices on January 2nd, before the Plan was officially initiated. The initial informal tentative plan presented in November 2012 was for 20 schools, unlike the final presented Plan for 15. Therefore ANC Commissioner Black was in office and does have standing to represent citizens with grievances in her Ward. Plaintiff Karlene Armstead is an Advisory Neighborhood Commissioner for 8E, the location of Ferebee-Hope Elementary School. Plaintiff Ericka S. Black is an Advisory Neighborhood Commissioner for 7D, the location of Kennilworth Elementary School. Commissioners Armstead and Black have standing to challenge the school closings because they are members of ANCs that have schools slated for closure. As such, they are elected by residents of the affected area to represent their interest in important matters, including education. Defendants concede that they neglected to provide proper notice or to give their opinion the great weight necessitated by law. But even if Commissioners Armstead and Black do not have standing (and Plaintiffs do not concede that point), the Standing flaw is cured by the Amended Complaint with Commissioners Palmer and Kone as additional Plaintiffs.

"The legislature has put in place a comprehensive procedure for obtaining the input of a community's elected representatives before the District makes important decisions affecting that community" mandating that ANCs be given great weight showed irreparable harm because "the residents' right to be have the issue presented to their elected representatives before the decision is finalized cannot be restored". *Bennett et al v. Union Station Redevelopment Corporation et al.*(D.D.C. Dec. 10 2012*).* "It has long been established that the loss of constitutional freedoms ... unquestionably constitutes irreparable injury." *Mills v. Dist. of Columbia,* 571 F.3d 1304, 1312 (D.C.Cir.2009).

LEGAL STANDARD FOR A MOTION TO DISMISS

The Legal Standard for a Motion to Dismiss in the District of Columbia is in line with the Federal Standard. "Dismissal under Rule 12(b)(6) is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 137-138 (D.C. 2006) and *Atkins v. Industrial Telecommunications Ass'n*, 660 A.2d 885 (D.C. 1995). Each count alleged by Plaintiffs in their Amended Complaint has a basis in the facts. "[Any uncertainties or ambiguities involving the sufficiency of the complaint must be resolved in favor of the pleader, and generally, the complaint must not be dismissed because the court doubts that the plaintiff will prevail." *Washkoviak v. Student Loan Marketing Ass'n*., 900 A.2d 168, 177 (D.C. 2006).

Defendants rely upon a misstatement of the Standard of Review under Rule 12(b) 6. "In evaluating a motion to dismiss for failure to state a claim, the Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C.Cir.2000). The Rule requires, "In reviewing the Complaint, the court must accept its factual allegations and construe them in a light most favorable to the non-moving party." *Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) and *Jordan Keys and Jessamy, LLP v. St. Paul Fire & Marine Ins. Co*., 870 A.2d 58, 62 (D.C. 2005. The United States Supreme Court has stated that the plaintiff must allege a "plausible entitlement to relief" by setting forth "a set of facts consistent with the allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1956 (2007). Further, the Rules manifest a preference for resolution of disputes on the merits, not on technicalities of pleading, and pleadings are construed as to do substantial justice. *Clampitt v. Am. Univ*., 957 A.2d 23, 29 (D.C. 2008), quoting *Carter-Obayuwana*

v. Howard University, 764 A.2d 779, 787 (D.C. 2001). This Court is required to take all factual allegations in the Complaint as true, *Grayson v. AT&T Corp*., 980 A.2d 1137, 1144 (D.C. 2009), citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Taking the factual allegations in the Complaint as true and construing them in a light most favorable to Plaintiffs clearly demands denial of the instant Motion.

Defendants' reliance on *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) is misplaced. That case sets out a two-pronged test to measure the weight of a motion to dismiss, and such a test necessarily resolves in favor of Plaintiff. Under *Iqbal*, a court must first determine what a legal conclusion and what a factual assertion is. When there are well pleaded factual allegations a court must accept those factual allegations as true. Second, the court must determine whether the factual allegations state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads enough facts to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. When analyzing a Motion made pursuant to Rule 12(b)(6), the Court must construe the complaint in a light most favorable to the plaintiff, while assuming the facts alleged in a complaint as true. Dismissal is only proper where the plaintiff can prove no plausible facts which would support the claim. *Cauman v. Geroge Wash. Univ.*, 630 A.2d 1104, 1105 (D.C. 1993) and *Aronoff v. Lenkin Co.*, 618 A.2d 669, 684 (D.C. 1992). And, as the United States Supreme Court articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 570 (2007), in order to survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." The claims of Plaintiffs are not only plausible and possible but likely as well.

LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In deciding whether there is a genuine issue of material fact, the court is to

view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson,* 477 U.S. at 248. The court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Defenders of Wildlife v. Department of Agriculture*, 311 F.Supp.2d 44, 53 (D.D.C. 2004) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)).

On the other hand, when one measures the abundance and variety of admissible evidence, from a range of sources, including many sources that do not have a dog in this fight, admissible evidence that supports the claims of Plaintiffs against the shallow pronouncements, with nothing more, from interested parties, it is quite clear that Defendants' Motion for Summary Judgment should be denied. "[M]ere assertions of facts in pleadings and affidavits, when unsupported by any evidence, are not necessarily sufficient to preclude summary judgment." *National Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 511 n.4 (D.C. Cir. 1984). Defendants' offerings in support of their cause consist solely of pleadings and self-serving affidavits and declarations, unsupported by any evidence.

ARGUMENT

The ANC Act was never satisfied by Defendants because notwithstanding clear, unequivocal statutory mandates, Defendants elected to ignore the law regarding notice to the affected ANC and because notice was not provided the ANC had no opportunity to have their views considered

This case, unlike most ANC cases, is not about liquor licenses, alley closings or neon signs in restaurants. This case is about life, education and the future of District citizens. Defendants will never follow the law if the Court allows them to get away with not following the law in the instant case.

Plaintiffs have provided proof and Defendants have conceded that the due process harm has occurred and is likely to occur again, proof indicating that the harm is certain to occur in the near future because Defendants assert they are not required to follow the law. See *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).*

Illuminating the point, there have been several due process cases decided in the wake of *Kopff v. D.C. Alcoholic Bev. Control Bd.*, 381 A.2d 1372 (D.C. 1977). Those cases, however, do not stand for the propositions Defendants and apparently this Court put forth and even if they do, the instant case is easily distinguishable from those. *Shiflett v. D.C. Board of Appeals and Review*, 431 A.2d 9 (D.C. 1981); *Committee For Wash.'s Riverfront Park v. Thompson*, 451 A. 2d 1177 (D.C. 1982); *Richardson v. District of Columbia Redevelopment Land Agency*, 453 A.2d 118 (D.C. 1982); and, finally, *Am. Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737 (D.C. 1979). But the most appropriate progeny of *Kopff* is the case of *District of Columbia v. Mayhew*, 601 A.2d 37 (D.C. 1991), where the court ruled that when it comes to fundamental due process, the government is required to provide notice prior to action which will affect interests in life, liberty or property. The closing of schools certainly affects interests in life, liberty and property.

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.)*.

Defendants concede and will not dispute that, despite knowing what the law required, at no point during the conceptualization, planning, preparation and execution of the School Closure Plan was the statutorily required notice provided to the ANCs. It seems that Defendants considered these legal requirements inconvenient or bothersome, not worthy of their compliance. The D.C. 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). Notice to the public is a requirement of due process in order to give each citizen an "adequate opportunity to prepare and present its position." *Kopff*, 1382-83.

Moreover, in general, the courts have insisted fastidiously upon proper legal notice, rejecting various forms of non-conforming "actual notice" even when the most sympathetic parties seek forgiveness for failing to give legal notice. *See, e.g., Blue v. Dist. of Columbia*, 850 F.Supp.2d 16, 36-37 (D.D.C. 2012) (dismissing an emotionally disturbed DCPS student's claims of, *inter alia*, negligent supervision and negligent hiring and retention against the District over a sexual relationship with her teacher because she did not comply with a six-month requirement of "notice in writing to the Mayor of the District of Columbia" of her injury). Indeed, when the District is itself the beneficiary of a specific notice requirement, D.C. law is generally severe against its opponents and, of course, the District almost always demands strict application of the law. See also *Owens v. Dist. of Columbia*, 993 A.2d 1087, 1089 (D.C. 2010), *Doe by Fein v. Dist. of Columbia*, 697 A.2d 23, 28 (D.C.1997) and *Chidel v. Hubbard*, 840 A.2d 689, 695 (D.C.2004).

Accordingly, it is clear that every due process requirement of law, every mandate that citizens be provided notice and the opportunity to participate, whether under the Advisory Neighborhood Commission Law or the Sunshine Amendment, Defendants ignored and failed or refused to comply. These mandates and requirements are not optional. They must be followed. There is no ambiguity in the language of these mandates. They are plain, clear and unequivocal. As was declared by the leading statutory interpretation treatise of that day, a principle that holds today, "Where the meaning of the statute is plainly expressed in its language and if it does not involve an absurdity, contradiction, injustice, [or] invade public policy … a literal interpretation will prevail." 2A *J. Sutherland, Statues and Statutory Construction*, Section 47.23 at 123 (4th edition C. Sands 1973).

While official action will not be held unconstitutional solely because it results in a racially disparate impact, disparate impact is not the sole touchstone of invidious racial discrimination.

Proof of racial discriminatory intent or purpose is required to show a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Determining whether invidious discriminatory purpose was the motivating factor demands

a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it "bears more heavily on one race than another," *Washington v. Davis*, 426 U.S. at 242, 96 S. Ct., at 2049 may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886); *Guinn v. United States*, 238 U.S 437, 35 S. Ct. 926, 59 L.Ed. 1340 (1915); *Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L.Ed. 1281 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed. 2d 110 (1960). The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purpose. See *Lane v. Wilson*, supra; *Griffin v. School Board*, 377 U.S. 218, 84 S. Ct.. 1226, 12 L.Ed 2d 256 (1964); *Davis v. Schnell*, 81 F.Supp. 872 (S.D. Ala.) aff'd per curium, 336 U.S. 933, 69 S. Ct. 749, 93 L.Ed. 1093 (1949); cf. *Keyes v. School Dist. No. 1, Denver Colo*., 413 U.S., at 207, 93 S. Ct., at 2696. The specific sequence of events leading up the [to] challenged decision also may shed some light on the decision maker's purpose, *Reitman v. Mulkey*, 387 US. 369, 373-376. 87 S. Ct. 1627, 1629-1631, 18 L.Ed.2d 830 (1967); *Grosjean v. American Press Co*., 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L.Ed. 660 (1936). Departures from the normal procedural sequences also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached. And, the legislative or administrative history may be highly relevant, especially where they are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019 (1951); *United States v Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974).

Defendants' School Closing Plan produces a stark racial impact and a clear pattern of discrimination in violation of equal protection and allied civil rights statutes.

This case presents a very important question. Does an official plan for public school closings that disproportionately burdens and displaces (almost exclusively) thousands of Black, Hispanic, Asian-American and Special Education students violate the Equal Protection rights of those students and their families? Plaintiffs submit that the answer to this question is a resounding "Yes".

School closings are a matter of Constitutional dimension and must conform to Equal Protection Principles: *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964). The closing of public schools, even when accompanied by the provision of enrollment alternatives to displaced students, is a matter not simply of administrative convenience but of constitutional significance, and school closings must conform to Equal Protection principles. *See Griffin*. This is no less true in the District of Columbia where Equal Protection principles apply with equal force to the rights of local Residents, *Bolling v. Sharpe*, 347 U.S. 497 (1954).[13] Students and their families have important interests at stake in the continued existence of their schools.[14] In *Griffin*, the Prince Edward County Board of Supervisors, whose members were determined to prevent desegregation of the County's public schools, simply closed the schools down and gave all students, both white and African-American,

[13] The *Bolling* Court struck down apartheid segregation in the District of Columbia's schools as a violation of Equal Protection principles assimilated to the 5th Amendment. As the District of Columbia's companion case to *Brown v. Board of Education*, *Bolling* was decided on the same day, May 17, 1954 and struck down racial segregation of public schools in the District of Columbia. Although citizens of the states have Fourteenth Amendment rights against their state governments that District residents do not have against Congress, the Court held that the 5th Amendment Due Process Clause, which applies to District residents, incorporates the Equal Protection principles of the Fourteenth Amendment because "discrimination may be so unjustifiable as to be violative of due process." In defining the rationale for what has come to be called a "reverse incorporation" doctrine, the Court stated that it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states when it comes to guaranteeing equal rights of children in public schooling.

[14] Like segregation itself, a racially tinged school closing can affect the "hearts and minds" of the students affected. See *Brown v. Board*, 347 U.S. 483 (1954)(Separating students from "others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Shutting down a school uproots its students and disrupts their education. When they are reassigned elsewhere, they lose everything familiar, routine, and intimate about their education and their neighborhood support systems; they go into entirely new neighborhoods and are forced to adjust to different schedules, different modes of transportation, and different school cultures and bureaucracies.

vouchers to go to private school instead. Ruling a decade after its desegregation decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court found that closing down public schools in order to avoid the desegregation mandate violates Equal Protection.

Significantly, the Court held that the school closings were unconstitutional even though there is no constitutional right to go to a neighborhood public school and even though all of the displaced children were given private school vouchers and thus the opportunity to continue to attend school at public expense. The *Griffin* Court held that: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." Thus, the Court has determined that, if an official decision to close schools is inconsistent with Equal Protection, the fact that the government makes other arrangements to educate the displaced students does not cure the constitutional violation.

The District of Columbia's School Closing Plan has a Racially Discriminatory Impact because it overwhelmingly burdens and displaces, almost exclusively, African-American, Hispanic and Asian-American Students. Defendants do not deny that the proposed school closings have a racially discriminatory impact and their implicit concession on this issue is wise given the starkness of the Plan's effects. See Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, 20 (stating that Plaintiffs "base their Equal Protection claim on the disparate impact of the Consolidation Plan . . . But, disparate impact alone is not enough to establish a violation of equal protection.") All of the schools targeted for closure by the Plan have an overwhelmingly or exclusively minority student population. Yet, no majority-white schools have been slated for closure. Indeed, in majority-white Ward 3 and in all areas West of the Park, which has been the traditional racial dividing line in the District, there have been no elementary, middle or high schools targeted for closure at all. Of the 2,792 students whose schools are slated to close, 2,790 of them are Black, Hispanic or Asian-American. This means that 99.9% of students affected by the Plan belong to minority groups that are suspect classes

under Equal Protection. At the same time, there are a total of *two* white students enrolled in all of the fifteen schools targeted for closure, meaning that white children make up less than .1% of the students forced to relocate. Those two students to the side, the entire burden of the Plan falls on the minority and special education student population.

The Plan's Racially Discriminatory Purpose Can Be Inferred from its "clear pattern" of stark racially discriminatory effects: *Village of Arlington Heights*. It is true, as Defendants emphasize, that to demonstrate violation of Equal Protection, Plaintiffs must show evidence of "racially discriminatory intent or purpose." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265 (1977). However, Plaintiffs do not have to show that "the challenged action rested *solely* on racially discriminatory purposes" since multiple considerations, by definition, enter into any public decision-making process, and "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id*. The test is whether *any* impermissible discriminatory purpose entered into the decision-making process as one of many motivating factors. To determine "whether invidious discriminatory purpose was a motivating factor" in a particular policy is a complex challenge that "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. While Defendants understandably place great emphasis on the argument that "disparate impact alone is not sufficient to establish a violation of equal protection," this triumphant statement does not capture the entire role that "disparate impact" plays in Equal Protection.

The Supreme Court has declared that the existence of a racially disparate "impact of the official action"—that is, "whether it 'bears more heavily on one race than another,'"—" may provide an important starting point" for the analysis of constitutional purpose. *Id.* It is, in fact, a profoundly important starting point because proof of a clear racially disparate impact can often illuminate--in a way that bare professions of official neutrality and even-handedness cannot--the underlying purposes and social meaning of a public policy: "Sometimes a clear pattern, unexplainable on grounds other than race,

emerges from the effect of the state action even when the governing legislation appears neutral on its face." Id. (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). The Court in *Arlington Heights* went further to state that, when such a "clear pattern" of racial disparity, "unexplainable on grounds other than race," emerges, the appearance of such a pattern makes the "evidentiary inquiry" of discriminatory purpose "relatively easy." *Id*. However, the Court cautioned that "such cases are rare. *Absent a pattern as stark as that in Gomillion or Yick Wo*, impact alone is not determinative. . ." *Id*. (emphasis added). The pattern of racially disparate effects that would be produced by the Plan is "Stark," like those Condemned in *Gomillion* and *Yick Wo*. As the Supreme Court clearly indicated, a pattern of racially disparate impact alone can be determinative of the purpose inquiry where there is "a pattern as stark as that in *Gomillion* or *Yick Wo*." *Id*. This racialized effect is comparable to the policy invalidated in *Gomillion v. Lightfoot*, where the Alabama legislature had changed the political boundaries of the City of Tuskekee in such a way as to remove from the city several hundred African-American voters "while not removing a single white voter or resident." 364 U.S. 339, 341 (1960). Although the displaced Black Americans still had the statewide voting rights they began with, they alone suffered the dislocating local political effects of the boundary revisions. Whatever differences may exist in the racial dynamics of gerrymandering in the electoral context and the racial dynamics of gerrymandering in the context of school closings, we can see that, in both cases, a completely lopsided and unfair burden is placed on the backs of non-white citizens.[15] Similarly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court found an Equal Protection violation where a facially neutral ordinance,

[15] It is true that there are two white students who would be affected by the school closing Plan in the District, but this is a trivial detail that should not distract the court from the fact that the overwhelming weight of the Plan's burden falls on the non-white population. If Alabama had accidentally or even deliberately included two white voters in the class of people gerrymandered outside of Tuskegee's municipal boundaries, this footnote to the facts would have made no difference to the outcome of the constitutional analysis. Therefore, one trusts that the court will not be moved by the Defendants' cavalier and unconvincing attempt to wave off this fundamental issue by saying that, "Plaintiffs already admit that the Consolidation Plan, in fact, affects students of a variety of races (African American, Hispanic, Caucasian, and "Asian/Other/unknown.)"

which forbade operation of a laundry in a wooden structure without the special permission of the city's Board of Supervisors, was applied in an unequal way disfavoring Chinese laundry owners. No Chinese owners were granted the special permit while all white applicants except for one received it. Further, according to the evidence, "more than 150" Chinese laundry operators were arrested for violating the ordinance while more than 80 non-Chinese owned laundries operating in wooden facilities without a permit were "left unmolested." Although school closings are not *per se* unconstitutional any more than rules against wooden laundries are, the existence on paper of policies that appear to be facially neutral cannot excuse the implementation of dramatically disparate racial effects. And, because Policymakers are inevitably Aware of Racial Effects in the School Closure Decision-Making Process, "Appearances Do Matter" and Subjecting only African-American and other Non-White Students to Closings "Bears an Uncomfortable Resemblance to Political Apartheid." In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court invoked *Arlington Heights* and *Gomillion* to find that, even without any evidence of an independent discriminatory public purpose, "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregate . . . voters' on the basis of race." *Id.* at 646-47. *Shaw* spelled out an Equal Protection right against the infiltration of impermissible racial dynamics and appearances into the political process. In *Shaw*, the challenged North Carolina congressional redistricting plan revealed nothing more shocking than irregularly drawn district lines and the existence of two majority-Black districts These innocuous facts, combined with the Court's recognition that "the legislature always is aware of race when it draws district lines," *id*. at 660, were sufficient to justify the majority's holding that a valid Equal Protection claim.

The dramatic numbers behind the racial disparity in this school closing case –99.9% racial minorities to .1% whites—dwarf the rather close percentages of racial population in the districts that ended up being struck down in North Carolina. The appearance of "political apartheid" is thus much more vivid here, especially because the overwhelmingly Black communities bearing the brunt of the school closings are made up of poorer and less powerful citizens while the majority-white communities

that have escaped hardship under the Plan are made up of wealthier and more politically connected citizens. Here, the racial identity of the affected minority communities becomes an emblem of the residents' political vulnerability and their powerlessness to challenge the selective burden imposed upon them by the political process. The racially lopsided School Closings Plan should be rejected for many of the same Equal Protection reasons that bizarrely drawn districts were found to be presumptively unconstitutional by the Supreme Court's majority. The gerrymandering of electoral districts or school closings along lines of race, "even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 657.

Defendants' effort to show legitimate purposes for their Plan proves both too little and too much. Defendants assert that it is improper to compare the demographics of the students and communities whose schools are targeted for closure with the overall demographics of the DCPS student population. "The entire point of the Consolidation Plan," they assert, "is to close schools that are *distinctly different* from other DCPS schools; generally those that are under-enrolled, are in areas with less anticipated student growth, and have not been recently renovated." This is the heart of Defendants' argument. They essentially insist that, however extreme the racially disparate impact of their Plan may be, it is justifiable so long as the District is engaged in a good-faith effort to close schools "that are under-enrolled, are in areas with less anticipated student growth, and have not been recently renovated."

The assertion proves too little from a constitutional standpoint because each of the three factors identified by the Defendants is affected in significant measure by strategic policy decisions that they themselves have made. Under-enrollment is a highly subjective and manipulable factor that reflects not just independent exogenous factors like the neighborhood birthrate, but the impact of official decisions --- draining East of the Park School populations, over a long period of time, to fatten the West of the Park School populations. That manipulation, began in the early 1970s with the busing program,

continues to this date. The East of the Park schools have also been affected by official action related to the opening of nearby charter schools (a legislative action), the assignment of teachers, the quality of the educational program, the funding of relevant elective and enrichment programs, and the official promotion of and support for the schools.[16] The Parents United Reported was followed by a 2010 Report from the Lawyers Committee for Civil Rights, *The State of the District of Columbia Public Schools 2010: A Five Year Update*, **Exhibit G,** reflecting that Defendants continued to ignore warnings about the need to improve public schools to retain students. The question of "anticipated student growth" is even more speculative and circular since high-quality and well-financed schools attract residents and students to a community while schools in poorer areas receiving less official support and investment do not have the same effect. See generally the IFF Study. The factor of "recent renovations" is almost entirely within the control of the Defendants, demonstrating the circularity of their efforts to justify the decision to close the non-renovated schools. In short, the factors of enrollment, past and future, and past renovations cannot sanitize a process saturated with racially disparate effects.

The Defendants' argument also proves far too much. For if the simple invocation of "enrollment" and "non-renovation of school buildings" as blanket justifications for closing schools suffices to overcome proof of a pattern of racially discriminatory impact, then there is no logical stopping place for this process. The Defendants could decide to close another dozen or 20 or 40 schools, all in majority Black or Hispanic communities, all in the name of budget savings[17] and consolidation, and justify it on this bland and apparently un-rebuttable basis. The right of families to send their children to a safe and familiar neighborhood school will be progressively lost to all but a small minority of Washingtonians.

Analysis under the DCHRA --- Banning Unintentional as well as Intentional Discrimination

[16] A cautionary note was sounded in a March 2005 Report from Parent's United, *Separate and Unequal: The State of the District of Columbia Public Schools Fifty Years After Brown and Bolling,* attached, **Exhibit H**.

[17] The Court in denying Plaintiffs' Motion for Preliminary Injunction seems to embrace Defendants' claim that savings in the amount of $8.5 million will result from the closings, apparently ignoring counter views from the District's Auditor. See Plaintiffs Memorandum, Report of the D.C. Auditor and Plaintiffs' Expert Affidavit of Soumya Bhat. At the very least, these competing views should have been put to the test through discovery.

To establish a *prima facie* case of discrimination under the DCHRA, a plaintiff must demonstrate (1) that he is a member of a protected class; (2) that he was similarly situated to someone who was not a member of a protected class; and (3) that he and the similarly situated person were treated disparately. Upon production of a *prima facie* case the burden then shifts to the defendant to provide an independent non-discriminatory basis for their actions. After which, the plaintiff can then rebut the defendant's non-discriminatory reason as pretextual. In *Mitchell v. DCX, Inc.*, 274 F.Supp.2d 33, 49 (D.D.C.2003) the court noted that "it is well established in this circuit that plaintiffs can use statistical evidence to establish the type of intentional discrimination that is necessary to prove a disparate treatment case or to argue that the non-discriminatory reason offered by the defendant is pretextual."

It is noteworthy that Initially, Defendant Henderson's plan called for the closure of 20 public schools all throughout D.C. allegedly due to under enrollment. Of the 20 schools slated to be closed the schools with the highest percentage of white students were Garrison Elementary and Francis-Stevens Education Campus. Neither of these schools are located in low-income areas. Garrison Elementary School is located in a community with a white population of roughly 49%. Francis-Stevens Education Campus is located in a community with a white population of roughly 74% and an African American population of roughly 6.3%. Of the 20 schools that were initially slated to close, 5 schools were removed from the list including Garrison and Francis-Stevens Education Campus. All of the 15 remaining schools that are slated to close are located East of the Park in DC's most underserved communities. If these closures take effect, roughly 16% of the entire African American DCPS student populace and 5.4% of the entire Hispanic DCPS student populace will be forced to negotiate further distances to attend schools with higher student teacher ratios and reduced resources compared to their former schools. Equally noteworthy, Johnson Middle School, with a utilization of just 25%, was taken off the list of slated closures, while Ferebee Hope, with a utilization of 61.2% remained on the List.

The DC Human Rights Act (DCHRA) states: "Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal

opportunity to participate in all aspects of life, including … [p]ublic accommodation, in educational institutions, in public service….". D.C. Code § 2-1402.11. Section § 2-1402.73 addresses the application of the law to District Government: 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, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business. D.C. Code § 2-1402.73 (emphasis added) DCHRA protections extend more broadly than federal law, because it bans discrimination based on residence in relation to public accommodations. In *Mitchell v. DCX, Inc.*, 274 F.Supp.2d 33, 49 (D.D.C.2003), the Court found that a taxicab company liable under the provisions of the Human Rights Law prohibiting residency discrimination in relation to public accommodations, § 2-1402.31, because Plaintiffs showed that the company was "significantly less likely to pick up a person requesting services from Anacostia than it [was] to pick up a person requesting service from another part of the city"). *Boykin v. Gray*, 895 F. Supp. 2d 199, 217-18 (D.D.C. 2012). In *2922 Sherman Tenants Association*, the Appeals Court found that the City plan to crack down on code violations in apartment buildings was discriminatorily applied to residents of Hispanic neighborhoods and that the Court should have instructed the jury to consider the DCHRA claim prohibiting place of residency discrimination in relation to housing, 444 F.3d 673, 680 (D.C. Cir. 2006). The DCHRA makes it unlawful "to refuse or restrict facilities, services, repairs or improvements for a tenant or lessee" "wholly or partially for a discriminatory reason based on ... race, color ... or place of residence." *Id.* A separate provision states, "[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice." *Id.* In *Boykin v. Gray*, the Court acknowledged that the plaintiffs could bring a DCHRA claim against the District on residency discrimination grounds, although it rejected the claim

for the homeless plaintiffs, 895 F. Supp. 2d 199, 217 (D.D.C. 2012). "The wholesale closure of a place of accommodation, which prevents all individuals from utilizing its benefits, does not appear to be an act that deprives any individual person of "the full and equal enjoyment" of that place. The statute's language clearly implies that a violation occurs where some individuals receive the benefit of a place of accommodation while others do not (or where some individuals receive greater benefits than others)". *Id.*, 217-18. The DCHRA prohibits both unintentional discrimination and intentional discrimination. See, *Mitchell*, 274 F.Supp.2d 33, 49 (D.D.C.2003), at 47. Section § 2-1402, the "Effects clause" of the Act states, "[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice. The District of Columbia Court of Appeals has said that the Effects Clause of the DCHRA means that "despite the absence of any intention to discriminate, practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason." *Id.* (citing, *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C.1987); see also *Ramirez v. Dist. of Columbia*, No. 99-803(TFH), 2000 WL 517758 (D.D.C.2000) (holding that "the effects clause of the DCHRA prohibits unintentional discrimination as well as intentional"). The D.C. Court of Appeals has held that this "effects clause" imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co.*" *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C.1987). The D.C. Court of Appeals has held that this "effects clause" imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co.*" *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C.1987). 2922 *Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 685 (D.C. Cir. 2006) (Citing, The *Mitchell* Court held that statistical data can be used to show disparate impact and show prima facie case for discrimination, based on place, rebuttable presumption. Plaintiffs establish prima facie case for disparate impact on the basis of geographic residence because all of the closures in the current plan East of Park, all in 2008 were also East of the Park, and because there have been no closures West of the

Park, ever. Defendants' own published materials support this. The District follows the Second Circuit's burden-shifting framework. Having established that the school closures disparately impact residents East of the Park, the burden shifts to the Defendants. to "prove that its actions furthered, in theory. *Mittchell v. DCX, Inc.*, 274 F. Supp. 2d 33, 48-49 (D.D.C. 2003)" and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect" *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2d Cir.1988). Id. Here, the Defendants have not made an attempt at a less discriminatory alternative.

The Disability Claims

As a starting point, Plaintiffs again assert that no administrative agency, federal or local, has the power or authority to grant the relief sought in the instant case. Only this Court can. Exhaustion of administrative remedies is not required under IDEA, Section 504, or ADA. It is widely accepted that exhaustion is not required if there is no adequate administrative remedy, *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975), because exhaustion would serve no purpose. Seeking relief through administrative processes would be futile due to Defendants' failure to provide adequate notice of the School Closing Plan, as discussed above. See 20 U.S.C.A. § 1400 et seq; *Honig v. Doe*, 484 U.S. 305, 327 (1988) (stating "…parents, may bypass administrative process where exhaustion would be futile or inadequate.") (citing *Smith v. Robinson*, 468 U.S. 992, 1014, n. 17 (1984). Moreover, because discovery has not been allowed, Plaintiffs do not know the actual plans Defendants have in store for their special education students.

Section 504 of the Rehabilitation Act of 1973 Does Not Require Plaintiffs to Exhaust Administrative Remedies. Section 504 regulations do not contain a requirement that a person file a complaint with OCR and exhaust his or her administrative remedies before filing a private lawsuit. Moreover, in order for Plaintiffs to be required to exhaust administrative remedies, the IDEA must be available to them. Defendants take for granted that it is. In so doing, Defendants fail to draw the distinction between IDEA eligibility and Section 504 protection, which is not one in the same. Section

504 protects individuals with disabilities from discrimination and ensures equal access to a free appropriate public education. *See* Section 504 Regulations, C.F.R. § 104.33. A disabled student *may* also be eligible for special education and related services under the IDEA and receive an Individualized Education Plan (IEP) accordingly. See also *Henneghan v. Dist. of Columbia*, No. 2007-CV-0217 (D.D.C. Apr. 16, 2013). The plaintiffs in *Henneghan* alleged that the government failed to implement an IEP. The Court acknowledged in that case that under certain circumstances, a plaintiff may bypass the IDEA's administrative processes. And see *Honig v. Doe*, 484 U.S. 305, 327 (1988) (stating "…parents, may bypass administrative process where exhaustion would be futile or inadequate.") (citing *Smith v. Robinson*, 468 U.S. 992, 1014, n. 17 (1984)

Plaintiffs need more information, which discovery would allow, to demonstrate that Defendants' Consolidation Plan Violates Section 504 of the Rehabilitation Act because it is in Bad Faith or Gross Misjudgment and it discriminates against Plaintiffs by restricting their child's access to a Free Appropriate Education. It is unclear from the Plan whether the receiving school will lack resources, will have overcrowded classrooms or will impose restrictions on choice,

In *Deal v. Hamilton Cty. Bd. of Ed.*, 392 F.3d 840 (6th Cir. 2004), the court found that it was a denial of a FAPE that the parent and the student's general education teacher were not present at the meeting. In *Deal* the school system met to review the student's progress and during that meeting decided on not just the services but also on the school placement for the student. However, the student's parent and the student's teacher were not present at the meeting and as a result did not have any input in the placement decision. As a result, the court should find similarly that the DCPS has denied the students a FAPE because the decision to move the special education students was not made with the participation of the parents. According to *M.C. on Behalf of J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (C.A.3. (N.J.), 1996) "a child's entitlement to special education should not depend upon the vigilance of the parents…..rather, it is the responsibility of the child's teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student's progress – to

ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly." However, in their decision to commence the closures, DCPS has not convened a multidisciplinary meeting to evaluate the students' progress to ascertain their needs and respond to those needs. In fact DCPS made their decisions based on financial gain or loss for the school system as opposed to the actual needs of the students.

Defendants cite to 20 U.S.C. § 1415(l) in making the exhaustion argument. However, there exhaustion applies to relief that can be garnered under the Act. An injunctive remedy cannot be garnered from an administrative due process hearing. Only a court can order such relief. Additionally, §1415(l) does not prohibit the courts from hearing the IDEA claims. In *Payne v. Peninsula School District*, 653 F.3d 863, 272 Ed. Law Rep. 119, 11 Cal. Daily Op. Serv. 9580, 2011 Daily Journal D.A.R. 11479 (9th Cir., 2011) the court stated: First, we observe that nothing in § 1415 mentions the jurisdiction of the federal courts. In fact, neither the word "courts" nor the word "jurisdiction" appears in § 1415(l). Exhaustion of administrative remedies is a diversion, offering no relief to Plaintiffs.

Respectfully Submitted,

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